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Institutional preconditions for mediation reform in Ukraine

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Abstract: The article focuses on three factors of institutional environments and their influence on development of mediation as a dispute resolution mechanism and as an institution in Ukraine. The highly volatile political and economic environment has not allowed the mediation movement to gain full political support with the Government and the judiciary. A settlement-friendly legal framework, although providing stable foundation for mediation, decreased the urgency of adoption of the law on mediation which in turn delayed nation-wide acceptance of mediation institutions. Finally, the relatively high efficiency of Ukrainian courts coupled with their perceived corruptibility suggested a low systemic self-interest of the courts in efficiency-raising mechanisms such as mediation. These institutional preconditions have generally slowed down mediation reforms and lead Ukraine to remain on the sidelines of the global mediation movement.

Keywords: mediation, Alternative Dispute Resolution, socio-political environment, Ukraine.

1. Introduction

Mediation as an Alternative Dispute Resolution (ADR) institution is aimed at the speedy resolution of various types of disputes by the parties with the assistance of a neutral mediator, avoiding traditional litigation in state courts. It is believed to decrease court congestion, save time and financial resources and to maintain high client satisfaction with the process, thereby improving the overall quality of the justice system. Fascinated by these promises of mediation and its peace-building rhetoric policymakers in virtually all corners of the world are undertaking efforts to implement various mediation schemes within the court system and outside of it. This process is developing with amazing speed and has been labelled the 'global ADR revolution' [1, 2].



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Within this global context of mediation, Ukraine may be seen as one of the many sites where mediation has been transplanted by international donors as a part of rule of law programs [3-7]. The first projects implementing mediation dated back to the early years of Ukrainian independence in 1991. Since that time the international community and local mediators invested substantial efforts into the development of mediation in the country. However, at the present time, Ukraine remains an outsider in mediation development even compared to its former Soviet Union neighbors. The Law on Mediation has not been adopted and the practice of mediation remains very scarce. Neither did mediation in Ukraine enjoy the financial support of international donor agencies as much as, for example, Russia. Ukrainian mediators are under-resourced and therefore in the shadow. Information on various aspects of legal regulation of mediation and existing providers of mediation services becomes increasingly available on the Internet, yet it is mostly limited to Ukrainian language sources and remains inaccessible to the international community. No systematic, theoretically-informed research on mediation in Ukraine has been published and widely disseminated so far.

By filling this informational and research gap, this article argues that substantial difficulties in the implementation of mediation reform in Ukraine were caused by factors stemming from the wider institutional environment in this country [7-9]. Thus, the aim of this article is to examine these broad societal and institutional factors and their influence on development of mediation as a dispute resolution mechanism and as an institution in Ukraine.

The article presents preliminary findings of the qualitative study which was conducted in May-June 2016 in three areas of Ukraine (Kyiv, Odesa and L'viv) and consisted of four focus-group discussions with 28 participants and 40 in-depths interviews. The sample for the interviews was designed to focus on the mediation community but also to include the major stakeholders in mediation development – the Government, courts, lawyers, and international donors. Interviews and focus-group discussions have been transcribed and analyzed through NVivo software for qualitative analysis of information.

Empirical data from the fieldwork was supplemented by information from Internet sources and policy documents of the Ukrainian mediation community and international donors, including reports of international experts – Bill Marsh [10], Ales Zalar [11], Friedrich-Joachim Mehmel and Frans van Arem [12]. Finally, a lot of useful information and links for this research derive from the author's professional experience of advising various actors on mediation development in Ukraine for nearly fifteen years.

The article is structured as follows. The first part provides an outline of the socio-political environment in Ukraine during the last twenty five years. The second part analyses the historical development of the settlement-friendly legal framework in Ukrainian law. The third part deals with a specific configuration of the Ukrainian court system that influences the self-interest of judiciary in promoting mediation. In conclusion, the paper evaluates the positive and negative influences of these institutional factors upon mediation development and suggests some policy implications and further avenues for research of mediation in the post-Soviet context.

2. Uncertainties of Institutional Environment

Ukraine, with a population of around 50 million and the second largest economy within the former Soviet Union, was blessed with a well-developed industrial base, highly trained labor force and rich farmlands holding 40% of the world's black earth agricultural soil. It was considered to have the greatest potential among all the Soviet Republics. However, in the twenty five years since the Soviet Union collapsed, Ukraine remains one of the poorest countries in Europe.

On the one hand, by the second decade of the transition, all major legal institutions, or at least their blueprints which laid the foundation for a market economy, were put into place in Ukraine. The private sector comprised 80% of all enterprises; a new or radically changed administrative system had been established; the court system, including specialized commercial courts, was functioning; monetary, fiscal, and tax systems and the system for the regulation of private enterprises and competition were set up. Ukraine was recognized as a market economy by the European Union and the United States in 2006.

On the other hand, nearly every institutional reform in all spheres was late, incomplete or inconsistent [13, p. 5; 14, p. 155]. Located in between Russia and the European Union, geographically and politically, Ukraine remains under the external pressure of these competing powers. Therefore, internal political forces with radically different geopolitical orientation took turns in running the country over the course of the quarter century. The semi-presidential model of governance has led to endless confrontations between the president and prime ministers, a high rate of cabinet turnover and high levels of intra-executive conflicts [15, p. 1092].

In 2013 Euromaidan protests in Kyiv, which demanded the European integration of Ukraine and fought against corruption, ousted the then President Yanukovich and brought a pro-European government to power. This, in turn, triggered an unprecedented sequence of events on a global scale. In the spring of 2014 Russian troops covertly invaded the Ukrainian territory of the Crimean peninsula and organized a referendum which annexed Crimea to Russia. Simultaneously, Eastern parts of Donetsk and Luhansk oblasts bordering the Russian Federation rebelled against the new central government and, after a series of military operations backed by Russian troops, separated themselves as two unrecognized "republics". The active fighting between the pro-

Russian separatists and the Ukrainian government took place during 2014. In response, the international community has imposed economic sanctions against Russia and deployed an OSCE Special Monitoring Mission to monitor the situation at the contact line. Although it became possible to sign several ceasefire agreements in Minsk until now they remain unimplemented, military hostilities are on-going and people are still being killed weekly [16-19]. Needless to say these events have magnified socio-political uncertainties in Ukraine and the country still remains at the edge of economic and political crisis. As a result, these recurring political and economic crises locked the country into a cyclical timeframe with an extremely low horizon aiming at survival 'from one harvest to the next, from one budget to the next' [20, p.26].

Within this highly unstable political and economic environment, reform of the judiciary played one of the key roles. From the very first days of independence it was seen as a priority by local reformers and international donors alike. Consequently, Ukraine has been undergoing a permanent, yet always partial and selective, reform for twenty five years. Although technical aid of international donors did improve the operational capacity of the courts through computerization, better case management and training of personnel, the independence of judges remains an Achilles heel of the Ukrainian justice system. Corruption amongst judges and political influence on them was one of the driving forces behind popular protests in 2004 and 2013 [21].

The instability and uncertainty of the wider socio-political environment entail important implications for the success of the mediation institutionalization process in Ukraine because it seriously undermined the efforts of mediators to gain the political support of the Government and the judiciary. After every change of government, when a different political force came to power, the first thing it did was to reshuffle people in all the key governmental positions. For mediators this meant that investments into connections with the political elite in supporting mediation reforms could not pay off in the long run.

Building the relationship with judges and the court system was equally problematic for mediators due to the same political instability and on-going reforms. The Ukrainian judiciary elite, while politely embracing the idea of mediation at official events and publicly endorsing court mediation projects sponsored by international donors, could not play an active role as champions in promoting mediation nationally. Uncertainty has especially risen in the aftermath of the 2014 Euromaidan revolution which increased political and societal pressure upon judges through new anti-corruption laws and the law on lustration [22]. In the atmosphere of public scrutiny of the judiciary, any change that is even slightly likely to be associated with possible informal dealings in courts is treated with suspicion by Ukrainian judges. Thus, it is highly unlikely that judges will assume individual responsibility for promoting mediation until it is collectively sanctioned from above through legislation or policy documents.

3. Settlement-Friendly Legal Framework

The Soviet legacy offered Ukraine only a few positive gains. Among them was a settlement-friendly spirit of procedural law. In turn, Soviet procedural law inherited inquisitorial traditions of the civil law systems. After the Bolsheviks came to power in Russia in 1917, the idea of widely accessible justice system made the participation of lay people in the administration of Soviet justice not only possible but politically desirable [23-25]. Litigants were free to settle their case out of court and to bring their settlement agreements (amicable settlement agreement – *myrova ugoda*) to be stamped by the courts [26, 27]. The overall aims of civil procedures of the late Soviet period were directed towards "correct" and "rapid" disposal of civil cases [28].

In relations between socialist enterprises the speed of case settlement became even more important. Since 1963 the law has introduced a mandatory pre-trial dispute resolution procedure (*preteniiny poriadok*) for all inter-enterprise disputes [29]. This procedure required parties, before initiating a lawsuit, to exchange written notices according to a specific template and thereby to attempt to amicably resolve their disagreement; otherwise, the courts would have to dismiss the claim [30]. Furthermore, after the claim had been accepted by the court the judge was obliged to actively promote settlement between the parties and only if it did not work, the case could proceed to a full-blown trial. This was called a 'principle of *arbitruvannia*' [31]. Generally, procedural mechanisms that encouraged pre-trial settlements, as well as in-court settlements, did achieve the aim of clearing the dockets of the Soviet courts.

After the breakdown of the Soviet Union in 1991, Ukraine faced the task of rapidly reforming its court system inherited from the Soviet Union according to the new standards of independent and fair justice. At the time of transition, justice based on adversarial principles was seen by the reformers as a far more important goal than efficiency. Consequently, the mandatory pre-trial dispute resolution (*preteniia*) was seen as depriving citizens of their constitutional right to a fair trial and was abolished in 2001. According to similar logic, the active role of a judge in assisting parties to settle in court was also eliminated in 2001 [32]. It was substituted with an informational obligation of the judge to make parties aware of their right to settle which most of the judges currently treat as an empty formality. What remained from Soviet procedural law was the right of the parties to settle at any stage of court proceedings including at the enforcement stage and an option to stamp the settlement agreement by the judge and to enforce it in the same way as a court judgement.

The move back to greater informality restarted around the second decade of the new millennium. Since 2006 provisions on mediation have begun to be included in bits and pieces of legislation on legal aid, social work and juvenile justice, as well as Presidential policy documents. In 2012 the new Code of Criminal Procedure for the first time introduced a whole chapter on agreements into criminal procedure, including plea bargaining agreements and agreements between victims and offenders. In June 2016 Parliament amended Article 124 of the Constitution to expressly allow the law to establish a mandatory pre-trial dispute resolution mechanism, thereby giving a green light to mandatory court mediation if someday legislators would deem it necessary [33].

Thus, it is a commonly expressed opinion of Ukrainian mediators and judges that the legal framework, back in the 1990s as well as today, is capable of accommodating mediation even without major legislative changes and without express authorization from the Government. Mediation was not and is not prohibited by Ukrainian law, and those cases that have been mediated within pilot court projects in 2000-2016 functioned relatively well. Paradoxically, this settlement-friendly framework delayed adoption of the Law on Mediation which is an important catalyst of mediation reform. Although ten drafts of mediation law have been submitted to Ukrainian Parliament in 2011-2015, the law has not yet been adopted. Each time mediators submitted the drafts of the mediation law to Parliament (there were at least five attempts to do so) the legislative process was aborted due to political reasons.

4. Dualism of Ukrainian Courts

The third aspect of the wider institutional environment in Ukraine that has important implications for mediation reform deals with a specific configuration of the Ukrainian court system. As a deeper cause of the lack of support from the judiciary, there might be a correlation between the efficiency of the court system and the willingness of judges to promote mediation. Where a court system is experiencing severe delays and inefficiencies, as it was for example in Italy, mandatory mediation may be incorporated into it as a mechanism to ease court congestions and to address these inefficiencies. In contrast, where courts are relatively quick and cheap, mediation may be of less interest to the judicial elite as was demonstrated by Kathryn Hendley's research of Russian courts [34, 35].

In a similar vein, Ukrainian courts were shown by Tatiana Kyselova in her 2014 qualitative study of Ukrainian businesses to be dual - relatively efficient in terms of time and costs, albeit prone to corruption [21]. On the one hand, contrary to the popular perception of Ukrainian courts, this study revealed their astonishing efficiency in terms of time and cost savings. Furthermore, empirical evidence revealed that the majority of the litigants in routine commercial cases at researched Ukrainian companies had rather positive experiences in the courts. The relative efficiency of Ukrainian courts in comparative perspective is corroborated by the results of several international surveys. For example, a 2013 Council of Europe study found that Ukrainian courts are more efficient than or as efficient as their European counterparts in processing civil and administrative law cases.

On the other hand, a minority of the cases of researched companies were diverted to the corrupted track with the result of judgments not being enforced and ultimate justice not being delivered.

Although it is hard to imagine a court system without some occasional failures and imperfections, this study argued that the flaws within the Ukrainian dual judiciary are consciously designed and reinforced by the ruling elite as a part of the state governance structure. Furthermore, court dualism was found to be a wider phenomenon than simply court corruption. The dual court system integrates institutional structures outside the immediate court system, such as economic laws containing provisions that *inter alia* subvert justice.

Multiple pressures resulted in the extreme uncertainty of the Ukrainian court system which despite its efficiency does not guarantee that justice will ultimately be delivered to all. The empirical findings reveal that neither the identity of the parties, nor the subject matter of the dispute can unambiguously determine which track any specific case is likely to follow. Although those litigants who have already had links to the state are more likely to invoke them in courts, any case can be diverted to the black track. This makes *ex ante* distinction between political and mundane cases nearly impossible. The most threatening aspect of the black track of the dual judiciary concerns its ability to exert coercive pressure upon the litigants including the criminal prosecution of disobedient litigants [21].

Thus, the relative efficiency of Ukrainian courts suggests that the Ukrainian judiciary has lower systemic self-interest in investing efforts into efficiency raising mechanisms such as mediation. The capacity of mediation to tackle the main court "illness" - perceived as well as actual corruption - remains questionable. Indirectly, mediation may decrease the level of corruption through offering a completely different dispute resolution route outside the courts to many disputes. However, the respondents in this study suggested that there is a danger that mediation itself can become a vehicle of corruption through informal dealings of mediators and judges.

5. Conclusions

This article examined the broad institutional environment and its influence on development of mediation as a dispute resolution mechanism and as an institution in Ukraine. The mix of three major factors – institutional uncertainties; the settlement-friendly legal framework; and relative efficiency of courts coupled with their perceived corruptibility, which were closely examined in this article, comprise complex incentive structures for mediation implementation in Ukraine.

The highly volatile political and economic environment, frequent changes of governments and their geopolitical orientations, currently aggravated by the armed conflict in Eastern Ukraine, and the subsequent economic recession did not allow the mediation movement to gain full political support. The grassroots mediation community lacked resources for powerful lobbying and did not have access to the top judicial and political elite. Although international donors did reach some top-rank officials and judges through court mediation projects, political instability did not allow the generation of strong and stable support. The judicial elite who have been trained within the framework of the pilot projects have been reshuffled in recent reforms; and those who remain in place do not risk taking up innovative initiatives under the severe pressure of anticorruption campaigns.

Settlement-friendly legal frameworks, although providing a stable foundation for mediation, decreased the urgency of adoption of the law on mediation which in turn delayed nation-wide acceptance of mediation institution.

Finally, the specific configuration of the Ukrainian post-Soviet court system influenced the motivation of courts with respect to mediation promotion. The relatively high efficiency of Ukrainian courts coupled with their perceived corruptibility implied low systemic self-interest of courts in efficiency-raising mechanisms such as mediation.

These institutional preconditions, inter alia, lead Ukraine to remain on the sidelines of the global mediation movement. These factors need a deeper understanding both by researchers and policy-making which would allow for better tailoring of mediation policies to specific conditions of Ukrainian transition. Separate interdisciplinary research is required to understand how cultural and behavioral patterns, which are specific to the post-Soviet context, influence receptiveness to mediation in this part of the world.

Author details (in Ukrainian)

Інституційні передумови реформ в сфері медіації в Україні

Тетяна Кисельова

Анотація. У статті розглянуто фактори інституційного середовища та їх вплив на реформи в сфері медіації в Україні. По-перше, нестабільність соціо-політичної системи відіграє негативну роль у становленні інституту медіації. Цей фактор не дозволив медіаторам отримати стабільну підтримку реформ з боку уряду та суддівського корпусу. По-друге, діючі норми процесуального права, які сприяють вирішенню спорів шляхом укладення мирових угод, з одного боку заклали правову основу для запровадження інституту медіації, з іншого боку зменшили необхідність і терміновість прийняття закону про медіацію, що в свою чергу затягнуло загальнонаціональне визнання цього інституту. По-третє, відносна ефективність українських судів в поєднанні з можливістю корупції вплинуло на низьку системну зацікавленість судів у підвищенні їхньої ефективності шляхом медіації. Ці фактори інституціонального середовища в цілому уповільнили реформи в сфері медіації в Україні.

Ключові слова: медіація, альтернативне вирішення спорів, інституційні передумови, Україна

Author details (in Russian)

Институциональные предпосылки реформ в сфере медиации в Украине

Татьяна Киселева

Аннотация. Статья рассматривает факторы институциональной среды и их влияние на реформы в сфере медиации в Украине. Во-первых, нестабильность социо-политической среды играет отрицательную роль в становлении института медиации в Украине. Этот фактор не позволил медиаторам получить стабильную поддержку реформ со стороны правительства и судейского корпуса. Во-вторых, действующие нормы процессуального права, которые способствуют разрешению споров путем заключения мировых соглашений, с одной стороны послужили правовой основой для внедрения института медиации, с другой стороны уменьшили необходимость и срочность принятия закона о медиации, что в свою очередь затянуло общенациональное признание медиации. В-третьих, относительная эффективность украинских судов в сочетании с возможностью коррупции повлияло на низкую системную заинтересованность судов в повышении их эффективности посредством медиации. Эти факторы институциональной среды в целом замедлили реформы в сфере медиации в Украине.

Ключевые слова: медиация, альтернативное разрешение споров, институциональные предпосылки, Украина

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