



# A Wartime View From Ukraine's Supreme Court

**F**ebruary 24, 2024, marked two years since Russia's large-scale invasion of Ukraine, the worst attack on a European country since World War II. Despite frequent air alerts and missile strikes, Ukraine's Supreme Court continues to operate — and is pushing forward with judicial reforms launched before the war to eradicate corruption and improve judicial accountability.

To learn more about the challenges Ukraine's courts face, **CRISTOBAL DIAZ**, assistant director for international programs at the Bolch Judicial Institute at Duke Law, interviewed **OLENA KIBENKO**, a justice of the Commercial Cassation Court within Ukraine's Supreme Court, for *Judicature International*. An excerpt of their discussion, which took place in January 2024, follows. The full interview, along with additional background on Ukraine's judicial reform efforts, can be found at [judicature.duke.edu](https://judicature.duke.edu).

**DIAZ: Justice Kibenko, we're so pleased to be able to talk to you. Can we start with just a brief description of your career path and how you became a Supreme Court justice in Ukraine?**

**KIBENKO:** Thank you. It's a great pleasure for me to give this interview. I never dreamt to be a judge. I became a judge at age 45. Previously I was a lecturer at a university. I was a corporate mergers and acquisitions lawyer; I was a partner at a law firm, and I didn't have a thought about being a judge.

But one day I looked at Facebook, and one of my friends had written a message that a new selection to the Supreme Court was open and everyone could take part in it. For example, if you were an experienced lawyer or lecturer, or practicing lawyer, and

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you had more than 10 years of experience, you could take part in this open selection.

It was a shock, because previously in Ukraine our court system was very closed. If you were a practitioner, or a lecturer, or a scholar, it was impossible to become a judge, especially at the Supreme Court level. You needed to build your career step by step from the lower courts to the appellate court and so on. In fact, all information about vacancies in the court system was secret. If you wanted to be a judge, you needed to have a relationship with someone from the judiciary, parliament, or the president's office.

So, I read about this open competition, and I decided to take part, just to try. I was absolutely sure that it would be impossible to win, but I advanced step by step, and finally, in November 2017 by decree of our president, I was appointed as a judge of the Supreme Court.

Now, about 30 percent of new judges are people from outside the court system, 70 percent from inside the court system. And it was judges from different instances — for example, the first instance appellate court — not only the court of cassation. So due to this reform, we added diversity to our Supreme Court because we got many

new judges from different regions of Ukraine with different experience — as lawyers, lecturers, scholars, and judges — and I think it helped us to move forward with this reform.

**DIAZ: The 2016 reforms appear to have brought many levels of diversity, which is essential for so many reasons, including perceptions of fairness and maintaining the public's trust. So your career trajectory changed quite significantly when you became a judge. Could you tell us how you responded to this change?**

**KIBENKO:** For me, it was a great challenge. I was the typical commercial lawyer, so I had never been involved in court cases before I became a judge. It was a great challenge to adapt to judicial work, and it was difficult to write opinions.

I was surprised because I had published seven books, and I know how to write. But it was difficult to write a good decision because it required a completely different approach than writing an article or a textbook for students. First, our Supreme Court has a huge caseload in comparison with the Supreme Court of the United States. The U.S. Supreme Court hears about 60, 70 cases per year. Our Supreme Court has a caseload of about 60,000 cases. It's an enormous caseload. We have about 160 judges, so you can imagine how huge such a caseload is for our judges. We must hear cases practically every day. We hear cases by panel of three or five judges mainly, but sometimes more complex cases are adjudicated by a bigger panel.

Our Supreme Court has a complicated structure. It includes four cassation courts: administrative, civil, criminal, and commercial. Each of our cassation courts has several cham- ▶

bers. I'm a judge of the Cassation Commercial Court, and we have four chambers: bankruptcy, land and immovable property, corporate, and intellectual property.

You can imagine if you have to hear 20 cases in one day, how little time you have for each case. So several years ago (in 2019), we proposed reform in our procedural codes (the Commercial, Administrative, and Civil Procedural Codes). Included was the right to refuse an oral hearing, because the Supreme Court is the court that decides matters of law, not matters of fact, and it's not necessary to have an oral hearing for each case. Usually, if we look at our schedule, you can see that each case has only 15, 20 minutes to hear. So, in this 15 or 20 minutes, you open the hearing, you make a small introduction, and then each party has only three minutes to introduce their case before the court. Then the court goes to the deliberation room. In the deliberation room, judges have to issue a decision, and then they return and announce this decision. And that's all the steps. It takes about 20 minutes. You can see that it's absurd. It's impossible to do. Sure, we are used to short times, but it's difficult to do because you have to hear all these cases in one day.

So, I think our procedural laws should be changed to improve this. And I think it should be done now, because during wartime it's dangerous to have oral hearings that gather many people in our building. The relevant draft law is finally in the parliament, and we hope for its support.

And besides oral hearings, judges also draft legal opinions. Again, due to this enormous caseload, legal assistants are also involved in drafting opinions. The Supreme Court has a small office of four people: three legal assistants and one secretary. Legal assistants are

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usually involved in drafting legal opinions. It's being discussed in our society — is it possible, is it good [to have legal assistants drafting opinions]? I'm sure that it's not good. I do like your Judge [Richard] Posner. He has issued a lot of books about the judicial profession, and he said that it's necessary for a judge to draft opinions by himself or herself because it gives you thorough, in-depth understanding of the cases. I try to use [that advice], and it's very difficult to do if you get such a caseload. I work sometimes all my weekend. I start work early in the morning and, when I return from the office, I work at my home.

I'm a member of the working group of the Supreme Court. This group is devoted to improving legal opinions. We propose new structures for court

opinions and new methods of drafting legal opinions. As a member of such a group, I should draft very well. Many judges look to my opinions thinking, “Oh, she should write perfectly, because she's a member of the group.” So, I try to do my best and try to write really well, in plain language, understandable and so on. It takes more time to write concisely and in plain language. Ukrainian legal opinions are often very hard to read because it's a lot of citation. It's hard to understand the reasons for the outcome, because nobody was taught in our universities about legal writing and reasoning. When I was a student, we were not taught how to write court decisions, lawsuits, or complaints. We just studied law, not legal writing, and that's why our lawyers, our judges cannot write well. We must try to change that. Today, leading universities in Ukraine are starting to teach legal writing.

Talking about our working day, despite the war, our judges are involved in different social activities. For example, we have a lot of conferences, seminars, and lectures. I usually have one conference or seminar per week. It's very intensive. I'm a judge speaker at the Supreme Court, so I must communicate a lot, and we have also a very proactive communication policy. We have a Facebook page with 65,000 users. It's a high number for Ukraine, it's like a professional legal newspaper. We also have accounts on Instagram, Twitter (X), Telegram, YouTube channel. Judges have extra work to prepare some cases to publish in the media because Facebook has one format, Instagram another, Telegram another. We try to communicate very actively, because we try to explain our legal decisions in plain language for people to understand and know about our decisions and apply them in their lives.

**DIAZ: If we look back to February 2022, when the conflict broke out and the courts had to adjust, how did your day change?**

**KIBENKO:** Now, the situation is normalized, but if we are looking back to February 2022, it was a shock for all of us. I think we were prepared mentally and physically for the situation, but it was [still] a shock.

Our court didn't meet in February and March, because Kyiv was under threat of being taken by the Russians. They were very close, actually in the suburbs of Kyiv. And it was dangerous to be in Kyiv. I live on the left bank of the Dnieper [River], and I was very afraid that something would be done to the bridge and that I could not get to the right bank. If I was left there, it would be impossible to escape.

So, on the first day of the war, I moved to the right bank. I rented a small apartment with my family, and we moved from left to right bank, and then the court was closed. The court destroyed some secret files and moved to a secret place, including our server and electronic information, and for two months the court was closed. Then, at the beginning of April, we began to come back, began to work, and in the middle of the May, we already had the first court hearing.

So, our work stabilized, I think, in three or four months. But after that we had a very, very hard time because there were a lot of blackouts. If you have blackouts, nothing works in our court. If you have no electricity, you have no internet, your security system doesn't work, you have no water, the toilet doesn't work. It's a disaster. It was very, very hard to work under such circumstances. For months, we had problems with electricity at home, so you could not do your tasks at home

either. Bombing alerts interrupted our court hearings and our work very often. Usually nobody went to the shelters because our court has no shelter in our building. We have a shelter 10 minutes' walk away. If you have, for example, five air alerts per day, it's impossible to go to shelter and come back and to shelter and come back. People became used to this danger and just continued to do their jobs. Maybe it's not wise, but it's impossible to work any other way.

It's very interesting when some people, some of our friends who come from abroad to Ukraine, during the first days they are usually very afraid of this alert of bombing. But after weeks, everyone just gets used to it. It's your everyday life, and you just accept it and continue to do your job. I don't think the judges are heroes to do this, because all Ukrainian people just continue to do their jobs. In shops, in different businesses, and other jobs.

So, I think it's okay, it's just a normal situation and you're just used to these circumstances. We bought electricity generators. At home, I have a small electricity station. We have a generator of electricity at the court. So, at the beginning of 2023, it became less painful. Our work stabilized and now everything is okay. We still have air alerts. Sometimes we have missile attacks. Several times I saw the missile just from my window. It's not a pleasant view, but everything is okay. We are just used to it.

**DIAZ: Have there been instances when you or your colleagues have had to make difficult decisions that balanced the rule of law with the security or stability of the nation during the conflict? Can you share insights into the importance of an independent judiciary in wartime?**

**KIBENKO:** In our job, I think, yes, you try to impart justice, even when we have litigant entities from Russia or controlled by Russia. Sometimes it's absurd: [Their] country invaded Ukraine, [they] destroy our people, [they] destroy our property, but then a Russian entity comes into the court and tries to obtain justice. Then we try to apply all legal prescriptions and observe their rights. For me, I do like the old movie about Nuremberg. It's very interesting how the judges tried to keep themselves devoted to the rule of law as they conducted this procedure against the Nazis. We also try to keep ourselves devoted to this high-level standard. We try to ensure justice in our court, despite whether litigants are from Russia or other countries that supported Russia.

Sometimes it's a matter of procedure. For example, for many litigants from Russia or controlled by Russia, it's a question of how to inform them about court procedure, because we have no postal relationship. We cannot use regular mail to inform them. But we can use electronic means. In addition, we publish information on the website about all hearings and all written cases. We try to keep the balance, so they have the possibility to get this information. Another significant problem is that people and business entities from Russia have difficulty finding legal support in Ukraine because law firms and Ukrainian lawyers are afraid of bad reputations from working with [them].

I think it's not good, because everyone should have the right to legal support, to legal aid. But especially in business matters, it's not obligatory to have such legal aid. The court cannot do anything because it's a matter of agreement between the client and a legal advisor, and if the client cannot find the legal advisor, the court ►

is not responsible for such a situation. I think it is our role is to explain to people that the legal representative and their reputation should not suffer from defending Russian people or Russian business entities. It's a matter of legal education, and we should just do that. I see on Facebook and different social media that, for example, if a lawyer defends a Russian soldier or Russian business entity, a lot of their colleagues write very negative commentary and tell them to stop having a business relationship with this client. I think that's not good.

**DIAZ: You earlier mentioned that the judges aren't heroes. I would say, though, that I think it's tremendous what you've done to keep the courts open and to adhere to the rule of law in such trying circumstances. I know that you have close personal relationships with colleagues and friends who have made the decision to pause their judicial work and go fight on the front lines. Can you speak a little bit about judges who have left to fight in the war and how you and your colleagues within the judiciary view that?**

**KIBENKO:** I think Judge [Ivan] Mishchenko and Judge [Oleksander] Mamalui and other judges who decided to defend Ukraine on the field of battle, they're real heroes. I was really impressed by this decision. Judge Mishchenko has three children, and they're pretty young. I think for him it was a very hard decision to go to fight because he was really on the front line. It was the 93rd Army Division, a very famous army division that took part in many famous battles. Another of our judges, Judge Mamalui, is a very famous sniper. He first went to war in 2014. At that time, he was a judge

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of the first instance court, and when Russia invaded Donbas, he volunteered for the army and defended Ukraine. Then he was demobilized and elected as a judge of the Supreme Court. But in February 2022, the first day of the war, I met him, Oleksandr Mamalui, and he told me that he did not need a summons from the army, he just decided to go into the army by himself. So, he rejoined the army from the first day of this full-fledged war.

He recently was elected as a deputy of our court president. I think this happened not because Judge Mamalui proved to be a skillful manager or a wise judge, but mainly because of the trust and gratitude for his service in the army, for defending Ukraine against the Russians.

**DIAZ: Your now-former Supreme Court President Vsevolod Knyazev was arrested last year and accused of corruption in the form of bribery. How have you and your colleagues kept that situation from distracting you from the already overwhelming task of keeping the court open and maintaining the rule of law during the conflict?**

**KIBENKO:** It was a shock for us. I remember that it was midnight on a day in May. I was looking at some news on Facebook, and I saw this picture of the money with Knyazev and read he was arrested [for taking bribes]. The other judges of the Supreme Court and I couldn't believe it. First, we thought that it was a fake, it was unbelievable. Then we understood that all the papers reported this news, that it was true.

And on that night, we began to summon a plenary session, a meeting of all the judges of the Supreme Court. Knyazev was arrested at midnight on the 15th of May, and on the 16th, by decision of this general meeting of all judges of the Supreme Court, we removed him from office.

Two weeks later, we elected a new president of the court. For me, it's personal history because I was head coordinator of the Supreme Court working group. Our working group developed a strategic plan for developing the Supreme Court over five years. It was a very challenging task and very important to us. We had almost finished our job, and Knyazev was involved in the work of this group. He was one of our leaders. He supported all these democratic ideas. When he was arrested, it compromised all the ideas of our working group. It was a disaster. That's why for me, it's additionally painful, because our dream, our strategic plan, we had just finished developing it, and I sent a draft to all the judges. We were just about to cross the finish line.

I think that impressions from this case disappointed judges. Knyazev was fluent in English, was a very prominent speaker. He was a so-called “new type of judge,” not like an old-fashioned conservative career judge. He was a head of our group of strategical development of the Supreme Court. As a result of his arrest, the justices seem

to have stopped believing in our ideas — strategic development, a new approach to writing decisions, a new philosophy of the Supreme Court. Judges began to associate this new type of judge with the image of a smart bribe-taker. So, unfortunately, it's also had a consequence in the Supreme Court vote, though now I think the situation has stabilized.

Another negative consequence I would like to mention, due to the situation, are several draft laws now in Parliament. One provides for a total examination of all Supreme Court judges, including the use of polygraphs. I think that's unconstitutional because there is no collective responsibility for criminal offenses, for bribes, for example. If it's suspected that some judges are involved [in criminal matters], it should be investigated via criminal procedure, not by an examination of all judges in an unconstitutional way. Another draft law provides some changes to the Great Chamber. It's a division of the Supreme Court in which [former Supreme Court] President Knyazev adjudicated cases as head of the Great Chamber. This draft law suggests some changes not to improve the activity of the Great Chamber, but to control it; to give some control of the activity of the Supreme Court to Parliament, or maybe the president [of Ukraine], because now many politicians talk about elections — elections to the Parliament, election of the president — and maybe politicians are trying to use the situation to control the power of the Supreme Court, because the Supreme Court usually decides the result of elections if questions arise. It's a dangerous situation for the Supreme Court as an institution.

**DIAZ: Is there anything that the Supreme Court is doing to counter that narrative, to show that Knyazev's behavior is not representative of all those people who are working so hard to reform the courts?**

**KIBENKO:** Yes, we tried to do this. For example, we issued a legal opinion of the Supreme Court regarding [these proposed laws]. We sent it to Parliament. We also formed new working groups on questions of management of the Supreme Court, communication, anti-corruption, as well as the group on structuring court decisions. So instead of this big group of 42 judges [working] on strategic development with the president of the Supreme Court as a head, we have five smaller groups. But it's only the beginning of our job. I wonder how actively judges will participate in these groups. Because for some career judges, the "Knyazev case" was a shock, and they now have a negative attitude toward participation in the various working groups as well. Their slogan is that we should just adjudicate the cases and that is all. They might just decide not to take part in any other activities besides adjudication of cases. So that's a very negative effect of this.

**DIAZ: Is there anything else you'd like to share with our readers?**

**KIBENKO:** I would like to thank you for this attention to our work. It's very important for us. Last week we met with a group of judges from California. With their own money and their own time, they organized this trip to Ukraine to meet with our judges, not only with the judges of the Supreme Court, but also with judges from all around Ukraine. We feel such support. It's very important that we understand

that we are not alone in such a situation. The war in Ukraine has already lasted more than 600 days. Sometimes I am afraid that our colleagues will get used to the situation and forget about Ukraine, forget about us. I am afraid they will be annoyed by all this bad news and just leave us with our problems.

Your interest in our situation, in the second year of the war, helps us. So we are very grateful. We are grateful to all the American people, because we have had unbelievable financial and political support. We are a country at war, and we have no financial resources. Without this financial support, we cannot do anything. The financial support from the European Union, from the United States and other countries is very important for us. We understand that, and we very much appreciate all the support.

**DIAZ: Thank you, Justice Kibenko. We really appreciate your time.**



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