

MÁTYÁS BENCZE\*

## What is judicial populism?

Adjudication is a *Janus*-faced phenomenon: it is both a legal-professional and a political activity.<sup>1</sup> The legal-professional side is closely linked to the expectation that courts should be the guardians of the rule of law and human rights, and that they should apply the law impartially and without regard to the will of the majority or other extraneous circumstances. Meeting this expectation requires a highly professional, even ‘elitist’ attitude on the part of judges, which is reinforced by various institutional and social factors (judges in most countries gain their position through cooptation by other judges, they are not elected by the people, they belong to the most educated groups of society).

The other side of judging (a kind of political activity) requires from judges to be sensitive to the social context and the consequences of their decisions in the cases brought before them. The participation of laypersons, the possibility of public criticism of the judges’ work, the freedom to interpret the law, the diversity criteria in the selection procedure of judges (and some other things) serve this purpose.

As a result, judges sometimes have to face the dilemma that a particular decision that can be justified on professional grounds may turn out to be unacceptable, or at least undesirable to the (perceived) majority of the members of a given political community. In a general sense, judicial populism is one of the responses to this dilemma. Nonetheless, until the rise of the political populism in the early 2000’s, legal theorists did not treat public pressure separately from other external factors that may influence the outcome of judicial decisions.<sup>2</sup> It goes without saying that in the era of political populism the phenomenon of judicial populism deserves more scholarly attention, since it is a realistic possibility that judicial populism can cause fundamental changes in the judicial activity, just as political populism has done in political life. Clarification of the meaning of judicial populism can facilitate social scientific research on this phenomenon.

---

\* professor, Deák Ferenc Faculty of Law and Political Sciences, Széchenyi István University; Senior Research Fellow, HUN-REN Centre for Social Sciences, Institute for Legal Studies

<sup>1</sup> This paper is a modified part of a longer chapter entitled ‘Judicial Populism’ that will be published in the ‘Research Handbook of Judging and Judiciary’ in 2024.

<sup>2</sup> I found the first mention of the term judicial populism in an article written in 2004: TRIBE, LAURENCE H.: *The People Themselves. Judicial Populism*. The New York Times 24 October 2004. <https://www.nytimes.com/2004/10/24/books/review/the-people-themselves-judicial-populism.html> (15.11.2022.).

Defining judicial populism, however, is as difficult as defining political populism. The concept of political populism has mostly remained nebulous because there is no consensus among political scientists not only on its main characteristics, but also on the phenomena that can be labeled ‘populist’<sup>3</sup>. It is also difficult to define judicial populism, since different authors offer different and sometimes contradictory meanings. Beyond the general epistemological characteristic of social sciences, another reason for the current conceptual plurality is that scholarly approaches to judicial populism are deeply embedded in the social and political context of the various jurisdictions from which the authors come from.

According to Ristawati and Salman (Indonesia), ‘judicial populism may be envisaged from how the judge tends to speak for the people or when the Court delivers decision adjusted and influenced by the majority of the people will while it is actually beyond justice, impartiality, and judicial independence’.<sup>4</sup> This definition is very concise and, as I explain below, it captures some of the most important features of judicial populism (deviation from legal-professional standards, and, at the same time, deference to the will of the majority). In their views, striking down laws enacted by the government and supported by the majority of the society is a clear sign of the anti-populist attitude of judges. However, they limit the meaning of judicial populism to the content of the judicial decision, and do not speak about the style of populist judicial decisions which is important when it comes to the definition of judicial populism.

On the contrary, Hilbink (US) in her sophisticated conceptual framework, influenced mainly by the US constitutional debates, describes judicial populism as a matter of judicial style (including both on- and off-the-bench activities of judges) independent of the content of the decision. Thus a maximally deferential or textualist decision can be labelled populist if it is made an ‘in the name of the people’ style and the decision maker uses several elements of the ‘populist toolkit’.<sup>5</sup>

While I agree that deferential or textualist judicial decisions can also be populist if they are written in a populist style, I also think that populism is not just a matter of style, but also a matter of content. Later, where I distinguish between ‘rhetorical’ and ‘decisional’ judicial populism, I argue that judgments which are delivered in the most technocratic style can be understood as populist if their content is in line with the public mood.

In her paper, Tanasescu (Romania) provides an overview of the possible meanings of judicial populism. First, it can mean a jurisprudence that shares the legal ideas of political populism such as popular sovereignty, constitutional identity, anti-pluralism, reduction of checks and balances, relativization of fundamental rights and other populist views. Second, judicial populism can be equal to realignment of the court’s position with the changing views within the society (in this sense, the U.S. Supreme Court was populist when it issued its famous *Brown* decision). Third, judicial self-restraint can be the sign of judicial populism, in which case the court allows for ‘greater margin of manoeuvre for political actors’. Fourth, ‘judicial populism can simply mean that courts defer to populist

<sup>3</sup> ‘It has been defined, inter alia, as an ideology, a thin ideology, a style of political communication, as leadership style, or a political strategy.’ See HOFFMANN TAMÁS – GÁRDOS-OROSZ FRUZZINA: *Populism and Law in Hungary. Introduction to the Special Issue*. Review of Central and East European Law 2022/1. 2. p.

<sup>4</sup> RISTAWATI, ROSA – SALMAN, RADIAN: *Judicial Independence vis-a-vis Judicial Populism. The Case of Ulayat Rights and Educational Rights*. Constitutional Review 2020/1. 110., 116. pp.

<sup>5</sup> HILBINK, LISA: *Judicial Populism. A Conceptual and Normative Inquiry*. (unpublished manuscript on file with the author) 27. p.

feelings and tilt the scale in favor of perceived majoritarian views, be it to become popular or to avoid popular resentment'. Finally, 'courts may simply give up their independence in order to support policies of populist governments' ('contextual' judicial populism).<sup>6</sup>

As I argue below, the fourth definition can be used as a starting point for constructing an adequate concept of judicial populism. The first, the third and the fifth definitions blur the line between political and judicial populism. In all the three cases, the element that makes judicial populism 'judicial' is missing. In the first case, the courts follow a populist political agenda, while in the fourth and fifth cases the courts simply defer to the governmental power. The 'judicial element' means that the court seeks popularity among citizens through its decisions (or by the style of communication about them). The second definition includes that element, but this behavior can be categorized more as responsiveness rather than as populism.

The first step in the identifying the core characteristics of judicial populism is to examine whether the features of political populism can be applied. Hilbink and other researchers have already discussed the key elements of political populism that are common to the representatives of political science. One of them is the Manichean thinking about the antagonistic contrast between the 'pure people' and the 'corrupt elite' where the former one can be exclusively represented by a single leader or party (often with personalized leadership).<sup>7</sup> This is why populism is generally hostile to pluralism. Another element is the 'direct and unmediated communication and connection between leaders and citizens'.<sup>8</sup> Finally, 'populists tend to loosen or find ways to circumvent institutional procedures and structures and will often violate sociocultural and political-cultural norms'.<sup>9</sup> Contempt for the authority of experts and not relying on them in political decision-making can be added to the list.<sup>10</sup>

It is hard not to see that these features of populism are 'designed' to win in a political struggle for governmental power. (seizing and/or abusing political power). However, judges very rarely aspire to this kind of power. Therefore, in the field of judicial practice, populism is not a means to gain political leadership. Taking into account the anti-elite character of political populism, it is easy to see that judges, although they can fight against the 'corrupt elite', cannot play the role of a political leader who is able to unite and exclusively represent the 'ordinary people'.<sup>11</sup> Or, it would be strange if a judge 'bypassed institutional procedures and structures', since procedures and structures define the essence of judicial activity. That is why it is insufficient to describe judicial populism in terms of the above-mentioned characteristics of political populism.

<sup>6</sup> TANASESCU, ELENA SIMINA: *Can Constitutional Courts become populist?* In: Belov, Martin (ed.): *The Role of Courts in Contemporary Legal Orders*. Eleven International Publishing, The Hague, 2019. 309–310. pp.

<sup>7</sup> BERNSTEIN, ANYA – STASZEWSKI, GLEN: *Judicial Populism*. *Minnesota Law Review* (106)2021/1. 283., 286–293. pp.

<sup>8</sup> HILBINK 14.

<sup>9</sup> HILBINK 14.

<sup>10</sup> ZIMRING, FRANKLIN E.: *Populism, Democratic Government, and the Decline of Expert Authority. Some Reflections on Three Strikes in California*. *Pacific Law Journal* (28)1996/1. 243. p.; HAJNAL GYÖRGY – BODA ZSOLT: *Illiberal Transformation of Government Bureaucracy in a Fragile Democracy. The Case of Hungary*. In: Bauer, Michael W. et al. (eds.): *Democratic Backsliding and Public Administration. How Populists in Government Transform State Bureaucracies*. Cambridge University Press. Cambridge, 2021. 97. p.

<sup>11</sup> It can also be argued here that the judiciary in any country is conceived as part of the social elite, which would make its anti-elite struggle inauthentic. However, as anyone can see, many politicians like Donald Trump, who come from the elite, can successfully present themselves as 'freedom fighters' against the elite.

Moreover, politics is primarily about goals (e.g., building a secular or a religious state) and politicians have wide latitude to achieve their goals. To put it in other words, in the political domain goals are more important than expertise (although much depends on the latter one). In contrast, adjudication, especially in modern societies, is designed to achieve predetermined goals such as preserving legal certainty, enforcing the government's will embodied in the laws and protecting rights. One of the main reasons why modern court systems are established and maintained is that judges have the necessary legal expertise to achieve these goals. The court system is a typical mediating institution which makes its decision 'in the name of the people', but it is also constructed in order to make well-considered judgments by applying the settled law in accordance with the established legal-professional standards.

It follows that the essence of judicial populism can be captured in the relationship of judges to the legal-professional values attributed to the judiciary *vis-à-vis* demands coming directly from the populace. Definitions of judicial populism which lack that omit the court's sensitivity to public mood or sentiment as a core element actually describe a different judicial behavior.

Putting the relationship of courts to their own legal-professional values at the center of our definition, 'unmediated-ness' is the necessary conceptual element of judicial populism. Unmediated-ness is the opposite of the legal-professional ('traditional') judicial approach, in which established law and received methods of argumentation 'filter' the will of the people in the course of judicial decision-making. Like populist politicians who, typically 'try to build bridges to the "real" people above the heads of intermediary institutions',<sup>12</sup> populist judges circumvent some of the professional standards of their work.

Unmediated-ness thus refers to a certain way of communicating and deciding: the court speaks directly to 'ordinary citizens', serving their mood or feelings either through the results of its decisions, which satisfy the demands of the perceived majority, or through the tone of the justification attached to the decision (using a less technocratic, easily understandable and often highly emotional language). In both cases, the 'judge' and the 'people' meet and symbolically reunite, just as populist leaders unite the people on the political scene.

When it comes to judicial populism unmediated-ness is often, but not necessarily, accompanied by a departure from the settled law in the adjudication (judicial activism). For this reason, judicial activism, although it is not a necessary element of the definition, plays a crucial role in determining the different versions of judicial populism.

Based on these considerations, three forms of manifestation of judicial populism can be identified. All the three share the characteristic of unmediated-ness, but they do not qualify as activist to the same extent. The first version can be called 'full-fledged' judicial populism, in which the court deviates from the settled law in order to satisfy public sentiment and also uses populist rhetorical devices (personalized tone, playing on the sentiments of the audience, abandoning the received legal language etc.).

The example here can be the Hungarian "Rezesova decisions" which can be seen as the 'paradigmatic case' of judicial populism. In 2012 a Slovakian celebrity killed four people

---

<sup>12</sup> Sadurski distinguishes between discursive and institutional approaches to judicial populism: SADURSKI, WOJCIECH: *Institutional Populism, Courts, and the European Union*. In: Krygier, Martin – Czarnota, Adam – Sadurski, Wojciech (eds.): *Anti-Constitutional Populism*. Cambridge University Press. Cambridge, 2022. 510. p.

in a car accident on a Hungarian motorway. The Hungarian court of first instance sentenced her to six years in prison, but at the same time released her from custody and ordered her to be placed under house arrest pending the final decision of the court of appeal. The house arrest decision provoked a huge public outcry from a large section of the public who believe that rich people always get special treatment from the law.<sup>13</sup> A prominent member of the governing party (Fidesz), expressed his disgust on his social media page shortly after the court's decision and called on the parliamentary committee dealing with legal matters and on the minister of justice to investigate the outrageous decision.<sup>14</sup> Nine days later the court of appeals changed the house arrest decision and reinstated the post-trial detention without any meaningful evidence of the defendant's 'flight risk'. In 2014 the appellate court increased her prison sentence to 9 years. One of the reasons for the aggravation was that the accident caused a huge public outcry.<sup>15</sup>

Obviously, the mere fact of being rich and a citizen of another EU member state cannot be the basis for detention without other circumstances that make the risk of flight sufficiently serious. As far as the final sentence is concerned, the severity of the sentence is far exceeds the average length of imprisonment in similar cases (deviation from the settled law).<sup>16</sup> It is also important to know that – contrary to the statement of the appellate court judge – Hungarian criminal law does not recognize 'public outcry' as reason for aggravating the sentence (populist rhetoric).

Nevertheless, there may be instances of judicial populism that are 'partial' in that either only the decision itself (decisional judicial populism) or only the rhetoric of the court (rhetorical judicial populism) is conceived as populist.

An example of decisional populism can be seen in the shift in the jurisprudence of the European Court of Justice (ECJ) in the EU citizenship cases in the mid-2010s. Blauburger and his colleagues convincingly argue that the shift in this field of EU law (in contrast to its own earlier practice, the ECJ began to interpret the cross-border social rights of EU citizens more restrictively) 'cannot sufficiently be explained solely by the threat of legislative override or non-compliance – the most prominent mechanisms to influence the ECJ' (which threats have long existed without having a significant impact on the ECJ's social right oriented jurisprudence).<sup>17</sup> Therefore, they attribute the change to the fact that the court has been influenced by the sudden increase in media-attention to such cases.

As the mainstream media discussed cross-border social rights under the heading of negative connoted terms like 'welfare migration' or 'benefit tourism', the court decided accordingly. They conclude that the strong correlation between the timing of increased media attention and the ECJ's turnaround makes it plausible that the Court is sensitive to

<sup>13</sup> BALOGH ÉVA: *Political Interference with the Hungarian Judiciary*. Hungarian Spectrum 5 December 2013. <https://hungarianspectrum.org/2013/12/05/political-interference-with-the-hungarian-judiciary/> (14.06.2021.).

<sup>14</sup> BALOGH 2013.

<sup>15</sup> *Appellate Court Raises Rezesova Prison Sentence to 9 Years*. Daily News Hungary 11 September 2014. <https://dailynewshungary.com/appellate-court-raises-rezesova-prison-sentence-to-9-years/> (22.02.2023.).

<sup>16</sup> BENCZE MÁTYÁS: *Everyday Judicial Populism in Hungary*. Review of Central and East European Law 2022/1. 37., 44–45. pp. That is why the decision is not a simple example of 'penal populism' (adjusting criminal justice policy to popular sentiment that demands harsher punishments) as penal populism would result in equally harsh sentences for any defendant. In the analyzed case the sentence can be attributed to the specific circumstances of the perpetrator (rich, celebrity, foreigner) that made her highly unpopular amongst ordinary citizens.

<sup>17</sup> BLAUBERGER, MICHAEL et al.: *ECJ Judges Read the Morning Papers. Explaining the Turnaround of European Citizenship Jurisprudence*. Journal of European Public Policy 2018/10. 1422., 1438. pp.

public mood. More importantly, the Court's language and the rhetoric did not change in any way. Although the Court used different arguments than before the turnaround, it spoke the technocratic, impersonal language of the ECJ judgments, and made no reference to the public opinion (public mood) or to the media coverage of such cases.

One might be surprised that a supranational court, which is quite distant from the (EU) citizens and not very well-known to them, can defer to the public mood. According to the authors, 'on the one hand, judges themselves are part of the public and may simply be influenced by the same debates and developments as public opinion in general. On the other hand, judges may be concerned about their "diffuse legitimacy" [...], i.e., about the acceptance and long-term support of their jurisprudence by the general public.'<sup>18</sup> The example of ECJ also shows that populist judicial behavior can occur in any political regime and not only in authoritarian states.

Another lesson from the analysis is that following a populist agenda does not require from judges to scrutinize opinion polls and to read social-scientific papers on changes in public mood and opinion in any cases before making a decision, but it is quite sufficient for them to inform themselves from the usual media sources, as any educated citizen does. Judicial populism *per definitionem* means that judges decide in a populist manner only in cases that attract public attention.

An illustration of rhetorical judicial populism is also a Hungarian case, where a judge in a manslaughter case, who acquitted the defendant by maximally observing the principle of the presumption of innocence, in his oral justification of the decision, said: 'The court in this case did not do justice, but has applied the law. We have applied the law because we could not do otherwise.'<sup>19</sup> On the one hand, this wording implies that the court did not served justice, only 'applied the law' when it acquitted a person, against whom there is insufficient evidence (and who may even be innocent). On the other hand, it says a lot about the judge's relationship to the pressure coming from the audience: he has to apologize because he has reached a verdict in accordance with the settled law.

Two other observations can be made from the above examples. First, judicial populism is a subcategory of deferential judicial behavior in which courts defer to the mood or sentiment of the people rather than (at least directly) to the will of the government. Second, as in the case of (authoritarian) political populism, populist jurisprudence is not necessarily tantamount to deferring to the opinion of the actual majority; it is sufficient to follow an opinion or sentiment that has prevailed in the public sphere through the activity of the media or other actors ('perceived majority').

---

<sup>18</sup> BLAUBERGER 2018, 1429. p.

<sup>19</sup> <http://bit.ly/2e37DkG>

---

BENCZE MÁTYÁS  
A BÍRÓI POPULIZMUS MIBENLÉTE

(Összefoglalás)

A bírói populizmus nem újkeletű jelenség, azonban tudományos igényű vizsgálata csupán a 2010-es évek közepétől indult meg, nem függetlenül a politikai populizmus látványos terjedésétől, ami közvetlen vagy közvetett úton a bírói magatartást is befolyásolja. Ez a tanulmány fogalmi tisztázást kíván nyújtani, mivel a különböző jogi kultúrákban szocializálódott szerzők eltérő jelentéstartalommal használják a "bírói populizmus" kifejezést, a társadalomtudományi kutatások viszont igénylik azt, hogy világosan körülhatároljuk azokat a bírói magatartásokat, amelyek a populizmus megnyilvánulásai, és elkülönítsük azokat más bírói megnyilvánulásoktól (például egy populista kormányzatnak történő behódolástól, vagy a bírák bíróságon kívüli politikai szerepvállalásától). A tanulmány amellet érvel, hogy a bírói populizmus fő jellemzője egy sajátos "közvetítetlenség": a bíró közvélemény vélt vagy valós nyomásának hatására átlépi a jogi érvelés támasztotta korlátokat. A populista bírói magatartás egyaránt megnyilvánulhat a döntések tartalmában és stílusában.