Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno XI, n. 1, 2021
data di pubblicazione: 5 aprile 2021

Osservatorio sociale

The Judicial System at the Crossroads of Populism and Elitism

di Giovanni Damele *

SOMMARIO: 1. Penal populism and judicial populism. – 2. Is criminal law inherently populistic? – 3. Judicial populism: between depoliticization and re-politicization. – 4. The "representative" function of the judiciary. – 5. Provisional conclusions.

1. Penal populism and judicial populism

"Penal populism" has become a common expression and a key category among scholars of both political populism and crime and punishment (Shammas 2019, 760). As Victor L. Shammas observes, the term is used "to refer to the ways in which politicians, political parties, and other governing elites present themselves as leading exponents of a politics of 'law and order'" (Shammas 2019, 760). The expression "penal elitism" mainly refers to "a transfer of the power to determine penal outcomes from bureaucrats, judges, and technocratic elites to politicians, legislators, and other representatives of the masses" (Shammas 2019, 760). Due to this

* *Professor auxiliar* presso la Facoltà di Scienze Sociali e Umanistiche della Universidade Nova di Lisbona, titolare dei corsi di Filosofia politica e Filosofia del diritto e dello stato. Contributo sottoposto a doppio referaggio cieco (*double blind peer review*); contributo ricevuto nella versione definitiva il 5 aprile 2021.

shift from a (purportedly) technical discourse to that of electoral struggle and political propaganda, penal populism has been described as a "political force driven more by emotion than rationality" (Pratt 2007, 92).

Two main features of this concept are particularly relevant here. First, penal populism is thought to involve the entire "realm of justice and the rule of law, *the proper application* of laws and the social conditioning that arises from *improper application*" (Anselmi 2018, 73, emphasis added). It follows from this that, rather than being confined to legislative processes (that is, to the "production" of criminal law), penal populism also affects the application (that is, the interpretation) of normative dispositions. *Judicial* populism can be considered a sub-category of the more general category of penal populism inasmuch as it relates to the judicial application of *criminal* law – at least if, following Giovanni Fiandaca, we define judicial populism as an attempt by judges and/or prosecutors to present themselves as genuine "representatives" or interpreters of the real interests and expectations of the people. This attempt is frequently presented according to a logic of the substitution of political power, which is perceived as being isolated from the "legitimate" or "true" interests of the people (Fiandaca 2014, 97, 105).

Second, penal populism is often described as a pathological phenomenon, related to inadequate law-making processes and the improper application of criminal law – a pathology that is ultimately based on a "*distorted* interpretation of the functioning of the justice system on the part of public opinion", which in turn "produces a delegitimization of the rule of law" (Anselmi 2018, 73). As a "manipulation of the objectives of the rule of law", penal populism results in the perversion of the "normal functioning

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno XI, n. 1, 2021
data di pubblicazione: 5 aprile 2021

Osservatorio sociale

of justice" (Anselmi 2018, 74). This common interpretation has been challenged by Shammas, who argues that the theoretical distinction between penal populism and what he defines as "penal elitism" is ultimately based on an ideological bias. According to critics of the phenomenon of penal populism, one of the main factors driving the decline of rehabilitative intent in criminal law is "the steadily declining fortune of rationality and technocracy – a trend that has been evidenced by the (re-)emergence of an emotive, irrational, and mercurial politics" (Shammas 2019, 761).

However, Shammas continues, this distinction between a rational technocratic and a populistic emotive approach is ultimately based on a false dichotomy. It is perfectly possible, according to Shammas, for a technocratic approach to result in the over-criminalization of minor offenses, for instance. On the other hand, the greater involvement of the public in criminal law-making could result in rehabilitative policies. "Under the right circumstances", Shammas observes, "the *populus* can certainly exhibit rehabilitative tendencies". Quoting Johnstone (2000) and Green (2006), he goes on to note that providing the public "with appropriate contextual information may help inform and facilitate a wholly different and more participatory form of penal policymaking", which in turn could result in the implementation of more rational – that is, less intolerant and less repressive – responses to crime (Shammas 2019, 765).

Important questions remain, however. Who defines the "right circumstances" under which the people – or "the *populus*" as Shammas puts it – can "exhibit rehabilitative tendencies"? Who is to provide "the public" with appropriate contextual information? It seems plausible that at least a significant part of this process depends on actions and draws on infor-

mation from political and technocratic (i.e. academic, technical-administrative, etc.) "elites" of some sort. Is there any substantial difference between this and what so-called liberal penal elitists advocate? Or, more importantly, is it possible to discuss criminal law without recognizing the central role played by at least one group of technocratic elites: that which constitutes the "organs of application"? Even in countries where judges or prosecutors are elected, they constitute an elite body: that of the *jurists*, with their own characteristics and self-conceptions. These aspects, as Shammas seems to recognize, are not without relevance to the debate on penal elitism. As Anselmi (quoted above) notes, penal elitism also has something to do with the process of applying criminal law. It is therefore important to recognize the role played by jurists, lawyers, prosecutors, judges, and the like.

Interestingly, Shammas notes that "if the law is inherently undemocratic, it is because it elevates justices or judges to a position of isolated pre-eminence, above and beyond the grasp of the public", and that "the bureaucratization of juridical forms produces the kind of autonomy of action that is intended to be insulated from public pressure and democratic influence" (Shammas 2019, 762). This kind of isolation seems to correspond to a traditional, ideologically positivistic[1] self-representation of judges as mere "technical executors" of a "law" that comes from elsewhere. As we will see, however, it can also easily correspond to an alter-

[1] For the distinction between ideological, methodological ed theoretical positivism see Bobbio (2014).

native (although related) representation of the judge as a "priest of justice" (*Priest der Themis*)[2], where the word "justice" should not be read as a synonym for "legal order" (in a positivist fashion) but in its original sense of a set of pre-positivist values and principles, the correct interpretation and translation of which, in the form of judicial decisions, is the real task of judges. This second interpretation of the role of the judge can be translated – in a "populistic" fashion, as it were – into a self-representation on the part of the judge (or the public prosecutor) as a genuine defender of the "true" interests of "the people", or at least of the majority.

Before addressing this topic, however, I would like to consider another aspect that seems to be somewhat implicit in Shammas's reconstruction. Is there something characteristically "populistic" about the process of law-making and judicial application in the field of criminal law? In other words, is criminal law inherently populistic?

2. Is criminal law inherently populistic?

From Shammas's perspective, the question whether criminal law is inherently populistic is already marked by ideological bias. The term "populism", we are told by Shammas, is increasingly used to lend a "veneer of scientific legitimacy", a "halo of respectability", to an ultimately derogatory view of certain political ideas, movements, parties and politicians (Shammas 2019, 766). In other words, according to Shammas, use of the

[2] For the self-representation of the judge as a "priest of justice" see Luminati (2007).

(otherwise underspecified) notion of populism serves to legitimate ideological opposition to various political phenomena, lending a purely subjective value judgement the appearance of objectivity. This critique is to some extent justified. Nevertheless, I will use this notion – "penal populism" – for the sake of argument, in order to understand why certain social phenomena have so frequently been associated with law-making and application processes in the field of criminal law.

Like "populism" in general, "penal populism" is commonly associated with irrational, passionate, emotive behaviour. Recent texts that make use of this phrase – particularly in mass communication media – seem to echo the stereotype of the "irrational crowd", which was common to the literature on "social psychology" (or the "psychology of the masses") that flourished in the late nineteenth and early twentieth century. The current academic literature would seem to partake in this cliché, at least in part. As Shammas recalls, "penal populism is predicated on what Daniel Defoe, in an earlier age, termed 'the rage of the street'", which in this case supplants "the (putatively) reflective, restrained, and rehabilitation-oriented disposition of rational, reasonable elites who were (so the story goes) previously tasked with shaping the field of crime control in past times". This is certainly a crucial commonplace, even though it is important to note that to attribute the somewhat simplistic idea of the existence of "rational, reasonable elites" to classic elitists (Pareto, for instance) would be to commit the "straw man" fallacy. Even with their methodological limitations and their ideological biases, these authors were well aware of the irrational dimension of the behaviour of elites. Thus, particularly in academic literature, the "elitist" approach has not been as naïve

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno XI, n. 1, 2021
data di pubblicazione: 5 aprile 2021

Osservatorio sociale

as Shammas seems to suggest. In any case, this topic is not directly addressed by him and is irrelevant to our purposes.

Let us therefore assume the existence and relevance of this commonplace, apparently shared to some extent by so-called "penal elitists". According to this reconstruction, the passions and the emotions of the masses, skilfully manipulated and translated into electoral programs by demagogues, ultimately distort a central tenet of the rule of law in Western countries – that is, the rehabilitative aim of punishment – on the contrary favouring a "restorative and reparative" understanding of criminal law (Anselmi 2018, 76). Thus, we may ask: why is this commonplace so common? Why – again quoting Shammas – "does it seem permissible, sensible, and perhaps even self-evident, that prisons and punishment should be taken out of the democratic process when other policy areas, such as education, foreign policy, and taxation, seem so obviously a part of what the voting public should have a say in influencing?" The answer, according to some authors, is that this is due to the inner vindictive nature of criminal law. For this reason, some authors (including some who belong to the liberal democratic tradition) have argued that criminal law – together with foreign policy – should be shielded from democratic pressures.

Let us consider a quotation that Shammas would view as an example of penal elitism. In his classic *Capitalism, Socialism and Democracy*, Joseph Schumpeter argued that there are matters for which the parliamentary vote should have a purely "formal" or "supervisory" nature, "otherwise the democratic method may turn out legislative freaks". One of these is precisely "the case of so bulky and so technical a measure as a criminal

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno XI, n. 1, 2021
data di pubblicazione: 5 aprile 2021

Osservatorio sociale

code". On Schumpeter's view, the democratic method may apply to certain general questions ("whether or not a country is to have such a codification at all", for instance), "but for the rest, government and parliament will have to accept the specialists' advice whatever they may think themselves". Given the complexity of crime as a phenomenon, Schumpeter continues, "popular slogans about it are almost invariably wrong", and "a rational treatment of it requires that legislation in this matter should be protected from both the fits of vindictiveness and the fits of sentimentality in which the laymen in the government and in the parliament are alternatingly prone to indulge" (Schumpeter 1996, 292).

"Fits of sentimentality" are common in every field of political life. "Fits of vindictiveness" typically seem to affect criminal policies, however. Both, Schumpeter suggests, are particularly dangerous as far as criminal law is concerned. But is there something in criminal law that justifies Schumpeter's concerns?

As René Girard acutely noted, a vindictive dimension is inherent in criminal law. Thanks to the adoption of judicial systems, societies were able to break the "vicious circle" of vengeance characteristic of (in Girard's words) "primitive societies". However, the judicial system "does not suppress vengeance; rather, it effectively limits it to a single act of reprisal, enacted by a sovereign authority specializing in this particular function". According to this interpretation, at least originally, "the decisions of the judiciary are invariably presented as the final word on vengeance". In order to understand this original dimension, Girard continues, "vocabulary" is more revealing than "judicial theories". The expression "private vengeance", frequently used to refer to revenge, implies the existence of a "counterpart never made explicit": public vengeance. And

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno XI, n. 1, 2021
data di pubblicazione: 5 aprile 2021

Osservatorio sociale

public vengeance is precisely what our "well-policed societies" call the judicial system. There is no real conflict in our penal systems between the principles of justice and the concept of revenge. Resorting to another lexical reference, Girard notes that "he who exacts his own vengeance is said to 'take the law into his own hands'". Thus, the difference between private and public vengeance is not a difference in principle but an (enormous) difference at the social level. In a judicial system, "an act of vengeance is no longer avenged", and the "danger of escalation averted". This explains why the victim no longer plays a central role in criminal trials. Paraphrasing Girard, we might say that the judicial system takes vengeance into its own hands, taking it away from victims and thus averting the danger of escalation (Girard 1972, 15-16).

Liberal societies have gradually rationalized criminal policies and translated their vindictive origins into rehabilitative programs. But we cannot erase the emotions that are linked to the original, intuitive function of penal sanctions. Moreover, this emotive dimension may also explain the relation between penal and judicial populism, which ultimately intersects with the prosecutorial function. Indictment and conviction are what really matter when it comes to the process of applying criminal law, not the verdict itself. This also explains why populists generally identify the state with its prosecutorial function (Corso 2019, 482).

But there is more. Giovanni Fiandaca, addressing the notion of the "inherent populistic" nature of criminal law, suggests that this intrinsic emotive dimension may also be based on the proximity of criminal law to the communitarian dimension and a given society's identity. Quoting Georg Jellinek and his concept of law as an ethical minimum (*ethisches Minimum*), Fiandaca stresses the symbolical function of criminal law, which is

justified by its crucial role in defending the community against its enemies – criminals – who have ultimately excluded and isolated themselves from the *social consortium*. From this perspective, according to Fiandaca, criminal law has an inevitably "polemological" dimension, providing the community with criteria for distinguishing between friends and enemies. This perspective can in turn help to explain why phenomena that we define as belonging to "judicial populism" (according to the definition quoted above) are particularly important as far as macrosocial phenomena are concerned, that is, phenomena that have a "communitarian" dimension (such as organized crime and political corruption) or, more generally, phenomena that are (or are presented or perceived as being) a threat to the community as a whole (Fiandaca 2014, 97).

3. Judicial populism: between depoliticization and re-politicization

We have defined judicial populism – following Fiandaca (2014) – as an attempt by judges and/or prosecutors to present themselves as genuine representatives and defenders of the "real" interests and values of the people. This definition may be somewhat surprising given that in many liberal democratic countries, judges and prosecutors are not elected officials. However, this apparent contradiction should be reconsidered in the light of the ambiguous relationship between the judicial system and certain political movements that are commonly described as "populist".

Politicians can use "the law" instrumentally in many different ways. Three main instrumental uses are relevant here. First, the instrumental use of juridical issues on the part of certain political candidates (Anselmi

2018, 74) can directly affect the judicial system. The skilful manipulation of public perception of crime in order to generate political consensus, for instance, is one example of penal populism (Anselmi 2018, 74). From this viewpoint, populist politicians can seek direct dialogue with public prosecutors. Second, the instrumental use of the judicial system can also assume the form of a "scapegoating" strategy which targets the courts and the judicial system in general. As Werneck Arguelhes notes, the courts – and the high courts in particular – are typically seen as victims of populist politics precisely because they are "staffed" by non-elected elites or – even worse – by elites appointed by previous administrations (Werneck Arguelhes 2017a). Furthermore, populists are frequently described "as impatient with procedures and institutions, and as ill-disposed to intermediary bodies" and to the separation of powers, "as they prefer unmediated relations between the populist ruler and the people" (Corso 2019, 485). Finally, populism is often described as a reaction to an excess of judicialization in constitutional law (Corso 2014, 443). In this scenario as well, the courts and judges usually play the role of victim.

We will return to the first instrumental use and to the possibility of indirect or direct dialogue between (some) politicians and (some) public prosecutors. Let us first consider the case of the courts and judges as victims of populist politics. This strategy can clearly prompt a direct reaction from judicial powers. As Werneck Arguelhes convincingly argues, courts may try to preserve their authority by "adjust[ing] their decisions to trends in public opinion, or perhaps 'go public' and speak out to the people, adopting public relations strategies to make it harder for politicians to ignore or retaliate against their decisions" (Werneck Arguelhes 2017a; Bassok 2016; Staton 2010). This strategy may increase what has been

called "the ambivalent stance of populism *vis-à-vis* the phenomenon of the judicialization of politics" (Corso 2019, 481). Moreover, in cases of increasing dissatisfaction with representative institutions, Werneck Arguelhes notes, "courts might actively pursue a populist path themselves and claim to speak for the people" (Werneck Arguelhes 2017a). In doing so, courts can play a crucial role in what we might describe as a "conflict between elites": between the institutionalized, sclerotized, "established" political elite – the target of public dissatisfaction – and the new, rising, "populistic" elite. From the viewpoint of the latter, their relationship with the judicial system can be characteristically ambivalent. As Corso notes, "on the one hand, lawyers and jurists are perceived as part of an elite that should be opposed, populism, on the other, also has roots in the judicialisation of politics" (Corso 2019, 481).

Furthermore, according to Werneck Arguelhes (echoing Fiandaca), courts themselves can adopt "the populist vocabulary", claiming "to represent and vindicate current majority sentiment against corrupt establishment politicians".

Italy in the 1990s and Brazil in the second decade of the twenty-first century can be seen as classical examples. The parallels between the two cases are evident: Sérgio Moro, a former federal trial judge and leading figure of the "Lava Jato" ("Car Wash") Operation, then Minister of Justice in the Bolsonaro administration[3], explicitly linked the two operations in a well-known and frequently quoted article: "Mani Pulite" and "Lava Jato" (Moro 2004). Part of this parallelism has been based on the necessity, for

[3] Sérgio Moro resigned on 24 April 2020 after a political disagreement with President Jair Bolsonaro.

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno XI, n. 1, 2021
data di pubblicazione: 5 aprile 2021

prosecutors and judges acting in the field of political corruption and white-collar crime, of seeking and maintaining support from public opinion in order to resist opposition stemming from political powers. Thus, Brazil and Italy represent two examples in which, in the words of Fiandaca (2014), "judicial populism" can be the result of an evident crisis of the traditional party system.

In both Italy and Brazil, the key role played by the judicial system is evident. In both countries, judicial inquiries have shaken the political system. In the Italian case in particular, this has led to a breakdown of the political center and to a complete reconfiguration of the political landscape. In the case of Brazil, key figures in the main political parties (including former president and leader of the *Partido dos Trabalhadores* Lula da Silva) have been accused or convicted of corruption.

Systematic judicial inquiries into political corruption can have both short- and long-term effects. These effects are of two types. On the one hand, they shape how prosecutors act against corruption. In particular, prosecutors can pursue direct interaction with public opinion for two main purposes: (indirectly) influencing anti-corruption legislation and weakening the (powerful) position of investigated politicians. They can also shift investigation strategies in order to overcome major obstacles to providing legal evidence, sometimes choosing to deflect attention away from the evaluation of facts to a narrative focused on the identity of the defendant. On the other hand, as the traditional political system loses legitimacy, the judicial system gains legitimacy as the only public power that can solve the problem of (endemic) corruption. This situation can be destabilizing, causing the political system to collapse and paving the way for populist, or even authoritarian, tendencies.

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno XI, n. 1, 2021
data di pubblicazione: 5 aprile 2021

In this process, as noted above, judges and public prosecutors may find it useful "go public" in order to resist the "political establishment", which is targeted by anti-corruption operations. This strategy can be developed in two different but compatible ways: a) a direct appeal to public opinion, and b) dialogue with "anti-system" parties and/or outsider candidates. In both cases, the goal may be to put pressure on the traditional political system. Judges and/or prosecutors can present themselves "as channeling popular sentiment and speaking for the *true interests of the people*" (Werneck Arguelhes 2017a; 2017b).

There are many examples of this strategy and this self-representation. In Brazil, prosecutors, judges and supreme court justices frequently used the mass media to reach a wider audience directly, their interviews often making headlines in the national newspapers. In Italy, a good example is the frequently quoted statement made by Francesco Saverio Borrelli, chief prosecutor of Milan and one of the leading figures of the "Mani Pulite" operation: "when people applaud us, they applaud themselves" (Giglioli, Cavicchioli & Fele 1997, 27).

Interestingly, this dialogue between judges and prosecutors on the one hand and public opinion on the other is ambivalent in a further sense. It can be interpreted both as a process of depoliticization and as a process of re-politicization (using these expressions in their broader meaning). From the first perspective, a crucial political issue, the problem of dissatisfaction with the establishment, is translated into a matter of criminal law. The judicialization of politics, in this case, means that political issues are treated as legal ones. From the second perspective, this phenomenon can be described in terms of the politicization of the judicial system, not

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno XI, n. 1, 2021
data di pubblicazione: 5 aprile 2021

Osservatorio sociale

in the ordinary partisan sense of the term but in a broader sense. The judicial system becomes either an actor or a partner of other actors in the political arena. Again, the cases of Italy and Brazil are exemplary: in both countries, the judicial system has played a major role in transforming the political system – by judging it, as it were.

4. The "representative" function of the judiciary

One last point remains. How can judges and/or prosecutors claim to represent the "will of the people" if they are independent and, generally speaking, non-elective officials? As Diego Werneck Arguelhes argues persuasively, the fact that "judges do not need to make claims to represent the people to keep their office or maintain their authority" does not necessarily mean that they will refrain from doing so. The two examples quoted above are quite significant in this regard. In both cases, the leading figures of the two operations – Sérgio Moro in the Brazilian case and Antonio Di Pietro in the Italian case – have entered into politics. And even if Moro's function as Minister of Justice in Bolsonaro's government was generally presented by him and his supporters as a technical role, he is now a major player in the Brazilian political arena. It is no surprise, then, that his key role in Bolsonaro's government (the main adversary of Lula's *Partido do Trabalhadores*) has cast a shadow over his previous neutrality. In any case, these examples show that individual reputation is not limited to a judge's institutional role but can also be connected to extrajudicial goals, such as running for office in the future (Falcão & Osório 2016).

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno XI, n. 1, 2021
data di pubblicazione: 5 aprile 2021

In order to achieve these extrajudicial goals, judges and public prosecutors may resort to two main channels of communication. One of these is the motivation for their decisions. One of the key points in the contemporary development of rhetorical and argumentation studies is the idea, stressed by Perelman and Olbrechts-Tyteca, that an "orator" can have more than one "particular audience". A "particular audience", according to them, is constituted by the individuals whom an orator wishes to persuade in a given context (Perelman & Olbrechts-Tyteca 1971, 28-31). Different audiences can have different hierarchical orders, from the perspective of persuasive strategy. For instance, one's "direct audience" (the audience that is "directly" addressed by the orator) can be less important than one's "indirect audience" – the persuasion of whom, although they are not actually present, is crucial from the orator's viewpoint. Thus, for instance, a lawyer may consider it more useful – for many reasons – to persuade public opinion or a part of the political system than the jury or judges. He may believe that pressure from public opinion or the political system is crucial to obtaining a verdict that is favorable to his client's interests. The same holds when it comes to the motivation behind legal decisions. The main audience, the superior instance, the legal community, etc., may not be perceived by the orator/author as having priority.

In an attempted analysis of the motivation behind Sérgio Moro's condemnation of former Brazilian President Lula da Silva, Mance (2017) aims to reveal key argumentative fallacies in crucial passages from Sérgio Moro's argument. In some cases, what he reveals are common *non sequiturs*; in other cases, they could constitute violations of processual rules that, if recognized as such, ought to be sanctioned (e.g. inversions of the burden of proof). In other cases, and most interesting for our purposes,

they could constitute informal fallacies (such as *ad hominem* attacks) that play the rhetorical role of reaching a larger audience.

As Diego Werneck Arguelhes (2017a) notes, these strategies are perfectly understandable when we distinguish between individual and institutional interests. Since these interests can diverge, a judge, considered as an individual, can play a role that, from an argumentative point of view, differs from that of the institution he represents. For this reason, persuading an audience other than the institutional one (the jury, appellate judges, etc.) can be part of a judge or public prosecutor's individual strategy (Baum 2009).

As we saw above, these individual goals can also be promoted without resorting to actual judicial decisions. This is the second channel of communication. Judges and public prosecutors may seek direct contact with the press, use social media as an individual channel of communication, or directly address the public through public rallies or symbolic acts. Judges can also exploit procedural rules in order to increase the public impact. This is particularly evident in the Brazilian case, where supreme court judges have agenda-setting power (Arguelhes & Hartmann 2017).

In all of these cases, and especially in situations of political/institutional crisis, we can observe a common strategy: an attempt, on the part of judges and/or prosecutors, to present themselves as genuine "representatives" or interpreters of the true interests and expectations of the people. This attempt is frequently presented according to a logic of substitution of political power. Following Fiandaca's definition, we might define this behaviour, *faute de mieux*, as "judicial populism".

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno XI, n. 1, 2021
data di pubblicazione: 5 aprile 2021

Osservatorio sociale

5. Provisional conclusions

As suggested above, the two phenomena commonly referred to as "penal populism" and "judicial populism" may share many crucial features. While "penal populism" is commonly related to the process of law-making, "judicial populism" clearly has to do with the application of the law. Addressing the topic of "destatisticalization" (that is, "the tendency to discuss criminal and security issues while totally disregarding statistical data"), Anselmi notes that it "shows the deep rhetorical nature of penal populism, as it subordinates the arguments on juridical matters in public discourse to the needs of social and political consensus" (Anselmi 2018, 75). Social and political consensus is not irrelevant to judges, especially in the context of judicial investigations that target macro-social or macro-political phenomena like organized crime or systemic political corruption. To some extent, this research on consensus may be perfectly legitimate. Especially in these cases, judges and public prosecutors are always political actors in the broad sense of the term. It would be better to recognize this inevitable political function rather than concealing it with an ideological representation of the judge as a *bouche de la loi*.

As discussed above, this attempt to establish a direct relation to public opinion may be solicited within the environment of the application of criminal law, characterized, in some cases, by a strong emotive dimension (linked to its "vindictive" origin) and to its proximity to the fundamental values of a given community.[4] This context may increase the political

[4] From this viewpoint, constitutional law can also represent a "sensitive" environment. I will not address this topic in this paper, however.

function of the judiciary, giving it, in the context of political and institutional crises, a populist nuance. Thus, both the language and the function of the judiciary can assume a characteristically moral nuance, which corresponds to an image of the judiciary as an agent of moralization, precisely because of its independence and its (purportedly) apolitical nature.

Nevertheless, this political function ultimately shows that what is frequently reconstructed as a radical dichotomy in which the "people" struggles against the "elite" is, in fact, a struggle among elites. From this viewpoint, judicial populism is located at the crossroads between penal populism and penal elitism: it shares with penal populism a claim to speak for the people, but this claim is clearly advanced by a technocratic elite. In some cases, in fact, it can even assume a paternalistic character.

In seeking direct contact with public opinion, judges and public prosecutors may present themselves as the "genuine" representatives of the will of the people. This move has crucial political consequences. With it, the judiciary clearly assumes a "substitutive" role. In the context of political and institutional crisis, however, it also frequently plays an ancillary role, aligning itself with anti-system and anti-politics parties. These political movements can make instrumental use of the judiciary. The opposite can also be true, however: if not the judiciary as a whole, then at least certain of its members can make instrumental use of these political movements. This can stem from both judicial (gaining public support in the judicial fight against corruption and organized crime) and extrajudicial (that is, purely individual) motives.

Bibliographical References

Anastasia, S., M. Anselmi, D. Falcinelli (2015), *Populismo Penale: Una Prospettiva Italiana*, Milano: Cedam.

Anselmi, M. (2018), *Populism: An Introduction*. Abingdon and New York, Routledge.

Bassok, O. (2016), *The Supreme Court at the Bar of Public Opinion Polls*. Constellations, 23 (4): 573-584.

Baum, L. (2009), *Judges and their audiences: A perspective on judicial behavior*. Princeton: Princeton University Press.

Bobbio, N. (2014), *Giusnaturalismo e positivismo giuridico*. Roma-Bari: Laterza.

Corso, L. (2019), *When Anti-Politics Becomes Political: What can the Italian Five Star Movement Tell us about the Relationship Between Populism and Legalism*, in *European Constitutional Law Review*, 15, pp. 462-487.

Falcão, J., L. Osório (2016). *A futura atividade político-partidária e a responsabilidade ética do magistrado*, in *Revista USP*, 110, pp. 55-64.

Fiandaca, G. (2014), *Populismo politico e populismo giudiziario*, in *Criminalia 2013*, pp. 95-121.

Giglioli, P.P., S. Cavicchioli, G. Fele (1997), *Rituali di degradazione. Anatomia del processo Cusani*. Bologna: il Mulino.

Luminati, M. (2007), *Priester der Themis: richterliches Selbstverständnis in Italien nach 1945*, Frankfurt a.M.: Klostermann.

Mance, E. (2017), *Falácias de Moro. Análise Lógica da Sentença Condenatória de Luiz Inácio Lula da Silva*, Passo Fundo: IFIBE.

Moro, S. (2004), *Considerações sobre a operação mani pulite*, in *Revista CEJ*, 8 (26), pp. 56-62.

Perelman, Ch., L. Olbrechts-Tyteca (1971), *The New Rhetoric. A Treatise on Argumentation*, Notre Dame-London, University of Notre Dame Press.

Shammas, V.L. (2020), *Penal Elitism: Anatomy of a Professorial Ideology*, in *Critical Criminology*, 28, pp. 759-774.

Staton, J.K. (2010), *Judicial power and strategic communication in Mexico*, Cambridge: Cambridge University Press.

Werneck Arguelhes, D. (2017a). *Judges Speaking for the People: Judicial Populism beyond Judicial Decisions*, in *VerfBlog*, 4th May, available on https://verfassungsblog.de/judges-speaking-for-the-people-judicial-populism-beyond-judicial-decisions/.

Werneck Arguelhes, D. (2017b). *Um Supremo que não erra*. In O. Vilhena Vieira, R. Glaezer (eds.). *A Razão e o Voto: Diálogos Constitucionais com Luís Roberto Barroso*, São Paulo: Saraiva, pp. 81-107.

Werneck Arguelhes, D., Hartmann, I.A. (2017). *Timing Control Without Docket Control: How individual Justices shape the Brazilian Supreme Court's agenda*, in *Journal of Law and Courts*, 5 (1), pp. 105-140.

Werneck Arguelhes, D., L.M. Ribeiro (2015). *O Supremo Individual: Mecanismos de atuação direta dos ministros sobre o processo político*, in *Direito, Estado e Sociedade*, 46, pp. 121-155.

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno XI, n. 1, 2021
data di pubblicazione: 5 aprile 2021

Osservatorio sociale

Abstract

The Judicial System at the Crossroads of Populism and Elitism

"Penal populism" has become a common expression and a key category among scholars of both political populism and crime and punishment, and it is often opposed to the concept of "penal elitism". "Judicial populism" can be considered a sub-category of the more general category of penal populism inasmuch as it relates to the judicial application of criminal law. Also in this case we may observe a dialectic between "populism" and "elitism". The judiciary, for instance, can be presented as an agent of moralization, because of its independence and its (purportedly) apolitical nature. Thus, judicial populism is located at the crossroads between penal populism and penal elitism: it shares with penal populism a claim to speak for the people, but this claim is clearly advanced by a technocratic elite.

Keywords: penal populism; penal elitism; judicial populism; judicialization of politics; politicization of judiciary.