

Ukraine: Between National Security and the Rule of Law

Maria Popova, in conversation with Manuel F  rez Gil

Maria Popova is Jean Monnet Chair and Associate Professor of Political Science at McGill University in Montreal. She holds a BA in Spanish Literature and Government from Dartmouth College and a PhD in Government from Harvard University. She has lived and conducted research across Eastern Europe and Eurasia and its various regime incarnations – from growing up in Bulgaria before 1989, through interviewing judges and lawyers in Russia and Ukraine for dissertation research in the 2000s, to her current attempt to disentangle real from fake anti-corruption efforts in Bulgaria, Romania, and Ukraine. Popova's work explores the intersection of politics and law in the region, specifically the rule of law, judicial reform, political corruption, populist parties, and legal repression of dissent. Popova's book, *Politicized Justice in Emerging Democracies* (2012), won the American Association for Ukrainian Studies prize for best book in the fields of Ukrainian history, politics, language, literature and culture. Other work appears in *Europe-Asia Studies*, *Problems of Post-Communism*, *Journal of East European Law*, and *Daedalus*. Popova's research is broadly interdisciplinary and has made it into volumes edited by historians (*Beyond Mosque, Church and State: Alternative Narratives of the Nation in the Balkans*, 2016) and sociologists (*A Sociology of Justice in Russia*, 2018).

Manuel F  rez: *Thank you very much for talking to us. Please tell us about yourself, your biography, studies and professional work.*

Maria Popova: I grew up in Bulgaria in the 1980s, witnessed the collapse of communism as a teenager, and was among the first wave of students from the post-Communist region, who got full scholarships to study at American universities. I graduated from Dartmouth College in 1997, worked for a year in Washington DC, during which I developed a keen interest in the politics of the

former Soviet Union as a research assistant to Anders Aslund and Martha Olcott – two leading academic/think tank specialists on Russia, Ukraine and Central Asia – and then headed to Harvard University where I completed a PhD in political science in 2006. I have since taught political science at McGill University in Montreal, Canada. I have done extensive field research in both Ukraine and Russia since the late 1990s, but as Russia's authoritarian regime became increasingly repressive, it got harder to do research on the courts there.

M.E.: *Your research is focused on the rule of law, political corruption and legal repression of dissent in the post-Communist region.*

M.P.: My research broadly focuses on courts and democracy in the post-Communist region. I have written about judicial independence and judicial reform in Russia, Ukraine, and Bulgaria. I have written about how courts can influence the electoral process and outcome through registration cases and how they affect media freedom through defamation cases. I have also written about the politics of prosecuting grand corruption.

M.E.: *Before approaching the issue of Ukraine from these perspectives, could you tell us a little about the dynamics of ex-communist countries in these areas, how to combat corruption, improve the rule of law and transparency in this space.*

M.P.: My research suggests two broad conclusions. First, there is no institutional silver bullet that improves rule of law, reduces corruption, and increases transparency. We cannot create well-functioning, impartial judiciaries through institutional engineering – best practices such as life tenure for judges, a Supreme Judicial Council in charge of judicial careers and financing, institutional insulation of the judiciary from the political branches are often either insufficient or, sometimes, counterproductive in producing the desired outcomes – impartial courts that uphold the rule of law. Instead, it is more important to have the right people in positions of power, both in the judiciary and in the political branches, people who are motivated to improve the rule of law, people who believe in independent and impartial courts and bring about change. Second, political regime matters a lot. Establishing the rule of law in an authoritarian regime is a chimera. As messy as democracies can be, sustained political competition slowly and gradually brings about positive change in terms of independent courts, which can constrain incumbents and maintain regime openness.

M.F.: *Much has been said about Ukraine due to the Russian invasion and occupation of its territory but little about the progress that Ukraine has made in combating corruption, democracy and the rule of law. At what point did the country begin to take action in this regard and what were its main motivations?*

M.P.: The big divergence between Russia and Ukraine as political regimes started after the Orange Revolution in 2004. The success of the popular mobilization against corruption and electoral fraud created an important precedent that helped Ukraine consolidate a competitive regime where actors accepted that they cannot reimpose autocracy – civil society would not allow it. This does not mean that corruption was immediately brought under control and the rule of law took root immediately. This has been a slow and painstaking process.

M.F.: *Ukraine's pro-European aspirations also have a relationship with the country's internal political processes and the search for better governance. Tell us about the EU-Ukraine relationship in this regard and how the Kyiv government has benefited from it.*

M.P.: The 2014 Maidan revolution provided another boost to anticorruption and rule of law efforts. As it became increasingly clear to the majority of Ukrainians, Ukraine's survival depended on its pro-European course, and this underscored that rule of law and anticorruption are top items on the reform agenda. The assistance of international partners and the efforts of domestic civil society activists together provided significant pressure on politicians to pursue judicial reform and anticorruption. In 2019, [Volodymyr] Zelensky won the presidency precisely on a promise to do even more in these areas than his predecessor Poroshenko. The ball has been rolling in the right direction, though more remains to be accomplished.

M.F.: *Your book "Politicized Justice in Emerging Democracies" won the American Association for Ukrainian Studies prize for best book in the fields of Ukrainian history, politics, language, literature and culture. Please tell us about the book, specially about why it is important to understand the concept of "politicized Justice" when we talk about young democracies.*

M.P.: The book compares the degree of politicization of the courts in Russia and Ukraine in the late 1990s and early 2000s and ten years after its publica-

tion, the title is somewhat embarrassing – while Ukraine did become a democracy, Russia is anything but. The core contributions of the book, however, have withstood the test of time. Sustained political pressure on courts in politically salient legal cases – or politicized justice – is an enduring feature of politics not just in young democracies, but increasingly in old ones as well. Just note former president [Donald] Trump's attacks on the legal system that is now looking into his potential malfeasance. Secondly, subsequent research in other contexts around the world has confirmed my finding that intense political competition could, under some circumstances, create an incentive for politicians to increase their control over the judiciary, rather than pull back and respect it as a neutral arbiter. As politicians in competitive regimes face imminent loss of power, they tend to lean on the courts more in order to try to achieve their political goals before their time is up.

M.F.: *Rule of law is a very important aspect in the development of a democracy. How would you assess the situation in Ukraine in relation to this issue? Could you give us some examples of positive and negative steps.*

M.P.: Ukraine has made significant strides towards the rule of law since 2014. It has adopted massive legislative changes aimed at bringing both the legal codes and the structure of the Ukrainian judiciary in line with best practices recommended by the Venice Commission of the Council of Europe. New institutions such as an Anti-Corruption investigative body, prosecution, and court, a revamped High Council of Justice, a judicial ethics commission have been established with sustained advice and involvement by both international partners and civil society activists. Despite all the legislative activity and innovation, however, it seemed that change was slow to come in the informal institutions that shape the interaction between the presidential administration and the judiciary. Both [Petro] Poroshenko and Zelensky engaged in informal pressure and influence and had point people for the judiciary in their administrations who wielded significant power. Remember, for example, how in Zelensky's much-discussed conversation with Trump (when the latter tried to blackmail him to open an investigation into Hunter Biden), Zelensky assured Trump that the prosecutor general is "his person". The common complaint by rule of law activists was that political incumbents were implementing judicial reform measures reluctantly and trying to circumvent them through informal channels. It seems that the war has injected the necessary political will for rule of law in the presidential administration. A very positive development from mid-

August 2022 is that the Ukrainian parliament appointed a leading civil society activist, Roman Maselko, to the High Council of Justice.

M.F.: *Russian aggression and invasion of Ukraine will have many negative effects on the country, in fact the Russian occupation and invasion already extends for more than eight years. How can a young democracy like Ukraine deal with this situation? How high is the risk of setbacks in Ukrainian democracy if Russian invasion and aggression persists?*

M.P.: Ukrainian democracy has endured and even strengthened despite Russia's aggression. It has strengthened because democracy has become the only game in town – for Ukrainians, Russian autocracy is such a vivid nightmare that they would never accept steps domestically towards consolidation of power around an authoritarian leader. The risks to Ukrainian democracy come from the need to balance civil and political rights with national security. It's a familiar debate in democracies, old and new, how to ensure that valid national security concerns don't lead to undue limits on individual rights? The question is particularly acute in Ukraine as the country faces the very real problems of treason and collaboration by local officials and political figures with the Russian aggressor, as well as information warfare coming from Russia in the form of disinformation campaigns. The key to dealing successfully with these threats without eroding Ukrainian democracy would be to strengthen the rule of law by enhancing the trust and legitimacy of the judiciary, which would need to develop an impartial process for adjudicating complex cases. This issue is a source both of vulnerability and of great opportunity for Ukraine. If the process goes well, Ukraine will have a rule of law breakthrough moment, which will put the country on great footing for decades to come. Another risk to Ukrainian democracy comes from the endurance of oligarchic networks of political corruption, which erode trust in the state and enhance inequality. Before the war, civil society was strongly mobilized to push an anticorruption agenda. Since February, the issue has deservedly taken a back seat to strengthening state capacity to maintain the war effort. The key to Ukrainian democracy's future development will be restarting anticorruption efforts and continuing Ukraine's trajectory towards cleaner politics.

M.F.: *The relationship with the European Union is a central pillar in Ukraine's foreign policy. As an academic working on Ukraine, what do you think will be the medium and long-term scenario of the EU-Ukraine relationship?*

M.P.: The achievement of candidate status in June of this year was a watershed moment in Ukraine's history. After vacillating the Ukrainians are now united in their goal and belief that their future as an independent nation depends on European integration. Thus, there will be considerable political will to undertake the necessary reforms to achieve this goal. Hopefully, on the EU's side there would be enduring understanding that European security and lasting peace depend primarily on bringing Ukraine into the European family and working to contain Russia as long as it remains an imperialist autocracy with aggressive designs on its neighbours.

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Works cited

Popova, Maria. *Politicized Justice in Emerging Democracies* (Cambridge: Cambridge University Press, 2012).