

Digest

Justice in conditions of armed conflict and quarantine

Donbas Regional Justice Reform Council

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In autumn 2018, EU Project "Pravo-Justice" started active work in the regions in the framework of supporting the implementation of reforms in justice sector in regions. In particular, in November 2018, Donbas Regional Justice Reform Council was established in Kharkiv to implement bottom-up reform by bringing across region-specific challenges and their solutions to the central level and organizing a better exchange of information on sector reforms from the centre to the regions and at the interregional level. The task of the Council is to identify problematic issues that arise in the process of judicial reform and to prepare generalized proposals for their solution. The functioning of the Regional Council should become a solid basis for establishing a permanent professional dialogue between the regions and the centre. Today, Regional Justice Reform Councils operate in six regions of Ukraine. These contributions on challenges related to the legal sphere during quarantine were prepared by Donbas Regional Justice Reform Council members.

Abbreviations.

ATO – Anti-Terrorist Operation

ORDLO – separate regions of Donetsk and Luhansk regions

HCJ – High Council of Justice

NSJ – National School of Judges of Ukraine

HQCJ – High Qualification Commission of Judges of Ukraine

UJITS – Unified Judicial Information and Telecommunication System

SJA – State Judicial Administration of Ukraine

EECP – entry-exit checkpoint

USRCD – Unified State Register of Court Decisions

JFO – Joint Forces Operation

Issue 1.

Justice in the context of armed conflict and quarantine.

Challenge: staff shortage in the judiciary.

Of 60 courts in Donetsk region that functioned before armed aggression, only 28 are currently operating and of 35 courts in the Luhansk region, only 16. A small number of courts has been relocated to other cities. At the same time, the jurisdiction of cases considered by courts that ceased to operate was transferred to other courts in the territory controlled by Ukraine.

Staff shortage in the judiciary is a widespread phenomenon throughout Ukraine. Courts in Donetsk and Luhansk regions are no exception. However, in these regions, the grounds for shortage of judges have their own peculiarities, given the armed conflict. These include relocation of many courts to other regions, leaving a certain number of judges of these courts in uncontrolled territory, reluctance to transfer judges from other regions to the region of armed conflict, threats to life and health, the need to arrange household issues in places with high number of displaced persons and, as a result, a significant increase in rents and basic goods and services.

The situation regarding court staff in the anti-terrorist operation zone is even more complicated. The staff receives a much lower salary than the judge, although the costs of rent and household issues are the same. At the same time, the vast majority of court staff remained or later returned to the temporarily occupied territories, and it is extremely difficult to recruit new court staff members, especially experienced ones.

It should also be borne in mind that in the presence of serious additional factors affecting staff shortage in the region, judges and court staff do not get any assistance or benefits from the state, with the exception of the fact that some courts that were relocated to other cities and service housing was provided to persons working in such courts.

In the context of quarantine imposed by the state, there are no actions on the part of the responsible state authorities to form HQCJ and resolve issues with staffing of courts, including in the anti-terrorist operation zone.

Solution options.

1. To provide additional compensations for judges and court staff in the courts located in ATO area. This can be done by introducing the relevant highest regional coefficients which are currently applied to the remuneration of judges administering justice in courts located in a locality with a population of at least one million people.

2. First of all and immediately provide official housing for all judges and court staff who administer justice in the ATO area.

3. That the President of Ukraine immediately appoint judges nominations in respect of who were sent by the HCJ and further comply with the deadlines for signing the decree on the appointment of judges provided by the Law of Ukraine "On Judiciary and the Status of Judges" (last appointment of 34 judges took place in July 2020).

4. Immediately form a new composition of HQCJ, and before that transfer its powers as to selection of judges to HCJ.

5. HQCJ or HCJ before establishment of HQCJ should complete competition for judicial positions in respect of persons who passed training in NSJ and passed the corresponding examinations and as a result of it to fill as much as possible vacancies in courts in the anti-terrorist operation zone and courts which do not administer justice.

6. Consider the involvement of retired judges in the administration of justice.

Challenge: access to court.

The problem of access to court is multifaceted, it includes: the lack of postal communication with ORDLO, the difficulty of submitting documents on-line for people living there, the difficulty in restoring the materials of cases left in the uncontrolled territory, especially in criminal proceedings, uncertainty of the legal status of prisoners in uncontrolled territories, lack of qualified legal staff in the ORDLO and the need to travel to the territory controlled by Ukraine to obtain it.

Lack of postal communication.

At present, according to rough estimates, about 1.6 million people live in ORDLO. Many of them are elderly people.

Since November 2014, Ukrposhta branches have not been functioning in the temporarily occupied territories. At the same time, postal communication, despite the development of modern telecommunication technologies, plays an important social, informational as well as organizational and procedural role in the life and activity of both individuals and legal entities. At this time, any postal service, delivery of correspondence and postal items with uncontrolled territory is completely absent.

The challenge of postal notification, the impossibility of timely information by sending appropriate notifications, including by public authorities, negatively affects the scope of rights of persons living in uncontrolled territories. Thus, the impossibility of notifying the hearing of a case where the defendant is a citizen of Ukraine living in an uncontrolled territory or a legal entity registered in the specified territories violates their right of access to court. However, the state did not make adequate efforts to remedy this situation and fulfil its positive obligations to ensure access to justice.

In respect of many ORDLO citizens who were defendants in court cases there were rendered decisions in absentia that they were not aware of. Decisions cover many types of debt, from utilities to loan arrears. This is due to the fact that the announcement of a summons to court or information on case consideration is placed on the website "Judiciary of Ukraine", to which the vast majority of the population ORDLO does not have access.

In order to come to a court hearing, citizens from ORDLO have to cross the demarcation line for 4-6 hours or get to Ukrainian court through the territory of the Russian Federation.

The ability to submit documents or appeals using on-line tools does not solve the challenge. Authorization is required for using them, often with a digital signature that cannot be obtained in uncontrolled areas. In

addition, older people do not have the skills to use online tools, so the only possible connection for them is post.

Quarantine negatively affected the possibility of crossing the demarcation line. Thus, the only EECP "Stanytsia Luhanska" at the beginning of imposition of restrictive measures related to the spread of Covid-19 was closed for about a month. At the time of compiling this digest, passing of persons through Stanytsia Luhanska checkpoint is temporarily suspended from October 15 to November 15¹. Thus, citizens who live there and do not have a digital signature are deprived of the opportunity to go to court at all.

Solution options.

1. As a solution option to the problem, it is proposed to create post offices in the very "grey zone" between the checkpoints and points of intersection with the uncontrolled territory, where correspondence is delivered and received, with further direction or delivery to recipients on both sides of the line. In addition, it is mandatory that the marks of delivery of messages and postal items of both parties be recognized.

In order to implement this option and ensure the inviolability, secrecy and confidentiality of postal notices, control of their receipt at address directed and provide feedback to the party that sent such notification, appropriate negotiations should be initiated, including within the framework of the Minsk Agreements.

2. As another option, it is possible to offer introduce reception and issue of postal correspondence at zero checkpoints and to simplify crossing demarcation line for persons wishing to use their services.

Difficulties in submitting documents on-line.

During quarantine, practice of using on-line services for the provision of administrative services, participation in litigation outside the courtroom has become widespread, however, this does not fully solve the problem of access to such services and procedures of individuals and legal entities residing in uncontrolled territories.

Using these resources requires authorization, usually with a digital signature, which cannot be obtained in uncontrolled areas, so again it is necessary to cross the demarcation line, which is quite problematic, especially for the elderly. In addition, they lack the skills to use on-line tools, which almost completely cuts off this category of citizens from access to judicial and administrative procedures and services. The only way out is to submit the necessary documents directly to the bodies specified or to the first post office in Ukrainian territory. However, during quarantine and given closing of checkpoints, this is not possible.

Procedural codes provide for the functioning of the "Electronic Court" within the framework of the introduction of the Unified Judicial Information and Telecommunication System. However, functionality of the E-Court is currently limited for both users and judges. This is due to the postponement of UJITS roll out for an uncertain period of time.

Moreover, another negative factor in using E-court in ORDLO is that the population of the region is almost completely unaware of this functionality. Whereas the population of the controlled part of Ukraine has the opportunity to receive information from various sources about the existence, procedure and features of using Electronic Court, citizens in the uncontrolled territory do not have such an opportunity. It is possible to obtain

¹ <https://www.facebook.com/pressjfo.news/posts/984028985423051>

information from the Internet, however, this is not possible for all categories of citizens, for example, given age, property status, and unstable Internet connection in these areas -it is very difficult.

Now one can get an electronic digital signature through Privatbank or any accredited key certification centre (currently there are 21 such centres in Ukraine, 19 of which are located in Kyiv²) if one has a passport of a citizen of Ukraine and a certificate on assignment of individual tax number. Therefore, the nearest place for citizens from ORDLO to obtain a digital signature is a branch of Privatbank in localities near the demarcation line. In addition, a person must be a client of this bank.

Solution options.

1. To simplify and make more convenient the conditions for obtaining a digital signature for persons living in uncontrolled territories. For example, to expand the list of state-owned banks where one can get an electronic digital signature in the centres of administrative services closest to the demarcation line.
2. To strongly recommend to SJA that the Unified Judicial Information and Telecommunication System be operational as soon as possible.
3. In places of the greatest concentration of persons crossing the demarcation line, to acquaint people with the availability and terms of using E-Court, for example, by distributing relevant brochures with all the necessary information and links. Preparation of brochures and their content can be done with the participation of grant projects funded by international organizations.

Restoration of case files.

Non-prediction of a possible loss of control over ORDLO by the state authorities resulted in the fact that vast majority of court case files of all jurisdictions were left there. This applies to both pending and completed cases before the loss of control of the courts. This necessitated restoration of a significant number of lost court proceedings. At the same time, resumption of criminal proceedings turned out to be practically impossible.

The peculiarities resuming lost proceedings are regulated by procedural codes, however, loss of cases because of armed aggression of the Russian Federation has its own peculiarities, in particular, impossibility of restoring files submitted by the parties or files of criminal proceedings not registered in USRCD.

The loss of criminal cases in which sentences have not entered into force and have been appealed in courts of appeal has a particularly negative impact on those prosecuted in such cases. Thus, texts of sentences are available in USRCD, however, in fact, if they are challenged, the person is not considered to be criminally responsible. And what if such a person is in custody in the territory controlled by Ukraine? The situation occurs when the charged cannot obtain the verdict entered into force or the decision of the appellate court on its cancelation or it being upheld. Thus, the charged is up in the air during anti-terrorist operation and JFO,

² <https://czo.gov.ua/ca-registry>

and possibly even longer because it is not a fact that criminal proceedings files will be available when Ukraine takes control over these territories.

Solution options.

1. To recommend to the Ministry of Justice of Ukraine to submit to the Parliament draft law "On regulation of the legal status of persons in respect of whom application of legislation of Ukraine on criminal responsibility, criminal procedure, penal legislation of Ukraine due to armed aggression, armed conflict, temporary occupation is initiated", which would regulate the question of impossibility to resume criminal proceedings and terminating them, with the exception of particularly serious crimes. The Parliament should consider such a law as an urgent one.

Lack of qualified legal aid for ORDLO population.

This factor also negatively affects access to court because in order to get legal aid, people living in ORDLO need to enter into an agreement on its provision, for which they must come to a lawyer in the territory controlled by Ukraine. It should be recalled that the vast majority of residents in these areas are elderly people. The power of attorney for the representation of interests provided by an individual must be notarized, which is also possible for the residents of ORDLO only on condition that they cross demarcation line and notarization takes place in the controlled area.

However, during quarantine, crossing demarcation line is limited. People follow precautionary measures, reduce their social activity and avoid being in crowded places, in particular at the checkpoints. In addition, many lawyers close to demarcation line have temporarily suspended services for ORDLO residents due to Covid-19 pandemic and significant virus spreading in uncontrolled areas.

Solution options.

1. One of the options to solve the problem would be to provide on-line and telephone consultations to residents of uncontrolled territories, in particular by FLA institutions.

2. In order to notarize the relevant powers of attorney for representation of interests of persons living in the uncontrolled territory in court, it is necessary that law must provide the opportunity to identify a person living there by video format. For example, a person is depicted on the screen with an open passport on the photo page, or at the request of a notary can turn the pages of the passport to the camera.

Uncertainty of the legal status of persons taken into custody and at the time when the aggression of the Russian Federation started were in pre-trial detention centres of Donetsk and Luhansk regions, persons serving sentences in the occupied territories.

When illegal armed groups gained control of ORDLO, Ukrainian penitentiary authorities did not have time to evacuate those who had been deprived of their liberty or were in custody, leaving many such prisoners in territory uncontrolled by government. The so-called LPR and DPR extended their jurisdiction over them. Such persons continue serving their sentences or remain in custody in uncontrolled territories. However, the

status of such persons under Ukrainian law is not defined. Therefore, a common problem of these persons is their non-regulated legal status.

On July 5, 2018, in the Parliament of Ukraine Draft Law No. 8560 "On Regulation of Legal Status of Persons in Respect of who the Legislation of Ukraine on Criminal Responsibility, Criminal Procedure, Penal Legislation of Ukraine as a Result of Armed Aggression, Armed Conflict, Temporary Occupation of Ukraine was Initiated" was registered. However, later on August 29, 2019, the draft law was withdrawn.

On July 8, 2020, the Ministry of Justice of Ukraine posted on its website a notice of electronic public consultations on the draft Law of Ukraine "On Regulation of Legal Status of Persons in Respect of who the Legislation of Ukraine on Criminal Responsibility, Criminal Procedure, Penal Legislation of Ukraine as a Result of Armed Aggression, Armed Conflict, Temporary Occupation of Ukraine was Initiated."³

Only on September 28, 2020, the Ministry of Justice of Ukraine published a report on the results of electronic public consultations on the draft Law, according to which the Ministry of Justice of Ukraine did not receive any comments or suggestions on the draft Law⁴. At present, the draft law has not been submitted to the Parliament.

From the above it can be seen that there has been no legislative solution as to legal status of persons deprived of liberty or in custody, although it needs an immediate solution given the duration of ORDLO occupation.

Solution options.

1. To recommend to the Ministry of Justice of Ukraine to submit to the Parliament a draft law "On Regulation of Legal Status of Persons in Respect of who the Legislation of Ukraine on Criminal Responsibility, Criminal Procedure, Penal Legislation of Ukraine as a Result of Armed Aggression, Armed Conflict, Temporary Occupation of Ukraine was Initiated",
2. To recommend the Parliament to consider this draft law as urgent.

Irrationality in determining jurisdiction of courts remaining in the occupied territory.

When many courts in Donetsk and Luhansk regions found themselves in the temporarily occupied territory and were unable to administer justice, the cases under their territorial jurisdiction were transferred to the

³ <https://minjust.gov.ua/m/08072020-povidomlennya-pro-provedennya-elektronnih-konsultatsiy-z-gromadskistyus-chodo-proektuzakonuukraini-pro-vregulyuvannya-pravovogo-statusu-osib-schodo-yakih-porusheno-poryadok-zastosuvannya-zakonodavstva-ukraini-pro-kriminalnu-vidpovidalnist-kriminal>

⁴ <https://minjust.gov.ua/m/28092020-zvit-pro-rezultati-provedennya-elektronnih-konsultatsiy-z-gromadskistyus-chodo-proektu-zakonu-ukraini-pro-vnesennya-zmin-do-kodeksu-ukraini-pro-administrativni-pravoporushennya-ta-kriminalnogo-protseualnogo-kodeksu-ukraini-stosovno-vregulyuvannya>

respective courts in the controlled territory, however, distance between these courts and their users was not taken into account, which significantly complicated their ability to apply directly to these institutions and participate in court hearings.

For example, cases previously heard by Zhovtnevyi Court of Luhansk are now being heard by Troitskyi District Court of Luhansk region. It is almost 220 km from Luhansk. Cases under the jurisdiction of Leninskyi District Court of Luhansk are now being considered by Svativskyi District Court of Luhansk region (158.6 km from Luhansk). Cases that were under the jurisdiction of Kamianobridskyi District Court of Luhansk are now being considered by Markovskiyi District Court of Luhansk region (155.2 km from Luhansk). Territorial jurisdiction was transferred from the Stanychno-Luhansk District Court of Luhansk region to Novoposkovskiyi District Court of Luhansk Region (153.2 km from Luhansk). Cases that were under the jurisdiction of Artemivsk District Court of Luhansk are now being considered by Bilokurakinskyi District Court of Luhansk Region (136.5 km from Luhansk). The situation with Donetsk region courts is similar.⁵

At the same time, for example, in Stanytsia-Luhanska, which is the closest to the only EECP in Luhansk region, the court premises have been preserved. Thus, after the restoration of Ukraine's control over this territory, it is not only possible but necessary to resume the operation of the Stanychno-Luhansk District Court as territorial jurisdiction of Luhansk District Courts could be transferred to this court. This would contribute to the fact that people from Luhansk would not have to travel long distances, up to 220 km after crossing demarcation line in order to go to court, submit documents or participate in a court hearing.

In addition, displaced persons can apply to any court of they choose to establish the fact of birth, but to establish the fact of death for some reason they can only go to court at the location of the applicant. This does not take into account that a person may have failed to obtain the status of a forcibly displaced person, and could have moved, for example, to Lviv, maybe does not have a new registration of residence and has the last registration in Luhansk. In this case, the applicant must travel from Lviv to the Luhansk region to exercise his right to go to court to establish the death of a relative who was in the territory of ORDLO. This is also significantly complicated by quarantine restrictions and reductions in rail passenger routes throughout Ukraine.

Solution options.

1. To consider the possibility of establishing courts in the settlements closest to demarcation line and transfer to them jurisdiction of courts remaining in the uncontrolled territory.
2. To establish the fact of death, to provide for territorial jurisdiction similar to the fact of birth - at the choice of the applicant throughout the territory of Ukraine. This could, in addition, significantly unload the courts of Donetsk and Luhansk regions that establish the facts of death.

⁵ <https://zakon.rada.gov.ua/laws/show/v2710740-14#Text>

Challenge: courts performing functions of registry offices when establishing facts of birth and death in temporarily occupied territories.

In accordance with Art. 2, Part 3 of the Law of Ukraine "On Peculiarities of State Policy to Ensure State Sovereignty of Ukraine in the Temporarily Occupied Territories in Donetsk and Luhansk Regions" the activities of armed formations of the Russian Federation and the occupation administration of the Russian Federation in Donetsk and Luhansk regions contrary to international law are illegal, and any document issued in connection with such activities is invalid and does not create any legal consequences, except for documents confirming the birth or death of a person in the temporarily occupied territories in Donetsk and Luhansk regions which are attached in accordance with the application for state registration of birth and death.

At the same time, there has been no procedure established for applying these provisions of Article 2 Part 3 of the Law of Ukraine "On Peculiarities of State Policy to Ensure State Sovereignty of Ukraine in the Temporarily Occupied Territories in Donetsk and Luhansk Regions".

On this basis, despite the above-mentioned provision of the law, registry offices refuse to citizens living in the temporarily occupied territories to establish the facts of birth or death, which results in the fact that people go to court as to the relevant applications.

The vast majority of courts recognize facts of births or deaths in the occupied territories and accept documents issued by the relevant authorities of unrecognized republics, however, this constitutes a significant increase in the number of cases before already overburdened courts in the region. At the same time, the courts, in fact, perform the function of registry office because on the basis of documents issued in the uncontrolled territory, they establish the facts of birth or death.

Solution options.

To recommend to the Cabinet of Ministers of Ukraine to immediately develop an appropriate procedure for recognition by registry office of facts of births and deaths that took place in temporarily occupied territory.