



Institutional continuum in the context of the pandemic

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Abstract

The article considers institutional responses to the challenges created by COVID-19 pandemic. The comparison of discrete structural alternatives is one of the most important principles of institutional analysis. It means that policymakers and researchers rely on a countable set of legal options in the course of comparison of different institutions designed to solve one or another problem. COVID-19 pandemic provoked the elaboration of “intermediate” normative solutions, thus changing the legal framework and leading to the formation of the short-term “institutional continuum” instead of the established spectrum of alternatives.

Keywords

COVID-19, institutional environment, discrete institutional alternatives, pandemic, lockdown

JEL codes: B40, H12, I18

The extraordinary situation of the COVID-19 coronavirus pandemic has proven to be a test not only for national health and policing systems but also for the institutional environment of many countries. In some cases, this has caused effects that are interesting for scientific discussion.

The importance of institutions for economic development has long become commonplace in economic theory (Acemoglu and Robinson 2012; North et al. 2011), although a simplified interpretation of the priority of institutional factors over other determinants of development is seriously criticized (Kapeliushnikov 2019).

One of the most influential scientific schools involved in research of institutions in the last two to three decades has been the new institutional economic theory, which has managed to combine the strengths of institutionalism and neoclassical economics including in the context of analysis opportunistic behaviour, and bounded rationality, and utility maximization, and methodological individualism (Shastitko 2010).

The key research tool of this scientific school is the comparative analysis of discrete structural alternatives (Williamson 1996). If you leave aside the methodological specifics and details related to the application of this tool in concrete situations – most often within the framework of economic analysis of organizations – its essence can be reduced to a simple principle: to regulate any relationship there is a numerable (or discrete) set of institutions, that is, rules with mechanisms of enforcement. Each set of rules is a complete structure, so it is impossible to unconditionally combine rules from different sets, and the discrete nature of the variety of these sets does not allow selecting some intermediate set.

In other words, the principle of comparing discrete structural alternatives states that, unlike the usual neoclassical task of utility maximization on a continuum of possible solutions, when an individual faces a choice between institutions, he or she has to choose the best option from only a few available alternatives, and the ideal optimum – the first best – is not usually available in practice.

Indeed, it is intuitively clear that in reality it is often necessary to deal with discrete choices, especially when it comes to choosing a legal framework. For example, an individual may get married – and live under one set of rules with relevant opportunities and limitations – or may not marry and live in another system of rules. An intermediate option – at least from a legal perspective – is generally not available.

Such a choice is also made at the state level – for example, in terms of institutions at the constitutional level, the choices between a republic or a monarchy, a federal or unitary structure.

But there are times when this discrete choice ceases to satisfy decision-makers, and then they try to violate that principle.

This situation may be caused by the need to make emergency decisions in special circumstances.

For example, during the ongoing process of amending the Constitution of Russia – certainly an extraordinary process – the authorities had two discrete alternatives. Firstly, it was possible to hold a referendum, thereby ensuring high legitimacy for amendments, but at the same time higher costs of complying with several formal restrictions on the electoral process and higher risks of a negative decision. Secondly, it was possible not to hold a referendum and to deal exclusively with other mechanisms in force to change constitutional norms, with the support of a qualified majority of the existing parliamentarians and regional legislative assemblies. The consequences of this choice are the opposite: less legitimacy of amendments with less risks and costs.

Nevertheless, the Russian authorities have taken a different path, not provided for as an alternative in the current legislation, and have designed a special institution – a popular vote – which is presumably capable of combining the most advantageous elements for promotion of these amendments. It combines relatively high legitimacy with relatively low costs and risks for the amendment process.

Almost at the same time, the state faced no less extreme circumstances – the COVID-19 pandemic.

A response to the spread of the infection with the possibility of a long symptom-free incubation period, and hence with the increased risk of spread among the population due to the presence of a potentially high number of carriers, which cannot be identified, is the introduction of restrictive measures (quarantine). Restrictive measures, or quarantine, are officially defined in Federal Law of 30.03.1999 N 52-FL “On Sanitary and Epidemiological Welfare of the Population”: “Restrictive measures (quarantine) are administrative, health, veterinary and other measures aimed at preventing the spread of infectious diseases and

providing for a special regime of economic and other activities, restriction of movement of the population, vehicles, cargo, goods, and animals”. Thus in the law there is at least a reference norm on an order of implementation of quarantine. But in practice, in addition to this, there is a completely new regime of self-isolation. Such a regime is not regulated officially, and therefore allows for different legal interpretations.

If we go further, the implementation of large-scale restrictions affecting the constitutional rights of Russian citizens, including the right to freedom of movement, is officially possible under the introduction of the state of emergency throughout the country or in individual territories. It allows, *inter alia*, the introduction of a special regime for entry into and exit from a certain territory of the country. But this tool was not formally used – at least at the time of writing this article, on 6 April. At the same time, certain restrictions of this kind were introduced *de facto*, but without detailed monitoring and control of the movement of citizens.

There is a paradoxical situation in which according to the Decree of the Moscow Mayor dated 05.03.2020, N 12-UM “On the introduction of a high alert regime” (as amended on 29.03.2020), a citizen in Moscow has the right to leave a place of stay (residence) only in several cases, which are established by the document, but at the same time, on the basis of the explanations on the official website of Moscow Mayor published the following day, entry to and exit from Moscow are in no way limited. Accordingly, under such a regime, movement within the city is restricted, and movements from and out of the city are not, although the latter in Moscow obviously partially imply movement within the city.

Another – perhaps the most striking – example of the ambiguous choice between discrete alternatives was the introduction of the regime of non-working days by the Decree of the President of the Russian Federation of 25.03.2020 N 206 “On the announcement of non-working days in the Russian Federation”. The Labour Code of the Russian Federation provides for the existence of working days, weekends and holidays, all of which are governed by work and rest regimes, and these regimes do not exclude the continuation of work on weekends and non-working holidays, including for continuously operating organizations and public service (Articles 111–113 of the Labour Code of the Russian Federation). However, in practice, a special, intermediate legal regime on non-working days has been introduced, which is not formally provided for in the Labour Code.

In all these examples, the State faces a choice between discrete institutional alternatives and rather than making a choice within the existing legal framework, taking into account the benefits and costs of each of the alternatives, makes an attempt to design a new alternative in search of an institutional optimum.

Apparently, it is not necessary to seek the peculiarities of the Russian state in this, since special regimes are introduced in many countries, but their consideration is beyond the scope of this article.

The most obvious explanation for this behaviour is that the emergency that was not foreseen in the design of existing discrete institutional alternatives, seriously increases the costs of implementing each of them for the State. At the same time, the costs of shifting from existing alternatives – first of all, the costs of possible illegitimacy of the decisions taken, and hence the loss of trust – under the conditions of tangible threats to life and health are likely to decrease as in society the short-term planning horizon supposedly begins to dominate, with a focus on preserving life and health here and now rather than the sustainability of rules. However, these conclusions certainly require serious additional research to verify them.

An interesting result in terms of institutional theory is the formation of a kind of “institutional continuum”, assuming the possibility of new combinations of norms instead of previ-

ous rigid discrete alternatives. Indeed, in a “peaceful” time, few people would have thought of looking for an intermediate legal regime “between” working days and weekends, but we are currently witnessing this.

On the one hand, this “institutional continuum” provides new opportunities for the optimization of solutions in the short term, but on the other hand, it creates legal uncertainty and, to be more precise, institutional uncertainty.

Institutional uncertainty stems not only from the lack of legal, formal rules that meet the new «hybrid» regimes, but also from the lack of accompanying informal rules, which often determine human behaviour. Few have read the articles of the Labour Code thoroughly, but at the same time people have a grasp of what can and should be done on weekends or working days – in particular, that in the first case you can go outside for collective recreation with barbecue and alcoholic beverages or take the whole family shopping in hypermarkets, and in the second case, it is usually necessary to refrain from doing so. When a new regime appears, it is possible to quickly adapt formal rules to it, but the adaptation of informal rules takes time. However, it is possible that extraordinary circumstances may also increase the flexibility of informal rules. Some conclusions can be drawn from the results of the unique natural experiment that we, unfortunately, observe in Russia and throughout the world.

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