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ARTICLE

Judging for the People: Public Interest and Public Spectacle

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Since Upendra Baxi (1980) first used the term "judicial populism" more than forty years ago to describe the Indian Supreme Court's performance in public interest litigation (or social action litigation, as he prefers), the concept has come a long way. Originally, judicial populism designated a form of people-oriented judicial action that extended human rights to a large mass of India's population based on considerations of substantive justice rather than limiting itself through technical jargon (Baxi 1980, 246). The concept referred to a judge-led process that made the Indian Supreme Court stand out in comparison to other state actors facing a legitimation crisis due to their commitment in making the protection of people's basic rights the core of the court's concerns (Baxi 1985).

Now that we face contemporary threats to institutions of more or less consolidated liberal democracies by governments also broadly classified as "populists," the notion of judicial populism has taken a negative spin. Excessive judicial interference in political issues, flagrant political bias of judges, and the use of deceptively simplifying argumentation of highly complex issues all have been called "judicial populism." Used as an umbrella term to describe the worst practices in decision-making and judicial behavior across different contexts, judicial populism has become a recurrent fighting word in public debate and has lost the required analytical precision that makes it useful as a concept of applied social science.

For this reason, the most important contribution made by the symposium papers on judicial populism is the successful recovery of the conceptual rigor required of the term. Lisa Hilbink's article is exemplary of this accomplishment as she successfully distinguishes the concept of judicial populism from that of judicial activism, with which it could be (and has been) confused. Although populist strategies can be employed to carry out more extreme forms of activism, Hilbink shows how differentiating judicial activism from judicial populism is as basic and important as distinguishing between substance and form. Given that what characterizes activism is the willingness of judges to set aside self-restraint and interfere in actions and

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policies taken by the executive and legislative branches, an important set of matters in which judicial populism can manifest itself may have nothing to do with the more or less activist stances by judges. Investigations and criminal proceedings against members of the economic elite for white-collar crimes or against organized crime groups, for example, will not necessarily involve decisions about greater or lesser deference to the actions of the executive and legislative branches and, therefore, fall outside the horizon of concerns about greater or lesser judicial activism. However, as Lucia Manzi's article and all the existing criminological literature on penal populism shows, investigations and court cases on criminal issues against agents of high economic power can perfectly well be the stage for populist actions of state authorities in charge of criminal matters, which, of course, include judiciary personnel.

This is why judicial populism should be understood, as Hilbink proposes, as a particular form of performance of the authority of judges and courts. If populism in general is a form of exercise of power that seeks to legitimize itself through a particular style of political mobilization (Landau 2018, 524), characterized by alleged deference, at any cost, to the sovereignty of the real people (Mudde and Rovira Kaltwasser 2018, 1669), then judicial populism must consist of forms of exercise of judicial power characterized by rhetoric, actions, and symbolic performances that intend to justify the exercise of judicial power via a direct connection to the rights and interests of the people, even if at the expense of departing from established precedent, ignoring canons of statutory interpretation and "flexibilizing" judicial liturgy.

The adoption of a judicial performance style that is less technocratic and more directly connected to the public is not inherently problematic. Setting aside the heavily negative connotations often associated with the term "populism," public communication initiatives by courts—designed to mitigate the hermeticism of legal procedures and reduce the alienation produced by rigid protocols and impenetrable terminology—can serve to narrow the gap between citizens and judicial institutions. The Brazilian experience offers an illustrative case of this approach. TV Justiça, created in 2002, is a public television channel run by the judiciary. It broadcasts the deliberative sessions of the Federal Supreme Court (Supremo Tribunal Federal)—a heated topic of debate among Brazilian jurists regarding its benefits and harms to judicial reasoning (V. Silva 2018; Arguelhes 2023)—alongside programming intended to inform the public about the court, the judiciary at large, and citizens' rights and obligations. This initiative exemplifies broader trends in Brazil: court sessions across the country are now regularly streamed via official YouTube channels, and public relations offices have expanded enormously, in the Federal Supreme Court and other courts (Albuquerque 2023, 110–49). The National Council of Justice (Conselho Nacional de Justiça) publishes annual reports detailing institutional goals, data, and budgetary information of the judiciary, as do the national and state courts.

These efforts reflect an understanding of the judiciary as a public service that must transparently and effectively communicate its performance to the society it serves. And, as a bonus, in extreme contexts, controlling a robust social communication structure might serve the purpose of defending courts against populist threats: during Jair Bolsonaro's government in 2019–22, the Federal Supreme Court used its broadcasting channels, including social media profiles, to disprove false claims by Bolsonaro regarding judicial rulings—an unheard initiative of real-time judicial fact-checking of presidential pronouncements.

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Yet, this benign and even socially beneficial form of what might be termed "judicial populism" is not the primary focus of scholars dedicated to this topic. Consistent with prior scholarship, the contributions to this symposium emphasize the risks associated with more extreme forms of judicial populism. These concerns align with the framework proposed by Hilbink, particularly the manifestations situated in the upper-right quadrant of her conceptual schema, where judicial behavior becomes explicitly politicized and strategically oriented toward popular acclaim, representing risks to democracy and the rule of law. The articles by Yasser Kureshi, Lucia Manzi, and Anuj Bhuwania provide valuable insights into such manifestations in different legal and social contexts, identifying enabling conditions that may induce the emergence of the worst faces of judicial populism. Their analyses facilitate the development of explanatory hypotheses that can be tested comparatively across different jurisdictions. In the remainder of this commentary, I will highlight some of these conditions and offer reflections on the specific case of the Brazilian judiciary, with which I am more familiar. By doing so, I aim to contribute to the broader comparative discussion on the dynamics of judicial populism and the complex interplay between judicial institutions and the democratic publics that this symposium addresses.

A key point to consider is the relationship between different constitutional designs and the phenomenon of judicial populism. This issue is exemplified in Anuj Bhuwania's article. His analysis of the Indian case demonstrates that courts operating under constitutions with directive or programmatic provisions may feel compelled to promote social transformations that are typically the responsibility of elected governmental branches. Such courts may be required to undertake more proactive and complex roles than those associated with constitutional courts operating judicial review within a more classical model of constitutionalism, which limits judicial intervention to striking down unconstitutional acts of the executive and legislature. This expanded role necessitates the pursuit of new forms of legitimation, particularly as a response to critiques regarding the democratic deficit inherent to unelected bodies.

The Brazilian Constitution, for instance, contains numerous provisions mandating the reduction of social inequalities and the promotion of administrative morality. A more assertive judicial approach to enforcing these norms has subjected the judiciary, especially the Federal Supreme Court, to recurrent criticism for engaging in matters that are more suited to institutions with representative mandates. To address such critiques, the court has adopted the practice of holding public hearings, during which experts, civil society representatives, and leaders of public and private institutions are invited to present their views on issues where the court is considering decisions with broad social impact (Sombra 2016).

These public hearings mirror analogous proceedings in the Brazilian legislature and serve as a mechanism through which the judiciary seeks to deflect the charge of deciding inherently political questions without being able to engage in public dialogue that is natural to parliamentary processes. However, many scholars have argued that these hearings, aside from being based on problematic factual and normative premises, exert limited influence on the Federal Supreme Court's decisions and open the judiciary to lobbying of the worst kind (Leal, Herdy, and Massadas 2018; Guimarães 2020). As a result, this practice can be criticized as providing merely an appearance of social deliberation that intends to mask the inherently undemocratic nature of judicial decision making. This exemplifies a situation in which the court

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adopted a new procedure—arguably, a mild form of populism—to mitigate critiques of lacking legitimacy but subsequently drove itself into further criticism for the ineffectiveness of that very remedial procedure.

By combining a contextual and cultural analysis, Yasser Kureshi's article draws attention to the fact that crises of legitimacy affecting the powers usually responsible for governing and producing laws create favorable scenarios for the emergence of populist alternatives, in general—and for judicial populism, in particular—where the local legal elite is permeated by an ideology that makes it see itself as more capable of pursuing the public interest. In the Pakistani case, which Kureshi discusses in rich detail, the contextual element stemmed from the permanent clash between political and military elites, who competed for control of the country's government and mutually undermined each other's legitimacy across state institutions ("dissonant institutionalization"). The cultural element, in turn, came from the particular formation of Pakistani elite lawyers, among whom justices of the country's Supreme Court are appointed, who strongly advocate for the judiciary's leadership in matters of public interest.

It is worth highlighting that the scenario described by Kureshi is markedly similar to the Brazilian case, which is surprising given the lack of common elements in the history and formation of the legal systems of both countries. In Brazil, the understanding that the judiciary should assume a leadership role in the country's modernization—in view of the dysfunction of the other branches, historically captured by networks of clientelism, patrimonialism, and corruption—is openly defended by ta former president of the Federal Supreme Court, Justice Luís Roberto Barroso. According to him, constitutional courts not only have a counter-majoritarian role but also a "representative" and an "enlightened" role. The representative role allows courts to "meet social demands not satisfied by the elected branches," establishing direct connections with the popular will, and the "enlightened" role, he says, empowers courts to "promote certain social advances that have not yet gained majority acceptance, but are requirements of civilizing processes" (Barroso 2019, 110). Barroso is not only a justice of the Brazilian Supreme Court, but he is also one of the most influential constitutional law scholars in the country, epitomizing the high-profile social litigation lawyer and law professor of post-dictatorship Brazil. His views are especially appealing to judges: in a recent poll, Brazilian judges singled him out as one of the five most relevant jurists in the country's history (Werneck Vianna, Carvalho, and Burgos 2018, 109).

The idea that the rise of a judiciary's potential "representative" and "enlightened" roles is natural in moments of crisis of legitimacy of the political branches leads to an obvious problem: under certain circumstances, the judiciary itself may be the agent that leads the delegitimization of governments and legislators, creating the very conditions for judicial encroachment over the other branches. Here, another parallel with Brazil clearly arises, but this time with the article by Lucia Manzi. Analyzing the behavior of prosecutors in the Mani Pulite operation—in Italy, prosecutors are members of the judiciary—Manzi demonstrates how the operation was structured around at least two core elements that are characteristic of judicial populism. First, there is the innovative interpretation of criminal law and criminal procedure norms, which created strong incentives for suspects to cooperate with prosecutors. Second, there is the strategy of direct communication with the public, aimed at mobilizing popular support to counteract political resistance to the operation,

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invoking a narrative that readily fits the archetype of the judicial defense of the public interest: the fight against political and corporate corruption.

This illustrates the long arc and the transformations that judicial populism has undergone. From its origins, as studied by Baxi, where the focus was on expanding basic individual rights for the broader population in India, judicial populism has evolved—at least in some contexts—into a rhetorical performance by actors within the justice system aimed at the criminal punishment of high-profile politicians and business figures involved, or allegedly involved, in large-scale corruption schemes. In both instances, these actions are justified in the name of upholding the public interest over legal technicalities. But when judicial populism is practiced in the context of criminal prosecutions, populist judges and prosecutors prey on a legitimation deficit of established political elites to which they contribute, or at least strategically amplify, with their own actions. Public interest becomes hard to distinguish from public spectacle. When this happens, judicial populism calls for extreme scrutiny based not only on the constitutional rights of the accused but also on norms of professional ethics applicable to judges and prosecutors.

Also in this matter, Brazil provides a noteworthy example. The *Lava Jato (Car Wash)* operation is the popular name given to a series of criminal cases that profoundly disrupted the Brazilian political system from 2014 onwards. The sustained political destabilization caused by *Lava Jato* rendered the formation of governing coalitions at the national level virtually impossible in Brazil, especially during President Dilma Rousseff's second term from 2015 to 2016, when the operation peaked. In the name of combating corruption as the supreme expression of the public interest, multiple constitutional and procedural rules were subjected to elastic and innovative interpretations by prosecutors and judges, always to the detriment of the defendants and in opposition to the prevailing views of legal scholars and established precedents.

As Fábio de Sá e Silva (2022) has convincingly shown, Brazilian prosecutors leading *Lava Jato* extensively employed communicative strategies analogous to those used by their Italian counterparts in *mani pulite* (clean hands), a nationwide judicial investigation into political corruption in the early 1990s that led to the collapse of Italy's major political parties, frequently deploying the Manichean rhetoric typical of populist movements across ideological spectrums in their public statements. And similarly to what Kureshi identified regarding the legal culture of Pakistan's elite bar, Silva also observed among Brazilian prosecutors a "legal consciousness" marked by the public delegitimization of elected political elites. Somewhat like *mani pulite*, *Lava Jato* had a melancholic ending. After journalistic reports based on cell phone leaks showed serious and persistent collusion between Judge Sergio Moro and Daltan Dallagnol, the prosecutor of the case, most convictions were overturned by the Federal Supreme Court. Moro and Dallagnol eventually resigned from their positions and became professional politicians in the very same system that they denounced, which remains mostly unchanged. Besides contributing to the prevailing negative view of party politics in Brazil, Moro and Dallagnol's spectacular rise and fall likely contributed to the growing distrust of a judiciary seen as overtly biased and excessively meddlesome in party politics.

Nowadays, the debate on judicial populism in Brazil orbits once again around the Federal Supreme Court and especially Justice Alexandre de Moraes, who gained worldwide attention as the caped wonder that used his judicial powers in a cunning

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and energetic manner to prevent President Bolsonaro from meddling with ballots and stealing the 2022 election. In electoral cases, Moraes, who by coincidence was also the president of the Supreme Electoral Court in 2022, aggressively used the normative powers of electoral justice to establish protocols that ordered social media platforms to promptly remove electoral disinformation. Any attempts to discredit electoral results and interfere in voting behavior were severely punished. In criminal cases, Moraes was also the rapporteur of all cases concerning the failed coup attempt that culminated in the riots in Brasília on January 8, 2023, including the case that convicted Bolsonaro to a twenty-seven-year and three-month prison sentence that he is currently serving. His cutting-edge interpretations of criminal procedure and his aggressive rhetoric both on and off the bench give him the strongman aura that any populist leader would wish for. The fact that this all comes into hand in the struggle of Brazil's Supreme Court against an authentic populist extremist—Bolsonaro—is a warning that populist-like performance, be it in benign or malign form, as Bhuwania points out, is indeed most likely to come into play when courts agree to take on overly ambitious tasks, whether it be ending poverty, eradicating corruption, or defeating political extremism.

References

Albuquerque, G. 2023. *Da lei aos desejos: o agendamento estratégico do STF*. São Paulo: Amanuense.

Arguelhes, D. W. 2023. *O Supremo: entre o direito e a política*. Rio de Janeiro: História Real.

Barroso, L. R. 2019. "Countermajoritatian, Representative and Enlightened: The Roles of Constitutional Courts in Democracies." *American Journal of Comparative Law* 67, no. 1: 109–43.

Baxi, U. 1980. *The Indian Supreme Court and Politics*. Lucknow, India: Eastern Book Company.

—— 1985. "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India." *Third World Legal Studies* 4, no. 6: 107–32.

Guimarães, L. G. 2020. "Participação Social no STF: repensando o papel das audiências públicas." *Direito & Práxis* 11, no. 1: 236–71.

Landau, D. 2018. "Populist Constitutions." *University of Chicago Law Review* 85, no. 2: 520–43.

Leal, F., R. Herdy, and J. Massadas. 2018. "Uma década de audiências públicas no Supremo Tribunal Federal (2007–2017)." *Revista de Investigações Constitucionais* 5, no. 1: 331–72.

Mudde, C., and C. Rovira Kaltwasser. 2018. "Studying Populism in Comparative Perspective: Reflections on the Contemporary and Future Research Agenda." *Comparative Political Studies* 51, no. 13: 1667–93.

Silva, F. S. 2022. "Lava Jato, Social Media Interactions, and the Co-Production of Law's Detraction in Brazil (2017–2019)." *Law & Society Review* 56, no. 3: 344–68.

Silva, V. A. 2018. "Big Brother Is Watching the Court: Effects of TV Broadcasting on Judicial Deliberation." *Verfassung und Recht in Übersee* 51: 437–55.

Sombra, T. L. 2016. "Why Should Public Hearings in the Brazilian Supreme Court Be Understood as an Innovative Democratic Tool in Constitutional Adjudication?" *German Law Journal* 17, no. 4: 657–90.

Werneck Vianna, L., M. A. R. Carvalho, and M. B. Burgos. 2018. *Quem somos: A magistratura que queremos*. Rio de Janeiro: Associação dos Magistrados Brasileiros.

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