

Kluwer Mediation Blog

Against Mediation Regulation

Tatiana Kyselova (Kyiv-Mohyla Academy, Ukraine) · Tuesday, October 30th, 2018

This is the third post about the recent exciting event held at the European University Viadrina on the 7th of October – International “Mediation Moves” Conference (see the posts by [Greg Bond](#) and [John Sturrock](#)).

I had a privilege to be one of the experts and contributors to the Conference. One of the workshops that I was asked to step in was on mediation regulation. Frankly speaking, after having researched this topic for a number of years and having co-authored the draft law on mediation for Ukraine, I have already moved to something else and was not such an enthusiast of mediation regulation any more. Yet, the request to contribute to this workshop was on my table and I decided to play a “devil’s advocate”.

With a German chair, two Polish and two Greek prominent lawyers, each presenting on the current state of mediation regulation in their respective countries, the workshop was extremely rich in details of various models and approaches to regulation of procedural aspects of mediation and practice of mediators. And the question “to regulate” or “not to regulate” did not arise. So, my arguments against regulation were, I guess, at a stark contrast to the previous speakers but still very much within the creative and provocative spirit of the Conference in general. Here I try to reproduce these arguments:

- The first premise is that mediation as an institution and especially its legal regulation is context specific. As legal systems are different, cultural, institutional and other contexts are different too, so in theory there should be no similar recipes for mediation regulation. Yet, at least in Europe, mediation regulation seems to follow the similar path in most countries. Well, there are still countries that are very different, and my own country – Ukraine – is of such kind.
- As Wisconsin professor Kathryn Hendley remade the famous Tolstoy phrase – “all good court systems look the same and all sick court systems are sick in their special way”. This is the case of the post-Soviet court systems – they are rather **efficient in terms of time and costs** but are sick on corruption. In these legal systems saving time and money is not a paramount concern, but rather the fairness of judgments. Most of the need for mediation regulation in the EU and US comes from the link between mediation and the court system, especially when mediation is mandatory. If you detach mediation from the court system – how much regulation will it need? When the government and the court system is not that interested in raising court efficiency, mediation does lose half of its appeal (although the other half – the promise of the better way to resolve conflicts in society – always remains).
- If you insert mediation into corrupted court system – what benefits will it bring to the court

system? Will it help to increase the quality of judgements and fair trial for all? If incorporated in environment conducive to corruption, will mediation survive attempts at manipulation and not become a vehicle of corrupted practice?

- Legal regulation of mediation is required a lot for enforcement of the outcome through the legal system. In the absence of developments with regards to the court mediation, mediation in Ukraine went into other domains. Organizational mediation is getting very popular with business. How much of legal enforcement one needs to enforce the outcome of mediation within organization?
- After the 2014 Maidan Revolution in Ukraine mediation went into local communities and local government. How much of legal enforcement one needs to enforce strategic plans developed with the help of mediation techniques or an agreement between local authorities and civil society? How much of legal enforcement one needs for peer mediation at schools?
- Due to mediation trainings, mediation was taught in Ukraine to thousands of people, most of whom will never change their occupations from lawyers, accountants, engineers, doctors, teachers, etc. to mediators. Yet, most of them do use mediation skills and competencies in their daily work and even conduct some kind of mediation sessions. Should this be regulated?
- In a modern crazy digital world, new professions emerge all the time. We have not heard of communication experts or coaches twenty years ago. These professions or occupations are not regulated. If mediation does not hold a public importance through its connection to the court system, why should it be regulated and loose its flexibility and adaptability to the emerging professions at the modern job market?
- Finally, for Ukrainian mediators, it always makes sense to learn the lessons of the others. Mediation regulation does cost a lot of efforts and creates rather cumbersome legal infrastructure. Most countries that had invested in it, so far, have not got the best return. So, the cost and benefit analysis still remains unclear.

All these arguments, of course can be rebutted and some of them, I admit, are rather weak. But perhaps, it makes sense to continue to question ourselves. At the end of the day, one of the tasks of mediator is to ask questions and to sow reasonable doubts at conventional approaches.

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