

In the name of the people? The populist style of judicial reasoning and justificatory formalism

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ABSTRACT

The populist political strategy has become a worldwide phenomenon among those in the executive and legislative branches of government. It is therefore justified to scrutinize whether populism influences the third branch of power, and if so, how. In the first instance, this research project will explore the characteristics of populist judicial reasoning in order to identify populist judgements. The results can be used to determine the extent to which populist judicial practice is widespread in a given legal system.

First, I distinguish between three types of populist judicial behaviour. Judicial populism can manifest in the content of the decision ('decisional'), in the court's communication ('rhetorical'), or in both ('full-fledged'). I then present the patterns of reasoning that can indicate populist judicial behaviour in each manifestation of judicial populism. Finally, I will address the question of how a variant of judicial formalism, which I term 'justificatory formalism', contributes to the spread of 'decisional' judicial populism.

KEYWORDS

judicial populism, populist judicial reasoning, judicial formalism, court communication, Hungarian courts

1. INTRODUCTION

Populist political strategies, such as polarizing the political community, 'ruling the moment', oversimplifying complex questions, and devaluing long-term political thinking in favour of

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maintaining popularity, have become a worldwide phenomenon among those in the executive and legislative branches.¹ Therefore, it is reasonable to examine whether populism influences the third branch of power and whether changes similar to those seen in party politics could occur in the near future.

Judges have been tempted by populism since the second half of the eighteenth century, when it became expected in European culture that judges should apply the laws created by the central authority regardless of various extralegal considerations (moral, economic etc.).² This is because the requirement of the strict, bureaucratic application of the law could conflict with the community's sense of justice and the public mood in certain cases.³

It is therefore no coincidence that, in the era of political populism, judicial populism has attracted more scholarly attention. As I demonstrate in Section 2 below, there is a realistic possibility that judicial populism will cause fundamental changes in judicial activity, just as political populism has in political life. The process of the 'judicialization of politics', which emerged in the late twentieth century and gave the courts significant political power,⁴ makes the academic scrutiny of populist judicial behaviour relevant from a political scientific perspective too. There are lots of questions to answer regarding judicial populism. What exactly are the phenomena that can be described as judicial populism? Is there a difference between socially sensitive or progressive judicial decisions and judicial populism? Does the twenty-first-century form of judicial populism differ quantitatively or qualitatively from earlier cases of this? If so, what are the reasons for this, and what are the consequences, and is it related to political populism or to how the judiciary responds to the emergence of 'new media' or autocratic political aspirations?

The first step in this research is to explore the characteristics of populist judicial reasoning, as this helps to identify populist judgements, and the results can be used to determine the extent to which populist judicial practice is widespread in a given legal system.

In terms of methodology, this study is partly based on a critical analysis of the relevant literature on judicial populism and populist judicial reasoning. Based on the findings of the analysis, in the empirical part of the paper, I illustrate the main characteristics of the populist judicial style through examples from legal practice, where I find the clearest manifestations of the different forms of judicial populism. First, I will outline the various conceptions of judicial populism, making a distinction between the two main approaches relevant to identifying populist judicial behaviour (content- and style-oriented). Next, I will present my interpretation of judicial populism, which is based on the idea that it can manifest in three ways: 'decisional', 'rhetorical', or a combination of the two. I will then demonstrate the implications of each for judicial reasoning. Finally, I will argue that a variant of judicial formalism, which I term

¹For an overview, see Hoffmann et al. (2022) 2.

²Weber (2013) 853.

³Weber (2013) 894. This tension first manifested itself in a spectacular form in the last third of the 19th century, when the massive social problems caused by capitalist development made the tension between the two types of expectations clearly perceptible. See Tucak (2023). It was during this period that the ideal of the 'good judge' emerged, a role modelled on the French judge Magnaud, who famously rendered decisions in favour of socially deprived defendants based on a very creative interpretation of laws, and who can therefore be considered one of the precursors of judicial populism. See Houte (2018).

⁴Hirschl (2013).

‘justificatory formalism’, can contribute to the proliferation of ‘decisional’ judicial populism by enabling judges to present populist decisions as the result of rigorous legal and professional considerations.

2. APPROACHES TO JUDICIAL POPULISM

The institutional approach to judicial populism identifies populist judicial behaviour as aligning judicial practice with the interests of populist political actors, primarily governments. According to this view, courts can become part of a populist political ‘machine’ and serve overly centralised political power while suspending their counter-majoritarian function (the literature on political populism is also rife with examples of populism that are in fact examples of the authoritarian exercise of political power rather than manifestations of ‘pure’ populism).⁵

The other, ‘discursive’ approach, adopted by most authors, distinguishes between judicial populism and judicial deference to authoritarian populist political power. According to them, judicial populism means that courts pursue their own political agenda and use a specific language, which can be considered populist in some respects.⁶

However, to identify the types of populist judicial reasoning, it is more productive to use a different classification: whether an author considers judicial populism to be a matter of content or communication. In other words, is a judicial decision populist if its outcome helps to advance a populist agenda, or if the justification attached to the decision shows signs of populism?

2.1. Content-oriented approaches to judicial populism

One of the representatives of the institutional approach is Tanasescu, who introduced the concept of ‘contextual judicial populism’. She qualified a series of decisions of the Romanian Constitutional Court as populist because the court played into the hands of a populist government.⁷ Another Romanian scholar, Alexandra Mercescu, like Tanasescu, considers another ruling populist because the court that issued it deferred to a populist government.⁸ Although their approach to judicial populism blurs the line between judicial populism and judicial deference to the government,⁹ what is important here is that they consider the content of the decision to be populist, not its communication.

In his essay, Shourie qualifies and heavily criticizes some of the Indian Supreme Court’s judgments as populist, questioning the merit of the decisions. These decisions saw the court

⁵‘This association with democratic backsliding has turned populism into the go-to label for political behaviour people want to cast in a negative light’. Hilbink (2024) 3.

⁶The basis for this distinction is Sadurski’s view, which differentiates between discursive and institutional approaches to political populism. From his perspective, political populism can be described as either the discourse of political actors using anti-pluralist rhetoric or their actions of building an immediate relationship with the ‘people’ and eliminating intermediary institutions. Sadurski (2022) 506–21.

⁷Tanasescu (2019) 309–10.

⁸Mercescu (2021) 202. For a similar view, see Stambulski (2024).

⁹I do not categorize courts that defer to a populist government as populist, since they lack the defining populist feature of ‘pleasing the populace’ in their activities. See for a detailed argument, Bencze (2024). Consequently, I do not analyse the style of these courts in this study.

uphold the constitutionality of the law providing for reservations (quotas) in government jobs for disadvantaged social groups.¹⁰

A similar content-oriented approach to judicial populism is that of Gonzalez, a judge of the Colombian Constitutional Court. Gonzalez identifies judicial populism with a pro-rights, social-liberal political agenda of courts, and argues in favour of judicial populism when he says that ‘Courts might be in a better position to resist authoritarianism when they have a political project with wide public support’.¹¹

According to Ristawati and Salman, judicial populism may be envisaged in terms of how ‘the judge tends to speak for the people or when the Court delivers decisions adjusted and influenced by the majority of the people’s will, while it is actually beyond justice, impartiality, and judicial independence’.

In their view, striking down laws enacted by the government and supported by the majority of society is a clear sign of the anti-populist attitude of judges. They also limit the meaning of judicial populism to the content of the judicial decisions, and do not speak about the communicative style of populist judicial decisions.¹²

2.2. Communication-(style)-oriented approaches to judicial populism

In contrast to content-oriented populism approaches, Harel and Kolt take a style-oriented approach to judicial populism. They see judicial populism as a response to populist political rhetoric, which leads some judges ‘to incorporate public sentiment and popular opinion into their decision-making’.¹³ Thus, the three liberty- and equality-oriented decisions they analysed could be justified on the basis of constitutional rights and values, but instead the judges referred to the ‘public’s raw conviction’ or to the ‘will of the majority of the people’.¹⁴

Hilbink, in her sophisticated conceptual framework, describes judicial populism explicitly as a matter of judicial style (including both the 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 in an ‘in the name of the people’ style and the decision maker uses several elements of the ‘populist toolkit’.¹⁵ Staszewski and Bernstein also characterize judicial populism in the U.S. context as a certain style of judicial reasoning that shares the general criteria of authoritarian political populism: the oversimplification of complex problems, denial of pluralism, antipathy toward mediating institutions, claims to the exclusive representation of the unified people, and Manichean thinking.¹⁶

The authors, however, also claim that ‘executivism’ is a feature of populist judicial behaviour, because it is the president who can truly represent the interests of a unified people, and ‘judges

¹⁰Shourie (2006).

¹¹‘The Court’s project revolved around the idea of *estado social de derecho* (ESD), which required an inclusive political agenda to seek redress for structural injustices that allegedly fueled violence’. González-Jacome (2017).

¹²Ristawati and Salman (2020) 116.

¹³Harel and Kolt (2020) 749.

¹⁴Harel and Kolt (2020) 759–62.

¹⁵Hilbink (2024) 17–18.

¹⁶Bernstein and Staszewski (2020) 2.

purport to remain above the fray of politics while effectively immunizing the president's actions from meaningful scrutiny'.¹⁷ However, this aspect of their theory suggests that judicial populism may be reflected not only in the style of decisions but also in their content.

2.3. The complex concepts of judicial populism

The aforementioned inconsistencies in formal approaches suggest that judicial populism should not be treated as an exclusively substantive or communicative issue. Kureshi, in his analysis of the recent practice of the Supreme Court of Pakistan, takes into consideration both the communication and content of adjudication in defining judicial populism. He shares the view that populist judges use a judicial language that shows proximity to the ordinary citizen,¹⁸ but he narrows down the scope of populist judicial decisions to cases where judges adjudicate in an extremely activist manner directly against the 'corrupt political elite'.¹⁹

However, the fact that the communicative and content-oriented definitions of judicial populism are not exclusive does not imply the opposite. We cannot say that we can only speak of judicial populism if a decision is populist in both content and style. Just as populist politics can manifest itself both in the content of political decisions and in the communication of politicians, judicial populism can also take two forms.

My starting point is that the essence of judicial populism should be captured in the dual relationship of judges with the normative legal-professional values attributed to the judiciary and the demands coming directly from the populace. Thus, satisfying popular demands at the cost of neglecting legal professional requirements in order to build and preserve trust toward the judiciary is a core element of populist judicial behaviour. That is why I suggest that 'unmediated engagement with the people' is a necessary conceptual element of judicial populism.

This 'unmediatedness' is the opposite of the legal-professional judicial approach (the 'standard model' of adjudication). The standard model, on the one hand, requires judges not to deviate from the 'settled law' manifested in the letter of the law, received legal doctrines, precedents, and consistent judicial practice when rendering their judgments. Obviously, different legal systems have different standards for what constitutes 'settled law'. For example, some legal systems are more open to legal interpretation with a view to fundamental rights and allow more room for judicial discretion.

On the other hand, the term 'standard model' also refers to the accepted language of judicial argumentation (how judges speak). As in the case of 'settled law', professional standards of judicial communication may vary from one legal system to another. For example, it is well known that French judicial style is terse, magisterial, and impersonal, whereas common law judgments tend to be longer, more discursive, and personal — even emotional.²⁰ Therefore, the phenomenon of departure from the standard model must be examined with regard to the specific context of the given legal system in both cases. Nevertheless, I agree with Hilbink that deviating from the standard model does not necessarily constitute judicial populism (as she

¹⁷Bernstein and Staszewski (2020) 27.

¹⁸Kureshi (2022) 258.

¹⁹Kureshi (2019).

²⁰Lasser (2009) 21–22 and 30–38.

notes, judicial populism is not ‘just judicial activism on steroids’).²¹ One can speak about judicial populism if the deviation has a certain direction. The ‘unmediatedness’ of the adjudication also implies that, when the court deviates from settled law or the received judicial style, its orientation point is the public mood. This orientation point can determine either the content or the style of the decision. This is why, contrary to Hilbink’s view, a judgment written in a maximal technocratic style can also be populist if its content reflects the expectations of ‘ordinary people’.

In the standard model, the established law and received methods of argumentation are designed to ‘filter’ the will of the people in the course of judicial decision-making, leading to a well-considered judgment. Populist judges, however, like populist politicians who typically ‘try to build bridges to the “real” people above the heads of intermediary institutions’,²² circumvent some of the professional standards of their work, and thus become ‘pseudo-representative’ institutions.²³

Judicial populism, thus, refers to a certain way of communicating and deciding; the court speaks directly to ‘ordinary citizens’. The court either serves the momentary mood or feelings of the perceived majority through the outcomes of its decisions, or through the tone of the justification attached to the decision (or other court communication). In both cases, the ‘judge’ and the ‘people’ meet and symbolically reunite, just as populist leaders unite the people on the political scene. Following from that, I also think that populism can be both a matter of style and a matter of content. Judgments which are delivered in the most technocratic style can be understood as populist if their content is in line with the public mood (‘decisional judicial populism’), but a decision that does not reflect public opinion in terms of its outcome may also be populist in terms of its language (‘rhetorical judicial populism’). However, the most striking cases of judicial populism are those that are populist in both content and style (‘full-fledged’ judicial populism). All three share the characteristic of an unmediated relationship with the public, but they do not qualify as activist to the same extent.

Taking these considerations into account, the following table summarizes the main characteristics of the different types of judicial populism (Table 1).

Table 1. Variants of judicial populism and their main characteristics

Variants of judicial populism	Relationship to the ‘standard model’ of adjudication		Examples (from Sections 3 and 4)
	Content	Style	
‘Decisional’	Activist (‘pleasing the populace’)	Technocratic (observing the received style of adjudication)	‘Welfare migration’ cases
‘Rhetorical’	Formalist (‘observing settled law’)	‘In the voice of the people’ style	‘Murderers’ parents’ case
‘Full-fledged’	Activist (‘pleasing the populace’)	‘In the voice of the people’ style	‘Rezesova’ case

²¹Hilbink (2024) 27. She rightly argues that, although judicial activism is one form of deviation from the ‘standard model’ of adjudication, it does not necessarily equate to judicial populism.

²²Sadurski (2022) 510.

²³Harel and Kolt (2020) 749.

3. THE STYLE OF RHETORICAL JUDICIAL POPULISM

There is no doubt that identifying examples of judicial populism through the court's communication is much easier in cases where a populist rhetorical style is present (cases of full-fledged rhetorical judicial populism). In these instances, the 'unmediatedness' is reflected directly in the language used by the court. Here, the court uses populist rhetorical devices, such as a personalized tone, playing on the sentiments of the audience, or abandoning received legal language.

The first example here is a Hungarian judgment from 2014 (the *Rezesova* case). In 2012, a Slovakian celebrity killed four people in a car accident on a Hungarian motorway. The Hungarian court of first instance sentenced her to six years in prison. The 'lenient' decision provoked a huge public outcry from a large proportion of the public who believe that rich people always get special (and better) treatment from the law. In 2014, the appellate court increased her prison sentence to nine years. In her oral justification, the presiding judge pointed out that one of the reasons for the increased sentence was that the accident had caused a *huge public outcry*.²⁴ It is important to know that – contrary to the statement of the appellate court judge – Hungarian criminal law does not recognize 'public outcry' as a reason for aggravating the sentence. The judge's statement, thus, clearly appeals to populist rhetoric. (This case is also an example of full-fledged judicial populism, as the sentence imposed on her was much harsher than the average punishment given for similar offences.)²⁵

Another example of rhetorical judicial populism is a judgment of a Hungarian higher civil court issued in a tort case ('Murderers' parents' case). The court had to decide on the material consequences of a crime that had been committed. The crime itself was quite unusual and shocking to the local community. Two schoolboys had beaten up one of their classmates so badly that he lost consciousness. After the beating, they threw him into a pond, where he drowned. Later on, the civil court ordered the parents of the boys to pay compensation to the victim's parents, stating that they had participated in the murder in an indirect way. The court held that the parents had not brought up their children in a proper manner. One of the peculiarities of the case was that the court refused to accept any evidence that was offered by the defendants showing how they had actually brought up their children. The justification for this – according to the judgement – was that the negligence of the parents must be, even without presenting any evidence, obvious to *any right-minded person*. If the children had been raised the right way, they would not have committed such a terrible crime.

Furthermore, populist court judgments can include justifications containing details that are capable of stirring up emotions but irrelevant to the assessment of the case, such as that a crime has 'struck a chord with society'.²⁶ Populist courts also tend to use legally irrelevant, 'mood-setting' expressions instead of neutral, objective, and appropriate legal wording. In one case, a Hungarian court, instead of referring to the participants of the case using their official

²⁴[Link1](#).

²⁵Bencze (2022) 44–45.

²⁶Janecskó (2013).

denomination (victims and defendants), called them ‘athletes’ and ‘Roma company’. In another ruling in a lynching case, the court included an ascertainment stating that one of the Roma defendants had shouted in a ‘hoarse, rough’ voice.²⁷

It follows from all this that the markers of rhetorical populism are relatively easy to identify, especially in legal systems that follow the continental model of adjudication, since according to this approach, the judge’s task is to apply the law in a neutral and impartial manner, which must be reflected in the text of the judgment and in the tone of the proceedings.²⁸

While it is beyond the scope of this paper to explore the causes of rhetorical judicial populism in detail, it is worth mentioning two factors that warrant further social scientific scrutiny.

One is that, outside of ‘on-the-bench’ judicial activity, the populism of the courts can be reflected in press releases, interviews with court leaders, and news published on websites. A notable example is an interview with the former Deputy President of the Supreme Court, in which he quoted the populist Hungarian government’s programme almost verbatim (‘Hungary cannot be a paradise for criminals’).²⁹ The statement can be considered populist because it promotes the popular ‘tough on crime’ approach. At the same time, it does not support the claim that Hungary was ever a ‘paradise for criminals’ with any professional arguments. Similarly, court websites reporting on cases of public interest with clickbait-style headlines reminiscent of tabloid newspapers can also be considered part of populist communication.³⁰ This populist-style off-the-bench communication, especially when it originates from or is approved by the court leadership, can spread to the language used in judicial reasoning, and it can contribute to the strengthening of judicial populism among those on the bench.³¹

The spread of a populist judicial style may also be reinforced by the fact that, since the early nineties, the media has paid increasing attention to court trials, which have been broadcast with increasing frequency. Some interesting cases are watched by tens of millions of viewers daily in the form of TV shows. The presence of journalists and TV cameras may have an impact on the behaviour of judges.³² It is well documented that some judges in India tend to shape their adjudicative activity to reflect the likely popular opinion shaped by underlying media campaigns.³³

²⁷Bencze (2014b) 137. One might think that severe sentences and harsh language in cases involving Roma defendants might be a sign of racism amongst Hungarian judges and not an indicator of judicial populism. A survey conducted by the Hungarian Helsinki Committee, however, 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. Bárdits et al. (2014) 127. This fact seems to support the hypothesis that the populist approach – and not racism – is responsible for numerous judicial miscarriages in Hungary.

²⁸Bencze (2021).

²⁹Pámer (2017).

³⁰‘He attacked with a snow shovel’, ‘The tale of the non-existent dollar and euro...’, ‘... chilli peppers were mixed into the disinfectant...’, ‘The “crystal” and “bio-grass” were found in the toilet bowl’. These news items were available on the Regional Court of Debrecen’s website at the time of the visit. [Link2](#).

³¹Bencze (2018a). Hilbink refers to this type of judicial populism as ‘off-the-bench’ populism. In this paper, I focus on the adjudicative (on-the-bench) aspect of judicial populism.

³²Sastry (2019), Lim (2015) 87.

³³‘Far too many in the Indian judicial system are reacting and responding to public sentiment and pressure with an eye on television cameras rather [than] with their eyes blindfolded like Lady Justice. Judicial populism has become a disease, an affliction that runs the risk of creating institutional paralysis’. [Link3](#).

4. THE STYLE OF DECISIONAL POPULISM

So, while it follows from the concept of rhetorical populism that this type of judicial populism can be identified in court communications, it may seem that, in the case of judgments using technocratic language, only an in-depth analysis can determine whether they can be classified as populist. If the content of the decision is in line with the current public mood, then we can speak of a populist judicial decision. Mercescu also emphasizes that the style (rhetoric) of a populist decision does not necessarily differ from that of ‘normal’ decisions; i.e., populist courts may use a legal language similar to that of other courts.³⁴ However, if we examine cases that can be classified as decisional populism, we see that these can also be paired with a specific style of argumentation.

To illustrate the characteristics of populist reasoning in decisional populism, consider Blauburger and his colleagues’ analysis of the shift in the European Court of Justice’s (ECJ) jurisprudence on EU citizenship cases in the mid-2010s. They 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).³⁵ Therefore, Blauburger et al. 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[ly] connoted terms like “welfare migration” or “benefit tourism”’,³⁶ the court decided accordingly. The authors 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 the public mood. Nevertheless, the Court’s language and rhetoric remained unchanged. Although the Court used different arguments from those used before the turnaround, it spoke in the technocratic, impersonal language typical of ECJ judgements and made no reference to public opinion or the media coverage of such cases. Furthermore, the ECJ departed from its own practice without providing a meaningful explanation for changing the established law.

In analysing a decision of the RCC, Mercescu also emphasizes that ‘weak argumentation’ (argumentative fallacies in reasoning or sudden, legally inexplicable changes in jurisprudence) can be an indicator of populist judicial behaviour.³⁷ A court may deviate from the standard model in order to serve populist interests; therefore, its reasoning becomes weak from a legal-professional point of view. At the same time, it tries to conceal this deviation by using

³⁴Mercescu (2021) 208. Stambulski also writes that the deferential judgments of the Polish Constitutional Tribunal (which have been captured by populists) follow the ‘standard model’ of judicial reasoning in terms of ‘language and structure of the reasons’. The court refers to ‘existing legal values such as the rule of law or the principle of human dignity and does not repeat the arguments raised by the populist applicants’. Stambulski (2024) 258.

³⁵Blauburger et al. (2018). Judicial decisions which struck down COVID-19 measures in several European countries could also be subject to scientific scrutiny as to whether they were influenced by anti-lockdown popular sentiments. Some authors suggest that these kinds of judicial decisions ‘were substantially impacted by larger normative and policy considerations’. Golia et al. (2021) 232–33.

³⁶Blauburger et al. (2018) 1434.

³⁷Mercescu (2021).

technocratic legal language. While I do not share her view of judicial populism as judicial deference to a populist government for the aforementioned reasons, I would argue that weak argumentation can be a corollary of decisional judicial populism.

4.1. Justificatory formalism

Following Mercescu's account, it can be concluded that 'weak argumentation' is not the same as no argumentation or 'poorly-drafted' judicial argumentation. 'Weak argumentation' means that those involved in legal practice do not find the argument convincing.³⁸ Therefore, this kind of judicial style is more accurately described as 'justificatory formalism', a special type of judicial formalism.³⁹

Judicial formalism is usually considered the opposite of judicial populism because it represents the traditional approach of judges. Proponents of judicial formalism argue that the court's primary role is to uphold the consistency of the law. When making a legal decision, a judge must consider the consistency of the legal system. Typical arguments used by judges who observe this model are the text of the law, earlier decisions, and commonly accepted legal doctrinal views, as well as some commonly accepted interpretive methods. These means and methods also determine the scope and limits of judicial discretion. It is only within this limited domain of reasons that it is justified to take public interest, natural justice, and other values external to law into consideration when making a judgment.

It is quite surprising, therefore, that Staszewski and Bernstein state that formalist judicial methods, such as the use of syllogism in judicial reasoning or textualism, are devices of judicial populism. They argue that these methods help judges make highly controversial populist ideas seem natural, as if they were logical consequences of agreed-upon premises. Thus, formalist adjudication meets one of populism's core criteria: anti-pluralism.⁴⁰ I agree that formalism can serve populist adjudication, but in a way that differs greatly from the authors' view.

It is important to clarify exactly what judicial formalism entails. According to the above definition, the court bases its decision solely on the law in the narrow sense, ignoring the external context of the case under consideration. So, in what sense can judicial formalism serve populist judicial behaviour, where the direction of the court's decision is determined by the reactions of the community rather than traditional legal arguments?

The answer is that formalism is not only a judicial approach to decision making ('decisional formalism'), but also an approach to justifying judgments. I call this latter type of formalism 'justificatory formalism': the judge does not depart from traditional legal arguments in giving reasons for the judgment, even in cases where they have based their decisions on extra-legal considerations. The essence of justificatory formalism is that, although the judge clearly made their decision based on some external reference point, they follow the standard model in their justification, thus giving the impression that these arguments led to the decision.⁴¹ This feature means that only experts can identify certain flaws and inconsistencies ('weak argumentation') in the line of reasoning.

³⁸Bencze (2018b).

³⁹Bencze (2022) 56.

⁴⁰Bernstein and Staszewski (2020) 29.

⁴¹Matczak et al. (2015) 67–69.

A textbook example of justificatory formalism can be found in a Hungarian court case (BH 2003. 310). In this case, the court resolved a legal problem by deviating from the text of the law, yet presented its decision as if it had acted in accordance with it.

Under the provisions of the Hungarian Criminal Procedure Act in force at the time of the trial, the defendant was generally required to cover the costs incurred during the proceedings if found guilty. An exception to this was that ‘a person who did not know the Hungarian language’ did not have to pay for the interpreter. In this case, the deaf and mute defendant was a Hungarian citizen and knew Hungarian as his mother tongue, but was unable to communicate verbally with the authorities conducting the proceedings. He was therefore questioned with the assistance of a sign language interpreter, and the court ordered him to pay the interpreter’s fees. However, the court of second instance overturned this decision, reasoning that

[t]he amount of criminal costs incurred in the first instance proceedings required correction. The costs related to interpretation cannot be charged to the defendant, but... are borne by the state. This is because the defendant is only able to communicate with the help of a sign language interpreter due to his severe hearing impairment. Therefore, according to the Supreme Court,... he must be considered as someone who does not know the Hungarian language.

This reasoning contains only legal arguments in the strict sense and does not explicitly state that the extended interpretation of the applicable rule was based on the morality of the community, as manifested in the constitutional right to equality. Therefore, the real reason for the decision cannot be discerned from the text. Nonetheless, the language used reflects a neutral, technocratic legal style.⁴²

It is easy to see that justificatory formalism can be used in any case in which the judge intends to deviate from the results that would otherwise be required of a trained judge. This type of formalism can serve to mask the judge’s hidden agenda and facilitate the spread of decisional judicial populism. Judgments driven by populism cannot be criticized on the ground that they are based on illegitimate reasoning because they appear to be supported by appropriate legal arguments. Thus, decisional judicial populism necessitates the strategic use of traditional legal arguments, especially in legal systems where judicial reasoning is confined to the formal aspects of the law.⁴³

In contrast with rhetorical populism, where populist language is a clear indicator of judicial populism, justificatory formalism is not a specific marker of judicial populism. Rather, it is a tool that helps judges deliver populist judgements while making them seem as if they are the result of legal and professional considerations. This is why justificatory formalism can also be a sign of judicial approaches other than populism. For example, it can indicate a rights-oriented approach (as in the cited case of the deaf and mute defendant), a pragmatic approach to adjudication (i.e. social engineering by judges), deference to an authoritarian government (as in the mentioned cases of Romanian and Polish constitutional courts)⁴⁴ or even a miscarriage of

⁴²Bencze (2011) 83–84.

⁴³Logically, the next step would be to examine the circumstances that might lead to the emergence of justificatory formalism. Such an investigation would lead far from the original subject of this paper.

⁴⁴The Polish Constitutional Tribunal, in the service of the populist Polish government, has employed legitimate constitutional arguments while disregarding the social and political context of the cases brought before it. Insensitivity to the wider context of a case is a sign of judicial formalism. Stambulski (2024) 258–59.

justice. Therefore, to identify a truly populist judgement, it is essential to examine the context and content of the case as a whole, and establish whether the decision-making process is oriented towards pleasing the populace (or avoiding public outcry), or whether other considerations are at play. An example of the use of justificatory formalism to conceal decisional judicial populism can be seen in the 2009 Hungarian case involving a murder in Olaszliszka, where the court of appeal sentenced two juvenile defendants under the age of 16 to the maximum term of imprisonment (10 years) for participating, along with two adults, in the beating to death of a man.⁴⁵ The sentence was much harsher than the established judicial practice.⁴⁶ An important feature of the case was that the perpetrators were members of the highly unpopular Roma minority, and they killed a Hungarian teacher who was a respected member of his community. The murder was followed by unprecedented outrage that contributed significantly to the rise of the far right in Hungary.⁴⁷

The language of the justification of the final decision was highly professional, using the neutral terminology of criminal law and not employing any rhetorical devices, while the decision itself was maximally subordinated to the public mood.

Building on this, I agree with Hilbink that style is important for identifying populist judicial behaviour. In the case of rhetorical judicial populism, the signs of populism ('proximate and publicly oriented' communication by judges) are relatively easy to identify.⁴⁸ However, when it comes to decisional populism, the style of the judgement ('justificatory formalism') only indicates 'suspicion' of populism, and further in-depth analysis is needed to categorize the verdict accurately.

Another implication of decisional judicial populism is that judgments written in a highly technocratic style can also contain populist elements. Although Hilbink clearly states that judicial populism relates to the 'in the name of the people' style rather than the content of judicial decisions, she emphasizes at one point in her paper that the legitimacy of judicial populism is based on the '[e]xplicit assertion that a ruling responds to popular needs or interests.'⁴⁹ I suggest that sensitivity to popular needs or interests in adjudication is more a matter of substance than style.

5. CONCLUSION

In this paper, I have argued that judicial populism is a form of judicial behaviour which aims to satisfy the perceived expectations of the general public at the expense of legal and professional requirements. Judicial populism can manifest itself in the content of a judicial decision, in court rhetoric, or in a combination of the two. If populist judicial decisions need to be identified for further analysis, then judicial populism in the rhetorical sense is easier to deal with. Such judgments may contain expressions that are legally irrelevant but close to spoken language

⁴⁵Debreceni Ítéletábla [Regional Court of Appeal of Debrecen] 506/2009/89.

⁴⁶Bencze (2014a).

⁴⁷Balogh (2009).

⁴⁸Hilbink (2024) 11.

⁴⁹Hilbink (2024) 14.

and express moods and emotions, or even directly refer to public sentiment and people's expectations. Another aspect of populist reasoning may be when courts follow the style of tabloid magazines or adopt the rhetorical turns of a populist government in the language of their judgments.

Identifying decisional judicial populism requires a more complex method. The language of such judgments does not differ from the 'standard model' of argumentation; they rely on traditional, established legal reasons and present decisions as having been derived from these grounds. In this case, an in-depth analysis of the decisions can provide guidance on whether they are indeed populist. A decisional populist judgment can be said to exist if two conditions are met. One is that it meets the perceived or actual expectations of the public, and the other is that the decision deviates from the solution based on the applicable legal reasons (if only the first condition is met, then we are not talking about judicial populism, but rather a fortunate situation where a well-considered judgment and public opinion coincide).

To establish whether the first condition is met, a socio-legal analysis of the political and societal context of the case is needed. The second condition implies that decisional populism is associated with a particular style of argumentation: justificatory formalism. The court does not give an account (because it cannot give an account) of the real reasons for its decision, which is why there are errors or deficiencies in the reasoning of the judgment, and the legal arguments put forward are not sufficiently convincing. Nonetheless, justificatory formalism is suitable for making arguments appear professional in the eyes of superficial readers. Therefore, serious expert analysis is required from a legal-doctrinal point of view in the case of 'decisional populism-suspicious' verdicts. This will establish whether the court's reasoning deviates unreasonably from the text of the law, current legal doctrines or relevant case law, and whether it considers the particular characteristics of the case in question.

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