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## Challenged by news personalisation: five perspectives on the right to receive information

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### ABSTRACT


More and more news is personalised, based on our personal data and interests. As a result, the focus of media regulation moves from the news producer to the news recipient. This research asks what the fundamental right to receive information means for personalised news consumers and the obligation it imposes on states. However, the right to receive information is under-theorised. Therefore, we develop a framework to understand this right, starting from case law of the European Court of Human Rights. On this basis, we identify five perspectives on the right to receive information: political debate, truth finding, social cohesion, avoidance of censorship and self-development. We evaluate how news personalisation affects the right to receive information, considering these five different perspectives. Our research reveals important policy choices that must be made regarding personalised news considering news consumers' rights.

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### Introduction

The way we receive news today is changing. Before the internet, the mass media distributed news to large, anonymous audiences. With the digitisation of news and the introduction of recommender technologies, news organisations are now able to address news consumers more personally when distributing content. We may receive a personalised news selection adjusted to topics and sources we are interested in, while other people receive a selection tailored to their specific interests.<sup>1</sup> News organisations employ personalisation

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<sup>1</sup>Neil Thurman and Steve Schifferes, 'The Future of Personalisation at News Websites: Lessons from a Longitudinal Study' (2012) 13(5–6) *Journalism Studies* 775.

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algorithms, and many people also receive personalised news via social media. About one-fifth of respondents in a recent Eurobarometer survey said they mainly use social media to read news.<sup>2</sup>

Recent discussions about new information technologies and changes in the media mainly focused on the fundamental right to freedom of expression of the news media or media freedom, as guaranteed by Article 10 of the European Convention on Human Rights ('ECHR').<sup>3</sup> Democratic values, such as media pluralism and open debate, were realised by ensuring and promoting free speech. Debates about filter bubbles or echo chambers focused more on the position of media users, albeit mainly with an alarmist tone and without discussing in depth the users' legal position.<sup>4</sup> This contribution takes a novel approach, by providing a balanced analysis of news personalisation while focusing on news consumers' fundamental right to receive information, which is also guaranteed by Article 10 ECHR.

News consumers' fundamental rights to receive information may prove an important point of departure to realise democratic values in the personalised media landscape.<sup>5</sup> The new media environment includes many private media actors, US-based parties, and intermediaries that do not fall under European media law and regulation. Next to that, Article 10 may entail positive obligations for the state, such as ensuring that media users receive balanced news.<sup>6</sup> The legal position of recipients of personalised news should be considered to determine whether the state has positive obligations regarding personalised news, for instance to ensure that it is balanced. The question in this research is thus: *what obligations does the fundamental right of news consumers to receive information entail for the state in relation to news personalisation?*

The research starts from the observation that the right to receive information is under-theorised,<sup>7</sup> lacking a framework to understand the rights of news consumers or the obligations of states regarding news recipients. We derive such a legal framework from case law of the European Court of

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<sup>2</sup>TNS Political & Social, 'Flash Eurobarometer 437: Internet users' preferences for accessing content online' (European Commission 2016).

<sup>3</sup>See e.g. Maria Edström, Andrew T Kenyon and Eva-Maria Svensson (eds), *Blurring the Lines: Market-Driven and Democracy-Driven Freedom of Expression* (Nordicom 2016); Jack M Balkin, 'The Future of Free Expression in a Digital Age' (2009) 36 *Pepperdine Law Review* 427; Ewa Komorek, 'Is Media Pluralism? The European Court of Human Rights, the Council of Europe and the Issue of Media Pluralism' (2009) *European Human Rights Law Review* 395; Armin Von Bogdandy and others, 'Reverse Solange—Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 *Common Market Law Review* 489.

<sup>4</sup>Cass R Sunstein, *Republic.com 2.0* (Princeton University Press 2007); Eli Pariser, *The Filter Bubble: What the Internet is Hiding from You* (Penguin Press 2011).

<sup>5</sup>See similarly, Eric Barendt, *Freedom of Speech* (2nd edn, Oxford University Press 2005) 109 and 112, suggesting situations in which the recipient is in a better position to invoke its right to receive information, then the publisher is to rely on its freedom to speak.

<sup>6</sup>*Manole and Others v. Moldova* ECHR 2009-IV (extracts), para 101 [hereafter 'Manole'].

<sup>7</sup>Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press 2015) 6.

Human Rights ('ECtHR' or 'Court') concerning the right to receive information. In the case law, we find five perspectives from which to understand the right to receive information: political debate, truth finding, social cohesion, avoidance of censorship, and self-development. Four perspectives correlate with a set of common arguments for the right to freedom of expression,<sup>8</sup> but one perspective (social cohesion) is more unique to the right to receive information. We also link the five perspectives to standard-setting by the Council of Europe in the media field. These standards are not binding, but are authoritative.<sup>9</sup>

Below, the second section provides some background on the fundamental right to receive information. The third section sets out five perspectives from which to understand this right. The fourth section uses the five perspectives to think through what news consumers' right to receive information implies for news personalisation, and thus answers the main research question. The final section concludes the article and suggests directions for further research.

## The fundamental right to receive information

The European Convention on Human Rights is the most important European fundamental rights agreement and explicitly guarantees the right to receive information in Article 10, paragraph 1:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and *to receive and impart information and ideas* without interference by public authorities and regardless of frontiers.<sup>10</sup>

As this provision shows, the right to receive information is part of the fundamental right to freedom of expression. The European Court of Human Rights has also read a right to receive information in other fundamental rights, such as in the right to respect for private and family life,<sup>11</sup> or the right to a fair trial.<sup>12</sup>

In this research, we distinguish the right to receive information as part of objective law from the right as a subjective right.<sup>13</sup> There are two instances of the right to receive information as a subjective right. The Court has established that the right to freedom to receive information 'prohibits a

<sup>8</sup>Namely, the four arguments discussed by Barendt (n 6) 6–230: the importance of discovering truth, free speech as an aspect of self-fulfilment, citizen participation in a democracy and suspicion of government.

<sup>9</sup>Note, however, that in practice, states often implemented Council of Europe and other international standards only partially and with variety; see Evangelia Psychogiopoulou and others, 'The Freedom and Independence of Public Service Media in Europe: International Standards and Their Domestic Implementation' (2017) 11 *International Journal of Communication*.

<sup>10</sup>Emphasis added. See similarly, Art. 11(1) EU Charter.

<sup>11</sup>Art. 8 ECHR.

<sup>12</sup>Art. 6 ECHR.

<sup>13</sup>With thanks to the anonymous reviewer for helping us to get this clear.

Government from restricting a person from receiving information that others wish or may be willing to impart to him' or her.<sup>14</sup> Next to that, people have a subjective right to receive information from their governments. Council of Europe Member States guarantee everyone the right of access to official documents held by public authorities.<sup>15</sup> Other national and regional freedom of information acts also give people subjective rights to receive state-held information.<sup>16</sup> The Court has also been prepared to find that the denial of access to information may interfere with an applicant's right to freedom of expression in circumstances where the information is instrumental for the exercise of freedom of expression,<sup>17</sup> thereby deriving a subjective right to receive information from Article 10.

The finding that the right to receive information is part of objective law means that the right functions on an institutional level: law and policy-makers take the right into account when drafting laws and policies,<sup>18</sup> and the right underlies the media's mission to inform the public. In other words, the right to receive information also functions as a policy goal, instead of as a 'right'. This is illustrated by the fact that many laws, policies and court judgements (even where the applicants did not themselves invoke the right<sup>19</sup>) explicitly refer to the right to receive information in a general sense. The functioning of the right to receive information on the institutional level is most apparent in broadcasting regulation.<sup>20</sup>

In addition to its subjective-objective qualities, a right has vertical or horizontal effects. A right with vertical effect applies only between citizens and the state, and not directly between citizens and private entities. A right with horizontal effect applies between private parties, such as between two citizens, or between a consumer and a company. The fundamental right to receive information has only vertical application, because the ECHR addresses just

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<sup>14</sup>*Leander v. Sweden* (1987) Series A no 116, para 74 [hereafter '*Leander*']; *Gaskin v. the United Kingdom* (1989) Series A no 160, para 52 [hereafter '*Gaskin*']; *Guerra and Others v. Italy* ECHR 1998-I, para 53 [hereafter '*Guerra*']; *Sirbu and Others v. Moldova* App nos 73562/01 and 5 others (ECtHR, 15 June 2004), para 18 [hereafter '*Sirbu*']; *Roche v. the United Kingdom* [GC] ECHR 2005-X, para 172 [hereafter '*Roche*']; *Khurshid Mustafa and Tarzibachi*, para 41; *Társaság*, para 36; *Gillberg*, para 83; *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria* App no 39534/07 (ECtHR, 28 November 2013), para 41 [hereafter '*Österreichische Vereinigung*']; *Magyar Helsinki Bizottság v. Hungary* [GC] App no 18030/11 (ECtHR, 8 November 2016), paras 155–156, paras 127 and 133 [hereafter '*Magyar Helsinki*']. See also *Guseva v. Bulgaria* App no 6987/07 (ECtHR, 17 February 2015), para 36 [hereafter '*Guseva*']. See also Jan Oster, *European and International Media Law* (Cambridge University Press 2017) 57–59.

<sup>15</sup>Convention on Access to Official Documents (Tromsø Convention). See also Art. 42 EU Charter.

<sup>16</sup>Barendt (n 6) 108.

<sup>17</sup>*Magyar Helsinki*, paras 155–156.

<sup>18</sup>See similarly Natali Helberger, *Controlling Access to Content: Regulating Conditional Access in Digital Broadcasting* (Kluwer Law International 2005) 76.

<sup>19</sup>See for example *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* App no 931/13 (ECtHR, 21 July 2016), para 65 [hereafter '*Satakunnan*'].

<sup>20</sup>See Jackie Harrison and Lorna Woods, *European Broadcasting Law and Policy* (Cambridge University Press 2007) 266–289; Oster (n 15) 181–189.

states.<sup>21</sup> News consumers may thus invoke their fundamental right to receive information against public authorities, but not against private media organisations directly.

In relation to its vertical effect, the fundamental right to receive information is first and foremost a negative right. This means the right imposes a duty on the state *not to interfere* with someone's enjoyment of the right, unless interference is justified. However, scholars and policymakers have long argued that freedom of expression may require active intervention by the state.<sup>22</sup> In line with that view, the ECtHR has found effective exercise of the right to freedom of expression may require positive measures of protection by the state, such as enacting domestic legislation.<sup>23</sup> In the case of *Dink*, the ECtHR elaborated this principle, determining that states have a positive obligation to create a favourable environment for participation in public debate by all.<sup>24</sup> Moreover, the ECtHR found that even *in the sphere of relations between individuals* the state may be obliged to take positive measures of protection.<sup>25</sup> This could mean that states should adopt rules to ensure media organisations respect the right to receive information of news consumers.

In summary, the fundamental right to receive information does not entail a general subjective right of news consumers to request specific information from the government, let alone from news organisations.<sup>26</sup> The right to receive information is a *liberty* to receive information.<sup>27</sup> This liberty is part of objective law, and creates positive obligations for the state only in limited circumstances. The possibility, however, of positive obligations of the state raises the question of how the state could dispose of its obligations. The following section describes five perspectives from which to answer that question.

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<sup>21</sup>Art. 1 ECHR.

<sup>22</sup>Martin Bullinger, 'Freedom of Expression and Information: An Essential Element of Democracy' (1985) 28 *German Yearbook of International Law* 88.

<sup>23</sup>*Fuentes Bobo v. Spain* App no 39293/98 (ECtHR, 29 February 2000), para 38 [hereafter '*Fuentes Bobo*'], and *Özgür Gündem v. Turkey* ECHR 2000-III, paras 42–46 [hereafter '*Özgür Gündem*'].

<sup>24</sup>*Dink v. Turkey* App nos 2668/07 and 4 others (ECtHR, 14 September 2010), para 137 [hereafter '*Dink*'], para 137. Note that *Dink* concerned the positive obligation to protect journalists against attacks by members of an extreme nationalist group, enabling them to express themselves without fear. In policy documents, the Council of Europe has given a wider interpretation of *Dink*, going beyond protecting journalists against violence.

<sup>25</sup>See e.g. *Fuentes Bobo*, para 38; *Özgür Gündem*, para 42–43; *Appleby and Others v. the United Kingdom* ECHR 2003-VI, para 39; *Khurshid Mustafa and Tarzibachi v. Sweden* App no 23883/06 (ECtHR, 16 December 2008), para 32; *Verein gegen Tierfabriken Schweiz v. Switzerland (no. 2)* [GC] ECHR 2009-IV, paras 79–80 [hereafter '*VgT (no. 2)*']; *Dink*, para 106; *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC] ECHR 2012-III, para 134 [hereafter '*Centro Europa*'].

<sup>26</sup>See similarly, Helberger (n 19) 89; Perry Keller, *European and International Media Law: Liberal Democracy and the New Media* (Oxford University Press 2011) 439.

<sup>27</sup>Wesley N Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) *Yale Law Journal* 16.

## Perspectives on the right to receive information

This section describes five perspectives that can be used to consider the right to receive information in law, policy, and theory. We start with perspectives focused more on societal and public goals and move towards those more focused on individual and private goals: (1) open political debate; (2) truth finding; (3) social cohesion; (4) avoidance of censorship and (5) self-development. The perspectives may overlap and complement each other, which becomes particularly clear when we apply the perspectives to news personalisation.

### *Perspective of political participation*

Many laws and policies expressly promote the fundamental right to receive information because receiving information is essential for people to participate in political life. We use a broad concept of political participation, encompassing taking part in the electoral process, but also ‘discovering and forming an opinion of the ideas and attitudes of political leaders’,<sup>28</sup> forming an opinion about public and private activities of political representatives,<sup>29</sup> and discussing actions of the government with others.

The object and purpose of the ECHR explains why the right to receive information is so strongly connected to political participation. The preamble to the ECHR makes a connection between fundamental rights and democracy by stating that the fundamental rights and freedoms contained in the Convention ‘are best maintained on the one hand by an effective political democracy and on the other hand by a common understanding and observance’ of these rights and freedoms. Furthermore, the second paragraphs of Articles 8 to 11 of the ECHR only allow interference with the exercise of fundamental rights *insofar as necessary in a democratic society*. In other words, the ECHR is ‘designed to maintain and promote the ideals and values of a democratic society’.<sup>30</sup> At the core of the Court’s concept of democracy is freedom of political debate through freedom of the press.<sup>31</sup>

The perspective of political participation is similar to a common argument for the protection of free speech, namely citizen participation in a democracy. American judge Louis Brandeis famously stated that ‘freedom to think as you

<sup>28</sup>*Lingens*, para 42; *Castells v. Spain* (1992) Series A no 236, para 43 [hereafter ‘*Castells*’]; *Sürek v. Turkey* (no. 1) [GC] ECHR 1999-IV, para 59 [hereafter ‘*Sürek* (no. 1)’]; *Özgür Gündem*, para 58; *Şener v. Turkey* App no 26680/95 (ECtHR, 18 July 2000), para 41 [hereafter ‘*Şener*’]; *Stoll v. Switzerland* [GC] ECHR 2007-V, paras 122–123 [hereafter ‘*Stoll*’]; *Manole*, para 96; *Centro Europa*, para 131; *Animal Defenders International v. the United Kingdom* [GC] ECHR 2013-II (extracts), para 102 [hereafter ‘*Animal Defenders*’]; *Orlovskaya Iskra v. Russia* App no 42911/08 (ECtHR, 21 February 2017), para 107 [hereafter ‘*Orlovskaya Iskra*’].

<sup>29</sup>*Wizerkaniuk v. Poland* App no 18990/05 (ECtHR, 5 July 2011), para 72 [hereafter ‘*Wizerkaniuk*’].

<sup>30</sup>*Kjeldsen, Busk Madsen and Pedersen v. Denmark* (1976) Series A no 23, para 53.

<sup>31</sup>*Lingens v. Austria* (1986) Series A no 103, para 42 [hereafter ‘*Lingens*’].

will and to speak as you think' are key to political discussion.<sup>32</sup> The argument of citizen participation is also associated with the work of Alexander Meiklejohn, who defended freedom of speech because of its crucial importance for self-government.<sup>33</sup> Meiklejohn expressly valued the need to hear over the need to speak. In his view, the ultimate interest of political self-government is not in the words of the speakers but in the minds of the listeners, who need to make wise decisions. Therefore, he found that freedom of speech essentially concerns the public need to listen, not the individual desire to speak.<sup>34</sup>

### Legal basis

In most ECtHR cases involving the right to receive information, the Court derived the public's right to receive information from the right to freedom of expression of the applicant journalist or media organisation. For example, in *Lingens v. Austria*, an Austrian journalist was convicted of defamation of a politician in the press. The journalist complained to the Court that the conviction violated his right to freedom of expression. In its assessment, the Court considered that it is incumbent on the press to impart information and ideas on political issues. The Court added that the press has the task to impart such information, and 'the public also has a right to receive them'.<sup>35</sup> Since then, the Court often considers the public's right to receive information in freedom of expression cases.<sup>36</sup>

In the ECtHR's analysis, the right to receive information is a 'corollary' of the function of the news media.<sup>37</sup> Otherwise, the Court reasons, the media would be unable to play its role of public watchdog.<sup>38</sup> The public watchdog doctrine expresses the idea that government actions should be subject to close scrutiny of the press and public opinion, in addition to review by the legislative and judicial branches.<sup>39</sup> For example, the presence of the media at public demonstrations or at parliamentary debates (that sometimes escalate), guarantees that the government can be held to account for its conduct against

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<sup>32</sup>Louis Brandeis, concurring opinion in 274 US 357, at 375 (1927) (*Whitney v. California*).

<sup>33</sup>Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper Brothers Publishers 1948) 63–66.

<sup>34</sup>*ibid* 66.

<sup>35</sup>*Lingens*, para 41.

<sup>36</sup>See the other cases references in this article, and a.o. *De Haes and Gijssels v. Belgium* ECHR 1997–I, para 39; *Fressoz and Roire v. France* [GC] ECHR 1999–I, para 51; *Bladet Tromsø and Stensaas v. Norway* [GC] ECHR 1999–III, para 62; *Editions Plon v. France* ECHR 2004–IV, para 43; *Pentikäinen v. Finland* [GC] ECHR 2015, para 88; *Bédat v. Switzerland* [GC] ECHR 2016, para 51.

<sup>37</sup>*Guerra*, para 53; *Sîrbu*, para 17.

<sup>38</sup>*Observer and Guardian v. the United Kingdom* (1991) Series A no 216, para 59(b) [hereafter '*Observer and Guardian*']; *Thorgeir Thorgeirson v. Iceland* (1992) Series A no 239, para 63 [hereafter '*Thorgeir Thorgeirson*']; *Gaweda v. Poland* ECHR 2002–II, para 34 [hereafter '*Gaweda*']; *Pedersen and Baadsgaard v. Denmark* [GC] ECHR 2004–XI, para 71 [hereafter '*Pedersen and Baadsgaard*'].

<sup>39</sup>*Castells*, para 46. See also *Sürek (no. 1)*, para 61; *Şener*, para 40; *Guja v. Moldova* [GC] ECHR 2008–II, para 74.



the demonstrators and the public at large.<sup>40</sup> By characterising the press as a public watchdog, the Court makes clear that the function of the press is also one of monitoring authorities on the public's behalf, in addition to providing information to the public.<sup>41</sup>

The link between the right to receive information and the functions of the press demonstrates the institutional character of the right to receive information (see the section on Perspectives on the right to receive information and The fundamental right to receive information): it is usually realised through social institutions such as the law and the media. The preambles to the Council of Europe European Convention on Transfrontier Television ('ECTT')<sup>42</sup> and the European Union Audiovisual Media Services Directive ('AVMSD')<sup>43</sup> reflect the reasoning of the ECtHR and illustrate how states fulfil their positive obligations regarding the right to receive information. The preamble of the AVMSD emphasises that audiovisual media services are important for democracy by ensuring freedom of information, diversity of opinion and pluralism.<sup>44</sup> Therefore, the operative part of the AVMSD imposes obligations on EU Member States to ensure the public can follow events which are of major importance to society on live television,<sup>45</sup> and watch short news reports on events of great interest.<sup>46</sup> The proposal for a Directive amending the AVMSD specifically states that the right to access political news programmes is crucial to safeguard the fundamental freedom to receive information, and that given the growing importance of audiovisual media services for societies and democracy, broadcasts of political news should be made available cross-border in the EU as much as possible.<sup>47</sup>

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<sup>40</sup>*Selmani and Others v. the former Yugoslav Republic of Macedonia App no 67259/14* (ECtHR, 9 February 2017), para 75.

<sup>41</sup>*Barthold v. Germany* (1985) Series A no 90, para 58 [hereafter '*Barthold*'].

<sup>42</sup>European Treaty Series (ETS) 132 (1989). The ECTT is the Council of Europe's most important legal instrument on broadcasting and focuses more cultural and freedom of expression than EU instruments, which are more market driven. However, EU broadcasting laws have been more powerful, and recent disputes between the Council of Europe and the European Commission have led to scholars questioning the continuing relevance of the ECTT; see Daithí Mac Síthigh, 'Death of a Convention: Competition between the Council of Europe and European Union in the Regulation of Broadcasting' (2013) 5 *Journal of Media Law* 133.

<sup>43</sup>Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (codified version) [2010] OJ L95/1. The AVMSD provides minimum harmonisation for broadcasting and on-demand services within the EU to ensure a single market and fair competition for audiovisual media, while safeguarding public interests such as media pluralism and the protection of children.

<sup>44</sup>Recital 5 AVMSD. See similarly, the preamble to the ECTT.

<sup>45</sup>Art. 14 AVMSD.

<sup>46</sup>Art. 15 AVMSD.

<sup>47</sup>Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities' COM (2016) 287 final, Recital 40.

The perspective of political participation leads to a concrete obligation for states. The ECtHR held that states have a duty to ensure that the public has access to accurate information and varied opinions through audiovisual media.<sup>48</sup> The Court tied this duty to television and radio because the Court found that audiovisual media have a particularly immediate and powerful effect when compared to the print media. The Court ascribed the large impact to the fact that radio and television convey messages through sound and images, are often used in the intimacy of the home, and are easily accessible, especially in remote areas.<sup>49</sup>

### **Perspective of truth finding**

Many of the ECtHR's judgements concerning the right to receive information highlight its value for truth finding. The perspective of truth finding does not mean that the information of interest should be true. Rather, it means that the quest for truth may legitimise a claim to receive information. This perspective is broader than the perspective of political participation, since people may aim to find out the truth about non-political issues, and political deliberation is not necessarily meant to bring us closer to the truth.

The perspective of truth finding correlates with a common argument for the protection of free speech, namely that it is important for discovering truth.<sup>50</sup> John Stuart Mill formulated a version of this argument while presuming that truth is an objective notion. In Mill's view, people gradually come to understand a subject entirely, and find truth by listening to what is said about a subject from all possible sides.<sup>51</sup> Therefore, everyone should have the freedom to speak and bring up all possible arguments. American judge Oliver W Holmes Jr. famously stated that the winning idea in the 'marketplace of ideas' is true,<sup>52</sup> which means that everyone should be free to speak and test their ideas on the marketplace. This is a more relativist version of the truth argument.

### **Legal basis**

The importance of truth finding underlies many ECtHR judgements. For example, in the case of *The Sunday Times (no. 1)*, the newspaper intended to publish an article about a pharmaceuticals tragedy and the related

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<sup>48</sup>Manole, para 100.

<sup>49</sup>ibid, para 97. See also a.o. *Jersild v. Denmark* (1994) Series A no 298, para 31; *Çetin and Others v. Turkey* ECHR 2003-III (extracts), para 62 [hereafter '*Çetin*']; *Radio France and Others v. France* (dec.) ECHR 2003-X (extracts), para 39; *Pedersen and Baadsgaard*, para 79; *Hachette Filipacchi Associés v. France* App no 71111/01 (ECtHR, 14 June 2007), para 42; *Centro Europa*, para 132; *Animal Defenders*, para 119; *Delfi AS v. Estonia* [GC] ECHR 2015, para 134 [hereafter '*Delfi AS*']; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt*, para 56.

<sup>50</sup>Barendt (n 6) 7–13.

<sup>51</sup>John S Mill, *On Liberty* (2nd edn, JW Parker 1859) 36–41.

<sup>52</sup>Oliver W Holmes Jr., dissenting in 250 US 616 (1919) (*Abrams v. United States*).

pending legal proceedings.<sup>53</sup> The newspaper did not publish the piece after it had received an injunction restraining publication of the article because publication would constitute contempt of court. The Sunday Times argued before the Court that the injunction violated its right to freedom of expression. The Court noted that the families of the victims of the tragedy were unaware of the difficulties involved in the legal proceedings concerning the tragedy and had a strong interest in knowing all the underlying facts and the various possible outcomes.<sup>54</sup> The Court also found the wider public had a legitimate interest in receiving the information. The news article could help the public answer questions about the legal and moral responsibilities of the pharmaceutical company towards the victims.<sup>55</sup> The Court's judgment was clearly oriented towards truth finding, not political participation.

The ECtHR turns to truth finding in various other contexts. The Court established that seeking historical truth is an integral part of freedom of expression.<sup>56</sup> In line with this, the Court found that the denial of established historical facts does not constitute historical research akin to a quest for truth worthy of protection.<sup>57</sup> Subsequently, the Court determined that access to original documentary sources for historical research is part of the right to freedom of expression.<sup>58</sup> In addition, in *Magyar Helsinki* the Court noted that an NGO wished to receive data from police departments to investigate seemingly prejudiced appointments of public defenders in Hungary.<sup>59</sup> The Court thus described the purpose of the applicant NGO as one of truth finding regarding a matter of public concern. The Court found that the Hungarian government's refusal of the request for information was unjustified in light of that purpose.<sup>60</sup>

The right of reply in European media law also hinges on the truth finding perspective, alongside the protection it aims to afford to the personal rights of the persons affected by a publication.<sup>61</sup> In *Ediciones Tiempo S.A. v. Spain*, the former European Commission of Human Rights considered that the purpose of the right to reply is to safeguard the interest of the public in receiving information from a variety of sources, and thereby to guarantee the fullest possible access to information.<sup>62</sup> The Committee of Ministers of the Council of Europe emphasised that the right of reply still serves this purpose in the new media

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<sup>53</sup>*The Sunday Times v. the United Kingdom* (no. 1) (1979) Series A no 30 [hereafter '*The Sunday Times* (no. 1)'].

<sup>54</sup>*The Sunday Times* (no. 1), para 66.

<sup>55</sup>*ibid*, para 66.

<sup>56</sup>*Chauvy and Others v. France* ECHR 2004-VI, para 69 [hereafter '*Chauvy*'].

<sup>57</sup>*Garaudy v. France* (dec.) ECHR 2003-IX (extracts), page 23.

<sup>58</sup>*Kenedi v. Hungary* App no 31475/05 (ECtHR, 26 May 2009), para 43.

<sup>59</sup>*Magyar Helsinki*, para 197.

<sup>60</sup>*ibid*, para 200.

<sup>61</sup>András Koltay, 'The Right of Reply in a European Comparative Perspective' (2013) 54(1) *Acta Juridica Hungarica* 73, 87.

<sup>62</sup>App no 13010/87 (Commission Decision, 12 July 1989).

environment.<sup>63</sup> If people know both sides of the story including the view of the person affected by the publication, they can form their own opinion of what happened.

The perspective of truth finding implies that the public itself should be able to find out what is true. For example, in *Özgür Gündem v. Turkey*, a Turkish daily newspaper complained before the ECtHR that it was forced to cease publication due to attacks on journalists and legal steps taken by the government against it.<sup>64</sup> The Court considered that the public had the right to be informed of different perspectives on a given situation in southeast Turkey, regardless of whether the authorities approved of those perspectives.<sup>65</sup> In other words, 'citizens must be permitted to receive a variety of messages, to choose between them and reach their own opinions on the various views expressed'.<sup>66</sup> Similarly, the Court claimed to have no role in settling debates among historians about historical events and their interpretation.<sup>67</sup> For similar reasons, the Committee of Ministers of the Council of Europe emphasised the importance of transparency of media ownership: such transparency ensures that the public can make its own analysis of the information distributed by media organisations.<sup>68</sup>

As mentioned above, the perspective of truth finding also implies that the public is entitled to receive a diversity of information. Truth will only emerge out of the marketplace of ideas if there is sufficient competition among diverse ideas and viewpoints.<sup>69</sup> Diversity has for a long time been a central tenet of European media law and policy,<sup>70</sup> implementing the value of pluralism.<sup>71</sup> The ECtHR established that democracy demands pluralism,<sup>72</sup> and that the state is the ultimate guarantor of pluralism.<sup>73</sup> In this respect, the Court imposes on states the positive obligation to put in place a legislative framework to guarantee pluralism in the media system.<sup>74</sup> For example, the Court found that states should allow

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<sup>63</sup>Recommendation Rec(2004)16 on the right of reply in the new media environment, 15 December 2004.

<sup>64</sup>*Özgür Gündem v. Turkey* ECHR 2000-III [hereafter '*Özgür Gündem*'], para 37.

<sup>65</sup>*ibid*, para 70. See also a.o. *Sürek v. Turkey (no. 4)* [GC] ECHR 1999, para 58; *Şener*, para 45.

<sup>66</sup>*Çetin*, para 64.

<sup>67</sup>*Lehideux*, para 47; *Chauvy*, para 69.

<sup>68</sup>Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content, 31 January 2007.

<sup>69</sup>Philip M Napoli, 'Deconstructing the Diversity Principle' (1999) 49(4) *Journal of Communication* 7–34, 9.

<sup>70</sup>See e.g. Council of Europe, Resolution (74)43 on press concentrations, 16 December 1974; Recommendation No. R(99)1 on measures to promote media pluralism, 19 January 1999; Recommendation CM/Rec (2007)2 on media pluralism and diversity of media content, 31 January 2007; European Commission, 'Green Paper on Pluralism and Media Concentration in the Internal Market – An Assessment of the Need for Community Action' COM(92) 480 final.

<sup>71</sup>Kari Karppinen, *Rethinking Media Pluralism* (Fordham University Press 2013).

<sup>72</sup>*Handyside v. the United Kingdom* (1976) Series A no 24, para 49 [hereafter '*Handyside*']. See also e.g. *Lingens*, para 41; *Özgür Gündem*, para 57; *VgT Verein gegen Tierfabriken v. Switzerland* ECHR 2001-VI, para 66 [hereafter '*VgT*']; *Manole*, para 95; *Centro Europa*, para 129; *Eğitim ve Bilim Emekçileri Sendikası v. Turkey* ECHR 2012-III (extracts), para 70 [hereafter '*Eğitim ve Bilim*'].

<sup>73</sup>*Informationsverein Lentia and Others v. Austria* (1993) Series A no 276, para 38; *VgT*, para 73; *Manole*, para 99; *Animal Defenders*, para 101; *Identoba and Others v. Georgia* App no 73235/12 (ECtHR, 12 May 2015), para 94.

<sup>74</sup>*Manole*, para 101; *Centro Europa*, para 134.

audiovisual media effective access to the market to guarantee diversity of overall programme content, reflecting the variety of opinions in society.<sup>75</sup>

### **Perspective of social cohesion**

European media legislation and the standard-setting initiatives of the Council of Europe, as well as the ECtHR, recognise the importance of receiving information for the creation and maintenance of social cohesion. In this research, social cohesion refers to high quality and strong social relations, including people having a sense of belonging to a social group, and groups being oriented towards the common good.<sup>76</sup> Social cohesion would not be possible without a certain degree of trust, while social cohesion also enables people to trust each other.<sup>77</sup> Social cohesion moreover entails common understanding and the building of communities.<sup>78</sup> This concept of social cohesion is broader than the concept in EU internal market legislation, where social cohesion is part of development policies and is mostly economic in character.<sup>79</sup>

Arguments for public service broadcasting or ‘public service media’ often emphasise the relationship between freely receiving information and a cohesive society. In Europe and the US, public service broadcasting is justified on the basis of economic arguments, namely spectrum scarcity and market failure to deliver diverse and high-quality content. However, in Europe, public service broadcasting is also justified on the basis of social-cultural goals, including public debate, pluralism, cultural diversity and, more recently, social cohesion.<sup>80</sup> Such arguments are supported by research that suggests that contact between different societal groups, mediated via television, may make groups look more positively towards other groups.<sup>81</sup>

### **Legal basis**

In Europe, public service media thus have the task of promoting social cohesion. The Committee of Ministers of the Council of Europe finds that Member States ‘should encourage public service media to play an active role in promoting social cohesion and integrating all communities, social groups and

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<sup>75</sup>*Centro Europa*, para 130.

<sup>76</sup>David Schiefer and Jolanda van der Noll, ‘The Essentials of Social Cohesion: A Literature Review’ (2016) *Social Indicators Research* 1.

<sup>77</sup>Christian A Larsen, *The Rise and Fall of Social Cohesion: The Construction and De-construction of Social Trust in the US, UK, Sweden and Denmark* (Oxford University Press 2013) 3.

<sup>78</sup>Mark Zuckerberg, ‘Building Global Community’ (2017), <<https://www.facebook.com/notes/mark-zuckerberg/building-global-community/10154544292806634>> accessed 22 September 2017.

<sup>79</sup>See Article 3(3) TEU and Article 174 TFEU.

<sup>80</sup>Parliamentary Assembly, Recommendation 1878 (2009) on funding of public service broadcasting, 25 June 2009; Karin Donders, *Public Service Media and Policy in Europe* (Palgrave Macmillan 2012) 33 and 85.

<sup>81</sup>Sung-Yeon Park, ‘Mediated Intergroup Contact: Concept Explication, Synthesis, and Application’ (2012) 15(1) *Mass Communication and Society* 136; Magdalena Wojcieszak and Rachid Azrout, ‘I Saw You in the News: Mediated and Direct Intergroup Contact Improve Outgroup Attitudes’ (2016) 66(6) *Journal of Communication* 1032.

generations, including minority groups, young people, the elderly, underprivileged and disadvantaged social categories, disabled persons, etc., while respecting their different identities and needs'.<sup>82</sup> Other types of media may also have a role in this. The Committee of Ministers stimulates Council of Europe Member States to encourage the development of social, local, or community media that create content for certain groups in society, respond to the specific needs of such groups, and contribute to social cohesion and integration.<sup>83</sup> The Committee of Ministers further ascribes importance to the internet, and in particular social networking services, for their ability to facilitate democracy and social cohesion.<sup>84</sup>

European states have given effect to their positive obligations regarding the right to receive information through EU law. For example, the AVMSD sets out to ensure that the public has access to broadcasting of events which are of major importance for society,<sup>85</sup> such as live coverage of the Olympic games or international football championships.<sup>86</sup> States may draw up lists of events which they consider to be of major importance and should be available on free television.<sup>87</sup> These lists mainly contain sports events,<sup>88</sup> although states have also included other events such as operas or music festivals.<sup>89</sup> The emphasis on sport indicates that these rules should be understood from the perspective of social cohesion, rather than the perspectives of political participation and truth finding. Furthermore, the AVMSD aims to ensure that the public has access to short news reports on events of high interest to the public.<sup>90</sup> The European Commission also takes a broad approach in its Media Pluralism Monitor, which focuses on social cohesion in addition to media ownership and concentration.<sup>91</sup>

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<sup>82</sup>Recommendation CM/Rec(2007)3 on the remit of public service media in the information society, 31 January 2007, para I. 3.2.

<sup>83</sup>ibid, para I. 4.

<sup>84</sup>Recommendation CM/Rec(2012)4 on the protection of human rights with regard to social networking services, 4 April 2012, para 2.

<sup>85</sup>Art. 14 AVMSD.

<sup>86</sup>Recital 49 AVMSD. According to Rowe, Art. 14 AVMSD is a protectionist measure for the public service media, against exclusive rights of commercial broadcasters; David Rowe, 'Watching Brief: Cultural Citizenship and Viewing Rights' (2004) 7 *Sport in Society* 385, 391.

<sup>87</sup>States are allowed to draw up such lists, but they are not required to do so. Once a state has drawn up a list, it can notify the European Commission, who will verify the compatibility of the list with EU law. Member States should ensure that domestic broadcasters respect the verified lists of other countries; see Oster (n 15) 400.

<sup>88</sup>Katrien Lefever, Hannes Cannie and Peggy Valcke, 'Watching live sport on television: a human right? The right to information and the list of major events regime' (2010) 4 *European Human Rights Law Review* 396, 399–400.

<sup>89</sup>Commission, 'Publication of the consolidated measures in accordance with Article 3a(2) of Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and of the Council' [2008] OJ C17/7.

<sup>90</sup>Art. 15 AVMSD. See also Recital 55 AVMSD.

<sup>91</sup>European Commission, Media pluralism in the Member States of the European Union – Commission staff working document, SEC(2007) 32; Peggy Valcke and others, 'Independent Study on Indicators for Media Pluralism in the Member States - Towards a Risk-Based Approach' (European Commission 2009).

In the context of freedom of thought, conscience and religion, and freedom of association, the Court affirmed that the value of social cohesion is inherent to a democratic system, and that states should defend and promote social cohesion. For example, in *Ouranio Toxo and Others v. Greece*, local authorities had incited the population of a city to gather in protest against a political party, and some members of the authorities had taken part in the protests. The Court considered that the Greek authorities contributed to arousing the hostile sentiment of a section of the population against the political party, while it is the role of public authorities to defend and promote the values inherent in a democratic system, ‘such as pluralism, tolerance and social cohesion’.<sup>92</sup> The Court concluded that the local authorities should have advocated a pacifying stance, rather than fuelling confrontational attitudes.

The perspective of social cohesion supports a novel approach to media diversity and pluralism. In the previous section we discussed diversity in the sense of a variety of information sources available, which is called ‘source diversity’ or ‘supplier diversity’.<sup>93</sup> This is the common approach to diversity in Europe.<sup>94</sup> In contrast, ‘exposure diversity’ concerns diversity in the sense of people truly being exposed to diverse information.<sup>95</sup> Exposure diversity, rather than source diversity, particularly benefits social cohesion. News consumers are only stimulated to understand other people when they are really exposed to a diversity of voices. ECtHR case law supports the connection between social cohesion and exposure diversity. The Court recognises that public debate about complex issues furthers social cohesion by ensuring that representatives of all views are heard,<sup>96</sup> and it has underlined that the interaction of people and groups with diverse identities is necessary for achieving social cohesion.<sup>97</sup> In line with this, the Court demands that states respect minority views, because giving all voices the chance to speak and be heard promotes cohesion and harmony in society.<sup>98</sup>

### **Perspective of avoidance of censorship**

The fundamental right to receive information contains a mistrust of censorship. Below, we use a broad concept of censorship, going beyond it as

<sup>92</sup>*Ouranio Toxo and Others v. Greece* ECHR 2005-X (extracts), para 42. See also a.o. *Eğitim ve Bilim*, para 70.

<sup>93</sup>Peggy Valcke, ‘Looking for the User in Media Pluralism Regulation: Unravelling the Traditional Diversity Chain and Recent Trends of User Empowerment in European Media Regulation’ (2011) 1 *Journal of Information Policy* 287, 291.

<sup>94</sup>*ibid.*, 289.

<sup>95</sup>*ibid.* 290. See also Natali Helberger, ‘Exposure Diversity as a Policy Goal’ (2012) 4(1) *Journal of Media Law* 65.

<sup>96</sup>*Alekseyev v. Russia* App nos 4916/07 and 2 others (ECtHR, 21 October 2010), para 86.

<sup>97</sup>*Gorzelik and Others v. Poland* [GC] ECHR 2004-I, para 92. See also *Izzettin Doğan and Others v. Turkey* [GC] App no 62649/10 ECHR 2016, para 109, for further references.

<sup>98</sup>*Gough v. the United Kingdom* App no 49327/11 (ECtHR, 28 October 2014), para 168.

a system in which publication is only allowed after obtaining clearance from a censor. Censorship may consist of prior restraint or of subsequent punishment.<sup>99</sup> Prior restraint entails a restriction on expressing or receiving information in advance of actual publication. Subsequent punishment entails restriction through a penalty imposed after a communicative act. Governments may wield prior restraint through a classic administrative censorship system, and courts may exercise judicial censorship by granting an interim or permanent injunction on the publication or further distribution of content in the context of a criminal proceeding or a private lawsuit.

Censorship clearly has implications for the exercise of the right to receive information because it prevents people from receiving information. Censorship also concerns the right to receive information because governments sometimes exercise censorship to protect people from exposure to content that may have a negative impact. For example, European states have set up legal frameworks for the blocking, filtering or removal of internet content to protect public morals against child pornography or obscene language and (unfortunately) 'homosexual propaganda'.<sup>100</sup>

The perspective of mistrust of censorship coincides with arguments for free speech that are grounded in liberal thought, and therefore are premised on a general suspicion of governments.<sup>101</sup> Liberalism concentrates on the individual, and finds that each person's freedom should be defended against state intervention or social constraint. The idea is that government power should be distrusted and that there are reasons to distrust the ability of governments to distinguish between allowable and unallowable speech.<sup>102</sup> Governments may want to suppress speech that criticises them, or claim that certain revelations about their actions are untrue or 'fake news'. Thus, the principles of liberalism work against censorship. By contrast, authoritarianism is in favour of censorship, since it considers that the media must further the interests of government.<sup>103</sup>

Empirical research supports mistrust of government regulation of expression.<sup>104</sup> Research has found that people who are exposed to a communication will expect the information or ideas to have a greater negative

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<sup>99</sup>Thomas I Emerson, 'The Doctrine of Prior Restraint' (1955) 20(4) *Law and Contemporary Problems* 648, 648.

<sup>100</sup>Council of Europe, 'Comparative study on blocking, filtering, and take-down of illegal internet content' (2017).

<sup>101</sup>Barendt (n 6) 21–23; Keller (n 27) 38–49.

<sup>102</sup>Barendt (n 6) 21 and 104.

<sup>103</sup>Fred S Siebert, Theodore Peterson and Wilbur Schramm, *Four Theories of the Press: The Authoritarian, Libertarian, Social Responsibility, and Soviet Communist Concepts of what the Press Should Be and Do* (University of Illinois Press 1956) 35.

<sup>104</sup>The argument in this paragraph is derived from Jane R Bambauer and Derek E Bambauer, 'Information Libertarianism' (2017) 105(2) *California Law Review* 335.



effect on others than on themselves.<sup>105</sup> This has been called the ‘third-person effect’. If government officials perceive that certain content has a stronger effect on citizens than is actually the case, they may tend to overregulate the media. The third-person effect may also mean that citizens support far-reaching censorship because they think their peers are less capable of managing their emotions or behaviour in response to certain content. The third-person effect theory thus warrants suspicion of government censorship: censorship is often exercised for the misguided aim of protecting recipients.

### **Legal basis**

The ECtHR is mindful of the dangers of censorship, especially as far as the press is concerned. The Court recognised that even a slight delay of publication may deprive news of its value,<sup>106</sup> and it noted that this danger also holds for other type of publications that deal with current issues.<sup>107</sup> Nevertheless, the Court found that Article 10, paragraph 1, of the ECHR does not prohibit prior restraints on publications as such.<sup>108</sup> The Court derives this conclusion from the fact that Article 10, paragraph 2, allows for ‘formalities, conditions, restrictions or penalties’ and for ‘prevention’ of unwanted effects. Similarly, the Court held that Article 10, paragraph 1, does not prohibit subsequent censorship.<sup>109</sup>

Censorship often concerns senders of information. A classic example is the case of *Observer and Guardian v. the United Kingdom*. The case concerned memoirs written by a former member of the British Security Service. The two British national newspapers published extracts of the manuscript of the memoirs, but English courts imposed interlocutory injunctions on the newspapers to prevent further publication. The ECtHR concluded that the prior restraints were legitimate as long as the book had not been published elsewhere.<sup>110</sup> However, the Court found that after the book had been published abroad, the injunctions were no longer necessary, and thus constituted a violation of the right to freedom of expression.<sup>111</sup>

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<sup>105</sup>W Phillips Davison, ‘The Third-Person Effect in Communication’ (1983) 47(1) *The Public Opinion Quarterly* 1; Richard M Perloff, ‘The Third Person Effect: A Critical Review and Synthesis’ (1999) 1(4) *Media Psychology* 353; Hans-Bernd Brosius and Inga Huck, ‘Third-Person Effects’ in *The International Encyclopaedia of Communication* (Blackwell Reference Online 2008).

<sup>106</sup>See e.g. *The Sunday Times v. the United Kingdom (no. 2)* (1991) Series A no 217, para 51 [hereafter ‘*The Sunday Times (no. 2)*’]; *Observer and Guardian*, para 60; *Association Ekin v. France* ECHR 2001-VIII, para 56 [hereafter ‘*Association Ekin*’]; Stoll, para 131; *Sanoma Uitgevers B.V. v. the Netherlands* [GC] App no 38224/03 (ECtHR, 14 September 2010), para 70; *Ahmet Yildirim v. Turkey* ECHR 2012-VI, para 47 [hereafter ‘*Ahmet Yildirim*’]; *RTBF v. Belgium* ECHR 2011-III (extracts), para 89; *Guseva*, para 49.

<sup>107</sup>*Ahmet Yildirim*, para 47.

<sup>108</sup>*The Sunday Times (no. 2)*, para 51; *Observer and Guardian*, para 60; *Association Ekin*, para 58; *Çetin*, para 59; *Ahmet Yildirim*, para 47.

<sup>109</sup>*Cumpănă and Mazăre v. Romania* [GC] ECHR 2004-XI, para 114.

<sup>110</sup>*Observer and Guardian*, para 65.

<sup>111</sup>*ibid.*, para 70.

Censorship may also concern recipients of information. The Court has established that the right to receive information prohibits the government from restricting a person from receiving information that others wish or may be willing to impart to him or her.<sup>112</sup> For example, in *Cyprus v. Turkey*, the authorities of the Turkish Republic of Northern Cyprus subjected school textbooks to a vetting procedure. This censorship system rejected a high number of books that could not be used in schools.<sup>113</sup> The Court found that the censorship amounted to a denial of the right to freedom of information, and that there had been a violation of Article 10 in respect of Greek Cypriots living in northern Cyprus.<sup>114</sup>

People thus have a right to receive uncensored information, and the Court is wary about how different types of government power may constitute a form of censorship. The Court has found that measures which merely make access to information more burdensome may become a form of indirect censorship.<sup>115</sup> A governmental monopoly on information, which hinders the gathering of information on a matter of public importance, may so amount to a form of censorship.<sup>116</sup> The Court has also established that a measure ordered in the context of criminal proceedings that renders large quantities of online information inaccessible, restricts the rights of internet users and amounts to collateral censorship.<sup>117</sup>

### **Perspective of self-development**

Various legal judgements or policy instruments are based on the idea that receiving information is necessary for people's self-development. This perspective covers two types of information: personal information in the sense of personal data, and information that is not personal but relevant to someone's private life for another personal reason.<sup>118</sup> The perspective of self-development goes beyond that of political participation because it concerns more than development into ideal citizens who participate in political life. Moreover, just like the perspective of avoidance of censorship, the perspective of self-development is intrinsically connected to liberalism, which centres on the free and autonomous individual.

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<sup>112</sup>See section on The fundamental right to receive information.

<sup>113</sup>*Cyprus v. Turkey* [GC] ECHR 2001-IV, para 80 [hereafter 'Cyprus'], para 44.

<sup>114</sup>*ibid*, paras 252–54.

<sup>115</sup>*Társaság*, para 27; *Roşianu v. Romania* App no 27329/06 (ECtHR, 24 June 2014), para 62.

<sup>116</sup>*Társaság*, para 28; *Österreichische Vereinigung*, para 47; *Magyar Helsinki*, para 132.

<sup>117</sup>*Ahmet Yıldırım*, para 66.

<sup>118</sup>Maeve McDonagh, 'The Right to Information in International Human Rights Law' (2013) 13(1) *Human Rights Law Review* 25, 41.

### Legal basis

In the first cases in which applicants to the ECtHR claimed a right of access to information, the Court assessed the value of receiving information as part of the right to respect for private and family life. For example, in *Leander v. Sweden*, the Swedish authorities refused to give someone access to information relating to him stored in a secret police-register. The Court held that both the storing and the release of the personal information to other authorities, combined with a refusal to allow the applicant an opportunity to contest the information, amounted to an interference with his right to respect for private life.<sup>119</sup> Although the Court did not find a violation of Article 8 in this case, it did recognise that accessing and receiving personal information can be a matter of the right to respect for private life.<sup>120</sup>

In *Guerra and Others v. Italy*, the Court recognised the value of receiving information that is not personal but concerns someone's private life in another way. The applicants lived in a town nearby a chemical factory, and the Italian government had not taken steps to provide information about the risks of the factory's toxic emissions and how to proceed in the event of a major accident. The Court concluded that the government, by failing to provide the information, had not fulfilled its positive obligation to secure the applicants' right to respect for their private and family life.<sup>121</sup> The decision of the Court recognised that the reception of information may be a matter of respect for private and family life, even when the information is not personal in the strict sense.

The ECtHR stated that freedom of expression is a basic condition for people's self-development or self-fulfilment,<sup>122</sup> and in *Khurshid Mustafa and Tarzibachi v. Sweden* it recognised the value of free information reception for self-realisation. The applicants in that case lived in a rented flat in Sweden, where they watched television programmes in Arabic and Farsi using a satellite dish. Their new landlord demanded that the satellite dish be dismantled. When the applicants did not comply, the landlord terminated the tenancy agreement, and the applicants eventually moved out. The applicants argued before the ECtHR that their freedom to receive information had been breached. The Court considered that the information the applicants wished to receive included political and social news in Arabic and Farsi that could be of particular interest to the applicants as immigrants from Iraq. Moreover, the Court found that:

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<sup>119</sup>*Leander*, para 48.

<sup>120</sup>*ibid*, para 68. See also *Gaskin*, paras 36–37; *Guerra*; *McGinley and Egan v. the United Kingdom* ECHR 1998-III, para 97 [hereafter '*McGinley and Egan*'; *Roche*, para 155.

<sup>121</sup>*Guerra*, para 60.

<sup>122</sup>See e.g. *Handyside*, para 49; *Barthold*, para 58; *Lingens*, para 41; *Zana v. Turkey* ECHR 1997-VII, para 51; *VgT*, para 66; *Gaweda*, para 32; *Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland* App no 34124/06 (ECtHR, 21 June 2012), para 51.

while such news might be the most important information protected by Article 10, the freedom to receive information does not extend only to reports of events of public concern, but covers in principle also cultural expressions as well as pure entertainment. The importance of the latter types of information should not be underestimated, especially for an immigrant family with three children, who may wish to maintain contact with the culture and language of their country of origin. The right at issue was therefore of particular importance to the applicants.<sup>123</sup>

The Court thus established that access to information is also important for private and cultural issues, in addition to public interest issues. Besides, this case also relates to the perspective of social cohesion.

People may also want access to personal information or information that is relevant to their private life for another reason. In *Open Door and Dublin Well Women*, the Court analysed such a case under Article 10. In this case, a non-profit organisation received an injunction against imparting information on abortion. In the organisation's application to the Court, two women of child-bearing age joined. The Court considered that the injunction interfered with the right of these two women to receive information in the event of being pregnant,<sup>124</sup> and that this information might have been crucial to their health and well-being.<sup>125</sup> The Court concluded that the restraint imposed on the applicants from imparting or receiving the information had violated Article 10.<sup>126</sup>

## Implications of the right to receive information for news personalisation

This section evaluates how news personalisation affects the right to receive information, considering the five different perspectives discussed in the previous section. Note that all the effects discussed below depend on the settings of the recommenders involved.

### Subjective rights

News personalisation invites us to reconsider subjective rights to receive information. As discussed in the section on the fundamental right to receive information, people have a subjective right to receive information that others are willing to impart, but they don't have a right to receive information that the media *is not willing to impart*. This was necessary

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<sup>123</sup>*Khurshid Mustafa and Tarzibachi v. Sweden* App no 23883/06 (ECtHR, 16 December 2008), para 44 [hereafter '*Khurshid Mustafa*'].

<sup>124</sup>*Open Door and Dublin Well Woman v. Ireland* (1992) Series A no 246-A, para 55 [hereafter '*Open Door*'].

<sup>125</sup>*ibid*, para 72.

<sup>126</sup>*ibid*, para 80.

when news was produced and distributed by one-to-many media. The media would lose its editorial freedom if people could demand that the media produces specific news stories and distribute these to them.<sup>127</sup> Moreover, if media consumers have conflicting demands for information, it would be difficult to decide whose right to receive information should prevail.

News personalisation could, in theory, resolve conflicts between subjective rights to receive information and the media's or other parties' freedom of expression. Personalisation technologies enable one-to-one communication, and personalisation often happens after news stories are produced by a media organisation, and then distributed in a personalised manner by social media, news aggregators, or news apps. With personalisation technologies, my wish to receive particular information out of the pool of news items already existing does not prevent media organisations from imparting different content to other people. Moreover, such a type of subjective right to receive information could help to establish what news consumers legitimately may expect from the news media with respect to the diversity or relevance of personalised recommendations.

### **Enhancing the right to receive information**

News personalisation could stimulate new forms of political participation, which is traditionally conceived of as entailing voting and contacting political leaders, but is now extended to other forms of involvement. Scholars have defined new citizen roles, such as expert citizens, who are politically active on topics that they personally engage with,<sup>128</sup> or monitorial citizens, who look politically inactive and just scan the news, rather than reading it, but are alert on many different issues and become active if needed.<sup>129</sup> Personalisation could help expert citizens to be more selective in searching for information in their area of expertise and in situations where they have political power, such as in local government or European citizens' initiatives. Personalisation could also inform monitorial citizens of relevant events and activate them when necessary.

Personalisation can unlock long-tail content and show it to monitorial or expert citizens.<sup>130</sup> The ECtHR stated that while the primary function of the

<sup>127</sup>Helberger (n 19) 76. See also Brian Richardson, 'The Public's Right to Know: A Dangerous Notion' (2004) 19(1) *Journal of Mass Media Ethics* 46, 50.

<sup>128</sup>Henrik P Bang, 'Among everyday makers and expert citizens' in Janet Newman (ed), *Remaking Governance: Peoples, Politics and the Public Sphere* (Policy Press 2005); Yaojun Li and David Marsh, 'New Forms of Political Participation: Searching for Expert Citizens and Everyday Makers' (2008) 38(2) *British Journal of Political Science* 247; Yannis Theocharis and Jan W. van Deth, 'The continuous expansion of citizen participation: A new taxonomy' (forthcoming) *European Political Science Review*.

<sup>129</sup>Michael Schudson, *The Good Citizen: A History of American Civic Life* (Free Press 1998) 310. A similar notion is that of the 'standby citizen'; see Erik Amnå and Joakim Ekman, 'Standby citizens: diverse faces of political passivity' (2014) 6(2) *European Political Science Review* 261.

press is to act as a public watchdog, its valuable secondary role is the maintaining and making available of news archives.<sup>131</sup> The Court thus determined that the interest of the public to access internet news archives is protected under Article 10 ECHR.<sup>132</sup> Personalisation may make news archives more accessible, by recommending news items that would otherwise be hidden in the far end of the long tail.

News personalisation could stimulate truth finding, by increasing competition among ideas in the marketplace. Personalised recommendations could point people to information that contrasts with their views, or contradicts news stories previously received. News personalisation might also present the news in such a manner that people are challenged to make their own evaluation. For example, a news app might first recommend factual accounts of a recent event, and only later provide more opinionated reports. A personalised recommender could suggest a fact-checking article after you read something labelled as potential fake news. In this manner, governments or media organisations would not have to censor fake news, and people could establish the truth themselves.

News personalisation could serve people close to each other with information on similar and local topics, and as such strengthen social cohesion. Public service broadcasters in Europe have already achieved such results by attracting many people to watch the evening news on national television.<sup>133</sup> The system of public broadcasting in Europe is an example of the way in which states fulfil their positive obligations towards the right to receive information. It is socially accepted that public broadcasters nudge people into an information diet containing public affairs news. Research even indicates that people expect such a shared news experience from public service media.<sup>134</sup> Personalisation could provide similar nudges. At the same time, scholars have predicted that under the right conditions, exposure *diversity* rather than exposure to *similar* content could benefit social cohesion,<sup>135</sup> so stimulating diverse or shared content should be carefully implemented.

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<sup>130</sup>The long tail theory states that the demand curve of entertainment products sold online has a very long tail (the less popular products) in comparison to the head of the curve (the most popular products). The theory implies that the digital entertainment economy will be as much about niche products in the long tail as it is about mainstream products; see Chris Anderson, *The Long Tail: Why the Future of Business is Selling Less of More* (Hyperion 2006).

<sup>131</sup>*Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)* ECHR 2009-1, para 45; *Węgrzynowski and Smolczewski v. Poland* App no 33846/07 (ECtHR, 16 July 2013), para 59 [hereafter '*Węgrzynowski and Smolczewski*'].

<sup>132</sup>*Węgrzynowski and Smolczewski*, para 65.

<sup>133</sup>James Curran and others, 'Media System, Public Knowledge and Democracy: A Comparative Study' (2009) 24(1) *European Journal of Communication* 5, 20.

<sup>134</sup>Jannick K Sørensen, 'Public service broadcasting goes personal: The failure of personalised PSB web pages' (2013) 29(55) *MedieKultur* 43, 63–64.

<sup>135</sup>Natali Helberger, Kari Karppinen and Lucia D'Acuntono, 'Exposure diversity as a design principle for recommender systems' (forthcoming) *Information, Communication & Society*.

News personalisation could give people information that is particularly relevant to their personal development without depriving other people of the information they need for their self-development. Different information needs matter less from the perspective of political participation and truth finding because, seen from these perspectives, it is less important what you as an individual, autonomous person find interesting. News personalisation could thus help journalists to provide audiences with information that will help them control the course of their own lives.<sup>136</sup>

Finally, news personalisation may help to protect news consumers against harmful or unwanted content by filtering out information, similarly to internet service providers who use filters to censor hate speech and child porn. Such protection by states and media companies could be a legitimate form of prior restraint under Article 10 of the ECHR. In a similar manner, people can already sign up for ‘do not call’ lists to make sure they do not receive commercial messages.

### ***Undermining the right to receive information***

There are concerns that news personalisation hinders the formation of fully informed citizens, which common notions of political participation consider essential. News personalisation could reduce access to hard news that people need in their role as informed citizen.<sup>137</sup> However, research indicates that, at present, personalised communication has not led to filter bubbles,<sup>138</sup> and that personalised news use does not lead to a small common core of public issues.<sup>139</sup> Recent studies also found that people actively search for political information online and offline, supplementing information that they encounter through personalised recommendations.<sup>140</sup> Nevertheless, the media and social media have a role in carrying personalised political messages. If future research shows that political micro-targeting leads to biases in the way people are politically informed, for example because some people who are not ‘worth’ pursuing are not targeted at all, then personalisation may diminish equal chances for political participation.

News personalisation could increase the impact of news messages, making people more susceptible to fake news or polarising messages. Research suggests that people perceive fake news headlines that are familiar to them as more accurate, with a single exposure already increasing perceptions of

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<sup>136</sup>Richardson (n 128) 54.

<sup>137</sup>Pablo J Boczkowski and Eugenia Mitchelstein, *The News Gap: When the Information Preferences of the Media and the Public Diverge* (MIT Press 2013).

<sup>138</sup>Frederik J Zuiderveen Borgesius and others, ‘Should we worry about filter bubbles?’ (2016) 5(1) *Internet Policy Review*.

<sup>139</sup>Judith Möller and others, ‘Shrinking core? Exploring the differential agenda setting power of traditional and personalized news media’ (2016) 18(6) *info* 26.

<sup>140</sup>William H Dutton and others, ‘Search and Politics: The Uses and Impacts of Search in Britain, France, Germany, Italy, Poland, Spain, and the United States’ (Michigan State University 2017).

accuracy.<sup>141</sup> When personalisation causes repeated exposure to similar fake news stories, they may be perceived more accurate. The remarks of the ECtHR about the impact of audiovisual media show that impact is a relevant factor in fundamental rights analysis (see the section on the perspective of political participation). Regarding the internet and social media, the Court considered these have less impact than broadcast media because of the choices in the use of online media, meaning that special regulation for radio and television was justified.<sup>142</sup> If news personalisation decreases the choices for news consumers, the impact of online news media might increase, which could be a reason to reconsider the current approach of regulating online news media less strictly.

Truth finding may be affected by news personalisation, since personalisation could also disturb competition in the marketplace of ideas. If someone's news selection is too personalised, the selection might not be sufficiently diverse to create effective competition among ideas. This could mean that incorrect information or fake news is not competed out of the information market. These effects could be reinforced by the persistent effects of misinformation that was corrected later.<sup>143</sup> Thus, the current problems with fake news may cast doubt on the presumption that a marketplace of ideas guarantees truth. Empirical research indeed indicates that an open marketplace of ideas does not necessarily sort out truths and falsities.<sup>144</sup>

Personalisation may also be detrimental to social cohesion, by creating isolated sub-communities around different topics.<sup>145</sup> Regulation for exposure diversity should not lead to a less cohesive society. The concern that diversity may lead to social erosion has been raised before, not just in the context of personalisation. However, if one adheres to an ideal of radical democracy, the fragmentary effect of diversity may actually be positive.<sup>146</sup>

News personalisation may indirectly lead to self-censorship by news consumers, in the sense that they restrain the exercise of their right to receive information. News consumers who are aware of personalisation and know that it involves personal data collection, may fear the consequences of this. As a response, people may hesitate to consult recommended content. The Committee of Ministers of the Council of Europe also noted how tracking users online can have a chilling effect on citizen participation in social,

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<sup>141</sup>Gordon Pennycook, Tyrone D Cannon and David G Rand, 'Prior Exposure Increases Perceived Accuracy of Fake News' (2017) <<https://ssrn.com/abstract=2958246>> accessed 22 September 2017.

<sup>142</sup>*Animal Defenders*, para 119.

<sup>143</sup>Emily Thorson, 'Belief Echoes: The Persistent Effects of Corrected Misinformation' (2016) 33(3) *Political Communication* 460.

<sup>144</sup>Daniel E Ho and Frederick Schauer, 'Testing the Marketplace of Ideas' (2015) 90(4) *New York University Law Review* 1160.

<sup>145</sup>Sunstein (n 5); Natascha Just and Michael Latzer, 'Governance by algorithms: reality construction by algorithmic selection on the Internet' (2017) 39(2) *Media, Culture & Society* 238, 254.

<sup>146</sup>Chantal Mouffe, *The Democratic Paradox* (Verso 2000).



cultural, and political life, and endanger the exercise of the right to receive and impart information.<sup>147</sup>

News personalisation could reinforce a spiral of silence, which is another form of self-censorship. This theory describes the tendency of people to fall silent on morally significant issues when they perceive that the general public does not share their ideas.<sup>148</sup> Truth finding and social cohesion both imply that states should ensure diversity, but if news personalisation makes someone feel they are the only person holding a certain opinion, they may fall silent and thus censor themselves. For example, research found that people who find out via Facebook that they disagree with colleagues on political issues, may be less willing to discuss politics at work.<sup>149</sup>

Personalisation may also entail prior restraints imposed by news organisations, since certain content may never reach you if it is filtered out. The ECtHR found that prior restraints are a form of censorship that warrant close attention, more than does removing content from view after it has been published. Current discussions about filtering and blocking of content by internet service providers and search engines show public concerns about hidden, private ‘censorship’.<sup>150</sup> Private censorship usually does not prevent a news consumer or producer seeking another news source or outlet, but this changes when the private censor has a monopoly.<sup>151</sup> Nevertheless, the ECtHR is mindful of stretching the concept of censorship too far. The Court refused to characterise a news website’s obligation to take measures to limit the dissemination of hate speech as private censorship.<sup>152</sup> Moreover, if governments or media limit someone’s access to information, the Court does not consider this as an interference with the right to receive information if sufficient alternative sources are available.<sup>153</sup> That will usually be the case with news.

However, the Court does not consider all information sources or media functionally equivalent.<sup>154</sup> In *Khurshid Mustafa*, the Court noted that

<sup>147</sup>Declaration on risks to fundamental rights stemming from digital tracking and other surveillance technologies, 11 June 2013.

<sup>148</sup>Elisabeth Noelle-Neumann, ‘The Spiral of Silence: A Theory of Public Opinion’ (1974) 24(2) *Journal of Communication* 43; Thomas Petersen, ‘Spiral of Silence’ in *The International Encyclopaedia of Communication* (Blackwell Reference Online 2008).

<sup>149</sup>Keith N Hampton, Inyoung Shin and Weixu Lu, ‘Social media and political discussion: when online presence silences offline conversation’ (2017) 20(7) *Information, Communication & Society* 1090.

<sup>150</sup>Council of Europe (n 101); Damian Tambini, Danilo Leonardi and Chris T. Marsden, ‘The Privatisation of Censorship: Self-regulation and Freedom of Expression’ in Damian Tambini, Danilo Leonardi and Chris T. Marsden, *Codifying Cyberspace: Communications Self-Regulation in the Age of Internet Convergence* (Routledge 2008).

<sup>151</sup>Barendt (n 6) 52.

<sup>152</sup>*Delfi AS*.

<sup>153</sup>See e.g. *Geïllustreerde Pers v. the Netherlands* (1976) DR 8, p. 13, para 86; *Özkan v. Turkey* App no 23886/94 (Commission Decision, 5 April 1995); *McGinley and Egan*, para 90; *Akdeniz v. Turkey* (dec.) App no 20877/10 (ECtHR, 11 March 2014), para 25; *Bubon v. Russia* App no 63898/09 (ECtHR, 7 February 2017), para 47.

<sup>154</sup>Christina Angelopoulos and others, ‘Study of fundamental rights limitations for online enforcement through self-regulation’ (Institute for Information Law 2016) 37.

foreign newspapers and radio programmes only cover part of what is available on television received via satellite dish, and ‘cannot in any way be equated with the latter’.<sup>155</sup> In *Cengiz and Others v. Turkey*, the Court furthermore found that a state measure blocking access to YouTube interfered with the applicants’ right to receive information, because YouTube contains specific information (including art, music and political speeches) that is not easily accessible by other means.<sup>156</sup> Thus, if a social media organisation removes all stories about current affairs from your news feed, this may be problematic if it is your only comprehensive news source.

## Concluding remarks

This research asked what obligations the fundamental right of news consumers to receive information implies for the state regarding news personalisation. We answered this question in two stages. First, we developed five perspectives from which to understand the right to receive information: political participation, truth finding, social cohesion, avoidance of censorship and self-development. The analysis demonstrated that the right to receive information is not just the counterpart of the right to freedom of expression, and concerns more than ensuring political participation. Second, we evaluated how news consumers’ right to receive information interacts with news personalisation, in light of empirical research and communication theories. The claim of this research is not that people always have a subjective right to receive certain information from news media, but rather that news personalisation may enable or hinder the exercise of this largely institutionally protected right.

Ultimately, what values we protect in a personalised news environment requires public debate and regulatory choices. Someone who is not convinced of the importance of political participation or personal development will not be persuaded by a fundamental rights analysis of news personalisation. Nevertheless, our research suggests obligations for states regarding news consumers’ right to receive information and reveals important policy choices that must be made regarding personalised news. There are many different values and interests at stake with news personalisation, which may lead to conflicts (e.g. truth finding versus social cohesion) that are not likely to end up in court but must be discussed in public. News personalisation challenges the right to receive information and it also challenges us to further conceptualise the right to receive information. Thus far, the right has mainly been developed by judges in response to potential violations. News personalisation requires us to think through what the right to receive information should mean today,

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<sup>155</sup>*Khurshid Mustafa*, para 45.

<sup>156</sup>*Cengiz*, para 51.

and to empirically study how people's search strategies and privacy attitudes influence the exercise of that right in a personalised communication environment.

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