

When talking about militant democracy, let's focus more on judicial craft

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Courts deciding with a consistent, comprehensive reasoning, alongside sensitivity to broader contexts, and a germ of creativity are important for the success of party bans.

Militancy and democracy seem to be intertwined more intimately than ever. Analyzing this relationship is challenging, as both concepts have countless interpretations. Among others, partisan polarization and the spread of disinformation particularly via social media fuels the *militarization of language*, marked by calls to 'fight enemies' of democracy—who, as worldwide measures show, thrive in most places.

Unsurprisingly, 'militant democracy' retains its conceptual appeal in this environment. It towers over its less offensive conceptual alternatives ('self-protecting constitutional state' or 'defensive democracy') and gives rise to spin-offs that consider, for example, executive term limits as a 'militant' measure ('militant constitutionalism') or enable 'a principled reinterpretation of rule of law precepts' ('militant rule of law'). Despite a rich array of normative arguments debating, for instance, whether the infringement upon association rights for members and supporters of a banned party that opposes democracy can, under any circumstance, offset the risks that party poses for democracy, and some empirical work, there is less emphasis on the mechanisms of militant democracy—for example, how the pathways through which a party bans come about shape the impact of these very decisions. This post makes the case for such a focus, both analytically and with an empirical illustration from Czechia and Slovakia, two similar jurisdictions with different experiences with party bans. Thereby, it aims to foster critical debate on the endogenous resources of courts to adjudicate party ban cases. Courts can amass these resources themselves (see 'Minimizing violence' below).

Courts make a difference

Through party ban cases, courts shape the capacity of democracy to defend itself. Acknowledging that these are elusive concepts, party ban cases may strengthen democracy *regardless* of whether a particular party gets banned or not—a frequently overlooked phenomenon.

What does this mean? The starting point is the linkage between democracy and justification, emphasized by several scholars. Without justifying political decisions, there is no democracy. Moreover, justifications need to be persuasive in that reasonable individuals can recognize their value, even though they might disagree about their substance.

Banning a party is a heavy restrictive measure, which is not to be taken lightly in a democracy—a democracy would hardly be seen as functioning if it was banning parties (or even initiating party ban proceedings) as often as, for example, issuing ministerial decrees on specialized policy concerns. While party bans may be initiated by various actors depending on jurisdictional specifics, it would be unimaginable that, in a democracy, a ban could be implemented without review option by a(n independent) competent court. The initiators of a ban, the defendants (the party that faces the ban) and third parties may bring many arguments, but in the end, it is the judicial decision that carries the day. If we are to believe Cover, such decisions are violent acts. If the party is banned, its supporters feel to have had their freedom suppressed. If it is not banned, some of its opponents feel that by allowing the party to function, its often exclusionary or discriminatory rhetoric and practices have been legitimized.

Minimizing violence: the centrality of justification

To minimize the above feelings and maximize the acceptance of its decision, the court needs to take great care in explaining why it decided (not) to ban the party. In turn, a framework that helps assess the degree of this care is useful for determining how the party ban fared as a case intended to strengthen, rather than constrain democracy.

Hence, building on existing scholarship on 'judicial craft' spearheaded by Herbert Kritzer, my framework identifies endogenous resources available to courts to strengthen democracy when adjudicating party ban cases. It identifies four types of mutually related resources: 'consistency', meaning that a given judgment makes sense from the perspective of previous case law; 'skills of reasoning and judgment' beyond merely showing that the judgment is in line with the practice, for example, by demonstrating engagement with a broad range of knowledge sources on the subject matter; 'problem solving', where it is essential to recognize the broader social contexts including by mastering social science or broadening the pool of external experts with access to courts to present their analytical perspective; and, most elusively, 'creativity' as the ability to go beyond the routine and come up with original solutions suited to the complex challenges posed by party ban cases.

The framework is sensitive to formal legal regulation (constitutional, statutory and sub-statutory provisions). It recognizes that, in a conventional party ban case, there might be a broader but also a narrower range of options available to a court. Instead of a version of Hamletian 'to b(an) or not to b(an)', the regulatory framework might encourage, among others, suspension before a ban, various regulations on the consequences of a ban for individual MPs affiliated with that party, or the possibility to submit a petition for judicial review of a ban to the constitutional court (provided this court does not decide in the first instance).

In principle, the more options a court has to choose from, the more actors can be involved in the case and the more avenues of review of a decision exist, the more complex can the case be in terms of justifying the option the court chose. This, however, also brings a

greater range of tools that may be used; for example, to suspend some operations of an antidemocratic party instead of either outright banning it or allowing it to continue functioning without sanction.

The factual material that is invoked (for example, expert witness statements) may increase the complexity of the case, but even without considerable factual material there is hardly an 'easy' party ban case.

A Central European illustration

The significance of 'judicial craft' may be illustrated on cases from Czechia and Slovakia between 1989–2022. These jurisdictions have a record of party ban cases. Moreover, they carry a legacy of antidemocratic regimes, especially the Slovak state of 1939–1945 which allied with Hitler and the state socialist Czechoslovakia of 1948–1989. Slovakia, in addition, has become more of a media frontrunner as one of the two EU member states with obvious de-democratizing tendencies, the other one being Hungary which, however, did not adjudicate a regular party ban in this period.

Contrasts between successful and failed bans in terms of what adjudicative resources were demonstrated when the cases were decided upon may be identified between Czechia and Slovakia with two marginal far-right parties, the Workers' Party (Czechia) and the Slovak Togetherness (Slovakia), and one more prominent parliamentary party, the People's Party Our Slovakia. The first one of the two Czech Workers' Party judgments by the Czech Supreme Administrative Court declined to ban the party, mainly because there was insufficient evidentiary basis offered to the Court by the petitioner. Nevertheless, its detailed decision clarified the conditions for party bans in the Czech legal system. For example, the imminent character of the threat to the 'democratic rule-of-law state' needs to be shown not only being evidenced by a few anti-minority demonstrations, but with a more comprehensive analysis of the public communications of the key party representatives that must show their affinity to authoritarian (such as neo-Nazi) thinking.

This decision prompted a renewed petition against the Workers' Party, upon reviewing which the party was indeed banned. Despite the two opposite verdicts, they together show the judicial craft of this Court in taking the issue seriously and offering detailed justifications immersed in understanding of party bans. Furthermore, the decisions facilitated a dialogue with and were enriched by insights from various disciplines including history and sociology.

The Slovak Supreme Court struggled to achieve a similar result; although it did deal with a party ban case earlier than its Czech (administrative) counterpart. In 2005, it notably banned the marginal Slovak Togetherness, but with a superficial justification that offered limited inspiration in reasoning at best. It did not engage with broader historical and social contexts and did not display sensitivity for offering guidance for future, possibly more complex party ban cases. This came back haunting in 2019 when adjudicating a petition

to ban the, at that time popular and parliamentary successor of Slovak Togetherness, People's Party Our Slovakia. The Court diverged from the earlier standard for party bans with no explanation of the inconsistency. Though demonstrating greater sensitivity in justifying its verdict, it missed some authoritative jurisprudential references, did not consult external experts and did not appear to aspire to clarify the functioning of party bans in Slovakia's legal system *pro futuro*.

Courts which care

While the Czech and Slovak illustrations are not generalizable, they indicate the viability of focusing on judicial craft, and amount to a call on (independent) courts to adjudicate with great care any party ban petitions that reach them. Such care comes across not only in terms of narrow or formal legal interpretation, but also by including a broader range of stakeholders (such as social scientists as expert witnesses) to assess the social impacts of the party in question, and creativity encompassing a forward-looking perspective. After all, the party ban the court adjudicates may not be the last one tomorrow.

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