



EPISTEMIC FAIRNESS IN MILITANT DEMOCRACIES: SHAPING FREEDOM OF SPEECH ON THE INTERNET IN THE INNER SIX*

SPRAWIEDLIWOŚĆ EPISTEMICZNA W DEMOKRACJACH
OPANCERZONYCH – KSZTAŁTOWANIE WOLNOŚCI SŁOWA
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— ABSTRACT —

Embedded in the theories of epistemic fairness and militant democracy and based on the qualitative document analysis, the case study deals with the research question: What is the epistemic fairness of threats' definitions included in the restrictions on the freedom of speech on the Internet in the Inner Six states? The article delivers initial evidence to support the theory-grounded assumption that epistemic fairness in legally defining threats to liberal democracy is a component of militant democracies that makes democracy last and not erode. Slight deviations from the principle of epistemic fairness in defining threats to democracy in France and Italy coincided with an incidental reduction in the quality of democracy. This is the first case study on militant democracies using the

— ABSTRAKT —

Studium przypadku, oparte na teorii epistemicznej sprawiedliwości i demokracji opancerzonej oraz jakościowej analizie dokumentów, odpowiada na pytanie badawcze: Jaki jest poziom epistemicznej sprawiedliwości definicji zagrożeń zawartych w ograniczeniach wolności słowa w Internecie w państwach założycielskich Unii Europejskiej? Artykuł dostarcza wstępnych dowodów na poparcie ugruntowanego teoretycznie założenia, że sprawiedliwość epistemiczna w legalnym definiowaniu zagrożeń dla liberalnej demokracji jest komponentem demokracji opancerzonych, powodującym, że demokracja trwa i nie ulega erozji. Niewielkie odstępstwa od zasady epistemicznej sprawiedliwości w definiowaniu zagrożeń dla demokracji we Francji i we Włoszech współwystępowały z incydentalnym obniżeniem jakości

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theoretical category of epistemic fairness. Preliminary conclusions incentivize more extensive comparative research, including other restrictions to democratic freedoms.

Keywords: militant democracy; epistemic fairness; civil freedoms; the Inner Six; threats to democracy

demokracji. Jest to pierwsze studium przypadku demokracji opancerzonych wykorzystujące kategorię teoretyczną epistemicznej sprawiedliwości. Wstępne wnioski zachęcają do szerszej zakrojonych badań porównawczych uwzględniających inne ograniczenia wolności demokratycznych.

Słowa kluczowe: demokracja opancerzona; sprawiedliwość epistemiczna; wolności obywatelskie; państwa założycielskie Unii Europejskiej; zagrożenia dla demokracji

INTRODUCTION

With the development of new technologies, novel challenges for modern democracies emerge. As the current research reveals, the protective measures inherent in democracy, known as militant-democratic measures, are insufficient to prevent de-democratization effectively (Kuzelewska, 2022). Researchers highlight that the existing legal solutions fail to consider technology development and are outdated. Moreover, political decision-makers controlling the legislature create ostensibly protective measures that provide structural opportunities for abusing democratic institutions and values (Steuer & Kovanič, 2022). At the same time, anti-democratic actors abuse these legal measures in practice. Social, political, and economic crises, which are the context for democratic backsliding, are conducive to abuses (Rezmer-Płotka, 2022). Also, political nations increasingly tolerate the misuse of anti-democratic means of shaping power. The current studies account for an authoritarian turn resulting from exploiting militant-democratic measures, not using them, and employing inadequate means (Rak, 2022). However, it remains a puzzle why some militant democracies do not make democracies vulnerable.

The article aims to verify the theory-grounded assumption that epistemic fairness in legally defining threats to liberal democracy is a component of militant democracies that makes democracy last and not erode (Kim, 2022). A threat's definition is epistemically fair when it draws on an actual diagnosis of the threat, including its consequences for a political nation's sovereignty. Introducing the category of epistemic fairness to militant democracy studies is a theoretical contribution to expanding the theory of contemporary militant democracies. It enriches our understanding of defining threats to democracies called enemies

of democracy and their consequences for political regimes. Moreover, the study provides initial empirical evidence to support a theory-based explanation of the relationship between the epistemic fairness of threats' definitions and de-democratization. Still, it has limited exploratory and explanatory power due to its limited focus on only one anti-democratic restriction.

The case study examines the restrictions on freedom of speech on the Internet in the Inner Six states, the founding members of the European Union (EU), which are Belgium, France, Germany, Italy, Luxembourg, and the Netherlands. They constitute a flagship example of resilience to anti-democratic threats. According to the Freedom in the World reports, during the recovery from the 2007–2009 great economic crisis, the democracies did not erode in these states. The exceptions include short-term decreases in quality in the rankings in France and Italy. They were a reaction to single political events, i.e., terrorist attacks in France, and long-lasting tendencies counterbalanced by other protective measures, i.e., mafia actions and media concentration in Italy (Rak, 2022). At the same time, the democracies remained stable compared to other regions of the EU (Skrzypek, 2022). In turn, the selected type of restriction meets the criteria of militant democracy sources of inefficiency. Existing precautions are ineffective in determining the limit of interference by entities abusing the freedom of expression on the Internet in the values protected by militant democracy.

The remainder of the article consists of three parts. The first discusses methodological and theoretical assumptions for the case study of restricting freedom of speech on the Internet in the Inner Six states. Then, we move on to the restriction-based definitions of threats and evaluate their epistemic fairness for each state individually. The last part offers a comparative perspective and determines avenues for continuing studies on freedom of speech and democratic resilience.

RESEARCH DESIGN

The analysis covers the Inner Six states as the crucial instances of enduring militant democracies. They offer rich comparative material to delve analytically into democratic resilience (Rak, 2022). Moreover, the Inner Six states are Western European consolidated democracies whose societies and political structures have been developing similarly. The democracies suffered similar social consequences of implementing austerity measures. They had to face a tremendous social mobi-

lization and curb the anti-democratic actors that emerged in response to cuts in social policies and public spending. The Inner Six states' involvement in European integration and respect for EU institutions and values are alike. These factors allow us to control for confounding factors when seeking to develop a theoretical understanding of epistemic fairness as a feature of militant-democratic restrictions that makes them endure.

The time caesuras are the beginning of the 2007–2009 Great Recession, resulting in democratic backsliding worldwide, and the 2020 global public health crisis outbreak. The latter initiated a new wave of the loss in quality of democratic regimes. By covering the period from 2008 to 2019, the analysis includes the whole phase of neo-militant democracies' endurance in recovering from the economic crisis' austerity-shaped consequences.

A case study approach effectively verifies theory in a new empirical context. It helps us identify the epistemic fairness of threats' definitions, develop a comprehension of their impact on a militant democracy's transformative potential, and conceptualize the relationships between these two factors for future studies. The case study deals with the research question: What is the epistemic fairness of threats' definitions included in the restrictions on the freedom of speech on the Internet in the Inner Six states? Limiting the analysis to one measure comes from the need to check the analytical potential of epistemic fairness in militant democracy studies and to diagnose the directions for future research.

We use a qualitative document analysis method to investigate national legislation. It allows us to list the laws imposing restrictions on the freedom of speech on the Internet in the Inner Six states. The list of sources includes constitutions, parliamentary acts, and acts issued by the executive addressing freedom of speech on the Internet. Encompassing all relevant legal acts, the corpus of sources is total. We also refer to relevant jurisprudence as supplementary sources to deepen the understanding of individual regulations if necessary.

The source analysis starts with identifying threats against which the laws protect the political nations according to the legislators' declarations. We determine the definitions of threats against which anti-democratic measures apply. The following analytical step involves positioning threats against liberal democracy by evaluating their epistemic fairness. Each case takes on one of two values depending on the regulation's designed influence, i.e., strengthening or weakening the political nations' sovereignty, understood as an ability to make final political decisions. While the former is peculiar to epistemic fairness, the latter is typical of unfairness.

In studies on militant democracy (e.g., Rak & Bäcker, 2022), a political nation is a community of individuals who share a collective political identity based on their citizenship and membership in a particular political entity, typically a nation-state. A political nation goes beyond a mere ethnic, cultural, or territorial identity. It covers individuals from diverse backgrounds bound together by a common political framework, i.e., institutions, laws, and governance structures.

Epistemic fairness is a theoretical category that depicts the quality of regulations and applies to investigate the characteristics of threats' definitions. Epistemically fair definitions draw on objective and credible knowledge rather than being influenced by prejudice, bias, or arbitrary factors. It requires a careful and balanced evaluation of the available information, considering different perspectives, and avoiding unfounded or biased generalizations or discriminatory practices. It is qualitative and gradable. Accordingly, a threat's definition is epistemically fair when it draws on an actual diagnosis of the threat, including its consequences for a political nation's sovereignty. As such, an epistemically fair definition targets the genuine enemies of democracy. The latter puts democracy at risk by striving to undermine or overthrow it. A threat's epistemically unfair definition rests on a fake threat diagnosis. It includes a false image of the latter's impact on a political nation's sovereignty. Since the threat can neither undermine nor overthrow democracy, it is a fake enemy of democracy. The use of epistemically fair and unfair definitions of the enemies of democracy provides the basis for legitimization claims, i.e., it allows one to justify their position in power, political decisions, and changes in the law that are the implementation of political interests.

We code as epistemically fair the restrictions limiting freedom of speech that draw on an actual diagnosis of the threat, including its consequences for a political nation's sovereignty. A restriction is epistemically fair if it does not exclude an individual or a group from political decision-making based on prejudice, bias, or arbitrary factors. Epistemically unfair restrictions involve restrictions on freedom of speech that apply to using specific websites and the publication of specific content, thereby excluding an individual or a group from political decision-making based on prejudice, bias, or arbitrary factors. They also include restrictions on specific society groups regarding publishing on the Internet. Leaving space for threats' interpretation with a broad definition is partially epistemically fair. It does not exclude any part of the political nation from decision-making but generates room for misinterpretation and abuses.

RESEARCH FINDINGS

In the period under analysis, the Italian Constitution ensured freedom of speech. Everyone had the right to express their thoughts through writing, speech, and other forms (*Constitution of the Italian Republic*, Article 21). On July 30, 2015, the Italians introduced the Declaration of Rights on the Internet, which granted everyone the right to access the Internet (Article 2). Moreover, data transmitted and received should not be discriminated against or restricted (Article 4). It introduced the possibility of violating a person's secrecy and freedom if the law provides or the relevant court has granted permission (Article 7). Moreover, it restricted the right to access networks and anonymously communicate if justified by the need to protect critical public interests (Article 10). The restrictions were implemented based on the law and guided by the characteristics of a democratic society. If a case is provided by law or an Internet user violates dignity, the court may identify the user. The declaration restricted using hate speech, discrimination, and violence online (*Dichiarazione dei diritti in Internet 2015*, Articles 2, 4, 7, 10, 13). It gave security services a tool to combat enemies of democracy online. Still, the law ensures a wide range of freedoms and reassurance of their rights and protects the public from harmful content.

Regulations concerning crimes committed on the Internet are also included in the Italian Penal Code. Article 612-ter criminalizes the dissemination of sexual content (images and videos) without the consent of the persons represented (*Codice Penale (Italy)*, Article 612-ter). The threat's intersubjective definition aims to strengthen the protection of citizens and cannot be misinterpreted to the detriment of the political nation's sovereignty, so the provision is epistemically fair.

Following the 2015 regulation, militant-democratic protection increased in Italy. These restrictions did not affect the political nation's sovereignty. Targeting those who commit harmful acts, the threats' definitions were partially epistemically fair. With skillful argumentation regarding one of the elements, i.e., hate speech, it is possible to classify as an enemy of democracy a person who is not. When misused or abused to satisfy political interests, the partial epistemic fairness in threats' definition may be a factor that made the Italian democracy vulnerable.

The 1789 Declaration of Human and Civic Rights in France guarantees freedom of speech (Article 10). However, it allows exceptions for speeches that abuse this freedom in cases specified by law (Article 11). Thus, spreading views and expressions that have been penalized is illegal. The above provision protects

the political nation from exposure to harmful content regulated by the Criminal Code. It does not exclude specific groups from participating in the state's decision-making but prevents the spread of anti-democratic values.

According to the French Law on Confidence in the Digital Economy, the freedom of speech on the Internet can only be restricted if respect for the dignity of the people, the freedoms and property of others, pluralism of thought and opinion, and the protection of public order, or the need for national defense (*Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique*, Article 1) require it. The above provisions are questionable because the broad catalog of applicability and lack of sharp criteria may result in their abuse, thus limiting the French political nation's sovereignty. Nevertheless, as long as applied to combat harmful content on the Internet or protect public security, they do not undermine the French political nation's sovereignty. The 2014 amendment also introduced a provision that if justified by the need to combat incitement to terrorism or glorification of such acts, public authorities may ask operators to withdraw such content (*Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique*, Article 6-1). It aimed to combat harmful content on the Internet and prevent the spread of anti-democratic values.

The French also limited freedom of speech on the Internet regarding supporting terrorism and incitement to terrorist attacks. If such a crime is committed online, the penalty increases from 5 to 7 years in prison and the fine from EUR 75,000 to 100,000 (*Code pénal (France)*, Article 421-2-5). An act of terrorism is also preparation for certain crimes (possession, obtaining, attempting to obtain, or manufacturing objects or substances that may pose a threat to others), and one of the factors of such preparation is visiting sites that directly incite to or glorify terrorism (*Code pénal (France)*, Article 421-2-6). These militant-democratic regulations aim to preclude further possible acts of terror in France. They also establish a tool for detecting terrorist activity on the Internet. Fear can limit the ability to make rational political decisions and discourage participation in public debate. As such, the protective measures favor the political nation's sovereignty.

Nevertheless, the provisions restricting freedom of expression on the Internet are of limited epistemic fairness. They can be applied broadly and thereby misused or abused by the ruling, which means they can be used as political tools. The limited epistemic fairness may have made French democracy vulnerable.

The Belgian Constitution states that freedom of expression in any form is guaranteed but stipulates that crimes committed to practicing this freedom may

be punished (*The Belgian Constitution*, Article 19). Furthermore, exercising freedoms must be guaranteed without discrimination (Article 11), and censorship can never be imposed (Article 25). Penal Code forbids the application of the provisions of this title (previous articles refer to terrorist actions) that would restrict or undermine fundamental freedoms, which also applies to freedom of the press and freedom of expression in other media (*Code pénal (Belgium)*, Article 141-ter). Thus, freedom of speech on the Internet in Belgium is protected yet unrestricted by any law as long as it does not constitute a crime.

In 2019, Belgium established a legal framework for the security of networks and information systems of general interest for public security. However, it primarily aimed at transposing the Directive of the European Parliament and the European Council on measures to ensure a high, common level of security for networks and information systems in the EU (*Loi établissant un cadre pour la sécurité des réseaux et des systèmes d'information d'intérêt général pour la sécurité publique*, Article 1). Thus, Belgium focused not on restricting freedom of speech on the Internet but on ensuring the security of information systems and implementing the EU directive.

The restrictions on freedom of speech aimed to protect minorities from discrimination. Belgian laws did not allow the spread of views that are crimes under the law. The law protected the political nation's sovereignty. Still, Belgium did not have a specific law on online speech. The threats' definitions were epistemically fair since they referred to those who could threaten democracy, identified in a just and intersubjective way. The possibility of their overinterpretation was limited.

The Luxembourg Constitution guarantees freedom of speech and opinion in all forms, including online. It can be restricted only if a crime is committed using this freedom. The press is free, and censorship can never be imposed (*Luxembourg Constitution of 1868 with Amendments through 2009*, Article 24). Additionally, the Freedom of Expression in the Media Act ensures freedom of expression in the media (*Loi du 8 juin 2004 sur la liberté d'expression dans les médias*, Article 1). Freedom of expression is the right to receive and seek information and to decide whether to make it public according to a freely chosen form and method. The act also guarantees the right to comment on such content. Still, it points out that the distinction between a fact and related commentary must be discernible (*Loi du 8 juin 2004 sur la liberté d'expression dans les médias*, Article 6). The laws established by the Grand Duchy of Luxembourg protected citizens from harmful content and the spread of criminal attitudes. These laws

rest on a fair analysis of threats. They are structured to facilitate participation in political decision-making and public debate and therefore do not limit the political nation's sovereignty.

The Luxembourgian Criminal Code restricts freedom of speech during assemblies, in public places, and disseminating content (posters, placards, writings, and other printed or not, distributed or sold) that directly provokes to commit a crime (*Code pénal (Luxembourg)*, Article 66). It protects citizens from the dissemination of opinions that are incompatible with democratic values.

Luxembourg introduced additional restrictions on the right to freedom of expression online during the period under review. From December 18, 2015, restrictions in the Criminal Code apply to incitement to terrorism (*Code pénal (Luxembourg)*, Article 135-11). Also, hate speech, including its online forms, was criminalized (*Country Reports on Humans Rights Practices for 2019*, sec. 2, a). The amendment of the Criminal Code did not affect the political nation's sovereignty. The threats' definitions were epistemically fair. They were precise, based on a fair assessment, and addressed those who commit or incite crimes, and the possibility of misinterpretation was low.

The Netherlands did not implement special restrictions on freedom of speech on the Internet. The Dutch Constitution states that requiring permission to publish and disseminate thoughts or opinions through the press is impossible. The only restriction related to the content of performances organized for people under sixteen was to protect good morals. The law concerned depriving content or content that is inappropriate for their age (*Constitution of The Netherlands*, Article 7). This measure did not limit the political nation's sovereignty but protected young citizens from harmful messages. The latter was fairly determined.

Furthermore, Dutch law criminalizes defamation using writings or images (*Strafwetboek*, Article 261). Insulting a group of people in writing or using an image because of their race, religion, beliefs of hetero or homosexual orientation, or physical or mental disability is prohibited (*Strafwetboek*, Article 137c). The law also criminalizes public, oral, written, or image-based incitement to hatred or discrimination based on race, religion, belief, gender, hetero or homosexual orientation, and physical and mental handicap (*Strafwetboek*, Article 137d). The restrictions were based on a fair recognition of threats. They protected citizens from harmful content that could occur with complete freedom of speech. The Netherlands did not seek to limit the political nation's sovereignty. The threats' definitions were highly epistemically fair. They referred to Internet users who spread undemocratic content and attacked social minorities.

The German Constitution guaranteed the free expression and dissemination of views in speech, writing, and image. German law did not provide for the possibility of censorship. However, other laws limited these rights (*Basic Law for Germany*, Article 5). The Criminal Code provided penalties for operating criminal online trading platforms (Article 127), prohibited the dissemination of materials promoting organizations that are terrorist or unconstitutional (Article 86), and penalized incitement to hatred (*Strafgesetzbuch*, Article 130). The above provisions protected the political nation from spreading anti-democratic content, such as unconstitutional organizations or those classified as terrorists. Simultaneously, they granted the right to freely manifest views that do not constitute a crime or offense. The regulations drew upon an unbiased recognition of threats. Therefore, German legislators did not seek to limit the political nation's sovereignty but to protect it from harmful content.

Moreover, in 2017, Germany introduced a new law on publishing content on the Internet aimed to counter hate speech, terrorism, and fake news on social media. However, it applied to service providers, not Internet users. It allowed services to control harmful content with an extensive but specific typology (*Gesetz zur Verbesserung...*, Article 1). The law required social media service providers to report unlawful behavior so that public authorities could eradicate it effectively. Limiting the political nation's sovereignty by using the restriction for political purposes was unlikely due to the specified catalog. The legislation targeted those who incite or engage in criminal activities. Based on a fair recognition, the threats' definitions were epistemically fair.

DISCUSSION AND CONCLUSION

The article delivers initial evidence to support the theory-grounded assumption that epistemic fairness in legally defining threats to democracy is a component of militant democracies that makes democracy last and not erode. Slight deviations from the principle of epistemic fairness in defining threats to democracy in France and Italy coincided with an incidental reduction in the quality of democracy. However, this is the first case study on militant democracies using the theoretical category of epistemic fairness. Preliminary conclusions incentivize more extensive comparative research, including other restrictions to democratic freedoms, especially freedoms of association, registration and functioning of political parties, assembly, the press, religion, passive and active voting rights,

LGBTQI+ rights, and naturalization. Such a study could enrich our understanding of the relationships between epistemic fairness and the rule of law.

The popularity of the Internet did not prompt the Inner Six states to regulate freedom of speech in the online space with special laws. Italy was the only country with detailed regulations. Germany also has a law for service providers (social media). These laws differ, as the Italian applies to citizens and providers, with the German seeking to regulate only the latter. Accordingly, militant-democratic measures take many forms and do not necessarily relate directly to citizens. Nevertheless, their introduction served to protect the political nations' sovereignty based on fairly determined threats to liberal democracy. The precautions facilitated the control of harmful content on the Internet while creating the possibility of criminal liability if such content appears online.

In the Inner Six states, the threats' definitions are epistemically fair to a high extent. They intersubjectively refer to those who commit, incite to commit a crime, or spread anti-democratic content on the Internet. In the states regulating hate speech, it is important to note how the above provision has been applied. Hate speech regulations can be a wide field for abuse by public authorities when implementing this provision due to the term's imprecision. In this regard, France opened the door to the possibility of classifying virtually everyone on the Internet as an enemy of democracy. In turn, the Netherlands introduced highly epistemically fair definitions by classifying what hatred against which persons meant and how it can be done.

In Belgium, France, the Netherlands, Germany, and Luxembourg, the constitutions and criminal codes guarantee freedom of speech if its exercise does not constitute a crime. Restrictions in the provisions of the criminal codes refer to discrimination, hate speech, glorification of terrorism, or incitement to crimes.

Freedom of speech on the Internet is still heavily unregulated. The existing laws are young or in the nascent stage. The rapidly developing technology will force lawmakers to create new laws and continue to introduce restrictions. Still, legislators continue facing the problem that some elements on the Internet are beyond the state's control, and at least part of militant-democratic measures may be delegated to civil society.

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