

The rule of law is “negotiable” in Ukraine...

Case study Odessa

HRWF (02.05.2016) - The rule of law in Ukraine is anything but predictable or unbiased if and when applied. Moreover, there are also questions over the enforcement of judicial rulings should matters get that far. The rule of law suffers from meddling of “external actors” not only at the national level where some cases sometimes make the headlines but also of the local and regional elites where they remain unnoticed. Criminal, economic, administrative law... none are free of meddling at any stage of proceedings.

Apart from the direct perversion and the manipulation of the rule of law by ‘interested parties’, there is also the matter of “privately negotiated law enforcement”. The Odessablogger (29 April) provides a concrete example of such a practice under the title “A ‘negotiable rule of law’: Odessa & Ukraine”:

“As an example of just how easy it is for the public to be deprived their lawful remedy via “negotiable rule of law”, the on-going issue of illegal construction in Odessa city centre is a useful guide.

46 Pushkinskaya, a building registered as an architectural monument of local importance, has seen its tenants locked in a battle with a construction company called Hephaestus that is building a multistory complex at Pushkinskaya 48. City Ordinance prohibits construction of more than 5 stories in the historical centre of which Pushkinskaya is clearly and unambiguously a part.

The planning permission documents held by Hephaestus provide for a 3 story building with attic – therefore falling within the rules.

Hephaestus however, have currently completed the 6th story and have begun to construct the seventh – in complete disregard for City Ordinance and the documented planning permissions that they hold. Hephaestus are building for an end client called Atlant, who also have not produced documentation that legitimizes the current construction.

The residents/tenants of 46 Pushkinskaya officially appealed to City Hall for help, and People’s Deputy Eduardo Stas, who is a fairly decent man, took up their cause as a People’s Deputy should. He created a commission to look at the illegal construction in the heart of the city – for the issues raised at Pushkinskaya 48 are sadly not unique.

As is always the case, when the law and rules are simply ignored and/or not enforced, fewer and fewer decide follow them as there becomes an inferred belief that tacit approval is given by the authorities. (For the record, the unofficial stance of those at the top of City Hall regarding this particular construction is that nobody would build on this plot of land in the city centre if limited to 5 stories – so what can you do? – Unsurprisingly Mayor Turkhanov and his band displayed a complete disregard for the law and provided that tacit approval.)

After three meetings of the ‘Stas commission’ held at 83 Kanatna, for the third time, the representatives of the State Architectural Control body failed to attend – despite being based at 83 Kanatna, the same building in which the commission met. Indeed Mr Stas rightly reached the end of his patience and went and found representatives of the SAC in the building, forcing their attendance.

Hephaestus, contrary to existing City Ordinance, continued to state they held all documentation for six stories – despite currently constructing a seventh – but failed to provide them. Thus Mr Stas and commission found that the construction be unauthorised and therefore illegal. The otherwise absent SAC then audited the construction. A fine of UAH 1 million was imposed (although it is unknown if it has been paid). UAH 1 million is not a lot of money (34,600 EUR), the land of 48 Pushkinskaya is worth considerably more than that, and with the illegal construction orders of magnitude more, measured in multiple millions of US\$ rather than UAH.

Nevertheless work on the 7th story continues.

Hephaestus is attempting to negotiate a settlement with those of 46 Pushkinskaya that brought the matter to the attention of Mr Stas, but those tenants are not impressed and a settlement has not been reached.

Ms Stas and the commission have therefore arranged another meeting in mid-May.

None of this has played out in a courtroom.

Whilst it be the tenants of 46 Pushkinskaya that have brought the matter to the attention of the otherwise deliberately blind and tacitly approving City Hall, the real complainants are all the citizens of Odessa. In short the complainants are “we the people” and not simply those living at 46 Pushkinskaya.

Whether or not Hephaestus and the tenants of 46 Pushkinskaya reach an agreement, the construction remains illegal. Thus whatever deal is reached between them is somewhat irrelevant.

The institutions of due process and the rule of law are currently excluded from the workings whilst Mr Stas and commission are wrongfully trying to mediate a settlement between those living at 46 Pushkinskaya and those at building at 48.

The construction remains in breach of City Ordinance. It remains without the planning documentation required. It defaces the historic city centre. The construction is about as aesthetically pleasing as finding a Damien Hirst formaldehyde corpse at a Monet exhibition.

An insignificant UAH 1 million fine (if ever paid) will do nothing to prevent others from ignoring the City Ordinance or sticking to parameters of the planning permissions they are given.

Once Mr Stas and commission arrived at the (rightful and obvious) conclusion that the construction was unauthorised and thus illegal, the matter should be passed to the courts. It is not for Mr Stas and commission to mediate outcomes when the rule of law has been broken. The rule of law is not “negotiated” by a City Deputy or his assembled commission. The rule of law is the competency solely of those institutions charged with enforcement and due process – never more so than when the rightful complainant is “the people”.

“Negotiated/negotiable” rule of law by City Deputies in lieu of legal remedy will do nothing to insure compliance with the planning permission granted and/or City Ordinance in the future. Official due process and enforced judicial rulings can be the only avenue.

The sad truth is that Mr Stas has actually done far more than most would have as a People's Deputy. Unfortunately he has now done too much and gone too far (as well-meaning as he may be), and impinged upon the right of "the people" to legal remedy in a court of law by continuing to "mediate" rather than informing the court of his and the commission's finding of unauthorised, and thus illegal construction.

This is but a single and seemingly unimportant case. Yet it is an example of many thousands of similar cases across Ukraine where the rule of law is "negotiable" by those with no authority to "negotiate" it.

The end result of this particular case is already clear. An illegal and undocumented construction (or belatedly documented some time hence) will remain. An immovable Damien Hirst formaldehyde corpse will be a permanent feature at the Monet exhibition.

The construction company will not be forced to demolish all the illegally built floors and comply with the permissions granted. "The people" will not get to opportunity for remedy by way of due process. The rule of law will suffer another blow. Others will follow in the footsteps of Hephaestus and Atlant in the expectation of proceeding along the same "negotiated route" - and that route may be far less transparent than Mr Stas has been. Nobody will be fired from within the SAC for failure to do their jobs.

Each and every step toward change in Odessa and Ukraine and the unchallenged ascendancy of rule of law will be an individual battle fought - won or lost - for a long time to come."