Militant Democracy, Populism, Illiberalism

The Role of Judicial Craft in Improving Democracy's Resilience: The Case of Party Bans in Czechia, Hungary and Slovakia

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The unsuccessful petition to ban Slovakia's extreme right parliamentary party – the value of focusing on judicial craft for studies of militant democracy and courts – statutory frameworks as intervening variables and their overview in Czechia, Hungary and Slovakia – key components of judicial craft endogenous to courts: consistency, legal reasoning skills, problem-solving abilities, creativity – the cases of Workers' Party (Czechia), Slovak Togetherness–National Party (Slovakia), People's Party Our Slovakia (Slovakia) and Hungarian Guard (Hungary) – the decisions of the Czech Supreme Administrative Court (2009) and the Slovak Supreme Court (2019) – re-evaluating what counts as 'success' with party bans: judicial craft affects the effectiveness of the statutory framework for party bans – a court-centric perspective on militant democracy when courts face illiberal assaults

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Introduction

'Democracy is one of the gravest threats to democracy'.[1]

In April 2019, a senate of the Slovak Supreme Court delivered the most notable party ban verdict in Slovak history.[2] The case involved the extreme-right People's Party Our Slovakia (PPOS), which celebrated a surprising success in the 2016 parliamentary elections and became a concern to state authorities due to its anti-minority rhetoric and its flirting with allegiance to the wartime Slovak state, whose leaders took part in the Holocaust on Slovak territory.[3] The PPOS leader, Marian Kotleba, was not new to party bans, as he was a key protagonist of the only other party ban case adjudicated by Slovak courts, that of the (electorally marginal) Slovak Togetherness–National Party (STNP).[4] Established in 2010, the PPOS is a successor of STNP, with Kotleba a central figure for both.

In 2017, the attorney general submitted a petition to ban PPOS, citing the above concerns. Yet, although in 2005 the Supreme Court decided to ban the STNP, Kotleba's defence of the PPOS was successful. The Court decried the lack of evidence submitted in support of banning the PPOS. Indeed, the petition offered little 'untainted evidence';[5] it scarcely addressed the PPOS' parliamentary activity, numerous media appearances and its leaders' operation in the Slovak party system for almost a decade.[6] Moreover, it erroneously claimed that 'in the National Council [the Slovak Parliament], the PPOS is in isolation because of its political positions'.[7] At the time the petition was submitted, some coalition

[1]A. Sajó, 'Militant Constitutionalism', in A. Malkopoulou and A. Kirshner (eds.), *Militant Democracy and Its Critics: Populism, Parties, Extremism* (Edinburgh University Press 2019) p. 187 at p. 187.

[2]Supreme Court of the Slovak Republic, 4 Volpp/1/2017 (2019).

[3]E.g. Bertelsmann Stiftung, *BTI Country Report: Slovakia*, ⟨https://bti-project.org/content/en/downloads/reports/country_report_2020_SVK.pdf⟩; A. Kazharski, 'The End of "Central Europe"? The Rise of the Radical Right and the Contestation of Identities in Slovakia and the Visegrad Four', 23 *Geopolitics* (2018) p. 754.

[4]M. Colborne, 'Marian Kotleba Wants to Make Slovakia Fascist Again', *Foreign Policy*, 2020, ⟨https://foreignpolicy.com/2020/02/28/marian-kotleba-slovakia-election-right-wing-fascism/⟩.

[5]M. Hailbronner, 'Combatting Malfunction or Optimizing Democracy? Lessons from Germany for a Comparative Political Process Theory', 19 *I•CON* (2021) p. 495 at p. 510.

[6]The petition was generally limited to references to party documents and selected statements by key party representatives alongside an expert witness statement from a different case prepared by the author of this article: Petition of the attorney general of the Slovak Republic, VI/2 Gc 137/16/1000 – 97, 2017, available at ⟨https://www.scribd.com/document/408062884/Znenie-%C5%BEaloby-na-rozpustenie-%C4%BDSNS#download&from_embed⟩, p. 3, 9, 11, 14, 15, 17.

[7]Petition, *supra* n. 6, p. 2.

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parties had voted with PPOS, and later collaborated more systematically.[8] A former Slovak Prime Minister tried (unsuccessfully) to convince Kotleba to support a constitutional amendment modifying the selection process for constitutional judges.[9]

Despite the decision not to ban the PPOS, the verdict endorses the petition's support of militant democracy. The petition states as a lesson of 'history', that the lack of willingness by democracies to defend themselves against antidemocrats leads to far-reaching consequences.[10] This gives rise to the 'duty' to 'exceptionally, and in accordance with the law, limit some of the principles, that [democracy] itself stands on [. . .]'.[11] Similarly, the Supreme Court writes that it 'generally accepts the concept of democracy capable of defending itself'.[12] The PPOS remains active and, with the 2019 case, gained argumentative resources to buttress its legitimacy. The reference to militant democracy in the attorney general's petition is important; more than in regimes which do not explicitly embrace militant democracy,[13] it allows the PPOS to invoke the proceeding as proof that it is a legitimate political party.

Cases such as STNP or PPOS present a challenge for the judicial system in several ways. Firstly, courts need to evaluate and interpret extensive evidence, comprising the positions and actions of the party representatives. Secondly, courts are exposed to public attention, especially if the defendant contests the case using a language of democracy, and presents the trial as evidence that the *existing system* is not democratic. Thirdly, time pressure grows, as the case prolongs the uncertainty within the party system, may impact upcoming elections, and allow the challenged party to gain support. Such challenges underscore the significance of resources that the courts need in order to effectively adjudicate party ban cases.

Studies on party bans, however, do not devote systematic attention to these resources, which are particularly important when democracy erodes.[14] To fill this gap, this article analyses Czech, Slovak and Hungarian party or movement ban cases. The three jurisdictions comprise systems of varying degrees of judicial

[8]E. Harris, 'Nation Before Democracy? Placing the Rise of the Slovak Extreme Right into Context', 35 *East European Politics* (2019) p. 538 at p. 553.

[9]J. Krempaský, 'Vraj ho porazí vrece zemiakov. Ficovi je dobrý už aj Kotleba', *Sme*, 12 February 2019, ⟨https://domov.sme.sk/c/22051558/vraj-ho-porazi-vrece-zemiakov-ficovi-je-dobry-uz-aj-kotleba.html⟩; M. Steuer, 'On the Brink of Joining Poland and Hungary: The Night of Surprises in the Slovak Parliament', *Verfassungsblog*, 25 October 2018, ⟨https://verfassungsblog.de/on-the-brink-of-joining-poland-and-hungary-the-night-of-surprises-in-the-slovak-parliament/⟩.

[10]Petition . . . , *supra* n. 6, p. 17.

[11]Ibid., p. 18.

[12]Supreme Court of the Slovak Republic, *supra* n. 2, § 156.

[13]*See*, e.g., A. Malkopoulou, 'Greece: A Procedural Defence of Democracy against the Golden Dawn', 17 *EuConst* (2021) p. 177.

[14]E.g. M. Graber et al. (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press 2018).

independence,[15] with Hungary having experienced a significant decline since 2010.[16] In all three, courts – with some differences – have the competence to ban antidemocratic parties and movements,[17] and they have adjudicated such cases. Moreover, these cases enjoyed considerable public interest.[18]

By focusing on the resources needed for effective adjudication, this article offers a new approach to evaluate the 'success' and 'failure' of party bans. To do so, it utilises the concept of 'judicial craft', for two reasons. Firstly, for studies of militant democracy, 'judicial craft' nuances the verdict-based classification of the party ban rulings, where bans *lapse* when a successor party continues in the activities of the banned party, or *fail* when a disagreement between key institutions of the state (e.g. the executive supporting a ban but the court rejecting its petition) occurs.[19] Thus, a case that results in a ban might amount to a failure from the perspective of generating the justificatory resources.[20] On the other hand, a case where the court disapproves the ban might nevertheless provide such justificatory resources and be considered a success.[21] This conceptualisation of 'success' and 'failure' points towards the so far neglected *judicial craft* needed to tackle party ban cases. This approach may be extended to evaluating the effectiveness of other militant measures and judicial decisions more broadly. Secondly, for judicial studies, 'judicial craft' focuses scholarly attention on the *endogenous* resources available for courts to advance their authority, crucial during persistent attacks on judicial independence.[22]

The first section briefly maps militant democracy scholarship on party bans. It argues for a court-centric approach that understands the impact of a specific case as dependent on the resources available for courts to 'do justice' to the complexity of these cases. The second section compares the militant statutory

[15]J.E. Moliterno and P. Čuroš, 'Recent Attacks on Judicial Independence: The Vulgar, the Systemic, and the Insidious', 22 *German Law Journal* (2021) p. 1159.

[16]K. Kovács and K.L. Scheppele, 'The Fragility of an Independent Judiciary: Lessons from Hungary and Poland – and the European Union', 51 *Communist and Post-Communist Studies* (2018) p. 189.

[17]*See* A. Bourne and F. Casal Bértoa, 'Mapping "Militant Democracy": Variation in Party Ban Practices in European Democracies (1945-2015)', 13 *EuConst* (2017) p. 221 at p. 234-236.

[18]M. Mareš, 'Czech Militant Democracy in Action: Dissolution of the Workers' Party and the Wider Context of This Act', 26 *East European Politics and Societies* (2012) p. 33 at p. 39; T. Nociar, 'Right-Wing Extremism in Slovakia' (Friedrich Ebert Stiftung 2012) p. 4 ⟨http://library.fes.de/pdf-files/id-moe/09567.pdf⟩; M. Varga, 'Hungary's "Anti-Capitalist" Far-Right: Jobbik and the Hungarian Guard', 42 *Nationalities Papers* (2014) p. 791 at p. 796.

[19]A. Bourne, *Democratic Dilemmas: Why Democracies Ban Political Parties* (Routledge 2018) p. 8.

[20]*See* the STNP decision below.

[21]*See* the first Workers' Party decision below.

[22]E.g. B. Bugarič and T. Ginsburg, 'The Assault on Postcommunist Courts', 27 *Journal of Democracy* (2016) p. 69; Moliterno and Čuroš, *supra* n. 15, p. 1190.

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frameworks vis-à-vis political parties and movements in Czechia, Hungary and Slovakia. This provides the basis for analysing the judicial craft exhibited by the courts in the three countries in six judicial decisions (in the third section). The cases show the significance of consistency with previous cases (if they exist), comprehensive legal reasoning, sensitivity towards the political context, and overall capacity to 'think outside the box'. These components were present in the Czech but not the Hungarian and Slovak adjudication. The article concludes with the lessons for studying party bans and the effectiveness of militant democracy at a time when democracy is being eroded. Dichotomous evaluations of bans as either successes or failures need to be overcome. A more nuanced assessment helps with effective use of the court cases to weaken antidemocratic parties.

Party bans as manifestations of militant democracy: the role of judicial craft

'*All* democracy is militant', if democracy is understood as encompassing legal safeguards against its decay *per definitionem*.[23] Yet, in its minimalist conception, democracy is vulnerable to the winners of free and fair elections determined to dismantle the institutional framework that enables those elections.[24] In order to avoid such breakdown of democratic regimes, is it compatible with democracy to *pre-emptively* restrict political rights?

Party bans in the 'militant democracy canon'

The original argument in favour of militant democracy typically attributed to Loewenstein[25] is concerned with the risk of regime transformations through extreme political ideologies. Loewenstein presents numerous instruments that may exclude antidemocrats from public life and decrease their chances of influence.[26] Party bans are the 'crown jewel' of militant democracy, given the magnitude of their interference with the right to association.[27] Although party bans affect the 'soul of democracy',[28] representatives of banned parties might keep their

[23]S. Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford University Press 2021) p. 21.

[24]The literature on defective democracies is vast : *see*, e.g., W. Merkel, 'Embedded and Defective Democracies', 11 *Democratization* (2004) p. 33.

[25]*Cf* B. Rijpkema, *Militant Democracy: The Limits of Democratic Tolerance* (Routledge 2018) p. 31-49.

[26]Ibid., p. 25-31.

[27]D.J. Harris et al., *Law of the European Convention on Human Rights*, 4th edn (Oxford University Press 2018) p. 704-712.

[28]L. Sólyom, *Pártok és érdekszervezetek az alkotmányban* (Rejtjel 2004) p. 96.

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public offices and hone support for their antidemocratic ideas. As the proceedings on bans are often administrative rather than criminal, a party ban might erroneously appear to represent a less serious interference than criminal sanctions.[29] At the same time, party bans might transform the party system and induce even deeper legitimacy challenges with supporters of the parties under scrutiny or with the opponents of bans in general. When bans may be initiated by the executive or the parliamentary majority, which are composed of representatives of other parties competing for voters, these legitimacy challenges are exacerbated. Given that the activation of a ban is ultimately decided by the judiciary,[30] party bans are an apparent challenge for courts. Courts need to consider, at least: (1) the complexity of the legal framework; (2) the operation of the party; and (3) the relationship between the party as a whole and its individual representatives. The more prominent the party and the longer it operates, the more competing evidence and claims courts are likely to face.

In addition to the challenges of handling evidence, party ban cases are a challenge for courts because it is difficult to determine the point at which behaviour becomes dangerous enough to justify curtailments of rights. In practice, few – if any – opponents of democracy openly denounce it; 'if democratic claims emerge, even anti-democrats tend to be forced to pay at least lip-service to democracy'.[31] Moreover, when rhetoric of 'illiberal' democracies[32] is rising, state institutions need to demonstrate that the particular party's *illiberalism* is also *a threat to democracy*[33] in order for a ban to become a feasible response to the party. Antidemocrats might respond by 'weaponising' the militant framework[34] to crack down on ideas critical not towards the *democratic ideal*, but towards the *existing state of a particular democracy*.[35] An overwhelming reliance on law to combat antidemocrats instead of, for example, public condemnation and the building of *cordons*

[29]Q. Jing and Z. Qingfeng, 'The Dissolution of the Hong Kong National Party: Constitutionality under the "Militant Democracy" Theory', 7 *The Chinese Journal of Comparative Law* (2019) p. 413 at p. 417.

[30]A. Bourne, 'Militant Democracy and the Banning of Political Parties in Democratic States: Why Some Do and Why Some Don't', in A. Ellian and B. Rijpkema (eds.), *Militant Democracy* (Springer 2018) p. 23 at p. 39.

[31]A. Jakab, *European Constitutional Language* (Cambridge University Press 2016) p. 181.

[32]B. Rijpkema, 'Militant Democracy and the Detection Problem', in Malkopoulou and Kirshner, *supra* n. 1, p. 169 at p. 183-184.

[33]*See also* C.R. Kaltwasser, 'Militant Democracy Versus Populism', in Malkopoulou and Kirshner, *supra* n. 1, p. 72 at p. 84-88.

[34]J. Rak, 'The Global Authoritarian Turn, Democratic Vulnerability, and Geo-Digital Competition', 27 *Geopolitics* (2022) p. 680 at p. 684.

[35]*Cf* G. Frankenberg and H. Alviar García, 'Authoritarian Structures and Trends in Consolidated Democracies', in A. Sajó et al. (eds.), *Routledge Handbook of Illiberalism* (Routledge 2021) p. 164 at p. 168-169.

sanitaires[36] might be detrimental to democracy. While responding to bans, particularly if not accompanied by in-depth justifications,[37] antidemocrats may present themselves as 'true democrats' or 'martyrs' in an oppressive regime. If there are acquittals, antidemocrats may pose as legitimate actors 'approved' by democratic institutions. Even if public institutions are fiercely focused on guarding democracy, they may remain vulnerable to criticisms due to the state invoking 'crackdown powers' vis-à-vis political parties.

Militant democracy and its alternatives in Central Europe

The criticisms[38] of militant democracy[39] prompt some democracies to embrace a 'tolerant' approach instead,[40] prominently articulated in Kelsen's 'proceduralist model'.[41] Here, militant measures are incompatible with democracy because they construct 'a democratic and constitutional fig leaf, covering decisionistic and authoritarian politics'.[42] Despite Kelsen's influence in Central Europe, the 'spirit of militant democracy' remains important there. The rise of the Nazi leaders is considered a prime example of democracy's failure to protect itself.[43] Unlike in Hungary,[44] courts in Czechia and Slovakia have explicitly supported militant

[36]J.W. Müller, 'The Problem of Peer Review in Militant Democracy', in U. Belavusau and A. Gliszczyńska-Grabias (eds.), *Constitutionalism Under Stress* (Oxford University Press 2020) p. 259; T. Vincents Olsen, 'Citizens' Actions against Non-liberal-democratic Parties', 18 *EuConst* (2022) p. 1; M. Steuer, 'Militant Democracy and COVID-19: Protecting the Regime, Protecting Rights?', 2 *Hong Kong Journal of Law and Public Affairs* (2020) p. 131 at p. 135-136 and references therein.

[37]J.W. Müller, 'Citizens as Militant Democrats, Or: Just How Intolerant Should the People Be?', 34 *Critical Review* (2022) p. 85 at p. 86, 90, 92.

[38]A. Kirshner, 'Militant Democracy Defended', in Malkopoulou and Kirshner, *supra* n. 1, p. 56.

[39]A. Sajó and R. Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press 2017) p. 439-440. '[Militant democratic measures] turn out to be a most useful tool to destroy constitutionalism in the hands of illiberal political forces.'

[40]A. Malkopoulou and L. Norman, 'Three Models of Democratic Self-Defence: Militant Democracy and Its Alternatives', 66 *Political Studies* (2018) p. 442 at p. 448-450.

[41]S. Baume, *Hans Kelsen and the Case for Democracy* (ECPR Press 2013) at p. 14-15 ff; L. Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press 2007) p. 101-144.

[42]C.I. Accetti and I. Zuckerman, 'What's Wrong with Militant Democracy?', 65 *Political Studies* (2016) p. 182 at p. 194. Loewenstein criticised this view as an expression of 'legalistic complacency and suicidal lethargy': K. Loewenstein, 'Militant Democracy and Fundamental Rights I', 31 *American Political Science Review* (1937) p. 417 at p. 432.

[43]E.g. M. Chou, *Democracy Against Itself: Sustaining an Unsustainable Idea* (Edinburgh University Press 2014) p. 50-76.

[44]A. Sajó, 'The Self-Protecting Constitutional State', 12 *East European Constititional Review* (2003) p. 78 at p. 81-83.

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democracy as the inspiration for legislation.[45] Capoccia commended the First Czechoslovak Republic (1918–1938) for its militant legal framework.[46] However, court practice did not live up to that framework.[47] For example, the Czechoslovak Constitutional Court, which could have reviewed the constitutionality of legislation enabling broad leeway for party bans,[48] became virtually defunct due to unfilled vacancies coupled with limited competences.[49] Capoccia's praise might be partially explained by the limited attention he paid to the role of courts, as opposed to partisan elites' influence on the effectiveness of militant measures via adopting them and defending them rhetorically.[50]

The embeddedness of Central European countries in the Council of Europe further entrenches militant frameworks. This is because the European Court of Human Rights has endorsed a relatively broad reading of party bans due to Europe's historical experience with antidemocratic parties, despite the risk of abuse of militant legislation via banning movements who advocate controversial but not antidemocratic doctrines.[51] The European Court of Human Rights's position, supported also by the Venice Commission,[52] makes it more difficult for

[45]Constitutional Court of the Czech and Slovak Federal Republic, PL. ÚS 5/92 (1992) p. 92; Czech Constitutional Court, IV. ÚS 2011/10 (2011) § 25; Slovak Constitutional Court PL. ÚS 5/2017 (2019) § 89.

[46]G. Capoccia, 'Legislative Responses against Extremism. The "Protection of Democracy" in the First Czechoslovak Republic (1920-1938)', 16 *East European Politics and Societies* (2002) p. 691.

[47]D. Kosař et al., 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism', 15 *EuConst* (2019) p. 427 at p. 438-439.

[48]Notably Act No. 201/1933 Coll. on suspending the activities and dissolving of political parties. *See* Capoccia, *supra* n. 46, p. 717-721. For details on the two judgments of the Czechoslovak Supreme Administrative Court, which addressed appeals to the dissolution of several parties by the executive, *see* A. Roztočil, 'Legislativa a judikatura k rozpouštění politických stran v první republice', 18 *Jurisprudence* (2009) p. 21 at p. 24-27.

[49]J. Osterkamp, *Verfassungsgerichtsbarkeit in der Tschechoslowakei (1920-1939)* (Klostermann 2009) p. 84-92.

[50]G. Capoccia, *Defending Democracy: Reactions to Extremism in Interwar Europe* (Johns Hopkins University Press 2007) p. 242-245.

[51]P. Harvey, 'Militant Democracy and the European Convention on Human Rights', 29 *European Law Review* (2004) p. 407 at p. 419; a landmark case was that of the Turkish Welfare Party where the ECtHR essentially confirmed the validity of a ban, substantially extending the militant model. *See* P. Macklem, 'Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination', 4 *I•CON* (2006) p. 488; *see also* A. Sajó, 'Militant Democracy and Emotional Politics', 19 *Constellations* (2012) p. 562 at p. 564.

[52]European Commission for Democracy through Law (Venice Commission), *Guidelines on Prohibition of Political Parties and Analogous Measures* (1999) ⟨https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2000)001-e⟩.

courts to oppose the militant model. Nevertheless, domestic courts remain key in shaping their jurisdictions' positions.[53]

The limited attention to courts in contemporary thought on militant democracy

Unlike accounts embracing militant democracy in its Loewensteinian sense, justifications which argue for more narrowly framed legal restrictions[54] rarely examine the roles of institutions in calibrating these restrictions. Rijpkema highlights democracy's capacity for 'self-correction' by preserving the possibility to amend erroneous past decisions; the rights of actors aiming to undermine the main components that enable such corrections can be curtailed.[55] Such justifications can inspire courts when weighing the options available to them to decide on a particular ban, which requires that they consider the meaning of equal participation in democratic decision-making. Another example of the interconnectedness of the normative justifications and judicial practice comes from the 'social democratic model' of democratic self-defence. This model 'take[s] a broader perspective that recognises an active role for citizens in the pursuit of a resilient democracy' through its focus on the need for education and equal access to opportunities.[56] Here, courts scrutinise the quality of legislation and practices devoted to education for democracy: if there are well-developed educational standards, a more resilient public can be expected, which necessitates more caution towards legal restrictions on fundamental rights. In such a public environment the application of the instruments of militant democracy may be broadly compatible with its social democratic preconditions.[57]

In the literature on militant democracy, courts *are* noted, but usually merely through specific decisions they make.[58] Some scholars supported militant democracy and noted the role of courts in it, but did not trust judicial review[59] or judicial

[53]E.g. M.R. Madsen, 'Resistance to the European Court of Human Rights: The Institutional and Sociological Consequences of Principled Resistance', in M. Breuer (ed.), *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Springer 2019) p. 35 at p. 46-47.

[54]A. Kirshner, *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism* (Yale University Press 2014); Rijpkema, *supra* n. 25; L. Vinx, 'Democratic Equality and Militant Democracy', 27 *Constellations* (2020) p. 685.

[55]Rijpkema, *supra* n. 25, p. 194.

[56]Malkopoulou and Norman, *supra* n. 40, p. 453.

[57]S. Choudhry, 'Resisting Democratic Backsliding: An Essay on Weimar, Self-Enforcing Constitutions, and the Frankfurt School', 7 *Global Constitutionalism* (2018) p. 54 at p. 61-63.

[58]E.g. A. Bourne, 'The Proscription of Parties and the Problem with "Militant Democracy"', 7 *Journal of Comparative Law* (2012) p. 196 at p. 208-210. This tendency is visible in the title of a prominent early study: K. Loewenstein, 'Legislative Control of Political Extremism in European Democracies I', 38 *Columbia Law Review* (1938) p. 591.

[59]Choudhry, *supra* n. 57, p. 70.

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power.[60] Max Lerner was more appreciative of the role of courts, considering them as 'symbols' of 'an ancient sureness and comforting stability'.[61] But even in Lerner's variant of 'resilient democracy',[62] courts were just that: important for resolving specific disputes, but not for calibrating the regime's approach to rights restrictions.[63] Constitutional courts, which, in some jurisdictions, were '[historically] instrumental in the rise of [...] militant democracy',[64] tend to be similarly underestimated or denounced as 'elite institutions' unfit for democratic self-defence.[65] Moreover, the discussion of specific judicial decisions is only loosely linked to theory development. For example, Kirshner's book on militant democracy[66] invokes courts only in terms of 'judicial review' as a tool against an antidemocratic regime overhaul.[67]

Thus, courts, with the possible exception of the European Court of Human Rights,[68] have received limited attention in militant democracy and party ban scholarship. It is particularly unclear what resources judges need in order to effectively decide on party bans, without providing leeway for antidemocratic actors to profit from the proceedings. In party ban cases, 'effective decision making' goes beyond satisfying the 'requirements of internal and external justification' which pertain to the identification and interpretation of legal norms, precedents and doctrines.[69] Moreover, these cases, given their high visibility and impact on

[60]R. Car, 'A Reply to Sujit Choudhry's "Resisting Democratic Backsliding": Weimar Legacy and Self-Enforcing Constitutions in Post-WWII Left-Wing Constitutional Theory', 8 *Global Constitutionalism* (2019) p. 391 at p. 399-400, 414-415, 416.

[61]M. Lerner, 'Constitution and Court as Symbols', 46 *Yale Law Journal* (1937) p. 1290 at p. 1291.

[62]G. Maddox, 'Karl Loewenstein, Max Lerner, and Militant Democracy: An Appeal to "Strong Democracy"', 54 *Australian Journal of Political Science* (2019) p. 490 at p. 498 ff.

[63]M. Lerner, *It Is Later than You Think: The Need for a Militant Democracy* (The Viking Press 1939).

[64]J.W. Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (Yale University Press 2011) p. 147.

[65]R. Møller Stahl and B.A. Popp-Madsen, 'Defending Democracy: Militant and Popular Models of Democratic Self-Defense', *Constellations* (2022) p. 1 at p. 16.

[66]Kirshner, *supra* n. 54, p. 14.

[67]An exception is the examination of selected case law of the German Constitutional Court and the ECtHR to test a (conceptually derived) theory of militant democracy: Rijpkema, *supra* n. 25, p. 141-156.

[68]E. Özbudun, 'Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and the European Court of Human Rights', 17 *Democratization* (2010) p. 125; S. Tyulkina, *Militant Democracy: Undemocratic Political Parties and Beyond* (Routledge 2015) p. 95-104.

[69]S. Basabe-Serrano, 'The Judges' Academic Background as Determinant of the Quality of Judicial Decisions in Latin American Supreme Courts', 40 *Justice System Journal* (2019) p. 110 at p. 112.

the political system, are important for the courts themselves, as they might shape the perception of the courts and the propensity of future illiberal assaults. These cases are 'stress tests' for whether courts can contribute to enforcing law-compliant behaviour and trigger a 'radiating effect'[70] on the polity. Courts exhibit significant diversity, *inter alia*, in their independence, commitment to respect due process and decisional transparency.[71] Their capacity to adjudicate party ban cases demonstrates these qualities, or the lack thereof. Granted, the courts' 'radiating effect' is partially determined by other actors, such as executives and legislatures, civil society, litigants, academics or media.[72] However, some conditions for effectiveness are *endogenous*, having to do with the adjudicative resources available for courts. These are captured by Kritzer's concept of 'judicial craft'.

Studying militant democracy via judicial craft at a time of illiberalisation

'Judicial craft' is not restricted to party ban cases. Rather, it offers an approach to evaluate endogenous resources possessed by a particular court, that may prove invaluable when that court, at a later point, faces the threat of its capture[73] or the dismemberment of the constitutional system.[74] This is why examining systems which have been facing illiberalisation *before* that process became widely visible and acknowledged, such as Hungary before 2010, is useful for understanding which resources its courts have – or do not have – to resist such tendencies.

How is 'judicial craft' conceptualised? According to Fleck's reading of Kritzer, 'writing a judicial sentence is at least partly a creation of something which is unique, personal, and which gives space for professional and individual liberty and creativity'.[75] The final output should have both intellectual and aesthetic value, making a contribution to legal interpretation.[76] For Kritzer, craft manifests in judicial decisions in a number of ways: (1) the capacity to achieve consistency

[70]M. Galanter, 'The Radiating Effects of Courts', in K.O. Boyum and L. Mather (eds.), *Empirical Theories About Courts* (Quid Pro 2015) p. 117.

[71]L.M. Friedman, *Impact: How Law Affects Behavior* (Harvard University Press 2016) p. 42.

[72]C. Smulovitz, 'Law and Courts' Impact on Development and Democratization', in P. Cane and H.M. Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) p. 729 at p. 741-744.

[73]D. Landau and R. Dixon, 'Abusive Judicial Review: Courts Against Democracy', 53 *UC Davis Law Review* (2020) p. 1313 at p. 1338-1345.

[74]R. Albert, 'Constitutional Amendment and Dismemberment', 43 *Yale Journal of International Law* (2018) p. 1 at p. 82.

[75]Z. Fleck, 'How to Measure? An Essay on the Social Context of Measuring Quality', in M. Bencze and G.Y. Ng (eds.), *How to Measure the Quality of Judicial Reasoning* (Springer 2018) p. 43 at p. 43-44.

[76]Ibid.

with the previous judgments in the given jurisdiction;[77] (2) the demonstration of skills of legal reasoning and judgment;[78] (3) problem-solving abilities (e.g. the capacity to ensure that the political context is adequately accounted for, either by possessing the skills necessary to analyse it or by inviting external experts with such skills); and (4) 'the ability to see situations in creative ways, and to come up with decisions and solutions that go far beyond the routine' as an indicator of its *creativity*.[79]

Kritzer's attention to the courts' endogenous resources is not completely new. Reichman argued that courts are under a constant 'evaluative eye' of various constituencies.[80] 'Judicial attitude [. . .] matters',[81] and is primarily articulated by how the courts actually perform when confronted with challenging cases. However, Reichman's broad definition of judicial craft as 'the art of being faithful to the modes of legal reasoning without losing sight of dialogue with neighboring practices'[82] is difficult to apply when analysing concrete cases. As Reichman himself puts it, 'trying to further analyze it would simply add words to that which words can hardly capture'.[83] A more specific proposal to capture the resources available to 'strong courts' which can stand their ground vis-à-vis executive and legislative pressures is presented by Rosalind Dixon, who formulates a series of indicators for 'judicial statecraft'.[84] This is a more comprehensive set of criteria that allow the '*strategic maximisation* of constitutional principle'[85] in non-ideal circumstances where court curbing may occur as a result of a judgment particularly inconvenient to the governing majority.

Yet, two reasons speak in support of Kritzer's conceptualisation. Firstly, unlike in Dixon,[86] the indicators of judicial craft may be evaluated ex post without assessing a court's overall performance. Thus, Kritzer's is a narrower approach than

[77] *See also* M. Florczak-Wątor, 'Introduction', in M. Florczak-Wątor (ed.), *Constitutional Law and Precedent: International Perspectives on Case-Based Reasoning* (Routledge 2022) p. 1.

[78] This includes the capacity to convincingly address objections raised by dissenting judges, if any. *See,* in the ECtHR context, M. Goldhaber, *The People's History of the European Court of Human Rights* (Rutgers University Press 2008) p. 93, discussing the Turkish *Welfare Party* cases.

[79] H.M. Kritzer, 'Toward a Theorization of Craft', 16 *Social & Legal Studies* (2007) p. 321 at p. 333-337.

[80] A. Reichman, 'The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar', 95 *California Law Review* (2007) p. 1619.

[81] Ibid., p. 1625.

[82] Ibid., p. 1662.

[83] Ibid.

[84] R. Dixon, 'Strong Courts: Judicial Statecraft in Aid of Constitutional Change', 59 *Columbia Journal of Transnational Law* (2021) p. 299.

[85] R. Mann, 'Non-Ideal Theory of Constitutional Adjudication', 7 *Global Constitutionalism* (2018) p. 14 at p. 41-43.

[86] *Cf* Dixon, *supra* n. 84, p. 302.

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Dixon's. Applying Kritzer's criteria can inform us about the 'impact potential' of a particular decision regardless of what the judges 'had in mind'.[87] Secondly, while some of Dixon's criteria are similar to Kritzer's,[88] others would be difficult to apply in party ban cases. Namely, it would be difficult for the courts to 'demonstrate respect for the motives or perspectives of constitutional losers',[89] if these losers are extreme political actors. Dixon's 'limits to comity',[90] which could include the conduct of convicted extreme party leaders, speak to this point. In short, while having narrower aspirations than Dixon's 'judicial statecraft', Kritzer's conceptualisation helps assess the quality of relevant judgments with reference to judicial craft. Before doing that, however, a brief overview the statutory framework of party bans follows, as a key resource *exogeneous* to courts that shapes the adjudication of party ban cases in Czechia, Hungary and Slovakia.

Party bans in the Czech, Hungarian and Slovak statutory framework

The three jurisdictions under study offer varied experiences with party bans. In Hungary and in Slovakia, the banned actors (PPOS and the Hungarian Guard, the latter banned by the Hungarian courts in 2009) retain their relevance today,[91] contributing to an overall shift of the party system towards 'a growing pervasiveness of far-right politics' in both countries.[92] In contrast, Czechia offers a story of banning a party, the *successor* of which remains 'really marginal'.[93]

The point of departure for developing well-crafted judgments in party ban cases remains the statutory framework that regulates them. Constitutional regulation of political parties is limited in the three jurisdictions.[94] Political parties

[87] *Cf*, for the US Supreme Court context, M.E.K. Hall, *What Justices Want: Goals and Personality on the U.S. Supreme Court* (Cambridge University Press 2018).

[88] For example, she highlights the importance of the timing of the decision, which would be included in Kritzer's sensitivity towards political context, or the importance of diverse narratives, akin to Kritzer's judicial creativity.

[89] Ibid., p. 321.

[90] Ibid., p. 326-327.

[91] In Hungary, segments of leadership of Jobbik – a popular contemporary opposition party – overlapped with the Hungarian Guard.

[92] A.L.P. Pirro et al., 'Close Ever, Distant Never? Integrating Protest Event and Social Network Approaches into the Transformation of the Hungarian Far Right', 27 *Party Politics* (2021) p. 22 at p. 23. On Slovakia, *see* J. Marušiak, '"Slovak, Not Brussels Social Democracy"', 38 *Czech Journal of Political Science* (2021) p. 37.

[93] A. Ellinas, *Organizing Against Democracy: The Local Organizational Development of Far Right Parties in Greece and Europe* (Cambridge University Press 2020) p. 33.

[94] F. Casal Bértoa and I. van Biezen, 'Party Regulation and Party Politics in Post-Communist Europe', 30 *East European Politics* (2014) p. 295 at p. 296-300.

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must 'respect [. . .] the basic democratic principles and reject [. . .] violence as a means of asserting their interests' in Czechia.[95] In Hungary, the 2011 Fundamental Law eliminated several references to political parties presented in the 1989 Constitution,[96] and Slovakia's Constitution merely mentions a right to establish political parties and to associate in them, which may be limited based on the standard three conditions (necessity, legality, purposiveness).[97]

An overview of Czech, Hungarian and Slovak statutory regulation demonstrates that these may restrict the range of options available for courts to effectively address party ban petitions. The degree of restrictiveness of the regulation can be identified via the following five features: (i) the range of potential petitioners for sanctioning a party; (ii) the range of options available for sanctioning the party in question;[98] (iii) the degree of interaction between administrative and criminal law proceedings pertaining to the party; (iv) the consequences of conviction for the political activity of the party; and (v) the final domestic appeal options. Some of these indicators are addressed in the literature on militant democracy.[99]

Before scrutinising the three jurisdictions via the five criteria, three remarks are in order. Firstly, unlike Czechia and Slovakia (with Slovakia considered to have the regionally most extensive party regulation),[100] the Hungarian 'party law remains subsidiary to the association law'.[101] The party law[102] does not offer any specific conditions for banning a party – they are the same as those for banning an association. The regulation in place since 2011 allows the banning of an association (including a party) if it violates the constitutional prohibition of autocratic concentration of power,[103] engages or calls for criminal conduct or violates the rights and freedoms of others.[104] From this perspective, while allowing a broader leeway for courts, the procedure for banning is more abuse-prone as it treats political

[95]Constitution of the Czech Republic, Art. 5.

[96]P. Smuk, 'European Constitutions as Sources of Party Law and the Fundamental Law of Hungary', 4 *Revista Jurídica de la Universidad de León* (2017) p. 51 at p. 62-64.

[97]Constitution of the Slovak Republic, Art. 29 sec. 2-3.

[98]This can include sanctions for non-democratic party structures. *See* Y. Mersel, 'The Dissolution of Political Parties: The Problem of Internal Democracy', 4 *I•CON* (2006) p. 84.

[99]E.g. Mareš, *supra* n. 18, p. 39-41.

[100]F. Casal Bértoa et al., 'Limits of Regulation: Party Law and Finance in Slovakia 1990–2012', 30 *East European Politics* (2014) p. 351 at p. 357.

[101]R. Uitz, 'Hungary', in M. Thiel (ed.), *The 'Militant Democracy' Principle in Modern Democracies* (Ashgate 2009) p. 162. On developments post-2010, *see* I. Halász and A. Horváth, 'Politikai közösség (nemzet, nemzetiségek, határon túli magyarok, pártok)', in I. Halász (ed.), *Alkotmányjog* (Dialóg Campus Kiadó 2018) p. 153.

[102]Party Act (Law XXXIII of 1989).

[103]Fundamental Law, Art. C) sec. 2.

[104]Civil Act (Act CLXXV of 2011), §3 sec. 3.

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parties as if they were regular associations.[105] Secondly, the first-instance courts in both Czechia and Slovakia are the Supreme Administrative Courts. Operating in Czechia since 2003, its Slovak variant started adjudicating in 2021,[106] with the Supreme Court handling party bans before that. In Hungary, regional courts are the first-instance courts.[107] Thus, there are more domestic appeal options to party bans, but the regional courts cannot be expected to have the specialised resources (such as clerks) necessary to effectively process such cases. Indeed, even the Supreme Administrative Courts can be presumed to have a less entrenched institutional identity than specialised constitutional courts.[108] Thirdly, in all three countries, courts adjudicate party ban cases in senates. In Czechia, a seven-member senate needs to be established for each such case.[109] The constitutional courts, which may review the decisions of the general courts, adjudicate such cases in a plenary sitting in Czechia and Slovakia, but not in Hungary, where the banned party may submit a constitutional complaint like any other banned association.[110]

Table 1 summarises the five regulatory features in the three jurisdictions. The main differences are in the actors competent to submit a petition for a ban, and the available sanctions. In Slovakia, only the attorney general is legitimated to submit a petition to ban a party.[111] Hence, if the attorney general supports antidemocratic parties, as the actions of the new Slovak attorney general indicate,[112] such parties are safe from judicial scrutiny. In Hungary, the prosecution plays a similar role,[113] while in Czechia, the executive (cabinet led by the Prime Minister), rather than the High State Attorney,

[105]P. Smuk, 'Pluralism Confined? Party Law Case Studies from Hungary', in C. Santos Botelho et al. (eds.), *Constitutionalism in a Plural World* (Universidade Católica Portuguesa 2018) p. 80 at p. 89.

[106]Constitution of the Slovak Republic, Art. 142 sec. 2(b).

[107]T. Drinóczi and G. Mészáros, 'Hungary: An Abusive Neo-Militant Democracy', in J. Rak and R. Bäcker (eds.), *Neo-Militant Democracies in Post-Communist Member States of the European Union* (Routledge 2022) p. 98 at p. 103.

[108]J. Hogan, 'Analyzing the Risk Thresholds For Banning Political Parties After NPD II', 23 *German Law Journal* (2022) p. 97 at p. 113.

[109]Czech Code of Administrative Justice, No. 150/2002 Coll. §16 sec. 2 a).

[110]Constitution of the Slovak Republic, Art. 131 sec. 1 (Slovakia); Act on the Constitutional Court of the Czech Republic, No. 182/1993 Coll. §11 sec. 2 e) (Czechia); Smuk, *supra* n. 105, p. 89 (Hungary).

[111]According to the Venice Commission, the question of initiating the proceedings against antidemocratic parties is the 'most important' one from 'the procedural perspective'. Reproduced in Venice Commission, *Compilation of Venice Commission Opinions and Reports Concerning Political Parties* (2016), ⟨https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2016)003-e⟩ p. 61.

[112]R. Pataj, 'Žilinka je na ceste bez návratu, sprevádzajú ho na nej Ficovi, Kotlebovi a Putinovi fanúšikovia', *Denník N*, 8 February 2022, ⟨https://dennikn.sk/2712274/newsfilter-zilinka-je-na-ceste-bez-navratu-sprevadzaju-ho-na-nej-ficovi-kotlebovi-a-putinovi-fanusikovia/⟩.

[113]Uitz, *supra* n. 101, p. 164-165.

Table 1. Comparison of the degree of restrictiveness of statutory regulation on party bans

Indicator	Czechia	Slovakia	Hungary
Options for sanctioning	Suspension, outright ban	Outright ban	Outright ban
Range of petitioners	Low (executive and, if inactive, head of state)	Minimal (only attorney general)	Minimal (prosecution)
Interaction between legal fields	No coordination between administrative and criminal law petitions		
Consequences of conviction	No effects on the mandates of the MPs from the banned party		
Appeal to the Constitutional Court	Dichotomous choice		

Source: author.

may submit a petition to ban a party. There, however, if the executive does not endorse an initiative for a ban coming from a third party, the President may do so instead.[114] This, compared to Slovakia and Hungary, decreases – but does not eliminate – the risk of a monopoly over the right to initiate a ban, since the President and the executive might share the same partisan background. In Hungary and Slovakia, courts only have the option to issue an outright ban if the party contravenes the democratic order, which limits their choices and may incentivise them to use this 'serious measure'[115] too early, or too late. Czech legislation is more conducive to judicial craft on this point, allowing suspension of up to one year as well.[116]

All three jurisdictions are similar in, firstly, the absence of coordination between the party ban proceedings, which are part of administrative law, and criminal proceedings against individual party representatives. The Slovak Supreme Administrative Court cannot wait for the outcome of an individual proceeding even against a leading party representative, as it is bound to decide within six months after the petition is submitted.[117] For example, when a PPOS MP lost his seat in the Slovak parliament due to a criminal conviction for disseminating 'hate speech', the Court did not take this into account in the PPOS case, because the criminal trial had not ended.[118] Secondly, while 'a party ban is often *de facto* a

[114]Act on association in political parties and political movements, No. 424/1991 Coll. §15 sec. 1.

[115]S. Sottiaux and S. Rummens, 'Concentric Democracy: Resolving the Incoherence in the ECtHR's Case Law on Freedom of Expression and Freedom of Association', 10 *I•CON* (2012) p. 106 at p. 122.

[116]Act, *supra* n. 114, §14 sec. 1.

[117]Slovak Administrative Procedure Code, Act No. 162/2015 Coll, § 388.

[118]Supreme Court of the Slovak Republic, 2To/10/2018 (2019). *See* overview in M. Steuer, 'Democratic (Dis)Armament', *Verfassungsblog*, 17 December 2019, ⟨https://verfassungsblog.de/democratic-disarmament/⟩.

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disqualification of known individuals',[119] in the jurisdictions studied here, it does not affect positions of members of parliament (MPs) elected from the banned party.[120] Unless individually criminally convicted (as the PPOS MP), their mandate endures.[121] Finally, the constitutional courts in these countries have only a dichotomous choice of affirming or invalidating the general courts' decision.[122]

Judicial craft in party ban cases: *The Workers' Party in Czechia*, *Slovak Togetherness–National Party*, *People's Party Our Slovakia*, and *Hungarian Guard*

Building on Kritzer's conceptualisation of judicial craft, party ban decisions can be evaluated via the judges':[123] (1) consistency across decisions on the same substantive question; (2) skills of legal reasoning and judgment; (3) problem-solving abilities; and (4) creativity. The criteria identified by Kritzer which depend on factors *beyond* the courts' powers ('utility' of and 'clientele' for the judgments)[124] are not used here, given the court-centric focus of the analysis. Differences between statutory frameworks appear as intervening variables, as they constrain or facilitate well-crafted judgments. For example, if courts can impose sanctions other than an outright ban, they can issue more creative and context-sensitive judgments. With the help of judicial craft, new light is shed on the 'success' and 'failure' of party bans, whereby not all *petitions that failed* amount to *failed bans*, and not all petitions that *resulted in a ban* amount to a *successful ban*.

Czechia

In the aftermath of violent anti-Roma demonstrations organised by the marginal Workers' Party, the executive submitted a petition requesting that the party be banned. It argued that, by violating the Act on the Right to Assembly,[125] the Workers' Party had committed an unlawful activity, thereby creating sufficient

[119]T. Ginsburg et al., 'The Law of Democratic Disqualification', 111 *California Law Review* (forthcoming) p. 1 at p. 23, ⟨https://papers.ssrn.com/abstract=3938600⟩.

[120]For Slovakia, *see* J. Drgonec, *Ústava Slovenskej republiky: Teória a prax* (CH Beck 2019) p. 726; for Hungary, Sólyom, *supra* n. 28, p. 101.

[121]Drgonec, *supra* n. 120, p. 724-725.

[122]Act on the Constitutional Court of the Slovak Republic, No. 314/2018 Coll. §180 in connection with §183; for Czechia and Hungary, *see supra* n. 110.

[123]The relationship between courts and judges is mutually constitutive: '[. . .] institutions have an important role in shaping the development of individuals within their role': J. Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge University Press 2006) p. 350.

[124]Kritzer, *supra* n. 80.

[125]Act No. 84/1990 Coll.

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grounds for proscription.[126] However, the evidential basis supporting this petition was, beyond the demonstrations, rather scarce. Accordingly, the Supreme Administrative Court did not issue a ban, but gave precise details on the evidence needed for a ban. Although this guidance was 'merely academic',[127] it helped improve subsequent petitions,[128] for example in terms of the type of relevant evidence that was required. The executive came back with an improved petition after a few months. The Court, with the help of experts in various adjacent disciplines,[129] scrutinised the Workers' Party's systematic positioning against minority rights, its capacity to unite extreme political actors and organise political gatherings, and its positive portrayal of past authoritarian political regimes. Referring to the case law of the Strasbourg Court on Article 17 of the ECHR,[130] it issued a ban based on the Workers' Party posing an imminent threat to the democratic foundations of the state and rights and freedoms that could not be neglected or addressed by a temporary suspension.[131]

Even though, in the first case, there was no previous domestic case law, the two cases together show *consistency*, as, in the second case, the Supreme Administrative Court retained the approach it had introduced in the first one. By establishing the connections between the rhetoric and actions of the Workers' Party, and by embedding these in a comparative and historical perspective, the Court, in both judgments, demonstrated *skills of legal reasoning and judgment* proportionate to the case complexity. Markedly, the judgment banning the Workers' Party reaches 122 pages, compared with the average of around 20 pages in the other judgments covered in this article. The composition of the judicial panel was the same for both cases, except for one differing member. Although expert witnesses were not called, most judges had experience with conceptual issues. At least three panel members were associate professors, and the remainder had extensive academic interactions (such as advanced degrees from abroad). Academic training does not guarantee *problem-solving abilities*, but may be conducive to sensitivity towards context as a necessity for (quality) academic work. The justifications offered in the case were affirmed by the Czech Constitutional Court, which heard an appeal against the ban. The plenum of that court merely acknowledged the 'extent and thoroughness

[126]Supreme Administrative Court of the Czech Republic, Pst 1/2008 – 66 9-11, (2009) § 50, 54, 59.

[127]Ibid., § 79, also § 86, on the effort to obtain power by 'undemocratic means', § 91, on violation of the Assembly Act as an insufficient ground for the prosecution of the party.

[128]J. Filip, 'Návrh na rozpuštění Dělnické strany před NSS', 18 *Jurisprudence* (2009) p. 14 at p. 20.

[129]Mareš, *supra* n. 18, p. 42-43.

[130]Supreme Administrative Court of the Czech Republic, Pst 1/2009 – 348 (2010) §§ 663-664.

[131]Ibid., §§ 626-628.

of the investigation that had been carried out'.[132] The judgments apply traditional solutions to party ban petitions according to the Czech militant framework (rejection to ban or ban) and hence are not particularly *creative.*[133] Still, their attention to detail demonstrates the judicial craft of the Supreme Administrative Court and serves as a key reference point for potential future cases in Czechia.

Slovakia

The Slovak Supreme Court has received two party ban petitions to date. The first one was in 2005, on the STNP, and resulted in its ban. The second one pertained to the PPOS as the STNP's successor, but the Court rejected the petition this time. STNP was a marginal political party established in January 2005. In its 'People's programme', it advocated the reintroduction of a 'class system of governance' where, *inter alia*, electoral rights would be conditioned by the citizens' membership in particular classes, and a 'reciprocal' acknowledgment of minority rights depending on the acknowledgment of Slovaks' rights in other countries. It also organised parades in uniforms of the Hlinka Guard, a militant arm of the wartime Slovak state that actively collaborated in the Holocaust.[134] In a mere nine-page judgment affirming the attorney general's petition, the Court analysed how several provisions of the 'People's programme' violated the constitutional guarantees of freedom and equality and therefore amounted to antidemocratic advocacy.[135] *Consistency* was not a source of concern, because this was the first judgment of its kind. But the brevity of the Court's *legal reasoning* did not encompass references to the actions of the party's representatives and failed to account for the political context, by declining to include expert opinions. The Court argued that an expert opinion on related criminal charges against prominent party members 'contains conclusions from history and political science which are unnecessary for a legal assessment of the case'.[136] By isolating the case from a broader (historical/political) context, the Court showed limited *abilities*, creating a risk it would 'make decisions on matters [it] knows little about'.[137] The judgment does not display *creativity,* as it does not offer solutions for future, more challenging cases of party bans, and it does not even acknowledge the complexity of party ban cases.

[132]Czech Constitutional Court, PL. ÚS 13/10 (2010).

[133]*See* Kritzer, *supra* n. 79. The first of the two judgments may be argued to be creative in taking up the role of providing advice to the executive. However, the analysis here evaluates all judgments in a single case together, rather than separately.

[134]For example, M. Vrzgulová, 'Memories of the Holocaust: Slovak Bystanders', 23 *Holocaust Studies* (2017) p. 99 at p. 103-105.

[135]Supreme Court of the Slovak Republic, 3Sž/79/2005 (2005).

[136]Ibid., p. 2.

[137]N.W. Barber, 'Self-Defence for Institutions', 72 *The Cambridge Law Journal* (2013) p. 558 at p. 571.

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Subsequently, a registered civic association (but not a political party) called Slovak Togetherness managed to build on the legacy of the banned party. The attempt to ban the association by the ministry of interior was overruled by the Supreme Court in 2009 because fair warning to the association to cease the unlawful activities was not provided before its decision.[138] After these experiences, STNP leader Marian Kotleba engaged in a more covert, sophisticated opposition to democracy, by declaring a crackdown on all 'parasites' in society, which was clearly aimed at the Roma minority.[139] Authorities reacted to these strategies with sporadic legal proceedings, such as the denial of registration for The People's Guard, an organisation associated with the PPOS that employed symbolics resembling the wartime Slovak state.[140] Other petitions, however, amounted to a failure on the prosecution's side.[141]

The attorney general's 2017 petition for banning the PPOS after seven years of operations and the 2016 electoral success was by far the most significant action in support of a party ban in Slovakia to date. In rejecting this petition, the Supreme Court retained *consistency*, when compared to the verdict in STNP, in its general commitment to a model of militant democracy in Slovakia.[142] However, the two judgments are inconsistent in terms of the burden of proof required for a party ban. According to the Court in *PPOS*, '[f]or banning a party, it is not enough [. . .] to just populistically declare anticonstitutional goals, rather, the accused political party must in reality combat the free democratic order [. . .]'.[143] The advocacy of 'anticonstitutional goals' was a reason sufficient to ban PPOS' predecessor, STNP, but the Court did not justify the divergence. In fact, it altogether excluded the *STNP* case from consideration, claiming that the case had been closed (*res judicata*).[144]

Unlike in 2005, the Supreme Court engaged with the case law of the European Court of Human Rights, on the basis of which it legitimately questioned whether a ban would pose a proportionate response in these circumstances.[145] However, it omitted references to Article 17 European Court of Human Rights case law, according to which a ban is warranted regardless of the prospects of the party

[138]Supreme Court of the Slovak Republic, 6Sr/1/2009 (2009).

[139]M. Mareš, 'How Does Militant Democracy Function in Combating Right-Wing Extremism? A Case Study of Slovakian Militant Democracy and the Rise of Kotleba – People's Party Our Slovakia', in Ellian and Rijpkema, *supra* n. 30, p. 61 at p. 72.

[140]M. Steuer and M. Kovanič, 'Militarisation of Democracy in Slovakia', in Rak and Bäcker, *supra* n. 107, p. 165.

[141]M. Steuer, 'Militant Democracy on the Rise: Consequences of Legal Restrictions on Extreme Speech in the Czech Republic, Slovakia and Hungary', 44 *Review of Central and East European Law* (2019) p. 162 at p. 192-194.

[142]Supreme Court of the Slovak Republic, *supra* n. 2, § 156.

[143]Ibid., § 136.

[144]Supreme Court, *supra* n. 2, § 163.

[145]Ibid., pp. 20–28.

triggering an actual regime change.[146] Moreover, it made several unwarranted assertions in its reasoning. Notably, it claimed that the PPOS' priority of 'preventing immigrants from seizing Slovakia' is 'in line with the current government policy',[147] as if anything (allegedly) being part of government policy would be self-evidently constitutional. Elsewhere, the Court claimed that the PPOS engaged in 'labelling the ample problems of the society' which 'cannot be limited because of using politically incorrect language [. . .]'.[148] The Court seems to have used such phrases to indicate the similarity between some of the PPOS's declared goals and those of other parties but along the way it came dangerously close to unintentionally endorsing such goals.

In evaluating the threat that the PPOS poses to the Slovak democratic order, the Court did not consult external experts. It argued that the PPOS could not be a catalyst of substantive political change, because of its small number of seats on the National Council.[149] This approach does not demonstrate the Court's practical *abilities* to engage with the political context. For example, PPOS votes could potentially be decisive for constitutional amendments, or other parties might co-opt its illiberal rhetoric, legitimised by the Court, to win over PPOS voters. Another Slovak political party Smer-SD, which formed a single-party executive in 2012–2016, had, by the time of the outbreak of the Covid-19 pandemic, openly embraced several aspects of PPOS's illiberalism.[150]

Finally, with the Court not offering significant new ideas and providing limited guidance on party bans which could be used in future cases, the judgment does not contain 'decisions and solutions that go far beyond the routine as an indicator of its *creativity*'.[151] A similar case would today be adjudicated by the Slovak Supreme Administrative Court,[152] but the *PPOS* ruling shows the Supreme Court's limited judicial craft.

[146]Tyulkina, *supra* n. 68, p. 95-98; Rijpkema, *supra* n. 25, p. 151-153.

[147]Ibid., § 151-152.

[148]Ibid., § 167.

[149]Ibid., § 135-136.

[150]Marušiak, *supra* n. 92; Z. Gál and D. Malová, 'Slovakia in the Eurozone: Tatra Tiger or Mafia State inside the Elite Club?', in K. Arató et al. (eds.), *The Political Economy of the Eurozone in Central and Eastern Europe: Why In, Why Out?* (Routledge 2021) p. 165 at p. 176.

[151]*See* Kritzer, *supra* n. 79.

[152]In August 2022, the attorney general indicated that he will not initiate another petition to ban the PPOS, despite, a few months earlier, Kotleba's conviction for defamation of nation, race and belief being affirmed by the Slovak Supreme Court. The attorney general argued that the party's popularity is decreasing and also substantively it no longer presents claims that would be a threat to democracy: Generálna prokuratúra Slovenskej republiky, *K dôvodom nepodania žaloby na rozpustenie politickej strany ĽSNS* (2022) ⟨https://www.genpro.gov.sk/spravy-2ed7.html?id=3021⟩.

Hungary

Hungarian courts examined the issue of whether to ban the Hungarian Guard, a registered association accompanied by an informal paramilitary movement. Even though the Hungarian Guard was not a party, it had close ties to the far-right Jobbik party, and its activities were similar to those of the Workers' Party in Czechia and of Marian Kotleba's parties in Slovakia.[153] The petition for a ban came after several anti-minority demonstrations (aimed especially at the Roma) near the homes of underprivileged Roma communities. Although no violent incidents took place, these demonstrations spread threats of violence against members of the targeted communities.[154] The Hungarian Guard was operating according to association law, which remains a relevant legal framework for the operation of political parties in Hungary.

The analysis here focuses on the judgment by the Budapest Court of Appeals,[155] which upheld the decision of the Budapest Metropolitan Court to ban the Hungarian Guard, and was later itself upheld by the Supreme Court.[156] The judgments are *consistent* with each other in that they focus on the violations of human dignity that occurred during demonstrations, as a reason for the ban.[157] The judges highlighted that the decision to hold demonstrations in small, rather isolated villages with a majority Roma population created 'captured communities', justifiably feeling threatened by the possibility of violence against them.[158] The Supreme Court's *reasoning* persuaded the European Court of Human Rights, which later reviewed the decision.[159] Yet neither Hungarian court decision offered reasons why a more minor interference than an outright ban would not have sufficed, merely resorting instead to the formalist claim that this sanction is the only one foreseen by the statutory framework.[160] Furthermore, they did not employ insights from external experts, signalling more limited *abilities* to craft a decision that could also be used in Hungary's political struggle with the far right. Indeed, in the 2010 general elections after the ban, Jobbik attained 16.7 per cent of the vote as 'the strongest for an extremist party in Hungary since the fall of communism two decades earlier [. . .]'.[161] Finally, the ban signals the

[153]Ellinas, *supra* n. 93, p. 36-37.

[154]Varga, *supra* n. 18, p. 794-797.

[155]Budapest Court of Appeals, 5.Pf.20.738/2009/7 (2009) p. 21.

[156]Supreme Court of Hungary, Kfv.X.37.783/2009/6 (2009) p. 10, 19.

[157]H. Küpper, 'A Legfelsőbb Bíróság ítélete a Magyar Gárda feloszlatása ügyében', 1 *Jogesetek magyarázata* (2010) p. 17 at p. 17-18.

[158]Budapest Court of Appeals, *supra* n. 155, p. 21.

[159]ECtHR 9 July 2013, No. 35943/10, *Vona* v *Hungary*.

[160]Küpper, *supra* n. 157, p. 22-23.

[161]W.M. Downs, *Political Extremism in Democracies: Combating Intolerance* (Palgrave 2012) p. 192.

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limited *creativity* of the Hungarian courts. The judgments do not signal the realisation that future cases might perceive the present one as authoritative guidance, nor do they recognise that a broad reading of bans, revolving around the protection of the dignity of the community instead of the individual, and the use of law to restrict all antidemocratic actions,[162] might be abused by future illiberal actors. Notably, after the ban, *Jobbik* transformed itself by engaging in more sophisticated anti-minority rhetoric, made it to the parliament[163] and, upon further diluting its positions,[164] has even become part of the coalition against Viktor Orbán in the 2022 elections.[165]

Summary

The four components of judicial craft analysed in this article cannot be neatly isolated from each other. For example, displaying creative solutions might increase a judgment's problem-solving ability and the involvement of external experts might also be conducive to quality legal reasoning. Nor does the focus on courts deny the importance of looking beyond the courts into the constraints for judicial craft posed by the statutory framework, which – as has been demonstrated – are more significant in Slovakia than in Czechia or Hungary.

Still, judicial craft – entailing consistency, utilising comprehensive legal reasoning, demonstrating sensitivity to the political context and showing openness to creative solutions – might make a petition that is rejected (such as the first Workers' Party judgment) a success insofar as it offers guidance to future cases and minimises the risk of unintended consequences. The absence of these elements, in contrast, raises doubts about the possibility of labelling rulings leading to an actual ban, such as the *STNP* case, a success. More broadly, judicial craft offers a framework to uncover the resources endogenous to courts, that may be essential in the moments illiberal actors launch assaults on them.[166]

[162]Küpper, *supra* n. 157, p. 20-22.

[163]*See*, e.g., E. De Giorgi et al., 'New Challenger Parties in Opposition: Isolation or Cooperation?', 74 *Parliamentary Affairs* (2021) p. 662 at p. 668-669.

[164]Pirro et al., *supra* n. 92, p. 30-31.

[165]This development is similar to that in Slovakia. There, STNP leader Kotleba, instead of ceasing partisan activities in the aftermath of the ban on STNP, spearheaded PPOS which became more successful than its predecessor.

[166]P. Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe', 15 *EuConst* (2019) p. 48.

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Conclusion

Some antidemocratic actors employ sophisticated strategies to appear democratic while trying to undermine the foundations of democratic regimes. Militant democracy is one ever-controversial solution to the threat they pose. In militant democracies, most or all institutions are ready to invoke rights restrictions to underline the commitment to the core values of democracy. If democracy is not reduced to unrestrained majority rule,[167] adjudicative institutions[168] which interpret and apply measures such as party bans are central to its perseverance. Party ban cases require judges to evaluate the political context in which the party operates and assess extensive evidence under increased public scrutiny. Courts may set precedents, which, in cases of low-quality decisions supporting a ban, could buttress future illiberal actors employing ban proceedings against legitimate political opposition.[169] As this article shows, the effectiveness of party bans is shaped by the evaluative capacities of the courts, approached here via four components of 'judicial craft'. '[A]ll institutions, including courts [. . .], are imperfect',[170] but decisions that are unable to provide in-depth, contextually sensitive and evidence-based justifications for their verdicts, consistently engaging with previous case law, disregard the complexity of the challenges at hand and can fuel the erosion of democracy. The framework offered here also enables a more systematic assessment of individual cases, going beyond the evaluation of the reasoning on the merits, as well as particular courts' case histories. The lessons on the significance of endogenous judicial resources for effective decisions may well go beyond party bans and encompass, at least, other rights restrictions associated with militant democracy.

This article offers the first assessment of the effort of the Slovak authorities to ban the parliamentary far-right PPOS and sheds new light on three other prominent party or movement ban cases. In *PPOS,* the petition adjudicated by the Slovak Supreme Court did not go far enough in collecting comprehensive evidence of the PPOS posing a threat to democracy. Even so, the Court missed an opportunity to substantially advance case law on party bans by demonstrating judicial craft via its reasoning, inclusion of expertise, consistency with the previous Slovak party ban case, and creative application of the statutory framework.

[167]D. Collier and S. Levitsky, 'Democracy with Adjectives: Conceptual Innovation in Comparative Research', 49 *World Politics* (1997) p. 430; Merkel, *supra* n. 24, p. 34-35.

[168]B. Rothstein, 'Political Institutions: An Overview', in R.E Goodin and H. D. Klingemann (eds.), *A New Handbook of Political Science* (Oxford University Press 1998) p. 133.

[169]B. Magyar and B, Madlovics, *The Anatomy of Post-Communist Regimes: A Conceptual Framework* (CEU Press 2020) p. 157-161.

[170]P. Craig, 'Democracy', in R. Masterman and R. Schütze (eds.), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019) p. 201 at p. 217.

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Raising questions about the effectiveness of militant democracy in Slovakia, this contrasts with the case of the Workers' Party. There, the Czech Supreme Administrative Court, even in the first verdict where it declined to ban the party, utilised comprehensive legal reasoning sensitive to the political context of the case and contributed to greater clarity of the legal framework.

As an explorative study, this article cannot conclusively *identify* the factors behind the presence or absence of 'judicial craft', which would require more primary data (obtained, for example, via interviews with relevant stakeholders in party ban cases) as well as more cases. A few such factors have been hypothesised nevertheless. Academic background may be conducive to the quality of reasoning. The type of court handling the case may matter as well, with first-instance general courts typically facing more time and expertise constraints than apex and especially constitutional courts. The capacity of the key driving actors of extreme political movements to restructure a banned movement into a successful party, avoiding the substance of the ban, may count as a sign of the limited creativity of the court issuing the ban. Yet, other factors might be at play, including elements of the legal culture[171] (which may affect the understanding of *consistency* in terms of the precedential weight of the first judgment on the subject in the system[172]), or the relationship of the domestic court to the relevant international adjudicatory bodies (notably the European Court of Human Rights). The reconceptualisation of what counts as a more or less successful party ban case opens a new chapter in court-centric analyses of militant democracy where the 'culture of justification'[173] matters for evaluating the effectiveness of particular measures. Further research is needed to examine exogenous resources for judicial craft, such as the degree to which flexibility and creativity are facilitated by the statutory framework, but also public support of courts and their decisions.[174]

In sum, this article may appeal both to works which interpret the endogenous resources as indicators of particular judicial strategies,[175] as well as to those which are more inclined to see them as manifestations of the courts' broader conceptions

[171] *See* Dixon, *supra* n. 84, p. 308.

[172] Z. Kühn, 'Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement', 52 *American Journal of Comparative Law* (2004) p. 531 at p. 558-561. Interestingly, Professor Kühn was one of the judges in the Workers' Party cases.

[173] K. Möller, 'Justifying the Culture of Justification', 17 *I•CON* (2019) p. 1078.

[174] Acceptance is important as courts themselves are not immune from the social contexts in which they operate: P. Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press 2016) p. 508.

[175] S. Verdugo, 'How Judges Can Challenge Dictators and Get Away with It: Advancing Democracy While Preserving Judicial Independence', 59 *Columbia Journal of Transnational Law* (2021) p. 554 at p. 577-585; Y. Roznai, 'Who Will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy', 29 *William & Mary Bill of Rights Journal* (2020) p. 1.

of democracy,[176] whereby conceptions going beyond majority rule generally stipulate higher standards for the quality of reasoning and the courts' broader contribution to the public debate. Such conceptions of democracy are instructive for capturing 'how judges themselves understand their role'[177] in the political regime.[178] Admittedly, demonstrations of 'judicial craft' in cases involving antidemocratic actors might also differ from situations in which other principles, such as secularism,[179] are the object of protection. But the first association of militant democracy often remains the commitment to ensure continuity of democracy by legally restricting antidemocratic actors from dismantling institutions that enable the protection of individual rights, and ultimately free and fair elections.[180] Courts would do well to use each party ban case as an opportunity to better prepare for the challenges that the next one will bring.

[176]M. Steuer, 'Authoritarian Populism, Conceptions of Democracy, and the Hungarian Constitutional Court: The Case of Political Participation', 26(7) *International Journal of Human Rights* (2022) p. 1207.

[177]Dixon, *supra* n. 84, p. 308.

[178]C.W. Clayton and D.A. May, 'A Political Regimes Approach to the Analysis of Legal Decisions', 32 *Polity* (1999) p. 233.

[179]Turkey is a particularly pertinent case in connection to this practice, *see*, e.g., Özbudun, *supra* n. 68, p. 125.

[180]A. Przeworski, *Crises of Democracy* (Cambridge University Press 2019) p. 162-164.

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