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The Fundamental Rights of News Users

Sarah Eskens

The Fundamental Rights of News Users:

The Legal Groundwork for a Personalised Online News Environment

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The Fundamental Rights of News Users: The Legal Groundwork for a Personalised Online News Environment

ACADEMISCH PROEFSCHRIFT

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Chapter 1.

General Introduction

1.1 Personalisation by Online News Media

1.1.1 Main Area of Research

Already from the 1990s, various online services have been using personalisation.[1] In a nutshell, personalisation is the tailoring of an online service to an individual end-user or customer based on certain knowledge about the user or customer.[2] Personalisation is used in various online sectors, ranging from online search[3] to e-commerce,[4] advertising,[5] music streaming,[6] and news.[7]

This research concentrates on personalisation in the online news sector and the fundamental rights of news users. News media have a central role in democratic societies by publishing information on matters of public interest, acting as a public watchdog, and providing a forum for public debate.[8] To fulfil these roles, news media have special freedom of expression protections and may qualify for exemptions under data protection law. The fundamental rights of news users need to be analysed taking into account the societal role of news media and the importance of news for people to enact different roles, such as citizen, caregiver, employer or employee, partner, parent, and politician or protester.

Personalisation as a goal and its technology builds on other paradigms and digital technologies, such as audience metrics and analytics,[9] and audience segmentation.[10] At least from the 2010s, journalism scholars and communication scientists have been systematically documenting the personalisation efforts of online news media.[11] Writing in 2020, many online news media are experimenting with personalisation.

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[1] G. Adomavicius, Z. Huang, and A. Tuzhilin, 'Personalization and recommender systems', in Z.-L. Chen and S. Raghavan (eds), *State-of-the-Art Decision-Making Tools in the Information-Intensive Age* (INFORMS, 2008), pp. 55–107 (p. 55), https://doi.org/10.1287/educ.1080.0044.

[2] Adomavicius, Huang, and Tuzhilin, 'Personalization and recommender systems', pp. 57–58.

[3] A. N. Langville and C. D. Meyer, *Google's PageRank and beyond: The Science of Search Engine Rankings* (Princeton University Press, 2012).

[4] C.-M. Karat, J. O. Blom, and J. Karat (eds), *Designing Personalized User Experiences in ECommerce* (Springer, 2004), https://doi.org/10.1007/1-4020-2148-8.

[5] J. Strycharz, 'Personalized marketing communication in context: Studying the perspectives of consumers, industry and regulators' (University of Amsterdam, 2020), https://dare.uva.nl/search?identifier=eee1aad4-373e-4d27-a54f-24de5e7f2d4e.

[6] R. Prey, 'Nothing personal: algorithmic individuation on music streaming platforms', *Media, Culture & Society*, 40:7 (2018), 1086–1100, https://doi.org/10.1177/0163443717745147.

[7] J. Kunert and N. Thurman, 'The form of content personalisation at mainstream, transatlantic news outlets: 2010–2016', *Journalism Practice*, 13:7 (2019), 759–80, https://doi.org/10.1080/17512786.2019.1567271; N. Thurman and S. Schifferes, 'The future of personalization at news websites: Lessons from a longitudinal study', *Journalism Studies*, 13:5–6 (2012), 775–90, https://doi.org/10.1080/1461670X.2012.664341.

[8] ECtHR, *Barthold v. Germany*, 1985, 8734/79, para. 58, http://hudoc.echr.coe.int/eng?i=001-57432; ECtHR, *Manole and Others v. Moldova*, 2009, 13936/02, para. 101, http://hudoc.echr.coe.int/eng?i=001-94075; B. McNair, 'Journalism and democracy', in T. Hanitzsch and K. Wahl-Jorgensen (eds), *The Handbook of Journalism Studies* (Routledge, 2009), pp. 237–49 (pp. 238–40).

[9] M. Carlson, 'Confronting measurable journalism', *Digital Journalism*, 6:4 (2018), 406–17, https://doi.org/10.1080/21670811.2018.1445003.

[10] D. McQuail, *Audience Analysis* (SAGE, 1997), p. 133.

[11] Thurman and Schifferes, 'The future of personalization at news websites'; Kunert and Thurman, 'The form of content personalisation at mainstream, transatlantic news outlets: 2010–2016'.

Online news media provide personalisation mostly in the form of recommendations in a sidebar on their website or below other news items on their website,[12] yet media are also developing and experimenting with fully personalised homepages, apps, and push notifications.[13] For example, BUZZ, the mobile app of Germany's largest newspaper Bild, states:

> *BUZZ schickt Dir immer das Wichtigste und Spannendste von BILD. BUZZ lernt, was Dich interessiert, und schickt Dir nur aufs Handy, was Du auch wirklich lesen willst. Blitsschnell als Push![14]*

A complex network of actors shapes the personalised online news environment. Traditional newspapers and broadcasting organisations, including public service media and commercial media, have websites and mobile apps. Digital-born news media also produce and publish news or aggregate news from other sources. Often, online news media use personalisation systems developed by third parties to implement these into their own website or app. This research concentrates on online news media which produce and publish news themselves and exercise editorial control over the content which they distribute, and not on social media or third parties which build personalisation systems.[15] The personalisation efforts by various news media actors are informed by different goals and optimised for different metrics, thereby impacting on the fundamental rights of news users in different degrees.

In the EU, the Charter of Fundamental Rights of the European Union ('EU Charter')[16] states that everyone has the right to respect for privacy,[17] the right to the protection of personal data, the right to freedom of thought, and the right to freedom of expression, which includes the freedom to hold opinions and to receive information and ideas. Personalisation raises novel questions with regard to these fundamental rights.

In order to provide personalised news services, online news media need to collect and process large numbers of personal data. By analysing these data, news media can get detailed knowledge about the private interests and behaviours of news users. When someone receives a personalised

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[12] Kunert and Thurman, 'The form of content personalisation at mainstream, transatlantic news outlets: 2010–2016', p. 16.

[13] R. Leuener, 'NZZ Companion: How we successfully developed a personalised news application', *Medium*, 16 August 2017, https://medium.com/@rouven.leuener/nzz-companion-how-we-successfully-developed-a-personalised-news-app-d3c382767025; L. Kelion, 'BBC News app revamp offers personalised coverage', *BBC News*, 21 January 2015, https://www.bbc.com/news/technology-30894674; *News360*, https://news360.com/; T. Plattner, 'Ten effective ways to personalize news platforms', 5 June 2018, https://medium.com/jsk-class-of-2018/ten-effective-ways-to-personalize-news-platform-c0e39890170e; B. Loni et al., 'Personalized push notifications for news recommendation', *2nd Workshop on Online Recommender Systems and User Modeling*, 2019, pp. 36–45, http://proceedings.mlr.press/v109/loni19a.html.

[14] 'BUZZ always sends you the most important and exciting things from Bild. BUZZ learns what interests you and delivers to you on your mobile phone only what you really want to read. Fast as lightning via a push notification!' (author translation). *BUZZ*, http://www.buzzapp.de/.

[15] For a legal analysis of personalisation by online intermediaries which distribute user-generated content without exercising editorial control, see J. Cobbe and J. Singh, 'Regulating recommending: Motivations, considerations, and principles', *European Journal of Law and Technology*, 10:3 (2019), https://ejlt.org/index.php/ejlt/article/view/686.

[16] Charter of Fundamental Rights of the European Union, http://data.europa.eu/eli/treaty/char_2012/oj.

[17] The EU Charter and ECHR use the term 'private life' instead of 'privacy', but I use both terms interchangeably, which is common in privacy law literature.

news selection, the selection of news items they receive might be different from what other news users receive and from what they might have chosen themselves.[18] Furthermore, when someone receives a personalised news selection, these news items might affect the development of their thoughts, ideas, and opinions. News personalisation also impacts on the interplay between the fundamental rights of news users. For example, when news users are aware that their personal data is being collected for personalisation, they might change the way in which they search for news and interact with online news media, which consequently may also influence news users' right to freedom of expression.

It might be necessary to regulate the changing relationship between online news media and news users in order to preserve democratic values and principles which are connected to news use, such as public debate, free flow of information, and personal autonomy. In this research, I concentrate on the user side of this relationship. Looking at the user side, few secondary legislation exists which can be analysed, besides the GDPR. News subscriptions are covered by consumer law, yet these rules mainly apply to the formalities of a contract. Media law applies to audiovisual media services and excludes online newspapers and magazines. Therefore, on the user side, the legal framework is formed mainly by fundamental rights. It is unclear, however, what the meaning and importance is of these fundamental rights for the relationship between online news media and news users, a relationship which is fast changing due to the introduction of new technologies such as personalisation. This situation leads to the main question of this research: How can EU fundamental rights inform the regulation of the relationship between online news media which personalise the news and their users?

1.1.2 Research Aim

With this research I aim to study how the fundamental rights of news users can play a role in the discussion about online news personalisation. As Leenes and colleagues have observed, the common heritage of European fundamental rights and freedoms can serve as an anchor point for regulatory discussions.[19] I am interested in the substantive content of fundamental rights of personalised news users. I want to explore what the meaning of these rights is for the position of news users and how fundamental rights could inform discussions about the regulation of news personalisation.

In order to clarify my research aim in more detail, I have to mention three characteristics of fundamental rights.[20] First, fundamental rights in principle apply only between the state and citizens, and not between private actors such as news users and online news media. Second, fundamental rights can give rise to positive obligations for the state. Third, the exercise of the fundamental right to freedom of expression comes with duties and responsibilities for the rights-holder.

[18] In this research, I use the singular 'they' / 'them', which is also endorsed by the American Psychological Association Seventh Edition style ('APA 7').
[19] R. Leenes et al., 'Regulatory challenges of robotics: Some guidelines for addressing legal and ethical issues', *Law, Innovation and Technology*, 9:1 (2017), 1–44, https://doi.org/10.1080/17579961.2017.1304921.
[20] See, in more detail, section 1.2.3.

The European Commission, the Council of Europe, academics, and civil society have repeatedly stressed that the use of algorithms and AI by public and private actors should respect fundamental rights. In its White Paper on Artificial Intelligence, the European Commission states that AI in the EU should be grounded in fundamental rights such as human dignity and privacy.[21] The Committee of Ministers of the Council of Europe recommends that states ensure that private actors which use algorithms fulfil their responsibilities to respect human rights.[22] Similarly, Hildebrandt has argued that the 'practical wisdom' of the ECHR 'should inspire the choice, the design and the employment' of digital technologies by private actors.[23]

These statements show that, regardless of the fact that fundamental rights in principle apply only between the state and citizens, a societal need is present to think about the meaning of fundamental rights in relationships between private actors as well. When powerful private actors use algorithms and AI, which are the underlying digital technologies for news personalisation, the fundamental rights of individual end-users provide a good starting point to reflect on the responsibilities of these private actors and the values and interests which should be preserved. For example, a fundamental rights framework can inform the development of what Helberger calls 'fair media practices', which are values and principles which could guide the relationship between personalised news media and their users.[24]

In this research, I examine to what extent people are able to enjoy their fundamental rights in the context of online news personalisation, taking into account that fundamental rights apply in principle only between the state and citizens. Furthermore, given that fundamental rights may give rise to positive obligations for the state, I study what positive obligations states have regarding users of personalised news. Finally, I investigate what kind of duties and responsibilities online news media have towards their audiences in personalising the news. These duties and responsibilities can be informed by the values which underlie fundamental rights. I extrapolate these values from a close reading of fundamental rights case law. Through the duties and responsibilities of online news media, fundamental rights might play a role in the relationship between private personalised online news media and their users.

1.1.3 Sub-Questions

The main research question and research aim are subdivided into four sub-questions, with which I explore the meaning, scope, and mechanisms of protection of the fundamental rights affected by news personalisation.

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[21] European Commission, 'White paper on artificial intelligence: A European approach to excellence and trust COM(2020) 65 final', 2020, p. 2, https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf.

[22] Council of Europe, 'Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States on the human rights impacts of algorithmic systems' (Council of Europe, 2020), para. 3, https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016809e1154.

[23] M. Hildebrandt, 'Balance or trade-off? Online security technologies and fundamental rights', *Philosophy & Technology*, 26:4 (2013), 357–79 (p. 359), https://doi.org/10.1007/s13347-013-0104-0.

[24] N. Helberger, 'Policy implications from algorithmic profiling and the changing relationship between newsreaders and the media', *Javnost - The Public*, 23:2 (2016), 188–203, https://doi.org/10.1080/13183222.2016.1162989.

As noted in the introduction, news users have the fundamental rights to respect for privacy, the right to the protection of personal data, the right to freedom of thought, and the right to freedom of expression, which includes the freedom to hold opinions and to receive information and ideas.

These fundamental rights are interconnected. For example, the right to privacy is connected to the right to freedom of expression and the right to receive information. The Reuters Institute found that, in 2019, people spent less time than in previous years on social media which have an open character, and more time on private messaging applications such as WhatsApp, Facebook Messenger, and Telegram.[25] People are using these private messaging applications more heavily than previous years, in particular for news.[26] Although my research does not focus on social media, the trend of people moving from open to more private media to find, share, and discuss news suggests that people seek some amount of privacy for their news use, and that people desire privacy when they exercise their rights to receive information and to freedom of expression. The fundamental right to data protection aims, in part, to give people control over their personal data.[27] The right to data protection is closely connected to the right to privacy; as just mentioned, data protection and privacy are intertwined with other fundamental rights in the area of communication and information. The question is how we can enrich our understanding of user control in the context of news personalisation, if we situate the right to data protection amidst the right to privacy, the right to freedom of expression, freedom of thought, freedom of opinion, and the right to receive information. This question is addressed in Chapter 2.

After this survey of the various fundamental rights which are involved in news personalisation, I zoom in on two fundamental rights: the right to data protection (see the paragraph following), and the right to receive information which is part of the right to freedom of expression. News personalisation changes the selection of information which news users receive, and empirical studies indicate that news personalisation changes the way in which people consume news. For instance, news personalisation may increase the likelihood of people reading news,[28] but it may also decrease the diversity of news which people receive. The right to receive information does not directly create obligations for online news media, but it might give rise to positive obligations for the state. The question arises what, if any, positive obligations states have with respect to the right to receive information and the effects of news personalisation on news users. This question is discussed in Chapter 3.

In order to personalise the news, online news media need to process personal data of news users on a large scale. The fundamental right to the protection of personal data is one of the few fundamental rights in the EU legal order which is developed through secondary legislation, namely

[25] N. Newman et al., 'Digital News Report 2019' (Reuters Institute for the Study of Journalism, 2019), p. 37, https://reutersinstitute.politics.ox.ac.uk/sites/default/files/inline-files/DNR_2019_FINAL.pdf.
[26] Newman et al., 'Digital News Report 2019', p. 37.
[27] O. Lynskey, 'Deconstructing data protection: The added-value of a right to data protection in the EU legal order', *International and Comparative Law Quarterly*, 63:3 (2014), 569–97, https://doi.org/10.1017/S0020589314000244.
[28] C. Monzer et al., 'User perspectives on the news personalisation process: Agency, trust and utility as building blocks', *Digital Journalism*, advance publication, 2020, 1–21 (p. 13), https://doi.org/10.1080/21670811.2020.1773291.

the EU General Data Protection Regulation ('GDPR').[29] The GDPR contains the so-called special purposes provision which provides for exceptions from several data protection rules for the media. The question is whether online news media can rely on this exception when they personalise the news. Should they be able rely on the exception, the majority of the rights and obligations in the GDPR do not apply to news personalisation. As stated above, the fundamental right to data protection is, among other elements, about control. The question is how the GDPR operationalises the notion of control, and what this means in practice for personalised news users and the design of personalisation systems. These two themes (application and operationalisation) form the third sub-question of my research: Does the special purposes provision in the GDPR apply to news personalisation? If not, how does the GDPR provide people control over the processing of their personal data for news personalisation? These questions are answered in Chapter 4.

The fundamental rights to respect for privacy, the right to the protection of personal data, the right to freedom of thought, and the right to freedom of expression—including the freedom to hold opinions and to receive information and ideas—, together protect the freedom of news users to read, think, and say what they want. The law and the majority of legal scholarship presume that someone's freedom is only limited when an actual interference with their rights or life occurs. However, in many circumstances, news personalisation does not entail an obvious interference with the fundamental rights of news users. At the same time, online news media have a lot of power to decide how to profile news users and shape their information environment. This raises the question whether the notion of an interference is capable of capturing the challenges of news personalisation. This question is investigated in Chapter 5, and a discussion is included on the theory of non-domination as an alternative way to look at limitations of rights and freedoms.

1.2 Legal Background

1.2.1 Charter of Fundamental Rights of the EU and Secondary EU law

1.2.1.1 Fundamental rights and primary and secondary legislation

This research focuses on fundamental rights in EU law and the European Convention on Human Rights ('ECHR').[30] For readers who are not familiar with the fundamental rights regime in the EU, I summarise the main features of the regime in this section. Readers who are well-versed in EU fundamental rights law can skip forward to section 1.3.

The EU legal order has various sources of law which can be divided in primary and secondary legislation. The EU founding treaties, namely the Treaty on European Union ('TEU')[31] and the Treaty on the Functioning of the European Union ('TFEU'),[32] are primary legislation. In order to

[29] Consolidated Text: Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), https://eur-lex.europa.eu/eli/reg/2016/679.
[30] Convention for the Protection of Human Rights and Fundamental Freedoms, https://www.echr.coe.int/Documents/Convention_ENG.pdf.
[31] Consolidated Version of the Treaty on European Union, http://data.europa.eu/eli/treaty/teu_2016/oj.
[32] Consolidated Version of the Treaty on the Functioning of the European Union, http://data.europa.eu/eli/treaty/tfeu_2016/oj.

exercise the competences conferred on the EU by the Treaties, EU institutions can adopt regulations, directives, decisions, recommendations, and opinions.[33] These legislative instruments are secondary legislation. Other sources of EU law include, among others, decisions of the Court of Justice of the European Union ('CJEU'), soft law, general principles of EU law, and fundamental rights.

The fundamental rights framework of the EU has two sources of law, namely the EU Charter and general principles of EU law. The EU Charter and general principles of EU law are developed through their interplay with the ECHR, among others.

Before the EU as we know it today came into being, European states were organised in various communities. The treaties establishing the European Coal and Steel Community in 1951 and the European Atomic Energy Community and European Economic Community in 1957 contained no references to fundamental rights.[34] In the late 1960s, the former European Court of Justice ('ECJ') recognised for the first time that fundamental rights are enshrined in the general principles of EU law and protected by the ECJ.[35] A few years later, the ECJ declared that 'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice'.[36] In safeguarding these rights, the ECJ drew inspiration from international treaties for the protection of human rights to which EU Member States are signatories.[37]

After these judicial developments, in 2000, the EU proclaimed the EU Charter as a means to strengthen the protection of fundamental rights. The EU Charter entered into force in 2009 with the Treaty of Lisbon.[38] The TEU, as amended by the Treaty of Lisbon, states that the EU recognises the rights, freedoms, and principles set out in the EU Charter and that the EU Charter has the same legal value as the Treaties.[39] In the legal hierarchy, the Treaties and the EU Charter are followed by regulations, directives, and soft-law.

Regulations are binding in their entirety and directly applicable in all EU Member States.[40] Member States do not have to transpose regulations into national law. In the field of EU data protection law, the most important legislative instrument is the General Data Protection Regulation ('GDPR'). Since the GDPR is a regulation, it applies entirely and directly in all Member States. For the rules on data protection, therefore, I only look into the GDPR and not into national data protection legislation.

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[33] Article 288 TFEU.

[34] See for possible explanations, R. Schütze, *European Union Law*, 2nd edn (Cambridge University Press, 2018), p. 447, https://doi.org/10.1017/9781108555913.

[35] ECJ, *Stauder v. City of Ulm*, 1969, C-29/69, para. 7, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1594400011742&uri=CELEX:61969CJ0029.

[36] ECJ, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970, C-11/70, para. 4, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1594400063365&uri=CELEX:61970CJ0011; ECJ, *Nold KG v. Commission*, 1974, C-4/73, para. 13, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1594400104888&uri=CELEX:61973CJ0004.

[37] ECJ, *Nold KG v. Commission*, para. 13.

[38] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Signed at Lisbon, 13 December 2007, http://data.europa.eu/eli/treaty/lis/sign.

[39] Article 6(1) TEU.

[40] Article 288 TFEU.

Directives are binding on Member States as to the result to be achieved, but leave the choice of form and methods to the national authorities.[41] Consequently, Directives do not apply directly in a Member State but rather oblige Member States to adapt their domestic law in line with the EU legislation.[42] For this research, three directives in particular are relevant.

At the outset, this research discusses the Data Protection Directive,[43] the predecessor of the GDPR. CJEU case law regarding the Data Protection Directive is still valid under the GDPR. I therefore consider the case law of the CJEU regarding both the Data Protection Directive and GDPR in this research.

The ePrivacy Directive also features in this research.[44] The ePrivacy Directive supplements the GDPR. The Directive ensures the confidentiality of communications in the electronic communications sector and specifies some of the EU data protection rules for the electronic communications sector. For example, it provides that organisations may store or read cookies or similar tracking technologies on the device of a person only with their explicit consent.[45]

In addition to these directives in the field of privacy and data protection, this research refers to the Audiovisual Media Service Directive ('AVMSD').[46] As the AVMSD is a directive, Member States have to transpose it into their national laws. Therefore, in the field of audiovisual media law, more variation occurs among Member States compared to the field of data protection law. Nevertheless, considering that the AVMSD plays a relatively small role in my research, and I do not need to go into the details of media law, I also focus on the EU level and not on the laws of the Member States in the field of media law.

Besides binding regulations and directives, soft law is a source of EU law as well. Soft law is constituted of rules which are not legally binding, but may have practical effects on the actions of public and private actors.[47] In order to understand one important type of soft law which this research refers to, I briefly address a former and current EU body.

The Article 29 Data Protection Working Party ('Working Party') was an EU body set up by the Data Protection Directive. It was an independent EU body with advisory status on data protection and privacy. The Working Party could give opinions and recommendations on the interpretation and

[41] Article 288 TFEU.
[42] K.-D. Borchardt, *The ABC of EU Law* (European Commission, 2018), p. 101, https://op.europa.eu/en/publication-detail/-/publication/5d4f8cde-de25-11e7-a506-01aa75ed71a1.
[43] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, http://data.europa.eu/eli/dir/1995/46/oj.
[44] Consolidated Text: Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector (Directive on Privacy and Electronic Communications), http://data.europa.eu/eli/dir/2002/58/2009-12-19.
[45] Article 5(3) ePrivacy Directive.
[46] Consolidated Text: 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 (Audiovisual Media Services Directive), https://eur-lex.europa.eu/eli/dir/2010/13.
[47] F. Snyder, 'The effectiveness of European Community law: Institutions, processes, tools and techniques', *The Modern Law Review*, 56:1 (1993), 19–54 (p. 32), https://doi.org/10.1111/j.1468-2230.1993.tb02852.x.

application of the Data Protection Directive.[48] As it only had advisory status, its opinions and recommendations were not legally binding. Nonetheless, the opinions and recommendations of the Working Party did have, and still have practical effect on the way in which courts and public and private organisations interpret and apply EU data protection law.[49] Accordingly, its opinions and recommendations can be considered soft law.[50]

The Working Party was succeeded by the European Data Protection Board ('EDPB'), which has been established by article 68 GDPR. The EDPB is also independent,[51] and it may issue guidelines, recommendations and opinions on the application and interpretation of EU data protection law.[52] These guidelines, recommendations, and opinions of the EDPR are also soft law. The opinions and recommendations of the former Working Party are still valid as soft law, together with the work of the current EDPB.

The news media sector itself produces a form of soft law as well. The fundamental right to freedom of expression provides special protections for news media so that they can fulfil their societal role. Media freedom provides strong protection and largely prohibits state-imposed regulation of news media. Instead, the news media sector has developed self-regulation to advance social responsibility of news media, among others in the form of journalistic codes of ethics. These codes of ethics contain the principles and rules which should guide journalistic work and the interactions of journalists with other citizens and audiences.[53]

1.2.1.2 Data protection as secondary legislation and a fundamental right

Article 8(1) EU Charter provides that everyone has the right to the protection of personal data concerning them. The relationship between the Data Protection Directive and the GDPR, on the one hand, and the EU Charter, on the other hand, is complicated.

The Data Protection Directive was drafted in 1992 and came into force in 1995. When it was implemented, the EU Charter did not yet exist. Instead, the preamble to the Data Protection Directive exclusively refers to the fundamental right to privacy as recognised in both article 8 ECHR and the general principles of EU law,[54] and to the Council of Europe Convention 108.[55] The reference to the ECHR by the Data Protection Directive illustrates why research about EU fundamental rights, including data protection, should consider both EU law and the ECHR.

After the Data Protection Directive had existed for several years, the EU adopted the Treaty of Lisbon in 2007, which entered into force in 2009. The Treaty of Lisbon amended the TEU and TFEU. The Treaty of Lisbon introduced a new article 16 TEU and, as described in the previous section,

[48] Article 30 Data Protection Directive.

[49] B. Eberlein and A. L. Newman, 'Escaping the international governance dilemma? Incorporated transgovernmental networks in the European Union', *Governance*, 21:1 (2008), 25–52 (p. 40), https://doi.org/10.1111/j.1468-0491.2007.00384.x.

[50] Hijmans also describes opinions and recommendations of the Article 29 Working Party as soft law, see H. Hijmans, 'The European Union as a constitutional guardian of internet privacy and data protection' (University of Amsterdam, 2016), p. 350, https://hdl.handle.net/11245/1.511969.

[51] Article 69 GDPR.

[52] Article 70 GDPR.

[53] S. J. A. Ward, *Global Journalism Ethics* (McGill-McQueen's University Press, 2010), p. 43.

[54] Recital 10 Data Protection Directive.

[55] Recital 11 Data Protection Directive.

amended the TEU in such a way that the EU Charter entered into force and gained the same legal value as the Treaties. Article 16(1) TEU provides that everyone has the right to the protection of personal data which concerns them. In addition, article 8(1) EU Charter provides in a similar formulation that everyone has the right to the protection of personal data which concerns them. The Treaty of Lisbon thereby created an explicit legal basis for data protection legislation and elevated the right to data protection to a fundamental right.[56]

An argument could be made that the EU Charter provision on personal data protection is based on the Data Protection Directive, rather than the other way around. The explanations relating to the EU Charter indeed state that article 8(1) was based on, among others, the Data Protection Directive.

The GDPR was drafted after the EU Charter and Treaty of Lisbon came into force and gives expression to the fundamental right to the protection of personal data. The manner in which the GDPR, an instrument of secondary legislation, gives expression to a fundamental right is rather unique in EU law. Muir has shown that, only in the fields of EU equality law and data protection law, instruments of secondary law give expression to a fundamental right.[57] In other fields of EU law, certain legal provisions sometimes aim to protect a certain fundamental right, but those cases usually concern a single provision rather than a complete instrument of secondary law which instrumentalises a fundamental right. For example, in the field of EU media law, certain provisions of the AVMSD intent to ensure the fundamental right to receive information of media users,[58] yet the AVMSD is not entirely devoted to the implementation of the right to receive information.

1.2.2 European Convention on Human Rights

The ECHR is another important fundamental rights document in Europe, apart from the EU Charter. The ECHR influences EU fundamental rights, even though it originates in the Council of Europe and not the EU. The Council of Europe is a human rights organisation founded in 1949 by a group of European states. Today, the Council of Europe has 47 members, of which 27 are EU Member States. In 1950, the members of the Council of Europe adopted the ECHR, which is a multilateral agreement which entered into force in 1953.

The Contracting Parties of the ECHR set up the European Commission of Human Rights ('ECommHR') and the European Court of Human Rights ('ECtHR') to ensure that states comply with the ECHR. Initially, the ECommHR decided on the admissibility of an application and, in case of admissibility, directed the case to the (former) ECtHR. The ECtHR would provide a final and binding judgment. Protocol No. 11 to the ECHR replaced the ECommHR and the former ECtHR with a new permanent Court in Strasbourg. The new ECtHR decides on both the admissibility and the merits of a case.

The relevance of the ECHR for EU law is affirmed in ECJ and CJEU case law, the TEU, and the EU Charter. The ECJ has stated that it draws inspiration from international treaties for the protection of human rights to which EU Member States are signatories.[59] The ECJ and current-day CJEU have

[56] O. Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press, 2015), p. 14 and 132–33.
[57] E. Muir, *EU Equality Law: The First Fundamental Rights Policy of the EU* (Oxford University Press, 2018), https://www.oxfordscholarship.com/view/10.1093/oso/9780198814665.001.0001/oso-9780198814665.
[58] N. Helberger, 'Controlling access to content: Regulating conditional access in digital broadcasting' (University of Amsterdam, 2005), https://hdl.handle.net/11245/1.254803.
[59] ECJ, *Nold KG v. Commission*, para. 13.

specified that they attach special significance to the ECHR in that respect.[60] Article 6(3) TEU codifies this line of case law by providing that fundamental rights, as guaranteed by the ECHR, are general principles of EU law.

Furthermore, article 52(3) EU Charter determines that, in so far as the EU Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights is the same as those laid down in the ECHR. For example, the CJEU held that article 7 EU Charter must be given the same meaning and scope as article 8 ECHR.[61] The case law of the ECtHR is therefore also relevant for EU law in areas where the EU Charter rights correspond with ECHR rights.

The ECtHR has a longer tradition and more experience with fundamental rights adjudication than the CJEU, which reinforces the importance of the case law of the ECtHR for EU law. The ECtHR has developed detailed case law on fundamental rights and has contributed substantially to the development of the meaning of fundamental rights.[62] For example, the case law of the ECtHR has provided a major contribution to the development of EU media law.[63] The EU Charter, the ECHR, and the case law of the CJEU and ECtHR, represent the legal framework for my analysis of online news personalisation. The analysis needs to consider special characteristics of fundamental rights which affect how these rights apply and can be used in legal reasoning. The next section discusses these fundamental rights characteristics.

1.2.3 Fundamental Rights Characteristics

For the purposes of this research, three characteristics of fundamental rights need to be clarified: the relationships in which they apply, the type of obligations they give rise to, and the duties and responsibilities which come with the exercise of certain fundamental rights.

For a long time, most fundamental rights scholars held that fundamental rights apply only between the citizen and the state.[64] In this relationship, the state is the obligation-holder and the citizen the beneficiary or right-holder of fundamental rights. This doctrine is called the vertical effect of fundamental rights. Nowadays, scholars and legal authorities sometimes allow the application of fundamental rights between private parties, which is referred to as the horizontal effect of fundamental rights.[65] For example, the fundamental right to privacy protects people against intrusions into their private lives by their employer, in addition to intrusions by the state.

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[60] ECJ, *Elliniki Radiophonia Tiléorassi AE (ERT AE) and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis (DEP) and Sotirios Kouvelas and Nicolaos Avdellas and others*, 1991, C-260/89, para. 41, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1594400230738&uri=CELEX:61989CJ0260; ECJ, *Kadi and Al Barakaat International Foundation v. Council and Commission*, 2008, C-402/05 P, C-415/05 P, para. 283, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62005CJ0402&rid=1.

[61] CJEU, *J. McB. v. L. E*, 2010, C-400/10 PPU, p. 53, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1594452351097&uri=CELEX:62010CJ0400.

[62] D. Harris et al., *Law of the European Convention on Human Rights*, 4th edn (Oxford University Press, 2018).

[63] J. Oster, *European and International Media Law* (Cambridge University Press, 2016), p. 24, https://doi.org/10.1017/9781139208116.

[64] C. L. Lane, 'The horizontal effect of international human rights law: Towards a multi-level governance approach' (University of Groningen, 2018), p. 49, http://hdl.handle.net/11370/d6becf0f-de98-45cd-a6ed-39cb4687cd23.

[65] K. Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012), p. 10.

The rights and freedoms in the ECHR and EU Charter are formulated as negative obligations. The provisions in these fundamental rights documents prohibit public authorities from interfering with the rights and freedoms of individuals.[66] In the 1960s, the ECtHR for the first time accepted the idea that the state may have positive obligations under certain Convention rights.[67] In the years thereafter, the ECtHR read positive obligations into the fundamental right to privacy.[68] More recently, the ECtHR also found that the fundamental right to freedom of expression may contain positive obligations for the state.[69] If a state has a positive obligation, it needs to take practical or legal measures to safeguard or protect a fundamental right.[70] For example, the ECtHR has determined that the state has a positive obligation to put in place a legislative and administrative framework to guarantee media pluralism.[71]

The exercise of the right to freedom of expression comes with duties and responsibilities. The second paragraph of article 10 ECHR provides that the exercise of freedom of expression 'carries with it duties and responsibilities'. This means that, although fundamental rights do not directly address online news media, should these online news media exercise their right to freedom of expression, they have respective duties and responsibilities.

1.3 News Sector Background

1.3.1 Developments in the News Media

For an overview of technological developments in the news media, of which news personalisation is one of the most recent developments, two key notions are important. Gatekeeping is the process of the selection of information by a gatekeeper while the information flows through a 'gate'.[72] News media act as gatekeepers in deciding to report on certain newsworthy events and not on others.[73] An effect of journalistic gatekeeping is agenda-setting, which is when news media give prominence to certain issues, thereby suggesting which issues are most important for the public agenda.[74]

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[66] J.-F. Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights* (Council of Europe, 2007), p. 7, https://rm.coe.int/168007ff4d.

[67] ECtHR, *Case relating to certain aspects of the laws on the use of languages in education in Belgium*, 1968, para. 27, http://hudoc.echr.coe.int/eng?i=001-57525.

[68] ECtHR, *Marckx v. Belgium*, 1979, 6833/74, para. 31, http://hudoc.echr.coe.int/eng?i=001-57534.

[69] ECtHR, *Özgür Gündem v. Turkey*, 2000, 23144/93, para. 43, http://hudoc.echr.coe.int/eng?i=001-58508; ECtHR, *Fuentes Bobo v. Spain*, 2000, 39293/98, para. 38, http://hudoc.echr.coe.int/eng?i=001-63608.

[70] Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights*, p. 6.

[71] ECtHR [GC], *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, 2012, 38433/09, para. 134, http://hudoc.echr.coe.int/eng?i=001-111399.

[72] K. Lewin, 'Channels of group life', *Human Relations*, 1:2 (1947), 143–53 (p. 145), https://doi.org/10.1177/001872674700100201.

[73] D. M. White, 'The "Gate Keeper": A case study in the selection of news', *Journalism Quarterly*, 27:4 (1950), 383–90, https://doi.org/10.1177/107769905002700403; P. B. Snider, '"Mr. Gates" revisited: A 1966 version of the 1949 case study', *Journalism Quarterly*, 44:3 (1967), 419–27, https://doi.org/10.1177/107769906704400301; P. J. Shoemaker and T. P. Vos, *Gatekeeping Theory* (Routledge, 2009).

[74] M. E. McCombs and D. L. Shaw, 'The agenda-setting function of mass media', *The Public Opinion Quarterly*, 36:2 (1972), 176–87; M. McCombs, *Setting the Agenda: Mass Media and Public Opinion* (Polity, 2014), 2ND ED.

In the 20th century, print and broadcast news media had a lot of power. Editors of newspapers acted as gatekeepers by deciding which news items to publish and which not to. Journalists had limited knowledge of their audience and they largely ignored audience feedback.[75] Accordingly, journalists selected and produced the news which they deemed most important and relevant for the audience and public debate.

Cable television gave news users more sources to choose from and made it easier for them to pick media content which they were interested in.[76] The internet further increased the number of news sources and facilitated user control over news exposure even more.[77] Online, people have more autonomy than offline, in the sense that they have more control over the news which they consume, at which time and location, and which news they upload themselves and distribute to other news users.[78] People can pick and choose and/or combine information from multiple online news sources, 24 hours per day and wherever they can connect their device to the internet. The internet has made news use interactive in the sense that people can click, search, and combine news items much more easily than in the analogue age.

Developments in computing and internet technology have enabled online news media to move towards the next level of interactivity. Online news media can use personalisation systems to personalise the news for every individual news user, which creates a continuous interaction between news users and news media.

Online news media introduce personalisation for competitive and strategic reasons. Newspaper print sales have fallen over the last decade and internet users are hesitant to pay for general news,[79] with the exception of a few big news brands such as the Guardian and the New York Times. Online, traditional news brands compete for attention with digital-born brands. Legacy news media are trying to distinguish themselves from newer brands and the masses of information which are published online.[80] News personalisation helps online news media to improve the perception of their brand and thereby obtain and retain subscribers.[81]

In addition to competition in the news market, online news media also use news personalisation to appeal to changing news user habits. In their yearly world-wide survey, the Reuters Institute found that over half of their respondents preferred to access news through social media, search engines, or news aggregators.[82] These online information intermediaries often use algorithms to

[75] H. J. Gans, *Deciding What's News: A Study of CBS Evening News, NBC Nightly News, Newsweek, and Time* (Pantheon Books, 1979).
[76] M. Prior, *Post-Broadcast Democracy: How Media Choice Increases Inequality in Political Involvement and Polarizes Elections* (Cambridge University Press, 2007), chap. 4, https://doi.org/10.1017/CBO9781139878425.
[77] S. L. Althaus and D. Tewksbury, 'Agenda setting and the "new" news: Patterns of issue importance among readers of the paper and online versions of the New York Times', *Communication Research*, 29:2 (2002), 180–207, https://doi.org/10.1177/0093650202029002004.
[78] P. Napoli, *Audience Evolution: New Technologies and the Transformation of Media Audiences* (Columbia University Press, 2010), p. 77.
[79] Newman et al., 'Digital News Report 2019', p. 10.
[80] Newman et al., 'Digital News Report 2019', p. 30.
[81] B. Bodó, 'Selling news to audiences: A qualitative inquiry into the emerging logics of algorithmic news personalization in European quality news media', *Digital Journalism*, 7:8 (2019), 1054–75, https://doi.org/10.1080/21670811.2019.1624185.
[82] Newman et al., 'Digital News Report 2019', p. 13.

select and rank news items, so news users get used to personalisation on these platforms and also start to expect personalisation in online news media such as the apps and websites of newspapers and broadcasters.

In addition, people have moved from desktop computers to mobile phones as their main device to access the news.[83] The smaller the screens on which people browse the news, the more they need personalisation to make finding the news which is relevant for them easier. Small screens on mobile phones require personalisation and mobile phones also enable personalisation. Mobile phones are typically used by just one person instead of desktop computers which may be shared, and therefore enable online news media to personally address each user on their own device.

Furthermore, in 2019, the Reuters Institute for the Study of Journalism found that more than a quarter of news users suffered from a 'news overload', meaning that they thought there were too much news stories and too many versions of the same stories.[84] This news overload creates the need for personalised information systems. Online news media are responding to user demand for choice and specialisation.[85] Especially younger generations prefer news media which can easily be read on a smartphone and with a logic similar to Facebook, Netflix, and Spotify.[86]

Besides competition and news user needs, public service media also use personalisation to realise their mission to ensure 'universality', which means the provision of a range of programs with universal appeal while also accommodating niche audiences.[87] News personalisation may thus be used by public service media to fulfil their mission to provide a range of programs which inform a diverse audience. For example, the BBC has stated in its Future of News report that, in the digital age, ensuring universality means telling different stories in different ways to different people, and informing different people about the different things which are directly relevant to their lives.[88]

From this overview, it appears that the introduction of personalisation to online news is part of technological developments which are fundamentally changing the relationship between online news media and their audiences.[89] The relationship between news media and news users went from a more asymmetric model of communication, in which information flows in one direction from the mass media to the audience, towards a more conversational model, in which communication between news media and audiences flows in both directions and news media listen more to the audience.[90] In the asymmetric model, the audience is primarily regarded as a passive, homogenous, and anonymous group. In the newer conversational model, the audience is more active, involved, and known by news media organisations on a personal level.

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[83] Newman et al., 'Digital News Report 2019', pp. 15–16.
[84] Newman et al., 'Digital News Report 2019', p. 26.
[85] N. Thurman, 'Making "The Daily Me": Technology, economics and habit in the mainstream assimilation of personalized news', *Journalism*, 12:4 (2011), 395–415 (p. 396), https://doi.org/10.1177/1464884910388228.
[86] Newman et al., 'Digital News Report 2019', p. 58.
[87] H. Van den Bulck and H. Moe, 'Public service media, universality and personalisation through algorithms: Mapping strategies and exploring dilemmas', *Media, Culture & Society*, 40:6 (2018), 875–92 (pp. 878, 890), https://doi.org/10.1177/0163443717734407.
[88] BBC, *The Future of News* (London, 2015), p. 43.
[89] Napoli, *Audience Evolution*, p. 122.
[90] J. Pavlik, 'The impact of technology on journalism', *Journalism Studies*, 1:2 (2000), 229–37, https://doi.org/10.1080/14616700050028226.

1.3.2 The Process of News Personalisation

This section describes how personalisation works in more detail. Adomavicius, Huang, and Tuzhilin describe personalisation as follows:

> [Personalisation] tailors certain offerings by providers to consumers based on certain knowledge about them and on the context in which these offerings are provided, and with certain goal(s) in mind. These personalized offerings are delivered from providers to consumers through personalization engines.[91]

Online news personalisation is the tailoring of news offerings by online news providers to individual news users based on certain knowledge about each individual user. These personalised offerings are delivered to news users by online news providers through personalisation systems.

Personalisation systems are not the same as recommender systems. Recommender systems are software programs which suggest items to users of online services.[92] The suggestions, or recommendations, can help users choose what items to buy, read, or watch.

Recommender systems can be personalised or non-personalised.[93] Personalised recommender systems suggest different items to different users, based on the personal attributes of each user. Non-personalised recommender system generate lists or recommendations which are the same for everyone.[94] For example, researchers have developed a non-personalised news recommender system which selects the most popular news stories and the stories which received the sharpest spike in popularity in a recent time interval.[95] The system produces a list which recommends the same selection of stories to all visitors of a news website. This research solely revolves around personalised news recommender systems, that is, recommender systems which provide personalised recommendations to news users. For the most part, I will simply use the term 'news personalisation'.

The term 'personalisation' is sometimes used in communication science to describe the use of personal stories in political communication and news stories. For example, Jebril, Albæk, and De Vreese use the term 'personalisation' to refer to 'a shift in journalism towards a news form in which public issues are discussed, while privileging the viewpoint of the ordinary citizen'.[96] This is not the type of news personalisation at issue in this research.

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[91] Adomavicius, Huang, and Tuzhilin, 'Personalization and recommender systems', pp. 57–58.

[92] F. Ricci, L. Rokach, and B. Shapira, 'Introduction to recommender systems handbook', in F. Ricci et al. (eds), *Recommender Systems Handbook* (Springer, 2011), p. 1, https://doi.org/10.1007/978-0-387-85820-3_1.

[93] Ricci, Rokach, and Shapira, 'Introduction to recommender systems handbook', p. 2; J. Furner, 'On recommending', *Journal of the American Society for Information Science and Technology*, 53:9 (2002), 747–63 (p. 759), https://doi.org/10.1002/asi.10080.

[94] Ricci, Rokach, and Shapira, 'Introduction to recommender systems handbook', p. 2.

[95] A. Chakraborty et al., 'Optimizing the recency-relevance-diversity trade-offs in non-personalized news recommendations', *Information Retrieval Journal*, 22:5 (2019), 447–75, https://doi.org/10.1007/s10791-019-09351-2.

[96] N. Jebril, E. Albæk, and C. H. de Vreese, 'Infotainment, cynicism and democracy: The effects of privatization vs personalization in the news', *European Journal of Communication*, 28:2 (2013), 105–21 (p. 107), https://doi.org/10.1177/0267323112468683.

Now that I have described what personalisation is taken to mean in this thesis, I will enter into the process of personalisation in more detail. The following three paragraphs are based on the work of Adomavicius, Huang, and Tuzhilin.[97] In broad strokes, personalisation consists of three stages which together form an iterative process with various data collection and feedback mechanisms: understanding the user; recommending to the user; reviewing the system.

In the first stage, a personalisation system tries to understand the user. Depending on the type of filtering of the information (content-based, collaborative, or hybrid: see below), the system collects either just data on the items a user has liked in the past or more complex data about the user. The system integrates these data and constructs individual user profiles. A user profile contains information on which items a user has liked in the past, or descriptions, predictions, and inferences about the user, such as the description that a user prefers to read long news articles on the weekend or that they usually consume news at a certain time.

In the second stage, a personalisation system delivers a tailored selection of recommended items to the user. In order to deliver such a selection, the system filters certain items from a bigger pool of items and matches these items with individual user profiles, taking into account the context of a user. The matchmaking process aims to find the items which are the most relevant for a given user on a certain time and day. After the matchmaking, the system selects a set of items for the user and delivers them.

Finally, in the third stage, a personalisation system measures the impact of the personalisation to improve and further optimise the understanding and recommending stages. The system evaluates the effectiveness of the personalisation using various metrics, such as accuracy, diversity, serendipity, novelty, or coverage.[98] Depending on how the personalisation system performs on one or several of these metrics, the system adjusts the previous stages of the personalisation process.

Throughout the personalisation process, online news media have approximately two ways to gain knowledge about the user and collect feedback. Personalisation systems can rely on direct user input and explicit feedback, or on inferred and predicted user data and implicit feedback. System which rely on direct user input collect personal data by, among others, asking individual users to indicate their interests, preferences, demographic data, and other relevant user attributes. The user then explicitly specifies their interests and preferences. Furthermore, personalisation systems can collect explicit user feedback when users click 'like' or 'thumbs up'.

Because collecting direct user input and explicit feedback can be intrusive and impractical,[99] personalisation systems also rely on other ways to create knowledge about the user. Personalisation systems often try to learn interests, preferences, and other user attributes on the basis of the online behaviour of a user and collect implicit feedback. Systems subsequently track how a user is interacting with an online service and analyse these data to infer or predict

[97] Adomavicius, Huang, and Tuzhilin, 'Personalization and recommender systems', pp. 63–68.

[98] M. Kaminskas and D. Bridge, 'Diversity, serendipity, novelty, and coverage: A survey and empirical analysis of beyond. Accuracy objectives in recommender systems', *ACM Transactions on Interactive Intelligent Systems*, 7:1 (2016), 1–42, https://doi.org/10.1145/2926720.

[99] Ö. Özgöbek, J. A. Gulla, and R. C. Erdur, 'A survey on challenges and methods in news recommendation', *Proceedings of the 10th International Conference on Web Information Systems and Technologies (WEBIST)*, 2014, pp. 278–85 (p. 282), https://doi.org/10.5220/0004844202780285.

someone's interested. For example, if a user opens a news story, but then immediately closes it, this may indicate that they do not like the topic of the story. Should a user never finish news stories with a high word count, the system might infer that the user prefers to read short news stories. Some personalisation systems combine direct user input and implicit feedback with inferred or predicted user knowledge and explicit feedback. This research mainly concentrates on personalisation systems in which the user has a passive role, that is, systems which rely on implicit user feedback and inference or prediction.

Personalisation systems can be differentiated according to three ways to filter items and match users with items. Content-based personalisation systems recommend items which have similar properties to those items the user has liked in the past.[100] A content-based system thus focuses on the content of an item. For example, if a news user has liked news items about national politics, then the personalisation system might recommend more items about national politics to them. Collaborative personalisation systems compare users with each other, and recommend items to a user based on the user's similarities to another user.[101] For example, if a user has liked news items about national politics, and another user has liked news about national politics and international relations, then the personalisation system might recommend items about international relations to the first user as well. Hybrid personalisation systems combine content-based and collaborative approaches.[102]

1.4 Methodology

1.4.1 Research Scope

This research is about news personalisation but 'news' is not defined in EU law. Nonetheless, a closely related term, namely 'journalism', features prominently in the case law of the CJEU and ECtHR about freedom of expression, privacy, and data protection. Journalism is essentially about the production and publication of news.

The CJEU went through a trajectory in which it consecutively provided broader and narrower definitions of journalism. I will outline the line of reasoning of the CJEU and correlate it with judgments of the ECtHR to define the scope of 'news' or 'journalism' for the purpose of this research.

In the case of *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy* ('Satamedia'), the CJEU had to decide whether certain activities performed by news publishers involved the processing of personal data for journalistic purposes. The news publishers in question collected documents in the public domain held by the Finnish tax authorities and published extracts from those data in their newspaper each year. Furthermore, the news publishers offered a text-messaging service whereby Finnish citizens could receive tax information about other citizens. The CJEU stressed that concepts relating to freedom of expression, such as journalism,

[100] P. Lops, M. de Gemmis, and G. Semeraro, 'Content-based recommender systems: State of the art and trends', in F. Ricci et al. (eds), *Recommender Systems Handbook* (Springer, 2011), p. 74, https://doi.org/10.1007/978-0-387-85820-3_1; Özgöbek, Gulla, and Erdur, 'A survey on challenges and methods in news recommendation', p. 279.
[101] Özgöbek, Gulla, and Erdur, 'A survey on challenges and methods in news recommendation', p. 279.
[102] Özgöbek, Gulla, and Erdur, 'A survey on challenges and methods in news recommendation', p. 279.

must be interpreted broadly.[103] Furthermore, the CJEU held that activities are considered to be carried out for journalistic purposes, therefore constitute journalism, if 'the sole object of those activities is the disclosure to the public of information, opinions, or ideas'.[104] With this judgment, the CJEU laid down a broad definition of journalism which covered any kind of activity focused on the communication of information to the public.

After the CJEU had provided this broad definition of journalism, the CJEU narrowed its concept of journalism. In the case of *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* ('Google Spain'), the CJEU was asked whether a search engine operator could be obliged to remove links to web pages published by third parties and containing information relating to a person from the list of search results made on the basis of a person's name. To answer that question, the CJEU had to determine whether a search engine operator is engaged in activities for journalistic purposes. The CJEU held that the publication of personal data by a search engine operator is not journalism.[105] The CJEU added that, in contrast, the publication of personal data by the publisher of a web page could be considered journalism in some circumstances.[106]

The difference between search engine operators and website publishers was deemed to lie in the activities performed. A website publisher makes information available whereas a search engine makes information which has been published elsewhere more accessible and easier to find. *Google Spain* thus established that search engines operators do not engage in journalism in terms of EU law while website publishers possibly can.

After *Satamedia* and *Google Spain*, the CJEU further refined the concept of journalism. In *Sergejs Buivids*, the CJEU needed to determine whether the video recording police officers and the publication on a website of that video by a citizen could be considered to be done for journalistic purposes. The CJEU noted that professional journalists and citizens might be engaging in journalism,[107] while not all online communication to the public is journalism.[108] The CJEU suggested that one consideration to take into account in deciding whether the communication of

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[103] CJEU, *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, 2008, C-73/07, para. 56, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1594452510221&uri=CELEX:62007CJ0073.

[104] CJEU, *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, para. 62.

[105] CJEU, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, 2014, C-131/12, para. 85, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1594452705333&uri=CELEX:62012CJ0131. The judgment was handed down in Spanish, and the English translation of the case contained a translating mistake. The translation provided that it 'does not appear' that search engine operators process personal data for journalistic purposes, thereby suggesting that, under certain circumstances, search engine operators could actually process data for journalistic purposes. However, the original Spanish text rules this out entirely. See, S. Kulk and F. J. Zuiderveen Borgesius, 'Google Spain v. González: Did the Court forget about freedom of expression?', *European Journal of Risk Regulation*, 5:3 (2014), 389–98 (p. 395 at fn 58); D. Erdos, 'From the Scylla of restriction to the Charybdis of licence? Exploring the scope of the "special purposes" freedom of expression shield in European data protection', *Common Market Law Review*, 52:1 (2015), 119–53 (pp. 130–31).

[106] CJEU, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, para. 85.

[107] CJEU, *Sergejs Buivids*, 2019, C-345/17, para. 55, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1594453034640&uri=CELEX:62017CJ0345.

[108] CJEU, *Sergejs Buivids*, para. 58.

certain information to the public is journalism, is whether the information is published to draw the attention of society to an event of public interest.[109] In other words, the CJEU proposed that journalism is the communication of information which contributes to a public debate.[110] With its judgment in *Sergejs Buivids*, the CJEU confirmed that a broad category of actors can be engaged in journalism, while not all activities consisting in publishing information are journalism.

The criterion of a contribution to public debate corresponds with a criterion found in the case law of the ECtHR. In a long line of cases, the ECtHR has repeated 'it is … incumbent on [the news media] to impart information and ideas on matters of public interest'.[111] Building on that, the ECtHR has developed principles to balance the fundamental right to privacy with the fundamental right to freedom of expression, in cases where news media publish private information of royals, citizens, politicians, or celebrities. One criterion is whether the news publication contributes to a debate of public interest.[112] In that regard, the ECtHR has recognised that a public interest can exist in a wide range of issues, such as politics, crimes, sports, or arts.[113]

On the basis of these CJEU and ECtHR judgments, for the purposes of this research, journalism is defined as the 1) communication of information 2) to the public 3) with the aim to contribute to public debate. Within the context of EU law, news can be said to be information which contributes to public debate or concerns matters of public interest. This research focuses on the personalisation of information which is directed to the public and contributes to public debate.

From this working definition of news, it follows that the scope of this research excludes personalisation of for instance entertainment media, such as music and film, or health information. Nonetheless, the distinction between news and entertainment is sometimes hard to make. People may learn about politics and public affairs through entertainment media such as political satire and comedy shows,[114] and reality television may cause political discussion online.[115] Entertainment media can contribute to public debate as much as news. Some of the arguments about news personalisation in this research may therefore apply to personalised entertainment media as well.

Furthermore, from the working definition of news, it follows that the scope of this research excludes personalisation by news aggregators, social media, search engines, and other online information intermediaries. These online information intermediaries might have an important role in the online news media environment because people often locate news via these

[109] CJEU, *Sergejs Buivids*, para. 60.
[110] D. Erdos, 'European data protection and freedom of expression after Buivids: An increasingly significant tension', *European Law Blog*, 2019, http://europeanlawblog.eu/2019/02/21/european-data-protection-and-freedom-of-expression-after-buivids-an-increasingly-significant-tension/.
[111] ECtHR, *Observer and Guardian v. the United Kingdom*, 1991, 13585/88, para. 59, http://hudoc.echr.coe.int/eng?i=001-57705.
[112] ECtHR, *Von Hannover v. Germany (No. 2)*, 2012, 40660/08, 60641/08, para. 109, http://hudoc.echr.coe.int/eng?i=001-109029.
[113] ECtHR, *Von Hannover v. Germany (No. 2)*, para. 109.
[114] A. B. Becker and D. J. Waisanen, 'From funny features to entertaining effects: Connecting approaches to communication research on political comedy', *Review of Communication*, 13:3 (2013), 161–83, https://doi.org/10.1080/15358593.2013.826816.
[115] T. Graham and A. Hajru, 'Reality TV as a trigger of everyday political talk in the net-based public sphere', *European Journal of Communication*, 26:1 (2011), 18–32, https://doi.org/10.1177/0267323110394858.

intermediaries.[116] Nonetheless, these online information intermediaries do not produce or publish original news. Online information intermediaries have different rights, obligations, and duties than online news media, and are therefore excluded from this research.

1.4.2 Research Approach and Methods

This research is mainly an exercise in doctrinal legal research.[117] Doctrinal legal research involves the description, interpretation, and systematisation of legislation and case law on a certain topic.[118] This research describes the legal framework for the rights of personalised news users, interprets rules where their application to news personalisation is unclear, and systematises case law on the fundamental rights which are relevant for news personalisation.

Fundamental rights can function as an internal normative framework.[119] However, for certain fundamental rights, work is to be done to distil and formulate the implicit principles before they can be used as an internal normative framework.[120] For example, the fundamental right to receive information is under-theorised and the positive law on the right to receive information has not been extensively described and systematised. One of the goals of this research is to systematise case law on the right to receive information so that it can function as an internal normative framework for doctrinal legal research questions about the regulation of news personalisation.

This research combines an internal and external perspective. The analysis of fundamental rights in Chapters 2 and 3 results in an internal normative framework to answer questions about the regulation of news personalisation. From this fundamental rights analysis, it follows that news users need to be involved in the personalisation process. This normative conclusion is reinforced by an external normative framework. Empirical research shows that news users generally appreciate personalisation,[121] and they want to have agency over the news personalisation process.[122] These needs of news users are used as an external justification for providing news users more control over the personalisation process.

Chapter 5 does not contain doctrinal legal research. In this chapter, I use author analysis, a general philosophical method which is suitable for legal research.[123] Taekema and Burg describe author analysis for the purposes of legal research as 'the appeal to philosophers who have extensively

[116] Newman et al., 'Digital News Report 2019'.
[117] Doctrinal legal research is also called dogmatic legal research or black letter law.
[118] M. van Hoecke, 'Preface', in M. van Hoecke (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011), pp. v–ix (p. vi).
[119] S. Taekema, 'Theoretical and normative frameworks for legal research: Putting theory into practice', *Law and Method*, 02, 2018, p. 8, https://doi.org/10.5553/REM/.000031.
[120] Taekema, 'Theoretical and normative frameworks for legal research', p. 8.
[121] T. Lavie et al., 'User attitudes towards news content personalization', *International Journal of Human-Computer Studies*, 68:8 (2010), 483–95, https://doi.org/10.1016/j.ijhcs.2009.09.011; N. Thurman et al., 'My friends, editors, algorithms, and I: Examining audience attitudes to news selection', *Digital Journalism*, 7:4 (2019), 447–69 (p. 459), https://doi.org/10.1080/21670811.2018.1493936; Monzer et al., 'User perspectives on the news personalisation process'.
[122] Monzer et al., 'User perspectives on the news personalisation process'.
[123] S. Taekema and W. van der Burg, 'Legal philosophy as an enrichment of doctrinal research part I: Introducing three philosophical methods', *Law and Method*, 1, 2020, https://doi.org/10.5553/REM/.000046.

studied certain subjects'.[124] Scholars who perform author analysis use definitions, concepts, and statements of others as a starting point to develop their own argument.[125] In the fifth chapter, I use different concepts of freedom as developed by political philosophers to analyse under which conditions news personalisation limits the freedoms of news users.

Although this research is firmly embedded in a larger interdisciplinary research project,[126] the resulting research is not interdisciplinary in the strict sense. I use Keestra and Menken's definition of interdisciplinary research as 'research in which relevant concepts, theories, and/or methodologies from different academic disciplines, as well as the results or insights these disciplines generate, are integrated'.[127] The goal of the integration of different disciplines is to promote understanding or solve problems across disciplinary boundaries.[128] The main question which this research asks, namely how EU fundamental rights can inform the regulation of the relationship between online news media which personalise the news and their users,[129] is a purely legal research question. The purpose of this question is to advance understanding and solve problems in the legal discipline, but not in other disciplines—such as communication science or journalism studies.

1.4.3 Societal and Scientific Relevance

The research presented in this thesis can be used by the online news media sector and contributes to public debates about the use of algorithms by online news media. Online news media want to provide personalisation, and research shows that news users want personalisation and see benefits to it.[130] At the same time, news users have concerns about personalisation, ranging from lack of diversity of information, to privacy and data protection, and being stereotyped and manipulated.[131]

The Personalised News project organised a workshop for journalists and developers working at Dutch media companies.[132] The workshop showed that online news media are aware of the concerns of news users but find it difficult to navigate the law and find solutions for diversity and privacy-friendly personalisation.[133] Research also found that journalists have concerns about the regulation of artificial intelligence in the news sector and ethical use of personal data.[134] Furthermore, many journalistic codes of ethics do not refer to the internet and information and

[124] Taekema and Burg, 'Legal philosophy as an enrichment of doctrinal research part I', p. 9.
[125] Taekema and Burg, 'Legal philosophy as an enrichment of doctrinal research part I', p. 9.
[126] See section 1.4.4.
[127] M. Keestra and S. Menken, *An Introduction to Interdisciplinary Research: Theory and Practice* (Amsterdam University Press, 2016), p. 32.
[128] National Academy of Sciences, as quoted in Keestra and Menken, *An Introduction to Interdisciplinary Research*, p. 31.
[129] See section 1.1.1.
[130] Monzer et al., 'User perspectives on the news personalisation process', pp. 8–9.
[131] Monzer et al., 'User perspectives on the news personalisation process', pp. 9–10.
[132] See next section on the Personalised News project.
[133] N. Helberger et al., 'News personalization symposium report' (Institute for Information Law, 2018), http://personalised-communication.net/wp-content/uploads/2018/05/Report-2018-Amsterdam-News-Personalisation-Symposium-1.pdf.
[134] M. Hansen et al., 'Artificial Intelligence: Practice and implications for journalism' (Tow Center for Digital Journalism, 2017), https://doi.org/10.7916/D8X92PRD.

communication technologies,[135] and are unsuitable to guide the use of personal data and personalisation technologies by online news media. The fundamental rights analysis provided in this book can inform new rules and principles for journalistic codes of ethics. Moreover, the analysis in Chapter 4 provides detailed guidance for online news media on how to design personalisation systems in compliance with the GDPR.

This research also contributes to scholarly debates about the use of algorithms and other digital technologies by online news media. Much research has been devoted to the balance of freedom of expression and privacy, in situations where news media publish stories containing private information about individuals.[136] In contrast, little research has been done on emerging conflicts between media freedom and data protection. Helberger has rightfully argued that we must look 'beyond the traditional boundaries of media law and e-commerce law, and expand our horizon to other areas, such as data protection law'.[137] This work aims to respond to Helberger's call.

Finally, fundamental rights analysis can uncover and indicate the policy questions which underlie the regulation of new relationships,[138] such as those between news users and online personalised online news media. Accordingly, the fundamental rights of individuals may form a framework for law and policy-makers to decide how to regulate a certain relationship.[139] In other words, a fundamental rights analysis can help to identify where different interests and goals conflict and suggest ways to resolve these conflicts. In relation to that, communication scientists have observed that it is difficult to assess the performance of news recommender systems because no agreed standards for decision-making by human journalists exist about issues such as pluralism and truth.[140] This thesis provides normative guidance on questions about how to evaluate news personalisation systems by tracing the principles and values embedded in European fundamental rights.

1.4.4 Research Format

The vast majority of doctoral theses in law published in the Netherlands are written in the form of a monograph.[141] For practical reasons, I have chosen to conduct my doctoral research and publish in the form of several articles which are combined in this manuscript as separate chapters.

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[135] J. Díaz-Campo and F. Segado-Boj, 'Journalism ethics in a digital environment: How journalistic codes of ethics have been adapted to the Internet and ICTs in countries around the world', *Telematics and Informatics*, 32:4 (2015), 735–44, https://doi.org/10.1016/j.tele.2015.03.004.

[136] D. Erdos, *European Data Protection Regulation, Journalism, and Traditional Publishers: Balancing on a Tightrope?* (Oxford University Press, 2019).

[137] N. Helberger, 'Media, users and algorithms: Towards a new balance' (Inaugural lecture, Amsterdam, 2014), pp. 13–14, https://hdl.handle.net/11245/1.519093.

[138] C. Mak, 'Fundamental rights and the European regulation of iConsumer contracts', *Journal of Consumer Policy*, 31:4 (2008), 425–39 (p. 426), https://doi.org/10.1007/s10603-008-9084-3.

[139] Mak, 'Fundamental rights and the European regulation of iConsumer contracts', p. 426.

[140] E. Nechushtai and S. C. Lewis, 'What kind of news gatekeepers do we want machines to be? Filter bubbles, fragmentation, and the normative dimensions of algorithmic recommendations', *Computers in Human Behavior*, 90 (2019), 298–307, https://doi.org/10.1016/j.chb.2018.07.043.

[141] C. de Jager, 'Promoveren op een artikelenproefschrift binnen de juridische faculteit: duidelijkheid gewenst', *Rechtsgeleerd Magazijn Themis*, 5, 2017, 212–27.

Writing separate articles over a period of several years enabled me to contribute to topical discussions about news personalisation more directly. When I started this research in 2016, a spirited debate was taking place in academia and among regulators about the implications of news personalisation for users and society.[142] With these articles, of which three out of four had already been published (and have been cited) at the time of publishing of the present manuscript, I could inform the discussions while they were ongoing.

In addition, this research was part of a larger interdisciplinary project which investigated the legal, normative, and communication science questions regarding news personalisation. The project was titled 'Profiling and targeting news readers: Implications for the democratic role of the digital media, user rights, and public policy' ('Personalised News project'), awarded an ERC Starting Grant in 2014. The Principal Investigator of this project was Natali Helberger. The Personalised News project conducted research on user attitudes towards news personalisation, changing practices and ethics of online news media, and the regulation of editorial integrity in the face of news personalisation.

Due to the embedding in this interdisciplinary research project, I collaborated with communication science, data protection, and media law scholars, making it more convenient to perform my research in the form of articles instead of a monograph. By publishing my work as such, my colleagues within the interdisciplinary project could build on, and refer to my work in their subsequent publications.

When I combined the articles for this manuscript and turned them into chapters, I made some adjustments. I rewrote the introduction and conclusion of each chapter to prevent repetition with the general introduction in Chapter 1. Furthermore, I added cross references to the chapters to improve the internal consistency of the manuscript. I also changed the chronological order of the articles so that Chapters 2-5 are the third, first, second, and fourth article respectively.

Chapter 2 was published as an article under the title 'The personal information sphere: An integral approach to privacy and related information and communication rights' in a special issue about information privacy in the digital age in the *Journal of the Association for Information Science and Technology*.[143]

Chapter 3 was published as an article under the title 'Challenged by news personalisation: Five perspectives on the right to receive information' in the *Journal of Media Law*.[144]

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[142] E. Pariser, *The Filter Bubble: What the Internet Is Hiding from You* (Penguin Books, 2011); C. R. Sunstein, *Republic.Com 2.0* (Princeton University Press, 2007); Thurman and Schifferes, 'The future of personalization at news websites'; European Commission, 'Green Paper Preparing for a fully converged audiovisual world: Growth, creation and values COM(2013) 231 final', 2013, p. 13, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2013:0231:FIN.

[143] S. Eskens, 'The personal information sphere: An integral approach to privacy and related information and communication rights', *Journal of the Association for Information Science and Technology*, https://doi.org/10.1002/asi.24354.

[144] S. Eskens, N. Helberger, and J. Moeller, 'Challenged by news personalisation: Five perspectives on the right to receive information', *Journal of Media Law*, 9:2 (2017), 259–84, https://doi.org/10.1080/17577632.2017.1387353.

Chapter 4 was published as an article under the title 'A right to reset your user profile and more: GDPR-rights for personalized news consumers' in *International Data Privacy Law*.[145]

Chapter 5 is prepared for submission to a journal.

In addition to these four articles, I have also co-authored two other articles and one report as part of the Personalised News project.[146] These writings are not part of my doctoral manuscript but I do refer to them throughout the text.

1.5 Outlook

Chapter 2 provides an overview of the fundamental rights of news users which are implicated by news personalisation and traces the interconnections between those rights. I discuss the fundamental rights to respect for privacy, confidentiality of communications, freedom of thought, and freedom of opinion, the right to receive information, and the right to freedom of expression. I conclude that these rights together protect what I call the personal information sphere. The personal information sphere is the domain where people can determine for themselves how they interact with information about the world and how other people may interact with information about them. I argue that, to respect the personal information sphere and the underlying fundamental rights, online news media should involve news users in the personalisation process, beyond the ways in which the fundamental right to data protection gives them some amount of control.

Chapter 3 zooms in on the fundamental right to receive information. Depending on how a news personalisation system is designed and for which goals it is employed, news personalisation may facilitate or hinder the exercise of the right to receive information. The right to receive information is part of, but operates independently from the fundamental right to freedom of expression. The right to receive information is undertheorized. In the third chapter, I develop five perspectives to understand the meaning of the right to receive information: political participation, truth-finding, social cohesion, personal self-development, and avoidance of censorship. On the basis of these five perspectives, I analyse how news personalisation affects the fundamental right to receive information.

Chapter 4 concentrates on the fundamental right to the protection of personal data. In this chapter, I analyse how the GDPR provides news users with different forms of control over news personalisation. The analysis in this chapter builds on the third chapter in several ways. For example, to determine whether the right not to be subject to a decision based solely on automated processing applies to news personalisation, I need to analyse if news personalisation has an effect on the rights of news users. This analysis relies on the examination of the implications

[145] S. Eskens, 'A right to reset your user profile and more: GDPR-rights for personalized news consumers', *International Data Privacy Law*, 9:3 (2019), 153–72, https://doi.org/10.1093/idpl/ipz007.

[146] B. Bodó et al., 'Interested in diversity: The role of user attitudes, algorithmic feedback loops, and policy in news personalization', *Digital Journalism*, 7:2 (2019), 206–29, https://doi.org/10.1080/21670811.2018.1521292; N. Helberger et al., 'Implications of AI-driven tools in the media for freedom of expression' (Council of Europe, 2020), https://rm.coe.int/cyprus-2020-ai-and-freedom-of-expression/168097fa82; Monzer et al., 'User perspectives on the news personalisation process'.

of news personalisation for the right to receive information of news users. The investigation in the fourth chapter also shows how the fundamental right to the protection of personal data serves the right to privacy and other rights, such as the right to receive information. By exercising their data protection rights, news users might influence the kind of information they receive via personalisation.

Chapter 5 starts with the observation that the preceding chapters have demonstrated that news personalisation might affect the fundamental rights of news users in many cases but it does not constitute an actual interference with their rights. This observation especially holds true for the fundamental rights other than privacy and data protection. In the fifth chapter, I therefore analyse different concepts of freedom to understand under what conditions the freedom of news users to choose and do certain things is limited, regardless of the question whether certain actions of online news media produce a true interference with the fundamental rights of news users. In this chapter, I discuss the concept of freedom as non-interference, which is the concept which also underlies the system of the ECHR and EU Charter. I put forward the concept of freedom as non-domination, which has been developed in political philosophy and can assist in understanding how personalisation affects fundamental rights and freedoms.

Chapter 2.

The Fundamental Rights of News Users

This chapter is based on Eskens, S., 'The personal information sphere: An integral approach to privacy and related information and communication rights', *Journal of the Association for Information Science and Technology*, 71:9 (2020), 1116–28, https://doi.org/10.1002/asi.24354. I edited the introduction and conclusion of the chapter to make it fit into this manuscript.

2.1 Introduction

If we look at the EU Charter and the ECHR, the most relevant fundamental rights of news users are the right to respect for privacy, the right to the protection of personal data, the right to freedom of thought, and the right to freedom of expression, including the freedom to hold opinions and the right to receive information and ideas. The right to the protection of personal data is developed through secondary legislation, namely the GDPR, and the case law of the CJEU and ECtHR. The rights to privacy and freedom of expression are extensively developed through the case law of the ECtHR and to a lesser extent through the case law of the CJEU. The right to receive information is also developed in the case law of the ECtHR but with less detail than the right to freedom of expression. The remaining fundamental rights, namely the right to freedom of thought and the right to hold opinions, are not or very limitedly developed through the case law of either of the two European courts.

Empirical research has shown that news users are interested in various forms of control over news personalisation.[147] As will be discussed in Chapter 4, the GDPR provides news users with several rights to control their personal data. The larger fundamental rights context could broaden our perspective on control and, specifically, what control over personal data and news personalisation should mean in practice.

The ECtHR determined that an important principle for the interpretation of the ECHR is that its provisions must be 'read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions'.[148] Scholars of European law have pointed out, but not thoroughly theorised the connection between privacy and freedom of expression.[149] In contrast, in the US, the legal and social sciences have a long tradition of extensively theorising the connections between privacy and freedom of expression as protected by the First Amendment,[150] most notably captured in what Cohen and Richards call 'intellectual

[147] Monzer et al., 'User perspectives on the news personalisation process'; J. Harambam et al., 'Designing for the better by taking users into account: A qualitative evaluation of user control mechanisms in (news) recommender systems', *Proceedings of the 13th ACM Conference on Recommender Systems*, 2019, pp. 69–77, https://doi.org/10.1145/3298689.3347014.

[148] ECtHR, *Klass and Others v. Germany*, 1978, 5029/71, para. 68, http://hudoc.echr.coe.int/eng?i=001-57510; ECtHR, *Soering v. the United Kingdom*, 1989, 14038/88, para. 103, http://hudoc.echr.coe.int/eng?i=001-57619; ECtHR [GC] (dec.), *Stec and Others v. the United Kingdom*, 2005, 65731/01, 65900/01, para. 48, http://hudoc.echr.coe.int/eng?i=001-70087.

[149] For scholars who at least point out the connection between privacy and freedom of expression, see, among others, C. Burke and A. Molitorisová, 'What does it matter who is browsing? ISP liability and the right to anonymity', *JIPITEC*, 8:3 (2017), 238–53; Helberger, 'Policy implications from algorithmic profiling and the changing relationship between newsreaders and the media'; B.-J. Koops et al., 'A typology of privacy', *University of Pennsylvania Journal of International Law*, 38:2 (2017), 483–576; D. Mead, 'A socialised conceptualisation of individual privacy: A theoretical and empirical study of the notion of the "public" in UK MoPI cases', *Journal of Media Law*, 9:1 (2017), 100–131, https://doi.org/10.1080/17577632.2017.1321227.

[150] A. L. Allen, 'First Amendment privacy and the battle for progressively liberal social change', *University of Pennsylvania Journal of Constitutional Law*, 14:4 (2011), 885–928; B. Ard, 'Confidentiality and the problem of third parties: Protecting reader privacy in the age of intermediaries', *Yale Journal of Law & Technology*, 16:1 (2013), 1–58; M. J. Blitz, 'Constitutional safeguards for silent experiments in living: Libraries, the right to read, and a First Amendment theory for an unaccompanied right to receive information', *UMKC Law Review*, 74:4 (2006), 799–882; S. P. Gangadharan, 'Library privacy in practice: system change and challenges', *I/S: A Journal of Law and Policy for the*

privacy'. [151] One reason why European legal scholars may have been less concerned with conceptualising the link between privacy, data protection, and other interests, might be that the EU Charter and ECHR already provided strong protection for a wide range of fundamental rights.[152] In contrast, in the US, such strong and clear constitutional protections are lacking, which drives legal scholars to continue to argue for the importance and supporting function of (informational) privacy.

The question is how we can enrich our understanding of user control in the context of news personalisation, if we situate the fundamental right to data protection amidst the fundamental rights to privacy, the right to freedom of expression, the right to freedom of thought, the right to freedom of opinion, and the right to receive information. To answer this question, I first provide an overview of these fundamental rights. The scope of this chapter excludes the fundamental right to data protection, which is already developed in detail by the GDPR and is discussed in Chapter 4.

Gerards describes fundamental rights as prisms: a fundamental right is transparent and looks like a clearly defined object, but as soon as light shines on it and passes through, the right disperses into a spectrum of interests, values, and even more rights.[153] Over time, courts and legal scholars might discern new interests, values, and rights within a particular fundamental right, even if these aspects were previously hidden from perception.[154] In this research, I shine a light on the prism of the fundamental rights of privacy, confidentiality of communications, the right to receive information, and freedom of thought, opinions, and expression.

Following this overview, I show that these fundamental rights together make up what I call the personal information sphere. Within the personal information sphere, the fundamental rights as discussed are all interconnected and reinforce each other. Finally, I conclude that the personal information sphere requires online personalisation systems to involve users in the personalisation process in ways beyond asking for consent.

2.2 Shining a Light on the Fundamental Rights of News Users

2.2.1 Right to Privacy

Article 8 ECHR and article 7 EU Charter protect, among others, the right to respect for private life. 'Private life' is a broad notion for which the ECtHR finds it impossible and unnecessary to provide an

Information Society, 13:1 (2016), 175–98; M. E. Kaminski, 'Intellectual and social freedom', in D. Gray and S. E. Henderson (eds), *The Cambridge Handbook of Surveillance Law* (Cambridge University Press, 2017), pp. 470–90; S. V. Shiffrin, 'A thinker-based approach to freedom of speech', *Constitutional Commentary*, 27:2 (2010), 283–308.

[151] J. Cohen, 'Intellectual privacy and censorship of the internet', *Seton Hall Constitutional Law Journal*, 8:3 (1998), 693–702; J. Cohen, 'A right to read anonymously: A closer look at copyright management in cyberspace', *Connecticut Law Review*, 28:4 (1996), 981–1040; N. Richards, 'Intellectual privacy', *Texas Law Review*, 87:2 (2008), 387–446; N. Richards, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age* (Oxford University Press, 2015).

[152] M. Oostveen and K. Irion, 'The golden age of personal data: How to regulate an enabling fundamental right?', in M. Bakhoum et al. (eds), *Personal Data in Competition, Consumer Protection and Intellectual Property Law: Towards a Holistic Approach?* (Springer, 2018), pp. 7–26 (sec. 2.2), https://doi.org/10.1007/978-3-662-57646-5_2.

[153] J. Gerards, 'The prism of fundamental rights', *European Constitutional Law Review*, 8:2 (2012), 173–202, https://doi.org/10.1017/S1574019612000144.

[154] Gerards, 'The prism of fundamental rights'.

exhaustive definition.[155] Instead of providing such a static definition, the ECtHR has gathered various interests and rights under the notion of privacy. For the purposes of this research, I distinguish three groups of interests in the case law on privacy: protection against unwanted attention; personality and identity; integrity of the person. The ECtHR has also derived a right to the protection of personal data from the right to privacy, which I discuss as an independent right in Chapter 4.

Initially, in *X. v. Iceland*, one of the first privacy judgments in Strasbourg, the ECommHR considered that the right to privacy could be understood as 'the right to live, as far as one wishes, protected from publicity'.[156] The ECtHR later reformulated this as 'the right to live privately, away from unwanted attention'.[157] The ECtHR recognised that online anonymity helps to avoid unwanted attention and promotes the free flow of ideas and information on the internet.[158] Furthermore, the ECtHR held that receiving unwanted communications can interfere with privacy.[159] Privacy thus enables people to live peacefully on their own and perform the normal activities of their daily lives, undisturbed by unwanted attention from others.

In *X. v. Iceland*, the ECtHR considered that privacy also comprises 'the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality'.[160] The ECtHR developed the personality aspect of the right to privacy in later cases, up to the point that people now have an actual right to personal development, whether in terms of personality or personal autonomy.[161] The right to develop and fulfil one's personality includes the right to identity.[162] Case law shows the importance of others recognising your identity and how you self-identify.[163] Furthermore, the ECtHR considered that negative stereotyping of a group might impact a group's sense of identity and the feelings of self-worth and confidence of group members.[164] In that sense, negative stereotyping can affect the privacy of members of a group.[165]

Al Tamimi illustrates that the ECtHR has established safeguards for personal identity under various provisions of the ECHR, including the right to privacy, the right to freedom of thought and religion,

[155] ECtHR, *Niemietz v. Germany*, 1992, 13710/88, para. 29, http://hudoc.echr.coe.int/eng?i=001-57887.
[156] ECommHR, *X. v. Iceland*, 1976, 6825/74, p. 87, http://hudoc.echr.coe.int/eng?i=001-74783.
[157] ECtHR, *Smirnova v. Russia*, 2003, 46133/99, 48183/99, para. 95, http://hudoc.echr.coe.int/eng?i=001-61262.
[158] ECtHR [GC], *Delfi AS v. Estonia*, 2015, 64569/09, para. 147, http://hudoc.echr.coe.int/eng?i=001-155105.
[159] ECtHR (dec.), *Muscio v. Italy*, 2007, 31358/03, p. 7, http://hudoc.echr.coe.int/eng?i=001-83736. The Court added that people no longer enjoy protection against unwanted communications once they connect to the internet, because people expose themselves to such communications by going online. However, an important doctrine of the Court is that the ECHR should be a living instrument. The Court might be willing to reconsider its strict view that people give up their right to be protected against unwanted communications once they connect to the internet.
[160] ECommHR, *X. v. Iceland*, p. 87.
[161] ECtHR, *Reklos and Davourlis v. Greece*, 2009, 1234/05, para. 39, http://hudoc.echr.coe.int/eng?i=001-90617.
[162] ECommHR, *Burghartz v. Switzerland*, 1992, 16213/90, para. 47, http://hudoc.echr.coe.int/eng?i=001-45558.
[163] J. Marshall, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martinus Nijhoff, 2009).
[164] ECtHR [GC], *Aksu v. Turkey*, 2012, 4149/04, 41029/04, para. 58, http://hudoc.echr.coe.int/eng?i=001-109577.
[165] ECtHR [GC], *Aksu v. Turkey*, para. 58.

and the right to freedom of association.[166] This is a first indication of the interconnectedness of different fundamental rights.

Finally, in another set of cases, the ECtHR held that privacy includes the physical, moral, and psychological integrity of the person.[167] From this perspective, the right to privacy can be engaged in cases where authorities interfere with someone's body and decisions about their body (sometimes also called 'decisional privacy'), such as forced medical examination, the prohibition of abortion for medical necessity, or acts of violence. The integrity of the person also covers matters where, for example, someone is maliciously misrepresented and consequently bullied on the internet,[168] harassed and beaten by classmates,[169] covertly filmed while naked at home,[170] or subjected to racist verbal abuse.[171] Accordingly, the integrity of the person therefore regards physical and mental well-being.

In sum, the right to privacy has a wide scope of application. As Purtova observed, the right to privacy 'goes beyond concealed personal information'.[172] The right protects people against unwanted attention in the form of publicity or unwanted communications, enabling people to develop their personality and identity, and contributing to the integrity of the person. Marshall therefore concludes that the case law of the ECtHR reflects the notion that it is important for people 'to retain an ability and capacity that is each person's domain to enable them to think reflectively without interference; to be in control of their own faculties'.[173] Many elements of privacy are strengthened through their connection with other fundamental rights, such as the right to receive information and the confidentiality of communications.

2.2.2 Right to Respect for Correspondence

Besides privacy, article 8 ECHR and article 7 EU Charter protect the right to respect for correspondence, also named the confidentiality of communications.[174] Confidentiality of communications covers letters, telephone calls, emails, internet use, communications metadata,[175] data stored on hard disks[176] or 'computer systems',[177] and online instant messaging

[166] Y. Al Tamimi, 'Human rights and the excess of identity: A legal and theoretical inquiry into the notion of identity in Strasbourg case law', *Social & Legal Studies*, 27:3 (2018), 283–98, https://doi.org/10.1177/0964663917722598.
[167] ECtHR, *X and Y v. the Netherlands*, 1985, 8978/80, para. 22, http://hudoc.echr.coe.int/eng?i=001-57603; ECtHR, *Botta v. Italy*, 1998, 21439/93, para. 32, http://hudoc.echr.coe.int/eng?i=001-58140.
[168] ECtHR, *K.U. v. Finland*, 2008, 2872/02, http://hudoc.echr.coe.int/eng?i=001-89964.
[169] ECtHR, *Đurđević v. Croatia*, 2011, 52442/09, http://hudoc.echr.coe.int/eng?i=001-105691.
[170] ECtHR [GC], *Söderman v. Sweden*, 2013, 5786/08, http://hudoc.echr.coe.int/eng?i=001-128043.
[171] ECtHR, *R.B. v. Hungary*, 2016, 64602/12, http://hudoc.echr.coe.int/eng?i=001-161983.
[172] N. Purtova, 'Private law solutions in European data protection: Relationship to privacy, and waiver of data protection rights', *Netherlands Quarterly of Human Rights*, 28:2 (2010), 179–98 (p. 186), https://doi.org/10.1177/016934411002800203.
[173] J. Marshall, 'S.A.S. v. France: Burqa bans and the control or empowerment of identities', *Human Rights Law Review*, 15:2 (2015), 377–89 (p. 381), https://doi.org/10.1093/hrlr/ngv003.
[174] Article 5(1) ePrivacy Directive also protects the confidentiality of electronic communications. As mentioned in the introduction, I focus on the fundamental rights for the purposes of this chapter.
[175] ECtHR, *Copland v. the United Kingdom*, 2007, 62617/00, paras 41–42, http://hudoc.echr.coe.int/eng?i=001-79996.
[176] ECtHR, *Petri Sallinen and Others v. Finland*, 2005, 50882/99, para. 71, http://hudoc.echr.coe.int/eng?i=001-70283.
[177] ECtHR, *Wieser and Bicos Beteiligungen GmbH v. Austria*, 2007, 74336/01, p. 45, http://hudoc.echr.coe.int/eng?i=001-82711.

services.[178] Confidentiality of communications further protects the use of radio transceivers on private wavelengths [179] but not on public ones. [180] In conclusion, the confidentiality of communications is protected irrespective of the communication technology used, except if someone uses a medium which is public in nature.

An interference with confidentiality of communications might consists of the interception of communications content or the collecting and storing of communications metadata. The ECtHR found that impeding someone from even initiating communication is the most far-reaching form of interference with confidentiality of communications.[181] This view fits with the ECtHR's concerns about chilling effects on freedom of expression.[182]

The right to confidentiality of communications as it currently stands is of limited value for news personalisation. The right ensures that information exchanged between a sender and a recipient is not revealed to third parties who are not involved in the communication. When online news media try to learn which news articles their audiences consume, they could be characterised as both the sender and the eavesdropping party. Confidentiality of communications does not prohibit the sender of the communication from knowing what it communicates to others. Nevertheless, the limitations of this right in the context of interactive media are partly accounted for by other rights, including the right to receive information and freedom of expression, opinion, and thought.

2.2.3 Freedom of Thought

Article 9 ECHR and article 10 EU Charter protect the right to freedom of thought, conscience, and religion, including the freedom to change one's religion or belief and the freedom to manifest one's religion or belief. The three freedoms of thought, conscience, and religion are interrelated but separate freedoms.[183] The freedoms have an internal and external dimension.[184] The internal dimension is the freedom to hold or change personal beliefs, while the external dimension is the freedom to manifest one's beliefs in worship, teaching, practice, and observance.

The majority of case law on the right to freedom of thought, conscience, and religion concerns religious beliefs. Still, the ECtHR has remarked that the right is also important for 'atheists, agnostics, sceptics and the unconcerned'.[185] Various philosophies and belief systems fall under the ambit of the right. The ECtHR has held that, for beliefs to attract the protection of freedom of thought, conscience, and religion, they should attain a certain level of cogency, seriousness, cohesion and importance.[186] Accordingly, the ECtHR applied freedom of thought to, among others,

[178] ECtHR [GC], *Bărbulescu v. Romania*, 2017, 61496/08, para. 74, http://hudoc.echr.coe.int/eng?i=001-177082.
[179] ECommHR, *X. and Y. v. Belgium*, 1982, 8962/80, p. 124, http://hudoc.echr.coe.int/eng?i=001-74290.
[180] ECommHR, *B.C. v. Switzerland*, 1995, 21353/93, http://hudoc.echr.coe.int/eng?i=001-2039.
[181] ECtHR, *Golder v. the United Kingdom*, 1975, 4451/70, para. 43, http://hudoc.echr.coe.int/eng?i=001-57496.
[182] R. Ó Fathaigh, 'Article 10 and the chilling effect: A critical examination of how the European Court of Human Rights seeks to protect freedom of expression from the chilling effect' (dissertation, Ghent University, 2019), http://hdl.handle.net/1854/LU-8620369.
[183] L. G. Loucaides, 'The right to freedom of thought as protected by the European Convention on Human Rights: Case notes and analysis', *Cyprus Human Rights Law Review*, 1, 2012, 79–87.
[184] ECommHR, *C. v. the United Kingdom*, 1983, 10358/83, p. 147, http://hudoc.echr.coe.int/eng?i=001-73635.
[185] ECtHR, *Kokkinakis v. Greece*, 1993, 14307/88, para. 31, http://hudoc.echr.coe.int/eng?i=001-57827.
[186] ECtHR, *Campbell and Cosans v. the United Kingdom*, 1982, 7511/76, 7743/76, para. 36, http://hudoc.echr.coe.int/eng?i=001-57455.

pacifism, [187] views on abortion, [188] veganism, [189] views on alternative medicines [190] and secularism. [191] Even the wish of parents to give their child a particular name can fall under freedom of thought. [192] In a separate opinion, Judge Fischbach once argued that environmentalist or ecological beliefs are protected by freedom of thought in so far as they are informed by a societal stance. [193]

The ECtHR has held that freedom of thought, conscience, and religion protects against 'indoctrination of religion by the State'. [194] I presume that this includes the prohibition of indoctrination of non-theistic and atheistic philosophies and beliefs systems. Furthermore, the ECtHR has determined that freedom of thought, conscience, and religion implies that a state cannot dictate what people should believe or force people to change their beliefs. [195] Other ways to interfere with the internal dimension of these freedoms, apart from indoctrination and physical force, are prohibited too. The freedom to hold and change a belief is unqualified and absolute. [196] In contrast, the freedom to manifest one's religion or belief may be limited under article 9, paragraph 2, ECHR, because the actions by which someone manifests their religion or beliefs may impact on the lives of others.

The ECtHR has not yet had the opportunity to decide whether freedom of thought in terms of protection against indoctrination gives rise to positive obligations for the state. It is thus an open question if the state might have positive obligations to protect news users against indoctrination by private online news media. What is more, it is quite a stretch to qualify news personalisation as indoctrination. To the extent that freedom of thought means freedom from indoctrination, this fundamental freedom might thus be less relevant for the legal position of news users.

Freedom of thought, conscience, and religion has a negative dimension. The ECtHR has determined that people have the freedom not to hold certain beliefs. [197] Furthermore, the ECtHR has found that people have the right not to be obliged to disclose their beliefs or to act in such a way that it is possible to conclude which beliefs they do (not) hold. [198] The negative dimension of freedom of thought, conscience, and religion is closely connected to the right to privacy. In the case of *Folgero and Others v. Norway*, the Grand Chamber of the ECtHR considered that information about religious beliefs and personal convictions concerns 'some of the most intimate aspects of private life' and that the obligation to disclose detailed information about one's

[187] ECommHR, *Arrowsmith v. the United Kingdom*, 1978, 7050/75, para. 69, http://hudoc.echr.coe.int/eng?i=001-104188.
[188] ECommHR, *Knudsen v. Norway*, 1985, 11045/84, p. 257, http://hudoc.echr.coe.int/eng?i=001-73733.
[189] ECommHR, *W. v. the United Kingdom*, 1993, 18187/91, http://hudoc.echr.coe.int/eng?i=001-1503.
[190] ECommHR, *Nyssönen v. Finland*, 1998, 30406/96, http://hudoc.echr.coe.int/eng?i=001-4097.
[191] ECtHR [GC], *Lautsi and Others v. Italy*, 2011, 30814/06, para. 58, http://hudoc.echr.coe.int/eng?i=001-104040.
[192] ECommHR, *Salonen v. Finland*, 1997, 27868/95, http://hudoc.echr.coe.int/eng?i=001-3751.
[193] ECtHR [GC], *Chassagnou and Others v. France*, 1999, 25088/94, 28331/95, 28443/95, http://hudoc.echr.coe.int/eng?i=001-58288.
[194] ECommHR, *Angeleni v. Sweden*, 1986, 10491/83, p. 48, http://hudoc.echr.coe.int/eng?i=001-78932.
[195] ECtHR, *Ivanova v. Bulgaria*, 2007, 52435/99, para. 79, http://hudoc.echr.coe.int/eng?i=001-80075.
[196] ECtHR, *Eweida and Others v. the United Kingdom*, 2013, 48420/10, 59842/10, 51671/10, 36516/10, para. 80, http://hudoc.echr.coe.int/eng?i=001-115881.
[197] ECtHR [GC], *Buscarini and Others v. San Marino*, 1999, 24645/94, para. 34, http://hudoc.echr.coe.int/eng?i=001-58915.
[198] ECtHR, *Alexandridris v. Greece*, 2008, 19516/06, para. 32, http://hudoc.echr.coe.int/eng?i=001-85189.

religious beliefs or philosophical convictions may constitute a violation of both privacy and freedom of thought, conscience, and religion.[199]

This overview shows that freedom of thought, conscience, and religion protects against indoctrination and encompasses more than freedom of religious beliefs. Freedom of thought strengthens other fundamental rights. Without freedom of thought, freedom of expression is meaningless. Free speech follows from free thought.[200] At the same time, freedom of thought is reinforced by other fundamental rights. Freedom of thought is only possible through effective freedom to receive information. Freedom of thought also overlaps with freedom of opinion: if a belief is not sufficiently serious and coherent to obtain protection of freedom of thought, it is at least protected by freedom of opinion.

2.2.4 Freedom of Opinion

Article 10 ECHR and article 11 EU Charter guarantee the freedom to have opinions as a component of freedom of expression. The wording of article 10 suggests that freedom of opinion may be restricted, just like limitations on freedom of expression might be legitimate under certain conditions. Nevertheless, as an official expert committee on the ECHR remarked, having an opinion is 'a psychological moment, which exists in the individual'.[201] From that perspective, it is similar to holding a religious or philosophical belief, which is absolute. The expert committee therefore concluded that freedom of opinion, as protected by article 10, is absolute as well.[202] An interference with freedom of opinion can thus never be legitimised.

The right to freedom of opinion is rather underdeveloped in terms of European case law. The ECtHR has established that requiring people to prove the truth of their value judgments infringes upon freedom of opinion.[203] In addition, some international human rights case law concerns freedom of opinion as protected by article 19 of the International Covenant on Civil and Political Rights ('ICCPR'). The United Nations Human Rights Committee found that an ideology conversion system used on inmates by the Republic of Korea violated freedom of opinion.[204] The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression therefore concluded that freedom of opinion 'requires freedom from undue coercion in the development of an individual's beliefs, ideologies, reactions and positions'.[205]

The consequences for not changing opinion differentiate legitimate influence over public opinion from coercion of opinions. News personalisation has much less effect on opinion-formation than

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[199] ECtHR [GC], *Folgerø and Others v. Norway*, 2007, 15472/02, para. 98, http://hudoc.echr.coe.int/eng?i=001-81356.
[200] Loucaides, 'The right to freedom of thought as protected by the ECHR', p. 80.
[201] Committee of Experts on Human Rights, 'Comparative study of Article 19 of the UN Covenant on Civil and Political Rights and of Article 10 of the European Convention on Human Rights' (Council of Europe, 1968), https://rm.coe.int/09000016806748a0.
[202] Committee of Experts on Human Rights, 'Comparative study'.
[203] ECtHR, *Lingens v. Austria*, 1986, 9815/82, para. 46, http://hudoc.echr.coe.int/eng?i=001-57523.
[204] UN HRC, *Yong Joo-Kang v. Republic of Korea*, 1998, CCPR/C/78/D/878/1999, para. 7.2, https://undocs.org/CCPR/C/78/D/878/1999.
[205] D. Kaye, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' (United Nations, 2018), p. 11, https://freedex.org/wp-content/blogs.dir/2015/files/2018/10/AI-and-FOE-GA.pdf.

ideology conversion systems because personalisation systems do not punish people for their opinions. Furthermore, informing people is part of the public task of the online news media, and the media inherently influence public opinion.

Still, the information and technologies which online news media use for personalisation give them the power to influence opinions. For example, when presented with a personalised news feed, a person might experience a feeling, described by Kahneman, that 'what you see is all there is', which may cause a jump to conclusions.[206] The opinion-forming power of personalisation is strengthened by a lack of transparency. People often do not know that their news feeds are tailored to their interests and preferences.[207] Most people do not live in a 'filter bubble' or 'echo chamber'.[208] Still, some groups might be more vulnerable to ending up in a filter bubble,[209] and some people might be more susceptible to receiving less diverse online news on certain issue topics, such as refugees.[210]

Freedom of opinion overlaps with freedom of thought. These freedoms protect the inner workings of the mind against coercion and indoctrination. In principle, protection under freedom of thought requires that the belief has a certain level of cogency, seriousness, cohesion and importance, yet this threshold seems mainly important for the freedom to manifest beliefs. In so far as freedom of thought and freedom of opinion focus on the internal workings of the mind, their scope of application and degree of protection are similar and absolute. Thought and opinion-formation are inviolable. This inviolability also affects how other related fundamental rights are understood.

2.2.5 Right to (not) Receive Information

Article 10 ECHR and article 11 EU Charter guarantee the right to receive information and ideas as another component of freedom of expression. The ECtHR generally sees the public's right to receive information as a corollary of the media's task to impart information and ideas.[211]

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[206] D. Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, 2011).

[207] M. Eslami et al., '"I always assumed that I wasn't really that close to [her]": Reasoning about invisible algorithms in news feeds', *Proceedings of the 33rd Annual ACM Conference on Human Factors in Computing Systems*, 2015, pp. 153–162, https://doi.org/10.1145/2702123.2702556.

[208] P. Barberá et al., *Social Media, Political Polarization, and Political Disinformation: A Review of the Scientific Literature* (Hewlett Foundation, 2018), https://hewlett.org/library/social-media-political-polarization-political-disinformation-review-scientific-literature/; E. Dubois and G. Blank, 'The echo chamber is overstated: the moderating effect of political interest and diverse media', *Information, Communication & Society*, 21:5 (2018), 729–45, https://doi.org/10.1080/1369118X.2018.1428656; R. Fletcher and R. K. Nielsen, 'Are people incidentally exposed to news on social media? A comparative analysis', *New Media & Society*, 20:7 (2018), 2450–68, https://doi.org/10.1177/1461444817724170; M. Haim, A. Graefe, and H.-B. Brosius, 'Burst of the filter bubble? Effects of personalization on the diversity of Google News', *Digital Journalism*, 6:3 (2018), 330–43, https://doi.org/10.1080/21670811.2017.1338145; Nechushtai and Lewis, 'What kind of news gatekeepers do we want machines to be?'; F. Zuiderveen Borgesius et al., 'Should we worry about filter bubbles?', *Internet Policy Review*, 5:1 (2016), https://doi.org/10.14763/2016.1.401.

[209] Bodó et al., 'Interested in diversity'.

[210] S. Mertens, L. d'Haenens, and R. De Cock, 'Online news consumption and public sentiment toward refugees: Is there a filter bubble at play? Belgium, France, the Netherlands, and Sweden: A comparison', in L. d'Haenens, W. Joris, and F. Heinderyckx (eds), *Images of Immigrants and Refugees in Western Europe: Media Representations, Public Opinion and Refugees' Experiences* (Leuven University Press, 2019), pp. 141–58.

[211] ECtHR [GC], *Guerra and Others v. Italy*, 1998, 116/1996/735/932, para. 53, http://hudoc.echr.coe.int/eng?i=001-58135.

Furthermore, the right to receive information mainly prohibits the state from restricting people from receiving information which others want to impart to them.[212] The right to receive information does not entitle people to forcibly obtain information from private parties. A right to receive information from private media would interfere with the freedom of media to determine what to produce and publish.[213]

Be that as it may, the ECtHR determined that it follows from the right to receive information that the public should have media access to 'impartial and accurate information and a range of opinion and comment, reflecting inter alia the diversity of political outlook within the country'.[214] In another case, the ECtHR considered that 'citizens must be permitted to receive a variety of messages, to choose between them and reach their own opinions on the various views expressed'.[215] Here, the connection between the freedom to hold an opinion and the right to receive information is visible.

The ECtHR has invoked various rationales for upholding the right to receive information, ranging from democratic political participation and truth-finding to social cohesion and personal self-development. 216 In the case of *Khurshid Mustafa and Tarzibachi v. Sweden*, the ECtHR established that the right to receive information covers news, cultural expressions, and even entertainment, to enable personal self-development.[217] Furthermore, studies have found that people sometimes learn about politics and public affairs through entertainment content such as political satire and comedy,[218] and that reality television may cause political discussion online.[219] These studies show that the ECtHR was right to include entertainment content in the range of information people are entitled to receive.

Earlier in this chapter, I explained that the right to privacy protects people against unwanted communications—although, according to the ECtHR, people do not enjoy such protection once connected to the internet. I have not found any judgments in which the ECtHR based a negative right to not receive information on the right to receive information.[220] In contrast, German courts have derived a *negatives Informationsfreiheit* (negative informational freedom) from the German constitutional right to freedom of expression and information in a series of cases about ad-blocking.[221] Furthermore, at the EU level, the right to receive information has acquired a negative dimension through secondary legislation. The EU ePrivacy Directive protects people against

[212] ECtHR, *Leander v. Sweden*, 1987, 9248/81, para. 74, http://hudoc.echr.coe.int/eng?i=001-57519.
[213] B. Richardson, 'The public's right to know: A dangerous notion', *Journal of Mass Media Ethics*, 19:1 (2004), 46–55, https://doi.org/10.1207/s15327728jmme1901_4.
[214] ECtHR, *Manole and Others v. Moldova*, para. 100.
[215] ECtHR, *Çetin and Others v. Turkey*, 2003, 40153/98, 40160/98, para. 64, http://hudoc.echr.coe.int/eng?i=001-60940.
[216] See section 3.3.
[217] ECtHR, *Khurshid Mustafa and Tarzibachi v. Sweden*, 2008, 23883/06, para. 44, http://hudoc.echr.coe.int/eng?i=001-90234.
[218] Becker and Waisanen, 'From funny features to entertaining effects'.
[219] Graham and Hajru, 'Reality TV as a trigger of everyday political talk in the net-based public sphere'.
[220] The fact that no such judgments exist might simply be because applicants before the Court have never invoked such a negative right. The ECtHR usually does not instate new rights if people do not ask for it.
[221] R. A. Miller, 'The legal fate of internet ad-blocking governing the internet: Public access, private regulation', *Boston University Journal of Science and Technology Law*, 24:2 (2018), 299–371.

communications for direct marketing purposes through the use of, among others, automatic calling machines (robocalls) or email (spam). Article 13 of the Directive stipulates that organisations may only contact people who have given their prior consent or previously purchased a product or service from the organisation. Likewise, article 5 of the EU Unfair Commercial Practices Directive regulates 'persistent and unwanted solicitations by telephone, fax, e-mail or other remote media'. Such unwanted solicitations are considered to be aggressive commercial practices, which are prohibited.

The rules on unsolicited communications do not aim to regulate the processing of personal data which are required to perform the communication.[222] Instead, the rules on unsolicited communications aim to contribute to the protection of privacy. Recital 40 of the ePrivacy Directive frames unsolicited communications as an intrusion of privacy. The idea is that people should be able to use all kinds of communication devices, including mobile phones and computers, without having to be bothered by third parties who reach out to them in their private space, unasked for, and unwanted.

Fuster and colleagues connect the EU's regulation of unsolicited communications with EU rules on television advertising. They argue that the rationale behind the latter type of regulation is to protect the enjoyment of watching television, 'without suffering the burden of excessive advertising'.[223] In other words, EU regulations on unsolicited communications and television advertising guarantee a sphere in which people are protected against unsolicited intrusions into their daily lives. The devices which we use to communicate with other people and to enjoy media products, should not open up our private sphere for unwelcome commercial communications. The discussion of the right to not receive information, as expressed in secondary legislation, again illustrates how the fundamental rights are all connected.[224]

2.2.6 Freedom to Impart Information

Finally, article 10 ECHR and article 11 EU Charter protect the freedom to impart information, the most well-known component of freedom of expression.[225] For the purposes of this research, I focus on the freedom of expression rights of news users rather than journalists and other media actors.

In one of its first cases on the right to freedom of expression, the ECtHR established that freedom of expression is one of the essential foundations of a democratic society.[226] The ECtHR further

[222] G. G. Fuster, S. Gutwirth, and P. De Hert, 'From unsolicited communications to unsolicited adjustments: Redefining a key mechanism for privacy protection', in S. Gutwirth, Y. Poullet, and P. De Hert (eds), *Data Protection in a Profiled World* (Springer, 2010), pp. 105–17.

[223] Fuster, Gutwirth, and De Hert, 'From unsolicited communications to unsolicited adjustments', p. 110.

[224] As the discussion revealed, the secondary rules on not receiving information aim to serve the fundamental right to privacy and they are not directly derived from the fundamental right to receive information. However, from a systematic point of view, it would make sense to see the negative right not to receive information as part of the fundamental right to receive information. For this reason, I addressed the right not to receive information in this section on the right to receive information and not in the section on the right to privacy.

[225] The right to freedom of expression includes the freedom to impart information, to receive information, and to hold opinions. Using 'freedom of expression' and 'freedom to impart information' interchangeably may not be entirely correct, but for ease of reading, I will simply speak of freedom of expression. I discuss and name the right to receive information and the freedom to hold opinions separately.

[226] ECtHR, *Handyside v. the United Kingdom*, 1976, 5493/72, para. 49, http://hudoc.echr.coe.int/eng?i=001-57499.

stressed the importance of media pluralism for freedom of expression and democracy.[227] The second paragraph of article 11 EU Charter codifies this objective by providing that the freedom and pluralism of the media shall be respected.

The ECtHR has constructed the scope of freedom of expression broadly, finding that freedom of expression protects the substance of communication and the form in which it is expressed.[228] Freedom of expression protects all modern means of communication. In the case of *Times Newspapers Ltd v. the United Kingdom (Nos. 1 and 2)*, the ECtHR confirmed that the internet 'plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general', and that freedom of expression thus protects communication via the internet.[229] A few years later, the ECtHR put it in even stronger terms, acknowledging how the internet provides an 'unprecedented platform for the exercise of freedom of expression'.[230]

There are three widely accepted theories which explain why freedom of expression is important. Freedom of expression enables (1) participation in democracy and self-government, (2) finding of truth, and (3) self-development and self-fulfilment.[231] The ECtHR relies on all three theories interchangeably. The ECtHR has noted that 'freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the ECHR', and that media freedom provides people one of the best means to discover and form an opinion on the ideas of politicians.[232] The ECtHR also confirmed that freedom of expression is a basic condition for personal self-development and fulfilment.[233] Finally, in cases where the ECtHR condemned internet blocking and its interference with academics doing their work, the ECtHR implicitly justifies freedom of expression with truth-finding.[234]

US legal scholars have a long history of reflecting on the relationship between privacy and freedom of expression.[235] As Richards notes, 'if we care about free speech, we should care about speakers having something interesting to say'.[236] People develop interesting things to say by consuming and experimenting with controversial ideas in private. The CJEU also linked privacy and freedom of expression by remarking that retention of data by telecom providers, which is a privacy interference, might affect how people use communication technologies and consequently, how they exercise their freedom of expression.[237] However, the CJEU has not further explored the relationship between privacy and freedom of expression.

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[227] ECtHR, *Handyside v. the United Kingdom*, para. 49.
[228] ECtHR, *Oberschlick v. Austria*, 1991, 11662/85, para. 57, http://hudoc.echr.coe.int/eng?i=001-57716.
[229] ECtHR, *Times Newspapers Ltd v. the United Kingdom (Nos. 1 and 2)*, 2009, 3002/03, 23676/03, para. 27, http://hudoc.echr.coe.int/eng?i=001-91706.
[230] ECtHR [GC], *Delfi AS v. Estonia*, para. 110.
[231] E. Barendt, *Freedom of Speech* (Oxford University Press, 2007), chap. 1.
[232] ECtHR, *Lingens v. Austria*, para. 42.
[233] ECtHR, *Handyside v. the United Kingdom*, para. 49; ECtHR, *Lingens v. Austria*, para. 41.
[234] ECtHR, *Ahmet Yıldırım v. Turkey*, 2012, 3111/10, http://hudoc.echr.coe.int/eng?i=001-115705; ECtHR, *Cengiz and Others v. Turkey*, 2015, 48226/10, 14027/11, http://hudoc.echr.coe.int/eng?i=001-159188; M. H. Randall, 'Freedom of expression in the internet', *Swiss Review of International and European Law*, 26:2 (2016), 235–54 (p. 240).
[235] See, in more detail, section 2.3.2.
[236] Richards, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age*, p. 98.
[237] CJEU [GC], *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, 2014, C-293/12, C-594/12, para. 28,

2.3 Interconnections between the Fundamental Rights of News Users

2.3.1 The Personal Information Sphere

If we shine a light through the prisms of the fundamental rights of privacy, the right to receive information, and the freedoms of expression, opinion, and thought, we see a wide spectrum of interests, values, and rights branching out from these fundamental rights. Together, these rights protect what I call the personal information sphere. The personal information sphere is the domain where people can determine for themselves how to interact with information about the world and how other people may interact with information about them. This is a form of control which differs from the kind of control enabled by data protection law, which focuses on consent, transparency, and data subject access rights.

We can visualise the personal information sphere as a circle around the individual. The right to receive information protects information flowing *into* the circle. People use these inflowing streams of information to inform themselves on political, scientific, and personal matters and to explore various perspectives and viewpoints on these issues. Freedom of thought and opinion protect information flows *within* the circle, where people process the information and develop their own original thoughts and opinions. Freedom of expression and confidentiality of communications consequently protect information flowing *out of* the circle. By communicating with the outer world, people position themselves in the world, contribute to discussions on matters which they care about, and present their personal identity to others. Finally, the right to privacy marks the boundary between private and public communication activities; it protects the mere existence of the circle and the freedom of people to determine the radius of their circle. Furthermore, privacy reinforces the freedom of people to gather information undisturbed, develop their thoughts and opinions, experiment with different ideas before they partake in public debate, and decide which beliefs they share with others and which ones they keep to themselves.

Within the personal information sphere, all the fundamental information and communication rights depend on, and strengthen each other. A range of empirical findings from the social sciences supports the integration of these fundamental rights into the notion of a personal information sphere, with its inward, outward, and inner information flows. Studies suggest that receiving and processing information from online news media in private, that is, undisturbed, is important for cognitive information processing. People learn from the news by simply being exposed to it, yet other cognitive information processes contribute more to learning than news exposure. Attention and 'elaboration' determine effective learning from news.[238] Elaboration is

https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1594930260932&uri=CELEX:62012CJ0293; CJEU [GC], *Tele2 Sverige AB v. Post- och telestyrelsen* and *Secretary of State for the Home Department v. Tom Watson and Others*, 2016, C-203/15, C-698/15, para. 101, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1594930355592&uri=CELEX:62015CJ0203.

[238] W. P. Eveland, 'The cognitive mediation model of learning from the news', *Communication Research*, 28:5 (2001), 571–601, https://doi.org/10.1177/009365001028005001; W. P. Eveland, 'News information processing as mediator of the relationship between motivations and political knowledge', *Journalism & Mass Communication Quarterly*, 79:1 (2002), 26–40, https://doi.org/10.1177/107769900207900103; W. P. Eveland, D. V. Shah, and N. Kwak, 'Assessing

the connection of new information to other information stored in memory or the connection between new pieces of information.[239] If people are interrupted by unwanted communications while they try to attend to, and elaborate on the news they receive, their learning process might be disturbed.

News personalisation could affect how users identify themselves, which shows a strong connection between the right to privacy in the sense of personality and identity, and the right to freedom of expression. Among other reasons, media users select and share information for what Coppini and colleagues call 'identity management': 'to express an individual's identity and curate one's image'.[240] Coppini and colleagues found that media users engage in identity management during their media choices when a wider audience sees their choices as well as when only they themselves see their choices.[241] News users thus identify themselves by choosing to consume and share certain news items. News personalisation may pre-empt this active choice and people's ability to self-define.[242]

Apart from the effect of news personalisation on identity management, news personalisation may affect news users' sense of self. People perceive themselves through the eyes of others. Cooley calls this the looking-glass self: an individual develops their self-concept through 'the imagination of our appearance to the other person; the imagination of his judgment of that appearance, and some sort of self-feeling, such as pride or mortification'.[243] Personal identity is thus a reflective process which emerges in interaction with someone's environment. When news users see which news items the personalisation system recommends to them, these recommendations tell them something about how the personalisation system sees them. News personalisation may thus affect how news users see themselves, an effect which is probably stronger for people whose news consumption largely consists of personalised news.

Freedom of expression relies on a traditional communication model consisting of a sender, message, and recipient. Accordingly, freedom of expression aims to ensure that a message arrives at its audience so that the sender can participate in democratic self-government, find the truth on certain issues, or feel self-fulfilled because they have expressed who they are. However, the sender also learns from face-to-face or online discussions in which they participate by composing and releasing messages ('sender effects' or 'expression effects').[244] That is to say, people in part

causality in the cognitive mediation model: A panel study of motivations, information processing, and learning during campaign 2000', *Communication Research*, 30:4 (2003), 359–86, https://doi.org/10.1177/0093650203253369.

[239] Eveland, 'The cognitive mediation model of learning from the news'.

[240] D. Coppini et al., 'When the whole world is watching: A motivations-based account of selective expression and exposure', *Computers in Human Behavior*, 75 (2017), 766–74 (p. 768), https://doi.org/10.1016/j.chb.2017.04.020.

[241] Coppini et al., 'When the whole world is watching: A motivations-based account of selective expression and exposure', p. 770.

[242] L. Baruh and M. Popescu, 'Big data analytics and the limits of privacy self-management', *New Media & Society*, 19:4 (2017), 579–96, https://doi.org/10.1177/1461444815614001.

[243] C. H. Cooley, *Human Nature and the Social Order* (Charles Scribner's Sons, 1922), p. 184.

[244] J. Cho et al., 'Influencing myself: Self-reinforcement through online political expression', *Communication Research*, 45:1 (2018), 83–111, https://doi.org/10.1177/0093650216644020; R. J. Pingree, 'How messages affect their senders: A more general model of message effects and implications for deliberation', *Communication Theory*, 17:4 (2007), 439–61, https://doi.org/10.1111/j.1468-2885.2007.00306.x; D. V. Shah, 'Conversation is the soul of democracy: Expression effects, communication mediation, and digital media', *Communication and the Public*, 1:1 (2016),

develop their ideas and gain understanding by formulating and expressing their thoughts, and not just by hearing the ideas of others. Expressing oneself is a form of reasoning to some extent. These studies about the effect of communication on the sender support the connection between freedom of expression, privacy, and freedom of thought and opinion.

Empirical privacy research also confirms the relationship between the right to develop and fulfil one's personality, which follows from privacy and freedom of expression. Studies indicate that people fulfil their need to self-identity by managing their privacy on social media and by disclosing personal information on social media.[245] In line with the ECtHR doctrines on privacy, Wu therefore concludes that 'privacy is not only about information protection'.[246] Privacy is also about expressing oneself and providing information about oneself to define and establish personal identity. People click, like, share, and comment on news articles in part to communicate their personal identity to others; these activities of engagement concern both the right to privacy and the right to freedom of expression. The case law of the ECtHR thus contains many correct intuitions about how people engage and interact with information from without, and information about themselves.

2.3.2 Intellectual Privacy and Personality Rights

The notion of a personal information sphere resembles the concept of 'intellectual privacy'.[247] Richards describes intellectual privacy as 'a zone of protection that guards our ability to make up our minds freely' so that we can prepare ourselves to exercise our freedom of expression rights.[248] The difference between intellectual privacy and the personal information sphere is that the latter concept arises from European fundamental rights, whereas the first concept is built on the US First Amendment. Furthermore, due to the elaborate European fundamental rights framework, the personal information sphere encompasses more rights and freedoms, and it is more inward-looking than intellectual privacy, which is more outward-looking and focused on the exercise of First Amendment expression rights. The personal information sphere is also relevant when people decide not to communicate or express themselves.

Besides that, the notion of a personal information sphere calls personality rights to mind. In private law, personality rights are the set of rights which protect the integrity and inviolability of the person,[249] such as the right to reputation, privacy, and publicity. Personality rights provide people control over their public image, in addition to control over their private self. Van der Sloot has identified a growing focus on personality rights by the ECtHR, and argues that this might prove

12–18, https://doi.org/10.1177/2057047316628310; P. M. Valkenburg, 'Understanding self-effects in social media', *Human Communication Research*, 43:4 (2017), 477–90, https://doi.org/10.1111/hcre.12113.

[245] P. F. Wu, 'The privacy paradox in the context of online social networking: A self-identity perspective', *Journal of the Association for Information Science and Technology*, 70:3 (2019), 207–17, https://doi.org/10.1002/asi.24113.

[246] Wu, 'The privacy paradox in the context of online social networking', p. 214.

[247] Cohen, 'A right to read anonymously'; Cohen, 'Intellectual privacy and censorship of the internet'; Richards, 'Intellectual privacy'; Richards, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age*.

[248] Richards, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age*, p. 95.

[249] G. Resta, 'Personnalité, persönlichkeit, personality', *European Journal of Comparative Law and Governance*, 1:3 (2014), 215–43, https://doi.org/10.1163/22134514-00103002.

useful in the age of big data.[250] The difference between personality rights and the personal information sphere is that the latter encompasses all kinds and directions of communication about all kinds of private and public matters, whereas personality rights mainly revolve around the communication of the rights holder's own image to the outer world.

2.4 Conclusion

In this chapter, I analysed the fundamental right to respect for privacy, the right to confidentiality of communications, the right to freedom of thought, and the right to freedom of expression, which includes the freedom to hold opinions and the right to receive information and ideas. The right to privacy ensures people a (metaphorical) space or zone where they are protected against unwanted attention in the form of publicity or communications. In addition, privacy includes a right to personal development and identity, covering the physical, moral, and psychological integrity of the person. The right to confidentiality of communications protects communication between a sender and recipient against intrusive third parties. This is not applicable where online news media are both sender and third party, in a sense. Freedom of thought, conscience, and religion safeguard absolute protection against indoctrination of religious and philosophical beliefs. Similarly, freedom of opinion provides absolute protection against coercion of the mind. Under the right to receive information, the general public should be ensured of diverse and truthful information via the media. The law also recognises a right to not receive certain communications, in order to provide people privacy when consuming media. Finally, the freedom to impart information guarantees free expression via offline and online media so that people can participate in democratic self-government, find truth about personal and societal matters, and feel self-fulfilled by expressing their identity.

Together, these rights and freedoms enable what I call a 'personal information sphere' for each individual citizen. The concept of a personal information sphere shows how privacy affects other fundamental rights which enable people to develop their sense of self and relate to the world. Most importantly, uncovering the personal information sphere in European case law reveals how the interconnectedness of these fundamental rights is ingrained in European jurisprudence rather than being an academic-only affair.

The essence of the personal information sphere is control. Yet, this is a different sort of control than that at the core of data protection law. The personal information sphere regards controlling how you situate yourself in networks of information and communication and how you are involved in algorithmic communication processes such as personalisation. This fundamental rights context can supplement the data protection lens in the perception of online personalisation and user rights.

Assessing the use of online personalisation systems for news personalisation from the perspective of the personal information sphere, it becomes clear that online news media should do more than ensure compliance with the GDPR. As Helberger observed, online news media are now competing with search engines and social media for the users' attention, and have adopted personalisation

[250] B. van der Sloot, 'Privacy as personality right: Why the ECtHR's focus on ulterior interests might prove indispensable in the age of "Big Data"', *Utrecht Journal of International and European Law*, 31:80 (2015), 25–50, https://doi.org/10.5334/ujiel.cp.

as part of their new strategy.[251] In this competition for attention, news users' freedom to find, receive, process, and engage with information should be ensured, in addition to their privacy and data protection rights. That is to say, the solution to respecting the personal information sphere is not simply limiting the amount of personalisation which takes place. Rather, online news media should develop ways to involve news users in the personalisation process beyond just asking for consent to process their personal data or give them subject access rights.

In a focus group study, Harambam and colleagues investigated what kinds of control news users want over personalisation. The participants in the study of Harambam and colleagues expressed the need to know how the algorithms perceive them: 'I find it refreshing actually, to see how *they* see me'.[252] The participants explained that they could use such information to improve themselves.[253] Furthermore, participants expressed interest in having different pre-configured types of algorithms to choose from, for example in the form of personalisation avatars, which are like 'anthropomorphized algorithms'.[254]

An experiment by Eslami and colleagues suggests that users become more engaged, and they feel that they have control, when they are made aware of the personalisation algorithms.[255] At the same time, the topics which people say they are interested in do not always match with the topics which their clicking behaviour shows they are actually interested in.[256] Full and unlimited user control might thus not be in the user interest.

These studies indicate that personalisation in which the user has control and is involved in the personalisation process, enhances the user experience, while users may not always click on what they actually like. Therefore, the best approach to news personalisation might be a mixture of explicit and implicit data collection and feedback for personalisation.[257]

[251] Helberger, 'Policy implications from algorithmic profiling and the changing relationship between newsreaders and the media'.
[252] Harambam et al., 'Designing for the better by taking users into account', p. 73.
[253] Harambam et al., 'Designing for the better by taking users into account', p. 73.
[254] Harambam et al., 'Designing for the better by taking users into account', p. 74.
[255] Eslami et al., 'Reasoning about invisible algorithms in news feeds'.
[256] M. Sela et al., 'Personalizing news content: An experimental study', *Journal of the Association for Information Science and Technology*, 66:1 (2015), 1–12, https://doi.org/10.1002/asi.23167.
[257] Sela et al., 'Personalizing news content'. On the difference between implicit and explicit data collection and feedback, see section 1.3.2.

Chapter 3.

The Fundamental Right of News Users to Receive Information

This chapter is based on Eskens, S., N. Helberger, and J. Moeller, 'Challenged by news personalisation: Five perspectives on the right to receive information', *Journal of Media Law*, 9:2 (2017), 259–84, https://doi.org/10.1080/17577632.2017.1387353. I edited the introduction of the chapter to make it fit into this manuscript.

3.1 Introduction

The fundamental right to receive information plays a central role in understanding the position of news users. News personalisation essentially revolves around changing the manner in which news users can enjoy their right to receive information. News personalisation may enhance the right to receive information, but it may also hinder or downplay the right to receive information and the autonomy with which news users exercise their right to receive information.

In addition, discussions about changes in online (news) media commonly focus on the side of speakers, including news media, and the freedom of expression rights of speakers.[258] Democratic values, such as media pluralism, public debate, and free flow of information are usually realised by ensuring and promoting freedom of expression. This research provides another perspective on changes in online news media by focusing on news users' fundamental rights to receive information.

As stated in the introduction of this research, fundamental rights in principle apply only vertically, between the state and citizens. The fundamental right to receive information does thus not apply between online news media and news users. Nonetheless, the fundamental right to freedom of expression may entail positive obligations for the state. This leads to the question what, if any, positive obligations states have with respect to the right to receive information and the effects of news personalisation on news users.

This research starts from the observation that the right to receive information is under-theorised.[259] We lack a comprehensive framework to understand the information rights of news users or the obligations of the state regarding news users and their right to receive information. In order to develop such a framework, I first provide an introduction to the fundamental right to receive information, including its legal sources and principles of application. Thereafter, I develop five perspectives through which to understand the right to receive information. These perspectives express the importance of receiving information for political participation, truth-finding, social cohesion, and personal self-development, and the importance of avoidance of censorship. Four of these perspectives correspond with the four arguments which are usually provided to defend the right to freedom of expression[260] but the perspective of social cohesion is more unique to the right to receive information. Ultimately, I use these five perspectives to figure out what news users' right to receive information implies for news personalisation.

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[258] J. M. Balkin, 'Free speech in the algorithmic society: Big data, private governance, and new school speech regulation', *U.C. Davis Law Review*, 51:3 (2017), 1149–1210; M. Brkan, 'Freedom of expression and artificial intelligence: On personalisation, disinformation and (lack of) horizontal effect of the Charter', 2019, https://papers.ssrn.com/abstract=3354180; U. Carlsson (ed.), *Freedom of Expression and Media in Transition: Studies and Reflections in the Digital Age* (Nordicom, 2016), https://www.nordicom.gu.se/en/publikationer/freedom-expression-and-media-transition; J. V. J. van Hoboken, 'Search engine freedom: On the implications of the right to freedom of expression for the legal governance of Web search engines' (University of Amsterdam, 2012), http://hdl.handle.net/11245/1.392066; E. Llansó et al., 'Artificial Intelligence, content moderation, and freedom of expression' (Institute for Information Law, 2020), https://www.ivir.nl/publicaties/download/AI-Llanso-Van-Hoboken-Feb-2020.pdf.

[259] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), p. 6.

[260] Barendt, *Freedom of Speech*, chap. 1.

3.2 A Description of the Right to Receive Information

Article 11, paragraph 1, EU Charter provides:

> 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 authority and regardless of frontiers.

This provision corresponds to article 10, paragraph 1, ECHR. By way of article 52, paragraph 3, EU Charter, the meaning and scope of the EU Charter provision on the right to receive information is the same as the meaning and scope of the ECHR provision on the right to receive information.

The EU Charter's and ECHR's provisions indicate that the right to receive information is part of the right to freedom of expression. Still, the right to receive information is a standalone right. This thesis shows that, in various cases, the ECtHR and CJEU look at the right to receive information on its own merits, and not just when the right to freedom of expression is implicated.

This research distinguishes between the right to receive information as part of objective law and the right as a subjective right. There are two instances of the right to receive information as a subjective right. The ECtHR has established that the right to freedom to receive information prohibits the state from restricting people from receiving information that others, be it public or private actors, want to communicate to them.[261] In the words of the ECtHR, this rule has become 'the standard jurisprudential position on the matter'.[262] Additionally, people have a subjective right to receive information from public authorities. Council of Europe Member States guarantee everyone the subjective right of access to official documents held by public authorities.[263] In the case of *Magyar Helsinki Bizottság v. Hungary*, the ECtHR has also found that the denial of access to state-held information may interfere with an applicant's right to freedom of expression if the information is instrumental for the exercise of their freedom of expression.[264] In that case, the ECtHR derived a subjective right to receive information from article 10 ECHR.

The perception of the right to receive information being part of objective law means that the right functions on an institutional level: law and policymakers take the right into account when drafting laws and policies;[265] the right underlies the media's mission to inform the public. In other words, the right to receive information sometimes 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,[266] explicitly refer to the right to receive information in a

[261] ECtHR, *Leander v. Sweden*, para. 74; ECtHR [GC], *Magyar Helsinki Bizottság v. Hungary*, 2016, 18030/11, para. 156, http://hudoc.echr.coe.int/eng?i=001-167828.
[262] ECtHR [GC], *Magyar Helsinki Bizottság v. Hungary*, para. 127.
[263] *Council of Europe Convention on Access to Official Documents*, 2009, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205.
[264] ECtHR [GC], *Magyar Helsinki Bizottság v. Hungary*, para. 156.
[265] Helberger, 'Controlling access to content', p. 76.
[266] ECtHR [GC], *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, 2017, 931/13, para. 65, http://hudoc.echr.coe.int/eng?i=001-175121.

general sense. The functioning of the right to receive information on an institutional level is most apparent in broadcasting regulation.[267]

In addition to the description of the right to receive information as a subjective right or part of objective law, it is necessary to note that the fundamental right to receive information only has a vertical application.[268] News users may thus invoke their right to receive information against public authorities, but not against private online news media. A subjective right to receive information from the media would be contrary to media freedom and could conflict with the rights of other news users.

In relation to its vertical application, the fundamental right to receive information is first and foremost a negative right. This means that 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.[269] In line with that view, the ECtHR has found that effective exercise of the right to freedom of expression may require positive measures of protection by the state, such as enacting domestic legislation.[270]

In the case of *Dink v. Turkey*, the ECtHR elaborated on the notion of positive obligations. The ECtHR determined that the state has a positive obligation to create a favourable environment for participation in public debate by all.[271] Moreover, the ECtHR found that, even in the sphere of relations between individuals, the state may be obliged to take positive measures of protection with regard to the right to privacy,[272] as well as the right to freedom of expression and to receive information.[273] The doctrine of positive obligations could mean that the state should adopt rules to ensure that online news media respect the right to receive information of news users.

In summary, the fundamental right to receive information does not entail a general subjective right of news users to request specific information from the government, let alone from online news media.[274] The right to receive information is a liberty to receive information.[275] This liberty is part of objective law, and only gives rise to positive obligations for the state in limited circumstances. However, the possibility of positive obligations for the state raises the question how states could fulfil said obligations. The following section describes five perspectives from which to approach that question.

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[267] J. Harrison and L. Woods, *European Broadcasting Law and Policy* (Cambridge University Press, 2007), pp. 266–89; Oster, *European and International Media Law*, pp. 181–89.

[268] See section 1.2.3.

[269] M. Bullinger, 'Freedom of expression and information: An essential element of democracy', *German Yearbook of International Law*, 28 (1985), 88–143.

[270] ECtHR, *Fuentes Bobo v. Spain*, para. 38; ECtHR, *Özgür Gündem v. Turkey*, paras 42–46.

[271] ECtHR, *Dink v. Turkey*, 2010, 2668/07, 6102/08, 30079/08, 7072/09, 7124/09, para. 137, http://hudoc.echr.coe.int/eng?i=001-100383.

[272] ECtHR, *X and Y v. the Netherlands*, para. 23.

[273] ECtHR, *Fuentes Bobo v. Spain*, para. 38; ECtHR, *Özgür Gündem v. Turkey*, para. 43.

[274] Helberger, 'Controlling access to content', p. 89; P. Keller, *European and International Media Law: Liberal Democracy and the New Media* (Oxford University Press, 2011), p. 439.

[275] W. N. Hohfeld, 'Some fundamental legal conceptions as applied in judicial reasoning', *The Yale Law Journal*, 23:1 (1913), 16–59, https://doi.org/10.2307/785533.

3.3 Perspectives to Understand the Right to Receive Information

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

3.3.1 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. I use a broad concept of political participation, which encompasses taking part in the electoral process, but also discovering and forming opinions about the ideas and attitudes of political leaders,[276] forming opinions about public and business activities of political representatives,[277] 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 states that the fundamental rights and freedoms contained in the ECHR '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 8-11 ECHR allow interference with the exercise of fundamental rights only 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'.[278] At the core of the ECtHR's concept of democracy lies freedom of political debate through freedom of the media.[279]

The perspective of political participation is similar to a common argument for the protection of freedom of expression, namely citizen participation in a democracy. American judge Louis Brandeis famously stated that 'freedom to think as you will and to speak as you think' are key to political discussion.[280] The argument of citizen participation is also associated with the work of Alexander Meiklejohn, who defended freedom of expression because of its crucial importance for self-government.[281] Meiklejohn expressly valued the need to hear over the need to speak. In his view, the ultimate interest of political self-government is not contained 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's need to listen, not the individual's desire to speak.

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[276] ECtHR, *Lingens v. Austria*, para. 42.
[277] ECtHR, *Wizerkaniuk v. Poland*, 2011, 18990/05, para. 72, http://hudoc.echr.coe.int/eng?i=001-105557.
[278] ECtHR, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 1976, 5095/71, 5920/72, 5926/72, para. 53, http://hudoc.echr.coe.int/eng?i=001-57509.
[279] ECtHR, *Lingens v. Austria*, para. 42.
[280] US SC, *Whitney v. California*, 1927, 274 U.S. 357, p. 375, https://supreme.justia.com/cases/federal/us/274/357/.
[281] A. Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper Brothers Publishers, 1948), pp. 63–66.

3.3.1.1 Legal basis

In most ECtHR cases involving the right to receive information, the ECtHR derived the public's right to receive information from the right to freedom of expression of the applicant journalist or news organisation. For example, in *Lingens v. Austria*, an Austrian journalist who had been convicted of defamation of a politician in the press, complained to the ECtHR that the conviction violated his right to freedom of expression. In its assessment, the ECtHR considered that it is incumbent on the news media to impart information and ideas on political issues. The ECtHR added that the news media has the task to impart such information while 'the public also has a right to receive them'.[282]

In the ECtHR's analysis, the right to receive information is a 'corollary' of the function of the news media.[283] The ECtHR reasoned that the media would otherwise be unable to play its role of public watchdog.[284] The public watchdog role means that news media have the obligation to monitor and scrutinise the exercise of public and private power.[285] For example, the presence of the media at public demonstrations or at parliamentary debates, which sometimes escalate, guarantees that the government can be held to account for its conduct towards the demonstrators and the public at large.[286]

The link between the right to receive information and the functions of the news media demonstrates the institutional character of the right to receive information:[287] the right is usually realised through social institutions such as the law and the media. The preambles to the Council of Europe's European Convention on Transfrontier Television ('ECTT') and the European Union's Audiovisual Media Services Directive ('AVMSD') reflect the reasoning of the ECtHR and illustrate how states fulfil their positive obligations regarding the right to receive information.[288] The preamble of the AVMSD emphasises that audiovisual media services are important for democracy by ensuring freedom of information, diversity of opinion, and pluralism.[289] Therefore, the operative part of the AVMSD imposes obligations on EU Member States to ensure that the public can follow events which are of major importance to society on live television,[290] and watch short news reports on events of great interest.[291] The initial proposal of the European Commission for a Directive amending the AVMSD specifically stated that the right to access political news programs is crucial to safeguard the freedom to receive information, and that given the growing

[282] ECtHR, *Lingens v. Austria*, para. 41.
[283] ECtHR [GC], *Guerra and Others v. Italy*, para. 53.
[284] ECtHR, *Observer and Guardian v. the United Kingdom*, para. 59; ECtHR, *Barthold v. Germany*, para. 58.
[285] McNair, 'Journalism and democracy', p. 239.
[286] ECtHR, *Selmani and Others v. the former Yugoslav Republic of Macedonia*, 2017, 67259/14, para. 75, http://hudoc.echr.coe.int/eng?i=001-170839.
[287] See section 3.2
[288] The ECTT is the Council of Europe's most important legal instrument on broadcasting and takes a more cultural and freedom of expression-favouring approach 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 scholars to question the continuing relevance of the ECTT; see D. Mac Síthigh, 'Death of a convention: Competition between the Council of Europe and European Union in the regulation of broadcasting', *Journal of Media Law*, 5:1 (2013), 133–55, https://doi.org/10.5235/17577632.5.1.133.
[289] Recital 5 AVMSD. See similarly, the preamble to the ECTT.
[290] Art. 14 AVMSD.
[291] Art. 15 AVMSD.

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.[292]

The perspective of political participation leads to a concrete obligation for the state. The ECtHR has held that the state has a duty to ensure that the public has access to accurate information and varied opinions through audiovisual media, reflecting the diversity of political views within the country.[293] The ECtHR tied this duty to television and radio because the ECtHR found that audiovisual media have a particularly immediate and powerful effect when compared to the print media. The ECtHR ascribed the larger 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.[294]

3.3.2 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 all information should be true. Rather, it conveys 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 freedom of expression, namely that it is important for discovering truth.[295] John Stuart Mill formulated a version of this argument in the presumption 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.[296] Therefore, everyone should have the freedom to speak and bring up all possible arguments. In a dissenting opinion, American judge Oliver W Holmes Jr. famously stated that the winning idea in the 'marketplace of ideas' is truth,[297] which means that everyone should be free to speak and test their ideas in the marketplace. This is a more relativist version of the truth argument.

3.3.2.1 Legal basis

The importance of truth-finding underlies many ECtHR judgements. For example, in the case of *The Sunday Times v. the United Kingdom (No. 1)*, the newspaper had intended to publish an article about a pharmaceuticals tragedy and related pending legal proceedings. The newspaper did not publish the piece after it had received an injunction restraining publication of the article for contempt of court. The Sunday Times argued before the ECtHR that the injunction violated its right to freedom of expression. The ECtHR noted that the families of the victims of the tragedy

[292] European 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', 2016, sec. 40, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0287.
[293] ECtHR, *Manole and Others v. Moldova*, para. 100.
[294] ECtHR [GC], *Jersild v. Denmark*, 1994, 15890/89, para. 31, http://hudoc.echr.coe.int/eng?i=001-57891.
[295] Barendt, *Freedom of Speech*, pp. 7–13.
[296] J. S. Mill, *On Liberty*, 2nd edn (JW Parker, 1859), pp. 36–41.
[297] US SC, *Abrams v. United States*, 1919, 250 U.S. 616, https://supreme.justia.com/cases/federal/us/250/616/.

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.[298] The ECtHR also found that the wider public had a legitimate interest in receiving the information. The news article could help the public understand the legal and moral responsibilities of the pharmaceutical company towards the victims.[299] The ECtHR's judgment was clearly oriented towards truth-finding, not political participation.

The ECtHR has turned to the argument of truth-finding in various other contexts. The ECtHR established that seeking historical truth is an integral part of freedom of expression.[300] In line with this, the ECtHR found that the denial of established historical facts does not constitute historical research akin to a quest for truth worthy of protection.[301] Subsequently, the ECtHR determined that access to original documentary sources for historical research is part of the right to freedom of expression.[302] Moreover, in *Magyar Helsinki Bizottság v. Hungary*, an NGO wished to receive data from police departments in order to investigate seemingly prejudiced appointments of public defenders in Hungary.[303] The ECtHR described the purpose of the applicant NGO as one of truth-finding regarding a matter of public concern. The ECtHR found that the Hungarian government's refusal of the request for information was unjustified in the light of that purpose.[304]

The right of reply in European media law also hinges on the truth-finding perspective, in addition to the protection which the right of reply aims to afford to the personality rights of persons affected by a publication.[305] One 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.[306] The Committee of Ministers of the Council of Europe emphasised that the right of reply still serves this purpose in the new media environment.[307] If people know both sides of the story, including the view of the person affected by the publication, they can form their own opinion on 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 had been forced to cease publication due to attacks on journalists and due to legal steps taken against it by the government.[308] The ECtHR considered that the public had the right to be informed of different perspectives on a given situation in southeast Turkey, regardless of

[298] ECtHR, *The Sunday Times v. the United Kingdom (No. 1)*, 1979, 6538/74, para. 66, http://hudoc.echr.coe.int/eng?i=001-57584.
[299] ECtHR, *The Sunday Times v. the United Kingdom (No. 1)*, para. 66.
[300] ECtHR, *Chauvy and Others v. France*, 2004, 64915/01, para. 69, http://hudoc.echr.coe.int/eng?i=001-61861.
[301] ECtHR (dec.), *Garaudy v. France*, 2003, 65831/01, p. 23, http://hudoc.echr.coe.int/eng?i=001-23829.
[302] ECtHR, *Kenedi v. Hungary*, 2009, 31475/05, para. 43, http://hudoc.echr.coe.int/eng?i=001-92663.
[303] ECtHR [GC], *Magyar Helsinki Bizottság v. Hungary*, para. 197.
[304] ECtHR [GC], *Magyar Helsinki Bizottság v. Hungary*, para. 200.
[305] A. Koltay, 'The right of reply in a European comparative perspective', *Acta Juridica Hungarica*, 54:1 (2013), 73–89 (p. 87).
[306] ECommHR, *Ediciones Tiempo S.A. v. Spain*, 1989, 13010/87, p. 254, http://hudoc.echr.coe.int/eng?i=001-82128; ECtHR (dec.), *Melnychuk v. Ukraine*, 2005, 28743/03, para. 2, http://hudoc.echr.coe.int/eng?i=001-70089.
[307] Council of Europe, 'Recommendation Rec(2004)16 of the Committee of Ministers to member states on the right of reply in the new media environment', 2004, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805db3b6.
[308] ECtHR, *Özgür Gündem v. Turkey*, para. 37.

whether the authorities approved of those perspectives.[309] In other words, as the ECtHR stipulated in *Çetin and Others v. Turkey*, 'citizens must be permitted to receive a variety of messages, to choose between them and reach their own opinions on the various views expressed'.[310] Similarly, the ECtHR takes no role in settling debates about historical events among historians and their interpretation.[311] 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 value of information distributed by online news media.[312]

Similar to the perspective of political participation, the perspective of truth-finding implies that the public is entitled to receive diverse information. Truth will emerge out of the marketplace of ideas only if there is sufficient competition among diverse ideas and viewpoints.[313] Diversity has been a central tenet of European media law and policy for a long time,[314] implementing the value of pluralism.[315] The ECtHR established that democracy demands pluralism,[316] and that the state is the ultimate guarantor of pluralism.[317] In this respect, the ECtHR imposes the positive obligation on states to put in place a legislative framework to guarantee pluralism in the media system.[318] For example, the ECtHR found that the state should provide audiovisual media with effective access to the market to guarantee diversity of overall program content, reflecting the variety of opinions in society.[319] Joris and colleagues conclude that the case law of the ECtHR even supports a specific 'right to diverse information'.[320] They acknowledge that the state primarily has a positive obligation to ensure diverse information in the audiovisual media sector, but they predict that the ECtHR might very well recognise a right to receive diverse information online, seeing that the ECtHR has recognised the importance of the internet for access to news.[321]

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[309] ECtHR, *Özgür Gündem v. Turkey*, para. 70.
[310] ECtHR, *Çetin and Others v. Turkey*, para. 64.
[311] ECtHR [GC], *Lehideux and Isorni v. France*, 1998, 55/1997/839/1045, para. 47, http://hudoc.echr.coe.int/eng?i=001-58245; ECtHR, *Chauvy and Others v. France*, para. 69.
[312] Council of Europe, 'Recommendation CM/Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content', 2007, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d6be3.
[313] P. Napoli, 'Deconstructing the diversity principle', *Journal of Communication*, 49:4 (1999), 7–34 (p. 9), https://doi.org/10.1111/j.1460-2466.1999.tb02815.x.
[314] Council of Europe, 'Resolution (74)43 on press concentrations', 1974; Council of Europe, 'Recommendation R(99)1 of the Committee of Ministers to member states on measures to promote media pluralism', 1999, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804fa377; Council of Europe, 'Recommendation CM/Rec(2007)2'; European Commission, 'Green Paper on pluralism and media concentration in the internal market: An assessment of the need for Community action', 1992, https://op.europa.eu/en/publication-detail/-/publication/8decb59b-785e-11e9-9f05-01aa75ed71a1/language-en/format-PDF/source-search.
[315] K. Karppinen, *Rethinking Media Pluralism* (Fordham University Press, 2013).
[316] ECtHR, *Handyside v. the United Kingdom*, para. 49.
[317] ECtHR, *Informationsverein Lentia v. Austria*, 2002, 37093/97, para. 38, http://hudoc.echr.coe.int/eng?i=001-60794.
[318] ECtHR, *Manole and Others v. Moldova*, 1 para. 101.
[319] ECtHR [GC], *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, para. 130.
[320] G. Joris et al., 'News diversity and recommendation systems: Setting the interdisciplinary scene', in M. Friedewald et al. (eds), *Privacy and Identity Management: Data for Better Living: AI and Privacy* (Springer, 2019), pp. 90–105 (p. 94), https://doi.org/10.1007/978-3-030-42504-3.
[321] Joris et al., 'News diversity and recommendation systems: Setting the interdisciplinary scene', p. 94.

3.3.3 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 work, social cohesion refers to high quality and strong social relations in society, people having a sense of belonging to a social group, and groups being oriented towards the common good.[322] Social cohesion would not be possible without a certain degree of trust, while social cohesion also enables people to trust each other.[323] Social cohesion moreover entails a common understanding and the building of communities.[324] This concept of social cohesion is broader than the concept in EU internal market legislation, where social cohesion is part of development policies and mostly economic in character.[325]

Arguments for public service broadcasting or, more broadly, 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.[326] Such arguments are supported by research which suggests that contact between different societal groups, mediated via television, may make groups look more positively towards other groups.[327]

3.3.3.1 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 generations, including minority groups, young people, the elderly, underprivileged and disadvantaged social categories, disabled persons, etc., while respecting their different identities and needs.[328]

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[322] D. Schiefer and J. van der Noll, 'The essentials of social cohesion: A literature review', *Social Indicators Research*, 2016, 1–25, https://doi.org/10.1007/s11205-016-1314-5.

[323] C. 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).

[324] M. Zuckerberg, 'Building global community', *Facebook*, 2017, https://www.facebook.com/notes/mark-zuckerberg/building-global-community/10154544292806634.

[325] See article 3(3) TEU and article 174 TFEU.

[326] K. Donders, *Public Service Media and Policy in Europe* (Palgrave Macmillan, 2012), p. 33 and 85; Parliamentary Assembly, 'Recommendation 1878 (2009) on funding of public service broadcasting', 2009, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17763&lang=en.

[327] S.-Y. Park, 'Mediated intergroup contact: Concept explication, synthesis, and application', *Mass Communication and Society*, 15:1 (2012), 136–59; M. Wojcieszak and R. Azrout, 'I saw you in the news: Mediated and direct intergroup contact improve outgroup attitudes', *Journal of Communication*, 66:6 (2016), 1032–60, https://doi.org/10.1111/jcom.12266.

[328] Council of Europe, 'Recommendation CM/Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society', 2007, para. I. 3.2, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d6bc5.

Other types of media may also have a part in this. The Committee of Ministers stimulates Council of Europe Member States to encourage the development of social, local, or community media which create content for certain groups in society, respond to the specific needs of such groups, and contribute to social cohesion and integration.[329] The Committee of Ministers further ascribes importance to the internet for its ability to facilitate democracy and social cohesion.[330]

European states have given effect to their positive obligations regarding the right to receive information through EU law, reflecting an orientation towards social cohesion. For example, the AVMSD sets out to ensure that the public has access to broadcasting of events which are of major importance for society,[331] such as live coverage of the Olympic games or international football championships.[332] States may draw up lists of events which they consider to be of major importance and should be available on free television.[333] These lists mainly contain sports events,[334] although states also include other events such as operas or music festivals.[335] The emphasis on sports 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.[336] 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.[337]

The perspective of social cohesion supports an innovative approach to media diversity and pluralism. So far, I discussed diversity in the sense of a variety of information sources available, which is called 'source diversity' or 'supplier diversity'.[338] The common approach to diversity in

[329] Council of Europe, 'Recommendation CM/Rec(2007)3', para. I. 4.
[330] Council of Europe, 'Recommendation CM/Rec(2012)4 of the Committee of Ministers to member States on the protection of human rights with regard to social networking services', 2012, http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168068460e.
[331] Art. 14 AVMSD.
[332] Recital 49 AVMSD. According to Rowe, Art. 14 AVMSD is a protectionist measure for the public service media, against exclusive rights of commercial broadcasters; see, D. Rowe, 'Watching brief: Cultural citizenship and viewing rights', *Sport in Society*, 7:3 (2004), 385–402 (p. 391), https://doi.org/10.1080/1743043042000291703.
[333] 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 test the list on its compatibility with EU law. Member States should ensure that domestic broadcasters respect the verified lists of other countries.
[334] K. Lefever, H. Cannie, and P. Valcke, 'Watching live sport on television: A human right? The right to information and the list of major events regime', *European Human Rights Law Review*, 4, 2010, 396–407 (pp. 399–400).
[335] European 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, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1595003385492&uri=CELEX:52008XC0124(05).
[336] Art. 15 AVMSD. See also Recital 55 AVMSD.
[337] European Commission, 'Staff working document: Media pluralism in the Member States of the European Union', 2007; P. Valcke et al., *Independent Study on Indicators for Media Pluralism in the Member States: Towards a Risk-Based Approach* (European Commission, 2009), http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/pfr_report.pdf.
[338] P. Valcke, 'Looking for the user in media pluralism regulation: Unraveling the traditional diversity chain and recent trends of user empowerment in European media regulation', *Journal of Information Policy*, 1 (2011), 287–320 (p. 291), https://doi.org/10.5325/jinfopoli.1.2011.0287.

Europe is source diversity.[339] In contrast, 'exposure diversity' concerns diversity in the sense of people truly being exposed to diverse information.[340] Exposure diversity, rather than source diversity, might particularly benefit social cohesion. News users are stimulated to understand other people only when they are really exposed to a diversity of voices. ECtHR case law supports the connection between social cohesion and exposure diversity. The ECtHR recognises that public debate about complex issues furthers social cohesion by ensuring that representatives of all views are heard.[341] It has underlined that the interaction of people and groups with diverse identities is necessary for achieving social cohesion.[342] Accordingly, the ECtHR demands that the state respects views of minorities, because giving all voices the chance to speak and be heard promotes cohesion and harmony in society.[343]

3.3.4 Perspective of Avoidance of Censorship

The fundamental right to receive information implies a mistrust of censorship. Below, I use a broad concept of censorship, going beyond a system in which publication is allowed only after obtaining clearance from a censor. Censorship may consist of prior restraint or subsequent punishment.[344] Prior restraint is a restriction on expressing or receiving information in advance of actual publication. Subsequent punishment is a 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 criminal proceedings or private lawsuits.

Censorship implicates 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 which 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, for instance, child sexual abuse material or obscene language.[345]

The perspective of mistrust of censorship coincides with arguments for freedom of expression which are grounded in liberal thought and premised on a general suspicion of governments.[346] 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

[339] Valcke, 'Looking for the user in media pluralism regulation', p. 289.
[340] Valcke, 'Looking for the user in media pluralism regulation', p. 290; N. Helberger, 'Exposure diversity as a policy goal', *Journal of Media Law*, 4:1 (2012), 65–92, https://doi.org/10.5235/175776312802483880.
[341] ECtHR, *Alekseyev v. Russia*, 2010, 4916/07, 25924/08, 14599/09, para. 86, http://hudoc.echr.coe.int/eng?i=001-101257.
[342] ECtHR [GC], *Gorzelik and Others v. Poland*, 2004, 44158/98, para. 92, http://hudoc.echr.coe.int/eng?i=001-61637.
[343] ECtHR, *Gough v. the United Kingdom*, 2014, 49327/11, para. 168, http://hudoc.echr.coe.int/eng?i=001-147623.
[344] T. I. Emerson, 'The doctrine of prior restraint', *Law and Contemporary Problems*, 20:4 (1955), 648–71.
[345] Swiss Institute of Comparative Law, 'Comparative study on blocking, filtering, and take-down of illegal internet content' (Council of Europe, 2017), https://edoc.coe.int/en/internet/7289-pdf-comparative-study-on-blocking-filtering-and-take-down-of-illegal-internet-content-.html.
[346] Barendt, *Freedom of Speech*, pp. 21–23; Keller, *European and International Media Law*, pp. 38–49.

between allowable and unallowable speech.[347] Governments may want to suppress speech which criticises them, or claim that certain revelations about their actions are untrue or 'fake news'. Thus, the principles of liberalism work against censorship. In contrast, authoritarianism is in favour of censorship, since it reckons that the media must further the interests of government.[348]

Empirical research supports mistrust of government regulation of expression.[349] Research has found that people who are exposed to a message will expect the information or ideas to have a greater negative effect on others than on themselves.[350] 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 make citizens supportive of 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 the recipients of information.

3.3.4.1 Legal basis

The ECtHR is mindful of the dangers of censorship, especially as far as the news media is concerned. The ECtHR has recognised that even a slight delay of publication may deprive news of its value,[351] and noted that this danger also holds for other type of publications which deal with current issues.[352] Nevertheless, the ECtHR has found that the right to freedom of expression does not prohibit prior restraints on publications as such.[353] The ECtHR 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 ECtHR has held that freedom of expression does not prohibit subsequent censorship.[354]

Censorship often concerns the sender of information. A classic example is the case of *Observer and Guardian v. the United Kingdom*. The case concerned the memoirs written by a former member of the British Security Service. The Observer and the Guardian 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 for as long as the book had not been published elsewhere.[355] However, the ECtHR

[347] Barendt, *Freedom of Speech*, p. 21 and 104.
[348] F. S. Siebert, T. Peterson, and W. 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), p. 35.
[349] J. R. Bambauer and D. E. Bambauer, 'Information libertarianism', *California Law Review*, 105:2 (2017), 335–94.
[350] W. P. Davison, 'The third-person effect in communication', *The Public Opinion Quarterly*, 47:1 (1983), 1–15, https://doi.org/10.1086/268763; R. M. Perloff, 'The third person effect: A critical review and synthesis', *Media Psychology*, 1:4 (1999), 353–78, https://doi.org/10.1207/s1532785xmep0104_4; H.-B. Brosius and I. Huck, 'Third-person effects', ed. W. Donsbach, *The International Encyclopedia of Communication* (Blackwell Reference Online, 2008).
[351] ECtHR, *The Sunday Times v. the United Kingdom (No. 2)*, 1991, 13166/87, para. 51, http://hudoc.echr.coe.int/eng?i=001-57708.
[352] ECtHR, *Ahmet Yıldırım v. Turkey*, para. 47.
[353] ECtHR, *The Sunday Times v. the United Kingdom (No. 2)*, para. 51.
[354] ECtHR [GC], *Cumpănă and Mazăre v. Romania*, 2004, 33348/96, para. 114, http://hudoc.echr.coe.int/eng?i=001-67816.
[355] ECtHR, *Observer and Guardian v. the United Kingdom*, para. 65.

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.[356]

Censorship may also concern recipients of information. The ECtHR has established that the right to receive information prohibits the government from restricting a person from receiving information which others wish or may be willing to impart to them. 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 for use in schools.[357] The ECtHR 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.[358]

People thus have a right to receive uncensored information, and the ECtHR is wary about how different types of government power may constitute a form of censorship. The ECtHR has found that measures which merely make access to information more burdensome, may become a form of indirect censorship.[359] A governmental monopoly on information, which hinders the gathering of information on a matter of public importance, may also amount to a form of censorship.[360] The ECtHR has also established that a measure ordered in the context of criminal proceedings which renders large quantities of online information inaccessible, restricts the rights of internet users and amounts to collateral censorship.[361]

3.3.5 Perspective of Self-Development

Various legal judgements or policy instruments are based on the concept 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 which is not personal but relevant to someone's private life for another personal reason.[362] The perspective of self-development goes beyond that of political participation because it concerns more than the development into ideal citizens who participate in political life. Moreover, 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.

3.3.5.1 Legal basis

In the first cases in which applicants to the ECtHR claimed a right of access to information, the ECtHR 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 ECtHR held that the storage as well as the release of the personal information to other authorities, combined with the refusal to allow the applicant an opportunity to contest the information, amounted to an

[356] ECtHR, *Observer and Guardian v. the United Kingdom*, para. 70.
[357] ECtHR [GC], *Cyprus v. Turkey*, 2001, 25781/94, para. 44, http://hudoc.echr.coe.int/eng?i=001-59454.
[358] ECtHR [GC], *Cyprus v. Turkey*, para. 252.
[359] ECtHR, *Társaság a Szabadságjogokért v. Hungary*, 2009, 37374/05, para. 27, http://hudoc.echr.coe.int/eng?i=001-92171.
[360] ECtHR, *Társaság a Szabadságjogokért v. Hungary*, para. 28.
[361] ECtHR, *Ahmet Yıldırım v. Turkey*, para. 66.
[362] M. McDonagh, 'The right to information in international human rights law', *Human Rights Law Review*, 13:1 (2013), 25–55 (p. 41), https://doi.org/10.1093/hrlr/ngs045.

interference with his right to respect for privacy.[363] Although the ECtHR did not find a violation of article 8 in this case, it recognised that accessing and receiving personal information can be a matter of the right to respect for privacy.[364]

In *Guerra and Others v. Italy*, the ECtHR recognised the value of receiving information which is not personal but concerns someone's private life in another way. The applicants lived in a town nearby a chemical factory. The Italian government had neglected to take 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 ECtHR concluded that the government, by failing to provide the information, had not fulfilled its positive obligation to secure the applicant's right to respect for their private and family life.[365] The decision of the ECtHR 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 has stated that freedom of expression is a basic condition for people's self-development or self-fulfilment.[366] In *Khurshid Mustafa and Tarzibachi v. Sweden*, the ECtHR most clearly recognised the value of free information reception for self-realisation. The applicants of that case lived in a rented flat in Sweden, where they watched television programs 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, eventually leading to the applicants moving out. The applicants argued before the ECtHR that their freedom to receive information had been breached. The ECtHR considered that the information which the applicants wished to receive included political and social news in Arabic and Farsi, which could be of particular interest to the applicants as immigrants from Iraq. Moreover, the ECtHR found:

> [W]hile 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.[367]

The ECtHR thus established that access to information is also important for private and cultural issues, in addition to public interest issues. The case of *Khurshid Mustafa and Tarzibachi v. Sweden* also relates to the perspective of social cohesion.

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[363] ECtHR, *Leander v. Sweden*, para. 48.
[364] ECtHR, *Leander v. Sweden*, para. 68.
[365] ECtHR [GC], *Guerra and Others v. Italy*, para. 60.
[366] ECtHR, *Handyside v. the United Kingdom*, para. 49; ECtHR, *Barthold v. Germany*, para. 58; ECtHR, *Lingens v. Austria*, para. 41.
[367] ECtHR, *Khurshid Mustafa and Tarzibachi v. Sweden*, para. 44.

3.4 Effects of News Personalisation on the Right to Receive Information

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

3.4.1 Enabling a Subjective Right to Receive Information

News personalisation invites us to reconsider subjective rights to receive information. People have a subjective right to receive information which others are willing to impart[368] but they do not have a right to receive information which the media is not willing to impart. This doctrine was necessary 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 produce specific news stories and distribute these to them.[369] Moreover, should media users present conflicting demands for information, it would be difficult to decide whose right to receive information should prevail.

In theory, news personalisation could 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. Personalisation often happens after news stories are produced by online news media, and are then distributed in a personalised manner. With personalisation technologies, someone's wish to receive particular information out of a pool of news items does not prevent online news media from imparting different content to other people. Moreover, such a subjective right to receive information could help to establish what news users legitimately may expect from the online news media with respect to the diversity or relevance of personalisation.

3.4.2 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 also encompasses other forms of political behaviour these days. Scholars have defined new citizen roles, such as expert citizens—who are politically active on topics with which they personally engage—;[370] 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.[371] A similar notion is the 'standby citizen'.[372] Personalisation could help expert citizens to be more selective in searching

[368] See section 3.2.

[369] Helberger, 'Controlling access to content', p. 76; Richardson, 'The public's right to know', p. 50.

[370] H. P. Bang, 'Among everyday makers and expert citizens', in J. Newman (ed.), *Remaking Governance: Peoples, Politics and the Public Sphere* (Policy Press, 2005), pp. 159–79; Y. Li and D. Marsh, 'New forms of political participation: Searching for expert citizens and everyday makers', *British Journal of Political Science*, 38:2 (2008), 247–72; Y. Theocharis and J. W. van Deth, 'The continuous expansion of citizen participation: A new taxonomy', *European Political Science Review*, 10:1 (2018), 139–63, https://doi.org/10.1017/S1755773916000230.

[371] M. Schudson, *The Good Citizen: A History of American Civic Life* (Free Press, 1998), p. 310.

[372] E. Amnå and J. Ekman, 'Standby citizens: diverse faces of political passivity', *European Political Science Review*, 6:2 (2014), 261–81, https://doi.org/10.1017/S175577391300009X.

for information in their area of expertise and in situations where they have political power, such as in local government or public schools. Personalisation could also inform monitorial citizens of relevant events and activate them when necessary.

Personalisation can unlock long-tail content[373] and indicate it to monitorial or expert citizens. The ECtHR has stated that, while the primary function of the news media is to act as a public watchdog, the media's secondary role is the maintaining and making available of news archives.[374] The ECtHR thus determined that the interest of the public to access internet news archives is protected under the right to freedom of expression.[375] Personalisation may make news archives more accessible by recommending news items which 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. Personalisation could point people to information which contrasts with their views, or provides another perspective on news stories which they 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 may first recommend factual accounts of a recent event, and only later provide more opinionated reports. A personalisation system could also suggest a fact-checking article after having read an item labelled as potential disinformation. In this manner, governments or online news media would not have to censor disinformation, and people could verify the truth themselves. Furthermore, news personalisation can be used for niche news topics to improve the provision of information. For example, researchers have shown how news personalisation can facilitate peace journalism or war reporting.[376] By providing news users with more diverse conflict coverage, news users can be supported in their search for truth.

News personalisation could provide 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.[377] 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 considered socially accepted that public broadcasters prod people towards an information diet containing public affairs news. Research even indicates that people expect such a shared news experience from public service media which offer personalisation.[378] Personalisation could provide similar nudges. At the same time, scholars have predicted that, under the right conditions, exposure to diverse

[373] C. Anderson, *The Long Tail: Why the Future of Business Is Selling Less of More* (Hyperion, 2006).
[374] ECtHR, *Times Newspapers Ltd v. the United Kingdom (Nos. 1 and 2)*, para. 45.
[375] ECtHR, *Węgrzynowski and Smolczewski v. Poland*, 2013, 33846/07, para. 65, http://hudoc.echr.coe.int/eng?i=001-122365.
[376] M. Bastian, M. Makhortykh, and T. Dobber, 'News personalization for peace: How algorithmic recommendations can impact conflict coverage', *International Journal of Conflict Management*, 30:3 (2019), 309–28, https://doi.org/10.1108/IJCMA-02-2019-0032.
[377] J. Curran et al., 'Media system, public knowledge and democracy: A comparative study', *European Journal of Communication*, 24:1 (2009), 5–26 (p. 20).
[378] J. K. Sørensen, 'PSB goes personal: The failure of personalised PSB web pages', *MedieKultur: Journal of Media and Communication Research*, 29:55 (2013), 43–71 (pp. 63–64), https://doi.org/10.7146/mediekultur.v29i55.7993.

rather than to widely shared content could benefit social cohesion.[379] Consequently, stimulation of exposure to diverse or widely shared content should be carefully implemented.

News personalisation could give people information which is particularly relevant to their personal development without depriving other people of the information they need for their self-development. Diverse information need matter less from the outlook 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 help online news media to provide audiences with information which will help them control the course of their own lives.

Finally, news personalisation could protect news users against harmful or unwanted content by filtering out information, similar to the manner in which internet service providers use filters to censor hate speech and child sexual abuse materials. Such a protection by states and media companies could be a legitimate form of prior restraint under the right to freedom of expression.

3.4.3 Undermining the Right to Receive Information

Concerns exist that news personalisation hinders the formation of fully informed citizens, which is required for political participation. News personalisation could reduce access to hard news which people need in their role as informed citizen.[380] However, research indicates that, in 2016, news personalisation did not (yet) lead to a small common core of public issues and less informed citizens.[381] Recent studies also found that people actively search for political information online and offline, supplementing information encountered through personalisation.[382] Nevertheless, the media play a role in carrying personalised political news. Should future research show that news personalisation leads to biases in the way people are politically informed, for example because some are profiled as not interested in, or receptive to political news, personalisation may diminish equal chances for political participation.

News personalisation could increase the impact of news messages, making people more susceptible to disinformation or polarising messages. Research by Pennycook, Canon and Rand suggests that people perceive 'fake news' headlines which are familiar to them as more accurate, with a single exposure already increasing this perception.[383] If personalisation causes repeated exposure to similar mis/disinformation stories, people may perceive these stories as more truthful. The remarks of the ECtHR about the impact of audiovisual media show that impact is a relevant factor in fundamental rights analysis. The ECtHR considers that the internet and social media have less impact than broadcast media because of the choices in the use of online media, meaning that special

[379] N. Helberger, K. Karppinen, and L. D'Acunto, 'Exposure diversity as a design principle for recommender systems', *Information, Communication & Society*, 21:2 (2018), 191–207, https://doi.org/10.1080/1369118X.2016.1271900.
[380] P. J. Boczkowski and E. Mitchelstein, *The News Gap: When the Information Preferences of the Media and the Public Diverge* (MIT Press, 2013).
[381] J. Moeller et al., 'Shrinking core? Exploring the differential agenda setting power of traditional and personalized news media', *Info*, 18:6 (2016), 26–41, https://doi.org/10.1108/info-05-2016-0020.
[382] W. H. Dutton et al., 'Search and politics: The uses and impacts of search in Britain, France, Germany, Italy, Poland, Spain, and the United States' (Michigan State University, 2017).
[383] G. Pennycook, T. D. Cannon, and D. G. Rand, 'Prior exposure increases perceived accuracy of fake news', *Journal of Experimental Psychology: General*, 147:12 (2018), 1865–80, https://doi.org/10.1037/xge0000465.

regulations for radio and television were found to be justified.[384] Should news personalisation decrease the choices for news users, the influence 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 the competition in the marketplace of ideas. If someone's news selection is rather personalised, the selection might not be sufficiently diverse to create effective competition among ideas. This could mean that incorrect information or disinformation is not competed out of the information market. Such a lack of correction could be reinforced by the persistent influence of disinformation which was corrected at a later stage.[385] Thus, the current problems with disinformation may cast doubts on the presumption that a marketplace of ideas guarantees truth. Ho and Schauer's empirical research has indeed indicated that an open marketplace of ideas does not necessarily sort between truths and falsities.[386]

Personalisation may also be detrimental to social cohesion by creating isolated sub-communities around different topics.[387] Regulations 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, adhering to an ideal of radical democracy,[388] the fragmentary effect of diversity may actually be positive.

News personalisation could reinforce a spiral of silence, which describes the tendency of people to fall silent on morally significant issues when they perceive that the general public does not share their ideas.[389] This is a form of self-censorship. Truth-finding and social cohesion both imply that the state 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, people who find out via social media that they disagree with colleagues on political issues, may be less willing to discuss politics at work.[390]

Personalisation may also entail prior restraints imposed by online news media, since certain content may never reach you if it is filtered out. The ECtHR found that prior restraint is a form of censorship which warrants close attention, more than the removal of content from view after it has been published. Current discussions about filtering and blocking of content by internet service

[384] ECtHR [GC], *Animal Defenders International v. the United Kingdom*, 2013, 48876/08, para. 119, http://hudoc.echr.coe.int/eng?i=001-119244.
[385] E. Thorson, 'Belief echoes: The persistent effects of corrected misinformation', *Political Communication*, 33:3 (2016), 460–80, https://doi.org/10.1080/10584609.2015.1102187.
[386] D. E. Ho and F. Schauer, 'Testing the marketplace of ideas', *New York University Law Review*, 90:4 (2015), 1160–1228.
[387] Sunstein, *Republic.Com 2.0*; N. Just and M. Latzer, 'Governance by algorithms: reality construction by algorithmic selection on the Internet', *Media, Culture & Society*, 39:2 (2017), 238–58 (p. 254), https://doi.org/10.1177/0163443716643157.
[388] C. Mouffe, *The Democratic Paradox* (Verso, 2000).
[389] E. Noelle-Neumann, 'The spiral of silence: A theory of public opinion', *Journal of Communication*, 24:2 (1974), 43–51.
[390] K. N. Hampton, I. Shin, and W. Lu, 'Social media and political discussion: when online presence silences offline conversation', *Information, Communication & Society*, 20:7 (2017), 1090–1107, https://doi.org/10.1080/1369118X.2016.1218526.

providers and search engines show public concerns about hidden, private 'censorship'.[391] Private censorship usually does not prevent a news user or producer from seeking another news source or outlet, but this changes when the private censor has a monopoly.[392] Nevertheless, the ECtHR is mindful of stretching the concept of censorship excessively. The ECtHR refused to characterise a news website's obligation to take measures to limit the dissemination of hate speech as private censorship.[393] Moreover, if governments or media limit someone's access to information, the ECtHR does not consider this as an interference with the right to receive information as long as sufficient alternative sources are available.[394] In the case of news, such alternative sources are generally available.

However, the ECtHR does not consider all information sources or media functionally equivalent.[395] In *Khurshid Mustafa and Tarzibachi v. Sweden*, the ECtHR noted that foreign newspapers and radio programs cover only parts of what is available on television received via satellite dish, and 'cannot in any way be equated with the latter'.[396] In *Cengiz and Others v. Turkey*, the ECtHR 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) which is not easily accessible by other means.[397] Thus, if online news media remove all stories about current affairs from a personal news feed, this may be problematic if this is the only comprehensive news source.

3.5 Conclusion

This chapter raised the question what obligations regarding news personalisation are implied for the state by the fundamental right of news users to receive information. I answered this question in two stages. First, I 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. The conclusion that the right to receive information also extends to information which is not exclusively of political importance or public interest, is further supported by the fact that the ECtHR has brought advertising under the scope of the right to receive information.[398]

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[391] Swiss Institute of Comparative Law, 'Comparative study on blocking, filtering, and take-down of illegal internet content'; D. Tambini, D. Leonardi, and C. T. Marsden, 'The privatisation of censorship: Self regulation and freedom of expression', in D. Tambini, D. Leonardi, and C. T. Marsden (eds), *Codifying Cyberspace: Communications Self-Regulation in the Age of Internet Convergence* (Routledge, 2008), http://eprints.lse.ac.uk/44999/.

[392] Barendt, *Freedom of Speech*, p. 52.

[393] ECtHR [GC], *Delfi AS v. Estonia*, para. 157.

[394] ECommHR, *De Geïllustreerde Pers NV v. the Netherlands*, 1976, 5178/71, p. 13, http://hudoc.echr.coe.int/eng?i=001-95643.

[395] C. Angelopoulos et al., 'Study of fundamental rights limitations for online enforcement through self-regulation' (Institute for Information Law, 2016), p. 37, https://www.ivir.nl/publicaties/download/1796.

[396] ECtHR, *Khurshid Mustafa and Tarzibachi v. Sweden*, para. 45.

[397] ECtHR, *Cengiz and Others v. Turkey*, para. 51.

[398] ECtHR (dec.), *Stambuk v. Germany*, 2002, 37928/97, http://hudoc.echr.coe.int/eng?i=001-60687.

Secondly, I evaluated how news users' right to receive information interacts with news personalisation in the 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 online news media, but rather that news personalisation may enable or hinder the exercise of this largely institutionally protected right.

Ultimately, what values are protected 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, my research suggests obligations for the state regarding news users' right to receive information and reveals important policy choices which must be made regarding personalised news. There are many values and interests at stake with news personalisation, which may lead to conflicts (e.g. truth-finding versus social cohesion), and which are not likely to end up in court but must be discussed in public. News personalisation challenges the right to receive information and it invites 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 ponder what the right to receive information should mean today.

Chapter 4.

The Fundamental Right of News Users to Data Protection

This chapter is based on Eskens, S., 'A right to reset your user profile and more: GDPR-rights for personalized news consumers', *International Data Privacy Law*, 9:3 (2019), 153–72, https://doi.org/10.1093/idpl/ipz007. I edited the introduction of the chapter to make it fit into this manuscript.

4.1 Introduction

Many people prefer algorithmic news selection over news selection by journalists and editors,[399] although they are simultaneously concerned about the consequences of personalisation for, among other matters, their privacy.[400] Some people worry about being profiled for news personalisation and the corresponding idea that the online realm will contain a profile of them somewhere.[401] Personalised news systems extensively collect and store revealing personal data of news users. Mobile apps generally collect even more personal data than browser-based applications, and thus generate more data protection risks such as the misuse, leakage, or cross-context transfer of data.[402]

The GDPR provides people some control over their data. However, its application to news personalisation is not straightforward. The GDPR obliges Member States to create exemptions for personal data processing carried out for journalistic purposes, although it remains an open question whether these exemptions apply to news personalisation. In addition, the meaning of many GDPR rules heavily depends on the context of application. For example, in order to understand how news users can stop the use of their personal data for personalisation, it is necessary to know on which legal ground online news media may process personal data. To answer that question, the online news media market, the personalisation technologies used, and other contextual factors have to be considered.

This research assesses to what extent the GDPR provides people control over the processing of their personal data for news personalisation. Previous work has studied the rights to privacy and data protection in the context of interactive television and personalisation for television programs.[403] This chapter focuses on data protection in the online personalised news context. The research is guided by two research questions: Does the special purposes provision in the GDPR apply to news personalisation? And, how does the GDPR provide people control over the processing of their personal data for news personalisation?

To limit the scope of the research, I take the following as a starting point. Personalisation generally involves the processing of personal data within the meaning of the GDPR.[404] Any data relating to identified or identifiable news users are personal data.[405] Someone is identifiable if they can be identified by name, IP address, cookies, or another online identifier—such as a browser fingerprint.[406]

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[399] Thurman et al., 'My friends, editors, algorithms, and I'.
[400] Monzer et al., 'User perspectives on the news personalisation process'.
[401] Monzer et al., 'User perspectives on the news personalisation process'.
[402] Article 29 Working Party, 'Opinion 02/2013 on apps on smart devices', 2013, p. 5, https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2013/wp202_en.pdf; R. Binns et al., 'Third party tracking in the mobile ecosystem', 2018, http://arxiv.org/abs/1804.03603.
[403] K. Irion and N. Helberger, 'Smart TV and the online media sector: User privacy in view of changing market realities', *Telecommunications Policy*, 41:3 (2017), 170–84, https://doi.org/10.1016/j.telpol.2016.12.013; I. Walden and L. Woods, 'Broadcasting privacy', *Journal of Media Law*, 3:1 (2011), 117–41, https://doi.org/10.5235/175776311796471323.
[404] Article 4(2) GDPR.
[405] Article 4(1) GDPR.
[406] Recital 30 GDPR.

Online news media which provides people with personalised news via a website or app are controllers, since they determine the purpose (namely: personalisation) and means (namely: requiring people to indicate interests; storing and accessing cookies; logging website and app use; etc.) of the data processing.[407] In its judgment on the case of *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v. Wirtschaftsakademie Schleswig-Holstein GmbH*, the CJEU ruled that an administrator of a fan page hosted on a social network is a joint controller with the social media company.[408] From this ruling can be inferred that news media with a page on Facebook or any other social network are a joint controller regarding personalisation via their social media page.

A company which processes personal data on behalf of another news media is a processor.[409] Online news media, especially small sized ones, often hire subcontractors to do the user profiling and personalisation if they do not have the in-house knowledge for these operations. App stores, where people can download news applications for their devices, also often have an important role in determining the level of data protection offered to users, as well as the controllers and processors.[410]

The GDPR's territorial scope covers online news media which conduct personalisation if they are established in the EU or have a processor in the EU,[411] or if they are neither established in the EU nor have an EU-based processor, yet are processing personal data of news users in the EU by monitoring their behaviour.[412] I will not assess the general principles relating to the processing of personal data,[413] whether valid consent is given,[414] or how sensitive news user data should be dealt with.[415]

In this chapter, I discuss provisions about the following topics: providing and withdrawing consent; entering and terminating a contract; objecting to processing in general and objecting to automated decisions-making specifically; right to rectification; right to erasure ('right to be forgotten'); right to data portability. I do not discuss the right to restriction of processing because it will be more useful for news users to rectify or erase data from their personal profile than just asking online news media temporarily not to use data about them.[416]

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[407] Article 4(7) GDPR. See on the notions of 'controller' and 'processor' B. Van Alsenoy, 'Regulating data protection: the allocation of responsibility and risk among actors involved in personal data processing' (KU Leuven, 2016), pp. 43–93, https://lirias.kuleuven.be/retrieve/396984.

[408] CJEU [GC], *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v. Wirtschaftsakademie Schleswig-Holstein GmbH*, 2018, C-210/16, para. 39, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1594971992539&uri=CELEX:62016CJ0210.

[409] Article 4(8) GDPR.

[410] A. Fong, 'The role of app intermediaries in protecting data privacy', *International Journal of Law and Information Technology*, 25:2 (2017), 85–114, https://doi.org/10.1093/ijlit/eax002.

[411] Article 3(1) GDPR.

[412] Article 3(2)(b) GDPR.

[413] Article 5 GDPR.

[414] Article 7 GDPR.

[415] Article 9 GDPR.

[416] The right to restriction of processing might be useful in other contexts, e.g.: if someone switches services, and the old service provider is legally obliged to store client data for a certain period, then the data subject can request the restriction of processing to ensure that their data will not be used for other goals.

4.2 The Application of the Special Purposes Provision to Personalisation

The GDPR obliges Member States to reconcile personal data protection with freedom of expression, including journalism.[417] More specifically, article 85, paragraph 2, GDPR requires Member States to include exemptions or derogations for journalistic data processing from a range of provisions of the GDPR in their domestic laws.[418] This provision also covers academic, artistic, and literary expression, and is generally called the 'special purposes provision'. If the special purposes provision applies to news personalisation, then online news media may be exempted from certain data protection rules when they process personal data for personalisation.

The special purposes provision is one example of where the GDPR allows Member States some discretion to adopt their own data protection rules.[419] Still, the EU Treaties oblige Member States not to impede the direct effect of the GDPR or hinder its simultaneous and uniform application in the EU with their national data protection measures.[420] Under the Data Protection Directive, the predecessor of the GDPR, Member States had implemented the special purposes provision very differently in their domestic laws.[421] As one of the aims of the GDPR is to harmonise national data protection legislation, a straightforward interpretation of the scope of the special purposes provision is necessary to limit national legal differences.

In order to get an impression of the effects of the application of the special purposes provision for the individual rights of news users, I take the Netherlands as an example. The special purposes provision implementing the GDPR under Dutch law establishes that news users do not have the rights to withdraw consent, to rectification, to erasure, to restrict processing, or to object to automated decision-making.[422] Furthermore, under the Dutch special purposes provision, online news media outside of Europe would not be obliged to appoint a representative in the EU to which people can turn if they have questions or complaints about the processing of their data for personalisation.[423]

The application of the special purposes provision to news personalisation would thus deprive news users of many of their data protection rights. From a user rights perspective could be argued that the special purposes provision therefore does not apply to news personalisation. In its judgment on the case of *Google Spain*, the CJEU indeed held that data protection rights 'as a

[417] Article 85(1) GDPR.
[418] Article 85(2) GDPR.
[419] J. Wagner and A. Benecke, 'National legislation within the framework of the GDPR', *European Data Protection Law Review*, 2:3 (2016), 353–61, https://doi.org/10.21552/EDPL/2016/3/10; K. Mc Cullagh, O. Tambou, and S. Bourton (eds), *National Adaptations of the GDPR* (Blog Droit Européen, 2019), https://wp.me/p6OBGR-3dP; D.-K. Kipker, 'How much diversity in data protection law does Europe need or can afford? Reports: Germany', *European Data Protection Law Review*, 3:2 (2017), 229–32 (p. 231).
[420] CJEU, *Fratelli Zerbone Snc v. Amministrazione delle finanze dello Stato*, 1978, C-94/77, paras 24–25, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1594973176685&uri=CELEX:61977CJ0094.
[421] D. Erdos, 'European Union data protection law and media expression: Fundamentally off balance', *International and Comparative Law Quarterly*, 65:1 (2016), 139–83, https://doi.org/10.1017/S0020589315000512.
[422] Article 43 Uitvoeringswet Algemene verordening gegevensbescherming ('UAVG').
[423] Article 43 UAVG.

general rule' override the interest of internet users' access to information.[424] Based on this judgment, legal scholars have pointed out that the CJEU seems to favour data protection over freedom of expression rights.[425] On the other hand, the CJEU delivered its judgment on *Google Spain* in the context of someone requesting a search engine to remove personal data relating to them so that these data would no longer be included in the search results and the hyperlinks to a news website.[426] Brkan therefore remarks that the CJEU's hierarchy of fundamental rights could be limited to such specific cases instead of applying to data protection in general.[427]

In the remainder of this section, I analyse if the special purposes provision applies to news personalisation. I use three legal interpretation techniques to uncover arguments for both sides of the argument and then draw a conclusion.[428]

4.2.1 Textual Approach

The starting point is the exact phrasing of the special purposes provision and the meaning of its terms:

> *For processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, Member States shall provide for exemptions or derogations (…) if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information.*[429]

The key term here is 'journalistic purposes'. Under EU law, journalism is the disclosure of information, opinions, or ideas to the public, although not all kinds of communication to the public are journalism.[430] To determine whether a communicative activity is journalism, a consideration should be made, among others, whether the information is published to draw the attention of society to an event of public interest or aims to contribute to public debate. The CJEU has determined that search engine operators do not engage in journalism.[431]

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[424] CJEU, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, para. 81 and 97.

[425] M. Jozwiak, 'Balancing the rights to data protection and freedom of expression and information by the Court of Justice of the European Union: The vulnerability of rights in an online context', *Maastricht Journal of European and Comparative Law*, 23:3 (2016), 404–20, https://doi.org/10.1177/1023263X1602300302; B. Petkova, 'Towards an internal hierarchy of values in the EU legal order: Balancing the freedom of speech and data privacy', *Maastricht Journal of European and Comparative Law*, 23:3 (2016), 421–38, https://doi.org/10.1177/1023263X1602300303; M. Brkan, 'The unstoppable expansion of the EU fundamental right to data protection: Little shop of horrors?', *Maastricht Journal of European and Comparative Law*, 23:5 (2016), 812–41 (p. 825), https://doi.org/10.1177/1023263X1602300505; W. G. Voss and C. Castets-Renard, 'Proposal for an international taxonomy on the various forms of the right to be forgotten: A study on the convergence of norms', *Colorado Technology Law Journal*, 14:2 (2015), 281–344 (p. 326).

[426] CJEU, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, para. 15.

[427] Brkan, 'The unstoppable expansion of the EU fundamental right to data protection', p. 826.

[428] See, for an overview of legal interpretation techniques: T. Lundmark and H. Waller, 'Using statutes and cases in common and civil law', *Transnational Legal Theory*, 7:4 (2016), 429–69, https://doi.org/10.1080/20414005.2016.1275590.

[429] Article 85(1) GDPR.

[430] See section 1.4.1.

[431] See section 1.4.1.

Obviously, when online news media produce and publish information for the wider public, they engage in journalism. The question at issue here is whether the specific communicative activity of personalisation is also journalism. With news personalisation, online news media distribute information to a selection of people rather than the public at large. In addition, news personalisation could be compared with the activities of online search operators. Both activities are concerned with making information more easily accessible and findable for people. On the basis of the case law of the CJEU and ECtHR, the argument could be made that personalisation is not journalism. However, this argument is not yet very convincing. It could be worthwhile to look into other textual elements of the GDPR and other interpretation techniques to determine how the special purposes provision should be interpreted.

Other textual elements of the GDPR indicate that the special purposes provision is narrow. The recitals to the GDPR stipulate that exemptions and derogations are allowed for 'processing of personal data solely for journalistic purposes'.[432] Besides that, the special purposes provision states that exceptions and derogations should be provided if they are necessary to reconcile the right to the protection of personal data with freedom of expression and information. In *Satamedia*, the CJEU even held that exemptions should be strictly necessary.[433] The necessity requirement implies a restrictive interpretation.[434] Were journalism to consist of news production and publication, an exemption for news personalisation activities would not be necessary to reconcile media freedom and data protection. Online news media may produce and publish as much content as they like, regardless of whether they are able to disseminate this content to their audiences in a personalised manner.

Van der Haak, Parks, and Castells argue however that, with today's online, networked journalism, 'the question of who gets which story and how becomes a matter of concern for many journalists'.[435] Napoli and Caplan also observe that the three core activities of media companies (production, distribution, and exhibition) have merged through digitisation and media convergence.[436] Others say it is part of the civic role of journalism to use personalisation systems to provide citizens with the information which they need.[437] Furthermore, personalised news systems essentially make decisions previously made by human editors, such as how to prioritise various news stories and who should see which news selection.[438] From this perspective,

[432] Recital 153 GDPR. The requirement that the special purposes provision applies to data processing 'solely for journalistic purposes' moved from the operative provisions in the Data Protection Directive to the recitals in the GDPR.
[433] CJEU, *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, para. 56.
[434] AG Kokott, *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, 2008, C-73/07, para. 59, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1594976562603&uri=CELEX:62007CC0073.
[435] B. van der Haak, M. Parks, and M. Castells, 'The future of journalism: Networked journalism', *International Journal of Communication*, 6 (2012), 2923–2938 (p. 2926).
[436] P. Napoli and R. Caplan, 'Why media companies insist they're not media companies, why they're wrong, and why it matters', *First Monday*, 22:5 (2017), https://doi.org/10.5210/fm.v22i5.7051.
[437] M. Hindman, 'Stickier news: What newspapers don't know about web traffic has hurt them badly - but there is a better way' (Harvard Kennedy School, 2015), pp. 17–18 and 31, https://shorensteincenter.org/stickier-news-matthew-hindman/.
[438] W. Loosen, *Four Forms of Datafied Journalism: Journalism's Response to the Datafication of Society* (University of Bremen, March 2018), p. 8 and 110, https://www.kommunikative-figurationen.de/fileadmin/user_upload/Arbeitspapiere/CoFi_EWP_No-18_Loosen.pdf.

personalised dissemination of news could be said to be part of journalism, hence it should fall under the special purposes provision. The digitalisation of the production and dissemination of news makes these activities harder to distinguish. The Article 29 Working Party foresaw a blurring of the borders between clear journalistic activities and related activities already in 1997:

> The moving of traditional media towards electronic publishing and the provision of on-line services seems to add further elements for reflection. The distinction between editorial activities and non-editorial activities assumes new dimensions in relation to on-line services which, unlike all traditional media, allow an identification of the recipients of the services.[439]

Finally, the ECtHR held that the right to freedom of expression as guaranteed in the ECHR also protects the means of transmission or reception of communication, in addition to the content, because any restriction imposed on communication technologies interferes with the right to receive and impart information.[440] The ECtHR further held that the right to freedom of expression does not apply solely to certain types of information or forms of expression, but also covers information of a commercial nature[441] and advertisements.[442] An expansive reading of the special purposes provision would be in line with the broad scope given to the right to freedom of expression by the ECtHR.

The textual approach remains inconclusive. A solution could be to determine that online news media can invoke the special purposes provision for news personalisation, whereas social media, search engines, and news aggregators cannot. In general, data protection authorities indeed fully apply data protection rules to social networking services and search engines.[443] Facebook notably sees itself as a social network, not as a kind of media.[444] In an interview, the CEO of Facebook, Mark Zuckerberg, said: 'In general, we're a social network. I prefer that because I think it is focused on the people part of it—as opposed to some people call it social media, which I think focuses more on the content. For me, it's always been about the people.'[445] If online news media do not want to qualify as a media entity, they cannot invoke the special purposes provision either.[446]

4.2.2 Historical Approach

Since the textual approach is inconclusive, I try to determine what the drafters of the special purposes provision intended when they drafted it, and what they would do when presented with

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[439] Article 29 Working Party, 'Recommendation 1/97: Data protection law and the media', 1997, p. 7, https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/1997/wp1_en.pdf.
[440] ECtHR, *Autotronic AG v. Switzerland*, 1990, 12726/87, para. 47, http://hudoc.echr.coe.int/eng?i=001-57630.
[441] ECtHR, *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, 1989, 10572/83, para. 26, http://hudoc.echr.coe.int/eng?i=001-57648.
[442] ECtHR, *Casado Coca v. Spain*, 1994, 15450/89, para. 35, http://hudoc.echr.coe.int/eng?i=001-57866.
[443] D. Erdos, 'Data protection confronts freedom of expression on the "new media" internet: the stance of European regulatory authorities', *European Law Review*, 40:4 (2015), 531–62.
[444] M. Carlson, 'Facebook in the news: Social media, journalism, and public responsibility following the 2016 Trending Topics controversy', *Digital Journalism*, 6:1 (2018), 4–20, https://doi.org/10.1080/21670811.2017.1298044.
[445] K. Swisher, 'Zuckerberg: The Recode interview', *Recode*, 18 July 2018, https://www.recode.net/2018/7/18/17575156/mark-zuckerberg-interview-facebook-recode-kara-swisher.
[446] Note however that, in litigation, Facebook lawyers have tried to make the argument that Facebook should be able to rely on freedom of expression protections for the media.

the facts of the case. Several EU Member States included exemptions for the media in their domestic data protection laws, long before the Data Protection Directive and the GDPR were enacted. In 1990-1992, the European legislator drafted the Data Protection Directive. The European legislator obliged Member States to grant exemptions for the news media because it wanted to harmonise the different national approaches towards personal data and the media.[447]

When the European legislator negotiated the GDPR in 2012-2016, it did not substantively change the special purposes provision, beyond that it integrated the case law of the CJEU in the recitals.[448] The European legislator also added to the recitals that the special purposes provision 'should apply in particular to the processing of personal data in the audiovisual field and in news archives and press libraries'.[449] I have not found any indication that the European legislator considered that the special purposes provision should apply to more ancillary activities performed by online news media, even though personalisation and other new technologies for journalism already existed when the GDPR was drafted.

Additionally, the Article 29 Working Party observed in 1997 that 'the ordinary data protection regime generally applies to non-editorial activities performed by the media' in various countries.[450] The Working Party concluded that derogations and exemptions should cover 'only data processing for journalistic (editorial) purposes including electronic publishing', and that any other form of data processing by journalists or the media should be subject to the ordinary rules of the Data Protection Directive.[451] The Working Party stressed that the distinction between editorial and other purposes pursued by the media was particularly relevant in relation to electronic publishing as the processing of subscriber data for billing or direct marketing should fall under the normal rules.[452]

A historical viewpoint suggests that the special purposes provision was written to protect the production and publication of news content, while news personalisation is a different kind of journalistic activity. The historical approach would therefore lead to the conclusion that the special purposes provision is not applicable to news personalisation. Overall, EU Member States, the European Commission, and Data Protection Authorities have always adopted a rather narrow understanding of the special purposes provision.[453]

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[447] European Commission, 'Amended proposal for a Council Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data COM(92) 422 final', 1992, p. 19, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:1992:0422:FIN.

[448] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) COM/2012/011 final', 2012, para. 121, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52012PC0011.

[449] Recital 153 GDPR.

[450] Article 29 Working Party, 'Recommendation 1/97', p. 6.

[451] Article 29 Working Party, 'Recommendation 1/97', p. 8.

[452] Article 29 Working Party, 'Recommendation 1/97', p. 8.

[453] D. Erdos, 'From the Scylla of restriction to the Charybdis of license? Exploring the scope of the "special purposes" freedom of expression shield in European data protection', *Common Market Law Review*, 52:1 (2015), 119–53 (p. 132 and further).

4.2.3 Functional Approach

Because the textual and historical approach leave doubt about the interpretation of the special purposes provision, I finally consider what the purpose of the exemption is. The special purposes provision was written to deal with situations in which news stories contain personal information of people involved in a story, such as their name or picture. By publishing such a story containing personal data, the media interferes with someone's fundamental right to the protection of personal data. In that case, strict application of the data protection rules could limit media freedom.[454] Legal restrictions on the processing of personal data by media actors are effectively a governmental decision on what information media can publish. Furthermore, the fears of sanctions or claims of violation of data protection law could have a chilling effect on the exercise of media freedom, a danger to which the ECtHR has also referred.[455] In other words, the function of the special purposes provision is to ensure that news media can produce and publish news stories containing personal data. The special purposes provision does not aim to exempt the processing of personal data in order to enable news dissemination.

4.2.4 Conclusion

I conclude that the special purposes provision does not apply to news personalisation insofar as news personalisation concerns the processing of personal data to disseminate news stories to specific audience members.[456] The media needs exemptions or derogations from the GDPR when strict data protection rules would hinder the production and publication of a news story. The special purposes provision therefore enables the media to freely use personal data in a publication, while news personalisation as discussed in this research is about the processing of personal data to disseminate stories. Besides, the media's right to freedom of expression and the public's right to receive information are only slightly interfered with when the media is required to comply with the GDPR to personalise the news. The GDPR does not block the media from disseminating news content; it merely conditions how the media may process personal data to disseminate news in a personalised manner.

4.3 The Right to Stop News Personalisation

If the special purposes provision in the GDPR does not apply to personalisation, then news users may exercise the full range of their data protection rights. People are empowered to control the processing of their personal data for news personalisation. By exercising their data protection rights, they might also influence the kind of news content which is recommended to them. Taken together, the data protection rights of news users boil down to two options: people may stop

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[454] AG Kokott, *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, para. 43.

[455] ECtHR [GC], *Cumpănă and Mazăre v. Romania*, para. 114; ECtHR [GC], *Goodwin v. the United Kingdom*, 1996, 17488/90, para. 39, http://hudoc.echr.coe.int/eng?i=001-57974; ECtHR [GC], *Morice v. France*, 2015, 29369/10, para. 127, http://hudoc.echr.coe.int/eng?i=001-154265; ECtHR [GC], *Axel Springer AG v. Germany*, 2012, 39954/08, para. 109, http://hudoc.echr.coe.int/eng?i=001-109034.

[456] The analysis would be different if online news media use personal data of news users to personalise the content itself, not just the distribution of the content. Researchers have already developed tools for that, see for example E. Adar et al., 'PersoLog: Personalization of news articles content', *Proceedings of the 2017 CHI Conference on Human Factors in Computing Systems* (ACM, 2017), pp. 3188–3200, https://doi.org/10.1145/3025453.3025631.

personalisation altogether or they may amend the profile on which the personalisation is based. In the section following, I discuss stopping personalisation, and in the one after that, amending personalisation profiles.

The way in which someone may (temporarily) stop personalisation depends on which legal ground the personal data processing is based. The GDPR states that personal data processing is lawful only if the data controller can rely on one of six legal grounds for processing.[457] In the context of news personalisation, four of the six legal grounds are relevant (consent; contract; public task; legitimate interests), which results in two ways to stop personalisation. A third way to stop personalisation is based on the rules for objecting to processing and automated decision-making. The legal ground to process personal data for news personalisation is important because it determines how people can intervene in the personalisation, and to what extent Member States can introduce more specific measures to ensure lawful and fair personalisation.

4.3.1 Withholding or Withdrawing Consent

News personalisation might be lawful if a news user has given consent to the processing of their data for personalisation.[458] When people install a news app and are asked to give consent, the news website or app should provide an option to refuse consent, instead of just the option to give consent.[459] People may withdraw consent at any time to stop the processing of their data for personalisation, and thus effectively stop personalisation.[460]

Online news media often need a set of personal data for several purposes, such as personalisation, billing, marketing, and advertising. These different purposes might be based on different legal grounds. If a set of personal data is covered by multiple legal grounds to legitimise the processing, online news media might still be able to process the data for another purpose after someone has withdrawn consent for personalisation.[461]

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[457] Article 6(1) GDPR provides that processing of personal data shall be lawful only if and to the extent that at least one of the following legal grounds applies: (a) the data subject has given consent; or processing is necessary for (b) the performance of a contract; (c) compliance with a legal obligation to which the controller is subject; (d) protecting someone's vital interests; (e) the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; (f) the purposes of the legitimate interests pursued by the controller or by a third party.
If news media collect data for personalisation via cookies or other tracking techniques, article 5(3) ePrivacy Directive requires them to obtain consent to store and access these tracking technologies on someone's device, regardless of the legal ground relied on to process the data further and regardless of whether the cookies collect personal data or any other kind of data. On the relationship between the GDPR and the ePrivacy rules, see among others F. Zuiderveen Borgesius, 'Personal data processing for behavioural targeting: which legal basis?', *International Data Privacy Law*, 5:3 (2015), 163–76, https://doi.org/10.1093/idpl/ipv011; A. Cormack, 'The draft ePrivacy Regulation: No more lex specialis for cookie processing?', *SCRIPTed*, 14:2 (2017), 345–57, https://doi.org/10.2966/scrip.140217.345.

[458] Article 6(1)(a) GDPR.

[459] Article 29 Working Party, 'Opinion 02/2013', p. 14.

[460] Article 7(3) GDPR.

[461] Article 29 Working Party, 'Guidelines on consent under Regulation 2016/679 (rev. 01)', 2018, p. 22, https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=623051.

4.3.1.1 Withdrawing consent for personalisation without detriment

News users' consent should be freely given, specific, and informed.[462] People cannot freely give consent if they are unable to refuse or withdraw consent without negative effects.[463] According to the Article 29 Working Party, this means that online news media should enable people to withdraw consent free of charge and 'without lowering service levels'.[464] The latter requirement is problematic if personalisation is regarded as an added-value service. If people do not consent to personalisation, it is impossible for website operators to continue to provide the same service level.

The rules on obtaining and withdrawing consent could have two consequences for the personalised news market. An argument could be made that online news media which ask people for consent for personalisation, should also offer a non-personalised service for people who do not want to give consent. Otherwise, these people would be pressured into accepting personalisation to receive at least some news via that service. The Dutch Data Protection Authority seemed to reason in a similar manner in a couple of enforcement actions regarding smart televisions. The Data Protection Authority found that television viewers should be able to choose between giving consent and withholding consent to personalisation services via their smart television,[465] instead of having to choose between giving consent or not having an internet connected television at all.

A further argument is that the entire news service market should be taken into account to assess whether consent is freely given, instead of just taking one particular service as a frame of reference. If there are personalised and non-personalised news services of a similar quality and orientation on the market, people can freely reject personalisation by one news outlet and still use other news sources. Yet, if there are only personalised news services on the market or just personalised services and non-personalised news services of a very different quality and orientation as the personalised ones,[466] and should these personalised news services not allow people to withhold consent for news personalisation specifically, then privacy-minded people who do not want personalisation, can opt only for not receiving news at all or receiving news of a different quality and orientation. Zuiderveen Borgesius and colleagues concluded the same for consent and tracking walls: 'It is dubious whether consent is still "freely given" if a company uses a tracking wall and there are no competitors that offer a similar, more privacy-friendly service. Somebody who does not want to disclose personal data would not have the possibility to use a certain type of service'.[467] Under such circumstances, people cannot freely give or withdraw consent for news personalisation. This scenario raises the question who should ensure that non-personalised news services are made available. Should the market or the government, via public service media or

[462] Article (4)11 GDPR. See also recitals 32, 40, 42, and 43 GDPR.
[463] Recital 42.
[464] Article 29 Working Party, 'Guidelines on consent', p. 21.
[465] Irion and Helberger, 'Smart TV and the online media sector', pp. 176–77.
[466] The Dutch DPA also found that, since there is no alternative for Dutch public broadcasting content, people cannot freely give consent to a cookie wall put up by the Dutch Public Broadcasting Organization, see Irion and Helberger, 'Smart TV and the online media sector', p. 180.
[467] F. Zuiderveen Borgesius et al., 'Tracking walls, take-it-or-leave-it choices, the GDPR, and the ePrivacy Regulation', *European Data Protection Law Review*, 3:3 (2017), 353–68 (p. 362), https://doi.org/10.21552/edpl/2017/3/9.

regulation, account for that? In principle, public service media could be well positioned to ensure that everyone has access to non-personalised and privacy protective news services.

4.3.1.2 Withdrawing consent specifically for personalisation

The GDPR requires that news users give consent for the specific purpose of personalisation.[468] In the context of news apps, simply clicking an 'install' button in the app store does not result in specific consent, so the app should obtain more specific consent for personalisation during the installation process.[469] People should be free to accept one purpose and not the other if their data is being processed for multiple purposes.[470] Research into privacy policies of Dutch and German newspapers indicates that online news media often combine consent for different processing purposes.[471] An exception is formed by several websites of Dutch public broadcasters. For example, on entering the website of the VPRO, consent is asked for personalised content, social media cookies, and targeted advertising.[472]

Some people have complained about the number of consent requests from Dutch public broadcasters,[473] but the broadcasters take the right approach in my view. Online news media may not consolidate consent for news personalisation, marketing, and targeted advertising.

Personalisation of news and targeted marketing or advertising are different processing purposes because they serve different objectives.[474] News personalisation has many objectives, among which are showing the diversity of content, pushing important stories which reached too few people, cater to niche audiences with specific interests, driving pay-per-article sales, or providing more context to news events.[475] The objectives of targeted marketing and advertising partially overlap with the objectives of news personalisation, such as growing readership, yet marketing and advertising do not have editorial goals like news personalisation.

Despite the rules on specific consent, internet users often do not distinguish between personalised news, targeted advertising, personalised movies and music, and responsive websites.[476]

> [Sarikakis and Winter found that] in the minds of [their participants] at least, social media are not distinguished in any significant manner vis-a-vis all online platforms and services, in terms of privacy: respondents spoke interchangeably about social media (Facebook and Twitter), Google, email, connection apps, and mobile technologies, highlighting unintentionally that the analytical distinctions I make

[468] Article (6)(1)(a) GDPR.
[469] Article 29 Working Party, 'Opinion 02/2013', p. 15.
[470] Recital 32 GDPR.
[471] M. Bastian, J. Harambam, and M. Makhortykh, 'Personalizing the news: How media outlets communicate their algorithmic recommendation practices online', 2018.
[472] *VPRO*, https://www.vpro.nl/.
[473] A. van der Struijk, '"NPO wil braafste jongetje van de klas zijn met cookiemelding"', *NOS*, 10 September 2018, https://nos.nl/op3/artikel/2249734-npo-wil-braafste-jongetje-van-de-klas-zijn-met-cookiemelding.html.
[474] Irion and Helberger, 'Smart TV and the online media sector', p. 174.
[475] Bodó, 'Selling news to audiences'; Van den Bulck and Moe, 'Public service media, universality and personalisation through algorithms'.
[476] Monzer et al., 'User perspectives on the news personalisation process'.

have little relevance in their lives, when it comes to the question of whether one can—and to what extent—protect one's privacy.[477]

What contributes to the confusion is that news websites sometimes display sidebars which contain both personalised recommendations for editorial content and targeted advertisements.[478] People are getting used to web personalisation and they just like or dislike a personalised online experience. In that regard, the legal framework does not suit people's mental model of the internet.

4.3.2 Terminating a Contract

News personalisation might be lawful if it is necessary for the performance of a news subscription or another kind of news contract, such as a paid news aggregation service.[479] News users may terminate the news subscription according to the rules of national contract law and accordingly stop personalisation. Almost half of the news publishers (44 per cent) surveyed by Reuters Institute in 2018 saw subscriptions, that is, contracts, as a very important source of digital revenue.[480]

According to the Article 29 Working Party, data processing cannot be legitimised by a contract if the controller imposes unnecessary data processing on the data subject, while claiming that the processing is necessary for the performance of said contract.[481] For example, webstores may not profile their customers based on items purchased while citing the sales contract as a legal ground, since such profiling is not necessary to deliver the good or service.[482] This means that if online news media currently sell non-personalised news services, they cannot simply implement news personalisation based on the argument that this is necessary for the performance of the contract. Furthermore, if online news media offer personalised news services and include consent for other data processing purposes—such as marketing, newsroom data analytics, or behavioural advertising—in their contract, the consent provisions should be clearly distinguishable from the other contract provisions.[483]

Many traditional news media are currently renewing their services by making their websites and apps more personalised. For existing news subscriptions, personalisation is not necessary for the performance of the contract considering that it was never part of the original service. These online news media will need to ask their subscribers for additional consent to personalise their news

[477] K. Sarikakis and L. Winter, 'Social media users' legal consciousness about privacy', *Social Media + Society*, 3:1 (2017), 1–14 (p. 10), https://doi.org/10.1177/2056305117695325.
[478] Kunert and Thurman, 'The form of content personalisation at mainstream, transatlantic news outlets: 2010–2016', pp. 16–17.
[479] Article 6(1)(b) GDPR.
[480] N. Newman, 'Journalism, media, and technology trends and predictions 2018' (Reuters Institute for the Study of Journalism, 2018), p. 5, https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2018-01/RISJ%20Trends%20and%20Predictions%202018%20NN.pdf.
[481] Article 29 Working Party, 'Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC', 2014, p. 16, https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp217_en.pdf.
[482] Article 29 Working Party, 'Opinion 06/2014', p. 17.
[483] Article 29 Working Party, 'Guidelines on consent', p. 15.

offerings. In the latter case, people may refuse consent or later withdraw consent to stop personalisation.[484]

4.3.3 Objecting to Processing

In addition to consent or a contract, news personalisation might also be lawful if it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller ('public task-ground'),[485] or if it is necessary for the purposes of the legitimate interests pursued by the controller or by a third party ('legitimate interest-ground').[486] When online news media rely on one of these two legal grounds, news users have the right to object to the processing of their personal data.[487] Such a right to object can be operationalised by giving people the opportunity to opt-out of processing.[488]

The difference between refusing to give consent or terminating a contract and objecting to personalisation, is that online news media cannot challenge the refusal of consent or a lawfully terminated contract. In contrast, in the case of objection, online news media may continue processing the personal data if they can give compelling legitimate grounds for the processing which override the interests of the data subject.[489] The online news media have the burden of proof to demonstrate that their interests overrides the interests of the data subject.[490] For example, online news media could argue that it is necessary to employ news personalisation for voice-assistant devices (without screens) because it is impossible to display a home page or side column on such devices. Furthermore, Member States may introduce more specific requirements for the personal data processing and other measures to ensure lawful and fair processing if the personalisation is based on the public task-ground.[491] National law could demand, for example, that news users should be able to reset their personalisation profile to continue with a clean slate.

4.3.3.1 May online news media invoke their public task or legitimate interest?

The question is under which conditions public and private online news media may invoke the public task or legitimate interest-ground for personalisation. In any case, public authorities may not invoke the legitimate interest-ground for processing carried out in the performance of their tasks.[492] The idea is that public authorities may process data in the performance of their tasks only if they are democratically authorised to do so by law and not when they themselves just decide that it is necessary.[493]

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[484] See previous subsection 'Withdrawing consent specifically for personalisation'.
[485] Article 6(1)(e) GDPR.
[486] Article 6(1)(f) GDPR.
[487] Article 21(1) GDPR.
[488] E. Kosta, 'Construing the meaning of opt-out: An analysis of the European, U.K. and German data protection legislation', *European Data Protection Law Review*, 1:1 (2015), 16–31.
[489] Article 21(1), second sentence, GDPR.
[490] Recital 69 GDPR.
[491] Article 6(2) GDPR.
[492] Article 6(1)(f) GDPR: 'Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks'.
[493] Article 29 Working Party, 'Opinion 06/2014', p. 27.

The GDPR does not define 'public authority'; According to the Article 29 Working Party, domestic law should define this term.[494] Some national laws implementing the GDPR indeed define 'public authority',[495] whereas others do not.[496] In spite of national differences, the Article 29 Working Party determined that public authority may be exercised by both public authorities and other natural or legal persons governed by public or private law, such as public service broadcasters (an example of the Working Party).[497] For the purpose of this research, I therefore assume that public service media are a public authority within the definition of the GDPR. Public service media may therefore not carry out personalisation based on the legitimate interest-ground.

Instead, public service media could lawfully personalise the news if the processing of personal data is necessary for the performance of their public interest task.[498] The legal basis for such processing should be laid down in Union or Member State law and the purpose of the processing (in this case, personalisation) should be necessary for the task to be performed (in this case, the public service remit).[499] The recitals to the GDPR state that no specific law is required for each individual processing operation.[500] The Article 29 Working Party further specified that the legal basis should be 'specific and precise enough in framing the kind of data processing that may be allowed'.[501] Moreover, the Union or Member State law should meet an objective of public interest and be proportionate to the legitimate aim pursued.[502] The latter conditions echo the general conditions of the first paragraph of article 52 of the EU Charter for limitations on fundamental rights and freedoms.[503] We can imagine that a domestic law which, for example, requires public service media to collect personal data of news users across the entire internet, beyond the websites of these public service media themselves, would not be proportionate to the aim of delivering diverse news.

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[494] Article 29 Working Party, 'Guidelines on Data Protection Officers ('DPOs') (rev. 01)', 2017, p. 6, https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=612048. With thanks to @Paapst for pointing this out.

[495] See for example article 5 of the Belgium law implementing the GDPR.

[496] See for example the Dutch Uitvoeringswet Algemene verordening gegevensbescherming (GDPR Implementation Act). Nonetheless, the Explanatory Memorandum to the Dutch act implementing the GDPR clarifies that the term 'public authority' can be understood in reference to general concepts of Dutch administrative law. With thanks to @ICTRecht for providing this relevant information.

[497] Article 29 Working Party, 'Guidelines on DPOs', p. 6.

[498] Article 6(1)(e) GDPR.

[499] Article 6(3) GDPR.

[500] Recital 45 GDPR.

[501] Article 29 Working Party, 'Opinion 06/2014', p. 22. This opinion of the Article 29 Working Party relates to the Data Protection Directive. The Data Protection Directive did not require that the public interest task was laid down in Union or Member State law. Nevertheless, the Article 29 Working Party considered that the 'public task will have been typically attributed in statutory laws or other legal regulations'. In that context, it added that 'the legal basis should be specific and precise enough in framing the kind of data processing that may be allowed'. We presume that this consideration of the Article 29 Working Party also holds for the GDPR, which does explicitly require a legal basis for the public interest task.

[502] Article 6(3), last sentence, GDPR.

[503] Article 52(1) EU Charter: 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

The GDPR allows for Union or Member State law to appoint a public authority, another natural or legal person governed by public law, or a natural or legal person governed by private law, to carry out a public interest task.[504] Cases in point, the United Kingdom and France have private media with public service commitments (respectively ITV and TF1).

On the basis of these provisions, personalisation by public service media or private media with public service commitments can be lawful if Union or Member State law specify a public interest task for such media. This law serves a public interest and is proportionate, and personalisation can be argued to be necessary for this public remit. For example, the Dutch Media Act defines the public media task as providing media offerings which aim to provide a large and diverse audience with information, culture, and education, via all available channels.[505] The Dutch public media task also includes stimulating innovation regarding media offerings using new opportunities to provide media content to the public through new media and dissemination technologies.[506] On this basis, Dutch public media could probably use personalisation to perform their public media task. Research has also found that many public service media indeed see personalisation as a way to realise their public task of universality, that is, the provision of diverse news to all citizens.[507]

Private sector media could lawfully personalise the news if it were necessary for the purpose of their own legitimate interest or a third party's interest, except where the interests or fundamental rights of the news user outweigh these legitimate interests.[508] The Article 29 Working Party found that the interest of controllers in getting to know their customers' preferences to improve the personalisation of their offers and supply products and services which better meet the needs and desires of the customers, is a legitimate interest.[509] Online news media may invoke their own commercial interest to personalise news. Besides, the Article 29 Working Party has determined that organisations may also cite more societally relevant interests, such as the interest of the news media to publish information about government corruption.[510] Private online news media could therefore argue that news personalisation is in the public interest.

4.3.3.2 Objecting

If online news media rely on the public task or legitimate interest ground, people may object to the personalisation on grounds relating to their particular situation.[511] In contrast, people cannot

[504] Recital 45 GDPR.
[505] Article 2.1(1)(a) Dutch Media Act.
[506] Article 2.1(1)(c) Dutch Media Act.
[507] Van den Bulck and Moe, 'Public service media, universality and personalisation through algorithms', p. 16.
[508] Article 6(1)(f) GDPR. This section only focuses on the question whether news personalisation is a legitimate interest. The legitimate interest-ground also demands that organisations show that the processing is necessary, and that they balance their legitimate interest with the data subject's interests. If the data subject's interests override the legitimate interest, an organisation may not invoke the legitimate interest-ground.
[509] Article 29 Working Party, 'Opinion 06/2014', p. 25.
[510] Article 29 Working Party, 'Opinion 06/2014', p. 24.
[511] Article 21(1) GDPR. Under article 14(a) Data Protection Directive, data subjects had to give compelling legitimate grounds relating to their situation to successfully object to the processing. Under the GDPR, data subjects only need to proffer grounds for objection and controllers need to give compelling legitimate grounds to rebut them. In that regard, the GDPR entails a shift of the burden of proof; see Article 29 Working Party, 'Guidelines on consent', p. 19. The controller now has to proof that the processing is legitimate, whereas the data subject previously had to demonstrate that they had good reasons to object. This shift of the burden of proof is reasonable, since the controller is in a better position to know all the implications of the processing;

object if the personalisation is based on consent or a contract.[512] The reason for this limitation is that people already have control over their personal data through (not) providing consent or (not) signing a contract. The right to object compensates for the fact that people have no initial control over their personal data when an organisation invokes the public task or legitimate interest-ground.

Online news media may rebut the objection to personalisation by demonstrating that their compelling legitimate grounds for the processing override the interests or rights of the news user.[513] Online news media could try to argue, for example, that news personalisation is necessary to carry out their task to educate people on political affairs, for which people may have different entry levels requiring different kinds of news messages. When the lawmaker determines that certain data should be processed for a public task or when online news media invoke the legitimate interest ground, they can consider the interests of a group of data subjects. However, it is practically impossible for them to consider the interests of each individual data subject at that stage. Should an individual news user objects to the processing, online news media need to consider this news user's personal situation and balance it with the public interest or the media's own legitimate interests.[514]

If a news user objects to personalisation, they may ask the controller to restrict the processing.[515] Online news media should then interrupt or not even start the personal data processing.[516] While online news media are assessing whether the public interest or its own interest overrides that of the data subject, the processing should already be restricted in the meantime.[517] After a successful objection (that is, if no overriding legitimate grounds are found for the processing), the news user can ask online news media to erase the data.[518]

When someone successfully objects and the controller restricts the processing, other data processing operations on the same data may continue, such as storing the data. For example, if you object to direct marketing by phone, the marketer will put your telephone number on a do-not-call list, but it will not delete your telephone number and stop processing your personal information altogether.[519] In the context of personalisation, people might thus successfully object to personalisation, after which their data could still be used for other processing operations, such as building models and profiles for collaborative filtering. Online news media which expect difficulties for their personalisation models should people erase their data, could try to nudge

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see C. de Terwangne, 'The right to be forgotten and the informational autonomy in the digital environment' (European Commission, 2013), p. 16, https://op.europa.eu/en/publication-detail/-/publication/6c4c7bc6-8619-4d21-ae57-30de1a349df1. The shift of the burden of proof also fits in with the introduction of the new accountability principle of article 5(2) GDPR.

[512] Note that the right not to be subject to a decision based on automated processing is available in the context of consent or a contract; see next subsection 'Not Being Subject to Automated Individual Decision-making'.

[513] Article 21(1) and Recital 69 GDPR.

[514] CJEU, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, para. 76.

[515] Article 18(1)(d) GDPR.

[516] Article 29 Working Party, 'Guidelines on consent', p. 18.

[517] Article 18(1)(d) GDPR.

[518] Article 17(1)(c) GDPR.

[519] Terwangne, 'The right to be forgotten and the informational autonomy in the digital environment', p. 21.

people who do not want personalisation towards only objecting to processing for the purpose of personalisation instead of requesting erasure.

4.3.4 Not Being Subject to Automated Individual Decision-Making

Article 22 GDPR gives data subjects the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning them or significantly affects them otherwise.[520] I see news personalisation as a form of decision-making based on automated processing in the sense that every time a news algorithm decides to recommend a particular news item to someone, this recommendation is based on automated processing such as collecting and analysing personal data of news users. The implications of the right not to be subject to automated decision-making are potentially huge as it could mean that online news media are prohibited from using news personalisation.[521] However, as we will see, the right not to be subject to automated decision-making is conditional and only applies to news personalisation in very limited situations.

The first question is whether news personalisation produces legal effects for news users or significantly affects them in another fashion. The notion of 'legal effect' was already used in the Data Protection Directive. The Article 29 Working Party explained legal effect along similar lines as scholars had interpreted it previously, namely as an effect on someone's legal rights or obligations, such as the freedom to associate or to vote in an election.[522] A legal effect may also be an effect on someone's legal status or rights under a contract, the denial of a particular social benefit granted by law, or the refused admission to a country.[523] The Article 29 Working Party also established that the right not to be subject to automated decision-making covers only 'serious impactful effects'.[524] Apparently, the notion of 'legal effect' has both a substantive and a relative element: is there an established legal right which is affected, and if so, is the effect sufficiently serious?

To determine if news personalisation has legal effects for news users, we should look at the fundamental rights of news users as discussed in Chapters 2 and 3. News personalisation could affect the freedom to hold and change beliefs, which is an unqualified and absolute right.[525] News personalisation could also affect the freedom of opinion, which is an absolute right as well.[526] However, as was shown, the threshold is high for an interference with freedom of opinion and

[520] Article 22(1) GDPR.
[521] Following the Article 29 Working Party, we see the 'right' not to be subject to automated decision-making as a prohibition for organisations, rather than a right which people should exercise; see Article 29 Working Party, 'Guidelines on consent' (n 461), at 19-20.
[522] Article 29 Working Party, 'Guidelines on automated individual decision-making and profiling for the purposes of Regulation 2016/679 (rev. 01)', 2018, p. 21, https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=612053; L. A. Bygrave, 'Minding the machine: Article 15 of the EC Data Protection Directive and Automated Profiling', *Computer Law & Security Review*, 17:1 (2001), 17–24, https://doi.org/10.1016/S0267-3649(01)00104-2; I. Mendoza and L. A. Bygrave, 'The right not to be subject to automated decisions based on profiling', in T. Synodinou et al. (eds), *EU Internet Law: Regulation and Enforcement* (Springer, 2017), pp. 77–98.
[523] Article 29 Working Party, 'Guidelines on automated decision-making and profiling', p. 21.
[524] Article 29 Working Party, 'Guidelines on automated decision-making and profiling', p. 21.
[525] See section 2.2.3.
[526] See section 2.2.4.

freedom of thought. Personalisation would have to be indoctrinating or coercing. Showing someone certain news items might influence their opinion-formation or thought processes but media effects are not so strong that they could be considered to be indoctrination or coercion.[527]

Furthermore, news personalisation could affect the right to receive information. However, if someone is not recommended the news items which they are interested in, this is a relatively modest effect on their rights compared to the effects article 22 intends to cover.

News personalisation could have a serious, impactful legal effect on the right to receive information of news users should it lead to online filter bubbles[528] or echo chambers.[529] The existence of filter bubbles or echo chambers in the online information sphere is widely disputed.[530] Nevertheless, experimental studies found that personalisation technologies increase the extent to which people selectively expose themselves to political news articles which align with their own political views, and decreases their exposure to contrasting political viewpoints.[531] Research also indicates that, while people are not in filter bubbles on average, certain groups of individuals might be more susceptible to homogeneous news diets.[532] Under such conditions, news personalisation could severely impact people's right to receive information from diverse sources and perspectives.

If news personalisation does not produce real legal effects, it could still significantly affect news users. The GDPR does not give a standard for a similarly significantly effect, but the recitals provide as examples the automatic refusal of an online credit application and e-recruiting practices without any human intervention.[533] The Article 29 Working Party added that, for data processing to significantly affect someone, the effects must be sufficiently great or important to be worthy of notice.[534] That is to say, the decision must have the potential to significantly affect the circumstances, behaviour or choices of the people concerned; have a prolonged or permanent impact on the data subject; lead to the exclusion or discrimination of people.[535]

Personalisation could significantly affect people if it leads, for example, to certain groups being excluded from the democratic process because they are profiled as people who are uninterested

[527] See, for a different analysis, J. Vermeulen, 'Recommended for you: "You don't need to thought control". An analysis of news personalisation in light of Article 22 GDPR', in M. Friedewald et al. (eds), *Privacy and Identity Management: Data for Better Living: AI and Privacy* (Springer, 2019), pp. 190–205, https://doi.org/10.1007/978-3-030-42504-3.

[528] Pariser, *The Filter Bubble*.

[529] Sunstein, *Republic.Com 2.0*.

[530] Zuiderveen Borgesius et al., 'Should we worry about filter bubbles?'; Barberá et al., *Social Media, Political Polarization, and Political Disinformation*.

[531] I. Dylko et al., 'Impact of customizability technology on political polarization', *Journal of Information Technology & Politics*, 15:1 (2018), 19–33, https://doi.org/10.1080/19331681.2017.1354243; I. Dylko et al., 'The dark side of technology: An experimental investigation of the influence of customizability technology on online political selective exposure', *Computers in Human Behavior*, 73 (2017), 181–90, https://doi.org/10.1016/j.chb.2017.03.031; I. B. Dylko, 'How technology encourages political selective exposure', *Communication Theory*, 26:4 (2016), 389–409, https://doi.org/10.1111/comt.12089.

[532] Bodó et al., 'Interested in diversity'.

[533] Recital 71 GDPR.

[534] Article 29 Working Party, 'Guidelines on automated decision-making and profiling', p. 21.

[535] Article 29 Working Party, 'Guidelines on automated decision-making and profiling', p. 21.

in political news. However, unveiling whether such impacts on democratic inclusion would be prolonged or permanent or just temporary, would require longitudinal studies into the effects of news personalisation.

My assessment shows that the application of article 22 GDPR to news personalisation, is limited. Other conditions in this provision further restrict its application. The right not to be subject to automated decision-making does not apply if the personalisation is necessary for the performance of a news subscription, or is based on Union or Member State law or the news users' explicit consent.[536]

According to the Article 29 Working Party, the term 'explicit' refers to the way in which data subjects express their consent. The Working Party has suggested that, in the online context, people may give explicit consent by typing in a statement in an electronic form, sending an email, electronically signing, or using two-stage verification, during which people first click 'agree' and then receive a verification code per email or text message to confirm the agreement.[537] Normal consent requires only a clear affirmative act such as ticking a box when visiting an internet website or adjusting settings in a browser.[538] Online news media could thus avoid the application of article 22 GDPR by asking for explicit consent. However, obtaining explicit consent is laborious and requires a more complex user interface and interactions than normal consent.[539]

Furthermore, the criterion of 'solely' in article 22 means that the right not to be subject to automated decision-making does not apply if there is meaningful human oversight of the personalisation.[540] However, news personalisation will generally involve large groups of news users, so it is unrealistic to expect that online news media can hire editors who oversee every decision to recommend a particular news item. At best, journalists, editors, or developers can monitor the overall workings of the personalisation system.

In conclusion, news users may have the right not to be subject to a personalisation decision if the personalisation is based on consent, is necessary for the performance of a task carried out in the public interest or in the exercise of official authority, or if it is necessary for the purposes of the legitimate interests pursued by the controller or a third party.[541] The right not to be subject to automated decision-making could mean that online news media are prohibited, under some circumstances, from using personalisation. Online news media will need to assess whether they qualify for one of the exceptions to the right, and if they do not, they need to ensure that news personalisation has no legal or similarly significant effects on news users. This will require online news media to check that people do not end up in filter bubbles or miss out on information which

[536] Article 22(2) GDPR. Note that these three exceptions resemble three of the legal grounds which legitimise personal data processing, yet they are not exactly the same; People cannot be said only to have a right not to be subject to automated decision-making in the case of the other three legal grounds,.
[537] Article 29 Working Party, 'Guidelines on consent', pp. 18–19.
[538] Article 4(11) and Recital 32 GDPR.
[539] F. Ferretti, 'Not-so-big and big credit data between traditional consumer finance, fintechs, and the Banking Union: Old and new challenges in an enduring EU policy and legal conundrum', *Global Jurist*, 18:1 (2018), p. 27, https://doi.org/10.1515/gj-2017-0020.
[540] Article 29 Working Party, 'Guidelines on automated decision-making and profiling', p. 21.
[541] Article 22(a) and (b) GDPR.

they need to make informed political decisions, engage with issues which they personally find important, or develop into the person they want to be.

4.4 The Right to Amend the User Profile for News Personalisation

In this section, I outline the set of rights which give people a right to amend their personal profiles on which the news personalisation is based. Such a right embodies the right to informational self-determination: the right of every individual to be in control of the image of themselves which they project to society.[542] The right to amend a personal profile consists in a right to rectify, erase, and restrict the processing of data.

4.4.1 … By Rectifying Data

News users have the right to have news media rectify inaccurate personal data and have incomplete personal data completed.[543] The criterion of 'inaccurate' refers to the accuracy principle: personal data should be accurate and be kept up to date.[544] The right to rectify data is mirrored in online news media's obligation to take every reasonable step to ensure that personal data which are inaccurate, are erased or rectified without delay.[545] When someone contests the accuracy of their personal data and the controller is still in the process of verifying if the data are accurate, this person has the right to obtain a restriction of processing in the meantime.[546]

For the right to rectify (and the right to erasure as discussed in the next subsection), I distinguish between three types of personal data: data submitted by news users themselves, for example by filling in their name, address, and age, or by ticking boxes for topics or sources which they are interested in; data observed by the controller, such as website usage and search activities; inferred data, which are data inferred by the controller from submitted and observed data, such as someone's predicted interests.[547]

The right to rectify data applies to submitted, observed, and inferred data. The Article 29 Working Party has stated that people may:

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[542] Y. Poullet, 'Data protection between property and liberties: A civil law approach', in G. Vandenberghe, H. Kaspersen, and A. Oskamp (eds), *Amongst Friends in Computers and Law: A Collection of Essays in Remembrance of Guy Vandenberghe* (Kluwer, 1990), pp. 161–81 (p. 169).

[543] Article 16 GDPR.

[544] Article 5(1)(d) GDPR.

[545] Article 5(1)(d) GDPR.

[546] Article 18(1)(a) GDPR.

[547] The World Economic Forum distinguished between volunteered, observed, and inferred data; see World Economic Forum, 'Personal data: The emergence of a new asset class' (World Economic Forum, 2011), p. 7, https://www.weforum.org/reports/personal-data-emergence-new-asset-class; Article 29 Working Party, 'Guidelines on the right to data portability (rev. 01)', 2017, pp. 9–10, Guidelines on data portability; G. Malgieri, 'Property and (intellectual) ownership of consumers' information: A new taxonomy for personal data', 2016, https://papers.ssrn.com/abstract=2916058. We could also add acquired data, which is data obtained by organisations via data brokers or other organisations.

> challenge the accuracy of the data used and any grouping or category that has been applied to them. The rights to rectification and erasure apply to both the 'input personal data' (the personal data used to create the profile) and the 'output data' (the profile itself or 'score' assigned to the person.[548]

Where the Working Party refers to 'personal data used to create the profile', this should include submitted and observed data, since the GDPR states that everyone has a right to rectify 'personal data concerning him or her'.[549]

By rectifying inferred data, news users may change their profile on which the news personalisation is based. This is useful since someone's profile determines the quality of the personalised news offer which they receive. Furthermore, some news users experience anxiety about the idea that there is a profile of them somewhere online, disregarding how their profile is used.[550] Exercising control over their profile might relieve some people's minds.

The right to have incomplete personal data completed is important because an algorithm processes only the bits of personal data which it can read.[551] These pieces of data stand in for actual users, while algorithms neglect or roughly approximate personal characteristics which are less legible.[552] Through their right to have personal data completed, news users can add information about less algorithmically legible characteristics and improve the quality of the personalisation which they receive. The right to rectification thus enables people to engage and tinker with the personalisation process, instead of simply stopping personalisation when they feel uncomfortable with the profile which is being compiled on them.

An open question is whether people have a right to rectify only objectively inaccurate data or also subjectively inaccurate data.[553] For example, is someone entitled to rectify only elements such as their age or geolocation, or also personal characteristics such as 'prefers sensational local news' if they aspire to be a different kind of news user? The Article 29 Working Party found that 'accurate' refers to matter of fact,[554] which suggests that the Working Party holds that only objectively inaccurate facts may be rectified. However, the Working Party developed this notion of accuracy in the context of delisting or erasing search results. In that case, a narrow reading of 'inaccurate' is justified because it minimises the implications of the removal of information for other fundamental rights, such as the right to freedom of expression and information of other

[548] Article 29 Working Party, 'Guidelines on automated decision-making and profiling', pp. 17–18.
[549] Article 16 GDPR.
[550] Monzer et al., 'User perspectives on the news personalisation process'.
[551] T. Gillespie, 'The relevance of algorithms', in T. Gillespie, P. J. Boczkowski, and K. A. Foot (eds), *Media Technologies : Essays on Communication, Materiality, and Society* (MIT Press, 2014), pp. 167–94 (p. 173).
[552] Gillespie, 'The relevance of algorithms', pp. 173–74.
[553] See for a critical discussion of the accuracy principle, J. Chen, 'The dangers of accuracy: Exploring the other side of the data quality principle', *European Data Protection Law Review*, 4:1 (2018), 36–52, https://doi.org/10.21552/edpl/2018/1/7.
[554] Article 29 Working Party, 'Guidelines on the implementation of the Court of Justice of the European Union judgement on "Google Spain and Inc v. Agencia Española de Protección de Dates (AEPD) and Mario Costeja González" C-131/12', 2014, p. 15.

internet users. The context of personal profiles for news personalisation holds no such risks to other people's rights should people be allowed to rectify subjectively inaccurate data as well.

4.4.2 … By Erasing Data

Instead of rectifying personal data, news users may also demand the erasure of personal data concerning them ('right to be forgotten'), from online news media in the following situations: the personal data are no longer necessary for the personalisation or have been unlawfully processed;[555] the news user has withdrawn consent and no other legal grounds for the processing are present; [556] they object to the processing pursuant to article 21(1); [557] the online news organisation is legally obliged to erase the data;[558] the personal data had been collected when the news user was still a child.[559] The right to erase personal data gives people control over their profile on which personalisation is based, because it enables them to start afresh and to reset their profile.

When a news user objects to processing which is based on the public task or legitimate interest-ground and requests erasure, online news media should grant it if there are no overriding legitimate grounds for the processing.[560] Online news media could try to argue, for example, that the personal data concerned are needed to maintain the algorithmically created model for news personalisation, which is also used to provide relevant personalisation to other news users who are similar to the person who makes the request. In such a case, the right to erasure requires that online news media balance the various interests at stake, while taking into account the particular situation of the news user (and not just the interest of the data subjects involved as an undefined group).[561] When the legislator determines that certain data should be processed for a public task, or when an organisation decides to legitimise data processing on the legitimate interest-ground, they simply consider the interests of a group of data subjects but not of each individual data subject. However, it is hard to see how someone's data protection interests could be outweighed by the interest of the news provider to keep its profiling models intact, or the interest of other news users to receive relevant personalisation.

The right to erasure is not applicable when the processing of personal data is necessary for, among others, exercising the right of freedom of expression and information.[562] The reference to freedom of expression in this provision is broader than the reference to freedom of expression in the special purposes provision of article 85(2) GDPR. The special purposes provision provides an arrangement for freedom of expression by journalists, academics, artists, or literary authors, while the right to erasure contains an arrangement for freedom of expression in general—not just freedom of expression as exercised by a specific group of people. Nevertheless, in the context of this research, the right to erasure only has to be balanced with the right to freedom of expression

[555] Article 17(1)(a) and (d) GDPR.
[556] See section III.
[557] Article 17(1)(c) GDPR.
[558] Article 17(1)(e) GDPR.
[559] Article 17(1)(f) GDPR.
[560] Article 17(1)(c) in conjunction with articles 21(1) and 6(1)(e) or (f) GDPR.
[561] CJEU, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, p. 330.
[562] Article 17(3)(a) GDPR.

of online news media. I am interested in personal data in personalisation profiles, not personal data in news stories. Erasing data from a personalisation profile could only limit how online news media can express themselves by providing personalisation.

Like in the context of the special purposes provision, the question is whether news personalisation is necessary for exercising the right of freedom of expression and information of online news media. Online news media can produce and publish news without being able to disseminate it in a personalised manner. Accordingly I argue that the right to erasure applies as usual to personal data processed in the context of news personalisation.

In addition, the right to erasure does not apply in case the processing of personal data is necessary for the performance of a task carried out in the public interest.[563] In that case, Union law or Member State law should lay down the basis for the processing and this law should be proportionate to the public interest pursued.[564] If public service media personalise news in the performance of their public task, people might not have a right to erasure. This is an unsatisfying conclusion from the perspective of individual rights protection, but public service media are free to offer an option to request erasure nonetheless.

When a controller has made personal data public and is obliged to erase some of it, the controller should inform other controllers which are also processing these data that the data subject has requested the erasure of any links to the data.[565] This obligation is relevant for news personalisation because online news media might share data and algorithmic models. For example, in Germany and the United Kingdom, publishers are pooling personal data in platforms for targeted advertising and single log-in procedures.[566] Similar data pooling initiatives could develop for news personalisation, especially if these data pools can help online publishers to counter the dominance of social media and search engines, which have better access to user data. People whose personal data ends up in one of such data pools should be able to erase their data by filing a request to one news provider, after which the provider should inform other partners in the data pool that the data should be erased.

Many scholars are critical of the right to be forgotten because it could lead to private censorship.[567] However, in the personalised news context, the right to erasure holds no risk of becoming a tool of private censorship. There is a difference between data which was communicated to the public in a news story or hyperlink and data which is stored in the back-end

[563] Article 17(3)(b) GDPR. The right to erasure does not apply in more circumstances than mentioned, but these are not relevant in the context of news personalisation.
[564] Article 6(3) GDPR.
[565] Article 17(2) GDPR.
[566] J. Davies, 'German publishers are joining forces against the duopoly', *Digiday*, 30 August 2017, https://digiday.com/media/german-publishers-joining-forces-duopoly/; J. Davies, 'German publishers are pooling data to compete with Google and Facebook', *Digiday*, 8 June 2016, https://digiday.com/uk/german-publishers-pool-data-compete-google-facebook/; R. Garcia, 'UK news publishers unite to create shared ad network', *Editor&Publisher*, 13 September 2018, https://www.editorandpublisher.com/a-section/uk-news-publishers-unite-to-create-shared-ad-network/.
[567] R. C. Post, 'Data privacy and dignitary privacy: Google Spain, the right to be forgotten, and the construction of the public sphere', *Duke Law Journal*, 67:5 (2017), 981–1072 (p. 1067); D. Keller, 'The new, worse "right to be forgotten"', *Politico*, 2016, https://www.politico.eu/article/right-to-be-forgotten-google-defense-data-protection-privacy/.

systems of online news media, including inferred data.[568] The erasure of public data might be critiqued from a freedom of expression and information perspective, contrasting with the erasure of back-end data rightfully enabling people to control how they are represented in systems which are used to make decisions about or for them.

As already stated in earlier in this section, a set of guidelines from the Article 29 Working Party indicates that people can exercise a right to erasure over submitted, observed, and inferred data.

4.5 The Right to Move the User Profile to Other Personalised News Providers

When the processing of personal data for news personalisation is based on consent or a contract, news users have the right to receive the personal data concerning them and to transmit those data to other online news media without hindrance from the online news organisation to which they had initially provided the data ('right to data portability').[569] Additionally, people have the right to have their personal data transmitted directly from one online news media to another, at least where technically feasible.[570] In the latter case, people instruct online news media to pass the data on to another online news organisation. When people exercise their right to data portability, they may exercise their right to erasure at the same time, but they do not need to do so.[571] Therefore, online news media do not need to delete the data from their own systems automatically when people port their data to another service.

The right to data portability covers data which someone has provided to a controller,[572] i.e., submitted data such as name, address, or stated interests. According to the Article 29 Working Party, provided data includes observed data, such as activity logs, website usage, and search activities.[573] It reasoned that people 'provide' such data by virtue of the use of the service or device.[574] The right to data portability excludes inferred data, such as personal interests inferred from other data.[575]

Some commentators see the right to data portability as a tool to prevent lock-in effects and to increase competition among online services.[576] When people can download their data and

[568] See similarly, D. Keller, 'The right tools: Europe's intermediary liability law and the EU 2016 General Data Protection Regulation', *Berkeley Technology Law Journal*, 33:1 (2018), 297–378 (p. 303).
[569] Article 20(1) GDPR.
[570] Article 20(2) GDPR. The standard for 'technical feasible' is not mentioned.
[571] Article 20(3) GDPR.
[572] Article 20(1) GDPR.
[573] Article 29 Working Party, 'Guidelines on the right to data portability (rev. 01)', p. 9.
[574] Article 29 Working Party, 'Guidelines on the right to data portability (rev. 01)', p. 9.
[575] Article 29 Working Party, 'Guidelines on the right to data portability (rev. 01)', pp. 10–11.
[576] P. De Hert and V. Papakonstantinou, 'The proposed data protection Regulation replacing Directive 95/46/EC: A sound system for the protection of individuals', *Computer Law & Security Review*, 28:2 (2012), 130–42 (p. 190), https://doi.org/10.1016/j.clsr.2012.01.011; P. De Hert et al., 'The right to data portability in the GDPR: Towards user-centric interoperability of digital services', *Computer Law & Security Review*, 34:2 (2018), 193–203, https://doi.org/10.1016/j.clsr.2017.10.003; A. D. Vanberg and M. B. Ünver, 'The right to data portability in the GDPR and EU competition law: odd couple or dynamic duo?', *European Journal of Law and Technology*, 8:1 (2017), http://ejlt.org/article/view/546; I. Graef, M. Husovec, and N. Purtova, 'Data portability and data control: Lessons for an emerging concept in EU law', *German Law Journal*, 19:6 (2018), 1359–98 (p. 1365).

conveniently import these into another service, they can more easily switch to a better service. The Article 29 Working Party nevertheless stressed that, while the right to data portability may enhance competition, it is most importantly a data protection right which supports user choice, control, and empowerment.[577]

For personalised news users, the right to data portability would be useful if it would enable them to switch to another news service and receive relevant personalisation immediately on starting to use the new service (on the basis of their old profile). However, as discussed, the right to data portability only covers submitted and observed data, whereas most personalisation happens on the basis of inferred data. The right to data portability will thus be useful solely for personalisation based on explicit feedback and not for personalisation based on implicit feedback.

People have the right to receive their data in a structured, commonly used and machine-readable format.[578] Nevertheless, data controllers are encouraged but not obliged to develop actual interoperable formats which enable data portability.[579] Furthermore, the right to data portability does not lead to an obligation for online news media to build processing systems which are technically compatible.[580] Experience in the telecom sector with number portability suggests that the right to have personal data transmitted directly from one online news media to another might be difficult to enforce without an obligation to create interoperable formats or technically compatible systems.[581] If news service providers do not have such obligations, and only need to ensure interoperability where technically feasible, they could avoid compliance by not developing technical standards in cooperation with other service providers.[582] This is a missed opportunity for improving news personalisation, since interoperable news user profiles could solve the problem of providing relevant personalisation to new users for whom the system has not yet registered any preferences (the so-called 'cold start problem').

The right to data portability does not apply when personalisation is based on a legal ground other than consent or contract.[583] Thus, when news personalisation is necessary for the performance of a task carried out in the public interest, such as when public service media personalise the news, or when it is necessary for the legitimate interests of online news media or a third party, people cannot download their data or transfer their profiles.

4.6 Conclusion

Empirical research has shown that people who are concerned about their privacy, often do not use privacy-preserving strategies and still disclose their personal data to organisations.[584] This

[577] Article 29 Working Party, 'Guidelines on the right to data portability (rev. 01)', pp. 3–4.
[578] Article 20(1) GDPR.
[579] Recital 68 GDPR.
[580] Recital 68 GDPR.
[581] E. Lecchi, 'Data portability, big data and the telecoms sector: A personal view', *Competition Law & Policy Debate*, 2:4 (2016), 42–51.
[582] Lecchi, 'Data portability, big data and the telecoms sector', p. 46.
[583] Recital 68 GDPR.
[584] A. Acquisti and J. Grossklags, 'Privacy and rationality in individual decision making', *IEEE Security and Privacy Magazine*, 3:1 (2005), 26–33 (p. 29), https://doi.org/10.1109/MSP.2005.22.

privacy paradox has been explained by cognitive limitations which interfere with rational privacy decision-making.[585] Another explanation for the observed privacy paradox is that people give up privacy decision-making because they feel that they have no real choice after all.[586] Scholars and commentators therefore criticise the regulatory and scholarly focus on individual control.[587] Nevertheless, as argued by Ausloos and Dewitte, even if only a few people exercise control, this may already provide checks and balances for the data processing activities of controllers.[588] If a small group of news users exercises control over their personal data and, for example, demands changes in how personalisation is provided to them, this could already have a disciplining effect on personalised news providers.

In this chapter, I have concluded that the special purposes provision does not apply to news personalisation. The main reason for that is that the special purposes provision aims to enable the use of personal data in news stories, but not the use of personal data to disseminate news. Online news media should be free to produce and publish the news which they deem important, and the special purposes provision guarantees this freedom to the extent that news stories contain personal data of the people concerned in the reported event. The GDPR consequently conditions how the media may bring these stories to their readers in case they do so in a personalised manner.

Subsequently, I have queried how the GDPR provides news users control over the processing of their personal data for news personalisation. I showed that, through exercising their data protection rights, people can either stop personalisation or prevent its initiation, or they can change their personal profile on which the personalisation is based. Furthermore, following from the application of the GDPR, online news media should provide personalised and non-personalised services of a similar orientation and quality, or such choices at least have to be catered to on the online news market as a whole. The various rights which enable people to change their personal profile could be translated into a right to reset: people have the right to keep their news service account, but they should be able to remove all the observed personal data from their profile, so that they can start afresh.

The GDPR can thereby accommodate both news users who appreciate personalisation and news users who do not. News users who are in favour of personalisation can exercise control over their profile; news users who are not in favour of personalisation can stop personalisation.

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[585] Acquisti and Grossklags, 'Privacy and rationality in individual decision making', pp. 29–32.

[586] N. A. Draper, 'From privacy pragmatist to privacy resigned: Challenging narratives of rational choice in digital privacy debates', *Policy & Internet*, 9:2 (2017), 232–51, https://doi.org/10.1002/poi3.142; E. Hargittai and A. Marwick, '"What can I really do?" Explaining the privacy paradox with online apathy', *International Journal of Communication*, 10 (2016), 3737–3757; Sarikakis and Winter, 'Social media users' legal consciousness about privacy'; N. A. Draper and J. Turow, 'The corporate cultivation of digital resignation', *New Media & Society*, 21:8 (2019), 1824–39, https://doi.org/10.1177/1461444819833331.

[587] C. Lazaro and D. L. Métayer, 'Control over personal data: True remedy or fairy tale?', *SCRIPTed*, 12:1 (2015), 3–34, https://doi.org/10.2966/scrip.120115.3; C. Quelle, 'Not just user control in the General Data Protection Regulation', in A. Lehmann et al. (eds), *Privacy and Identity Management. Facing up to Next Steps* (Springer, 2016), pp. 140–63.

[588] J. Ausloos and P. Dewitte, 'Shattering one-way mirrors: Data subject access rights in practice', *International Data Privacy Law*, 8:1 (2018), 4–28, https://doi.org/10.1093/idpl/ipy001.

Besides complying with the GDPR, online news media can do more to develop privacy-friendly services—supposing that they want to. Many online media have repeatedly stated that they care about the privacy of their users. For example, Kobsa has suggested various privacy-enhancing technologies ('PETs') for personalisation, including client-side personalisation, where personal data is stored and processed at the user side rather than the server side, and collaborative filtering with distributed rather than central repositories.[589]

This research has not dealt with special categories of personal data ('sensitive data') in the context of news personalisation. Sensitive data are personal data revealing, among others, racial or ethnic origin, political opinions, religious or philosophical beliefs, or data concerning someone's sexual orientation.[590] According to the Article 29 Working Party, this prohibition should include 'not only data which by its nature contains sensitive information (...), but also data from which sensitive information with regard to an individual can be concluded'.[591] Data which serves as a proxy for sensitive data are thus to be treated as sensitive data. The question remains to be asked to what extent the data which people disclose by their news use, such as that they are interested in certain political or cultural topics, also reveal matters such as their political beliefs or racial identity. Should all or much of the personal data processed for news personalisation be seen as sensitive data, the situation under the GDPR changes and will be much more focused on explicit consent—one of the legal grounds to legitimise the processing of sensitive data.[592] The analysis on the right not to be subject to automated individual decision-making will also change,[593] and a data protection impact assessment might be required.[594] Considering that the regime for the processing of sensitive data raises many more questions with regard to news personalisation, more research is needed on this topic.

That said, providing people control over their personal data through consent or explicit consent might be of lesser importance in the context of news personalisation. As Edwards and Veale argue, in the digital environment, 'what we increasingly want is *not* a right not to be profiled—which means effectively secluding ourselves from society and its benefits—but to determine *how* we are profiled and on the basis of what data—a "right how to be read"'.[595] Along similar lines, I contend that, because many people are actually open to news personalisation services, the most important function of the GDPR in that respect is to enable people to control how their news interests and preferences are registered in the system, and how they are perceived by the various online personalisation systems. The GDPR is not opposed to news personalisation. If online news media take the GDPR into consideration while designing their systems, the legal norms can help them to develop privacy-friendly news services.

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[589] A. Kobsa, 'Privacy-enhanced web personalization', in P. Brusilovsky, A. Kobsa, and W. Nejdl (eds), *The Adaptive Web* (Springer, 2007), pp. 628–70.
[590] Article 9 GDPR.
[591] Article 29 Working Party, 'Advice paper on special categories of data ("sensitive data")', 2011, p. 6, https://ec.europa.eu/justice/article-29/documentation/other-document/files/2011/2011_04_20_letter_artwp_mme_le_bail_directive_9546ec_annex1_en.pdf.
[592] Article 9(2)(a) GDPR.
[593] Article 22(4) GDPR.
[594] Article 35(3)(b) GDPR.
[595] L. Edwards and M. Veale, 'Slave to the algorithm? Why a "right to an explanation" is probably not the remedy you are looking for', *Duke Law & Technology Review*, 16:1 (2018), 18–84 (p. 73).

Chapter 5.

The Freedom from Interference and Domination of News Users: Insights from Republican Theory

5.1 Introduction

As Chapters 2-5 have demonstrated, the use of personalisation systems by online news media affects the fundamental rights of news users, ranging from the right to respect for privacy, the right to the protection of personal data, the right to freedom of thought, and the right to freedom of expression, which includes the freedom to hold opinions and to receive information and ideas. News personalisation can help people to enjoy their rights, such as when it supports them in finding the news which they are interested in and prepare themselves for discussions they want to partake in, as well as infringe upon the rights of news users. It should therefore be clear that news personalisation is not simply a threat to news users. However, I am primarily interested in the negative effects of news personalisation in this research, investigating whether news users should be protected against these effects, and if so, how. The purpose of this chapter is to understand under which circumstances news personalisation can limit the fundamental rights and freedoms of news users.

In order to distinguish news personalisation which supports news users from that which limits the freedoms of news users, I briefly review how fundamental rights work. States have negative and positive obligations regarding fundamental rights.[596] A negative obligation means that a state has to refrain from interfering with fundamental rights, in contrast to a positive obligation meaning that a state should take legal or practical measures to safeguard or protect a fundamental right.[597] As the ECtHR has admitted, the boundaries between the state's negative and positive obligations 'do not lend themselves to precise definition' in practice.[598]

Both negative and positive obligations can be analysed in terms of an interference.[599] For either type of obligations, Lavrysen has shown that the analysis can start with the 'perspective of the (alleged) victim' of a fundamental rights violation, 'which relates to the actual experience of a situation' in which fundamental rights are violated.[600] Consequently, an interference can be defined as 'a state of affairs, be it occasioned by an action or in-action which causes the exercise of the protected conduct and interests of a right to be impaired or hindered'.[601] An interference is negative, so not any kind of effect on the exercise of fundamental rights constitutes an interference. Should certain actions or inactions facilitate the enjoyment of fundamental rights, these actions or inactions would affect but not interfere with the rights in question.

However, it is not clear whether the notion of an interference with fundamental rights is capable of capturing all the instances in which news personalisation restricts the fundamental rights and freedoms of news users. The notion of an interference requires an obvious effect on someone's fundamental rights, whereas effects of personalisation on fundamental rights may be hard to prove

[596] See section 1.2.3.
[597] Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights*, p. 7.
[598] ECtHR, Keegan v. Ireland, 1994, 16969/90, para. 49, http://hudoc.echr.coe.int/eng?i=001-57881.
[599] L. Lavrysen, 'The scope of rights and the scope of obligations: Positive obligations', in E. Brems and J. Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press, 2013).
[600] Lavrysen, 'The scope of rights and the scope of obligations: Positive obligations', p. 165.
[601] G. van der Schyff, *Limitation of Rights* (Wolf Legal Publishers, 2005), p. 41., as cited in Lavrysen, 'The scope of rights and the scope of obligations: Positive obligations', p. 167.

for being mainly slow developing, accumulative over time, with long-term consequences. A single news recommendation will not affect someone's right to receive information, freedom of opinion, or freedom of expression. At the same time, news personalisation is a powerful tool in the hands of online news media. Users might need to be protected in certain respects, even when the effects of news personalisation cannot unambiguously be qualified as a fundamental rights interference.

This chapter tackles the research question whether the concept of interferences with fundamental rights and freedoms is suitable to deal with news personalisation. As an alternative to the concept of freedom as non-interference, this chapter discusses a concept of freedom as non-domination. The concept of freedom as non-domination concentrates on the existence of a power relationship rather than on an actual interference. Therefore, it might be useful in understanding the dynamics between news media which offer personalisation and news users. Other authors have already used a concept of freedom as non-domination in the context of state or corporate surveillance and their effects on privacy.[602] Here, I apply the concept of freedom as non-domination to a wider range of fundamental rights and personalisation technologies.

I first outline the concept of freedom as non-interference on the basis of Isaiah Berlin's distinction between positive and negative freedom. I illustrate how this concept of freedom as non-interference underlies fundamental rights theory, and how it falls short in the context of news personalisation. As an alternative perspective on freedom, I posit the concept of freedom as non-domination, as most notably set out by Philip Pettit. I lay out how online news media dominate news users in certain selections by using personalisation, which limits the freedom of news users even when they do not experience an actual interference with their rights and freedoms. Finally, I discuss how to protect news users against domination by personalised news providers.

5.2 Freedom as Non-Interference

5.2.1 Isaiah Berlin: Positive and Negative Freedom

The contemporary political philosophical debate about freedom is largely shaped by the ideas of Isaiah Berlin.[603] Berlin's work also informs legal scholarly work on constitutional law,[604] news personalisation and news user freedoms,[605] privacy and data protection,[606] digital technology,[607]

[602] E. Gräf, 'When automated profiling threatens our freedom: A neo-republican perspective', *European Data Protection Law Review*, 3:4 (2017), 441–51, https://doi.org/10.21552/edpl/2017/4/6; A. Roberts, 'Privacy in the republic' (University of Amsterdam, 2019), https://pure.uva.nl/ws/files/42627565/Thesis.pdf; B. C. Newell, 'Technopolicing, surveillance, and citizen oversight: A neorepublican theory of liberty and information control', *Government Information Quarterly*, 31:3 (2014), 421–31, https://doi.org/10.1016/j.giq.2014.04.001; B. van der Sloot, 'A new approach to the right to privacy, or how the European Court of Human Rights embraced the non-domination principle', *Computer Law & Security Review*, 34:3 (2018), 539–49, https://doi.org/10.1016/j.clsr.2017.11.013.

[603] C. Kukathas, 'Liberty', in R. E. Goodin, P. Pettit, and T. Pogge (eds), *A Companion to Contemporary Political Philosophy* (Blackwell Publishing, 2007), pp. 685–98 (p. 685).

[604] Möller, *The Global Model of Constitutional Rights*.

[605] Helberger, Karppinen, and D'Acunto, 'Exposure diversity as a design principle for recommender systems'.

[606] G. G. Fuster and R. Gellert, 'The fundamental right of data protection in the European Union: In search of an uncharted right', *International Review of Law, Computers & Technology*, 26:1 (2012), 73–82, https://doi.org/10.1080/13600869.2012.646798.

[607] E. Benvenisti, 'Upholding democracy amid the challenges of new technology: What role for the law of global governance?', *European Journal of International Law*, 29:1 (2018), 9–82 (p. 59 and 81),

and automated profiling.[608]

Berlin has argued that, essentially, two concepts of freedom exist: a negative one and a positive one (not to be confused with negative and positive obligations flowing from fundamental rights). To illuminate these two concepts of freedom, I will explore the relationship between a person and another agent, yet both sides could be a person, group, organisation, or another sort of collective agent which has power or is subject to power. That is to say, a person can be subject to power by another person, a corporation, or the state, and a single person or a social group can be controlled by another agent.[609] For this research, I am interested in the relationship between an individual news user and online news media which use personalisation systems.

The concept of negative freedom conveys that someone is free when no other agent interferes with their activities or choices.[610] If someone is prevented by another agent from doing what they could otherwise do, they suffer a loss of freedom.[611] (Negative) freedom does not mean solely an absence of interference with a desired action, because under such a concept of freedom, people could simply 'become free' by giving up their wishes.[612] In other words, from such a perspective, someone could become freer by having less will. Instead, Berlin argues that negative freedom is the absence of interference with someone's possible activities and choices, that is, an absence of interference with all the activities and choices a person respectively wishes to do and make and could wish to do and make.[613] Taylor, another philosopher, used the following words on this concept: '[B]eing free is a matter of what we can do, of what is open to us to do, whether or not we do anything to exercise these options'.[614] Paraphrasing Berlin, the extent of someone's freedom therefore consists in the absence of obstacles to their actual and potential choices—to their acting in this or that way if they choose to do so,[615] regardless of whether they actually do so. As Berlin has said, '[f]reedom is the opportunity to act, not action itself'.[616]

Although freedom as non-interference covers the interference with both actual and potential choices and activities, the interference itself must really take place to result in a loss of freedom.

Juxtaposed with negative freedom, Berlin places a positive concept of freedom. This concept of freedom is about exercising control over one's life.[617] Positive freedom is based on the human desire of every individual to be their own master and people's understanding of themselves as

https://doi.org/10.1093/ejil/chy013; M. Hildebrandt, 'Legal protection by design: Objections and refutations', *Legisprudence*, 5:2 (2011), https://works.bepress.com/mireille_hildebrandt/43/; M. Hildebrandt, 'Profiling and the rule of law', *Identity in the Information Society*, 1:1 (2008), 55–70, https://doi.org/10.1007/s12394-008-0003-1.

[608] M. Hildebrandt and B.-J. Koops, 'The challenges of ambient law and legal protection in the profiling era', *The Modern Law Review*, 73:3 (2010), 428–60, https://doi.org/10.1111/j.1468-2230.2010.00806.x.

[609] P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1997), p. 52.

[610] I. Berlin, *Four Essays on Liberty* (Oxford University Press, 1969), p. 122.

[611] Berlin, *Four Essays on Liberty*, p. 122.

[612] Berlin, *Four Essays on Liberty*, p. xxxviii.

[613] Berlin, *Four Essays on Liberty*, p. xxxix.

[614] C. Taylor, 'What's wrong with negative liberty', in *Philosophy and the Human Sciences: Philosophical Papers* (Cambridge University Press, 1985), pp. 211–29 (p. 213).

[615] Berlin, *Four Essays on Liberty*, p. xl.

[616] Berlin, *Four Essays on Liberty*, p. xlii.

[617] Taylor, 'What's wrong with negative liberty', p. 213.

thinking, willing, and active beings who are responsible for their own actions and choices.[618] People attain positive freedom when they achieve self-mastery.[619] The idea of self-mastery is based on a humanistic, romantic understanding of people being divided between a 'higher', more 'real', or 'ideal' self, and a 'lower' self which is driven by desires and passions.[620] When our rational self manages to keep our passionate self in line, we can act according to our 'real' choices and purposes in life. On account of positive freedom, someone is free only to the extent that they have determined themselves and the shape of their life.[621] Positive freedom is thus the presence of something, namely self-mastery, whereas negative freedom is the absence of something, namely interference.[622]

The American legal philosopher MacCallum has criticised Berlin's dichotomy, arguing that both negative and positive concepts of freedom are part of one concept of freedom; No two fundamentally different concepts of freedom exist.[623] According to MacCallum, freedom is a relationship between agents, preventing conditions, and a range of actions or things to become: '[F]reedom is thus always *of* something (an agent or agents), *from* something, *to* do, not do, become, or not become something'.[624] The preventing conditions correspond with negative freedom and the range of actions or things to become with positive freedom. From this perspective, freedom is always the absence of external or internal interference to do or become something.

What Berlin describes as positive freedom can accordingly be described as negative freedom as well, in the sense that someone achieves self-mastery when internal hindrances are absent. In the same paper where Berlin distinguishes between negative and positive freedom, he actually hints at the view of MacCallum, declaring that '[t]he essence of the notion of liberty, both in the "positive" and the "negative" senses, is the holding off of something or someone—of others who trespass on my field or assert their authority over me, or of obsessions, fears, neuroses, irrational forces—intruders and despots of one kind or another'.[625]

Following MacCallum, freedom could be seen as the absence of interference with someone's life, choices, or opportunities, by another person, organisation, or someone's own inner drives. In the course of this research, I will refer to this position as the concept of freedom as non-interference.

5.2.2 Non-Interference in the Context of Fundamental Rights Law

The concept of freedom as non-interference is vital to fundamental rights.[626] The EU Charter and ECHR contain various indications that fundamental right systems operate based on the notion of

[618] Berlin, *Four Essays on Liberty*, p. 131.
[619] Berlin, *Four Essays on Liberty*, p. 134.
[620] Berlin, *Four Essays on Liberty*, p. 134 and xliv.
[621] Taylor, 'What's wrong with negative liberty', p. 213.
[622] I. Carter, 'Liberty', in R. Bellamy and A. Mason (eds), *Political Concepts* (Manchester University Press, 2003), pp. 4–15 (p. 5).
[623] G. C. MacCallum, 'Negative and positive freedom', *The Philosophical Review*, 76:3 (1967), 312–34, https://doi.org/10.2307/2183622.
[624] MacCallum, 'Negative and positive freedom', p. 314.
[625] Berlin, *Four Essays on Liberty*, p. 158.
[626] Van der Sloot, 'A new approach to the right to privacy, or how the European Court of Human Rights embraced the non-domination principle', p. 542.

interference. The second paragraph of article 8 of the ECHR provides that '[t]here shall be no interference' with the fundamental right to respect for privacy unless certain conditions are complied with. Similarly, the second paragraph of article 9 of the ECHR states that freedom of thought 'shall be subject only to such limitations' as are prescribed in the provision. The second paragraph of article 10 of the ECHR requires that the exercise of freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties'. In addition, article 34 ECHR enables applications for individuals 'claiming to be the victim of a violation' of their rights.

In the EU Charter, articles 7, 8, 10, and 11 protect the right to privacy, data protection, freedom of thought, and freedom of expression. Article 52, paragraph 1, EU Charter states that '[a]ny limitation on the exercise of the rights and freedoms recognised by the EU Charter' must comply with certain conditions. The provisions in the ECHR and EU Charter express the idea that someone should experience an interference, limitation, or restriction of their rights before the protections become applicable.

These quotations show that the EU Charter and ECHR provisions use varying terminology. The EU Charter speaks of 'limitations' on rights and freedoms; The ECHR mentions 'interferences', 'limitations', and 'formalities, conditions, restrictions or penalties'. These different terms can be used interchangeably. For the purposes of this research, both the EU Charter and ECHR simply appear to revolve around fundamental rights interferences.

In principle, the ECtHR does not consider complaints *in abstracto*.[627] This means that the ECtHR does not hold itself competent to examine in the abstract if certain domestic legislation conforms with the provisions of the ECHR. Instead, the ECtHR requires applicants to demonstrate that they experienced an actual interference with their lives. The ECtHR also refuses to deliberate on complaints about future, potential violations,[628] which confirms that fundamental rights are engaged only when people experience an actual interference, in a concrete and specific situation. The question is to what extent news personalisation forms such a clearly distinguishable, actionable interference with the fundamental rights of news users.

5.2.3 Non-Interference in the Context of News Personalisation

In order to establish under which circumstances news personalisation forms an interference with the fundamental rights and freedom of news users, I look into the three stages of the news personalisation process: understanding the user, recommending to the user, and reviewing the system.[629] In general, news personalisation can help people to enjoy their fundamental right to receive information, to develop their opinions and thoughts, and to express themselves. At the same time, especially in the first and second stage, news media have various forms of power over news users which may lead to a limitation of the fundamental rights and freedoms of news users.

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[627] ECommHR, *X. v. the Federal Republic of Germany*, 1961, 920/60, http://hudoc.echr.coe.int/eng?i=001-3195; ECtHR, *De Becker v. Belgium*, 1962, 214/56, para. 14, http://hudoc.echr.coe.int/eng?i=001-57433; ECtHR, *Golder v. the United Kingdom*, para. 39; E. Kosta, 'Algorithmic state surveillance: Challenging the notion of agency in human rights', *Regulation & Governance*, advance publication (2020), p. 5, https://doi.org/10.1111/rego.12331.
[628] ECtHR (dec.), *Tauira and 18 Others v. France*, 1995, 28204/95, p. 130, http://hudoc.echr.coe.int/eng?i=001-87173.
[629] See section 1.3.2

However, the news media's actions, by way of their personalisation systems, do not necessarily amount to interferences with fundamental rights.

The first stage of the personalisation process encompasses two steps: collecting data about the user and profiling the user on the basis of this data. In trying to understand the user, online news media make decisions about the news user. Online news media determine which kinds of user data to collect for personalisation and how to process these data to build an individual profile. In this procedure, news media therefore have the power to determine what kind of knowledge and personal details they infer from or predict on the basis of the input data. Online news media decide in which box to put a news user and thereby produce knowledge about the user.

A news user has some control over the profiling phase. News users can either consent to the collection of personal data or, if the personal data processing is based on another legal ground, object to the processing of the data.[630] However, the news user has no control over the analysis of their data, and how news media infer or predict their interests and preferences.

The data collection and profiling stage involve interferences with the fundamental rights to privacy and the protection of personal data. However, data collection and profiling in themselves do not directly interfere with other fundamental rights of news users, including their right to freedom of opinion and thought, and right to freedom of expression and freedom to receive information. The steps of data collection and profiling do not change how people can exercise these fundamental rights because, at this first stage in the personalisation process, people are not yet provided with particular information. The speculation could be raised that if people are uncomfortable with the collection and analysis of their personal data, they may also feel inhibited to search for information or express themselves online. Some indications that government surveillance has such 'chilling effects' on online search are noticeable,[631] but these effects seem slight and only short-term.[632] Furthermore, the few studies on surveillance by online service providers show no, or negligible, harmful effects.[633]

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[630] See section 4.3.

[631] J. W. Penney, 'Chilling effects: Online surveillance and Wikipedia use', *Berkeley Technology Law Journal*, 31:1 (2016), 117–92, https://doi.org/https://doi.org/10.15779/Z38SS13; J. W. Penney, 'Internet surveillance, regulation, and chilling effects online: a comparative case study', *Internet Policy Review*, 6:2 (2017), https://doi.org/10.14763/2017.2.692; E. Stoycheff, 'Under surveillance: Examining Facebook's spiral of silence effects in the wake of NSA internet monitoring', *Journalism & Mass Communication Quarterly*, 93:2 (2016), 296–311, https://doi.org/10.1177/1077699016630255; E. Stoycheff et al., 'Privacy and the panopticon: Online mass surveillance's deterrence and chilling effects', *New Media & Society*, 21:3 (2019), 602–19, https://doi.org/10.1177/1461444818801317; A. Marthews and C. E. Tucker, 'Government surveillance and internet search behavior', 2014, https://papers.ssrn.com/abstract=2412564.

[632] Marthews and Tucker found that, in the US and its 40 international trading partner countries, the volume of online search for more privacy-sensitive search terms only fell with roughly 4 per cent after the Snowden revelations, see Marthews and Tucker, 'Government surveillance and internet search behavior'. Preibusch uncovered that, after the Snowden revelations, US internet users' interest in privacy-enhancing technologies and other privacy protective behaviours rose but quickly returned to the original level, despite continued media coverage, see S. Preibusch, 'Privacy behaviors after Snowden', *Communications of the ACM*, 58:5 (2015), 48–55, https://doi.org/10.1145/2663341.

[633] Cooper studied how people changed their use of Google Search after Google had announced in 2012 that it would start combining personal data across its different platforms, such as Search, Google+, Gmail, and YouTube. Cooper found that there was just a small (3-7 per cent) and short-term (1-2 months) reduction in the searches for sensitive

In the second stage of the personalisation process, online news media decide how to match a profile with available news items and thereby shape choices for the user by selecting, ranking, and presenting news items in a personalised manner. News users have some control over their own choices: They can choose to click or not click on news items, search for other information, or sometimes adjust some of the personalisation settings.

As in the first stage, the actions of online news media often fail to meet the threshold of an interference in this second stage of the personalisation process. The ECommHR held that restrictions to publish or receive certain information do not conflict with freedom of expression and the right to receive information as long as sufficient alternative sources for that information are available to the public.[634] Therefore, if a news personalisation system does not give news users the news items which they want to receive, their right to receive information is not interfered with as long as users can still freely search for the news which interests them. All news websites and apps have a search function and a menu to navigate the information, so there are plenty of other options to search and find the wished for information.

The substantive meaning of certain fundamental rights also creates issues for establishing an interference. The right to freedom of opinion amounts to a right not to be coerced in the development of one's opinions and the right to freedom of thought entails a right not to be indoctrinated.[635] The notions of coercion and indoctrination set a high bar which is not met by news personalisation. The potential negative implications of news personalisation for the individual rights of news users are difficult to capture in the language of interferences, especially when it comes to the rights to freedom of thought, freedom to hold opinions, freedom to receive information, and freedom of expression.

Nevertheless, news media wield a lot of power when personalising the news. News personalisation can affect which news people see, how people can identify with their news choices, what they talk and think about, and what is on the public agenda. The power which online news media can exercise through personalisation systems is more intrusive, less transparent, and harder to challenge or avoid than the agenda-setting and gatekeeping powers news media have had since the 19th century.[636] The question is at which point the power of online news media to personalise the news occasions a loss of freedom for news users, and under which conditions this power can be still legitimate. A concept of freedom as non-domination can help to address these questions.

topics, see J. C. Cooper, 'Anonymity, autonomy, and the collection of personal data: Measuring the privacy impact of Google's 2012 privacy policy change', 2017, https://papers.ssrn.com/abstract=2909148. Cooper's percentages correspond to the results of Marthews and Tucker. Hermstrüwer and Dickert also identified only limited and short-lived effects, see Y. Hermstrüwer and S. Dickert, 'Tearing the veil of privacy law: An experiment on chilling effects and the right to be forgotten' (Max Planck Institute for Research on Collective Goods, 2013), https://ideas.repec.org/p/mpg/wpaper/2013_15.html.

[634] ECommHR, *De Geïllustreerde Pers NV v. the Netherlands*, p. 13; ECommHR, *Özkan v. Turkey*, 1995, 23886/94, http://hudoc.echr.coe.int/eng?i=001-2114.

[635] See sections 2.2.3 and 2.2.4.

[636] See section 1.3.1.

5.3 Freedom as Non-Domination

5.3.1 Philip Pettit: Republican Freedom

The idea of freedom as non-domination has had a longer history in political philosophy, but philosopher and political theorist Philip Pettit has offered the most influential modern contribution to this idea.[637] An agent dominates another person if '1) they have the capacity to interfere 2) on an arbitrary basis 3) in certain choices that the person is in a position to make'.[638] Under this concept of freedom, domination is not the same as power, although having power, that is, a capacity to interfere, is one of the building blocks of domination.[639] In addition, domination is defined in reference to interference but differs from it, as domination can exist without the interference actually taking place. In more recent work, Pettit speaks of uncontrolled interference instead of arbitrary interference,[640] but both notions refer to the situation in which an agent can interfere at its own will.

In order to clarify freedom as non-domination, we should focus on the three components of Pettit's definition. The first component is about interference. In the introduction to this chapter, I described interference as the action or inaction which causes the exercise of a protected behaviour and interests of a (fundamental) right to be impaired or obstructed. An interference is a negative effect on someone's life. Actions or inactions which facilitate the exercise of certain rights may affect someone's life, but do not interfere. This definition originates in fundamental rights research, and it may not align exactly with Pettit's or other philosophers' definitions of interference. However, the purpose of this paper is to analyse interference as used in fundamental rights law and to propose a new way to conceive of a loss of fundamental freedoms and rights. Consequently, the rights-based definition can be used. The capacity to interfere must be concrete, not theoretical or virtual.[641]

The second component of the definition refers to arbitrariness. A dominating agent has arbitrary power if they can exercise their capacity to interfere at their own discretion without considering the interests of the dominated person.[642] Simply put, if someone can do what they want to another person, then they have arbitrary power. External rules and procedures can constrain the exercise of power and force an agent to keep track of the interests of others, so the lack of such rules and procedures usually renders the power arbitrary.[643] Power is arbitrary even if the consequences of the interference would be in favour of the dominated person.[644] For example, if a news organisation can decide at its own discretion to tune all its personalisation systems

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[637] E. Beaumont, 'Phillip Pettit, Republicanism: A theory of freedom and government', in J. T. Levy (ed.), *The Oxford Handbook of Classics in Contemporary Political Theory* (Oxford University Press, 2017).
[638] Pettit, *Republicanism*, p. 52.
[639] F. Lovett, 'Domination: A preliminary analysis', *The Monist*, 84:1 (2001), 98–112 (p. 104), https://doi.org/10.5840/monist20018414.
[640] P. Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press, 2012), p. 58.
[641] Pettit, *Republicanism*, p. 54.
[642] Pettit, *Republicanism*, p. 55; Pettit, *On the People's Terms*, p. 50.
[643] F. Lovett, *A General Theory of Domination and Justice* (Oxford University Press, 2010), p. 96.
[644] Pettit, *Republicanism*, p. 55.

towards generating more revenue or blocking certain political views, then news users are dominated in their news choices, regardless of whether the users like the personalised recommendations.

The third component of the definition of non-domination concerns specific choices which a person can make. Pettit stresses that his theory is about certain choices rather than all choices.[645] An agent can dominate another person in particular domains of their life, without affecting the choices the person makes in other spheres of their life. I see the relationship between choices and fundamental rights and freedoms as follows. Fundamental rights protect people in their ability to make choices, such as the choice to say or read this or that, or to think this or that. For instance, someone enjoys their freedom of thought if they can freely choose what to believe in and via which pathway to develop new thoughts.[646] All interfering acts or behaviours change someone's choice situation,[647] or, in other words, their choice architecture.

For the purposes of this research, the most important characteristic of freedom as non-domination is that a loss of freedom does not require the dominating agent to actually interfere or to be inclined to interfere with the life or choices of the dominated person.[648] Freedom as non-domination focuses on the existence of a structural, dominating relationship and not on actual exercises of power or specific consequences of the exercise of power.[649] The loss of freedom lies in the fact that the dominated person lives at the mercy of the dominating agent which holds power over them, in the words of Skinner, 'to live in a condition of dependence is in itself a source and a form of constraint'.[650] In such a situation, the freedom of the dominated person depends on the goodwill of the dominating agent.[651] The dominated person would suffer a loss of freedom, irrespective of whether the dominating agent actively imposes its will on them.[652]

A final point to note is that one of the parties in a certain relationship has dominating power if this agent has the capacity to interfere on an arbitrary basis, disregarding whether this relationship is based on consent or a contract.[653] The consent may be given in an asymmetrical relationship, the contract may have been concluded with unequal bargaining power, or the situation may have changed since the consent was given or the contract concluded.

A theory of freedom as non-domination clarifies which forms of power are problematic (namely: arbitrary forms of power), and why these forms of power are problematic (namely: they entail a loss of freedom). Freedom of non-domination therefore allows for going beyond the simple conclusion that a certain power relationship exists. The advantage of freedom as non-domination over freedom as non-interference is that the first concept helps to articulate why some forms of

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[645] Pettit, *Republicanism*, p. 58.
[646] M. Stenlund and P. Slotte, 'Forum internum revisited: Considering the absolute core of freedom of belief and opinion in terms of negative liberty, authenticity, and capability', *Human Rights Review*, 19:4 (2018), 425–46 (p. 438), https://doi.org/10.1007/s12142-018-0512-8.
[647] Pettit, *Republicanism*, p. 53.
[648] Pettit, *Republicanism*, p. 63; P. Pettit, 'Freedom as antipower', *Ethics*, 106:3 (1996), 576–604 (p. 586).
[649] Lovett, *A General Theory of Domination and Justice*, p. 45.
[650] Q. Skinner, *Liberty before Liberalism* (Cambridge University Press, 1998), p. 84.
[651] Skinner, *Liberty before Liberalism*, p. 70.
[652] Pettit, *On the People's Terms*, p. 60.
[653] Pettit, *Republicanism*, p. 62.

power, for example of online news media, may threaten the freedom of news users under certain circumstances. The next section delves further into non-domination and news personalisation.

5.3.2 Non-Domination in the Context of News Personalisation

To apply the perspective of freedom as non-domination to news personalisation and assess which forms of news personalisation may be at odds with the fundamental rights and freedoms of news users, I return to the first and second stage of the personalisation process. In the first stage, online news media collect data about the user and profile the user on the basis of this data. As mentioned before,[654] the collection of data and profiling of news users may in itself constitute an interference with user's rights to privacy and data protection. However, as Roberts points out, a greater concern is that, under certain circumstances, the interference with privacy and data protection could leave the data subject vulnerable to domination.[655] This domination mainly takes places in the second stage of the personalisation process, where personalisation systems match user profiles with news items and present the latter to the former.

As stipulated in the previous section, an agent dominates another person 1) if they have the capacity to interfere 2) on an arbitrary basis 3) in certain choices which the person is in a position to make. When online news media personalise the news, they meet all three conditions.

Expounding on this, I start with the third component of the definition of domination. In searching for, reading, and engaging with the news, news users are continuously making choices and performing actions which can be framed in terms of fundamental rights. In Chapter 2, I have described the personal information sphere, which is based on an integral reading of the fundamental rights of news users and can be visualised as a circle around the individual. The right to receive information protects information flows into the circle. People choose to open up their personal information sphere for certain information to inform themselves on various matters and to explore different viewpoints. Freedom of thought and opinion protect information flows within the circle, where people choose to attend to certain information, and choose to spend time to mull over certain issues, to develop their own beliefs and opinions. Freedom of expression and confidentiality of communications protect information flows which leave the circle. By communicating about certain topics and expressing their beliefs and opinions, people choose to show parts of their identity to other people and also shape their self-image. I consider liking a news story or upvoting it in a news app a form of expression as well.

Not all these 'choices' are strictly conscious choices. Online, people also encounter news incidentally, when they are not specifically looking for it, which can increase their knowledge on current affairs.[656] Furthermore, people do not always arrive at a certain belief through a conscious, reasoned process. Nonetheless, for the purposes of this research, it is sufficient to note that news users have various choices in navigating the online news environment. In general, online news users have a lot of options to decide when, where, and what to read. News media also frame the

[654] See section 5.2.3

[655] Roberts, 'Privacy in the republic', p. 44.

[656] A. P. David Tewksbury, G. S. Andrew J. Weaver, and G. S. Brett D. Maddex, 'Accidentally informed: Incidental news exposure on the World Wide Web', *Journalism & Mass Communication Quarterly*, 2016, https://doi.org/10.1177/107769900107800309.

position of news users as an abundance of choice. For example, the Dutch media company RTL Nederland has stated in an explanatory video of its data science activities that 'the consumer is in control'.[657] All these choices of news users are potentially subject to interference by news media.

The first component of the definition of domination refers to the capacity to interfere. The question here is if online news media, via the personalisation systems which they employ, can not only promote but also hinder or obstruct the choices of news users under certain circumstances. Online news media cannot force people to read something, yet with personalisation, they can shape the choices which people make because of their access to data and personalisation infrastructures. Empirical research has also demonstrated that different design choices for news personalisation systems have divergent effects on the way in which people cognitively process the news.[658] Tracking technologies give online news media access to large amounts of data, and personalisation technologies give them an infrastructure to exercise power over the choices which people make when they navigate the news.

The point is not that current day personalisation leads to actual interference with the fundamental rights of news users, because in that case, the concept of freedom as non-interference would suffice to explain the loss of freedom of news users. Rather, the argument is that, depending on how online news media profile people and organise their personalisation systems, they have the power to steer and shape the choices of news users. Simply having such power does not make online news media automatically interfere with the fundamental rights of news users. From a perspective of freedom as non-interference, the fact that online news media have such power in itself does not reduce the freedom of news users. In contrast, from a perspective of freedom as non-domination, the fact that online news media have such power may in itself limit the freedom of news users in case this power is also arbitrary, which I will discuss shortly.

Personalisation does not necessarily impair or hinder the choices of news users in the sense that it has exclusively negative effects. For example, a study suggests that people who use personalised news sources, view more sources of news as well as more different categories of news (such as sports, national events, and arts and culture) compared to people who do not.[659] From the perspective of media pluralism and democratic debate, these are positive effects on the fundamental rights of news users. However, online news media have the power to change the design of their personalisation systems and thereby negatively affect the choices of news user, for example by presenting people with more entertainment news, which is less informative overall but keeps people in the news app longer.

An opposing argument could be that news media have always had the power to shape the choices of news users. In deciding what is to be included on the front page of the newspaper, or in which order news items are to be presented on a television show, news media affect to which news stories people attend. Indeed, news media have had gatekeeping and agenda-setting power from

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[657] RTL, *RTL Data Intelligence*, 2017, pt. 0:30, https://www.youtube.com/watch?v=8_UzX_psL_s.
[658] M. A. Beam, 'Automating the news: How personalized news recommender system design choices impact news reception', *Communication Research*, 41:8 (2013), 1019–41 (p. 1035), https://doi.org/10.1177/0093650213497979.
[659] M. A. Beam and G. M. Kosicki, 'Personalized news portals: Filtering systems and increased news exposure', *Journalism & Mass Communication Quarterly*, 91:1 (2014), 59–77 (p. 71), https://doi.org/10.1177/1077699013514411. Note that this study cannot confirm causality, only correlation.

the beginning.[660] However, news personalisation gives news media gatekeeping and agenda-setting power on a one-on-one basis, taking place in a partially or fully automated way, which means that these gatekeeping and agenda-setting powers differ from previous forms of media power and could have a bigger and more targeted impact on people's choices and behaviour.

Finally, the second component of the definition of domination concerns arbitrariness. The capacity of online news media to interfere is arbitrary as long as news users cannot control what kind of information is inferred or predicted about them,[661] and the goals of personalisation. These objectives do not involve personal data yet do influence which news stories are selected for a particular user, how these are presented to them, and thereby which news stories someone chooses to read and engage with. As Gräf remarks, 'scenarios involving online environments that structure a person's possibilities based on her data profile are instances of arbitrary control, as long as the person has no degree of control over the way her scope of action is adapted'.[662] Such is the case for news personalisation. News users have some control over their personal data, but they have little to no control over how their data is analysed and for which goals personalisation is used. These two factors (data analysis and personalisation goals) determine the scope of news users' action to a great extent, since these factors are rather influential on which news items are selected for them and their manner of organisation and presentation. This decision-making power of online news media, regardless of whether they are benevolent or malignant entities, contains their arbitrary power.

Many news users are aware of the arbitrary power of online news media which offer personalisation. In a focus group study, Monzer and colleagues found that news users who interact with personalisation systems feel that they miss the means to exercise agency, especially in relation to the way in which personalisation systems detect their (changing) interests and full identity.[663] Monzer and colleagues concluded that, without sufficient options for news users to put in information into the system themselves, and engage with the algorithms, 'users feel they are at the mercy of algorithmic news personalization'.[664] News users' feeling that they are under the control of personalisation expresses the arbitrary power of online news media.

An objection could be raised that news users sometimes voluntarily use a personalised news service, and therefore, that the power of news media could be considered not to be arbitrary. For example, a Dutch personalised news service called Blendle Premium sends each of their subscribers a personalised daily selection of news stories for a monthly payment.[665] However, a dominating relationship which originates in consent, voluntariness, or a contract, remains dominating. Once people have subscribed to Blendle, their personalisation system can arbitrarily decide which news items to send them each day, and how to arrange these news items in the newsletter. Blendle decides for which goals certain items are selected, and people cannot exercise control over these decisions, even if they initially agreed to be subject to such personalisation.

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[660] See section 1.3.1.

[661] S. Wachter and B. Mittelstadt, 'A right to reasonable inferences: Re-thinking data protection law in the age of big data and AI', *Columbia Business Law Review*, 2019:2 (2019), 494–620.

[662] Gräf, 'When automated profiling threatens our freedom', p. 450.

[663] Monzer et al., 'User perspectives on the news personalisation process'.

[664] Monzer et al., 'User perspectives on the news personalisation process'.

[665] 'Privacyverklaring', *Blendle*, https://blendle.com/legal/privacy.

Furthermore, on the basis of the GDPR, news users might be able to stop personalisation whenever they want and they might be able to change some characteristics in their personal profile,[666] yet these data protection tools are limited and do not make the news user a true participant to the personalisation process.

To claim that news media dominate news users when they offer personalisation is rather extreme. Typical examples of domination are the slaveholder who dominates an enslaved person, the husband who can physically abuse his wife without repercussions, or the employer who can fire employees at will. [667] The use of personalisation by news media is of an entirely different degree, and by no means would I like to suggest that news personalisation comes even close to those kinds of domination. Still, the perspective of freedom as non-domination is useful to look at news personalisation because it helps to understand why it may entail a limitation of the freedom of news users even when their fundamental rights are not interfered with. The perspective of freedom as non-domination goes beyond establishing that news media have a certain form of power, helping to develop measures to protect news users against the existence of arbitrary power.

5.3.3 How to Protect News Users Against Domination?

In assessing how to protect news users against domination by personalised news providers, I take the following two starting positions. The goal of protecting news users against domination is to protect them against *arbitrary* interference by news media, not against all kinds of interference. News personalisation can help people to navigate the overload of information online and reduce the number of choices which people have to make in searching for news.[668] Such an interference, consisting in the limiting of someone's choices, is not necessarily bad. Empirical research also indicates that people appreciate personalisation, if it is performed under the right conditions. [669] Therefore, I am not interested in ways to prohibit personalisation entirely. Rather, I am looking for ways to make online news media accountable for the arbitrary power of to decide how people are profiled and for which goals people's news feeds are personalised.

The second position I take concerns media freedom, which protects online news media's independence and news gathering, production, and distribution processes.[670] As news media have a central role in democratic societies by publishing information on matters of public interest, acting as a public watchdog, and providing a forum for public debate,[671] their media freedoms are an important social good. Any kind of solution to the dominance of online news media over news users should respect media freedom, and not introduce a new form of domination over the media themselves.

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[666] See Chapter 4.
[667] Pettit, *Republicanism*, p. 57.
[668] Lavie et al., 'User attitudes towards news content personalization', p. 491.
[669] Lavie et al., 'User attitudes towards news content personalization'; Thurman et al., 'My friends, editors, algorithms, and I', p. 459; Monzer et al., 'User perspectives on the news personalisation process'.
[670] Oster, *Media Freedom as a Fundamental Right*, p. 85.
[671] ECtHR, *Barthold v. Germany*, para. 58; ECtHR, *Manole and Others v. Moldova*, para. 101; McNair, 'Journalism and democracy', pp. 238–40.

In the light of these two considerations, news users could be protected against domination on the part of online news media by ensuring that the news media's capacity to interfere will no longer be arbitrary. An agent's capacity to interfere is not arbitrary if the agent is forced to consider the relevant interests and ideas of the person affected by the interference.[672] According to Pettit, the most important way to ensure non-arbitrariness is the possibility for individuals to contest the exercise of power.[673] The idea is that, if someone can always contest an action by a powerful agent when they find that the action does not consider their relevant interests and ideas, the person has some control over the decision and the decision results not arbitrary.[674]

The GDPR provides a right to contestation. Article 22, paragraph 3, GDPR gives people the right to contest a decision regarding them which is based solely on automated decision-making, in cases where automated decision-making is allowed because the decision is necessary for a contract, based on EU or national law, or based on the data subject's explicit consent. If news personalisation is fully automated, has legal effects on news users, or significantly affects them similarly, and is based on a news subscription contract, a rule of EU or national law, or explicit consent of the news user,[675] news users may indeed have a right to contest a specific recommendation.

However, there are various limitations to contestation. In most cases, article 22 GDPR will not apply to personalisation because the implications of news personalisation cannot be qualified as having legal effects or similarly significant effects.[676] Furthermore, article 22 GDPR seems to be written for individual decisions which can be contested as separate decisions, such as the decision to refuse someone a loan. News personalisation could be described as consisting in individual decisions to recommend someone this or that news item, and to rank news items in a specific order. My preference is however to describe news personalisation as a process of which the effects build up over time. With regard to news personalisation, the system and its workings as such should be contestable rather than each individual recommendation decision.

In addition to these legal limitations, contestation is mainly reactive and takes place after the fact, that is, after a powerful agent has already exercised its capacity to interfere.[677] As discussed several times throughout this thesis, an actual interference might be hard to determine in the case of news personalisation. This would make it difficult to establish at which point a news user should be permitted to react and contest a personalisation decision or process.

Political theorist Iseult Honohan has suggested that people should be enabled to participate in a decision-making process to protect them against arbitrary power, besides being able to contest decision-making after the fact.[678] An ideal of participation, instead of contestation, seems most suitable to address domination in the case of news personalisation. If news users can participate in deciding what personalisation systems look like and how they work, that is, how their data are analysed and for which goals personalisation systems are used, the interferences which might

[672] Pettit, *Republicanism*, p. 55.
[673] Pettit, *Republicanism*, p. 63.
[674] Pettit, *Republicanism*, p. 185.
[675] See section 4.3.4.
[676] See section 4.3.4.
[677] Beaumont, 'Phillip Pettit, Republicanism: A theory of freedom and government'.
[678] I. Honohan, *Civic Republicanism* (Routledge, 2002), p. 237.

result from personalisation will be closer to the user's interests and personal goals and less arbitrary. The idea that users of a service should be able to participate in decision-making about the workings of recommender services underlies a provision in the European Commission's proposal for a Digital Services Act as well.[679] Article 29 and recital 62 of the proposal provide that very large online platforms which use recommender systems should ensure that users can modify or influence the main parameters used in the recommender systems and that they can choose between several options for each of the recommender systems. Online news media will probably not qualify as 'very large online platforms'. Consequently, if adopted, this provision will not apply to the latter. Yet, the inclusion of this type of obligation shows that a need is felt to move beyond GDPR-based forms of participation which revolve around control over personal data. People may find it laborious to control single data points, but influence the workings of a system in general may be more attractive.

The idea that individuals should be involved with the personalisation process echoes a call by Harambam and colleagues to enable news users to express 'voice'.[680] They define voice in the context of news personalisation 'as the possibility to exert control over the algorithms that curate people's own news provision'.[681] Harambam and colleagues developed the idea of personalisation personae, which are 'pre-configured and anthropomorphised types of recommendation algorithms from which people can choose from when browsing (news) sites'.[682] When people use a news service, they should be able to choose several personae to get diverse types of personalised news recommendations, depending on their personal goals.[683] In their study, Harambam and colleagues developed five personalisation personae inspired by different goals, those providing: diverse news, news which fosters mutual understanding and empathy, surprising and serendipitous news, light and entertaining news, or expert news.[684] These personae do not relate to specific topical interests, which are often difficult to grasp for users themselves as well as service providers,[685] but to different personalisation goals. As such, personalisation personae provide an intelligent user interface making users more active participants in the personalisation process, and less dependent on the goodwill of news media which can superimpose their personalisation goals.

The idea of personalisation personae should be developed further, and the dimensions which the various personalisation personae should cover, have to be explored. A personalisation system is informed by abstract goals of the news publisher, such as attracting new subscribers, retaining

[679] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC (2020/0361 (COD))', 2020, https://ec.europa.eu/info/sites/info/files/proposal_for_a_regulation_on_a_single_market_for_digital_services.pdf.
[680] J. Harambam, N. Helberger, and J. van Hoboken, 'Democratizing algorithmic news recommenders: How to materialize voice in a technologically saturated media ecosystem', *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences*, 376:2133 (2018), 1–21, https://doi.org/10.1098/rsta.2018.0088.
[681] Harambam, Helberger, and van Hoboken, 'Democratizing algorithmic news recommenders', p. 4.
[682] Harambam, Helberger, and van Hoboken, 'Democratizing algorithmic news recommenders', p. 13.
[683] See also Harambam et al., 'Designing for the better by taking users into account'.
[684] Harambam, Helberger, and van Hoboken, 'Democratizing algorithmic news recommenders', pp. 15–16.
[685] U. Lyngs et al., 'So, tell me what users want, what they really, really want!', *Extended Abstracts of the 2018 CHI Conference on Human Factors in Computing Systems* (ACM, 2018), pp. 1–10, https://doi.org/10.1145/3170427.3188397.

current subscribers, showcasing undervalued journalism, or increasing engagement. In addition, news organisations evaluate and adjust their personalisation systems on the basis of different metrics, such as accuracy, diversity, serendipity, novelty, or coverage.[686] Finally, a personalisation system is informed by different editorial values, such as providing timely news, surprising news users, stimulating more diverse news consumption, and increasing item coverage, which can be independently tweaked without affecting how a personalisation system performs on the accuracy metric.[687] Personalisation personae cannot address all these different factors which affect the output of a personalisation system, but they can offer a concrete and intuitive way for people to participate in decisions about what news algorithms do, and thereby diminish the arbitrariness of the power of online news media.

5.4 Conclusion

The concept of freedom as non-interference means that someone's freedom is limited only when another agent interferes with their life or choices. But the concept of interferences is not capable of dealing with, and making sense of exercises of power by personalised online news media. If a news user receives a personalised selection of news articles, they can still search for other news items on the internet so that their freedom to receive information is not interfered with. Likewise, online news personalisation does not meet the threshold for an interference with the right freedom of thought and opinion, or the right to freedom of expression. What is more, news personalisation may advance the enjoyment of fundamental rights of news users. At the same time, personalisation may be a powerful tool in the hands of online news media, especially should they start to implement personalisation more widely. The New York Times, for instance, formulated the ambition to have a home page 'where the dominant spots on the screen show the big news and feature stories, but much of the surrounding content is tailored to your own interests'.[688]

From the perspective of freedom as non-domination, we can see how personalisation limits the freedom of news users even though it does not directly interfere with their choices. Freedom as non-domination means that someone suffers a loss of freedom when another agent has arbitrary power to interfere with their choices. In line with this concept, the loss of freedom exists regardless of whether the powerful agent actually exercises their power and causing an interference with someone's choices. Online news media have an arbitrary power to control how people are profiled and for which goals personalisation is used, which affects the output of personalisation systems. News users have limited and insufficient control over these processes of inferences and goal-setting.

News users should be involved in the personalisation process to protect them against the arbitrary powers of online news media. Personalisation personae offer an intuitive and comprehensible way in which to enable news users to determine for which goals their news feeds are personalised,

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[686] Kaminskas and Bridge, 'Diversity, serendipity, novelty, and coverage'.

[687] F. Lu, A. Dumitrache, and D. Graus, 'Beyond optimizing for clicks: Incorporating editorial values in news recommendation', *Proceedings of the 28th ACM Conference on User Modeling, Adaptation and Personalization*, 2020, 145–53, https://doi.org/10.1145/3340631.3394864.

[688] L. Spayd, 'A "community" of one: The Times gets tailored', *The New York Times*, 2017, https://www.nytimes.com/2017/03/18/public-editor/a-community-of-one-the-times-gets-tailored.html.

which makes this process and power of online news media less arbitrary. In order to respect media freedom and independence of the media, this approach to protect news users against domination should not necessarily translate into legal obligations.[689] However, a clear link between personalisation personae and the law exists: Personalisation personae can supplement the rights which news users have on the basis of the GDPR while respecting media freedom and principles of self-regulation of the media.

[689] Similarly, see Harambam, Helberger, and van Hoboken, 'Democratizing algorithmic news recommenders', p. 7.

Chapter 6.

General Conclusions

6.1 News Personalisation is Here to Stay

Online news media will likely continue to use news personalisation, in combination with non-personalised news. Competition in the online news market and changing user habits are important drives for the adoption of personalisation.[690] Online news media offer personalised news to keep the attention of their users, entice people to spend more time on news websites and apps, and help people to manage the information overload. With personalisation, online news media can mimic the personalised nature of social media and search engines, and be responsive to the needs of users who are getting accustomed to a personalised internet. Personalisation seems to be very effective under certain circumstances. A data scientist from DPG Media, the largest Dutch publishing house, reports that personalised push notifications are opened ten times more often than non-personalised push notifications.[691]

Amidst these pressures for online news media to adopt personalisation, most online news media are still developing and experimenting with the technology. The Rathenau Instituut, a technology assessment research institute in the Netherlands, found that, to date, most Dutch news media are using personalisation only sparingly, although many big news groups are experimenting with personalised websites, newsletters, and apps.[692] Meanwhile, the Personalised News project, of which the research presented here is part,[693] collaborated with various online news media from the Netherlands, Germany, and the United Kingdom. From these collaborations resulted that many online news media are looking for guidance in the interpretation of the legal framework and daily decision making with regard to personal data collection.[694]

The main research question was how EU fundamental rights can inform the regulation of the relationship between online news media which personalise the news and their users. I focused on the fundamental rights of news users to respect for privacy, the right to the protection of personal data, the right to freedom of thought, and the right to freedom of expression, which includes the freedom to hold opinions and to receive information and ideas. The research was presented in four articles which were published in peer-reviewed journals and eventually combined in this manuscript.[695] This final chapter summarises my research and answers the main research question.

6.2 Fundamental Rights Context of News Personalisation

Shining a light on the fundamental rights of news users to respect for privacy, the right to freedom of thought, and the right to freedom of expression, which includes the freedom to hold opinions and to receive information and ideas, these fundamental rights disperse into a spectrum of

[690] See section 1.3.1.
[691] J. Baan, 'News recommendation at scale', *Medium*, 2020, https://medium.com/@engineering/news-recommendation-at-scale-2ce03bbc4692.
[692] I. van Keulen et al., 'Digitalisering van het nieuws: Online nieuwsgedrag, desinformatie en personalisatie in Nederland' (Rathenau Instituut, 2018), p. 67, https://www.rathenau.nl/nl/digitale-samenleving/digitalisering-van-het-nieuws.
[693] See section 1.4.4.
[694] Helberger et al., 'News personalization symposium report', pp. 3–4.
[695] See section 1.4.4.

interests, values, and even more rights.[696] This fundamental rights context can supplement ideas of control in terms of data protection law.

Article 7 EU Charter and article 8 ECHR provide that everyone has the right to respect for their private and family life, home, and communications. The fundamental right to respect for privacy covers three groups of interests: protection against unwanted attention, personality and identity, and integrity of the person.[697]

If news personalisation helps news users to find information which is relevant for them and to avoid information which is irrelevant to them, news personalisation could contribute to privacy as protection against unwanted attention. At the same time, news personalisation may negatively affect the right to privacy in the sense of personality and identity. Media users select and share information to express their own identity and curate their own image.[698] News personalisation may pre-empt the active choice to read certain content and people's ability to self-define.

In order to respect the free development of personality and identity, the algorithmic feedback loop in personalisation systems should leave room for an element of self-expression. Especially public service media have an educational function and part of education is the encouragement of personal development and autonomy.[699]

The right to confidentiality of communication as it currently stands in terms of positive law is not applicable to news personalisation, because the purpose of the right is to ensure that information exchanged between a sender and recipient is not revealed to third parties who are not involved in the communication.[700] When online news media track which news items people click, these news media are themselves the sender of the communication and evidently involved in the communication. Online news media scanning the contents of news items which news users click to determine the topic of these items, cannot be characterised as a third party which is eavesdropping. The fundamental right to confidentiality of communications does not prohibit the sender of the communication from knowing what it communicates to the recipient.

Article 10 EU Charter and article 9 ECHR protect the right to freedom of thought, conscience, and religion.[701] The majority of case law on the right to freedom of thought, conscience, and religion is about religious beliefs. Nonetheless, freedom of thought can apply to a wide range of personal beliefs, as long as they attain a certain level of cogency, seriousness, cohesion, and importance. Furthermore, the baseline protection of freedom of thought is that it protects against indoctrination by the state.

The fundamental right to freedom of opinion appears similar to freedom of thought, but freedom of opinion is protected through different provisions.[702] Article 11 EU Charter and article 10 ECHR provide that everyone has the right to freedom of expression, which includes, among others, the

[696] See section 2.1 for the visualization of fundamental rights as prisms, which was inspired by the work of Gerards.
[697] See section 2.2.1.
[698] See section 2.3.1.
[699] N. Helberger, 'Merely facilitating or actively stimulating diverse media choices? Public service media at the crossroad', *International Journal of Communication*, 9 (2015), 1324–40 (p. 1335).
[700] See section 2.2.2.
[701] See section 2.2.3
[702] See section 2.2.4.

freedom to hold opinions. Just like the right to freedom of thought, the right to freedom of opinion is rather underdeveloped in terms of European case law. In any case, freedom of opinion at least requires freedom from coercion in the development of opinions.

Freedom of thought and freedom of opinion thus protect against indoctrination and coercion of opinion-formation. Although these rights are laid down in different provisions, the substance of their protection is alike. From a positive law perspective, freedom of thought and opinion are ill-suited to accommodate the position of news users, unless news personalisation takes extreme forms. Nonetheless, in view of new digital technologies—such as news personalisation—, but also other technologies—such as digital interventions in the brain based on neuroscientific insights—, [703] it might be worthwhile to further develop the scope and meaning of these fundamental rights through other processes than ECtHR or CJEU case law.

The right to receive information means, among others, that the public should have access to diverse information through the media so they can develop their own original opinions. [704] In addition, the right to privacy in the sense of protection against unwanted attention has similarities to the right not to receive information. Such a right to not receive information underlies article 13 of the ePrivacy Directive. People have a right not to receive unsolicited communications, which could provide a conceptual basis for a right not to receive unsolicited personalisation.

Shining a light through the prism of the right to respect for privacy, the right to freedom of thought, and the right to freedom of expression, which includes the freedom to hold opinions and to receive information and ideas, a wide spectrum of interests, values, and rights arising from these fundamental rights can be observed. Together, these rights protect what I have designated the personal information sphere. [705] The personal information sphere is the domain where people can determine for themselves how they interact with information about the world and how other people may interact with information about them. This is a form of control which differs from the kind of control enabled by data protection law, which focuses on consent, transparency, and subject access rights.

The notion of a personal information sphere fits within a larger trend within European constitutional jurisprudence. Möller has observed how constitutional courts around the world increasingly understand and explain constitutional rights as protecting people's autonomy interests in controlling certain domains of their lives. [706] The personal information sphere also resembles what Cohen and Richards call 'intellectual privacy', [707] the privacy which protects people's ability to read and think about information without the prying eyes of others.

In addition to showing connections between different fundamental rights, the notion of a personal information sphere can help to balance conflicting interests in news personalisation. For

[703] J. C. Bublitz, 'Freedom of thought in the age of neuroscience', *Archiv Für Rechts- Und Sozialphilosphie*, 100:1 (2014), 1–25.
[704] See section 2.2.5
[705] See section 2.3.1.
[706] K. Möller, 'Two conceptions of positive liberty: Towards an autonomy-based theory of constitutional rights', *Oxford Journal of Legal Studies*, 29:4 (2009), 757–86, https://doi.org/10.1093/ojls/gqp029.
[707] Cohen, 'Intellectual privacy and censorship of the internet'; Cohen, 'A right to read anonymously'; Richards, 'Intellectual privacy'; Richards, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age*.

example, the Reuters Institute for the Study of Journalism found in 2019 that almost a third of news users actively avoids the news.[708] News personalisation could be used to bring important news items to the attention of news avoiders. Such a use of personalisation could benefit the public interest of public debate and engaged citizens. This public interest needs to be balanced with the interests of news users which are captured in the personal information sphere, which goes beyond privacy or data protection.

6.3 Fundamental Right to Receive Information

Article 10 ECHR and article 11 EU Charter have laid down the fundamental right to receive information as part of the fundamental right to freedom of expression. The ECtHR has also read a right to receive certain information into other rights. For example, the right to respect for private and family life or the right to a fair trial may give rise to a right to receive information. This present work focused on the right to receive information as part of the fundamental right to freedom of expression.

For a long time, the audience's right to receive information was mainly protected indirectly through media freedom. The idea was that if the media is free to publish what they like, then the audience's right to receive information is protected as well.

In the 1940s, the Hutchins Commission published a report which legal scholar Baker described as 'the most influential modern American account of the goals of journalistic performance'.[709] In its report, the Hutchins Commission noted that, until then, it had been sufficient to protect the freedom of the consumer and the interests of the community via the freedom of the press.[710] The Commission argued that, should the conditions affecting the consumer's freedom radically change, it might become necessary to protect the freedom of the consumer as well.[711] The Commission concluded that due to developments in the media, the protection of the freedom of the media was no longer sufficient to automatically protect the consumer and the community.[712]

A similar point has been reached in 2020 with news personalisation. A focus on media freedom is no longer sufficient to ensure that news users receive the information which they want to have and need for their different social and citizen roles. Therefore, this thesis has explored the meaning and scope of the news user's right to receive information.

I have distinguished the right to receive information as part of objective law and as a subjective right.[713] In most cases, the right to receive information falls under objective law, which is to say that legal authorities, such as lawmakers and courts, must take the right into account in drafting laws or adjudicating cases. In a limited number of cases, the fundamental right to receive information is a subjective right. As a subjective right, the right to receive information prohibits

[708] Newman et al., 'Digital News Report 2019', p. 25.
[709] C. E. Baker, *Media, Markets, and Democracy* (Cambridge University Press, 2001), p. 154.
[710] R. M. Hutchins et al., 'A free and responsible press' (The University of Chicago Press, 1947), p. 124, https://archive.org/details/freeandresponsib029216mbp.
[711] Hutchins et al., 'A free and responsible press', p. 124.
[712] Hutchins et al., 'A free and responsible press', p. 125.
[713] See section 3.2

public authorities from restricting people to receive information which others want, or may be willing to communicate to them. People may also have a subjective right to receive information held by the state.

Case law in which the right to receive information functions as part of objective law or as a subjective right contains a variety of justifications to uphold it. These perspectives range from ones focused more on societal and public goals to those focused more on individual and private goals: political participation, truth-finding, social cohesion, self-development, and avoidance of censorship.[714] Media policy and regulation which aim to protect the right to receive information in the face of news personalisation, should consider all these perspectives, which go beyond the importance of receiving information for political participation.

Individuals give meaning to their own lives and develop their self-image by participation in culture, through receiving cultural messages and communications, and responding to them. Truth-finding, personal self-development, and social cohesion are all aspects of a wider democratic culture which transcends political participation. European legislation and case law reflect that the right to receive information plays a role in serving these various goals.

The five perspectives which justify the right to receive information could inform the design of different news personalisation systems. For example, online news media could offer avatars which enable people to receive more news related to political issues, contentious fact-finding issues, social issues, or more personal, human interest issues.[715] With personalisation avatars, online news media could thus design personalisation systems which are responsive to the different justifications for the fundamental right to receive information.

Another question is who is responsible for ensuring that news personalisation respects all dimensions of the right to receive information. In principle, the right to receive information only creates legal obligations for states. At the same time, the exercise of freedom of expression comes with duties and responsibilities for the right-holder.[716] Online news media exercise their right to freedom of expression in personalising the news or using other forms of artificial intelligence in the production, publication, and distribution of news.[717] To fulfil their duties and responsibilities, news media could develop new rules for existing journalistic codes of ethics to ensure that personalisation respects news users' right to receive information.

Individual news users do not have a subjective right to receive specific information from the media.[718] However, this doctrine assumes a rather traditional, analogue media system in which news media have limited capacities to cater to the needs of every individual news user. News personalisation challenges the arguments against a subjective right to receive information. News stories are first produced and published by news media, and then distributed in a personalised manner by a news company. A subjective right to receive information from news media could work if it only targets the final phase of the news distribution process. If an individual wants to

[714] See section 3.3.
[715] See section 2.3.1 on the idea to offer news users personalisation avatars, as proposed by Harambam and colleagues.
[716] See section 1.2.3.
[717] Helberger et al., 'Implications of AI-driven tools in the media for freedom of expression'.
[718] See section 3.2.

receive certain news items from a larger pool of news items which an online news organisation has already published anyway, then the freedom of the media to publish what they deem necessary and the information rights of other news users do not need to be affected. In case news personalisation becomes more pervasive, a subjective right to receive information could provide a counter-balance to the power of online news media.

News users' fundamental right to receive information is closely connected to their fundamental right to the protection of personal data. The manner in which online news media implement the right to data protection of news users influences how the latter can exercise their right to receive information. The next section shows the links between the right to receive information and data protection, and discusses the various data protection rights of personalised news users.

6.4 Fundamental Right to Data Protection

The fundamental right to data protection is protected by article 8 EU Charter and article 16 TFEU. Of the various fundamental rights at issue in this thesis, the fundamental right to the protection of personal data is the only one which is developed in detail through secondary legislation, namely the GDPR.

The GDPR contains the so-called special purposes provision, which is an obstacle to the application of European data protection law to news personalisation. Article 85, paragraph 1, GDPR obliges Member States to reconcile the right to the protection of personal data with the right to freedom of expression and information, including processing for journalistic purposes. Article 85, paragraph 2, further specifies this obligation by requiring that Member States in their domestic laws provide for exemptions or derogations from a range of provisions of the GDPR for processing carried out for journalistic purposes.

The special purposes provision does not apply to the processing of personal data for personalised news dissemination.[719] The special purposes provision aims to enable the use of personal data in news stories, but not the use of personal data to disseminate the news. Online news media should be free to produce and publish the news they deem important, and the special purposes provision guarantees this freedom to the extent that news stories contain personal data of the people concerned in the reported event. News users which receive personalised news thus have their full range of data protection rights regarding personalisation, and online news media need to comply with all their data protection obligations regarding news personalisation.

When the European Commission proposed the Data Protection Directive in 1990, it stressed that the approach behind the special purposes provision emphasises the obligation to balance the interests of media and data subjects.[720] The Commission added that this balance could consider, among others, the existence of journalistic codes of ethics.[721] As long as journalistic codes of

[719] See section 4.2.

[720] European Commission, 'Proposal for a Council Directive concerning the protection of individuals in relation to the processing of personal data COM(90) 314 final', 1990, p. 39, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:1990:0314:FIN.

[721] European Commission, 'Proposal for a Council Directive concerning the protection of individuals in relation to the processing of personal data', p. 39.

ethics are not updated to cover the use of artificial intelligence, and more specifically, personalisation, an extra argument exists not to allow exemptions or derogations from the GDPR for news personalisation.

Apart from balancing the interests of online news media and news users via the special purposes provision, another balance is to be performed in the context of news personalisation. News users have to weigh how much personalisation they want against how much personal data they are willing to submit to news media. Several provisions of the GDPR give news users opportunities to perform this balancing exercise. By stopping personalisation or adjusting their profile, news users can exercise control over the personalisation process and adjust their news experience more towards protective of privacy and data protection or more towards an enhanced right to receive information.[722]

The GDPR can thus accommodate both news users who appreciate personalisation and news users who do not. News users who are not in favour of personalisation can stop personalisation on the basis of their data protection rights and news users who approve of personalisation, but would like to exercise control over the output of the personalisation system, can adjust their profile on the basis of their data protection rights.

The GDPR provides news users with four ways to stop personalisation. If the legal ground for the processing of personal data for personalisation is consent, then news users may withhold or withdraw consent when they do not wish to receive personalised news.[723] Consent should be freely given, specific, and informed. To ensure that people can freely give consent to personalisation, people should have the option to choose a non-personalised news service. In European media systems, public service media are well positioned to ensure that everyone has access to non-personalised, and thereby, more privacy protective news services.

If the legal ground for the processing of personal data for news personalisation is a contract, such as a news subscription, then news users can terminate the news subscription according to the rules of national contract law and stop personalisation in so doing.[724] Many online news media are currently improving their services by offering personalisation via their websites and apps. For existing news subscriptions, personalisation will not be deemed necessary for the performance of the contract since the personalisation was never part of the original service. These online news media will need to ask their subscribers for additional consent to personalise their news offerings. In practice, therefore, many news services will have need of consent.

If online news personalisation is based on the public task or legitimate interest ground, then news users may object to the processing of their personal data and accordingly stop personalisation.[725] In that regard, the present work has concluded that public service media can carry out personalisation on the basis of their public task but not on the basis of their legitimate interests. Commercial media may invoke consent, a contract, or their legitimate interests for personalisation.

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[722] That is not to say that the protection of personal data and news personalisation cannot go together; Several studies have been done on privacy-protective (news) personalisation systems. Nonetheless, news personalisation does require personal data processing and profiling.

[723] See section 4.3.1.

[724] See section 4.3.2.

[725] See section 4.3.3.

Finally, news users can probably not invoke their right not to be subject to a decision based solely on automated processing.[726] Various conditions in the GDPR limit the application of this right to news personalisation. One condition is that the automated decision should produce legal effects concerning news user or similarly significantly affect them. To answer the question whether news personalisation has legal effects or similar significant effects on news users, among other rights, the right to receive information should be taken into account. News users do not have a subjective right to receive information from news media. Therefore, news personalisation usually cannot be said to have a legal effect or similar significant effect on news users. In addition, when a news user is not recommended a news item which they want, they can still search for this news item on the news website or the wider internet. Only if news personalisation severely decreases the diversity of the news which news users receive, their fundamental right to receive information could be affected.

The analysis of the right not to be subject to automated individual decision-making again illustrates the relationship between different fundamental rights. In order to determine whether news users have a right not to be subject to automated decision-making, it should become clear whether news users have a right to receive information, and if news personalisation affects that right.

The fundamental right to the protection of personal data gives news users, through the GDPR, the right to amend their profile on which the personalisation is based.[727] In this context, I distinguish between three types of personal data: data submitted by news users themselves, for example by ticking boxes for news topics or sources in which they are interested; data observed by the controller, such as website usage, search activities, and reading time; inferred data, which is data inferred from submitted and observed data by the controller, such as what someone's interests (probably) are.

News users have the right to obtain the rectification of inaccurate submitted, observed, and inferred personal data from online news media, and to have incomplete personal data completed.[728] The former Article 29 Working Party held that data subjects solely have the right to rectify data which are inaccurate as a matter of fact,[729] suggesting that people may only rectify objectively inaccurate data. However, the Working Party developed this notion of accuracy in the context of delisting or erasing search results. In that case, a narrow reading of inaccurate is justified because it minimises the implications of the removal of information for other rights-holders. The rectification of data in personal profiles for news personalisation does not present risks for other people's rights. News users should therefore be allowed to rectify objective and subjective inaccurate data in their personalisation profile.

Under certain conditions, news users have the right to obtain the erasure of personal data concerning them from news media.[730] The right to erasure gives people control over their profile on which personalisation is based, because it enables them to start afresh and to reset their profile, without having to delete their entire account or terminate their subscription. The GDPR provides

[726] See section 4.3.4.
[727] See section 4.4
[728] See section 4.4.1.
[729] Article 29 Working Party, 'Guidelines on the implementation of Google Spain', p. 15.
[730] See section 4.4.2.

that the right to erasure is not applicable when the processing of personal data is necessary for exercising the right to freedom of expression and information. However, online news media can produce and publish news without being able to disseminate it in a personalised manner. The right of news users to erase data from their personal profile is not contrary to media freedom.

The right to amend their profile allows news users to influence the kind of news content which they are recommended and receive in a personalised manner. This demonstrates how the GDPR and the fundamental right to data protection are supportive of other rights, such as the right to receive information in this case.

Finally, besides stopping personalisation and amending their profile, news users have the right to receive the personal data concerning them and to transmit those data to another online news media if the processing of their personal data is based on consent or a contract.[731] However, the right to data portability covers only data which someone has provided to a controller, that is, submitted and observed data, but not inferred data—even though inferred data are personal data. For personalised news users, the right to data portability would be most useful if they could also port inferred data, so that they can switch to another personalised news service and immediately receive relevant personalisation when joining the new service.

With rectification and erasure, news users can change the profile on which their news personalisation is based. This is relevant because someone's profile determines the quality of the news personalisation received. If the fundamental right to data protection is implemented effectively for personalised news users, they gain opportunities to exercise their right to receive information in a meaningful manner. Furthermore, the right to amend their profile enables news users to engage with the personalisation process, instead of just stopping personalisation or giving up control when they feel uncomfortable with being profiled.

Through the GDPR, the fundamental right to data protection can be translated into two concrete design principles for news personalisation. Every news personalisation application needs to have an option to turn off personalisation at any point in time, and an interface where users can change their profile as they like. The European Commission noted in its European strategy for data that individuals 'suffer from the absence of technical tools and standards that make the exercise of their rights simple and not overly burdensome'.[732] The fundamental right to data protection is not opposed to news personalisation but rather mandates a truly interactive and collaborative personalisation process. All of this is necessary to prevent an individual's data protection preference becoming an access condition to receive information.

6.5 Limitations of Fundamental Rights and Freedoms

As the research so far has demonstrated, the use of personalisation by online news media affects the fundamental rights of news users, ranging from the right to respect for privacy, the right to the protection of personal data, the right to freedom of thought, and the right to freedom of

[731] See section 4.5.

[732] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region: A European strategy for data COM(2020) 66 final', 2020, p. 10, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0066.

expression, which includes the freedom to hold opinions and to receive information and ideas. The system of fundamental rights aims to protect people against interferences with these fundamental rights.

An interference with a fundamental right can be defined as a state of affairs, caused by an action or inaction of another agent which impairs or hinders the exercise of the protected conduct and interests of the right.[733] The notion of an interference requires an obvious effect on someone's fundamental rights, whereas news personalisation has mostly liminal effects which build up over time and are hard to pinpoint in the sense of: 'this recommendation caused such interference with someone's right to receive information'. Therefore, the question is whether the concept of interferences with fundamental rights and freedoms is capable of capturing all the instances in which news personalisation limits the fundamental rights and freedoms of news users.

The application of the law is usually informed by a concept of freedom as non-interference. For the purposes of this research, I have understood freedom as non-interference as meaning that someone is free in the absence of interference with their life, choices, or opportunities by another (external) agent or their own (inner) drives.[734]

According to a concept of freedom as non-interference, a loss of freedom is only experienced if an actual interference occurs. In collecting data about the user and profiling them on the basis of these data, online news media interfere with the fundamental rights to privacy and the protection of personal data. However, data collection and profiling in themselves do not directly interfere with the other fundamental rights of news users. Furthermore, when online news media match user profiles with news items and provide users with a personalised news selection, their actions or inactions usually do not meet the threshold of an interference. As long as news users can search for information elsewhere on a news site or the internet, and are not actually blocked from expressing themselves, news personalisation does not interfere with their fundamental right to receive information or freedom of expression.[735]

Instead of freedom as non-interference, I proposed to look at freedom as non-domination to understand the power in the hand of online news media. Pettit has argued that an agent has dominating power over another person if 1) the agent has the capacity to interfere, 2) on an arbitrary basis, 3) in certain choices which the other person is in a position to make.[736] An agent has arbitrary power if they can exercise their capacity to interfere at their own discretion, without considering the interests of the dominated person.

The key difference between freedom as non-interference and freedom as non-domination is that a loss of freedom as non-domination does not require that the power-holding agent actually interferes, or is inclined to interfere with the life or choices of the person who is subject to their power. Freedom as non-domination focuses on the existence of a structural, dominating relationship rather than on the actual exercise of power. Someone experiences a loss of freedom (as non-domination) when they are at the mercy of an agent which holds arbitrary power over them.

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[733] See section 5.1.
[734] See section 5.2.1.
[735] See section 5.2.3.
[736] Pettit, *Republicanism*, p. 52. See also section 5.3.1.

From the perspective of freedom as non-domination, online news media may limit the freedom of news users when they use news personalisation. When news users search for, read, and engage with the news, they are continuously making choices which can be framed in terms of their rights to freedom of thought, freedom of opinion, right to receive information, and right to freedom of expression. Online news media, by way of their personalisation systems, have the capacity to hinder or obstruct the choices of news users. That is not to say that online news media currently actually exercise these powers to the detriment of news users. But from a perspective of freedom as non-domination, it is sufficient to establish that online news media do have arbitrary power to shape people's choices. Online news media decide how people are profiled on the basis of the data collected, and online news media set the goals and evaluation metrics for their personalisation systems. These powers of news media are largely arbitrary. The GDPR may enable people to stop personalisation or adjust some profile characteristics, but it does not enable news users to have a say in the objectives of personalisation, or the way in which their data are analysed, besides the binary option to refuse to provide consent for the processing of their personal data or to object to the processing.

To protect news users against domination by online news media which personalise their news offerings, two elements have been considered. First, the goal of protecting news users against domination is to guard them against arbitrary interference by news media, not against all forms of personalisation. Personalisation has many benefits for news users, such as helping them to better exercise and realise their fundamental right to receive information. Furthermore, many news users appreciate and welcome news personalisation. Therefore, we should not strive to ban personalization altogether, but we should try to make personalization less dominating. Secondly, any intervention with news personalisation should respect media freedom and not introduce a new form of domination over the media themselves.

News users can be protected against domination on the part of online news media by ensuring that the news media's capacity to interfere is no longer arbitrary.[737] The most suitable way to make news personalisation less dominating is by enabling news users to participate in the personalisation process. I am not arguing that news users should have a say on an organisational level, for example in decisions about whether or not to invest in personalisation technologies. What I am arguing for is allowing users to make meaningful choices between different types of recommender system settings and designs. If news users can participate in deciding for which goals personalisation systems are used, then the interferences which might result from personalisation will be closer to the user's interests and personal goals, and users will be less dependent on the goodwill of news media. Personalisation personae present a way to enable users to participate in the goal-setting for personalisation systems, letting them switch between different algorithmic logics and influence the output of personalisation systems without having to be able to articulate their fleeting and always changeable topical interests very precisely.

6.6 Conclusion

In this research project, I have queried how EU fundamental rights can inform the regulation of the relationship between online news media which personalise the news and their users.

[737] See section 5.3.3

Fundamental rights embody democratic values and provide a framework to determine and weigh interests of news users vis-à-vis news media. For news users, the most relevant fundamental rights to are the right to respect for privacy, the right to the protection of personal data, the right to freedom of thought, and the right to freedom of expression, which includes the freedom to hold opinions and to receive information and ideas.

The fundamental right to data protection, which is given expression in the GDPR, and the fundamental right to receive information, in conjunction translate into concrete regulatory guidelines for news personalisation systems. News users should be empowered to stop personalisation at any moment, and they should have accessible options to change their individual user profiles on which the personalisation is based. Furthermore, states should ensure that news personalisation does not diminish the diversity of the content which people receive. By providing people with the means to exercise their data protection rights, they are also enabled to influence the kind of information which they receive.

The fundamental rights to freedom of thought, freedom of opinion, and freedom of expression lead to less concrete regulatory imperatives for news personalisation. On the one hand, the bar to establish an interference with the right to freedom of thought or freedom of opinion is set high, and it is quite a stretch to suggest that news personalisation poses a risk, or interferes with the ability of people to freely express themselves. Nonetheless, an extra-legal perspective shows that online news media which personalise the news, have arbitrary power over the choices which news users make to read and engage with certain news items, and news media thereby limit the freedom of thought, opinion, and expression of news users. To reduce the arbitrariness of this power, news users should be able to participate in the personalisation process, in a manner which goes beyond just asking for their consent to process their personal data or giving them the option to tick some boxes in their personal profile. News users should be able to exercise control over the question for which goals their news feeds are personalised.

In its White Paper on artificial intelligence, the European Commission has stated that a need exists to examine whether current legislation is able to address the risks of AI, whether adaptations of the legislation are needed, or whether new legislation is needed.[738] As regards the use of personalisation technologies in the news sector, which are largely based on AI applications, my answer would be that: 1) the GDPR is able to address some risks of AI in the news sector, although data portability should be strengthened to ensure full data protection, and people should also be able to rectify subjective inaccurate data; 2) the GDPR's focus on AI problems is too narrow, we should also consider the other fundamental rights of users and how these rights relate to each other. In that respect, new legislation might be needed—just like the GDPR gives expression to the fundamental right to the protection of personal data—insofar as certain fundamental rights are not sufficiently developed to deal with questions which arise from AI in the news sector. In order to ensure that news personalisation truly serves the interests of news users, and not just the goals of the media, it is necessary to consider the fundamental rights of news users and the role of states in creating the conditions for news users to enjoy their rights.

[738] European Commission, 'White paper on artificial intelligence', p. 10.

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Author contributions

Chapter 3 is a slightly altered version of a multiple-author article. The researchers having been involved with said article were Sarah Eskens, Natali Helberger, Judith Moeller, and Frederik Zuiderveen Borgesius (who is not listed as an author).

The contributions of the different authors to Chapter 3 were as follows: Sarah, Natali, Judith, and Frederik conceptualised the chapter. Sarah gathered relevant laws, case law, and literature, and Natali, Judith, and Frederik suggested additional literature from legal and communication science. Sarah analysed the law, case law, and literature, and brainstormed with Natali, Judith, and Frederik about the analytical framework. Sarah drafted and edited the article. Natali, Judith, and Frederik reviewed the article. Sarah edited the chapter for inclusion into this manuscript.

Chapters 1, 2, and 4-6 are single-authored by Sarah.

Nederlandse samenvatting

Hoofdstuk 1

Online nieuwsmedia zijn steeds meer aan het experimenteren met personalisatietechnologieën, en sommige media hebben deze technologieën zelfs al in hun websites en mobiele apps geïmplementeerd. Nieuwspersonalisatie is het automatisch afstemmen van het nieuwsaanbod op individuele nieuwsgebruikers, gebaseerd op bepaalde kennis over elke gebruiker. Met behulp van personalisatie kunnen nieuwsgebruikers dus op geautomatiseerde wijze een veelheid aan nieuwsartikelen ontvangen die speciaal voor hen zijn geselecteerd en gerangschikt.

Het online nieuwslandschap wordt gevormd door een complex netwerk van verschillende partijen. Traditionele kranten en omroepbedrijven, waaronder de publieke omroep en commerciële media, hebben tegenwoordig allemaal een website en app. *Digital born* nieuwsmedia produceren en publiceren zelf ook nieuws, of ze bundelen nieuws uit andere bronnen. Online nieuwsmedia gebruiken vaak ook personalisatiesystemen die door derde partijen zijn ontwikkeld. Dit onderzoek richt zich op online nieuwsmedia die zelf nieuws produceren en publiceren, en redactionele controle uitoefenen over de inhoud die ze distribueren. Sociale media en derde partijen die personalisatiesystemen bouwen, vallen buiten de omvang van dit onderzoek.

In de rechtsorde van de Europese Unie is er weinig secundaire wetgeving of nationaal recht dat de positie van nieuwsgebruikers beschermt in de context van nieuwspersonalisatie, afgezien van de Algemene Verordening Gegevensbescherming ('AVG'). Nieuwsabonnementen vallen onder het contractenrecht, maar deze regels slaan vooral op de formaliteiten van een overeenkomst. Mediarecht is van toepassing op audiovisuele mediadiensten maar niet op online kranten. Daarom wordt de positie van nieuwsgebruikers voornamelijk beschermd door grondrechten. In de EU bepaalt het Handvest van de grondrechten van de Europese Unie ('EU Handvest') dat iedereen het recht heeft op eerbiediging van privacy, het recht op bescherming van persoonsgegevens, vrijheid van gedachte, en de vrijheid van meningsuiting, welke ook de vrijheid een mening te koesteren en de vrijheid om kennis te nemen van informatie en ideeën omvat. Het is echter onduidelijk wat de betekenis van deze grondrechten is voor de relatie tussen online nieuwsmedia en nieuwsgebruikers—een relatie die snel veranderd dankzij de introductie van nieuwe technologieën zoals personalisatie. Dit brengt ons tot de hoofdvraag van dit onderzoek: Hoe kunnen EU grondrechten de regulering van de verhouding tussen online nieuwsmedia die het nieuws personaliseren en nieuwsgebruikers inspireren?

Dit onderzoek bekijkt de grondrechten van mensen die gepersonaliseerd nieuws ontvangen vanuit verschillende perspectieven. Daarbij neem ik in aanmerking dat grondrechten in principe alleen van toepassing zijn tussen de staat en burgers, en niet direct tussen private partijen. Grondrechten in het EU recht en het Europees Verdrag voor de Rechten van de Mens ('EVRM') vormen het juridisch kader voor dit onderzoek.

Het EU recht kent twee rechtsbronnen voor grondrechten, namelijk de algemene beginselen van het EU recht en het Handvest van de Grondrechten van de Europese Unie ('EU Handvest'). Eind jaren 60 erkende het Hof van Justitie van de Europese Unie ('HvJ EU') voor de eerste keer dat grondrechten besloten liggen in de algemene beginselen van het EU recht. Een paar jaar later

stelde het HvJ EU in nog sterkere bewoording vast dat de eerbiediging van grondrechten een bestanddeel is van de algemene beginselen van het EU recht.

In het jaar 2000 kondigde de EU het EU Handvest af met als doel de bescherming van de grondrechten te versterken. Het EU Handvest trad in werking in 2009 met het Verdrag van Lissabon. Het EU Handvest beschermt, onder andere, het recht op eerbiediging van privacy, het recht op bescherming van persoonsgegevens, vrijheid van gedachte, en de vrijheid van meningsuiting, welke ook het recht een mening te hebben en de vrijheid om kennis te nemen van informatie en ideeën omvat. Het recht op bescherming van persoonsgegevens wordt verder ontwikkeld door secundaire wetgeving, namelijk de AVG.

Naast het EU Handvest, vormt het EVMR een belangrijke bron voor grondrechten in Europa. Het EVRM is van grote invloed op grondrechten in de EU, ook al vindt het EVRM zijn oorsprong in de Raad van Europa en niet in de EU. Het belang van het EVRM voor EU recht wordt bevestigd door rechtspraak van het HvJ EU, het VEU, en het EU Handvest. Het HvJ EU laat zich onder andere leiden door internationale wilsverklaringen inzake de bescherming van de rechten van de mens waarbij de lidstaten van de EU zich hebben aangesloten. Het HvJEU kent daarbij een bijzondere betekenis toe aan het EVRM. Artikel 6(3) VEU codificeert deze uitspraken door te stellen dat grondrechten, zoals zij worden gewaarborgd door het EVRM, als algemene beginselen deel uitmaken van het EU recht. Daarnaast bepaalt artikel 52(3) EU Handvest dat voor zover het Handvest rechten bevat die corresponderen met rechten welke zijn gegarandeerd door het EVRM, de inhoud en reikwijdte ervan dezelfde zijn als die welke er door het EVRM aan worden toegekend. De rechtspraak van het EHRM is daarom ook van belang voor het EU recht.

Hoofdstuk 2

Empirisch onderzoek laat zien dat nieuwsgebruikers verschillende vormen van controle willen hebben over nieuwspersonalisatie. De AVG voorziet nieuwsgebruikers in verschillende rechten waarmee ze hun persoonsgegevens kunnen controleren. De vorm van controle waar de AVG in voorziet wordt echter bekritiseerd omdat deze mensen geen zinvolle mogelijkheden zou bieden om zich te verhouden tot datagestuurde systemen die beslissingen voor en over hen maken. De vraag is hoe we ons begrip van gebruikerscontrole kunnen verbreden in de context van nieuwspersonalisatie als we het recht op bescherming van persoonsgegevens te midden zien van het recht op privacy, de vrijheid van gedachte, de vrijheid van meningsuiting, het recht een mening te hebben, en de vrijheid om kennis te nemen van informatie. Dit verband van grondrechten kan ons idee van controle, en, in het bijzonder, controle over persoonsgegevens die gebruikt worden voor nieuwspersonalisatie, verbreden.

Om de betekenis en verbanden tussen de grondrechten van nieuwsgebruikers te ontdekken, gebruik ik een metafoor van Janneke Gerards. Gerards beschrijft grondrechten als kleine prisma's: een grondrecht is doorzichtig en lijkt een scherp omlijnd object, maar zodra er licht op valt en er doorheen schijnt, dan breekt het licht in een spectrum van belangen, waarden, en zelfs nieuwe rechten. Over de jaren heen kunnen rechters en rechtsgeleerden nieuwe belangen, waarden, en rechten in een bepaald grondrecht waarnemen, terwijl deze aspecten daarvoor nog niet waren te onderscheiden. In dit onderzoek schijn ik een licht op de prisma's van het recht op privacy, de vrijheid van gedachte, de vrijheid van meningsuiting, het recht een mening te hebben, en de vrijheid om kennis te nemen van informatie. Het recht op bescherming van persoonsgegevens

wordt al in detail uitgewerkt door de AVG, en wordt daarom verder niet besproken in dit hoofdstuk.

Als we een licht schijnen op de prisma's van het recht op privacy, de vrijheid van gedachte, de vrijheid van meningsuiting, het recht een mening te hebben, en de vrijheid om kennis te nemen van informatie, dan zien we een breed spectrum van verschillende belangen, waarden, en nieuwe rechten. Deze rechten beschermen samen hetgeen wat ik de persoonlijke informatieomgeving noem. De persoonlijke informatieomgeving is het domein waar mensen voor zichzelf kunnen bepalen hoe ze zich inlaten met informatie en hoe andere mensen zich kunnen verhouden tot hun gegevens. Deze vorm van controle verschilt van de soort controle waar het gegevensbeschermingsrecht in voorziet. Deze laatste vorm van controle focust namelijk vooral op toestemming, transparantie, en toegangsrechten voor de betrokkene.

We kunnen de persoonlijke informatieomgeving visualiseren als een kring waar het individu in staat. Het recht om kennis te nemen van informatie beschermt informatiestromen die de kring in gaan. Mensen gebruiken deze inkomende informatie om meer te leren over politieke, wetenschappelijke en persoonlijke vraagstukken, en om verschillende perspectieven op deze vraagstukken te verkennen. Vrijheid van gedachte en het recht een mening te hebben beschermen informatiestromen die in de kring rondgaan. In hun eigen kring verwerken mensen informatie en ontwikkelen ze hun gedachtes en meningen. Vrijheid van meningsuiting en het communicatiegeheim beschermen informatie die de kring weer uitstroomt. Door met de buitenwereld te communiceren, nemen mensen een plaats in in de wereld, dragen bij aan debatten over zaken waar ze belang aan hechten, en tonen ze hun persoonlijke identiteit. Het recht op privacy vormt de grenslijn tussen persoonlijke en publieke communicatie; het beschermt het simpele bestaan van de kring en de vrijheid van mensen om de straal, de breedte, van hun eigen kring te bepalen. Daarnaast versterkt het recht op privacy de vrijheid van mensen om ongestoord informatie te verzamelen, hun eigen gedachtes en meningen te ontwikkelen, te experimenteren met verschillende ideeën voordat ze deelnemen aan het publieke debat, en te beslissen welke overtuigingen ze met andere mensen delen en welke ze voor zichzelf houden.

Wanneer we het gebruik van online nieuwspersonalisatie bekijken vanuit het perspectief van de persoonlijke informatieomgeving, dan wordt duidelijk dat online nieuwsmedia meer moeten doen dan alleen de AVG na leven. Online nieuwsmedia concurreren met zoekmachines en sociale media om de aandacht van gebruikers, en personalisatie vormt een onderdeel van hun concurrentiestrategie. In deze concurrentiestrijd moet het recht van nieuwsgebruikers om in vrijheid informatie te zoeken, ontvangen, en verwerken, en te reageren op informatie, gewaarborgd zijn, in aanvulling op hun privacy- en gegevensbeschermingsrechten. Dat wil zeggen, om de persoonlijke informatiesfeer te respecteren is het niet nodig om simpelweg de hoeveelheid nieuwspersonalisatie te verminderen. In plaats daarvan moeten online nieuwsmedia oplossingen ontwikkelen waarmee nieuwsgebruikers betrokken worden in het personalisatieproces, en deze oplossingen moeten verder gaan dan gewoon het vragen om toestemming om persoonsgegevens te verwerken of het faciliteren van toegangsrechten.

Hoofdstuk 3

Het voorgaande hoofdstuk gaf een algemeen overzicht van de grondrechten van nieuwsgebruikers. Het grondrecht om kennis te nemen van informatie speelt een centrale rol in

de juridische positie van nieuwsgebruikers en verdient daarom een meer diepgaande analyse. Nieuwspersonalisatie gaat er in de kern om dat de manier waarop mensen nieuws ontvangen verandert. Het grondrecht om kennis te nemen van informatie heeft geen horizontale werking tussen nieuwsgebruikers en online nieuwsmedia. Daarentegen kan het recht om kennis te nemen van informatie wel positieve verplichtingen bevatten voor de staat, zelfs in de verhouding tussen private partijen. Dit leidt tot de vraag of het recht om kennis te nemen van informatie in verband met nieuwspersonalisatie inderdaad positieve verplichtingen bevat voor de staat, en zo ja, waar deze verplichtingen dan uit bestaan.

Rechtspraak en wetgeving waarin het recht om kennis te nemen van informatie een rol speelt, toont een verscheidenheid aan rechtvaardigingen om dit recht te handhaven. Deze perspectieven lopen uiteen van meer gericht op maatschappelijke en publieke doeleinden tot meer gericht op individuele en persoonlijke doeleinden: politieke participatie, waarheidsvinding, sociale cohesie, en zelfontwikkeling.

Een groot aantal rechterlijke uitspraken handhaaft het recht om kennis te nemen van informatie omdat mensen informatie nodig hebben om deel te kunnen nemen aan het politieke leven. Politieke participatie omvat het stemmen met verkiezingen, als ook het verkennen en vormen van meningen over de ideeën en standpunten van politieke vertegenwoordigers, het vormen van meningen over de politieke en zakelijke activiteiten van politieke vertegenwoordigers, en het debatteren van overheidshandelen.

Het perspectief van waarheidsvinding impliceert dat het publiek zelf in staat moet zijn om te ontdekken en beslissen wat 'waar' is. In de zaak van *Özgür Gündem/Turkije* overweegt het EHRM bijvoorbeeld dat het publiek het recht had om kennis te nemen van de verschillende standpunten ten opzichte van een bepaalde situatie in zuidoost Turkije, onafhankelijk van de vraag of de autoriteiten deze standpunten onderschreven. In een andere zaak benadrukt het EHRM daarom dat het burgers moet zijn toegestaan om een diversiteit aan berichten te ontvangen, te kiezen tussen deze berichten, en hun eigen meningen met betrekking tot de verschillende standpunten die in deze berichten ten uitdrukking worden gebracht te ontwikkelen. Evenzo houdt het EHRM zich afzijdig in het beslissen van debatten over historische gebeurtenissen en de manier waarop deze gebeurtenissen begrepen moeten worden.

Europese mediawetgeving en -beleid en de standaardsetting initiatieven van de Raad van Europa, en zowel als het EHRM, erkennen het belang van het kennis nemen van informatie voor de totstandkoming en het behoud van sociale cohesie. De Richtlijn audiovisuele mediadiensten zorgt er bijvoorbeeld voor dat het publiek kan kennisnemen van uitzendingen van evenementen die van aanzienlijk belang voor de samenleving zijn, zoals een live uitzending van de Olympische spelen of internationale voetbalkampioenschappen. Lidstaten mogen lijsten samenstellen van evenementen die zij van aanzienlijk belang achten voor de samenleving en die op de kosteloze televisie beschikbaar moeten zijn. Deze lijsten bevatten voornamelijk sportevenementen, alhoewel lidstaten ook evenementen zoals opera's of muziekfestivals opnemen. De nadruk op sport toont dat deze regels vooral om sociale cohesie gaan, in plaats van om politieke participatie of waarheidsvinding. In een aantal zaken heeft het EHRM ook erkend dat publiek debat en de interactie tussen mensen met verschillende achtergronden noodzakelijk zijn voor de sociale cohesie.

Het ERHM heeft bepaald dat het recht om kennis te nemen van informatie een basisvoorwaarde is voor zelfontwikkeling en zelfrealisatie. In *Khurshid Mustafa en Tarzibachi/Zweden* heeft het EHRM in de meest duidelijke bewoording het belang van vrije informatiegaring voor zelfontwikkeling vastgesteld. Het EHRM overwoog dat de verzoekers politiek en maatschappelijk nieuws wilde ontvangen in het Arabisch en Farsi, wat voor hen van bijzonder belang was als Irakese immigranten. Het EHRM bepaalde verder dat het recht om kennis te nemen van informatie ook belangrijk is voor persoonlijke en culturele doeleinden, naast politieke doeleinden.

Op basis van deze perspectieven kunnen we de positieve en negatieve effecten van nieuwspersonalisatie op het recht om kennis te nemen van informatie evalueren. Nieuwspersonalisatie kan het recht om kennis te nemen van informatie ondermijnen, bijvoorbeeld wanneer personalisatie het aanbod aan nieuws dat mensen nodig hebben voor hun rol als geïnformeerde burger verkleint. Nieuwspersonalisatie kan het recht om kennis te nemen van informatie ook versterken en faciliteren, bijvoorbeeld door mensen informatie te presenteren welke in het bijzonder van belang is voor hun persoonlijke ontwikkeling, zonder daarbij andere mensen te onthouden van de informatie die zij weer nodig hebben voor hun ontwikkeling.

Het perspectief van politieke participatie leidt tot een concrete positieve verplichting voor de staat. Het EHRM heeft bepaald dat de staat de plicht heeft om er voor te zorgen dat het publiek via audiovisuele media toegang heeft tot correcte informatie en gevarieerde meningen die de diversiteit aan verschillende politieke standpunten in een land laten zien. Het EHRM heeft overwogen dat het internet en sociale media vanwege hun keuzeaanbod minder impact hebben dan televisie en radio. Het EHRM vindt speciale wet- en regelgeving voor radio en televisie daarom gerechtvaardigd. Als nieuwspersonalisatie het keuzeaanbod voor de nieuwsgebruiker verkleint, dan zou de impact van online nieuwsmedia kunnen vergroten, wat dan een reden zou kunnen zijn om online nieuwsmedia ook meer te reguleren.

Net zoals het perspectief van politieke participatie, impliceert het perspectief van waarheidsvinding dat het publiek het recht heeft om diverse informatie te ontvangen. Het EHRM heeft bepaald dat democratie media pluralisme nodig heeft, en dat de staat de eindverantwoordelijkheid voor pluralisme heeft. Het EHRM heeft aan staten daarom de positieve verplichting opgelegd om een juridisch kader te ontwikkelen om pluralisme in het mediabestel te garanderen.

Het EHRM heeft geen concrete positieve verplichtingen voor de staat geformuleerd met betrekking tot het perspectief van sociale cohesie of zelfontwikkeling. Ik betoog dat mediabeleid en -regulering die tot doel hebben het recht om kennis te nemen van informatie te beschermen in de context van nieuwspersonalisatie, alle perspectieven in acht moet nemen. Het recht laat zien dat het belang van informatie verder gaat dan politieke participatie.

Hoofdstuk 4

De meeste grondrechten van nieuwsgebruikers krijgen vorm door rechtspraak, maar het grondrecht op bescherming van persoonsgegevens wordt verder ontwikkeld door de AVG. De AVG kan een belangrijke rol spelen om er voor te zorgen dat nieuwspersonalisatiesystemen zo ontworpen worden dat het belang van de nieuwsgebruiker centraal staat en dat deze systemen de wensen van de gebruiker respecteren. Maar de toepassing van de AVG op

nieuwspersonalisatie is niet zo simpel. De AVG gebiedt lidstaten om uitzonderingen vast te stellen voor het verwerken van persoonsgegevens voor journalistieke doeleinden. Het is echter onduidelijk of nieuwspersonalisatie onder het bereik van deze zogenoemde speciale doeleinden-bepaling valt. Dit werpt de vraag op of de speciale doeleinden-bepaling van toepassing is op nieuwspersonalisatie. Een ander probleem voor de toepassing van de AVG zit hem in het volgende. De AVG heeft als doel om mensen meer controle te geven over het gebruik van hun persoonsgegevens, maar de vorm van controle hangt af van de context waarin de personalisatie wordt aangeboden. Dit leidt tot de vraag op welke manier de AVG mensen controle geeft over de verwerking van hun persoonsgegevens voor nieuwspersonalisatie.

Dit onderzoek concludeert dat de speciale doeleinden-bepaling niet van toepassing is op nieuwspersonalisatie. Nieuwspersonalisatie betreft de verwerking van persoonsgegevens om nieuws aan specifieke nieuwsgebruikers aan te bieden. De media hebben alleen een uitzondering van de AVG nodig wanneer een strikte toepassing van de regels een drempel zou opwerpen voor het produceren en publiceren van nieuws. De speciale doeleinden-bepaling staat media daarom toe om vrijelijk persoonsgegevens in een nieuwsartikel te gebruiken. Daarentegen gaat nieuwspersonalisatie om de verwerking van persoonsgegevens om nieuwsartikelen te verspreiden, niet om deze artikelen te schrijven. De AVG verbiedt nieuwsmedia niet om nieuwsartikelen te distribueren. De AVG reguleert alleen onder welke voorwaarden nieuwsmedia persoonsgegevens mogen verwerken om hun aanbod op een gepersonaliseerde manier te verspreiden.

Aangezien de speciale doeleinden-bepaling niet van toepassing is op personalisatie, hebben nieuwsgebruikers dus al hun gegevensbeschermingsrechten tot hun beschikking. De AVG stelt mensen in staat om controle uit te oefenen over de manier waarop hun persoonsgegevens voor nieuwspersonalisatie worden gebruikt. Door hun gegevensbeschermingsrechten uit te oefenen kunnen nieuwsgebruikers ook invloed uitoefenen op de selectie van nieuwsartikelen die zij ontvangen. Samengenomen komen de gegevensbeschermingsrechten van nieuwsgebruikers neer op twee acties: ze kunnen personalisatie beëindigen, en ze kunnen hun profiel waarop de personalisatie is gebaseerd aanpassen.

De AVG voorziet nieuwsgebruikers op vier verschillende manieren om personalisatie te beëindigen. Als toestemming de grondslag voor het verwerken van persoonsgegevens is, dan kunnen nieuwsgebruikers hun toestemming intrekken wanneer ze geen gepersonaliseerd nieuws meer willen ontvangen. Als de grondslag een overeenkomst is, zoals bijvoorbeeld een nieuwsabonnement, dan kunnen nieuwsgebruikers hun abonnement beëindigen op basis van nationaal recht. Als een publieke taak of de legitieme belangen een grondslag vormen voor personalisatie, dan kunnen nieuwsgebruikers bezwaar maken tegen de verwerking van hun persoonsgegeven en op die manier de personalisatie beëindigen. Nieuwsgebruikers kunnen waarschijnlijk geen gebruik maken van het recht om niet onderworpen te worden aan geautomatiseerde besluitvorming. Verschillende bepalingen in de AVG beperken de toepassing van dit recht op nieuwspersonalisatie.

De verschillende rechten die er samen voor zorgen dat nieuwsgebruikers hun profiel kunnen aanpassen, kunnen een “recht op reset” genoemd worden: nieuwsgebruikers hebben het recht

om hun account te behouden, maar ze zouden in staat moeten zijn om alle geobserveerde data uit hun profiel te verwijderen, zodat ze af en toe een frisse start kunnen maken.

Middels de AVG kan het grondrecht op gegevensbescherming dus worden vertaald in twee concrete ontwerprichtlijnen voor nieuwspersonalisatiesystemen. Elke nieuwspersonalisatietoepassing moet de optie hebben om personalisatie op ieder moment uit te zetten, en een toegankelijke interface waar nieuwsgebruikers hun profiel kunnen aanpassen. Het grondrecht op bescherming van persoonsgegevens staat niet diametraal tegenover nieuwspersonalisatie, maar vereist een interactieve en gezamenlijk personalisatieproces. Dit is nodig om te voorkomen dat iemands gegevensbeschermingsvoorkeuren een toegangsvoorwaarde vormen voor het recht om kennis te nemen van informatie.

Hoofdstuk 5

Tot zover heeft dit onderzoek laten zien dat nieuwspersonalisatie van invloed is op de grondrechten van nieuwsgebruikers. Het systeem van grondrechten probeert mensen te beschermen tegen een inmenging met hun grondrechten. Een inmenging met een grondrecht kan gedefinieerd worden als een toestand, veroorzaakt door een handeling of afwezigheid van een handeling van een agent, die afbreuk doet aan of een obstakel opwerpt voor de uitoefening van het beschermde gedrag of andere inhoud van een recht. Een inmenging vereist een duidelijk effect op iemands grondrechten, maar nieuwspersonalisatie heeft vooral subtiele effecten die over langere tijd opstapelen, en waarbij het lastig is om vast te stellen op welk moment de inmenging plaatsvindt. Dit doet de vraag rijzen of het idee van een inmenging met grondrechten wel in staat is om alle gevallen waarin nieuwspersonalisatie de rechten en vrijheden van nieuwsgebruikers beperkt, vast te leggen.

Het idee dat je vrij bent wanneer je geen inmenging ervaart, betekent dat je alleen vrijheid verliest op het moment dat er een echte inmenging plaatsvindt. Het verzamelen en verwerken van persoonsgegevens van nieuwsgebruikers vormt een inmenging met de grondrechten op privacy en gegevensbescherming. Maar het verzamelen en verwerken van persoonsgegevens vormt op zichzelf geen inmenging met de overige grondrechten van nieuwsgebruikers. Daarnaast voldoen de handelingen van online nieuwsmedia wanneer ze mensen een gepersonaliseerd nieuwsaanbod geven meestal ook niet aan de drempelwaarde voor wat geldt als een inmenging. Zolang als nieuwsgebruikers vrijelijk op een nieuwswebsite of het internet naar informatie kunnen zoeken, en zij zichzelf vrijelijk kunnen uitdrukken, vormt nieuwspersonalisatie geen inmenging met het recht om van informatie kennis te nemen of de vrijheid van meningsuiting.

In plaats van het idee van vrijheid als de afwezigheid van een inmenging, stel ik voor om te kijken naar het idee van vrijheid als de afwezigheid van overheersing om de macht van nieuwsmedia te begrijpen. Philip Pettit heeft beargumenteerd dat een agent overheersende macht heeft over een andere persoon wanneer 1) de agent de capaciteit heeft om in te mengen, 2) op een willekeurige basis, 3) in bepaalde keuzes die de andere persoon kan maken. Overheersing wordt dus gedefinieerd met behulp van inmenging, maar is wel iets anders, aangezien overheersing kan bestaan zonder dat er daadwerkelijk een inmenging plaatsvindt. Een agent heeft willekeurige macht als zij haar capaciteit tot inmenging naar gelieve kan uitoefenen, zonder de belangen van de betrokken persoon in overweging te nemen.

Het idee van vrijheid als de afwezigheid van overheersing laat zien dat online nieuwsmedia wel degelijk de rechten en vrijheden van nieuwsgebruikers kunnen beperken wanneer ze personalisatie gebruiken. Wanneer nieuwsgebruikers naar nieuws zoeken, dit lezen, en reageren op het nieuws, maken ze voortdurend keuzes die je kan weergeven in termen van hun recht op vrijheid van gedachte, vrijheid om een mening te hebben, het recht om kennis te nemen van informatie, en het recht op vrijheid van meningsuiting. Online nieuwsmedia hebben dankzij hun personalisatiesystemen de capaciteit om afbreuk te doen aan de keuzevrijheid van nieuwsgebruikers. Daarmee wil ik niet zeggen dat online nieuwsmedia op dit moment ook daadwerkelijk hun capaciteit om in te mengen uitoefenen. Op basis van het idee van vrijheid als afwezigheid van overheersing is het voldoende om vast te stellen dat online nieuwsmedia willekeurige macht hebben om de keuzes van nieuwsgebruikers te beïnvloeden.

Om na te denken over de manier waarop nieuwsgebruikers beschermd kunnen worden tegen online nieuwsmedia die het nieuws personaliseren, hanteer ik twee uitgangspunten. Ten eerste heeft de bescherming van nieuwsgebruikers het doel om hen te beschermen tegen willekeurige inmengingen door nieuwsmedia, niet tegen alle vormen van personalisatie. Personalisatie heeft vele voordelen voor nieuwsgebruikers. Het kan hen bijvoorbeeld helpen om hun recht om kennis te nemen van informatie te realiseren. Een grote groep nieuwsgebruikers staat ook ontvankelijk tegenover personalisatie. We moeten personalisatie daarom niet geheel verbieden. In plaats daarvan moeten we nieuwspersonalisatie minder overheersend maken. Ten tweede moet elke maatregel ten opzichte van nieuwspersonalisatie mediavrijheid respecteren en niet leiden tot een vorm van overheersing over de media.

We kunnen nieuwsgebruikers beschermen tegen overheersing door de nieuwsmedia door er voor te zorgen dat de capaciteit van media om in te mengen niet langer willekeurig is. De meest geschikte manier om nieuwspersonalisatie minder overheersend te maken is door nieuwsgebruikers in staat te stellen deel te nemen aan het personalisatieproces. Ik neem niet het standpunt in dat nieuwsgebruikers mee moeten kunnen praten op een organisatorisch niveau, bijvoorbeeld door inspraak te hebben in de bedrijfsmatige keuzen om te investeren in personalisatietechnologie. Ik beargumenteer dat nieuwsgebruikers in staat gesteld moeten worden om betekenisvolle keuzes te maken tussen verschillende types en instellingen van aanbevelingssystemen. Als nieuwsgebruikers kunnen meebeslissen voor welke doeleinden personalisatie wordt ingezet, dan zal de inmenging die wordt gevormd door de personalisatie beter aansluiten bij persoonlijke belangen en doeleinden van de nieuwsgebruiker. Nieuwsgebruikers zijn dan minder afhankelijk van de welwillendheid van de nieuwsmedia.

Hoofdstuk 6

In dit onderzoek heb ik de vraag gesteld hoe grondrechten de regulering van de relatie tussen online nieuwsmedia die het nieuws personaliseren en nieuwsgebruikers kan inspireren. Grondrechten belichamen democratische waardes en bieden een kader om de belangen van nieuwsgebruikers tegenover nieuwsmedia te identificeren en af te wegen.

Het grondrecht op gegevensbescherming en het recht om kennis te nemen van informatie kunnen vertaald worden in concrete richtlijnen voor wetgeving voor nieuwspersonalisatiesystemen. Nieuwsgebruikers moeten in staat worden gesteld om personalisatie op elk moment stop te zetten, en ze moeten toegankelijke menu's hebben om hun individuele profiel waarop de

personalisatie is gebaseerd aan te passen. Daarnaast moeten lidstaten van de EU er voor zorgen dat nieuwspersonalisatie de diversiteit van het aanbod dat mensen ontvangen niet vermindert. Door nieuwsgebruikers de middelen te geven om hun gegevensbeschermingsrechten uit te oefenen, kunnen zij ook invloed uitoefenen op de informatie die ze ontvangen.

De grondrechten op vrijheid van gedachte, de vrijheid om een mening te hebben, en vrijheid van meningsuiting leiden tot minder concrete reguleringsrichtlijnen voor nieuwspersonalisatie. De drempel om een inmenging met het recht op vrijheid van gedachte of de vrijheid om een mening te hebben is hoog, en het is nogal vergezocht om te zeggen dat nieuwspersonalisatie een inmenging vormt met de vrijheid van meningsuiting. Desalniettemin, een extern juridisch perspectief laat zien dat online nieuwsmedia die het nieuws personaliseren een willekeurige macht hebben over de keuzes die nieuwsgebruikers maken om bepaald nieuws te lezen en op bepaalde nieuwsartikelen te reageren. Nieuwsmedia beperken daarmee de vrijheid van gedachte, de vrijheid om een mening te hebben, en de vrijheid van meningsuiting van nieuwsgebruikers. Om de willekeurigheid van deze macht te verminderen, moeten nieuwsgebruikers in staat worden gesteld om deel te nemen aan het personalisatieproces. Deze deelname moet verder gaan dan nieuwsgebruikers om toestemming vragen om hun persoonsgegevens te verwerken, of hen de optie geven om een paar klikjes te zetten in hun persoonlijke profiel. Nieuwsgebruikers moeten in staat zijn om controle uit te oefenen over de doeleinden waarvoor hun nieuwsoverzicht wordt gepersonaliseerd.

De Europese Commissie heeft vastgesteld dat er een noodzaak bestaat om te onderzoeken of huidige wetgeving in staat is om de risico's van kunstmatige intelligentie aan te pakken, of dat er aanpassingen of nieuwe wetgeving nodig is. Met betrekking tot het gebruik van personalisatietechnologieën in de nieuwssector, welke grotendeels zijn gebaseerd op kunstmatige intelligentie, luidt mijn antwoord als volgt: 1) De AVG is in staat om sommige risico's van kunstmatige intelligentie in de nieuwssector aan te pakken, alhoewel het recht op overdraagbaarheid van gegevens versterkt moet worden, en mensen zouden ook in staat gesteld moeten worden om subjectief onjuiste gegevens te rectificeren; 2) We moeten niet alleen naar kunstmatige intelligentie door de bril van de AVG kijken; we moeten ook de andere grondrechten van nieuwsgebruikers in overweging nemen en daarbij aandacht hebben voor de manier waarop deze rechten met elkaar in verband staan. In dat opzicht is misschien nieuwe wetgeving nodig—net zoals de AVG invulling geeft aan het grondrecht op gegevensbescherming—in zoverre dat sommige grondrechten niet voldoende ontwikkeld zijn om te reageren op vragen die bestaan rondom het gebruik van kunstmatige intelligentie in de nieuwsector. Om er voor te zorgen dat nieuwspersonalisatie echt de belangen van de nieuwsgebruiker dient, en niet gewoon de belangen van de nieuwsmedia, is het noodzakelijk om alle grondrechten van nieuwsgebruikers in overweging te nemen wanneer we de voorwaarden creëren voor nieuwspersonalisatie.

English summary

Chapter 1

Online news media are increasingly experimenting with and implementing personalisation technologies into their websites and apps. News personalisation is the automated tailoring of news offerings by online news providers to individual news users based on specific knowledge about each user. With news personalisation, every news user can automatically receive various news items specifically selected and ranked for them.

A complex network of actors shapes the personalised online news environment. Traditional newspapers and broadcasting organisations, including public service media and commercial media, have websites and mobile apps. Digital-born news media also produce and publish news or aggregate news from other sources. Often, online news media use personalisation systems developed by third parties to implement these into their website or app. This research concentrates on online news media which produce and publish news themselves and exercise editorial control over the content they distribute. The scope of the research excludes social media or third parties which build personalisation systems.

In the European Union's legal order, there is little secondary legislation or national law that protects the position of the users in the context of news personalisation, besides the General Data Protection Regulation ('GDPR'). News subscriptions are covered by consumer law, yet these rules mainly apply to the formalities of a contract. Media law applies to audiovisual media services but excludes online newspapers and magazines. Instead, the position of news users is largely protected through fundamental rights. In the EU, the Charter of Fundamental Rights of the European Union ('EU Charter') states that everyone has the right to respect for privacy, the right to the protection of personal data, the right to freedom of thought, and the right to freedom of expression, which includes the freedom to hold opinions and to receive information and ideas. However, the meaning and importance of these fundamental rights for the relationship between online news media and news users are unclear. This relationship is fast changing due to the introduction of new technologies such as personalisation. These changes lead to the following central question of this research: How can EU fundamental rights inform the regulation of the relationship between online news media which personalise the news and their users?

This research explores the fundamental rights of people who receive personalised news from several angles, taking into account that fundamental rights in principle apply only between the state and citizens and not directly between private parties. Fundamental rights in EU law and the European Convention on Human Rights ('ECHR') form the legal framework of this research.

Fundamental rights in the EU have two sources of law, namely general principles of EU law and the EU Charter. In the late 1960s, the former European Court of Justice ('ECJ') recognised for the first time that fundamental rights are enshrined in the general principles of EU law and protected by the ECJ. A few years later, the ECJ established that respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice.

In the year 2000, the EU proclaimed the EU Charter to strengthen the protection of fundamental rights. The EU Charter entered into force in 2009 with the Treaty of Lisbon. The EU Charter protects, among others, the right to respect for privacy, the right to the protection of personal data, the right to freedom of thought, and the right to freedom of expression, including the freedom to hold opinions and the right to receive information and ideas. The right to the protection of personal data is given expression through secondary legislation, namely the GDPR.

The ECHR is another essential fundamental rights document in Europe, apart from the EU Charter. The ECHR influences EU fundamental rights, even though it originates in the Council of Europe and not the EU. The relevance of the ECHR for EU law is affirmed in ECJ and CJEU case law, the TEU, and the EU Charter. The former ECJ has stated that it draws inspiration from international treaties for the protection of human rights to which EU Member States are signatories. The ECJ and current-day CJEU have specified that they attach special significance to the ECHR in that respect. Article 6(3) TEU codifies this line of case law by providing that fundamental rights, as guaranteed by the ECHR, are general principles of EU law. Furthermore, article 52(3) EU Charter determines that, in so far as the EU Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights are the same as those laid down in the ECHR. The case law of the ECtHR is therefore also relevant for EU law in areas where the EU Charter rights correspond with ECHR rights.

Chapter 2

Empirical research has shown that news users are interested in various forms of control over news personalisation. The GDPR provides news users with several rights to control their personal data. However, the form of control offered by the GDPR is often criticized for not providing people with a meaningful way to interact with data-driven systems that make decisions for them and about them. The question is how we can enrich our understanding of user control in the context of news personalisation, if we situate the right to data protection amidst the right to privacy, the right to freedom of expression, freedom of thought, freedom of opinion, and the right to receive information. The larger fundamental rights context could broaden our perspective on control and, specifically, what control over personal data and news personalisation should mean in practice.

To look at the meaning and interconnections of the fundamental rights of news users, I use Janneke Gerards' metaphor of describing fundamental rights as tiny prisms: a fundamental right is transparent and looks like a clearly defined object, but as soon as light shines on it and passes through, the right disperses into a spectrum of interests, values, and even more rights. Over time, courts and legal scholars might discern new interests, values, and rights within a particular fundamental right, even if these aspects were previously hidden from perception. In this research, I shine a light through the prisms of the fundamental rights of privacy, the confidentiality of communications, the right to receive information, and freedom of thought, opinions, and expression. The right to data protection is already developed in detail through the GDPR and is therefore not further analysed in this chapter.

If we shine a light through the prisms of the fundamental rights of privacy, the right to receive information, and the freedoms of expression, opinion, and thought, we see a broad spectrum of interests, values, and rights branching out from these fundamental rights. Together, these rights protect what I call the personal information sphere. The personal information sphere is the

domain where people can determine for themselves how to engage with information about the world and how other people may interact with information about them. This form of control differs from the control enabled by data protection law, which focuses on consent, transparency, and data subject access rights.

We can visualise the personal information sphere as a circle around the individual. The right to receive information protects information flowing into the circle. People use these inflowing streams of information to inform themselves on political, scientific, and personal matters and to explore various perspectives and viewpoints on these issues. Freedom of thought and opinion protect information flows within the circle, where people process the information and develop their original thoughts and opinions. Freedom of expression and confidentiality of communications consequently protect information flowing out of the circle. By communicating with the outer world, people position themselves in the world, contribute to discussions on matters they care about and present their personal identity to others. Finally, the right to privacy marks the boundary between private and public communication activities; it protects the mere existence of the circle and the freedom of people to determine the radius of their circle. Furthermore, privacy reinforces the freedom of people to gather information undisturbed, develop their thoughts and opinions, experiment with different ideas before they partake in public debate, and decide which beliefs they share with others and which ones they keep to themselves.

Assessing the use of online personalisation systems for news personalisation from the perspective of the personal information sphere, it becomes clear that online news media should do more than ensure compliance with the GDPR. Online news media are now competing with search engines and social media for the users' attention and have adopted personalisation as part of their new strategy. In this competition for attention, news users' freedom to find, receive, process, and engage with information should be ensured, in addition to their privacy and data protection rights. That is to say, the solution to respecting the personal information sphere is not simply limiting the amount of personalisation which takes place. Instead, online news media should develop ways to involve news users in the personalisation process beyond just asking for consent to process their personal data or give them subject access rights.

Chapter 3

The previous chapter provided a general survey of the fundamental rights of news users. The fundamental right to receive information deserves more in-depth attention, as it plays a central role in understanding the position of news users. News personalisation essentially revolves around changing how news users receive information. The fundamental right to receive information does not apply directly, in a horizontal manner, between online news media and news users. Nonetheless, the fundamental right to receive information may entail positive obligations for the state, even in the sphere of relations between private parties. This leads to the question what, if any, positive obligations states have with respect to the right to receive information and the effects of news personalisation on news users.

Case law or legislation in which the right to receive information plays a part showcases various justifications for upholding it. These perspectives range from ones focused more on societal and public goals to those focused more on individual and private goals: political participation, truth-finding, social cohesion, and self-development.

Many court judgments uphold the right to receive information because receiving information is essential for people to participate in political life. Political participation encompasses taking part in the electoral process, discovering and forming opinions about the ideas and attitudes of political leaders, developing opinions about public and business activities of political representatives, and discussing government actions with others.

The perspective of truth-finding implies the public itself should be able to find out what is true. For example, in *Özgür Gündem v. Turkey*, the ECtHR 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. In other words, as the ECtHR stipulated in another case, 'citizens must be permitted to receive a variety of messages, to choose between them and reach their own opinions on the various views expressed'. Similarly, the ECtHR takes no role in settling debates about historical events among historians and their interpretation.

European media legislation and the standard-setting initiatives of the Council of Europe and the ECtHR recognise the importance of receiving information for the creation and maintenance of social cohesion. For example, the AVMSD sets out to ensure that the public has access to the broadcasting of events of major importance for society, such as live coverage of the Olympic games or international football championships. States may draw up lists of events which they consider to be of major importance and should be available on free television. These lists mainly contain sports events, although states also include other events such as operas or music festivals. The emphasis on sports indicates that these rules should be understood from the perspective of social cohesion rather than the perspectives of political participation and truth-finding. In several of its cases, the ECtHR has also recognised that public debate and the interaction of people with diverse identities are necessary for achieving social cohesion.

The ECtHR has stated that the right to receive information is a basic condition for people's self-development or self-fulfilment. In *Khurshid Mustafa and Tarzibachi v. Sweden*, the ECtHR most clearly recognised the value of free information reception for self-realisation. The ECtHR considered that the information which the applicants wished to receive included political and social news in Arabic and Farsi, which could be of particular interest to the applicants as immigrants from Iraq. In that case, the ECtHR furthermore established that access to information is also essential for private and cultural issues, in addition to public interest issues.

Based on these perspectives, news personalisation's positive and negative effects on the right to receive information can be evaluated. News personalisation may undermine the right to receive information, for instance, when it reduces access to news which people need in their role as informed citizens. At the same time, news personalisation may also enhance the right to receive information by sending people information that is particularly relevant to their personal development without depriving other people of the information they need for their self-development.

The perspective of political participation leads to a concrete obligation for the state. The ECtHR has held that the state has a duty to ensure that the public has access to accurate information and varied opinions through audiovisual media, reflecting the diversity of political views within the country. The ECtHR considers that the internet and social media have less impact than broadcast media because of the choices in the use of online media, meaning that the ECtHR finds

special regulations for radio and television to be justified. Should news personalisation decrease the choices for news users, 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.

Parallel to the perspective of political participation, the perspective of truth-finding implies that the public is entitled to receive diverse information. The ECtHR established that democracy demands pluralism and that the state is the ultimate guarantor of pluralism. Therefore, the ECtHR imposes the positive obligation on states to establish a legislative framework to guarantee pluralism in the media system.

The ECtHR has not formulated concrete positive obligations for states concerning the perspective of social cohesion or self-development. Still, media policy and regulation which aim to protect the right to receive information in the face of news personalisation should consider all these perspectives. The law shows that the importance of receiving information goes beyond political participation.

Chapter 4

While most fundamental rights of news users are developed only through case law, the fundamental right to the protection of personal data is given expression through the GDPR. The GDPR could play an important role in ensuring that news personalisation systems are designed with the user in mind and respect the wishes of news users. However, the application of the GDPR to news personalisation is not straightforward. The GDPR obliges Member States to create exemptions for personal data processing carried out for journalistic purposes. Still, it is an open question whether news personalisation falls within this so-called special purposes provision. In addition, while the GDPR, among others, aims to provide people control, the types of control that the GDPR offers depends on the content in which the personalisation is provided. This brings us to the question how the GDPR provides people control over the processing of their personal data for news personalisation.

This research finds that the special purposes provision does not apply to news personalisation insofar as news personalisation concerns the processing of personal data to disseminate news stories to specific audience members. The media needs exemptions or derogations from the GDPR when strict data protection rules would hinder producing and publishing a news story. Therefore, the special purposes provision enables the media to freely use personal data in a publication, while news personalisation as discussed in this research is about the processing of personal data to disseminate stories. Besides, the media's right to freedom of expression and the public's right to receive information are only slightly interfered with when the media is required to comply with the GDPR to personalise the news. The GDPR does not block the media from disseminating news content; it merely conditions how the media may process personal data to disseminate news in a personalised manner.

If the special purposes provision in the GDPR does not apply to personalisation, then news users may exercise the full range of their data protection rights. People are empowered to control the processing of their personal data for news personalisation. By exercising their data protection rights, they might also influence the kind of news content recommended to them. Taken together, the data protection rights of news users boil down to two options: people may stop personalisation altogether, or they may amend the profile on which the personalisation is based.

The GDPR provides news users with four ways to stop personalisation. Suppose the legal ground for the processing of personal data for personalisation is consent. In that case, news users may withhold or withdraw consent when they do not wish to receive personalised news. Suppose the legal ground for the processing of personal data for news personalisation is a contract, such as a news subscription. In that case, news users can terminate the news subscription according to the rules of national contract law and stop personalisation in so doing. If online news personalisation is based on the public task or legitimate interest ground, news users may object to the processing of their personal data and accordingly stop personalisation. News users can probably not invoke their right not to be subject to a decision based solely on automated processing to stop personalisation. Various conditions in the GDPR limit the application of this right to news personalisation.

Furthermore, following the application of the GDPR, online news media should provide personalised and non-personalised services of similar orientation and quality, or such choices at least have to be catered to on the online news market as a whole. The various rights which enable people to change their personal profile could be translated into a right to reset: people have the right to keep their news service account, but they should be able to remove all the observed personal data from their profile so that they can start afresh.

Through the GDPR, the fundamental right to data protection can thus be translated into two concrete design principles for news personalisation systems. Every news personalisation application needs to have an option to turn off personalisation at any time and an interface where users can change their profile as they like. The fundamental right to data protection is not opposed to news personalisation but instead mandates a truly interactive and collaborative personalisation process. All of this is necessary to prevent an individual's data protection preference from becoming an access condition to receive information.

Chapter 5

As the research so far has demonstrated, the use of personalisation by online news media affects the fundamental rights of news users. The system of fundamental rights aims to protect people against interferences with these fundamental rights. An interference with a fundamental right can be defined as a state of affairs caused by an action or inaction of another agent which impairs or hinders the exercise of the protected conduct and interests of the right. The notion of an interference requires an obvious effect on someone's fundamental rights, whereas news personalisation has mostly liminal effects which build up over time and are hard to pinpoint in time. Therefore, the question is whether the concept of interferences with fundamental rights and freedoms is capable of capturing all the instances in which news personalisation limits the fundamental rights and freedoms of news users.

According to a concept of freedom as non-interference, a loss of freedom is only experienced if an actual interference occurs. In collecting data about the user and profiling them based on these data, online news media interfere with the fundamental rights to privacy and the protection of personal data. However, data collection and profiling in themselves do not directly interfere with the other fundamental rights of news users. Furthermore, when online news media match user profiles with news items and provide users with a personalised news selection, their actions or inactions usually do not meet the threshold of an interference. As long as news users can search

for information elsewhere on a news site or the internet and are not actually blocked from expressing themselves, news personalisation does not interfere with their fundamental right to receive information or freedom of expression.

Instead of freedom as non-interference, I propose to look at freedom as non-domination to understand the power in the hand of online news media. Philip Pettit has argued that an agent has dominating power over another person if 1) the agent has the capacity to interfere, 2) on an arbitrary basis, 3) in certain choices which the other person is in a position to make. Domination is defined in reference to interference but differs from it, as domination can exist without the interference actually taking place. An agent has arbitrary power if they can exercise their capacity to interfere at their discretion, without considering the interests of the dominated person.

From the perspective of freedom as non-domination, online news media may limit the freedom of news users when they use personalisation. When news users search for, read, and engage with the news, they continuously make choices that can be framed in terms of their rights to freedom of thought, freedom of opinion, right to receive information and freedom of expression. Online news media, by way of their personalisation systems, have the capacity to hinder or obstruct the choices of news users. That is not to say that online news media currently actually exercise these powers to the detriment of news users. But from a perspective of freedom as non-domination, it is sufficient to establish that online news media have arbitrary power to shape people's choices.

To protect news users against domination by online news media that personalise their news offerings, I take two observations into account. First, the goal of safeguarding news users against domination is to guard them against arbitrary interference by news media, not against all forms of personalisation. Personalisation has many benefits for news users, such as helping them to better exercise and realise their fundamental right to receive information. Furthermore, many news users appreciate and welcome news personalisation. Therefore, we should not strive to ban personalization altogether, but we should try to make personalization less dominating. Secondly, any intervention with news personalisation should respect media freedom and not introduce a new form of domination over the media themselves.

News users can be protected against domination on the part of online news media by ensuring that the news media's capacity to interfere is no longer arbitrary. The most suitable way to make news personalisation less dominating is by enabling news users to participate in the personalisation process. I am not arguing that news users should have a say on an organisational level, for example, in deciding whether or not to invest in personalisation technologies. I am arguing for allowing users to make meaningful choices between different types of recommender system settings and designs. If news users can participate in deciding for which goals personalisation systems are used, then the interferences which might result from personalisation will be closer to the user's interests and personal goals, and users will be less dependent on the goodwill of news media. Personalisation personae present a way to enable users to participate in the goal-setting for personalisation systems, letting them switch between different algorithmic logics and influence the output of personalisation systems without needing to articulate their fleeting and continuously changeable topical interests very precisely.

Chapter 6

In this research project, I have queried how EU fundamental rights can inform the regulation of the relationship between online news media which personalise the news and their users. Fundamental rights embody democratic values and provide a framework to determine and weigh the interests of news users vis-à-vis news media.

The fundamental right to data protection, which is given expression in the GDPR, and the fundamental right to receive information translate into concrete regulatory guidelines for news personalisation systems. News users should be empowered to stop personalisation at any moment, and they should have accessible options to change their individual user profiles on which the personalisation is based. Furthermore, states should ensure that news personalisation does not diminish the diversity of the content which people receive. By providing people with the means to exercise their data protection rights, they are also enabled to influence the kind of information they receive.

The fundamental rights to freedom of thought, freedom of opinion, and freedom of expression lead to less concrete regulatory imperatives for news personalisation. The bar to establish an interference with the right to freedom of thought or freedom of opinion is set high, and it is quite a stretch to suggest that news personalisation poses a risk or interferes with the ability of people to express themselves freely. Nonetheless, an extra-legal perspective shows that online news media which personalise the news have arbitrary power over the choices which news users make to read and engage with certain news items. News media thereby limit the freedom of thought, opinion, and expression of news users. To reduce the arbitrariness of this power, news users should be able to participate in the personalisation process in a manner that goes beyond just asking for their consent to process their personal data or giving them the option to tick some boxes in their personal profile. News users should be able to exercise control over the question for which goals their news feeds are personalised.

In its White Paper on artificial intelligence, the European Commission has stated that a need exists to examine whether current legislation can address the risks of AI, whether adaptations of the legislation are needed, or whether new legislation is required. As regards the use of personalisation technologies in the news sector, which are largely based on AI applications, my answer would be that: 1) the GDPR can address some risks of AI in the news sector, although data portability should be strengthened to ensure full data protection, and people should also be able to rectify subjective inaccurate data; 2) We should not look at AI problems only through the lens of the GDPR, we should also consider the other fundamental rights of users and how these rights relate to each other. In that respect, new legislation might be needed—just like the GDPR gives expression to the fundamental right to the protection of personal data—insofar as certain fundamental rights are not sufficiently developed to deal with questions which arise from AI in the news sector. To ensure that news personalisation truly serves the interests of news users and not just the goals of the media, it is necessary to consider the fundamental rights of news users and the role of states in creating the conditions for news users to enjoy their rights.