

Mediation in Ukraine: Challenges of Peace and War

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This Article analyzes challenges of institutionalizing mediation in Ukraine before and after the 2014 crisis, in three broad areas: (1) professionalization and regulation of mediation, (2) development of the mediation market, and (3) integration of mediation into the court system. Based on the findings of the qualitative empirical study, low demand for mediation services and relatively slow development of mediation in Ukraine was conditioned by the factors of wider socio-legal environment, such as high court efficiency coupled with corruptibility of judges, and general political instability. However, these factors also had some positive side effects. Lack of resources, political uncertainty, and insufficient interest on the part of the judiciary offered a span of time for the grassroots mediation community to independently establish themselves, to mature, and to learn the lessons of mediation regulation from other jurisdictions. Although the current armed conflict in Eastern Ukraine has amplified environmental uncertainties, it also prompted a greater attention of the international community to mediation in Ukraine and offered further opportunities for Ukrainian mediators.

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I. INTRODUCTION

The war in Eastern Ukraine unleashed an unprecedented fusion of deeply ingrained conflicts—from a geopolitical struggle between the world superpowers to fierce societal tensions inside the country.¹ Irrespective of the outcome of the current crisis, Ukraine and the whole region is in urgent need of healing and reconciliation. Mediation is capable of offering a path to such reconciliation as a highly promising instrument to broker peace that can “help to disentangle the knot of interests and needs in a structured and efficient way.”² Since the beginning of the crisis, international donors and international organizations working in the area of peacebuilding offered an immediate support to mediation and dialogue initiatives at various levels of the Ukrainian society.³

Mediation, as a dispute resolution method, had been introduced to Ukraine long before 2014. According to interviewees in this Article, the first attempts to plant institutionalized mediation in Ukraine date back to the late 1980s when the first mediation seminars were conducted in the Donbas region.⁴ Since that time, more than 3000 Ukrainians were

1. REVOLUTION AND WAR IN CONTEMPORARY UKRAINE: THE CHALLENGE OF CHANGE (Olga Bertelsen ed., 2017).

2. Lars Kirchhoff, *Linking Mediation and Transitional Justice: The Use of Internet-Based Mediation in Process of Transition*, in BUILDING A FUTURE ON PEACE AND JUSTICE: STUDIES ON TRANSITIONAL JUSTICE, PEACE, AND DEVELOPMENT 237, 238 (K. Ambos et al. eds., 2009).

3. PROTECTION CLUSTER UKR., PEACEBUILDING AND RECONCILIATION IN UKRAINE 2, 12 (2016), http://unhcr.org.ua/attachments/article/317/Peacebuilding%20And%20Reconciliation_Guidance%20Note_Final-ENG.pdf (discussing international efforts to support mediation and dialogue in Ukraine).

4. Focus-Group Discussion with Ukrainian Mediators and Dialogue Facilitators, Kramatorsk (May 5, 2016). The inevitable collapse of the Soviet Union caused massive industrial strikes in the most industrialized Donbass region of Ukraine where in the late 1980s a group of Ukrainian psychologists and U.S. mediators conducted the first mediation training seminars. This resulted in the collaborative effort of Ukrainian mediators and the U.S. NGO “Search for Common Ground” to establish the first mediation center in Donetsk and the network of eight mediation centers in other parts of Ukraine. Coal-mining strikes have also triggered the establishment of the new governmental agency—National Mediation and Conciliation Service—authorized to facilitate settlements of collective labor disputes. See *Zakon Ukrainyiny Pro poriadok vyryshennya kolektyvnykh trudovykh sporiv (konfliktiv)* [Law of Ukraine in the

trained as mediators at various training programs, forming a vibrant professional community.⁵ By 2017, the landscape of mediation organizations consisted of a national umbrella association, several national mediation centers, and a dozen regional organizations in Kyiv, Odesa, Lviv, Kharkiv, and other parts of Ukraine.⁶ Since 1997, court mediation schemes were piloted in more than fifteen Ukrainian courts of general and administrative jurisdictions.⁷ Finally, ten drafts of mediation law have been registered with the Ukrainian Parliament since 2011, and one of them was voted on the first reading in November 2016⁸ with the hopes to be finally adopted in 2017.⁹ Thus, substantial efforts have been invested into the institutionalization of mediation in the country over the last two decades.

However, at the present time, Ukraine remains an outsider in the global alternative dispute resolution (ADR) revolution.¹⁰ Law on Mediation has not been adopted yet, and the practice of mediation remains very scarce.¹¹ 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 and Russian language and remains inaccessible to the international

Resolution of Collective Labor Disputes], Mar. 3, 1998, No 137/98-BP, as amended, Vidomosti Verkhovnoyi Rady Ukrainy [Journal of Parliament of Ukraine] 1998, N34, p.227 (Ukr.).

5. Interview with Ukrainian Mediator, Kyiv (Aug. 17 2016).

6. For a detailed description of mediation organizations currently active in Ukraine, see Tatiana Kyselova, *Mediation Organizations in Ukraine: Short Guide 1-5* (Kyiv-Mohyla Academy, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3012496.

7. Tatiana Kyselova, Council of Europe, *Integration of Mediation into Ukrainian Court System: Policy Paper* (2017), <http://ssrn.com/abstract=3054519> [hereinafter Kyselova, *Integration of Mediation*].

8. Proekt Zakonu pro mediatsiyu [The Draft Law on Mediation] No. 3665, Dec. 17, 2015, voted by the Parliament of Ukraine on the first reading on Nov. 3, 2016, Oficiyniy web portal Verkhovnoyi Rady Ukrainy [Official web portal of the Parliament of Ukraine], http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57463 (Ukr.) [hereinafter The Draft Law on Mediation No. 3665]; Tatiana Kyselova & Maryna Omelynska, *Will Ukraine Have a Law on Mediation in 2017?*, KLUWER MEDIATION BLOG (Nov. 15, 2016), http://kluwermediationblog.com/2016/11/15/will-ukraine-have-a-law-on-mediation-in-2017/?doing_wp_cron=1505670710.7370109558105468750000; see UKR. CTR. FOR COMMON GROUND, www.uccg.org.ua/index.html (last visited Aug. 27, 2017).

9. Kyselova & Omelynska, *supra* note 8.

10. Mark Goodale, *The Globalization of Sympathetic Law and Its Consequences*, 27 L. & SOC. INQUIRY 595, 595-608 (2002); Laura Nader & Elisabetta Grande, *Current Illusions and Delusions About Conflict Management—in Africa and Elsewhere*, 27 L. & SOC. INQUIRY 573, 573-91 (2002); Tatiana Kyselova, *Institutional Preconditions for Mediation Reform in Ukraine*, 15(2) SOCIAL'NO-EKONOMIČNI PROBLEMI I DERŽAVA 78, 79 (2016) [hereinafter Kyselova, *Institutional Preconditions*]. Many former USSR countries have also adopted their laws on mediation. *Id.* Russia adopted the law on mediation in 2011, Kazakhstan in 2011, Belarus in 2013, Georgia in 2010 and 2012. *Id.*

11. See Ukrainian Mediation statistics, Appendix I.

community.¹² No systematic, theoretically informed research on mediation in Ukraine has so far been published and widely disseminated.¹³ All of this leads some experts to conclude that mediation in Ukraine is a rather “ghostly” phenomenon that has been promoted by donors but failed to materialize into a functional mediation system.¹⁴

By filling this informational and research gap, this Article argues that low demand for mediation services and relatively slow development of mediation institution in Ukraine were conditioned by the factors of a wider sociopolitical environment that makes the Ukrainian situation rather unique. These factors include specific configurations of the court system and sociopolitical uncertainties that were grossly amplified by the current armed conflict in Eastern Ukraine. Having analyzed the negative effects of such uncertainties and wartime dynamics, this Article seeks to identify how these factors can still positively contribute to and what opportunities they may offer for the post-2014 mediation developments in Ukraine. Thus, the aim of this Article is twofold: firstly, to map mediation development in Ukraine and to outline challenges that Ukrainian mediators faced before and after the 2014 crisis; and secondly, to serve as a starting point for exploring deeper cultural and institutional impediments to mediation development in the post-Soviet environment.

This Article presents findings of a qualitative study that was conducted in May through August 2016 and January 2017 in Ukraine, specifically in the cities of Kyiv, Odesa, Lviv, Kramatorsk, as well as in Berlin, Germany, which consists of five focus-group discussions with thirty-five participants and sixty-three in-depth interviews.¹⁵ The sample for the interviews was designed to focus on the mediation community and to include the major stakeholders in mediation development. It was initially based on the information from the database of the National Association of Mediators of Ukraine and later relied on the snowball

12. For example, the website of the National Association of Mediators of Ukraine is available only in Ukrainian. Similarly, Google Scholar search for “mediation and Ukraine” in the title of the sources has identified twenty-six sources and only six of them were in English (the search performed by the author on Oct. 13, 2017).

13. *But see* Tatiana Kyselova, *Professional Peacemakers in Ukraine: Mediators and Dialogue Facilitators Before and After 2014*, 3 KYIV-MOHYLA L. & POL. J. (forthcoming 2017) [hereinafter Kyselova, *Professional Peacemakers*]; Nancy Erbe, *The Global Popularity and Promise of Facilitative ADR*, 18 TEMP. INT'L & COMP. L.J. 343, 347 (2004).

14. Kyselova, *Professional Peacemakers*, *supra* note 13, at 21; Kyselova, *Institutional Preconditions*, *supra* note 10, at 79.

15. The fieldwork in Ukraine, including interviews and focus groups, was conducted as a part of the author's postdoctoral research project “Exporting Mediation as a Part of Rule of Law: Mechanisms and Impediments in Post-Soviet Ukraine” at University of Torino, Italy under the Marie Curie/COFUND fellowship in 2015-2017.

sampling technique.¹⁶ The sampling procedure aimed at the highest possible degree of variability of the answers and, therefore, proponents and opponents of mediation, the “patriarchs” of the mediation movement and the recent followers, representatives of the Government, local authorities and civil society activists, lawyers and psychologists, as well as Ukrainian and foreign experts were interviewed in this study. Interviews and focus-group discussions have been transcribed and analyzed through NVivo software for qualitative analysis of data.

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,¹⁷ Ales Zalar,¹⁸ Friedrich-Joachim Mehmel, and Frans van Arem.¹⁹ Finally, much of the useful information and links for this research derive from the author’s professional experience of advising various actors on mediation development in Ukraine for more than ten years.

This Article is structured as follows. Following the introduction, the second Part provides an analysis of challenges faced by Ukrainian mediators from 1991 to 2014 in three broad areas—professionalization and regulation of mediation, development of mediation market, and integration of mediation into the court system. The third Part demonstrates how the armed conflict in Eastern Ukraine, which started in 2014 and continues to the present day, has exacerbated the peacetime challenges by increasing environmental uncertainties, competition within the professional field, and pressures from the international community. In conclusion, this Article evaluates positive and negative consequences of current challenges and suggests further avenues for research of mediation in the post-Soviet context.

II. CHALLENGES OF PEACE: BEFORE 2014

According to the interviewees in this study, the overall path to mediation growth in Ukraine turned out to be thornier than initially

16. Chaim Noy, *Sampling Knowledge: The Hermeneutics of Snowball Sampling in Qualitative Research*, 11(4) INT. J. SOC. RES. METHODOLOGY 327, 330 (2008).

17. Bill Marsh, *Policy Issues Arising from Draft Mediation Laws in Ukraine* (USAID Fair Justice Program 2016) (unpublished manuscript) (on file with the author).

18. Ales Zalar, *Draft Laws on Mediation in Ukraine* (USAID Fair Justice Program 2016) (unpublished manuscript) (on file with the author).

19. Friedrich-Joachim Mehmel & Frans van Arem, *Court-Bounded and Commercial Mediation—a Pilot Project in Ukraine: A Story of Success* (Council of Europe 2011) (unpublished manuscript) (on file with the author); see Kyselova, *Institutional Preconditions*, *supra* note 10, at 7.

expected—some challenges faced by the first mediators were successfully worked out, yet others seemed to have impeded or slowed down mediation development for at least two decades. The following Sections offer analysis of these challenges before the armed conflict in Eastern Ukraine erupted in 2014.

A. *Professionalization and Regulation of Mediation*

1. Developing a Distinct Professional Identity

In contrast to Russian mediators and mediators in other post-Soviet countries, Ukrainian mediators decided to rely on the single anglicized term “*mediatsiia*” as a marketing strategy from the early days of mediation development.²⁰ They were keen to establish a distinct professional identity based on the interest-based facilitative mediation model that, admittedly, has its roots in the works of Roger Fisher and William Ury.²¹ Although deviations in practice render this model questionable,²² it continuously serves as an aspirational ideal for Ukrainian mediators.²³ It was first brought to Ukraine by the American mediators through the first USAID-sponsored projects in the 1990s and later was spread through the training programs of the Ukrainian Mediation Center and other Ukrainian organizations.²⁴ This model of

20. In Russia, the use of the anglicized term “*mediatsiia*” and its competing Russian language counterparts—“*posrednichestvo*” and “*primireniē*”—have triggered many confusing terminological debates. See Kathryn Hendley, *What If You Build It and No One Comes: The Introduction of Mediation to Russia*, 14 CARDOZO J. CONFLICT RESOL. 727, 738-39, 746-47 (2012); Ye. I. Nosyriova & I.A. Sterin, ‘*Posrednichestvo*’ ili ‘*Mediatsiia*’: *K Voprosu o Terminologii*, [‘*Intermediary*’ or ‘*Mediation*’: *to the issue of terminology*], 1(49) TRETISKY SUD 9 (2007) (Rus.).

21. ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 11-12, 14, 32, 40, 44 (Bruce Patton ed., 3d ed. 2011); Carrie Menkel-Meadow, *Why Hasn't the World Gotten to Yes? An Appreciation and Some Reflections*, 22 NEGOT. J. 485, 491, 497 (2006).

22. Kenneth M Roberts, *Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement*, 39 LOY. U. CHI. L.J. 187, 207-09, 211 (2007); John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321, 323 (2000).

23. Nancy Erbe, *The Global Popularity and Promise of Facilitative ADR*, 18 TEMP. INT'L & COMP. L.J. 343, 361-62 (2004).

24. SCOTT BROWN ET AL., CTR. FOR DEMOCRACY & GOV'T, USAID, ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS GUIDE 109 (1998); *On Alternative Dispute Resolution*, UKRAINIAN MEDIATION CTR., <http://ukrmediation.com.ua/index.php/ua/korysna-informatsiia/pro-alternatyvne-vyrishennia-sporiv> (last visited Aug. 27, 2017); KYIV MEDIATION CTR., <https://www.kyivcm.com/about-us> (last visited Aug. 27, 2017); see Carole J. Brown, *Facillitative Mediation: The Classic Approach Retains Its Appeal*, 4 PEPP. DISP. RESOL. L.J. 279, 281 (2003).

mediation was referred to by Ukrainian mediators interviewed in this study as “the classic mediation.”²⁵

In short, the main goal of a mediator in this “classic facilitative mediation” model is to facilitate the settlement process by eliciting interests of the conflict parties that underlie their initial positions in negotiations. Through enhanced communication, rephrasing, reframing, and targeted questioning, a mediator helps the parties to generate creative solutions that satisfy at least some of their interests. The mediator should be perceived by the parties as neutral and independent and the process as confidential. The facilitative aspect of the model emphasizes the focus on the parties’ empowerment and self-determination, full responsibility of the parties for crafting their own solutions, and delicate guidance of the mediator in procedural aspects of mediation. The procedural framework of facilitative mediation usually includes a first joint meeting of the parties, individual caucuses, and a concluding joint meeting to sign an agreement which is the most desirable outcome of the process.²⁶

The focus on the facilitative mediation model in Ukraine largely excluded differing styles of mediation, such as transformative²⁷ or evaluative mediation.²⁸ Transformative mediation is expressly used only by the Institute of Peace and Common Ground in their restorative justice programs as one of many methods, alongside facilitative mediation, family group conferences, and restorative circles, which are jointly referred to as the “restorative approach to conflict.”²⁹ Most other training programs in civil and commercial mediation in Ukraine do not even mention the transformative model of mediation.³⁰ Similarly, evaluative mediation is rejected by the mainstream mediation discourse by both

25. Interview with Ukrainian Mediator, Kyiv (June 13, 2016); Interview with Ukrainian Mediator, Lviv (June 10, 2016); Interview with Ukrainian mediator, Kyiv (May 26, 2016).

26. Bernard Mayer, *Facilitative Mediation*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 29 (Jay Folberg, Ann Milne & Peter Salem eds., 2004).

27. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 15-16, 53, 83-84 (2004); Lisa L. Blomgren Bingham, *Transformative Mediation at the United States Postal Service*, 5 *NEGOT. & CONF. MGMT. RES.* 354, 358 (2012).

28. It is difficult to practically distinguish evaluative mediation style as it often comes in a tool-box of styles along with many other approaches. In theory, evaluative mediation practices permit the mediator to render advice with regards to the merits of the dispute, prospects of possible litigation, settlement options, etc. For the facilitative-evaluative debate, see Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 *NOTRE DAME L. REV.* 1, 30 (2003); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin’s Grid*, 3 *HARV. NEGOT. L. REV.* 71, 75-76, 78-81 (1998).

29. Interview with Ukrainian Mediator, Odesa (June 4, 2016).

30. *Id.*; Interview with Ukrainian Mediator, Kyiv (Aug. 17, 2016).

Ukrainian commercial mediators and restorative justice practitioners as an illegitimate mutation of the facilitative mediation model.³¹

This nearly religious belief in facilitative mediation has obtained a remarkable and distinctive embodiment in the draft law on mediation. For example, the latest draft, No. 3665, which was voted on by the Parliament in November 2016, emphasized the principles of voluntary participation of the parties in mediation, parties' self-determination, independence, and neutrality of the mediator. Furthermore, the draft contains provisions that the decisions on the merits are made solely by the parties (article 6.2); the mediator has no right to solve the conflict of the parties (article 8.3); and the mediator can advise parties exclusively on procedural matters and matters concerning the settlement agreement (article 8.2). Finally, the draft directly prohibits the mediator from evaluating parties' behavior and their positions (article 8.3), unless they agree on this in writing.³² These draft provisions do give ground to believe that the mainstream Ukrainian mediation community remains faithful to the purity of facilitative mediation.

Although relying rigorously on the facilitative approach facilitated the quick and consistent process of professional identity formation, it lacked the flexibility that was required to apply mediation to various contexts in varied fields. Some evidence obtained in this study suggests that lawyer-dominated commercial mediation practice in Ukraine is heavily infused with evaluation.³³ Thus, the question of whether to maintain legislative adherence to the purely facilitative model of mediation as the basis for professional identity or to meet the expectations of consumers by allowing some evaluation awaits its strategic answer from the professional community.

2. Retaining Unity of the Professional Community

It would be unfair to say that the Ukrainian mediation community went through the process of establishing their professional identity painlessly and smoothly. As in many other parts of the world, this process was thwarted by the conflicting interests of various groups of mediators. In the course of this research, it became apparent that Ukrainian mediators struggle to overcome divisions conditioned by their professional identities and ideologies.

31. Focus-Group discussion with Ukrainian Mediators, Kyiv (May 17, 2016).

32. The Draft Law on Mediation No. 3665, *supra* note 8, arts. 5-8.

33. Interview with Ukrainian Mediator and Lawyer, Kyiv (May 26, 2016).

Based on the interviews in this study,³⁴ Ukrainian mediators do distinguish themselves between “commercial” mediators with an eventual goal of making one’s living through mediation and “social” mediators seeking to promote the culture of peaceful conflict resolution within Ukrainian society.³⁵ Based on these ideologies, “commercial” mediators are mostly of legal and business backgrounds and view corporate business as a major potential moving force for mediation in Ukraine. Therefore, they focus their practice on business disputes and rely on commercialized training in mediation as a source of earning. In contrast, “social” mediators are mostly psychologists, social workers, civil society activists, and others. They view their mission as strengthening social cohesion through community building and work primarily with vulnerable groups of the population focusing their practice on family mediation, peer mediation in schools, and restorative justice. Therefore, international donors remain nearly the only source of financial support for mediation projects of the “social” mediators.

This division is not sharp but is rather a matter of emphasis as both orientations are present within each group of mediators. It is not unique for Ukrainian mediators; similar tensions have been identified, for example, in the U.S. context, between “money-makers” and “peacemakers” or “service provision” and “social transformation” ideologies in mediation.³⁶ Nevertheless, Ukrainian mediators had to reconcile these ideological orientations, while deciding on the scope of entry requirements to the profession with commercial mediators wanting a higher threshold and social mediators promoting easy access to the profession.³⁷

In a similar vein, there was a lack of agreement between mediators with regards to regulation of mediation profession and mandatory court mediation. One group of mediators insisted on a decentralized market

34. Interview with Ukrainian Mediator, Lviv (June 10, 2016); Interview with Ukrainian Mediator, Odesa (June 5, 2016); Interview with Ukrainian Mediator, Odesa (June 4, 2016); Focus-Group discussion with Ukrainian Mediators, Kyiv (May 17, 2016); Focus-Group discussion with Ukrainian Dialogue Facilitators, Kramatorsk (May 5, 2016).

35. For more on comparison of professional identities of Ukrainian mediators and dialogue facilitators, see Kyselova, *Professional Peacemakers*, *supra* note 13.

36. Urska Velikonja, *Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice*, 72 ALB. L. REV. 257, 262-64 (2009); Christine B. Harrington & Sally Engle Merry, *Ideological Production: The Making of Community Mediation* 22 L. & SOC’Y REV. 709, 709-35 (1988).

37. At the moment, the Draft Law on Mediation No. 3665 (art. 16) establishes the following entry requirements into mediation profession: twenty-five years of age, university or professional-technical (college) education, and mediation training consisting of ninety academic hours (including not less than forty-five academic hours of training in practical skills).

mechanism of mediation regulation with extensive self-regulation by professional organizations. In their vision, multiple mediation providers and mediation training centers in Ukraine should have an equal right to certify mediators, maintain registries of mediators, set up professional standards, and monitor mediation practice. Mediator organizations should be free to unite themselves into one or several national associations, but no preference should be given to any of them.³⁸

In contrast, the other group of mediators was in favor of a slightly more centralized approach. They initially suggested to divide the mediation profession into two groups, mediators and “authorized” mediators, who would have higher requirements as for education and training and would obtain an exclusive right to mediate cases referred to by the courts. Authorized mediators were suggested to be certified and supervised by a single private-public body—the Council of Mediators—composed of mediators, judges, advocates, and representatives of the Ministry of Justice. All mediators were suggested to have a right to elect their representatives to the Congress of Mediators as a self-governing body.³⁹

Although these disagreements materialized in two alternative drafts of the mediation law submitted to the Parliament, Ukrainian mediators still managed to overcome them through the National Association of Mediators of Ukraine.⁴⁰ Since 2014, it has become a single umbrella organization of mediators in Ukraine, which was set up based on the contributions from mediators without any input from donors who previously had attempted to organize such an association at least twice. This grassroots organization currently plays the role of a unifying force inside the mediation community and a single voice of mediators for the outside world, including drafting and lobbying for mediation law and setting up national professional standards for mediators. Thus, the Ukrainian mediation community still invests considerable efforts in practicing what they preach—to apply transparent and mediation-like

38. The Draft Law on Mediation No. 3665, *supra* note 8; Tatiana Kyselova, *Mediation Development in Ukraine: 1991-2016*, at 13 (2016) (unpublished manuscript) (on file with author) [hereinafter Kyselova, *Mediation Development*].

39. *Alternatyvnyi proekt Zakonu pro mediatsiyu* [Alternative version of Draft Law On Mediation], No. 2480-1, Apr. 9, 2015, by S. Kivalov and V. Razvadovsky, *Oficiyniy web portal Verkhovnoyi Rady Ukrainyiny* [Official web portal of the Parliament of Ukraine] http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=54758 (Ukr.); see Kyselova, *Mediation Development*, *supra* note 38, at 12; *About the Association*, NAT'L ASS'N MEDIATORS UKR., namu.com.ua/?page_id=57 (last visited Sept. 17, 2017); Kyselova & Omelynska, *supra* note 8.

40. *About the Association*, *supra* note 39.

procedures to all their activities and to include voices of a wider mediation community as well as other interested stakeholders.

3. Struggling To Pass the Law on Mediation

One of the substantial challenges that united the community of mediators in Ukraine was the need to draft and lobby for mediation law. The law on mediation has been seen as a priority and as a primary booster of nationwide demand for mediation services from the very first days of mediation development in Ukraine. It is still viewed as an important step to introduce the terminology of mediation, its main values, and principles to the wider public in Ukraine.⁴¹ At least ten drafts have been developed and submitted to the Parliament in 2010, 2011, 2013, and 2015.

All these attempts were undermined by the lack of a unified vision of regulation by the mediation community outlined above. Each time the draft law was submitted to the Parliament, there were, in fact, two alternative drafts from two different groups of mediators also submitted.⁴² Despite this, the law on mediation did have a chance to be adopted. Both groups of drafters and political forces that supported them were about to agree on the single text, but, every time, the legislative process was aborted for reasons outside their control.⁴³ Finally, in November 2016, the Parliament voted on the first reading of the Draft Law No. 3665, and hopefully the law will eventually be adopted in 2017.

By 2017, the National Association of Mediators, supported by the Council of Europe in Ukraine, was able to come up with a strategy of legal regulation of mediation and a single text of the draft law on mediation based on this strategy. The drafters of the strategy declared their aspiration to gradually develop legal regulation of mediation from the general framework mediation law to specialized legal acts in civil, commercial, family, administrative, tax, criminal, penal, and other areas.

41. Interview with Ukrainian Mediator, Kyiv (May 20, 2016).

42. See, e.g., proekt Zakonu pro mediatsiyu [Draft Law On Mediation], No. 2480, Mar. 27, 2015, by A. Shkrum and others, Oficiyniy web portal Verkhovnoyi Rady Ukrainiyiny [Official web portal of the Parliament of Ukraine] http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=56401 (Ukr.); Alternatyvniy proekt Zakonu pro mediatsiyu [Alternative version of Draft Law On Mediation], No. 2480-1, Apr. 9 2015, by S. Kivalov and V. Razvadovsky, Oficiyniy web portal Verkhovnoyi Rady Ukrainiyiny [Official web portal of the Parliament of Ukraine] http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=54758 (Ukr.).

43. In 2011 there was simply not enough time to agree on the single draft before the Parliament got reelected, which meant that the drafts had to be submitted *de novo*. In 2013 the legislative process was cut off by the Euromaidan protests and subsequent change of the Government. Kyselova & Omelynska, *supra* note 8.

The drafters also confirmed that they are aware of the danger of over-regulating mediation at the outset. According to the research of the Ukrainian Center for Common Ground, a threat to restorative justice and mediation in Ukraine “may be posed if it is ordered from above through some state institution that will cause its bureaucratization, loss of trust, formal implementation by order of the superior, and false reporting.”⁴⁴ Therefore, to avoid this trap, the draft law on mediation is suggested to be applicable to disputes in all areas and attempts to remain within the framework structure.⁴⁵ It introduces only minimal legislative standards and incorporates mediation into the existing legal framework through available procedural devices.⁴⁶

Rather uniquely, the drafters of the mediation law included a very detailed section on the principles of mediation that describe the voluntary participation of the parties in mediation, parties’ self-determination, independence and neutrality of the mediator, and confidentiality of information in mediation.⁴⁷ The drafters of the draft law rejected the temptation to introduce mandatory court mediation from the outset. Instead, it is envisaged that the draft includes voluntary models of court mediation. In a similar cautious manner, the draft incorporated an open-ended market regulation of mediation that offers maximum freedom to professional mediation organizations to self-regulate and control mediation practice in all possible areas.

Thus, despite political instability and difficult negotiation process inside the mediation community, the final consensus has been reached towards cautious and gradual legal regulation of mediation, which requires experimentation through pilot schemes and further reconsideration and amendments in several years.

44. Natallya Pylypiv, *Vidnovne Pravosuddya v Ukraini: Pidsumky ta Perspektyvy [Restorative Justice in Ukraine: Results and Prospects]*, 3-4 RESTORATIVE JUST. UKR. 87, 87 (2011) (Ukr.); see Kyselova, *Mediation Development*, *supra* note 38, at 87.

45. The Draft Law on Mediation No. 3665, *supra* note 8, art. 3.1. “Mediation can be applied in any conflict (dispute) including civil, family, labor, commercial, administrative as well as in criminal cases and cases as to administrative offenses.” The only exception refers to grave and especially grave crimes where mediation is suggested to be limited only to the issues of compensation to the victim. *Id.*

46. For example, amicable settlement agreements (*myrova ugodà*), conciliation agreements (*ugoda pro prymyrennia*), pretrial dispute resolution (*dosudove vregulivannia sporu*), and others.

47. The Draft Law on Mediation No. 3665, *supra* note 8, arts. 5-9; see Kyselova, *Institutional Preconditions*, *supra* note 10, at 79.

4. Building a Relationship with International Donors

Mediation in Ukraine has not enjoyed the same wealth of financial support by international donor organizations compared to Russia.⁴⁸ Nor has mediation become a focus of international aid as much as the rule of law, justice, and legal reforms programs.⁴⁹ In the 1990s, these were organizations mostly from the United States and Canada, which brought an idea of modern mediation to Ukraine and other former Soviet Union countries. These organizations became the main partners of Ukrainian mediation nongovernmental organizations (NGOs) in terms of financial support, expertise transfer, and mediation ideologies. Among the most active foreign donors at that time were USAID, Eurasia Foundation, and Renaissance Foundation (George Soros Foundation).

After 2008, the European Union emerged as a leading promoter of mediation and other ADR mechanisms among its member states influencing neighboring countries, such as Ukraine.⁵⁰ Additionally, the geographical proximity of the European Union, links to European mediators, and appealing success stories of mediation in some European Union Member States inspired Ukrainian mediators.⁵¹ By the first decade of the new millennium, most of the donors who sponsored mediation projects were European, including the European Commission, Council of Europe, United Kingdom Embassy, Swedish International Development Agency, Swiss Agency for Development and Cooperation, Polish Aid, and others.

International donors, who invested in mediation development in Ukraine, however, had their own agendas and structural constraints that framed their policies with regards to mediation. Generally, mediation did not enjoy an independent status within donors' agendas and was adjacent to other larger programs in the areas of the rule of law and justice

48. Interview with Ukrainian Mediator, Kyiv (June 7, 2016); Interview with Ukrainian Mediator, Odesa (June 4, 2016).

49. See, e.g., *Current Rule of Law Programs in Ukraine*, AM. BAR ASS'N, https://www.americanbar.org/advocacy/rule_of_law/where_we_work/europe_eurasia/ukraine/programs.html (last visited Sept. 18, 2017); *Evaluation of the European Commission's Cooperation with Ukraine 2010 Report*, EUR. COMMISSION, http://ec.europa.eu/europeaid/how/evaluation/evaluation_reports/2010/1283_docs_en.htm#content (last visited Sept. 18, 2017); *EU Projects in Ukraine*, EUR. COMMISSION, https://ec.europa.eu/delegations/ukraine/1938/eu-projects-ukraine_en (last visited Sept. 18, 2017).

50. In 2008, the EU has adopted the Directive No 2008/52/EC of the European Parliament and the Council of May 21, 2008 on certain aspects of mediation in civil and commercial matters, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF> (last visited Sept. 18, 2017).

51. For an overview of mediation in the EU, see GIUSEPPE DE PALO & MARY TREVOR, *EU MEDIATION LAW AND PRACTICE* (OUP 2012).

reforms. For example, six out of eight donor-sponsored projects listed on the website of the Ukrainian Center for Common Ground operated within broader programs on the rule of law and focused on cooperation with the courts, police, and prosecutor's office.⁵²

Placing mediation in the context of court reforms prompted conceptualization of mediation as one of the elements of this reform, which is aimed at increasing court efficiency.⁵³ Therefore, a typical court mediation project sponsored under the court reform heading included a pilot court mediation scheme; fees for foreign experts to conduct training and policy research; mediation training for judges, lawyers, prosecutors, and other representatives of the justice system; study tours abroad for top Ukrainian justice officials; and a popularization campaign.⁵⁴

After the first court mediation projects were implemented by the mediation community, with the support of international donors, it became clear that courts were not the easiest partners in mediation development.⁵⁵ Consequently, "commercially oriented" mediators decided to focus on businesses and lawyers to develop self-sustainable mediation training programs while the structural location of mediation projects within judiciary reforms programs continued to impose the need to focus on courts.

Furthermore, the donors were keen to see "mediation in action"—the cases settled, the settlement rates reported, and institutional mechanisms implemented promptly by the end of the one- or two-year period of funding. Some Ukrainian NGOs took a risk to promise these, knowing in advance that they were at odds with the undeveloped mediation market in Ukraine.⁵⁶ Thus, as suggested by the interviewees in this study, it was important to understand that before the cases can be mediated, Ukrainians would have to raise the nationwide demand for mediation services, which was impossible to do within a few years of the project's duration. Mediators, interviewed in this study, believe that the projects should have been supported for at least five years and ideally for ten years to bring meaningful results.⁵⁷

52. Kyselova, *Institutional Preconditions*, *supra* note 10, at 81; *Projects*, UKRAINIAN CTR. FOR COMMON GROUND, <http://www.uccg.org.ua/projects.html> (last visited Aug. 27, 2017).

53. Interview with the Representative of the International Donor Organization, Kyiv (Aug. 25, 2016).

54. *See, e.g.*, Mehmehl & van Arem, *supra* note 19.

55. Kyselova, *Integration of Mediation*, *supra* note 7, at 9.

56. Interview with Ukrainian Mediator, Kyiv (May 18, 2016).

57. Focus-Group Discussion with Ukrainian Mediators and Dialogue Facilitators, Kyiv (June 1, 2016).

Finally, court mediation projects that were sponsored by different donors relied on the different models of court mediation without much coordination among themselves that unintentionally created a competition among projects.⁵⁸ For example, the judges of one of the donor-led court mediation projects drafted the amendments to procedural codes incorporating “their” model of judicial mediation and succeeded in lobbying these amendments, while other judges, who had piloted other models, felt excluded from this process.⁵⁹

These, and many others, structural constraints that derive from cooperation with the donors are generally attributable to democracy aid as a whole.⁶⁰ They were also seen as regrettable, but largely unavoidable, by the interviewees of this study. Indeed, for many Ukrainian mediation NGOs active both in commercial mediation as well as in sociopolitical conflicts, grants from international donors remain an important source of financial support, so they cannot afford to disregard financial aid from abroad completely.⁶¹ Better coordination of donors with the local professional community of mediators will undeniably increase efficiency of mediation implementation in Ukraine.

To conclude, the difficulties associated with the donor support of mediation in Ukraine have paradoxically assisted the formation of mediation community by leaving this community largely on their own in harsh political and economic conditions. For the last two decades, grassroots mediation movements in Ukraine went through the process of independent identity formation, the establishment of various professional organizations, competition among themselves, and integration under a single umbrella association.⁶² Although they still have to address the challenges of evaluative mediation practice, retaining the unity of their community, passing the law on mediation, cooperation with international donors, and many others, it is suggested that they be viewed as an

58. For discussion of the court mediation schemes piloted in Ukraine I 1997-2017, see *infra* Part III; Kyselova, *Mediation Development*, *supra* note 38, at 1.

59. Projekt Zakonu pro vnesennya zmin do Gospodarskogo procesualnogo kodeksu Ukrainy, Tsivilnogo procesualnogo kodeksu Ukrainy, Kodeksu administratyvnogo sudochynstva Ukrainy ta inshyh zakonodavchyyh aktiv [Draft Law of Ukraine On Amendments to Commercial Procedural Code of Ukraine, Civil Procedural Code of Ukraine, Administrative Procedural Code of Ukraine and other legislative acts], No 6232, Mar. 23, 2017, Oficiyniy web portal Verkhovnoyi Rady Ukrainy [Official web portal of the Parliament of Ukraine] http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=61415 (Ukr.).

60. Stephen Knack et al., *Aid Quality and Donor Rankings*, 39(11) *WORLD DEV.* 1907 (2011); Cynthia Alkon, *Cookie Cutter Syndrome: Legal Reform Assistance Under Post-Communist Democratization Programs*, 2002 *J. DISP. RES.* 327, 327-65 (2002).

61. Focus-Group Discussion with Ukrainian Mediators and Dialogue Facilitators, Kyiv (June 1, 2016).

62. *See About the Association*, *supra* note 39.

independent, competent, and vibrant community of professionals moving towards maturity.

B. Developing a Mediation Market

1. Developing Demand for Mediation

As in many, if not all, jurisdictions,⁶³ mediation in Ukraine suffers from a lack of popular demand for mediation services. The service's market did not develop on its own, and the mediation movement in Ukraine has been guided by the supply and not the demand. The number of cases mediated annually in Ukraine remains an enigma. It is only the Ukrainian Mediation Center that posts online the short accounts of the success stories—cases mediated or negotiated by the graduates of its educational programs.⁶⁴ However, this is far from representing the statistical data. At the moment, it is possible to give only some estimates of the cases mediated within donor-sponsored projects, which are summarized in Appendix I.

Most of the cases mediated within donor-sponsored projects were reported by the Ukrainian Center for Common Ground (UCCG) in the area of restorative justice.⁶⁵ The UCCG has developed a model that links together the state agencies, courts, local community leaders, mediators, and disputants through a three-level mechanism: 1) crime prevention through mediation training and other events; 2) mediation of disputes between peers at schools; and 3) mediation of criminal cases referred by the courts, police officers, children service officers, and others.⁶⁶ This multilevel referral mechanism has been implemented in fourteen local

63. Carrie Menkel-Meadow, *Variations in the Uptake of and Resistance to Mediation Outside of the United States*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2015, at 189 (Arthur W. Rovine ed., 2015); Benoit Bastard, *Family Mediation in France: A New Profession Has Been Established, but Where Are the Clients?*, 32 J. SOC. WELFARE & FAM. L. 135, 136, 139 (2010); Hendley, *supra* note 20, at 727; Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want: Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 151-52 (1984); Policy Department C: Citizens' Rights and Constitutional Affairs, *'Rebooting' the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Measures To Increase the Numbers of Mediations in the EU*, EUR. PARL. STUDY 11, 12, 20 (2014), [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET\(2014\)493042_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf) [hereinafter *Rebooting the Mediation Directive*]; Dean B. Thomson, *A Disconnect of Supply and Demand: Survey of Members' Mediation Preferences*, 21 CONSTRUCTION LAW. 17 (2001); Christopher T. Whitten, *Making Mediation Services Work: A Market Perspective*, 9 MEDIATION Q. 253, 254-56, 265 (1992).

64. *The Stories of Success*, UKRAINIAN MEDIATION CTR., <http://ukrmediation.com/ua/vrehuliuvannia-sporiv/istorii-uspikhu> (last visited Sept. 18, 2017).

65. UKRAINIAN CTR. FOR COMMON GROUND, <http://www.uccg.org.ua/> (last visited Oct. 2, 2017).

66. Pylypiv, *supra* note 44.

community restorative justice centers and resulted in 541 mediated cases and 152 restorative circles conferences (2004-2012). Although settlement rates for these cases were not reported, the notable positive achievement was that offenders who went through mediation did not commit any more offenses and the settlement agreements were voluntarily executed in full, thus, amounting to a 100% compliance rate.⁶⁷

Other donor-sponsored projects, mostly pilot court mediation schemes, account for another 187 cases mediated in 1997-2017 with the settlement rates from 37% to 72% (see Appendix I). Put together, all the donor-sponsored projects summarized in Appendix 1 resulted in approximately forty mediated cases per year, which is far below the minimum quantity identified, for example, for European Union countries in the 2014 Rebooting Mediation Study.⁶⁸

Although several dozens of cases mediated within each donor-sponsored court project is indeed a drop in the ocean, Ukrainian mediators were successful in developing another market—the market for training services, which is also the case in most countries in the world where mediation had been implemented. Ukrainian market in mediation training services has recently proved to be fully functional and potentially profitable.⁶⁹ Initial support by international donors allowed Ukrainian mediators to design a number of high-quality training products in basic and advanced skills of mediation, family mediation, mediation competencies for managers, interest-based negotiations, etc. They adopted role-plays and simulation exercises from the Western context to meet cultural expectations of Ukrainian participants, wrote their own scripts based on the cases mediated in Ukraine, and developed innovative methodologies of training.⁷⁰ At the time of this writing, there were at least three training centers in Kyiv and one in each region of Lviv, Odesa, and Kharkiv.⁷¹ Most of the training centers clearly pursued a business-oriented approach aimed at attracting the highest possible number of participants with all kinds of backgrounds. Additionally, training in mediation skills became an integral part of most donor-sponsored

67. Seventy percent of these cases were referred to mediators in the centers by police officers, 20% by the courts, and the remaining 10% by the prosecutor office, advocates, welfare offices, NGOs, schools, or parties themselves. Pylypiv, *supra* note 44.

68. The minimum quantity identified by European Union countries is 500 mediations per year. See *Rebooting the Mediation Directive*, *supra* note 63.

69. For example, the program “Business-mediator” offered by the Ukrainian Mediation Center and IHK Academy of Munich and Upper Bavaria attracts at least two groups of trainees every year despite rather high tuition fees (for Ukrainian standards). See <http://business-mediation.com.ua/> (last visited Sept. 18, 2017).

70. Focus-Group Discussion with Ukrainian Mediators, Kyiv (May 17, 2016).

71. Kyselova, *supra* note 6.

projects in court mediation, peer mediation at schools, restorative justice, and criminal mediation, which were conducted on an *ad hoc* basis. The interviewees in this research estimated that there were altogether more than 3000 people trained in mediation, both in commercial certification programs as well as within donor-sponsored projects.⁷²

In sum, the demand for mediation skills in the Ukrainian market at the moment highly exceeds the demand for mediation as a dispute resolution service, although both remain insignificant on a national scale. Whether prevalence of the training market is an unambiguously positive achievement remains questionable. On the one hand, mediation professionalization is unthinkable without high-quality education and practical training.⁷³ On the other hand, given that the educational and training market gives much quicker returns on investments than mediation practice as such, it is not surprising that most able Ukrainian mediators invest more efforts to promote themselves as trainers in Ukraine as well as in the countries of the former Soviet Union, such as Russia, Georgia, Kazakhstan, Kyrgyzstan, and others.⁷⁴ This leads to the vicious circle where more and more mediators are trained every year while their services remain under-demanded. Consequently they lack opportunity to master their skills in practice, and many of them abandon the idea to pursue a mediation career, which, in turn, undermines the capabilities of the mediation profession to develop demand for mediation services. According to the interviewees in this study, mediation trainers become aware of the fact that the lack of popular demand for mediation services may eventually threaten the demand for mediation training, and, therefore, new schemes of apprenticeship and supervision are currently being elaborated on by the Ukrainian Mediation Center and the National Association of Mediators.⁷⁵ However, the professional mediation community in Ukraine generally remains under-resourced to

72. Interviews with Ukrainian Mediator, Kyiv (Aug. 17, 2016); Focus-Group Discussion with Ukrainian Mediators and Dialogue Facilitators, Kyiv (June 1, 2016).

73. David Ardagh, *Is Mediation Now a Profession?*, 10 ADR BULL. 3, 6 (2009); Ronald M. Pipkin & Janet Rifkin, *Social Organization in Alternative Dispute Resolution: Implications for Professionalization of Mediation*, 9 JUST. SYS. J. 204, 224-25 (1984); Geetha Ravindra, *Is Mediation a Profession*, 15 DISP. RESOL. MAG., 2008, at 6; Urska Velikonja, *Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice*, 72 ALB. L. R. 257, 262-64 (2009); Harold L. Wilensky, *The Professionalization of Everyone?*, 70 AM. J. SOC. 137, 137 (1964).

74. Interview with Ukrainian Mediator, Odesa (June 4, 2016); Interview with Ukrainian Mediator, Kyiv (May 31, 2016).

75. Interview with Ukrainian Mediator, Kyiv (June 7, 2016); Focus-Group Discussion with Ukrainian Mediators, Kyiv (May 17, 2016).

powerfully boost the demand for mediation services on their own and obviously require external support for doing this.

2. Raising Public Awareness About Mediation

Raising public awareness of mediation was logically seen as a primary objective for the development of demand for mediation. In contrast to Russia,⁷⁶ mediation popularization campaigns in Ukraine are characterized by the prevalence of Europeanization discourse, inspired by ambitions of Ukraine to integrate with the European Union.⁷⁷ Ukrainian mediators have quickly adopted the official “European” discourse and began presenting mediation as “an integral part of European culture” and as “an important European value.”⁷⁸ Mediation was claimed to be directly “recognized” by the European Union-Ukraine Association Agreement⁷⁹ and was promoted as a weapon against corruption and organized crimes that would assist in establishing a modern “civilized” court system.⁸⁰ Thus, strategically using current

76. Some Russian academics have expressed their “anti-European” approach to mediation in Russia. For example, according to Professor Lisitsyn,

[H]istorical experience of conciliatory dispute settlement in our country is connected first of all to the state and the church and not to the missionary activity of certain “mediation providers . . .” Implementation of court mediation model will show our people that results of court reform can be successful. This will allow reducing court loads and thereby decrease the attractiveness of the “European justice” in a real (and not declaratory) manner. We need to prove to everyone that we can solve the problems of our court system by ourselves.

See Valeriy Lisitsyn, *Mediatsiya v Rossii “Segonya mi nablyudaem vozvrashcheniye k istokam”* [*Mediation in Russia: Today We Observe Return to Roots*], PRAVOPRESS, <http://pravopress.ru/node/442> (last visited Sept. 18, 2017) (Rus.).

77. Andrea Gawrich et al., *Neighbourhood Europeanization Through ENP: The Case of Ukraine*, 48 *JCMS* 1209, 1209 (2010); Paul Kubicek, *The European Union and Democratization in Ukraine*, 38 *COMMUNIST & POST-COMMUNIST STUD.* 269, 269 (2005); Taras Kuzio, *Is Ukraine Part of Europe’s Future?*, 29 *WASH. Q.* 89, 90-91 (2006); Roman Petrov, *Constitutional Challenges for the Implementation of Association Agreements Between the EU and Ukraine, Moldova and Georgia*, 21 *EUR. PUB. L.* 241, 243 (2015); Oleksandr Shepotylo, *A Gravity Model of Net Benefits of EU Membership: The Case of Ukraine*, 25 *J. ECON. INTEGRATION* 676, 677 (2010).

78. Institutionalized and commercialized mediation is also a relatively new phenomenon at the European continent and cannot be seen as an unambiguously European value yet. For the example of Ukrainian mediators referring to mediation as “European value,” see Vitaliy Krupelnitsky, *Mediatsiya yak Fenomen Yevropeyskykh Pravovidnosyn* [*Mediation as a Phenomenon of European Legal Relations*], *LAW TODAY* (2011), <http://pravotoday.in.ua/ua/press-centre/publications/pub-681/> (last visited Sept. 18, 2017) (Ukr.).

79. “Conditions for European integration of Ukraine and membership in WTO require implementation of alternative methods of dispute resolution.” See S.V. Vasylichak & L.V. Kutas, *Mediation as a Method of Civilized Resolution of Corporate Disputes*, 20 *SCI. J. NLTU UKR.*, 133 (2010), http://nltu.edu.ua/nv/Archive/2010/20_14/133_Was.pdf (last visited Sept. 18, 2017).

80. Natalia Nestor, *Vprovdjennya Protsedury Mediatsiyi Yak Napryam Udoskonalennya Prottydyi Organizovany Zlochynosti* [*Implementation of Mediation Procedure*

political rhetoric, Ukrainian mediators seek to gain political and popular support for mediation.

The European mediation discourse was equally supported by mediators and international donors in their popularization campaigns, albeit from different starting points. Mediators campaigned for mediation at the grassroots level within wider professional communities of lawyers, psychologists, social workers, human resources managers, entrepreneurs, and other professionals. Donor-sponsored projects approached this task from above by conveying the benefits of mediation to the top-rank officials of the justice system—the heads of the ministries, prosecutors, heads of the high courts, heads of the Qualification Commission of Judges, and others—those to whom mediation NGOs had restricted access.⁸¹

At the same time, both top-down and bottom-up popularization campaigns were conducted through narrowly specialized professional outlets for lawyers and businesspeople as the main target audience.⁸² Similarly, most of the presentations and awareness raising events were designed for this target group through meetings and conferences of various professional associations and groups. Such a marketing approach has resulted in a certain level of mediation awareness among professionals and triggered some interest in mediation training. However, these campaigns were apparently not sufficient to reach a wider circle of potential users of mediation services. Raising demand for mediation requires more substantial and wider popularization campaigns, greater resources, and more time.

3. Gaining Political Support Within an Uncertain Environment

Gaining political support for mediation from the government and the judiciary is another important condition for the success of mediation reforms. It was seen as a priority by Ukrainian mediators as early as in the mid-nineties. However, unambiguous and strong political support was very difficult to gain due to the high level of political instability in

as a Way to Counteract Organized Crime], 23 BOROT'BA Z ORGANIZOVANOYU ZLOCHYNNISTYU I KORUPTSIYEU: TEORIYA I PRAKTYKA [FIGHTING ORGANIZED CRIME AND CORRUPTION: THEORY AND PRACTICE] 364 (2010) (Ukr.).

81. Interview with Representative of International Donor Organization, Kyiv (Aug. 28, 2016).

82. For "mediation in Ukraine," a Google search offers popularization articles in the Ukrainian language primarily in legal outlets such as Liga-Zakon [Liga-Law], Yurydychnyi Radnyk [Law Advisor], Yurydychna Gazeta [Law Gazette], Ukraine Pravo [Ukraine Law] and others.

Ukraine.⁸³ For the twenty years of independence, Ukraine has witnessed two massive revolutions, an armed conflict, and numerous changes of the political leadership of radically different political orientation.⁸⁴ When in power, each political force changed people in all the key governmental positions, which meant that mediators' investments into connections with political elite could hardly pay off in the long run.

State agencies and the Ukrainian government still have to understand and to embrace mediation. So far, they remain passive by reacting either to the pressure of the international community from above or the initiatives of the grassroots mediation organizations from below.⁸⁵ For example, in 2012, the Ministry of Social Policy included mediation into the list of social services, which could be provided to disadvantaged groups of the population.⁸⁶ However, with a closer look, it becomes clear that this was prompted by the activities of the Council of Europe project on social integration of gypsy communities. In a similar vein, the work of the mediation NGO—Ukrainian Center for Common Ground—resulted in several policy documents in criminal justice reform that declared the need to introduce mediation in Ukraine.⁸⁷ Thus, so far, Ukrainian state agencies have not demonstrated their independent self-interest in and vision of mediation development in Ukraine.

Building the relationship with judges and the court system was equally problematic for mediators due to the same political instability and ongoing reforms.⁸⁸ The Ukrainian judiciary elite, while politely

83. Interview with Ukrainian Mediator, Lviv (June 10, 2016); Focus-Group Discussion with Ukrainian Mediators, Kyiv (June 9, 2016).

84. ANDERS ÅSLUND, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS, UKRAINE: WHAT WENT WRONG AND HOW TO FIX IT? (2015).

85. For analysis of the state agencies as stakeholders of mediation development in Ukraine, see Kyselova, *Integration of Mediation*, *supra* note 7, at 9.

86. Ministerstvo Sotsial'noyi Polityky Ukrainy Nakaz Pro Zatverdzhennya Pereliku Sotsial'nykh Poslul, Shcho Nadayut'sya Osobam, Yaki Perebuvayut' u Skladnykh Zhyttyvykh Obstavynakh i ne Mozhut' Samostiyno Yikh Podolaty [Decree of the Ministry of Social Policy of Ukraine on the List of Social Services Offered to the Persons in Hard Life Circumstances Which They Cannot Face on Their Own], *Ofitsiynyy visnyk Ukrainy* [Official Gazette of Ukraine] Aug. 10, 2012, No. 74, at 53 (Ukr.).

87. Nakaz Prezydenta Ukrainy Pro Kontseptsiyu Rozvytku Kryminal'noyi Yustytsiyi Shchodo Nepovnoletnikh v Ukraini [Decree of the President of Ukraine on the Concept of the Development of Criminal Justice for Minors in Ukraine], *Uryadovyy kur'yer* [Government Courier] Feb. 2, 2011, No. 99 (Ukr.); Lyst Ministerstvo Osvity i Nauky Shchodo Polipshennya Preventyvnoho Vykhovannya ta Profilaktychnoyi Roboty Podolannya Zlochynnosti Sered Nepovnoletnikh [MON] [Letter of the Ministry of Education and Science Concerning the Improvement of Preventive Education and Preventive Work on Juvenile Delinquency] Sept. 11, 2009, No.1/9-632 (Ukr.).

88. The latest reform of June 2016 has reorganized the whole system once again. Currently, it consists of the Constitutional Court and courts of general, administrative, and commercial jurisdictions. The courts are organized in three levels—local courts, appellate courts,

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 nationwide. When the uncertainty had risen in the aftermath of the 2014 Euromaidan revolution and subsequent armed conflict, it also increased political and societal pressure upon judges through new anti-corruption laws and the law on lustration.⁸⁹ 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.⁹⁰ Even those judicial elite, who were trained by the few donor-sponsored court projects, have been recently reshuffled in the post-Euromaidan reforms. Those judges who remain in office do not risk taking up innovative initiatives under the severe pressure of current anti-corruption campaigns. 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.

Additionally, 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.⁹¹ 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.⁹²

Ukrainian courts were also shown by the researchers to be dual—relatively efficient in terms of time and costs but prone to corruption.⁹³

and the Supreme Court of Ukraine. Zakon Ukrayiny Pro sudoustriy i status suddiv [Law of Ukraine on Organization of Court System and Status of Judges] No. 1402-VIII, June 2, 2016, as amended, along with Constitutional amendments, Vidomosti Verkhovnoyi Rady Ukrainy [Journal of Parliament of Ukraine] 2016, No.31, p.545 (Ukr.); Kyselova, *Institutional Preconditions*, *supra* note 10, at 80.

89. Zakon Ukrayiny Pro Ochyshchennya vldy [Law of Ukraine on Lustration] No. 1682-VII, Sept. 16, 2014, as amended, Vidomosti Verkhovnoyi Rady Ukrainy [Journal of Parliament of Ukraine] 2014, No.44, p.2978 (Ukr.); Kyselova, *Institutional Preconditions*, *supra* note 10, at 80.

90. Interview with Ukrainian Mediator, Odesa (June 5, 2016).

91. Giuseppe De Palo & Romina Canessa, *Sleeping-Comatose-Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union*, 16 CARDOZO J. CONFLICT. RESOL. 713 (2014).

92. Hendley, *supra* note 20, at 728.

93. Tatiana Kyselova, *Dualism of Ukrainian Commercial Courts: Exploratory Study*, 6 HAGUE J. ON RULE L. 178, 179, 183 (2014); Kyselova, *Institutional Preconditions*, *supra* note 10, at 81.

The relative efficiency of Ukrainian courts in comparative perspective is corroborated by the results of 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.⁹⁴ Thus, the relative efficiency of Ukrainian courts suggests that the Ukrainian judiciary has a lower systemic self-interest in investing efforts into efficiency raising mechanisms, such as mediation.

Similarly, the capacity of mediation to tackle corruption as the main court “illness” in the post-Soviet context 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, most cases that are processed in Ukrainian courts, under corrupt schemes, are not likely to be mediable. Furthermore, some interviewees 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.⁹⁵

To conclude, the low demand for mediation services and low popular awareness about mediation coupled with the lack of political support within a highly uncertain political environment remains an Achilles heel of mediation development in Ukraine.

C. *Integration of Mediation Within the Court System*

Despite difficult sociopolitical conditions and lack of self-interest of the judiciary outlined above, there were quite a few attempts to integrate mediation into the court system that are worthy of analyzing. These attempts were largely possible due to the efforts of the donor community and existence of the legal framework that was favorable to settlements.

Luckily, Ukraine has inherited a favorable legal framework for settlements from the Soviet law. In general terms, this framework consists of the following provisions: the availability of the pretrial dispute resolution procedures (*preteniia*);⁹⁶ the right of the parties to ask for a

94. Ukraine civil and administrative cases clearance rates are respectively 103.0% and 95.7% (compared to 98.2% median EU); Ukraine civil and administrative cases disposition times are respectively 47 and 55 days (compared to 95.7 and 98.9 days median EU time). See Council of Europe, *Enhancing Judicial Reform in the Eastern Partnership Countries: Enhancing Judicial Systems Report*, at 59 (Dec. 2014); Kyselova, *Institutional Preconditions*, *supra* note 10, at 81.

95. Kyselova, *Institutional Preconditions*, *supra* note 10, at 80; Focus-Group Discussion with Ukrainian Mediators, Kyiv (May 17, 2016); Interview with Ukrainian Mediator, Kyiv (May 16, 2016).

96. Tatiana Kyselova, *Preteniia Dispute Resolution in Ukraine: Formal and Informal Transformation*, 40 R. CENT. & EAST EUR. L. 1, 3 (2015).

break in a court hearing and to settle at any stage of court proceedings, including at the enforcement stage;⁹⁷ the discretion of the judge to incorporate the settlement agreement into the judgement; the right of the claimant to drop his/her claims pursuant to a settlement agreement; the right of the parties to sign a formal settlement agreement (myrova ugoda);⁹⁸ an option to stamp the settlement agreement by the judge (if signed during the court proceedings); and to enforce it in the same way as a court judgement.⁹⁹

This framework allowed Ukraine to experiment with voluntary court mediation schemes since the late-1990s. Based on the information provided by the National Association of Mediators of Ukraine and information obtained through the interviews in this study, at least seven mediation projects were piloted in more than fifteen courts of general and administrative jurisdictions of the first and appellate instances since 1997.¹⁰⁰

All the court mediation projects offered mediation services to litigants with their consent on a *pro bono* basis, so that mediation and information sessions were free to litigants. Given the absence of a provision in the law that directly allows mediation within the court system, court mediation projects relied heavily on the personal support of the heads of the respective courts and tried to back themselves up by the decisions of the judicial self-government bodies.¹⁰¹ Thus, despite the law

97. Civil Procedural Code of Ukraine [CPC] arts. 46, 192 (Ukr.); Economic Procedural Code of Ukraine [EPC] arts. 49, 207 (Ukr.); Code of Administrative Procedure of Ukraine [CAP] art. 47 (Ukr.).

98. For detailed information on the legal framework for settlements in Ukrainian law, see Kyselova, *Institutional Preconditions*, *supra* note 10, at 81.

99. The court can refuse to enforce the settlement agreement if it contradicts the law, violates third parties' rights and freedoms, or if it is not possible to enforce the settlement agreement, or if the party's counsel acts against the interests of his/her client. See, e.g., CPC art. 207 (Ukr.); EPC art. 192 (Ukr.); CAP art. 190 (Ukr.).

100. See Kyselova, *Integration of Mediation*, *supra* note 7. The court mediation projects included the following: Ukrainian Mediation Group project in Donetsk and Odesa courts supported by the Eurasia Foundation grant (1997); Ukrainian Center for Common Ground projects, various courts and donors (2001-2012); *Transparency and Efficiency of the Judicial System of Ukraine 2008-2011* by the European Commission and the Council of Europe in Bila Tserkva Miskrayonny Court, Vynnitsa Administrative Court, Donetsk Administrative Appeal Court, Ivano-Frankivsk City Court; Ukrainian Mediation Center project, Dniprovsky Kyiv Court of general instance supported by the IFC/World Bank (2009); *Educating Judges for Economic Growth 2013-2016* by the National Judicial Institute of Canada in Odesa Administrative Court, Malinovsky Court of general jurisdiction, Odesa, Ivano-Frankivsk Administrative Court, Ivano-Frankivsk; Volyn Center for Legal Aid project, 8 courts of Volyn region supported by the USAID Fair Justice Program (2015-2016).

101. For example, the High Qualification Commission of Judges rendered a decision to grant exceptions for pilot courts in the event that judges-mediators would violate the statutory

not prohibiting mediation within court proceedings, in order to truly encourage judges to refer cases to mediation, Ukraine still requires the Law on Mediation and the support of political leadership.

1. Introducing Mediation in Courts: To Mandate or Not To Mandate?

All the court mediation projects that have been implemented during the last twenty years relied on voluntary schemes of referrals and required express consent to mediation from both parties. Although mediation services were free to litigants, all projects faced difficulties in persuading parties to mediate. This experience unsurprisingly raised the question whether to make mediation in courts compulsory, which triggered a fierce discussion within the mediation community.

Indeed, mandatory mediation has a number of advantages.¹⁰² It has an advantage of a quick gain for the court system as it reduces cases going to full trial, which, in turn, positively influences the overall disposition time and costs of the court system. Furthermore, within mandatory mediation schemes, it is more feasible to exercise control over the quality of mediators' training, mediation process, and legal aid to disadvantaged groups of citizens. Finally, mandatory mediation guarantees a certain stable flow of mediation cases and, therefore, earnings for mediators.¹⁰³

However, there are risks and disadvantages of mandatory mediation. First, a mandatory pretrial mediation can only force parties to attempt to settle but not to actually settle. Given that any formal requirement, especially in the post-Soviet context, is often treated by the parties and their lawyers as a bureaucratic formality and as an additional step on the way to the courthouse, many litigants simply do not show up at the first information session about mediation.¹⁰⁴ This may result in quite low

time-limits for consideration of cases which was never the case in reality. See Kyselova, *Institutional Preconditions*, *supra* note 10, at 81.

102. De Palo & Canessa, *supra* note 91, at 713.

103. Mediation in courts can be integrated in a dozen different designs—from just an opportunity of the parties to ask for a break in a court hearing for mediation (voluntary schemes) to mandatory pretrial mediation when all the cases of a certain type are statutorily required to be mediated before the court can hear the case (mandatory schemes). For debates on the pros and cons of mandatory court mediation, see Menkel-Meadow, *supra* note 63, at 189, 191-97; Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 485-88, 493-94 (1985); Jacqueline M. Nolan-Haley, *Is Europe Headed Down the Primrose Path with Mandatory Mediation?*, 37 N.C. J. INT'L L. & COMM. REG. 981, 984-86 (2012); Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 584-85, 592-95 (2004).

104. In some countries, for example in many places in Australia, mandatory mediation schemes require parties to participate “in good faith,” which means people have to show up and,

settlement rates in mandatory mediations and bounce the majority of the cases back to courts.¹⁰⁵ Consequently, time and costs increase for the cases that were forced to attempt mediation but have not settled. Second, mandatory mediation entails tension between the need to guarantee affordable mediation procedures to the parties and the need to support the mediation profession.¹⁰⁶ Mandatory mediation makes essential for the state to guarantee free legal aid within mediation procedures and free access to mediation services to those categories of citizens who are entitled to free legal aid according to law.¹⁰⁷ These require additional expenditures from the state budget, which is highly unlikely in the current political situation in Ukraine. Third, a quick introduction of mandatory mediation even in the narrow category of disputes, such as divorce disputes, requires a stable and professional pool of trained and certified mediators, which is currently unavailable in many distant regional courts of Ukraine. Finally, mandatory mediation in the post-Soviet context entails some risks of corruption. Although these risks have not been proven empirically, some interviewees in this study suggested that judges may manipulate mediation to the advantage of certain mediators, which, in turn, may lead to the phenomenon of the so-called “pocket mediators.”¹⁰⁸

Having weighed the pros and cons of mandatory mediation within the context of the current justice reform, the Ukrainian mediation community has abandoned the idea of an immediate introduction of mandatory court mediation schemes.¹⁰⁹ It was decided that the best way was to start gradually from voluntary schemes of court mediation with (1) the express right of the parties to request a stay of court proceedings

at a minimum, not blatantly ruin the process. However, the “good faith” requirement is not without problems. See Penny Brooker, *Mediating in Good Faith in the English and Welsh Jurisdiction: Lessons from Other Common Law Countries*, 43 COMMON L. WORLD REV. 120, 121-53 (2014); Alexandria Zylstra, *Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 J. AM. ACAD. MATRIMONIAL L. 69, 70-71, 75-82 (2001).

105. For example, the settlement rate in mandatory mediations in Italy in the first quarter of 2016 was 21.4%. More than 50% of mandatory referred cases end up with only one party taking part in the first session. See *Mediation Statistics of the Ministry of Justice of Italy*, DGSTAT, <https://webstat.giustizia.it> (last visited Sept. 18, 2017).

106. For requirements established by the European Court of Justice, see Joined Cases C-317/08 & C-320/08, *Alassini v. Telecom It.* SpA 2010, E.C.R. I-221.

107. Interview with Ukrainian Judge (Court of Administrative Jurisdiction), Odesa (June 6, 2016).

108. “Pocket mediators” are informally connected to the judges who advise the parties to refer their cases to these mediators thereby distracting free choice of the parties and promoting unfair competition among mediators. Interview with Ukrainian Mediator, Kyiv (May 26, 2016); Focus-Group Discussion with Ukrainian Mediators, Kyiv (May 17, 2016).

109. Kyselova, *Integration of Mediation*, *supra* note 7.

for a limited time-period in order to mediate their dispute; and (2) the express right of the judge in appropriate cases to recommend mediation to the litigants and with consent of one or both parties to stay the proceedings for a limited time-period. At the same time, mediation law should leave the doors open to possible mandatory elements in future. Through experiments and pilot programs, such a path can eventually bring Ukraine to mandatory court mediation, but it was believed that this should not happen overnight.

At the same time, Ukrainian mediators, having been advised by the international mediation experts who analyzed draft mediation laws,¹¹⁰ realize that without some assistance from the judiciary, mediation intake will not increase in Ukraine. Therefore, mediators propose two motivational mechanisms that were discussed with the stakeholders during 2016-2017: (1) discount of 10% of court filing fees in cases where the parties attempted mediation and did not reach settlement; and (2) refusal of the court to award costs to the winning party in case they unreasonably rejected to take part in mediation. Both proposals are still very raw and require further discussion and careful consideration with all the stakeholders.

2. Court Mediation by External Mediator or by Judge-Mediator?

Whether mediation in Ukrainian courts will be voluntary or mandatory, there remains a question about who should mediate cases filed in courts. The pilot court mediation projects, which were piloted in Ukrainian courts in 1997-2016, have developed three models in this regard.¹¹¹

The first model envisaged court referrals to external mediators who conducted informational sessions or mediated the cases within or outside the court premises but always with the parties' consent. The second model involved referral of the case to the specially trained judge-mediator within the same court. The third model allowed the same judge, who was appointed to decide on the merits of the case, to conduct pretrial settlement procedure with the parties (*vregulyuvannia sporu za uchastiu suddi*).¹¹²

110. Marsh, *supra* note 17; Zalar, *supra* note 18; Kyselova, Mediation Development, *supra* note 38, at 4.

111. For detailed description of the court mediation projects, see Kyselova, *Integration of Mediation*, *supra* note 7; Kyselova, Mediation Development, *supra* note 38, at 4; Kyselova, *Institutional Preconditions*, *supra* note 10, at 79.

112. See Kyselova, *Integration of Mediation*, *supra* note 7, at 11-14.

After years of competition between these models, the Parliament finally voted for the third model, in three procedural codes—Civil Procedural Code, Economic Procedural Code, and Code of Administrative Procedure.¹¹³ The new procedural codes include a separate chapter that regulates settlement at the preparatory stage of court proceedings with the consent of both parties by the same judge, who is appointed to hear the case.¹¹⁴ The judge has a right to meet each party separately, without having to record these meetings.¹¹⁵ The draft procedural codes permit the judge to give advice as to the possible judgement in the case and to suggest solutions for the dispute during the settlement procedure.¹¹⁶ If the parties come to an agreement during the settlement conference, the judge confirms and stamps the settlement agreement. If they do not reach a settlement, another judge is appointed to make a final judgment in the case. This procedure, in the opinion of the mediators, has very little in common with mediation and rightly the new procedural codes do not call it mediation but rather “pre-trial settlement procedure by judge.”¹¹⁷

At the same time, new procedural codes also seem to leave the doors open to mediation by external mediators by mentioning mediation in the article that grants a mediator the right not to be called to the court as a witness.¹¹⁸ Whether and how the new procedural codes are implemented, and how much space they leave to mediation by external mediators, remains to be seen. The position of Ukrainian mediators on this issue is that all of the three models outlined above have the potential for development within the Ukrainian court system. This requires openness from the legislation to a variety of court mediation models, encouragement of an experimental approach to court mediation through pilot projects, and their careful assessment by external evaluators with resulting policy recommendations.

To sum up, the dilemma currently faced by Ukrainian mediators is to design a relationship between mediation and the courts that would

113. Zakon Ukrainy pro vnesennya zmin do Gospodarskogo procesualnogo kodeksu Ukrainy, Tsivilnogo procesualnogo kodeksu Ukrainy, Kodeksu administrativnogo sudochynstva Ukrainy ta inshyh zakonodavchykh aktiv [Law of Ukraine On Amendments to Economic Procedural Code of Ukraine, Civil Procedural Code of Ukraine, Code of Administrative Procedure of Ukraine and other legislative acts], No 2147, Oct. 3, 2017, Golos Ukrainy [Official Journal], Nov. 28, 2017 (Ukr.).

114. *Id.* at 14.

115. *Id.*

116. *Id.*

117. For differences between mediation and pretrial settlement procedure by judge, see Kyselova, *Integration of Mediation*, *supra* note 7, at 29.

118. *Id.*

preserve the values of mediation, on the one hand, and safely motivate parties to use mediation without substantive state expenditure, on the other hand. One of the possible solutions to this puzzle, which is currently pursued by Ukrainian mediators, is to combine voluntary referral to mediation, minimal state regulation, and financial incentives that will motivate the parties to use mediation.

III. CHALLENGES OF WAR: AFTER 2014

The life of most Ukrainians has been broken into two parts—before and after the 2014 conflict in Crimea and Eastern Ukraine. The Euromaidan mass street protests in Kyiv, which demanded integration of Ukraine with the European Union, and the fight against corruption ousted the then-President Yanukovich and brought a pro-European government to power in late 2013. This, in turn, triggered an unprecedented sequence of events on a global scale. In spring 2014, Russian troops covertly invaded Ukrainian territory of the Crimean peninsula and organized a referendum that annexed Crimea to Russia. Simultaneously, Eastern parts of Donetsk and Luhansk, Ukraine, 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 Organization for Security and Co-operation in Europe (OSCE) Special Monitoring Mission to monitor the situation at the contact line. Although it became possible to sign two ceasefire agreements in Minsk in September 2014 and February 2015 until now, they remain unimplemented, military hostilities are ongoing, and people are still being killed weekly. This conflict has already cost the lives of around 10,000 people and was seen by experts as a threat “for the wider European security order of a greater magnitude than anything since the end of the Cold War.”¹¹⁹

119. Roy Allison, *Russian ‘Deniable’ Intervention in Ukraine: How and Why Russia Broke the Rules*, 90 INT’L AFF. 1255, 1255 (2014); Nadezhda K. Arbatova & Alexander A. Dynkin, *World Order After Ukraine*, 58 SURVIVAL 71, 72 (2016); Elizabeth Cullen Dunn & Michael S. Bobick, *The Empire Strikes Back: War Without War and Occupation Without Occupation in the Russian Sphere of Influence*, 41 AM. ETHNOLOGIST 405, 405 (2014); Lawrence Freedman, *Ukraine and the Art of Limited War*, 56 SURVIVAL 7, 13 (2014); Taras Kuzio, *Competing Nationalisms, Euromaidan, and the Russian-Ukrainian Conflict*, 15 STUD. ETHNICITY & NATIONALISM 157, 160-61, 164 (2015); Mykola Makhortykh & Yehor Lyebyedyev, *#SaveDonbasspeople: Twitter, Propaganda, and Conflict in Eastern Ukraine*, 18 COMMU. REV.

Political turmoil and armed conflict has changed an overall political and societal context in the region and affected the process of mediation institutionalization. According to interviewees in this study, general level of social polarization, aggression, and hatred have undoubtedly increased in Ukrainian society during the last three years.¹²⁰ Societal context, shaped by Ukrainian mass media, is far from promoting cooperation and peacebuilding and currently emphasizes the need for defense from external threats rather than the need for reconciliation.¹²¹ These contextual trends have downgraded the prospects of mediation acceptance in the society. At the same time, the war has increased the value of peace for Ukrainians and admittedly intensified the need for peaceful conflict resolution mechanisms in any area within the society. For example, at least several policy documents have declared the need for participatory and inclusive technologies to involve civil society into the decision-making of the local communities.¹²² These simultaneous and contradictory trends towards war and peace create a very complicated context for further mediation development in Ukraine.

What became more visible after 2014 was the reactive formation of the dialogue facilitation professional community and increased pressure of the international community to include mediation into court reform package. The following Sections will analyze in more details how these challenges are faced by mediators on the ground.

A. *Competing with Dialogue Facilitators*

The armed conflict in Eastern Ukraine prompted a fast response by the international community through humanitarian assistance and support to peacebuilding initiatives in the conflict zone and throughout the country.¹²³ International experts, who arrived in the country during

239, 242 (2015); Joshua Mulford, *Non-State Actors in the Russo-Ukrainian War*, 15 CONNECTIONS 89, 95 (2016); Robert Wade, *Reinterpreting the Ukraine Conflict: The Drive for Ethnic Subordination and Existential Enemies*, 58 CHALLENGE 361, 365 (2015); Yuri M. Zhukov, *Trading Hard Hats for Combat Helmets: The Economics of Rebellion in Eastern Ukraine*, 44 J. COMP. ECON. 1, 5-6 (2015).

120. Interview with Ukrainian Dialogue Facilitator, Kyiv (Jan. 21, 2017).

121. Interview with Representative of Ukrainian Donor Organization, Kyiv (June 30, 2016).

122. Ukaz Presydynta Ukrayiny Pro Spryannia rozvytku gromadskogo suspilstva v. Ukrayini [Decree of the President of Ukraine On promoting the development of civil society in Ukraine] No. 68/2016, Feb. 26, 2016, Uryadovyy kur'yer [Government Courier] Feb. 2, 2016, No.41 (Ukr.); see Kyselova, *Mediation Development*, *supra* note 38, at 4.

123. Tatiana Kyselova & Julia von Dobeneck, *Track III Dialogues in Ukraine: Major Patterns and Resulting Risks*, CTR. FOR PEACE MEDIATION (2017), http://www.peacemediation.de/uploads/7/3/9/1/73911539/track_iii_dialogue_ukraine_policy_paper_cpm_kma.pdf.

the Euromaidan protests in 2013, brought with them a number of mediation-like methodologies that were previously tested in other hot conflict zones—Non-Violent Communication, Alternatives to Violence, Process-Oriented Psychology, Technology of Participation, Round-tables, Restorative Circles, Theatre for Dialogue, and others. This eclectic pool of methodologies derives from the single ideology of the respect for human dignity; inclusion, empowerment, and recognition of the conflict parties; safe communication; and a joint search for understanding and solutions. As an umbrella term, they are labeled as dialogues or dialogue facilitation. According to the OSCE reference guide:

The key features of dialogue facilitation are the same as for mediation. However, dialogue facilitation represents a distinct approach insofar as it is ‘a more open-ended communication process between conflict parties in order to foster mutual understanding, recognition, empathy, and trust. These can be one-off conversations or go on over a longer period of time. Although dialogues can lead to very concrete decisions and actions, the primary aim is not to reach a specific settlement, but to gain a better understanding of the different perspectives involved in a conflict.’¹²⁴

Based on these vague distinctions between mediation and dialogue facilitation, since 2014, a professional community of dialogue facilitators began to actively establish itself in Ukraine.¹²⁵ They are still in search of their professional identity by attempting to distinguish themselves from mediators. The task is not an easy one as mediation itself generally remains an unknown dispute resolution method in Ukraine let alone dialogue facilitation.

During the Euromaidan protests in 2013-2014, facilitators conducted dialogue sessions between protesters and the police. The dialogues later moved on to tackle the problems of internally displaced persons, “de-communization” and coordination between local government, and a civil society within the national decentralization reform.¹²⁶ Special dialogue initiatives were implemented in Odesa, Ukraine, in the aftermath of the violent clashes between groups of

124. *Mediation and Dialogue Facilitation in the OSCE: Reference Guide*, ORG. FOR SECURITY & CO-OPERATION EUR. 1, 10, <http://www.osce.org/secretariat/126646?download=true> (last visited Nov. 14, 2017).

125. Focus-Group Discussion with Ukrainian Dialogue Facilitators, Kyiv (June 1, 2016); Focus-Group Discussion with Ukrainian Mediators and Dialogue Facilitators, Kramatorsk (May 5, 2016); Focus-Group Discussion with International Dialogue Facilitators, Berlin (Nov. 23, 2016).

126. For a detailed description of issues discussed in the dialogue sessions and the map of the dialogues conducted since 2014, see *Reports*, DIALOGUE SUPPORT PLATFORM UKR., <http://ukraine.dialoguesupport.org/en/reports> (last visited Sept. 18, 2017).

opposing political orientation in May 2014.¹²⁷ More politicized topics, such as the relationship between Ukrainians and Russians, have not been directly addressed in most dialogue initiatives because of the obvious difficulties of the ongoing armed conflict and political constraints.¹²⁸

By 2015, chaotic and uncoordinated initiatives were partly systematized through several reports and databases.¹²⁹ By mid-2015, the Brussels-based organization, MediatEUR, and United Nations Development Programme (UNDP) launched an Internet platform to collect dialogue content and to coordinate efforts of facilitators, participants, and funders of the dialogue initiatives in Ukraine.¹³⁰ At the time of this writing, the Platform offered information on twenty-four Ukrainian organizations active in dialogue facilitation in Kyiv, Lviv, Kharkiv, Donetsk oblast, Dnipro, Kryvyi Rih, Kherson, Kremenchug,

127. One of the dialogue projects implemented in Odesa was the project “The Common House: Supporting and Broadening Dialogue Processes in Odesa” by the Berlin Center for Integrative Mediation (<http://www.cssp-mediation.org/>), Inmedio (<http://www.inmedio.de/en/>), and the Center for Peace Mediation (<http://www.peacemediation.de/index.shtml>) in cooperation with Odesa Regional Mediation Group. International experts have identified a core group of local actors in Odesa and trained them in basic mediation and dialogue skills, offered coaching sessions and strategic support for further self-sustainability of dialogue platforms. *The Common House: Supporting and Broadening Dialogue Processes in Odesa*, CTR. FOR PEACE MEDIATION, <http://www.peacemediation.de/the-common-house.html> (last visited Sept. 18, 2017). The group was able to organize regular dialogue meetings in Odesa involving civil activists of both pro-Russian and pro-Ukrainian orientation in 2014 and 2016. INMEDIO, <http://www.inmedio.de/en/> (last visited Sept. 18, 2017). The project has also conducted a systematic conflict study in Odesa that focused on conflict-driving positions and interests, the dynamics between different (political) groups and potential barriers to dialogue among these actors/groups. CTR. FOR PEACE MEDIATION, <http://www.peacemediation.de/index.shtml> (last visited Sept. 18, 2017).

128. The cross-border or transnational dialogue initiatives between Ukrainian and Russian civil society remain very few. One example is a project by Swisspeace on Transnational Russian-Ukrainian dialogues that brought civil society activists from Russia and Ukraine to dialogue sessions in Istanbul, Turkey in 2014. *Transactional Russia-Ukraine Dialogue Project*, SWISSPEACE, <http://www.swisspeace.ch/regions/russia-ukraine-and-caucasus.html> (last visited Sept. 18, 2017). Dialogues connecting Ukrainians from the territories uncontrolled by the Ukrainian government and the rest of the country are very few. The online dialogue initiative of this kind was conducted by the Donbass Dialogue NGO (Svyatohirsk and Donetsk) in October 2015 and April 2016. The goal of this dialogue sessions was reported to be “presentation of the method and assessment of the effectiveness of on-line dialogue as peace-making tool.” See *Objective of the Project*, DONBASS DIALOGUE, <http://www.donbassdialog.org.ua/p/about.html> (last visited Oct. 23, 2017).

129. Agder Research Project, *Pilot Project: Mapping Local Actors in Southeastern Ukraine Who Promote Peace, Reconciliation and Cooperation*, DIALOGUE UKR. NOR. (2014), <http://dialogue-ukraine.org/>; Olena Zakharova, *Mapping of Dialogue Initiatives To Resolve Conflict in Ukraine*, INT’L CTR. FOR POL’Y STUD. 1, 1 (Jan. 2015), http://www.icps.com.ua/assets/uploads/images/images/eu/mapping_of_dialogue_initiatives_eng_.pdf.

130 UKR. DIALOGUE SUPPORT PLATFORM, <http://ukraine.dialoguesupport.org/en> (last visited Oct. 3, 2017).

and others.¹³¹ Additionally, this research identified more than twenty international organizations that entered Ukraine after 2014 with various projects on peace mediation, dialogue facilitation, and peace-building.¹³²

Dialogue-related activities of these organizations are rather diverse. For example, the OSCE Project Coordinator in Ukraine organized and conducted dialogue forums in the conflict-affected zone in Mariupol, Severodonetsk, Kramatorsk, and other places; established a pool of moderators called to facilitate dialogue sessions; conducted annual international conferences on dialogue facilitation; initiated a coordination group of international donors active in dialogues and peace-building; as well as cooperated with the National Association of Mediators in training and popularization of dialogue facilitation and mediation.¹³³

Although there are, indeed, multiple points of similarity between mediation and dialogue, professional communities in Ukraine prefer to keep them separate. Only a few representatives of the Ukrainian mediation community directly responded to the wartime challenge by applying their mediation skills to the newly emerged sociopolitical conflicts. Similarly, a few mediation NGOs, including the Institute of Peace and Common Ground, Odesa Regional Mediation Group, and Donbas Dialogue (formerly Donetsk Regional Mediation Group), who used to work in the area of mediation and restorative justice, began to be involved in facilitating dialogues in Eastern and Southern regions of Ukraine. Yet, this study has demonstrated that most mediators remain faithful to their professional identity based on the facilitative model of mediation.

Thus, after 2014, Ukraine has witnessed the mushrooming of dialogue initiatives and the rapid emergence of a professional community of dialogue facilitators. Whether this movement poses serious challenges to mediation remains unclear. A parallel professional field can support the development of the mediation field, and there is great potential for constructive exchange and co-support between the two fields. At the same time, some mediators interviewed in this study have expressed their concern about professional competencies of some NGOs, who facilitate

131. The platform collected content of dialogues that were conducted in Ukraine including conflict issues, coordinated capacity building for local dialogue facilitators, mapped dialogue initiatives, organized face-to-face meetings of Ukrainian dialogue facilitators and international experts, and produced regular reports on the activity of the platform. *Id.*

132. See the list of current dialogue initiatives at the website *National Dialogue*, INT'L CTR. FOR POL'Y STUD., <http://ndialog.org.ua/golovna> (last visited Nov. 14, 2017).

133. *Demining, Social Issues, Business Climate and Infrastructure Discussed at OSCE-Supported Dialogue Forum in Mariupol, Eastern Ukraine*, ORG. FOR SECURITY & CO-OPERATION EUR., <http://www.osce.org/ukraine/229641> (last visited Sept. 18, 2017).

dialogues without proper training and experience in this field, that might negatively affect perceptions of the consensual dispute resolution by Ukrainians.¹³⁴ Furthermore, the emergence of a dialogue facilitation practice has noticeably increased the competition for limited financial resources offered by international donors and contributed to the general sense of uncertainty in the mediation field.¹³⁵ Better interconnection and interaction between mediators and dialogue facilitators will benefit both professional fields, and the National Association of Mediators is on the right track by strategically leading this process.

B. Responding to Post-Euromaidan Pressures from the International Community

The other challenge to mediation development in Ukraine that emerged after 2014 has to do with the increased pressure from the international community to reform Ukrainian judiciary. Popular perceptions of Ukrainian courts as a completely corrupt system and demands for “fair justice for all” were among the driving factors of the Euromaidan protests.¹³⁶ In the aftermath of the protests, court reform was recognized as a priority both by the new Ukrainian government and the international community.¹³⁷ However, in contrast to the previous waves of reforms, this time mediation was clearly spelled out in the policy documents.

First, the European Union supported the development of the Presidential Strategy of Reform of the Court System, Judicial Procedures, and Related Legal Instruments for 2015-2020, which states that “mechanisms of alternative dispute resolution should be expanded, in particular through the practical implementation of mediation and conciliation.”¹³⁸

Second, the latest pressure for reforms, in particular by the World Bank, has materialized in the requirement to improve Ukraine’s Doing

134. Interview with Ukrainian Mediator, Odesa (June 4, 2016).

135. Focus-Group Discussion with Mediators and Dialogue Facilitators, Kramatorsk (May 5, 2016).

136. Maria Popova, *Why the Orange Revolution Was Short and Peaceful and Euromaidan Long and Violent*, 61 PROBS. POST-COMMUNISM 64, 69 (2014).

137. See, e.g., Council of Europe, *Action Plan for Ukraine 2015-2017*, <https://rm.coe.int/16802ed0b6> (last visited Sept. 18, 2017).

138. Ukaz Presydynta Ukrayiny Pro strategiyu reformuvannya sudoustroyu, sudochynstva ta sumizhnyh pravovyh instytutiv na 2015-2020 roky [Decree of the President of Ukraine On Strategy of Reform of Court System, Court Procedures and Related Legal Institutions] in 2015-202, No. 276/2015, May 20, 2015, Uryadovyy kur’yer [Government Courier] May 26, 2015, No.92 (Ukr.).

Business ranking.¹³⁹ Therefore, mediation was seen by the Government as a feasible option to bring Ukraine a few points in this rating, and, in December 2015, the Cabinet of Ministers had entrusted the task to supervise the legislative process on adoption of mediation law to the Ministry of Justice.¹⁴⁰

Third, Ministry of Finances and the State Fiscal Service are currently under pressure to meet requirements of the International Monetary Fund to implement mediation in tax disputes.¹⁴¹ In 2014, the Draft Amendments to the Tax Code introducing mediation were registered in the Parliament but apparently were stuck there.¹⁴² In May 2016, the Ministry of Justice, Ministry of Finances, and State Fiscal Service were officially entrusted by the Governmental Action Plan with the task to develop a new draft that would include mediation procedure for tax disputes.¹⁴³ National Association of Mediators actively joined this process, established a working group, and coordinated several round tables on mediation in fiscal matters in 2016.¹⁴⁴

These pressures have apparently accelerated the parliamentary voting for mediation law on the first reading in November 2016 and amendments to the Constitution of Ukraine to expressly allow the law to establish mandatory pretrial dispute resolution mechanisms that gave the

139. Economy Rankings, WORLD BANK: DOING BUS. (June 2016), <http://www.doingbusiness.org/rankings>. In 2016, the World Bank Doing Business Rating included ADR ratings that give points for 1) availability of arbitration, mediation, and other ADR mechanisms; (2) legal regulation of ADR through separate laws or as a part of other legislative acts; and (3) financial mechanisms that motivate parties to settle.

140. Dekret Kabinety Ministriv Ukrainy Pro zatverdzhennya planu diy chshodo implementatsii kraschych praktyk yakisnogo ta effectyvnoho reguluvannya, vidobrazhenyh Grupoyu Svitovogo banku u metodologiyi "Vedennya biznesu" [Decree of the Cabinet of Ministers of Ukraine "Action Plan on Implementation of the Best Practices of High Quality and Efficient Regulation by the World Bank Group Rating 'Doing Business'"], No. 1406-p, Dec. 16, 2015, Uryadovyy kur'yer [Government Courier] No.13, Jan. 22, 2016 (Ukr.).

141. Interview with the Representative of the Ministry of Justice of Ukraine (July 22, 2016); Interview with Ukrainian Mediator, Kyiv (May 26, 2016).

142. Proekt Zakonu pro vnesennya zmin do Podatkvogo kodeksu Ukrainy (shchodo vvedennya protsedury mediatsiyi) [Draft Law of Ukraine on Amendments to Tax Code of Ukraine (Regarding Mediation Procedure)] No. 1666 2014, Dec. 28, 2014, Oficiyniy web portal Verkhovnoyi Rady Ukrainy [Official web portal of the Parliament of Ukraine] (Ukr.). The Draft suggested detailed regulation of mediation procedure that is inbuilt into the system of internal administrative pretrial dispute resolution within hierarchy of tax authorities. However, the draft does not present a clear vision of the status of mediators within this system—whether mediators will be state servants or external independent professionals and other issues.

143. Rasporyadzhennya Kabinetu Ministriv Ukrainy pro zatverdzhennya planu prioritetnyh diy Uryadu na 2016 rik [Resolution of the Cabinet of Ministers of Ukraine on Approval of the Plan of Priority Actions of the Government of Ukraine for 2016] No. 418-p, May 27, 2016, Uryadovyy kur'yer [Government Courier] July 16, 2016, No.113 (Ukr.).

144. Interview with the President of the National Association of Mediators of Ukraine (Jan. 26, 2017).

green light to mandatory court mediation if someday legislators would deem it necessary.¹⁴⁵ It remains to be seen whether the top-down pressures of the international community will break through the passive resistance of the Ukrainian judiciary and the Government to mediation and finally result in the adoption of the mediation law.

IV. CONCLUSIONS

Development of mediation in Ukraine is similar to the development in many other European countries. The seed of mediation was brought to Ukraine by foreigners in the early 1990s and gave its first fruits through professional mediation community, whereas popular awareness about mediation and demand in mediation services remain scarce until now. In this sense, mediation, indeed, remains a somewhat “ghostly” phenomenon in Ukraine. However, this fact is not drastically different from the other European countries, as mediators throughout the continent complain about insufficient demand for their services.¹⁴⁶

What is different in Ukraine is a wider institutional environment where mediation development takes place, namely its two characteristics—specific configuration of the Ukrainian court system and highly volatile sociopolitical conditions. Ukrainian courts, along with the courts in other post-Soviet countries, are profoundly different from their counterparts elsewhere because they are relatively efficient in terms of cost- and time-saving but susceptible to corruption. This entails low systemic interest of Ukrainian judiciary in decreasing their caseloads through mediation, as well as a profoundly different nature of the relationship between mediation and the courts. Despite this factor, international donors approached mediation in Ukraine as a part of court reform and kept investing in courts rather than the professional mediation community, which apparently has not resulted in the level of mediation development initially expected.

On top of this, the highly volatile political and economic environment of Ukraine within the last decade did not allow mediation movement to gain the support of the judiciary and the Government. Each time mediators submitted a draft mediation law to the Parliament,

145. KONSTYTUTSIYA UKRAYINY [CONSTITUTION OF UKRAINE] art. 124 (Ukr.); Zakon Ukrainy Pro vnesennya zmin do Konstitutsiyi Ukrainy (shchodo pravosuddy) [Law of Ukraine on Amendments to the Constitution of Ukraine (Regarding Justice)] No.1401-VIII, dated June 2, 2016, Vidomosti Verkhovnoyi Rady Ukrainy [Journal of Parliament of Ukraine] 2016, No.28, p.532 (Ukr.); see Kyselova, Mediation Development, *supra* note 38, at 2-3; *About the Association*, *supra* note 39.

146. Bastard, *supra* note 63; Thomson, *supra* note 63; Menkel-Meadow, *supra* note 63.

the legislative process was aborted due to the political turmoil or other political reasons beyond their control. After 2014, these challenges were amplified by the wartime pressures. The annexation of Crimea and the armed conflict in Eastern Ukraine have undeniably increased political and economic uncertainties on the ground. The anti-corruption court reform that followed the Euromaidan protests has reshuffled many judges who had been trained in mediation and thereby decreased the potential for mediation development within the court system. Similarly, the arrival of numerous international conflict resolution experts in the country after 2014 and the emergence of local professional dialogue facilitators intensified funding competition and contributed to the general sense of uncertainty within the field. These factors of wider institutional environment led Ukraine to remain on the sidelines of the global mediation movement.

At the same time, paradoxically, the very same environmental factors may play out positively for mediation development. Uncoordinated policies of donors, lack of resources, political uncertainty, and insufficient interest from the judiciary offered a span of time for the grassroots mediation community to establish themselves independently and to mature in these harsh conditions. In twenty years, Ukrainian mediators managed to form their distinct professional identity, develop a market for mediation training, and unite themselves into a national umbrella association. This community still faces many dilemmas, such as challenges of evaluative mediation practice, decentralized self-regulation of mediation profession, development of the market for mediation services, and integration of mediation within the court system. Nevertheless, Ukrainian mediators present a highly competent and vibrant professional community, which is on the right track of integration and dialogue with all other actors. In contrast to courts and state agencies, it remains the only self-interested stakeholder of mediation development and a single powerful engine of mediation reform in Ukraine.

Another positive aspect of “being late” concerns the opportunity to learn the lessons from the others. One lesson that has firmly been learned by Ukrainian mediators is that overly strong involvement of the state in mediation may destroy its values and spoil the whole enterprise, but without support from the Government and the judiciary, mediation is unlikely to move either. Therefore, Ukrainian mediators rejected the idea of mandatory court mediation, centralized professional regulation, and a unified registry of mediators, opting for market driven regulation combined with the parties’ incentives to use mediation. If the current

draft law incorporating this model passes through the Parliament in 2017, Ukraine will become one of the few, if not the only, continental European countries with an open-ended market regulation of mediation similar to the United Kingdom or United States.

Finally, even more paradoxically, the current armed conflict in Eastern Ukraine might also have unexpected positive side effects for mediation development. The 2014 crisis led to greater attention of the international community to Ukraine in terms of financial support and hardened aid conditionality requirements for the Government. The pressure of the international community for further court reforms has doubled and, for the first time, has expressly included mediation as a part of court reforms. Ukrainian Government has already reacted to these pressures by incorporating references to mediation into Presidential policy documents, changing the Constitution, and pushing the Parliament for the adoption of mediation law. Whether Ukrainian mediators will be able to make use of these side effects of the current crisis to the advantage of mediation development remains to be seen.

To conclude, although in any country establishing mediation as a new professional field and a new social institution is always a volatile process, in Ukraine, the uncertainties of the peaceful times are amplified by the parallel wartime dynamics. Beyond understanding the added complexity that is brought by the crisis, researchers might also probe to detect possible synergies between the emergence of the mediation system and the systemic societal crisis. The risks of mediation development within volatile war-affected political and societal environment call for a cautious context-specific approach to the design of mediation and dialogue processes and institutions. Researchers can contribute to such context-specific approaches through research of the root causes of resistance to mediation in post-Soviet countries, in particular with regards to the cultural conflict resolution patterns inherited from the Soviet past. In a similar vein, more research is required to understand in what way post-Soviet courts with their high efficiency and corruptibility can benefit from mediation and what societal consequences this might entail. By cooperating with international donors and the local mediation community, researchers have better chances to increase the impact of their research and to meaningfully contribute to mediation development.

APPENDIX I. MEDIATION STATISTICS 1997-2017

| Organization/ Project | Supported by | Years | No of cases mediated | Settlement rate |
|---|---|---------------|----------------------------|--------------------|
| Ukrainian Mediation Group network of eight regional centers ¹⁴⁷ | USAID | 1997- 1999 | 90 | Not reported |
| Court mediation project in Donetsk and Odesa, Ukrainian Mediation Group ¹⁴⁸ | Eurasia Foundation | 1999 | 9 | Not reported |
| Ukrainian Center for Common Ground, various projects ¹⁴⁹ | Various | 2004- 2012 | 541 | Not reported |
| <i>Transparency and Efficiency of the Judicial system of Ukraine</i> , mediation projects in four courts ¹⁵⁰ | European Commission, Council of Europe | 2008- 2011 | 50 | 72% |
| Mediation projects in eight courts of Volyn oblast ¹⁵¹ | USAID, Renaissance Foundation | 2014- 2016 | 38 | 37% |
| Total | | 1997- 2016 | 728 | |

147. USAID PROJECT, IMPROVING DISPUTE RESOLUTION CAPABILITIES IN UKRAINE 1, 1 (Feb. 2000), http://pdf.usaid.gov/pdf_docs/Pdabs114.pdf.

148. Tatiana Kyselova, *Promoting Alternative Dispute Resolution Through the Legal System in Ukraine: Narrative Report of the Project*.

149. Pylypiv, *supra* note 44.

150. Irina Zaretskaya, Put' k Soglasiiu ili Peregovory bez Porazheniya [The Way To Understanding or Negotiations Without Giving In], http://jurliga.ligazakon.ua/yurvtv_detail/211 (last visited Sept. 18, 2017).

151. VOLYN REG'L CIVIC ORG. "CTR. FOR LEGAL AID," USAID, MEDIATION IN COURTS: MYTH OR REALITY (2016), <http://legalaid.in.ua/upload/files/3a44250831253ade03a28cb816844196.pdf> (last visited Sept. 18, 2017).