

‘Everyday Judicial Populism’ in Hungary

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Abstract

Scholarly works on judicial populism tend to concentrate on the landmark judgments of constitutional courts and apex courts. Nonetheless, the examination of the activities of ordinary courts is of great importance as they shape the lives of citizens and can strengthen or curb populist politics. In this paper I analyze a phenomenon emerging in the adjudication of Hungarian ordinary courts which can be labelled ‘everyday judicial populism’. Based on case studies and empirical scrutiny I argue that the political populism of the Hungarian government has both a direct and an indirect, but clearly detectable, impact on judicial practice. As regards the latter, the government can manipulate (through its media) public opinion in certain court cases, and judges take this opinion - as the ‘vox populi’ - into consideration in their decision-making. At the end of the paper I examine the institutional conditions that have facilitated the emergence of judicial populism.

Keywords

judicial populism – judicial politics – Rule of Law in Hungary – justice system of Hungary – penal populism

1 Populism in the Judicial Context

There is a tension at the heart of judicial work in terms of what is expected of a modern judiciary. On the one hand, courts should be the safeguards of

the Rule of Law, and have to apply the law without considering the will of the majority or other circumstances external to the law. Compliance with this expectation requires a highly professional and 'aristocratic' attitude on the parts of the judges, which is strengthened by various institutional and social features (judges in most countries are not elected by the people; they belong to the most educated groups of the society). The opposing expectation is that judges should be sensitive to the social context and the consequences of their decisions in cases brought before them. Lay participation and the opportunity for public critiques of judges' work serve this purpose. Judicial populism is one answer to the latter expectation in which the orienting point of the adjudication is public opinion.

Reading through the literature, the first observation to make is that academic studies mostly concentrate on the landmark judgments of constitutional and international courts in terms of their relationship with judicial populism.¹ They almost completely neglect any examination of the practice of ordinary or lower courts with regard to populist adjudication. Exceptions to this are Smilov, who mentions that the extremely high conviction rate in Bulgaria is a sign of judicial populism, and the author of the present paper, who also published a paper on the legal-theoretical background of the judicial populism of Hungarian ordinary courts.² This is not to deny the importance of the decisions of apex and international courts, but it can be worthwhile to put some emphasis on the adjudication of lower court judges, who can also be susceptible to the populist *Zeitgeist*. The examination of the activities of ordinary courts is of great importance as they shape the lives of millions of citizens and can strengthen or curb populist politics.

The second observation is that judicial populism (of apex courts) tends to be examined intensively in common law legal systems such as those in the

- 1 Nick Friedman, *The Impact of Populism on Courts: Institutional Legitimacy and the Popular Will* (The Foundation for Law, Justice and Society, Oxford, UK, 2019); Elena Simina Tanasescu, "Can Constitutional Courts Become Populist?," in Martin Belov (ed.), *The Role of Courts in Contemporary Legal Orders* (Eleven International Publishing, The Hague, Netherlands, 2019), 305–319; Erik Voeten, "Liberalism, Populism, and the Backlash Against International Courts," Paper presented at the American Political Science Association Annual Meeting, San Francisco in 2017; Fruzsina Gárdos-Orosz and Zoltán Szente (eds.), *Populist Challenges to Constitutional Interpretation in Europe and Beyond* (Routledge, London, UK, 2021).
- 2 Daniel Smilov, *Populism, Courts and the Rule of Law: Eastern European Perspectives* (The Foundation for Law, Justice and Society in collaboration with The Centre for Socio-Legal Studies, University of Oxford, Oxford, UK, 2007), 5; Mátyás Bencze, "Explaining Judicial Populism in Hungary – a Legal Realist Approach," 20(1) *Iuris Dictio* (2020), 83–96.

USA, India and Pakistan,³ and in Latin American countries.⁴ The sensitivity of common law legal cultures to the phenomenon of judicial populism can be explained by the fact that common law judges are considered organic elements of political life (in the USA, for example, judges in numerous states are elected by the people, and jury systems exist in several common law countries).⁵ In Latin America, where democracies are weak and political populism has a long tradition,⁶ it is no surprise that courts are affected by populism. By the open acknowledgment of the political character of the adjudication in the common-law and Latin American countries judicial populism seems to be a somehow 'natural' and, what is more, not necessarily perceived as a negative phenomenon.⁷

In continental Europe there is no significant literature on the phenomenon of judicial populism, with the above-mentioned exceptions of Hungary and Bulgaria. The lack of this kind of research can be traced to the fact that in the courts of most European countries the signs of populism are rather sporadic and limited only to certain issues, such as immigration policy. This is the case in Ireland and France, where courts are generally consistent defenders of human rights, but in cases relating to foreigners they show some deference to a restrictive governmental policy,⁸ while in Spain an author accused a panel of the Spanish Supreme Court of social populism.⁹ It must be noted that other courts in Western-Europe go openly against anti-migrant and other populist

3 Arun Shourie, *Falling over Backwards: An Essay on Reservations and Judicial Populism* (Harper Collins, New Delhi, India, 2017); Yasser Kureshi, "What is Judicial Populism and How Does It Work in Pakistan?," *Prism* (1 February 2019), available at <https://www.dawn.com/news/1461194>; Friedman, *op.cit.* note 1.

4 Diego Werneck Arguelhes, "Judges Speaking for the People: Judicial Populism Beyond Judicial Decisions," *Verfassungblog* (4 May 2017), available at <https://verfassungsblog.de/judges-speaking-for-the-people-judicial-populism-beyond-judicial-decisions/>.

5 Rene David and John E. C. Brierly, *Major Legal Systems in the World Today* (Stevens & Sons, London, UK, 1985), 373–374; John Bell, *Judiciaries Within Europe* (Cambridge University Press, Cambridge, UK, 2006), 329–349.

6 Ruth Berins Collier and David Collier, *Shaping the Political Arena: Critical Junctures, the Labor Movement, and Regime Analysis in Latin America* (University of Notre Dame Press, Notre Dame, US, 2002).

7 For example, judicial populism can be a strategy used by courts to acquire more legitimacy (Friedman, *op.cit.* note 1, 4) or a manifestation of the responsibility of judges for the protection of ordinary people's interests against authoritarian governments (Arguelhes, *op.cit.* note 4).

8 These are the findings of work package 6 of a research project titled Demos research project based on experts from almost all the EU member states who were asked about the legal consequences of political populism. The results are available at https://openarchive.tk.mta.hu/433/1/Populist_Constitutionalism_Final%20.pdf.

9 Melitón Cardona, "Judicial Populism," *The Diplomat in Spain* (12 November 2018), available at <https://thediplomatinspain.com/en/2018/11/judicial-populism/>.

laws adopted by the ruling majority (Austria, Belgium, UK, Sweden) even if they could easily become victims of fierce attacks from the general public and/or the media (a telling example is the media reaction to the Brexit-decision of the Supreme Courts of England and Wales).¹⁰ The ordinary judiciary has also shown surprisingly strong resistance against political populism in many Central and Eastern European (CEE) countries.¹¹ This is why authors who examine judicial politics from a political populism perspective tend to focus on the efforts of populist governments at trying to influence court decisions.¹²

In my paper I examine a special form of judicial populism. By judicial populism I mean a judicial strategy which drives judges at any level of the hierarchy of ordinary court systems to adjust their decisions (and sometimes the argumentative style of their reasoning) to the public sentiment even if their decisions can hardly be defended on legal-professional grounds.¹³ The purpose of this strategy is to gain popularity amongst ordinary people in order to strengthen the institutional position of courts in the field of politics.¹⁴ The phenomenon of judicial populism as described below is not independent from the state of democracy in a given country.

2 Theoretical Framework

A possible theoretical background behind the examinations of the behavior of national court judges can be the 'judicialization of politics' as occurs in some post-Soviet countries. As Mazmanyán describes it, the judicialization of politics in the post-Soviet region is essentially different from the form of judicialization which has occurred in the past few decades in the Western world. While

¹⁰ These observations are also from the Demos research mentioned in note 8.

¹¹ Witold Zontek, "You Can't Forbid Judges to Think," *Verfassungsblog* (5 February 2020), available at <https://verfassungsblog.de/you-cant-forbid-judges-to-think/>; Elena Simina Tanasescu, "Romania: From Constitutional Democracy to Constitutional Decay?," in Violeta Besirevic (ed.), *New Politics of Decisionism*, (Eleven International Publishing, The Hague, Netherlands, 2019), 177–191. According to the Demos research, the Lithuanian, the Czech and the Slovakian courts also strongly resist populist governments.

¹² David Prendergast, "The Judicial Role in Protecting Democracy from Populism," 20(2) *German Law Journal* (2019), 245–262; Tom Ginsburg and Bojan Bugarić, "The Assault on Postcommunist Courts," 27(3) *Journal of Democracy* (2016), 69–82; Voeten, *op.cit.* note 1.

¹³ For other possible interpretations of the term 'judicial populism' that cannot be discussed here, see Tanasescu, *op.cit.* note 1, 309–310, and Anya Bernstein and Glen Staszewski, "Judicial Populism," 5 *Buffalo Legal Studies Research Paper* (2020), 29–34, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3694132.

¹⁴ Tanasescu, *op.cit.* note 1, 314.

courts in the latter region have remained autonomous, independent actors with growing political weight and have become the concern of politicians,¹⁵ in the post-Soviet countries politicians in power have been able to control the activity of courts from above and use them as means to achieve their goals by dressing up dubious political steps as the implementation of court decisions made on legal grounds.¹⁶ Mazmanyán cites the adage that labels the Russian Constitutional Court the “fifth wheel of the carriage of the Russian autocracy”. This theoretical framework - originally elaborated in order to explain the situation in post-Soviet countries - can be applied to Hungary, as this country is in some respects currently closer to Russia than to Western Europe.¹⁷

The judicialization of politics can be manifested in two forms. The first case is where a court defers to a government and decides cases in its favor. A good example here is the Romanian Constitutional Court which has become subordinate to the populist government “without any packing, reshuffling or visible political pressure.”¹⁸ Secondly, governments can appoint new judges whose aim is to change the established judicial practice. These judges are not autonomous public actors, and their activities are controlled by politicians. The second form of judicialization is reflected in the way the Hungarian government has treated the Hungarian Constitutional Court (court packing, stripping it of some competences)¹⁹ and the *Kúria* (Supreme Court of Hungary) where a strong governmental party supporter has been elected to the presidency with serious competences in case-allocation and appointments to *Kúria* judgeships.²⁰

15 Torbjörn Vallinder, “The Judicialization of Politics – A World-wide Phenomenon: Introduction,” 15(2) *International Political Science Review* (1994), 91–99; Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford University Press, Oxford, UK, 2002); John Ferejohn, “Judicializing Politics, Politicizing Law,” 65(3) *Law & Contemporary Problems* (2002), 41–68.

16 Armen Mazmanyán, “Judicialization of Politics: The Post-Soviet Way,” 13(1) *International Journal of Constitutional Law* (2015), 200–218.

17 Ginsburg and Bugarc, *op.cit.* note 12, 69.

18 Elena Simina Tanasescu, “The Independence of Justice in EU Context,” [Manuscript] 14. In the above referred work of hers she refers to this turn as ‘contextual judicial populism’ because the decisions of the court without considering their political context could be seen as rather anti-populist. However, the court was playing into the hand of a populist government through its decisions thus they can be qualified as populists. Tanasescu, *op.cit.* note 1, 314–319.

19 Fruzsina Gárdos-Orosz, “Challenges to Constitutional Adjudication in Hungary after 2010,” in Martin Belov (ed.), *The Role of Courts in Contemporary Legal Orders* (Eleven International Publishing, The Hague, Netherlands, 2019), 321–339.

20 Viktor Z. Kazai and Ágnes Kovács, “The Last Days of the Independent Supreme Court of Hungary?,” *Verfassungsblog* (13 October 2020), available at <https://verfassungsblog.de/the-last-days-of-the-independent-supreme-court-of-hungary/>.

Nonetheless, it is my belief, that the behavior of lower court judges cannot be fully, nor adequately, explained within the framework of the 'judicialization of politics'. While it is typical that constitutional courts or supreme courts have the final word in cases where the political stakes are high, lower courts typically do not play a key role in these kinds of cases. However, there are many ordinary cases before courts which, although they do not have a direct relevance in governmental activities (policy-making, appointment issues etc.), for various reasons carry political significance. It is in the interests of the government that courts follow the governmental agenda and/or narrative when making decisions in these kinds of cases.

Therefore, the 'politicization of the courts' seems to be a better methodological choice as this process refers to a broader scope of governmental efforts made in order to influence the judicial practice. In my paper I describe the sophisticated mechanism of that influence as developed by the populist Hungarian government to turn judges who have autonomy to the 'right' direction. The result of this effort is a phenomenon I call 'everyday judicial populism'.

In the next section, I present three cases which can be illustrative in terms of everyday judicial populism. After analyzing those cases from a legal-professional perspective I describe the general characteristics of the examined phenomenon. Finally, by using a social-scientific approach I explore the possible causes and preconditions of the emergence of judicial populism in Hungary.

3 Evidence of the Presence of Everyday Judicial Populism

3.1 *Three Judicial Decisions*

In the last few years the number of controversial judicial decisions from all branches of adjudication has been increasing, and they share some common distinctive features.²¹ I will summarize three of them (all three are criminal cases as I have researched this field of law intensively); I will then highlight the common features of these judgments and try to find a plausible explanation for them.

3.1.1 A Millionaire Shall be Held in Detention

In 2013 a striking decision was issued. A Slovakian woman, mother of two children, killed four people in a car accident on a Hungarian motorway driving

²¹ This section is based on Bencze, *op.cit.* note 2, 84–86.

intoxicated to a mild degree. The perpetrator was a millionaire celebrity who has been often seen on the front pages of Slovakian tabloids. The Hungarian court of first instance sentenced her to six years imprisonment, at the same time, however, releasing her from detention and ordering her house arrest until the final decision of the appellate court was delivered. The decision on house arrest provoked a huge public outcry in a large section of the public that believes rich people always get special treatment. They were convinced that the court had made an exemption when, instead of keeping the foreign citizen millionaire in jail, they let her return to her own home so that she could go on living her luxurious life.²² Nine days later the appellate court changed the decision on the house arrest and re-ordered the post-charge detention, explaining its decision by citing the "flight risk" of the defendant. The appellate court presented no evidence as regards a planned flight attempt. It simply stated that she was rich enough to organize her own escape, even from a house arrest.²³ In 2014 the appeal court increased her prison sentence to 9 years. One of the reasons for the aggravation was that the accident caused huge public outcry.²⁴

3.1.2 Red Mud Disaster

In 2010 an industrial accident at a caustic waste reservoir chain occurred at an alumina factory in the western part of Hungary. As a consequence of the disaster toxic "red mud" killed 10 people. In 2016 a judge cleared all the 15 defendants who were employees at the alumina company (from the CEO of the company to the warden of the reservoir). The decision was considered outrageous by many people.²⁵ The appeal court quashed the ruling in February 2017 and ordered a retrial. The reason was that the court of first instance did not provide sufficient reasoning for the judgment. In the repeated procedure

22 "Political Interference with the Hungarian Judiciary," *Hungarian Spectrum* (5 December 2013), available at <https://hungarianspectrum.org/2013/12/05/political-interference-with-the-hungarian-judiciary/>.

23 Budapest Körményi Törvényszék, Bkf. 1033/2013/3.

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

25 "Vörösiszap-per: az elsőfokú ítélet miatt tüntettek Veszprémbe," *Mandiner* (4 February 2016), available at https://makronom.mandiner.hu/cikk/20160204_vorosiszap_per_az_elsofoku_itelet_miatt_tuntettek_veszpremben.

ordered by the appellate court the trial court found 10 of the 15 defendants guilty.²⁶

3.1.3 A Fast and Furious Camerawoman²⁷

In October 2018, the *Kúria* acquitted a journalist (a camerawoman) of charges of violent assault against refugees on the Hungarian-Serbian border in 2015. The *Kúria*, by reversing the judgments of lower courts, found that the journalist had not committed the crime of public nuisance when, without any lawful reason, she tripped and kicked refugees fleeing the police on the border, since the act of the journalist was not blatantly antisocial with regard to the public peace, which had been already disturbed by the fleeing migrants themselves.²⁸

3.2 *Legal Evaluation of the Decisions*

As is obvious, in the first case the mere facts of being rich and a foreign citizen cannot be the basis for detention without other circumstances that make the risk of escape sufficiently serious. As regards the final judgment, the harshness of the sentence is far above the average length of prison sentences in similar cases (i.e. driving under the influence of alcohol or drugs and causing an accident which leads to death of more than two persons). In the table below I have collected the decisions that represent the judicial practice. It is also important to know that – contrary to the statement of the appellate court judge – Hungarian criminal laws do not recognize ‘public outcry’ as reason for aggravation of the sentence.

In the second case the appeal court used a “joker in the pack” argument, namely the argument of “insufficient reasoning”. According to the Hungarian Criminal Procedure Act the lack of sufficient reasoning qualifies as a serious violation of the fair trial principle and thus can be the basis for quashing a judgement. Nonetheless, the law does not specify the required minimal extent of sufficiency, so courts of appeal can interpret this provision of the code very flexibly if they do not agree with the verdict of the trial court, and they do not

26 “Court Finds Ten Guilty in Red Sludge Spill Case,” *Budapest Business Journal* (5 February 2019), available at https://bbj.hu/news/court-finds-ten-guilty-in-red-sludge-spill-case_161023.

27 This case is from a manuscript written by the author and Ágnes Kovács entitled “Judicial Independence and Models of Court Administration”.

28 Currently, only the press release is available: “A megvádolt operatőr cselekménye nem valósította meg a garázdaság vétségét,” *Kúria* (30 October 2018), available at <http://www.kuria-birosag.hu/hu/sajto/megvadolt-operator-cselekménye-nem-valositotta-meg-garazdasag-vetseget>.

TABLE 1 Decisions that represent the Hungarian judicial practice in drink and drive cases causing an accident which led to death of more than three persons.²⁹

Case identifier	Number of people killed in the accident	Other circumstances	Length of imprisonment (min. 5, max. ten years)
FBK 1993/21.	not specified (min. 3)	n/a	6 years
BH 1978.3.107	4	16 people injured No criminal record	7 years
Békés Megyei Bíróság Bf.356/2006/6	3	5 people injured Has a criminal record	7 years
EBH 2003. 932.	not specified (min. 3)	n/a	7.5 years
Kiskunfélegyháza (2012)	4	Has a criminal record	8 years
Sátoraljaújhely (2020)	4	5 people injured Has a criminal record (influenced by both drugs and alcohol), 4 children	9 years
Rezesova (2014)	4	No criminal record, 2 children	9 years

have any other legal opportunity to overturn it.³⁰ It is also worth mentioning that one retired senior judge wrote a book on this case and she characterized the trial judge as one of the most competent judges she had ever seen.³¹

In the third case, the *Kúria* delivered a decision and argumentation that greatly deviated from the established judicial practice which existed in public nuisance cases. It held that the flight of the refugees had already caused disturbance, and thus the behavior of the camerawoman could not have caused

29 The author's own compilation, based on Hungarian judicial databases and court press releases.

30 "A bíróságok hatályon kívül helyezési gyakorlatának elemzése. Büntető ügyek. 2012," *Kúria* (22 February 2013), available at https://kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemenye_2012iimod2_2.pdf.

31 <https://www.youtube.com/watch?v=3Juwye7FVo8>.

it (causing disturbance is one of the legal criteria of guilt in public nuisance cases).³² This reasoning implies the absurd conclusion that everybody can kick another person without facing charges in a situation of disturbance.

3.3 *Possible Explanations*

The first and simplest possible explanation might be that the judgements presented in each case are the result of accidental judicial miscarriages that occur in every legal system. However, judicial miscarriages, just like cases of medical mistreatment, stem from negligence or ignorance, and it is hard to believe that in all three cases, where experienced senior judges of higher courts made the decisions in a judicial panel, negligence or ignorance were the main reasons such controversial judgments were delivered.

Another possible explanation comes from the Dworkinian approach.³³ It may be that the judges in those three cases have a strong conservative-communitarian political view and this view drove their decision-making. At first glance, this might explain the decisions, as in all three cases the judges thought that the interests of the Hungarian political community had to prevail over other legal principles such as proportionality, the right to a fair trial and legal certainty. It is easy, however, to realize that xenophobia (in the first and the third cases) is not a moral principle, even if the majority of Hungarian citizens share this attitude. As for the second case (the red mud disaster), solidarity with victims may be the sign of a communitarian attitude, but the popular prejudice towards a company which represents “Big Money” is also a plausible explanation.

Besides this, we must bear in mind that the cases were decided in a way that pleases the man or woman in the street. This mentality is not an attribute of conservative political thinking at all. Besides, we conducted an on-line survey amongst Hungarian judges in order to determine their judicial attitudes and our findings showed that there is no conservative majority within the judiciary. One half of judges in criminal cases considered that the most fundamental purpose of the criminal procedure is to guarantee the rights of the defendant during the criminal process (liberal attitude), while the other half thought that criminal procedural laws have to serve the ‘order of the community’ even at the price of playing down individual rights (conservative attitude).³⁴

³² EH 2019.03.B5.

³³ Ronald Dworkin, “The Moral Reading of the Constitution,” *The New York Review of Books* (21 March 1996), available at <http://www.nybooks.com/articles/archives/1996/mar/21/the-moral-reading-of-the-constitution/?page=1>.

³⁴ See Mátyás Bencze, “Nincs füst, ahol nincsen tűz.” Az ártatlanság vélelmének érvényesülése a magyar büntetőbíráóságok gyakorlatában (Gondolat, Budapest, Hungary, 2016), 142–144.

A further explanation can be that judges in their decisions took a pragmatist stance. One characteristic of this approach is that it focuses on the social impact of the decision and does not care much about its legal correctness, nor its compatibility with fundamental legal values. A pragmatist judge considers it more important to adequately reflect the social needs behind the law. Several representatives of the pragmatist approach have a clear concept of the social function of law that adjudication should serve.³⁵ These versions of judicial decision-making can be called 'reflective pragmatism', since one may discover a more or less coherent ideology, which drives them in a series of judgments.

However, while reflective pragmatists see judicial power as a means to achieve a certain social aim and they are sensitive to the long-term consequences of the judgement, the judges in the three cases did not reflect on the deeper social consequences of their decision: the possible erosion of Rule of Law. Citizens could learn that the immediate reaction to a case from the media and the sentiments of the 'ordinary man or woman' triumphed over legal reasons. This can undermine the trust in the justice system amongst those who do not drift with the populist public mood.

From this short analysis we can conclude that if a judge deliberately deviates from the law or from the established judicial practice in order to satisfy the presumed expectations of 'ordinary people', we may speak of judicial populism.

4 Characteristics of Everyday Judicial Populism in Hungary

First, what one can learn from the examples above, is that the judges, despite using genuine legal arguments, did not take the valid counter-arguments into consideration. The judges in all three cases significantly limited the number of adequate legal reasons, that is, they did not take their professional obligations seriously.

Secondly, the cases received — although to varying degrees — nationwide publicity. Judges knew that the wider public would be informed of their decisions. Besides, the pressure on courts exercised by politicians was clearly detectable in all the three cases. In the Rezesova case, one prominent member of the governing party (Fidesz), shortly after the judgment of the trial court, took along a cameraman and delivered a short message in front of Rezesova's residence, which he placed on his social media site. He expressed his disgust and, in the name of the Fidesz parliamentary faction, called on the parliamentary committee dealing with legal matters and on the minister of justice to

35 Richard A. Posner, "Pragmatic Adjudication," 18(1) *Cardozo Law Review* (1996), 1–20.

investigate the outrageous decision that enabled the defendant to spend her time between the two trials in the comfort of her home.³⁶ In the second case, when the ruling of the first instance court was issued, one of the leaders of Fidesz publicly denounced the judgment as outrageous and initiated a parliamentary debate about the administration of justice. He stressed that the ruling party respected the 'liberal' standard of judicial independence but democratic values such as transparency and accountability should have been enforced, as well.³⁷ In the case of the camerawoman there was no direct pressure, but it is important to know that the judgment obviously fits into the hostile approach of the government towards migrants.³⁸ A common feature of the above-mentioned political statements is that they referred to the will or interest of the ordinary people.

Third, judicial populism in Hungary takes a clear majority-protective legal position.³⁹ Besides the above-analyzed three cases, over the past few years several surveys have revealed that Hungarian courts have adopted an explicitly majority-protective legal position in hate crimes cases,⁴⁰ and Hungarian justice has more frequently found Roma people guilty in one of the hate crimes - violence against a member of a community - than non-Roma individuals.⁴¹ Paradoxically, the objective of the legislation which introduced hate crimes into the Penal Code was to protect vulnerable minorities.⁴² In the field of sentencing a significant bias can also be detected, especially in murder cases. Research points to the fact that many judges tend to impose severe sentences

³⁶ See *op.cit.* note 23.

³⁷ "Bíróági ítéletekről vitázna a Fidesz," *Magyar Nemzet* (31 January 2016), available at <https://mno.hu/belfold/birosagi-iteletekrol-vitazna-a-fidesz-1326421>.

³⁸ For an overview, see <http://abouthungary.hu/illegal-immigration/>.

³⁹ This is also the case in Bulgaria. Daniel Smilov, "The Rule of Law and the Rise of Populism: A Case Study of Post-Accession Bulgaria," in Kyriaki Topidi and Alexander H. E. Morawa (eds.), *Constitutional Evolution in Central and Eastern Europe: Expansion and Integration in the EU* (Ashgate, Aldershot, UK, 2010), 253.

⁴⁰ Eszter Jovánovics and András László Pap, "Kollektív bűnösség a 21. század Magyarországon: magyarellenesség vádja cigányokkal szemben két emblemikus perben," 17(4) *Fundamentum* (2013), 153–157; Mátyás Bencze, "Gyűlölet-bűncselekmények és 'ítélkezési populizmus,'" 18(1–2) *Fundamentum* (2014), 129–139.

⁴¹ In the five officially published cases up to 2014 where the accusation was violence against a member of the Roma community, courts only once found the defendants guilty in that type of crime (author's own research). Eszter Jovánovics, "A tárgyalótermek fantomja: a rasszista cigány," *TASZ* (20 February 2013), available at http://ataszjelenti.blog.hu/2013/02/20/a_targyalotermek_fantomja_a_rasszista_cigany.

⁴² <http://www.parlament.hu/iromany/fulltext/00548txt.htm>.

on perpetrators from ethnic minorities. On the other hand, judges are usually more lenient when it comes to crimes committed against ethnic minorities.⁴³

It is important to mention two facts here. On the one hand, hate crimes committed against non-Roma people almost always receive nationwide publicity; on the other hand, a survey conducted by the Hungarian Helsinki Committee referred to above did not find any difference in sentencing between Roma and non-Roma perpetrators in robbery cases which did not trigger a 'threshold stimulus' for the national media.⁴⁴ These facts seem to support the hypothesis that the populist approach - and not racism - is responsible for numerous judicial miscarriages in Hungary.

Beside criminal cases, we can find the traces of judicial populism in other branches of adjudication, as well. In my own research I scrutinized civil or administrative court verdicts published over the past 15 years, and – with one exception – could not find any cases where any fundamental rights would have overridden the right to religious freedom or religious sentiments in cases where one of the parties was the Catholic Church. It is an important feature of all these cases that the legal correctness of the judgements was highly controversial.⁴⁵ According to the results of the last two censuses, it is clear that the majority of Hungarian society identifies itself as Roman Catholic. A plausible explanation for the legally arguable decisions, therefore, is the pro-majoritarian populism of the courts. It is also an important feature of all the decisions examined that they are in accordance with the government's politics, which strongly supports the traditional Christian churches.

The final observation is that, with a few exceptions, it is the outcome of the decision which can be characterized as populist (as it satisfies the ordinary people) rather than the language of the judgments. Judges, even in their populist decisions, tend to use formal, neutral legal language and, with a few exceptions, refrain from using emotional rhetoric.⁴⁶

43 Borbála Ivány, "Minősíthetetlen szigorúság," *Szuverén* (26 July 2012), available at <http://www.szuveren.hu/jog/minosithetetlen-szigorusag>.

44 Anna Bárdits, András Kristóf Kádár, Nóra Novoszádek, Bori Simonovits, Dóra Szegő and Dániel Vince, *Last Among Equals – The Equality Before the Law of Vulnerable Groups in the Criminal Justice System* (Hungarian Helsinki Committee, Budapest, Hungary, 2014), 127.

45 Máttyás Bencze and Richárd Drótos, "A társadalmi tekintély szerepe az ítélkezésben – tradicionális keresztény egyházak jogai és érdekei a magyar bíróságok előtt," 56(3) *Állam- és Jogtudomány* (2015), 3–28.

46 For the exceptions see Bencze, *op.cit.* note 40.

5 Causes of Everyday Judicial Populism

When searching for the factors that incentivize judges to adjudicate in a populist manner, a distinction has first to be made between two kinds of judicial populism. On the one hand, it can take the form of ‘attitudinal populism’, where a judge truly believes that s/he has to take into consideration the interests and opinions of ordinary people. In this case the source of the motivation of judges can stem from their own world-view. This can be the case in the few populist decisions of some Western European courts I mentioned above, where governmental influence on courts is not detectable. In Hungary, although the presence of attitudinal populism cannot be excluded, the training of prospective judges and the institutional design of the justice system push judges towards the role of a technocratic law-applier, rather than to that of a ‘heroic’ judge who stands up for the interests of the people.⁴⁷

On the other hand, courts are often depicted in the literature as sophisticated strategic actors in the political sphere.⁴⁸ Thus, it is plausible that in some CEE countries, and especially in Hungary, populism serves as a kind of judicial strategy, that is, judges follow a purpose by applying a populist adjudicative method, which can be clearly distinguished from the purpose of satisfying public needs and sentiments. My hypothesis is that Hungarian courts use a populist strategy in some cases as a means of fulfilling their institutional purposes. This purpose is to gain the support of the government in such a way that the perception of their independence is not destroyed.

According to my hypothesis, judicial populism can be conceived as a response to the direct and indirect governmental pressure on the courts. The direct pressure is manifested in the harsh and unfounded criticism towards Hungarian courts from high-ranking governmental politicians since Fidesz took power in 2010. The first case occurred in 2012, when the Minister of Public Administration and Justice wrote a letter to President of the *Kúria* in which he objected the “too lenient” sentencing practices of the court, also referring to a specific judgment.⁴⁹ In the “red-mud” case a leader of Fidesz publicly denounced the judgment as outrageous (together with a decision concerning the former deputy mayor of Budapest, a member of the opposition MSZP, which was considered too soft, as he was given a suspended prison sentence) and initiated a parliamentary debate on the administration of justice. He

47 I discuss the self-understanding of the Hungarian judges in the next section.

48 Lee J. Epstein and Jack Knight, *The Choices Justices Make* (CQ Press, Washington DC, US, 1998).

49 “Open letter to Mr. Tibor Navracsics, Minister of Public Administration and Justice”, *The Hungarian Helsinki Committee* (18 May 2012), available at <https://www.helsinki.hu/en/open-letter-to-mr-tibor-navracsics-the-minister-of-public-administration-and-justice/>.

stressed that the ruling party respected the “liberal” standard of judicial independence, but democratic values such as transparency and accountability must be enforced, as well.⁵⁰ In another case, the *Kúria* upheld the decision of the National Election Committee certifying the results of voting by mail in the 2018 parliamentary elections.⁵¹ The decision triggered a huge political controversy as Fidesz lost one seat due to some invalidated ballots. The prime minister, Viktor Orbán, through his press chief, reacted to the decision of the *Kúria* in an unprecedented manner, stating that “the Curia has taken a mandate away from our electors. The Curia has clearly and grossly interfered in the elections. (...) it is evident that the Curia has not risen to the challenge of its task intellectually”.⁵²

In 2019 a man who had been sentenced to five years in prison murdered two of his children just after he was released on parole. According to the Head of Prime Minister's Office, the previous punishment was “unacceptably lenient” and he added that “had he not been sentenced so leniently he would still be behind bars and the children would be alive”.⁵³ The Minister of Justice called for the President of the *Kúria* to launch an enquiry to examine whether the sentencing practice of Hungarian criminal courts is severe enough.⁵⁴ At the beginning of 2020, the prime minister of Hungary openly refused to pay any compensation ruled by Hungarian courts for prisoners who had suffered from humiliating prison conditions, because, he said, in these cases “the law was applied in an incorrect manner.”⁵⁵ According to the State Secretary of the Ministry of Justice, the justification for this decision, amongst others, is that the so-called ‘prison business’ “damages public trust in the justice system and hurts people's sense of justice.”⁵⁶ Also in 2020, the Prime Minister blamed a court decision for ordering compensation in a school segregation case for

50 See *op.cit.* note 37.

51 Decision of the *Kúria* no. Kvk.III.37.503/2018/6. This paragraph is based on a manuscript written by the author and Ágnes Kovács, entitled “Judicial Independence and Models of Court Administration”.

52 “Curia Has Grossly Interfered in Elections,” *Miniszterelnök.hu* (7 May 2018), available at <http://www.miniszterelnok.hu/curia-has-grossly-interfered-in-elections/>.

53 “Government Mulling Law to Prevent Release of Murderers on Probation,” *Hungary Today* (19 December 2019), available at <https://hungarytoday.hu/gyor-murder-law-murderers-probation/>.

54 “Justice Minister to Tighten Rules on Conditional Release of Murder Convicts,” *Hungary Today* (7 January 2020), available at <https://hungarytoday.hu/gyor-murder-justice-minister-rules/>.

55 Péter Magyar, “Előre szolt az ellenzék, hogy botrány lesz a rabok kompenzációjából,” *444.hu* (23 January 2020), available at <https://444.hu/2020/01/23/elore-szolt-az-ellenzek-hogy-botran-lesz-a-rabok-kompenzaciojabol>.

56 “Government to Suspend Payment of Compensations to Prisoners with Immediate Effect,” *Hungary Today* (20 January 2020), available at <https://hungarytoday.hu/prison-conditions-hungary-compansetion/>.

Roma pupils, saying “[d]ue to a court decision following a lawsuit launched by Soros organizations, millions must be paid to those who have made it impossible for their children to learn properly.”⁵⁷

These worrying episodes show how the government attempts to put direct pressure on judges in cases it considers politically beneficial. As for the organizational reactions to the above-mentioned political attacks on judges and judicial decisions, it was a common feature that the competent administrative leaders stood up for judicial independence, but not in a determined manner. They tended to adopt a defensive position and sometimes blamed the judges themselves for their practice, or for a certain decision.⁵⁸ The other feature of the political criticism is that governmental officers always referred to the will of the ‘ordinary people’ as the basis of their criticism.⁵⁹

Turning to the indirect governmental pressure, the relevance of the populist politics cannot be overestimated. In the past decade Hungary has become the forerunner of neo-authoritarian populism (‘fake populism’) amongst CEE countries.⁶⁰

As an organic element of political populism, penal populism also has become stronger and stronger over the last few years. There are many unambiguous examples of the application of this political strategy. Criminal legislation in the past ten years has followed a ‘classic’ populist agenda.⁶¹ One of the first moves the new government took in 2010 was to enact the notorious ‘three strikes’ provision in the Penal Code.⁶² A parliamentary majority then implemented an American style ‘lawful defense’ making legal the murder of a

57 “Orbán on Gyöngyöspata Case: Government Sides with Decent, Working Hungarians,” *Hungary Today* (30 January 2020), available at <https://hungarytoday.hu/orban-on-gyongyospata-case-govt-sides-with-decent-working-hungarians/>.

58 “Zéró tolerancia jöhet a bírósági ügyek halogatása ellen,” *Népszava* (23 June 2015), available at https://nepszava.hu/1061270_zero-tolerancia-johet-a-birosagi-ugyek-halogatasa-ellen.

59 Gergő Plankó and Péter Erdélyi, “Az autokrácia trükkje: az emberek igazságérzete nevében nekimennia bíróságoknak,” *444.hu* (2 March 2020), available at <https://tldr.444.hu/2020/03/02/az-autokracia-trukkje-az-emberek-igazsagerzete-neveben-nekimenni-a-birosagoknak>.

60 According to the latest report of Freedom House (2020) Hungary is no longer classified as democracy but as a “transitional or hybrid regime” while all the other EU member states are classified as democracies. Available at <https://freedomhouse.org/countries/nations-transit/scores>. For a detailed explanation of term ‘fake populism’ see Thomas Frank, *The People, No: A Brief History of Anti-Populism* (Metropolitan Books, New York, US, 2020), Chapter III.

61 The Hungarian Society of Criminology dedicated its annual meeting to discussing the phenomenon of penal populism in Hungary. Available at <http://www.kriminologia.hu/esemenyek/tarsasag-eves-kozgyulese-es-tudomanyos-ules-bunteto-populizmus>. See also Katalin Gönczöl, “A büntető populizmus,” *Élet és Irodalom* (6 September 2013), available at <https://www.es.hu/cikk/2013-09-06/gonczol-katalin/a-8222bunteto-populizmus8221.html>.

62 Art. 4, Act LVII of 2010.

trespasser under certain circumstances.⁶³ Following this, the Hungarian government declared it would uphold real life imprisonment against the decision of the European Court of Human Rights, which holds that it is an inhuman and degrading punishment.⁶⁴ Recently, Hungarian legislation has criminalized some forms of help for asylum seekers and homeless people.⁶⁵ As the justification of the 'law and order' legislation, just as in the case of the public criticism of the courts, the government also referred to the popular will.⁶⁶

As for the governmental respect for 'public opinion' and the 'will of the ordinary people' it is crucial that political scientists in Hungary have found that political populism (including penal populism) is not a response from the government to the public mood or the 'moral panic' generated by the mass media. The situation is, actually, quite the opposite. It is the government itself that manipulates the public mood by using its media and other means.⁶⁷ A good illustration of this manipulation is the Rezesova judgement where – according to the oral justification of the judgement – one of the reasons for the harsh sentence was that the accident caused huge public outcry.⁶⁸ In fact, this huge public outcry was largely generated by the government through the media, and the decision supported the 'tough on crime' and anti-elitist rhetoric of the government.

Under these circumstances it is perfectly understandable if many judges find that deference to government generated populism is a viable option in order to preserve the institutional position of the court system. This opportunity also makes it possible for judges to 'save face' in the eyes of the legal-professional community and the educated public. Populist adjudication can be justified on the ground that judges come out from their 'ivory tower' and take

63 Art. 22, Act C of 2012.

64 ECtHR, *László Magyar v. Hungary*, ECtHR Judgment (20 May 2014) App. No. 73593. For governmental reaction, see "Trócsányi László: marad a tényleges életfogytiglan," *Kormány.hu* (3 June 2014), available at <http://nol.hu/belfold/trocsanyi-marad-a-tenyleges-életfogytiglan-1466965>.

65 "Hungary Passes Anti-Immigrant 'Stop Soros' Laws", *The Guardian* (20 June 2018), available at <https://www.theguardian.com/world/2018/jun/20/hungary-passes-anti-immigrant-stop-soros-laws>. Rita Palfi and Alice Tidey, "Homeless People Face Prison in Hungary After Tough New Law Is Passed," *Euronews* (22 October 2018), available at <https://www.euronews.com/2018/10/22/homeless-people-face-prison-in-hungary-after-tough-new-law-is-passed>.

66 Katalin Gönczöl, "A hagyományos pönológiától a posztmodern kriminálpopulizmusig," *Socio.hu* (1 April 2014), available at https://socio.hu/uploads/files/2014_1/6takacs.pdf.

67 Zsolt Boda, Gabriella Szabó, Attila Bartha, Gergő Medve-Bálint and Zsuzsa Vidra, "Politically Driven. Mapping Political and Media Discourses of Penal Populism – the Hungarian Case," 29(4) *East European Politics and Societies* (2015), 871–891.

68 See *op.cit.* note 23.

social responsibility in their practice – even if their judgements are practically in accordance with the government's politics. A practical advantage of the populist adjudication is that it can build the image of the 'good judge' who serves the people rather than being a 'black-letter' jurist. The increasing level of public trust can function as a 'shield' that can also help courts to secure their institutional position through the external support of the public sphere.

This adjudicative method has received support from the highest judicial officials. The deputy-president of the Curia stressed in an interview, although nebulously, that judges have to take into consideration certain values and the expectations of the society.⁶⁹ Similarly, Péter Darák, the president of the Curia wrote: "If the instrumental values of protection of the 'purity' and consistency of law are confronted with the fundamental values which lay at the ontological ground of the law, the latter must be prioritized."⁷⁰

6 Preconditions of the Emergence of Judicial Populism

Judicial populism has not appeared out of the blue in Hungary. Some institutional and social factors have created an environment of adjudication which have greatly facilitated the emergence of judicial populism. These factors can be divided into two groups: both internal (the institutional design of the court and the judicial method) and external (the media, and political circumstances) factors are in play.

Regarding the internal preconditions, the institutional design of the court system must be highlighted. As Lisa Hilbink has pointed out, the strength of judicial resistance against an authoritarian regime can depend on certain organizational and structural conditions which, at first glance, seem to be far removed from having any influence on judicial behavior. Hilbink argues that the internal career system of judges (especially their assessment and promotion) can strengthen the dominant judicial ideology. If this ideology is in line

69 *Fearing the unknown – how rising control is undermining judicial independence in Hungary* (Amnesty International Hungary, Budapest, Hungary, 2020), available at <https://www.amnesty.org/download/Documents/EUR2720512020ENGLISH.PDF>.

70 Péter Darák, "Társadalmi problémák – jogi megoldások," in Zoltán Csehi, András Koltay, Balázs Landi and Anett Pogácsás (eds.), *(L)ex cathedra et praxis Ünnepi kötet Lábady Tamás 70. születésnapja alkalmából* (Pázmány Péter Katolikus Egyetem, Jog- és Államtudományi Kar, Budapest, Hungary, 2014), 600. It must be noted that it was also Péter Darák who recently (at the end of his presidential term) emphasized in an interview that judges must not adjudicate for the public mood. András Sereg, "Nem a közhangulatnak kell ítélni – Darák Péter az Indexnek," *Index.hu* (2 November 2020), available at https://index.hu/belfold/2020/11/02/darak_peter_nem_a_kozhangulatnak_kell_megfelelnie_a_bironak/.

with the ideology of the political regime, then courts will defer to the political will even if the judicial system enjoys wide institutional autonomy.⁷¹

In Hungary the institutional independence of the court system is guaranteed by the constitution and other laws. However, the present system of judicial evaluation and promotion does not support the autonomous thinking of individual judges. As one might notice, the judge's professional activity is assessed by his/her immediate professional superior who knows her/him personally, and is the person on whom his/her professional career essentially depends. This situation raises the problem that apart from the detailed assessment criteria, the assessor's personal opinion of the examined judge may play a role in the assessment. Therefore, judges in lower courts are generally encouraged to align their judicial activity predominantly to the viewpoint of the reviewing second instance panel, as well as to its judicial style, regardless of any opposing professional convictions.⁷² This situation affects autonomous judicial thinking even if a reasonable uniformity in the practice of lower courts is also desirable.

This bureaucratic type of judicial career system can strengthen a conformist attitude amongst judges. Conservative judges who originally prefer social order to individual rights can be more sensitive to direct and indirect pressure coming from governmental politicians.⁷³

Judicial formalism as a feature of Hungarian judicial reasoning is closely related to the bureaucratic mentality and it has also paved the way for judicial populism. This statement may surprise those who have studied the extensive literature of judicial styles in CEE countries.⁷⁴ This is because judicial formalism is often characterized as the "most-locally-applicable-rule" approach in legal decision-making.⁷⁵ This means that the practitioner tries to solve a given

71 Lisa Hilbink, "Agents of Anti-Politics: Courts in Pinochet's Chile," in Tom Ginsburg and Tamir Moustafa (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, Cambridge, UK, 2008), 102–131.

72 Attila Badó and Mátyás Bencze, "Quality of Justice in Hungary in European Context," 6(2) *Forum: Acta Juridica et Politica* (2016), 5–23, at 16–17.

73 I discuss the implications of a bureaucratic justice system in detail in another paper. Mátyás Bencze, "Judicial Populism and the 'Weberian Judge' – The Strength of Judicial Resistance Against Governmental Influence in Hungary," [forthcoming].

74 Zdeněk Kühn, "Worlds Apart. Western and Central European Judicial Culture at the Onset of the European Enlargement," 52(3) *American Journal of Comparative Law* (2004), 531–568; Denis Galligan and Marcin Matczak, *Strategies of Judicial Review, Exercising Judicial Discretion in Administrative Cases Involving Business Entities* (Ernst & Young, Warsaw, Poland, 2005), 28–35; Bernard Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press, Chicago, US, 2000), 236–237.

75 Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford University Press, Oxford, UK, 1991), 210.

legal problem by relying exclusively on the text of the law, accepted legal doctrines and the traditional interpretive methods, without taking into consideration the wider social and legal context of the case. This model represents a judicial attitude which remains loyal to traditional legal reasons, as they serve the idea of the rule of law the best.

Nonetheless, formalism is not only a judicial approach to decision-making, but an approach to the justification of judgements. This latter approach can be called 'justificatory formalism': the judge does not depart from traditional legal arguments in providing reasons for the judgment, even in difficult cases. The problem is that in this case the judge's decision cannot be deduced from the traditional legal arguments that s/he presents in the opinion.⁷⁶ One can easily realize that justificatory formalism can be used in any case where the judge intends to diverge from the results that would otherwise be required from a trained judge. This type of formalism – which is quite widespread amongst Hungarian judges⁷⁷ – may function as a cover for the judge's hidden agenda; therefore it facilitates the spread of judicial formalism. Judgments driven by populism cannot be criticized on the basis of relying on illegitimate reasons, because the judgment, seemingly, is supported by appropriate legal arguments. Judicial populism therefore presupposes the strategic use of traditional legal arguments, because a judge cannot refer openly to public sentiment.⁷⁸

The third internal precondition of judicial populism in Hungary is the lack of any effective lay participation in the adjudication. The Hungarian lay justice system has been practically ineffective for long time and in the past three

76 Marcin Matczak, Mátyás Bencze and Zdenek Kühn, "EU Law and Central European Judges: Administrative Judiciaries in the Czech Republic, Hungary and Poland Ten Years after the Accession," in Michal Bobek (ed.), *Central European Judges under the European Influence. The Transformative Power of The EU Revisited* (Hart Publishing, Oxford, UK, 2015), 67–69.

77 Mátyás Bencze, *Elvek és gyakorlatok* (Gondolat, Budapest, Hungary, 2011), 169–174.

78 Logically, the next step would be to explore the circumstances which could cause the emergence of justificatory formalism. Such an examination would lead far from the original subject of this paper. Nonetheless, two factors can be mentioned here. One is the lack of any institutionalized quality-control mechanism of judicial reasoning (although legal scholars sometimes criticize court judgments, one can hardly detect any real impact of scholarly criticism on Hungarian adjudication). See Ágnes Kovács, Mátyás Bencze and Zsolt Zódi, "Methods of Quality Assessment of Judicial Reasoning in Hungary," in Mátyás Bencze and Gar Yein Ng (eds.), *How to Measure the Quality of Judicial Reasoning* (Springer, 2018), 187–205. The other is the quality of statutory drafts in Hungary. Drafters have the tendency to formulate 'the Legislator's Will' in vague and uncertain terms (using the language of abstract declarations) which makes the adjudication unpredictable and somehow uncontrollable. This has led directly to the use of the oversimplified, 'one-size-fits-all'-type of argument which is spreading among judges and makes it easier to provide legally flawed populist decisions with token reasoning. Andras Sajó, "New Legalism in East Central Europe: Law as an Instrument of Social Transformation," 17(3) *Journal of Law and Society* (1990), 329–344, at 331.

decades the Hungarian legislation has gradually narrowed the group of court cases where the participation of lay assessors was compulsory.⁷⁹ As lay participation represents the democratic character of the justice system, if it does not exist then professional judges may feel a temptation to directly serve the demands of the populace at the expense of their professional duties, including the unbiased application of the law and the defense of civil liberties.

Two external factors have also contributed to the emergence of judicial populism in Hungary, which are well-known in the other parts of the world as well. These are the 'decline of expert authority' and the 'mediatization' of adjudication. As regards the former factor, it can be observed that political populism systematically devaluates the professional approach to solving problems in favor of making a decision which is popular amongst ordinary people. The pattern of behavior of the political actors is to present their acts as being carried out in the service of ordinary people while ignoring the opinion of experts on policy formation and evaluation.⁸⁰ This may result in a decline in the authority of legal expertise in the case of the judiciary. As for mediatization, since the early nineties the media has paid increasing attention to court trials, and court trials have been more and more frequently broadcast. Interesting legal cases are watched by tens of millions of viewers on a daily basis in the form of a TV show. The presence of journalists and TV cameras may have an impact on the behavior of judges.⁸¹ It has already been detected that in some countries court decisions are sometimes influenced by popular sentiment.⁸²

7 Conclusion

First, it must be emphasized, that judicial populism is not an exclusive trend in Hungary. There are court rulings in Hungary that go against the governmental

79 Attila Badó and Mátyás Bencze, "Reforming the Hungarian Lay Justice System," in Péter Cserne, István H. Szilágyi, Miklós Könczöl, Máté Paksy, Péter Takács and Szilárd Tattay (eds.), *Theatrum Legale Mundi. Symbola Cs. Varga Oblata* (Societas Sancti Stephani Budapest, Hungary, 2007), 1–13.

80 Franklin E. Zimring, "Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on Three Strikes in California," 28(1) *Pacific Law Journal* (1996), 243–256.

81 Péter Hack's contribution to the conference "Az igazságügyi adatkezelésről és tájékoztatásról szóló törvény koncepciója" held in Szeged, Hungary, 17 January 2014, available at http://www.birosag.hu/sites/default/files/jegyzet_0207_oszesített_javitott_ta_o.pdf.

82 For example, in India: "Far too many in the Indian judicial system are reacting and responding to public sentiment and pressure with an eye on television cameras rather with their eyes blindfolded like Lady Justice. Judicial populism has become a disease, an affliction

will or the pressure from the public,⁸³ but there is a visible trend, especially in criminal adjudication, which can be characterized as judicial populism.

Populist judges, similarly to pragmatist ones, take extra-legal circumstances into consideration in their decision-making. However, it must be stressed that judicial populism is not the same as pragmatist adjudication. While the latter reflects social needs and the requirements of the *Zeitgeist*, the populist approach to adjudication does not care much about the deeper social context and consequences of the decisions, but reacts directly to changes in the public mood. Such deference to the 'vox populi' can increase the momentary popularity of courts, but it may have a detrimental effect on the justice system in the long run. A constitutional democracy requires counter-majoritarian institutions whose legitimacy is based not only on democratic election but also on epistemic authority.⁸⁴ Professional judges represent a kind of knowledge and expertise which legitimize their activity. A judicial approach that downplays expert authority can make the law primitive and incapable of guaranteeing the rights and long-term interests of the citizens. Thus, justificatory formalism in Hungary, which oversimplifies legal-doctrinal questions, and the lack of proper quality control over judicial reasoning can also facilitate the spread of a populist judicial style.⁸⁵

Deference to the popular will also represents a danger to judicial independence. A strong political party or a government can manipulate the public mood in many ways, according to its own political interest.⁸⁶ Judges who follow the public mood in their practice – either through conviction or for strategic reasons – can become the agents of governmental politics. Thus, a clever populist government can exercise undue influence on courts in an indirect way.

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that runs the risk of creating institutional paralysis." "Judicial populism", *Business Standard* (20 January 2013), available at http://www.business-standard.com/article/opinion/judicial-populism-110122900016_1.html.

83 Badó and Bencze, *op.cit.* note 72.

84 Alex Stein, "On the Epistemic Authority of Courts," 5(3) *Episteme* (2008), 402–410.

85 Bencze, *op.cit.* note 77, 169–170.

86 Boda et al., *op.cit.* note 67.

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