

## Part one: The media order

### 1 Introduction

Digital transformation has affected all aspects of life. This book focuses on a specific aspect of this transformation, one that is held preconditional to the proper functioning of a democratic society: the functioning of the public discourse. This precarious social process has been impacted so deeply by the digital technology that it prompted a legislative wave within the European Union. Democratic public discourse is a complex phenomenon that cannot be directly tackled, without also overly limiting certain fundamental rights, foremost the freedom of expression. Therefore, the European regulatory policy addressed the surrounding market and technological environment, to create a situation where public discourse may have better conditions to thrive.

The concept of rational, public discourse roots in communication and political science. But how can lawyers put their hands on this fluid concept? I will deconstruct this notion into its elements and scrutinise the relating human rights. While the public discourse is not a right in itself, it is a value which is a prerequisite for the democratic process. The discursive process on matters of public interest is intellectual and emotional at the same time. It includes mutual exchanges of people's opinions, as well as of the available information. This collective action leads to a weighing of competing political alternatives. These alternatives can be various rational policy options, or merely values with what voters can identify with, but the process ultimately requires, and legitimises, collective political decisions. Engaging in this discursive action means to exercise the right to freedom of expression, freedom of information, a certain level of the right to privacy, and other political freedoms like the freedom of assembly and association. Besides the theoretical potential to enjoy these freedoms without state interference, also practical possibilities should exist that enable citizens to exercise their rights. Public fora are needed, where an exchange of ideas can

take place. This can be either a physical space, or media; but meaningful information must also be available, and people should have the necessary time to participate in the discussion.

What we already know is, that political, among them participatory and communicative rights enjoy a special place among human rights and are protected at the global level by international law. States are under international legal obligation to ensure the exercise of these rights, like that of freedom of expression, and other "first generation" human rights.<sup>6</sup> Exercise of these rights is a prerequisite and also the product of democracy. But there is no right to "democracy" as such, and no legal obligation to uphold democracy. There is a moral consensus in the West that democracy is the best legitimate form of governance, but there is no legal obligation to protect it. Paradoxically, the liberties ensured by democratic systems can be abused to overthrow democracy (while still maintaining the democratic façade). If a collective political decision would overturn democracy in a democratic process, there would be no legal way to restore it. Defenders of democracy therefore have argued since the early 20th century that democracy needs to be defended "militantly".<sup>7</sup> Self-defensive democracy has several instruments: multiple entrenchment of the constitution's normativity, the constitution's primacy over other law, its comprehensive judicial safeguarding including through a constitutional court jurisdiction, employing barriers against constitutional amendments.<sup>8</sup> In particular, abuse of fundamental rights should result in forfeiture of those rights (in particular those that are to be abused, and not all others).<sup>9</sup> The abuse clause has also been incorporated into the European Convention (ECHR, Article 17), which excludes that the rights in

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6 Carl Wellman, "Solidarity, the Individual and Human Rights," *Human Rights Quarterly* 22, no. 3 (2000): 639–657. <http://www.jstor.org/stable/4489297>.

7 For a full and original description, see Karl Loewenstein, "Militant Democracy and Fundamental Rights" *The American Political Science Review* 31, no. 3 (1937): 417–432. But cf. „the Böckenförde Theorem“, Ernst-Wolfgang Böckenförde, (1967, 2006) „Die Entstehung des Staates als Vorgang der Säkularisation“ in *Recht, Staat, Freiheit, Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte. Erweiterte Ausgabe* (Frankfurt: Suhrkamp Verlag AG, 1991): 112. With the new wave in populistic authoritarianism in transitional and latin-American states, the literature on militant democracy has become significantly more robust. See András Sajó, and Lorri Rutt Bentch, *Militant Democracy* (Vol. 1) (Hague: Eleven International Publishing, 2004). See also: Markus Thiel, *The 'Militant Democracy' Principle in Modern Democracies* (New York, NY: Routledge, 2016).

8 On the example of the German Constitution, see Articles 5, 9, 21, 33, 79, 87, 91 and 98.

9 Sachs/Pagenkopf, 8. Aufl. 2018, GG Art. 18 Rn. 1–19.

ECHR are invoked to protect deeds that are aimed at the destruction of any ECHR rights and freedoms, or at their limitation to a greater extent than is provided by ECHR.<sup>10</sup>

This book will revisit theories of freedom of expression and of the media in the light of the changes in the scene of media and public communication that happened between 2016–2023. This period included several crises and even more policy initiatives. Frictions that were perceived in the democratic functioning led the European Commission to adopt the European Democracy Action Plan (EDAP) in 2020. After discussing those fundamental rights which are needed for establishing, maintaining and protecting the rational discourse, the book will discuss the background and the content of the democracy package and the parallel digital regulatory package of the EU, which together, as I argue, laid the grounds of a new European media order. Chapters 5–10 discuss those elements of this European regulatory package that relate to the public discourse, covering parts of the EMFA, the DSA, the DMA, the AI Act and the Political Advertising Regulation. Throughout the critical analysis offered on these regulatory instruments, I will assess the desirable limits of governmental intervention, exploring the middle between too much interference and too little intervention to preserve the values of liberal democracies.

### 1.1 The crisis of democracy

In 2016 and 2017, frightening information emerged about threats and crisis signs of the democratic process.<sup>11</sup> This crisis was observed primarily in the public discourse and the related political discourse that manifested in political decisions in 2016. The suspicion on manipulation and hostile influencing of the political process emerged primarily in relation to the Brexit vote and the preceding campaign, and the American presidential campaign – both in 2016. Ample studies analysed the disinformation and manipulation

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<sup>10</sup> Article 17 ECHR. [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf).

<sup>11</sup> It was subsequently revealed that a research organisation, Cambridge Analytica was contracted to generate personal profiles based on personal data harvested of more than 80 million Facebook users, for the purpose of targeted political manipulation, influencing and dissemination of disinformation. Philip N. Howard, *Lie Machines: How to Save Democracy from Toll Armies, Deceitful Robots, Junk News Operations, and Political Operatives* (New Haven, CT: Yale University Press, 2020).

tactics and were seeking solution.<sup>12</sup> A global consensus was developing that the giant platforms were unduly powerful, and governments all over the world sought ways to reduce this power, or address some of the anomalies.<sup>13</sup>

This happened when the EU internally struggled with a rule of law deficiency that affected several member states at that time. Rule of law is necessary for a mutual trust between the European Member States, which is a ground for the stability of the integration, in particular for the common market and judicial cooperation.<sup>14</sup>

Both internal and external political trends showed that populism was on the rise, polarisation and extremism was on the rise in-and-outside of the EU.<sup>15</sup> For all these reasons, the stability of the democratic process was seen as increasingly under attack in those years.<sup>16</sup>

Moreover, the EU takes on the role as representing democracy, the rule of law and human rights towards third countries. It does so in the Eastern Partnership region, and also in farther geographic locations. To be able to perform a credible representation, it is necessary to actively protect and maintain these values within its own borders. These reasons also contributed the EU's intention to set out an action plan devoted for reinforcing democracy. This has three main pillars: election integrity and democratic participation, strengthening media freedom and pluralism, and countering disinformation. The EDAP defines a legislative and policy programme that

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12 Claire Wardle and Hossein Derakhshan, *Information Disorder: Toward an interdisciplinary framework* (Strasbourg: Council of Europe, 2017): 17. <https://rm.coe.int/information-disorder-toward-an-interdisciplinary-framework-for-research/168076277c>. See also: Samantha Bradshaw, and Philip N. Howard, "Troops, Trolls and Troublemakers: A Global Inventory of Organized Social Media Manipulation," *Computational Propaganda Research Project*, Working paper no. 12 (2017). <https://mtech.ox.ac.uk/wp-content/uploads/sites/12/2017/07/Troops-Trolls-and-Troublemakers.pdf> See also: Bayer et al., *Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States*, Study for the European Parliament Policy Department C: Citizens' Rights and Constitutional Affairs. 2019. [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/608864/IPOL\\_STU\(2019\)608864\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/608864/IPOL_STU(2019)608864_EN.pdf).

13 Martin Moore and Damian Tambini, *Regulating big tech: Policy Responses to Digital Dominance* (New York, NY: Oxford University Press, 2021): 338.

14 Petra Bárd, The Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values. (2022).

15 See for example *The Global State of Democracy 2019 Report* (Stockholm: International Institute for Democracy and Electoral Assistance, 2019).

16 President von der Leyen's Political Guidelines, [https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf).

has been gradually carried out. Under its aegis, the EU has drafted a new regulation on political advertising,<sup>17</sup> and reviewed the existing regulation on the statute and funding of European political parties and foundations.<sup>18</sup> It is planning a Treaty change with the view to create a widened and EU-wide definition for hate speech and hate crime, to include the protected characteristics of age, gender and sexual orientation. In the realm of the media it has issued a recommendation to strengthen the safety of journalists and other media professionals,<sup>19</sup> a recommendation<sup>20</sup> and a directive<sup>21</sup> to fight against Strategic Litigation against Public Participation (SLAPPs), and a Regulation on the European Media Freedom Act that includes, among others, provisions on state advertising, cooperation between national media regulatory authorities, and an accompanying recommendation. It has launched significant policy programmes to provide funds for civil society, cooperation, collecting systematic evidence regarding disinformation. Its separate addition, the Media and Audiovisual Action Plan has addressed the financial viability of the media sector. And finally, a substantial part of this package addressed the digital infrastructure of public communication.

This Action Plan coincided with a legislative programme that aimed to tackle the platformisation of media, the concentration of media platforms and the data-driven economy.<sup>22</sup> This book tackles the intersection of the

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- 17 Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising, COM/2021/731 final. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0731>.
- 18 Proposal for a Regulation of the European Parliament and of the Council on the statute and funding of European political parties and European political foundations (recast). COM/2021/734 final. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0734>.
- 19 COMMISSION RECOMMENDATION of 16.9.2021. on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union. Brussels, 16.9.2021. C(2021) 6650 final. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021H1534>.
- 20 Commission Recommendation (EU) 2022/758 of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation') C/2022/2428. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022H0758>.
- 21 Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation") COM/2022/177 final. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0177>.
- 22 The DSA, DMA, the Data Act and the Data Governance Act.

two areas: the digital infrastructure of public communication and the democratic functioning of the EU.

Democracy has been long viewed as being in a worldwide crisis,<sup>23</sup> partly due to the consecutive economic and social crises that could not be solved without leaving large parts of the societies suffering painful material or personal losses – the financial crisis in 2002 and 2008, migration crisis in 2015, Covid-19 in 2020–21, and the Russian war in 2022.<sup>24</sup> However, amidst these crises, democracy faces a more specific challenge as well: the transformation of the information and communication sphere. The emergence of social media democratised public communication, giving access to masses whose voices were previously unheard in the rational discourse. Users could potentially experience a sense of empowerment due to convenient access to information and knowledge, as well as the ability of sharing their voice. At the same time, an escalating dissatisfaction developed against the governing political elite whose voices also became more informal, and whose personal weaknesses became more visible in the constant scrutiny of media that got a closer angle than ever before in history. Between experiencing a sense of empowerment in the equality of access to publicity, and the simultaneous perception of being excluded from substantive involvement in conventional decision-making procedures, a tension is growing.<sup>25</sup> Such disillusionment gave rise to distrust in established institutions, including the media sphere.<sup>26</sup> Moreover, it created fertile soil for intolerance and vulnerability to radical "alternative" remedies. Within an exceedingly diverse, hyperpluralistic<sup>27</sup> information landscape,

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23 *Freedom in the World 2023* (Washington, DC: Freedom House, 2023). [https://freedomhouse.org/sites/default/files/2023-03/FIW\\_World\\_2023\\_DigitalPDF.pdf](https://freedomhouse.org/sites/default/files/2023-03/FIW_World_2023_DigitalPDF.pdf).

24 Wernli et al., "Understanding and governing global systemic crises in the 21st century: A complexity perspective," *Global Policy* 14, no. 2 (2023): 207–228.

25 Nora Biteniece et al., *Digital Hydra: Security Implications of False Information Online* (Riga: NATO Strategic Communications Centre of Excellence, 2017): 7. <https://www.stratcomcoe.org/digital-hydra-security-implications-false-information-online>.

26 Ipsos Veracity Index 2022, <https://www.ipsos.com/en-uk/ipsos-veracity-index-2022> A significant decrease was registered between 2021 and 2022 in public trust in politicians: 12 % from 19 %. Trust in journalists was already low, but did not decrease further. Nevertheless, trust in the media, if included social media and mass (audiovisual) media is more negative: Amy Watson, "Attitudes on the trustworthiness and impact of the media among Millennials worldwide as of January 2019," Statista 2022. <https://www.statista.com/statistics/381486/trusted-sources-news-info-millennials-worldwide/>.

27 See the lecture of Monroe E. Price: <https://cmdss.ceu.edu/article/2017-05-05/public-service-media-age-hyper-pluralism>.

reasoned discourse frequently finds itself overshadowed by the multitude of competing voices.<sup>28</sup> Empirical studies have supported the hypothesis that populist discourse aligns itself with social media platforms, in part due to the distinct attributes of social media, such as direct access to the audience without journalistic intermediaries, the establishment of personal connections, and the potential for customization and targeted communication.<sup>29</sup> Consequently, populist politicians are more inclined to employ social media as their primary means of communication with the public as opposed to traditional television talk shows.<sup>30</sup>

In sum, the democratisation of the public discourse provided the illusion of empowerment to disempowered masses of voters, and this process was not followed by a better attention to serve the interests of these masses. The traditional liberal political elites are still overly attached to the social elites, and the disapproval of this power structure is vehemently expressed in the equalised social media.

## 1.2 The role of public sphere in democracies

Ideally, democratic public discourse provides the ground on which a deliberative democracy operates. Its objective is to exchange ideas with the view to discuss alternative options, to exercise self-government<sup>31</sup> or to control the governing power, and to enable individuals to "develop their faculties", to self-realisation of their own potential and autonomy.<sup>32</sup> The "marketplace of ideas" theory argues that an uninhibited and unregulated free speech

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28 Judit Bayer, "The illusion of pluralism. Regulatory aspects of equality in the new media," in *Digital Media Inequalities. Policies against divides, distrust and discrimination*, ed. Josef Trappel, 127–140. (Göteborg: Nordicom, 2019): 127–140.

29 Kai Spiekermann, "Why populists do well on social media," *Global Justice: Theory Practice Rhetoric* 12 no 2 (2020): 50–71.

30 Nicole Ernst et al., "Extreme parties and populism: an analysis of Facebook and Twitter across six countries," *Information Communication and Society* 20, no. 9 (2017): 1347–1364.

31 Robert Post, "Participatory Democracy and Free Speech" *Virginia Law Review* 97, no 3 (2011): 478.

32 Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (New York, NY: Harper, 1960) see also: Alexander Meiklejohn, (2004) *Free Speech And Its Relation to Self-Government* (Clark, NJ: The Lawbook Exchange, 2004) and Owen M. Fiss, "Free Speech and Social Structure," *Iowa Law Review* 71. no.5 (1986): 1405. and Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1999): 200.

would best ensure this public discourse.<sup>33</sup> However, competition on this marketplace may get distorted. John Milton assumed that the battle be "free and open", which at least implicates that it is played on a level playing field.<sup>34</sup> Sponsorship of content may "drown out the voices of others", or at least further distort the equal chances of getting heard.<sup>35</sup> Also John Stuart Mill was well aware that liberty does not necessarily lead to truth: "But, indeed, the dictum that truth always triumphs over persecution is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes. History teems with instances of truth put down by persecution. If not suppressed for ever, it may be thrown back for centuries."<sup>36</sup> And according to Justice Holmes, truth is whatever prevails in the marketplace of ideas.<sup>37</sup> In our post-truth age, this sounds unacceptably fatalistic.

The instruments of competition in the "marketplace of ideas" have seen a development in the past century, which can be compared to the development of weapons from a simple gun to the nuclear missiles. Rather than wit, the weapons of persuasion are: explicit sponsorship, the attention-driven business model which is able to take advantage of behavioural data, and profiles based on personality traits that enable algorithms to opaquely up-rank or downranks certain content on the basis of their assumed engaging effect.<sup>38</sup> Even if truth wins in the long run, what price is not too high to pay, for the toleration of falsehood?<sup>39</sup>

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33 Justice Oliver Wendell Holmes in *Abrams v United States* 250 US 616 (1919), 630–631.

34 "Let her [Truth] and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter? Her confuting is the best and surest suppressing." John Milton, *Areopagitica* (London: Leopold Classic Library, 2016). In this respect, Barendt suggested: "Some constraints may be required to ensure that false propositions do not drive out truths". Eric Barendt: *Freedom of Speech* (New York, NY: Oxford University Press, 2005): 9.

35 Julian N. Eule, "Promoting Speaker Diversity: Austin and Metro Broadcasting," *Sup. Court Review* 105, 111–116. (1990): 115.

36 John Stuart Mill, *On Liberty* (Boston, MA: Ticknor and Fields, 1863):50–58., 56.

37 Abrams v. United States 250. US. in Chapter 2. See in Sajó, A (2004) Freedom of Expression. Institute of Public Affairs. p. 20.

38 Shoshana Zuboff, *The Age Of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (London: Profile Books, 2019).

39 If the societal price is considered disproportionate, the precautionary principle may prevail, and the political system would become self-defensive. Karl Loewenstein, "Militant Democracy and Fundamental Rights," *American Political Science Review* 31. no.3. (1937): 417–433, 638–658.

The libertarian theory – known for its risk-taking attitude<sup>40</sup> – has gained new strength with the advent of the internet, and became the "de-facto communication theory" for online speech, at least in the Western countries.<sup>41</sup> The vanishing of scarcity and material boundaries created the short-lived illusion that the internet provides a space equally for every "netizen"<sup>42</sup> to express their views, an equal opportunity to exchange information,<sup>43</sup> free of government power.<sup>44</sup> Western countries enforced this liberal position in their regulatory policy,<sup>45</sup> while the non-Western world took a different direction.<sup>46</sup> The internet appeared to allow that every criticism is responded to with an adequate response and that the previously so limited public discourse can evolve into a global dialogue. However, these ideas, perhaps naively, celebrated the anarchy of the vast open space, as if human history had not taught us that these are so soon colonised. Similarly to 16–18th century England, private enclosures changed the nature of the internet, this time not by fences, but by code.<sup>47</sup> As Lawrence Lessig described, the freedom of the internet is regulated by those private companies which define the possibilities of actions for other users. The "battle field" is thus defined by particular commercial interests, and personal agendas – not ideal for public discourse. While the marketplace theory may have been less than accurate even in the previous eras, is suits even less the twenty-first-century

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40 András Sajó and Lorri Rutt Bentch, *Militant democracy* (Utrecht: Eleven International Publishing, 2004): 217.

41 Peter Coe, *Media Freedom in the Age of Citizen Journalism* (Cheltenham, UK/Northampton, USA: Edward Elgar Publishing, 2021): 133.

42 The word "netizen" is attributed to the late Michael F. Hauben in his speech in Japan. Michael F. Hauben, "The netizens and community networks." *Hypernetwork '95 Beppu Bay Conference* November 24. 1995. <http://www.columbia.edu/~hauben/text/bbc95spch.txt>.

43 Lincoln Dahlberg, "Cyber-libertarianism 2.0: A Discourse Theory/Critical Political Economy Examination," *Cultural Politics* 6, no.3 (2010): 331, 332–333.

44 John Perry Barlow, "A Declaration of the Independence of Cyberspace," February 8, 1996 <https://www.eff.org/cyberspace-independence> See on ICANN: Renee Marlin-Bennett, "ICANN and democracy: contradictions and possibilities", *info* 3, no. 4 (2001): 299–311. <https://doi.org/10.1108/14636690110801978>.

45 CDA 230, and the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

46 Ang, P. H. (1997, June). "How countries are regulating Internet content" in *Annual Meeting of the Internet Society, Kuala Lumpur, Malaysia* 3, June (1997).

47 Lawrence Lessig, *Code: And other laws of cyberspace* (New York, NY: Basic Books, 1999).

speech.<sup>48</sup> Pete Coe calls it a "flawed normative framework" that "should be rejected".<sup>49</sup> In my view, the marketplace analogy is not bad: it honestly describes the market, which can be distorted by all the unfair behaviours (or simply by bad luck) that we know from commerce.

### 1.2.1 How public is the public discourse?

At the same time, the privately-imposed restrictions on internet freedom are only part of the problems that new public discourse is encountering. I argue that at least as meaningful is the inclusive nature of the internet, by the very feature that was unequivocally celebrated by Western democracies and feared by non-Western powers: the empowerment of the masses, in other words: non-elite social groups attaining their voice. Never in history has there been such a favourable environment to freely communicate with so many fellow "comrades" – where under comrades I understand the like-minded citoyens. Clearly, the impact of the online technology to democracy is at least as much positive, as negative.<sup>50</sup> The empowerment of minority and even niche groups has contributed to social equality movements.<sup>51</sup> The social representation is more diverse, but this diversity is illusory:<sup>52</sup> it is hardly perceived by the ordinary user, who encounters fragmented pieces of the public discourse.<sup>53</sup> This fragmentation makes the process of discussion and debate impossible in the organically developing online environment. The inclusory nature of the internet is even weaponised, and used as a weapon of mass "distraction". Rather than suppressing speech, some politi-

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48 Coe, *Media Freedom*, 36.

49 Coe, *Media Freedom*, 148.

50 C. Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters* (New York, NY: Cambridge University Press, 2007): 98–112.

51 Particularly in the field of movements for non-discrimination on the basis of gender and sexual orientation, where previously stigmatised minorities and survivors were united by the network.

52 Judit Bayer, "The illusion of pluralism," in *Digital media inequalities: Policies against divides, distrust and discrimination*, ed. Trappel, J. (Gothenburg: Nordicum, 2019).

53 James Curran, "The Internet of Dreams: Reinterpreting the Internet," in *Misunderstanding the Internet*, ed. James Curran, Natalie Fenton and Des Freedman (London: Routledge, 2016): 5–6; See also: C. Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters* (Cambridge University Press, 2007): 101. And Coe, *Media Freedom*, at p. 67.

cal forces flood the online space with false or misleading information, only to destroy trust and increase “noise” in the system.<sup>54</sup>

In any case, democracy was designed among very different circumstances. In the ancient Greece, merely a limited number of free male citizens were entitled to vote at the public gatherings. Athenian city-states were homogeneous communities with a common culture, and the number of orators was similarly limited. During the dark centuries of the Middle Ages, culture was marked by a symbolic representation of the supernatural, and was generally non-written.<sup>55</sup> Rational discourse gained a new recognition during the Enlightenment and became a founding stone of democracy. After the *bourgeois* revolutions, this rational discourse took place among the privileged men in the society, in public spaces like coffeehouses, in private salons,<sup>56</sup> or through the printed press.<sup>57</sup> Participation in this "public" discourse demanded wealth, at least enough to allow that a man can spend his time, as well as his money, in coffeehouses or to maintain a regular "salon". Literacy, to read papers, was also a privilege, in absence of general public education.

Voting rights remained restricted until well into the 20th century. In the United States, only white males had the right to vote until 1876. After that, requirements of owning property and literacy were introduced to enforce indirect discrimination of the lower classes. For example, in the election of George Washington, only 6 % of the population had the right to vote. Voting rights became universal only during the 20th century with a few exceptions, such as New Zealand, where women got the suffrage already in 1893. In a few states it happened even later: after the millennium, or not

<sup>54</sup> “Noise reduction is a necessary approach to filtering out content to replace it with newsworthy information, by an authoritative news outlet.” Ingrid Brodnig, OSCE: Can there be security without media freedom? 2022. See also: Damian Tambini, *Media Freedom* (Hoboken, NJ: Wiley and Sons, 2021).

<sup>55</sup> Johan Huizinga, *The Autumn of the Middle Ages* (Chicago: University of Chicago Press, 1996 [1919]).

<sup>56</sup> To what extent women participated in the formation of the public sphere, remains debated, this writing is not capable of immersing into this debate, but see: Elizabeth Eger, Charlotte Grant, Chlíona Ó Gallchoir, and Penny Warburton, eds., *Women, writing and the public sphere, 1700–1830*. (Cambridge, UK: Cambridge University Press, 2001) In any case, salons were more cultural and less political. See Hannah Arendt, Rahel Varnhagen, *The Life of a Jewess* (Baltimore, MD: Johns Hopkins University Press, 1997).

<sup>57</sup> Jürgen Habermas, *The structural transformation of the public sphere: An inquiry into a category of bourgeois society* (Cambridge, MA: MIT Press, 1991).

at all.<sup>58</sup> Extension of the voting rights was preceded by the introduction of general primary education, a wide distribution of press products, and then the mass media during the 20th century. In parallel, the "public sphere" got extended, and public communication became more inclusive.

The social standing that was required to enjoy the right to vote meant that the voters were relatively more educated, and were relatively more interested in maintaining the status quo, than those without voting rights.

Habermas argued that the deliberative public sphere became degraded by the commercialised mass media system, and by the intertwining of the public and the private sphere.<sup>59</sup> Later, social media communication caused – among other effects – also an acceleration of this process. In retrospect, even the much-criticised commercial mass media represented the interests and ideas of a privileged social elite, while commercialisation helped to convey the messages to the masses. However, although messages reached a wider segment of the population, this communication remained one-to-many and one-sided, because the lower social classes never had an equal chance to actively participate in the formation of public opinion. Mass media outlets were owned by well-established publishers and licence holders, who bore responsibility for their content, and strictly moderated all opinions that were publicly carried. Entry into this information-shaping circle had its considerable barriers: financial, for securing the organisational background and publishing the product; educational, for the journalists and media workers; and official, for using the terrestrial channels.<sup>60</sup> Even though suffrage became universal, the information that could govern the outcomes were held in the hands of a few. This ensured the sustaining of the status quo, and contributed to maintaining social injustices. At the same time, it also provided the advantage of political stability.

In social media communication, these barriers vanished, similarly to national boundaries. Lowering or vanishing the barriers seemed at first sight as a very democratic change. In theory, it could provide an optimal

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58 Compare the Swiss referendum on women's suffrage in 1959 that rejected the idea by 67 % of Swiss men.

59 Habermas above, see also: Craig Calhoun ed., *Habermas and the Public Sphere* (Cambridge, MA: MIT Press, 1993).

60 Thomas Irwin Emerson, *Toward a General Theory of the First Amendment* (Toronto: Vintage Books, 1966): 9. See also: Bayer et al (2019) Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States. Study for the European Parliament Policy Department C: Citizens' Rights and Constitutional Affairs. 2019.

technological basis for realising the ideal type of democracy.<sup>61</sup> Truly, social media is significantly more inclusive than ever, and certainly much more than the public sphere was in the 18th century, because potentially everyone has access, and is able to share their thoughts and to reflect on others'. However, the structuring of information and its channelling into the democratic process would be key to realise the democratic potential of this public discourse. Even harmful materials would have their unique value, if it were ensured that reasonable and well-discussed opinions eventually get represented and find their way to the voters, and into governance. "Everything Worth Saying Should Be Said", as Meiklejohn put it.<sup>62</sup>

### 1.2.2 How rational is the "rational discourse"? Rational versus ritual models of communication

The libertarian theory appears to presume that the citizens who participate in the public discourse rationally consider the received information, weigh and balance the arguments and synthetise a reasonable decision on the basis of the whole picture. Both speakers and audiences are regarded as "presumptively autonomous" where the rule of "caveat emptor" reigns.<sup>63</sup> After all, liberty is about higher risk-taking.<sup>64</sup> However, culture, science, the arts, religion or literature are also part of democratic public life.<sup>65</sup> Social media is not the first to offer content that is not entirely rational. Tabloids attract wide segments of the population, who limit their information consumption to them, and other entertaining, infotaining and boulevard media genres.

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61 Barlow, *A Declaration of the Independence*, <https://doi.org/10.1108/14636690110801978>.

62 Alexander Meiklejohn, "'Everything Worth Saying Should Be Said'; An educator says we talk of free speech, but hedge that freedom with too many reservations. 'Everything Worth Saying Should Be Said,' *The New York Times* July 18 1948. <https://www.nytimes.com/1948/07/18/archives/everything-worth-saying-should-be-said-an-educator-says-we-talk-of.html>.

63 Robert Post, "Participatory Democracy and Free Speech" *Virginia Law Review* 97, no. 3 (2011): 485. Same rational presumption at Mill, J.S. or E. Barendt, 'Press and Broadcasting Freedom: Does Anyone Have Any Rights to Free Speech?' (1991) 44 *Current Legal Problems* 63, (1991): 66–67. The same view was expressed in *ACLU v. Reno*, but lately in *Stocker v. Stocker* as well (2019) UKSC 17, see Coe p. 150.

64 Sajó, *Militant democracy*, 7, 217.

65 Emerson, *Toward a General*, 9.

However, we have increasing information about the fallibility of the audience, based on research in connection with disinformation.<sup>66</sup> Studies that explored what influenced users' inclination to share disinformation found a diversity of features, without a consistent pattern.<sup>67</sup> Even the same individuals may be more rational one day and less so another day. Further, the level of rationality and autonomy may depend on the subject: one can have a scientific attitude to climate change but be sceptical about the vaccine.<sup>68</sup> Human beings are moderately rational; as communities, they behave more irrationally. The ritual model of communication theory argues that the role of media is not so much to generate a rational discourse, but to define identities, generate feelings of togetherness, a shared sense of common values.<sup>69</sup> The ritual function is in fact a third incentive of speech, besides the interest-motivated speech (which Posts regards as falling outside the public discourse) and the genuine (i.e. not motivated by material interests) speech for political participation. This ritual function speaks to the moral aspects of the human being, which may be connected to the political, but may also be independent of it.<sup>70</sup>

Political speech is an absolute hybrid: besides embracing the elements of rational speech and ritual speech, it may also represent material interests, as far as party politics is intertwined with particular economic interests. Ideally, party politics ought to serve public interest rather than economic interests of certain companies, company groups or industries, and even less so the interests of individual politicians. This is a clear indication of corruption in democracy, and yet it is present in all contemporary democratic systems. Nothing more starkly signals the current crisis of democracy

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66 See references in chapter 6.6. about the Code of Practice on Disinformation.

67 Some studies showed that elderly people were found more likely to share disinformation, however, variables of education and other demographic characteristics did not yield conclusive results.

68 Ideological "packages" of worldviews are identified and (ab)used by advertisers when generating profiles based on presumptions, concluded from behavioural traces. Michał Kosinski, David Stillwell, and Graepel Thore, "Private traits and attributes are predictable from digital records of human behavior." *PNAS* 110, no.15 (2013): 5802–5805.

69 Tamar Liebes, James Curran, and Elihu Katz, *Media, ritual, and identity*. (New York, NY – London, UK: Psychology Press, Routledge): 4.

70 See more on this in: Daniel Dayan and Elihu Katz, "Articulating consensus: the ritual and rhetoric of media events" *Durkheimian sociology: Cultural studies* (1988): 139.

or explains the widespread rise of populism.<sup>71</sup> The ritualistic and emotional nature of populistic political communication which aims to conceal interest-based politics, creates a vicious circle by discrediting independent, critical media.<sup>72</sup>

When Carey characterised communication as „a symbolic process whereby reality is produced, maintained, repaired, and transformed”, he predicted the current non-political visual social media culture of Tik-Tok, as well as the populistic and disinformative symbolism of the new authoritarian politicians.<sup>73</sup> McLuhan used the metaphor of "tribalisation" of the public sphere. In his view, mass media had already transformed the function of public communication from a "rational transmission of information" into a ritual function that served to reinforce community (tribal) identities.<sup>74</sup> McLuhan stressed that the new electronic media had a decentralising effect, as opposed to the centralising effect of "cold" media like print, which required literacy and focus. Cultures which become more cohesive and more intense as the result of consuming "hot" media like radio, become separatist and exclusive: they become tribal.<sup>75</sup> In today's rhetoric, we would call this: the hotter a medium is, the more polarising it is. He appears

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71 Eliska Drapalova, "Corruption and the Crisis of Democracy," Transparency International Anti-Corruption Help-desk Answer, 2019. [https://knowledgehub.transparency.org/assets/uploads/helpdesk/Corruption-and-Crisis-of-Democracy\\_2019.pdf](https://knowledgehub.transparency.org/assets/uploads/helpdesk/Corruption-and-Crisis-of-Democracy_2019.pdf); Donatella Della Porta and Yves Mény, *Democracy and corruption in Europe* (London; Washington: Pinter, 1997) William English, "Institutional corruption and the crisis of liberal democracy," Edmond J. Safra Working Papers, (15). 20 Jun 2013.

72 Interestingly, Loewenstein found that authoritarian regimes are held together by emotionalism, which replaces the rule of law. Sajó, *Militant democracy*, 210. Democratic constitutionalism is supposed to operate within the limits of reason – but what is the answer when the entire public discourse is shifting towards the emotional? See in: András Sajó, "Militant democracy and emotional politics," *Constellations* 19, no.4 (2012): 562–574.

73 James W. Carey, *Communication as Culture: Essays on Media and Society* (Boston, MA: Unwin Hyman, 1989). Elliott points at how the political leadership of a society draws attention to the values that they hold to be of special significance, cited by John J. Pauly, "Ritual theory and the media," in *The handbook of media and mass communication theory*, Chapter 10. (2014): 172–189. See also: Alice E. Marwick, 'Why Do People Share Fake News? A Sociotechnical Model of Media Effects,' *Georgetown Law Technology Review* 474. (2018).

74 Patrick Roesle, (2017) "Marshall McLuhan Predicted Digital-Mediated Tribalism," *McLuhan Galaxy*. February 16. 2017. <https://mcluhangalaxy.wordpress.com/2017/02/16/marshall-mcluhan-predicted-digital-mediated-tribalism/>.

75 Marshall McLuhan, "Radio: The Tribal Drum," *AV Communication Review* 12, no2 (1964): 136. <http://www.jstor.org/stable/30217121>.

to have forecasted that the internet brings individuals together, without requirements for civilisation or education, as a medium that brings total participation and involvement in the lives of others.<sup>76</sup> He wrote: "*the instant nature of electric-information movement is decentralizing – rather than enlarging – the family of man into a new state of multitudinous tribal existences.*"<sup>77</sup>

This thesis of McLuhan – similarly to his global village concept – only has grown in relevance during the past decades. Communication is becoming increasingly non-written and non-verbal, more symbolic, more visual and less rational,<sup>78</sup> similarly to how Huizinga described medieval cultural communication.<sup>79</sup> The concept of community identities has also been used by Fukuyama, who argued that voters chose party preferences by identification, as opposed to by rational choice.<sup>80</sup> The wide array of policy options and their complexity escapes the careful scrutiny of the average voter, therefore, instead of weighing arguments, they rely rather on personality traits that express a set of values that they support.

Important basic tenets for the topic that is discussed here are that (1) what we call democracy was born in a rigidly structured social hierarchy, and (2) it developed in a structured and moderated information environment. This structured order vanished amidst social and technological development that provided equal opportunities to all who have access to technology, and gave room to a new structure to emerge. Initially chaotic, or at least not immediately comprehensible, this chaos has been organised according to a commercial logic. Information that circulates in this vast space without structure would be indigestible, therefore, online intermediary platforms structure this information with the help of algorithms. The information becomes categorised, so are users, and this way the communication space gained a new structure. This is so convenient for users, that

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76 Kathleen Gabriels, "Rethinking McLuhan's concept of 'tribe' in view of 'Second Life,'" in *McLuhan's Philosophy of Media -Centennial Conference (Proceedings)*, ed. Yoni Van Den Eede et al. Royal Flemish Academy of Belgium for Science and the Arts, (2012): 107–113.

77 Roesle, "McLuhan Predicted," <https://mcluhangalaxy.wordpress.com/2017/02/16/marshall-mcluhan-predicted-digital-mediated-tribalism/>.

78 Marshall McLuhan, *The Gutenberg Galaxy: The Making of Typographic Man* (Toronto: University of Toronto Press, 1962).

79 See Huizinga citation above, McLuhan, above, and Jason Epstein, "The End of the Gutenberg Era," *Library Trends* 57, no1 (2008).

80 Francis Fukuyama, „Against identity politics: The new tribalism and the crisis of democracy," *Foreign Aff.* 97, 90 (2018).

they accepted this new structure almost without criticism. The underlying commercial logic was not questioned, until negative events raised awareness to the power of the algorithms.<sup>81</sup> Legislators and researchers started to examine the logic of structuring information, and the relationship between causes and effects of content providing, disseminating and consuming, but without having access to the root of the problem: the programming of algorithms. While we may have guesses about the incentives of large corporations (such as engaging users, increasing click-rates, etc.) we are unaware of the instructions that are given to developers (if any), and of the process how algorithms are trained and applied. What appears certain, is that platforms are all but neutral.<sup>82</sup> Addressing this gap, the DSA has obligated platforms to reveal some information to the public about the criteria they use. This, however, remains still rather limited (see Chapter 6).

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81 These negative events were the sweeping political disinformation campaigns in 2015–2016, mentioned above. See more on those at: Samantha Bradshaw, and Philip N. Howard, “Troops, Trolls and Troublemakers: A Global Inventory of Organized Social Media Manipulation,” *University of Oxford: Working Paper*, no.12 (2017). See also: Judit Bayer et al (2019) Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States. Study for the European Parliament Policy Department C: Citizens' Rights and Constitutional Affairs. 2019.

82 Paul Bernal, *The Internet, Warts and All. Free Speech, Privacy and Truth* (New York, NY: Cambridge University Press, 2018).



## 2 Media freedom and pluralism in the platform age

### 2.1 Defining media freedom

#### 2.1.1 Elements of media freedom

A media order that supports the democratic process, lies on the basic pillars of human rights. Respect for human rights and democracy are mutually interconnected: one cannot exist without the other. Rights without democracy would be merely privileges granted by the sovereign power, but without guarantee for their respect. Whereas democracy without ensuring rights – although technically possible – is a dictatorship of the majority. Enforceability of human rights also presupposes the rule of law. These three – human rights, democracy and the rule of law – are interconnected premises that are interdependent of each other. Harm to one element will inflict damage to the entire structure.<sup>83</sup>

The underlying fundamental right requisite to democracy is freedom of expression. While it is a prerequisite, it is still not sufficient in itself to ensure the operation of a democratic society. What is really necessary is free and plural media which is able to facilitate a democratic, rational public discourse.<sup>84</sup> The right to freedom of expression and media freedom cannot be regarded as same, for several reasons. Freedom of expression has two main justifications: first, to serve the realisation of the personality;<sup>85</sup> second, to constitute a public discourse that is necessary for the democratic

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83 In another interpretation, deficiency of one element signals a malfunction of the triangular system. Sergio Carrera, Elspeth Guild, and Nicholas Hernanz, “The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU, Towards an EU Copenhagen Mechanism,” *Study for the European Parliament*, 2013, [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE\\_ET%282013%29493031\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET%282013%29493031_EN.pdf).

84 Bernd Holznagel, Dieter Dörr, Doris Hildebrand, *Elektronische Medien: Entwicklung und Regulierungsbedarf* (München: Vahlen Verlag, 2008): 586. Damian Tambini, „A Theory of Media Freedom“ *Journal of Media Law* 13, no.2 (2021) <https://doi.org/10.1080/17577632.2021.1992128>.

85 András Sajó, *Freedom of expression* (Warszawa: Institute of Public Affairs, 2004) To keep a close focus on our chosen topic, this book does not go into detail in regard of the general freedom of expression theories.

society.<sup>86</sup> Media freedom relies on the second goal only.<sup>87</sup> It is not an inherent liberty, rather an instrumental right that draws its legitimisation from its social function.<sup>88</sup>

The legal category of "media freedom" (and even more of "media pluralism") is not entirely clarified in the international human rights jurisprudence. Neither the Universal Declaration of Human Rights, nor the International Covenant on Civil and Political Rights mention freedom of the press or of the media, nor does the European Convention on Human Rights (ECHR). However, the former, global documents both refer to the free choice of a plurality of media: "through any media" or "through any other media of his choice".<sup>89</sup> Whereas, the ECHR's case law delivers ample precedents that support that media freedom and to some extent also media pluralism are implied rights that flow from the goals of the Convention.<sup>90</sup> The Court (ECtHR) has repeatedly emphasised that a free media plays an indispensable role in driving public discussion in matters of public importance.<sup>91</sup> It clarified that Article 10 of the Convention protects not only the individual liberty of a publisher, but also the press' role in facilitating public discourse within democratic societies.<sup>92</sup> In its case law it consistently found that the democratic process was at stake when freedom of expression was restricted, and it attributed a decisive role to the press in facilitating the

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86 Eric Barendt, *Freedom of Speech* (Oxford: Oxford Press University, 1985).

87 But see the American theories in the realm of the "industry-driven" interpretation of the First Amendment.

88 Jan Oster: *Media Freedom as a Fundamental Right* (Cambridge: Cambridge University Press, 2015), Tambini, *Media Freedom*, 12.

89 Wiebke Lamer, "Press Freedom as an International Human Right," (Palgrave Pivot Cham, 2018) [https://doi.org/10.1007/978-3-319-76508-2\\_2](https://doi.org/10.1007/978-3-319-76508-2_2).

90 Centro, Lingens v Austria App no 9815/82 (ECtHR 8 July 1986) para 42; Oberschlick v Austria (No 1) App no 1162/85 (ECtHR 23 May 1991) para 58; Bergens Tidende v Norwma (2001) 31 EHRR 16, [48]; Busuioc v Moldova (2006) 42 EHRR 14, [64] [65]; Jersild v Denmark (1995) 19 EHRR 1; Janowski v Poland (No 1) (2000) 29 EHRR 705, [32]. See also: Peter Coe, 'Redefining "media" using a "media as a constitutional component" concept: an evaluation of the need for the European Court of Human Rights to alter its understanding of "media" within a new media landscape' *Legal Studies* 37, no. 1 (2017): 25 53, 49.

91 *Bladet Tromsø and Stensaas v Norway* [1999] App. no. 21980/93, [59, 62].

92 See also: *Axel Springer AG v Germany* (No. 1) [2012] App. no. 39954/08, [79]; *Von Hannover v Germany* (No. 2) [2012] App. nos. 40660/08 and 60641/08, [102]; *Sunday Times v United Kingdom* (No. 1) [1979] App. no. 6538/74, [65]; *Times Newspapers Ltd v United Kingdom* (Nos. 1 and 2) [2009] App. nos. 3002/03 and 23676/03, [40].

democratic process,<sup>93</sup> often stating that the press acts as a public watchdog to society.<sup>94</sup>

At the same time, the American and German constitutions explicitly protect media freedom (named "press freedom" in US). In spite of this similarity, the difference between American and German jurisprudence in regard of media is greater than the difference between the ECHR and German ones. The reliance on negative freedom by American First Amendment jurisprudence stems not only from the text of the Constitution ("Congress shall make no law"), but also from the historical background of American independence and the subsequent constitutionalism.<sup>95</sup> This negative freedom is construed by some authors as the liberty of the press as an industry, whereas by others, as a more complex freedom of the press as a communication technology, that protects every speaker who uses this technology.<sup>96</sup> The latter can be divided into two further categories, depending on whether press is understood as institutional press, or press as a technology.<sup>97</sup>

International, European and specifically German enumerations of human rights have been created after the second world war and got heavily impregnated by the historical lessons learned.<sup>98</sup> In particular, the role that the media played in Germany before and during the second World War prompted for extra caution and resulted a sophisticated and elaborated positive regulation of media freedom and pluralism. The European Charter of Fundamental Rights can be interpreted both ways. Besides declaring the right to freedom of expression, it adds: "The freedom and pluralism of the media shall be respected."<sup>99</sup>

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93 *Krone Verlag GmbH & Co KG v Austria* (2006) 42 EHRR 28; see also Wragg at 318.

94 *Observer and Guardian* 13585/88, Judgement 26/11/1991.

95 See a detailed analysis of American jurisprudence at Coe, fn. 36.

96 See an exhaustive analysis of this question in: Eugene Volokh, "Freedom for the Press as an Industry, or the Press as a Technology? – From the Framing to Today," *University of Pennsylvania Law Review* 160, no. 2/3 (2012)

97 Volokh, "Freedom," 505.

98 Damian Tambini, *Media Freedom* (New York, NY: John Wiley & Sons, 2021).

99 Article 11 (1) and (2) Freedom of expression and information. The official explanation of the Charta holds merely that "Paragraph 2 of this Article spells out the consequences of paragraph 1 regarding freedom of the media", which does not provide guidance.

### 2.1.2 Who are the right holders of media freedom?

Media freedom is not typically an individual right, and also not a group right.<sup>100</sup> It can be the right of representatives of the media industry, as it is clear both from ECHR,<sup>101</sup> and from German jurisprudence.<sup>102</sup> However, under the European Charter, media freedom has no defined subject, in contrast to freedom of expression, to which "everyone has the right to".

The primary beneficiary of this right is, in fact, the audience. Media companies and journalists who act on behalf of the media, are instruments of this freedom, rather than beneficiaries. We can derive this from the goal of the right, which is: fostering a democratic public discourse. Self-realisation (the other justification for the right) is not among the rights of media companies.<sup>103</sup> The self-realisation of the particular interests of a media company is protected by the right to free entrepreneurship, and not by free expression. Media freedom is concerned not so much with the freedom to act in the material sense, but a freedom to carry and to receive ideas and information, and thereby to facilitate the public discourse. This is the case even if media freedom extends to entertainment or cultural programmes.<sup>104</sup> We can say that the constitutional right of media freedom applies the assumption that media companies operate in the public interest, which includes as much the informative function, as the community function of the media.<sup>105</sup>

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100 "Freedom of expression is a human right and freedom of the media clearly not the right of a human," Damian Tambini, A theory of media freedom *Journal of Media Law* 13, no 2 (2021): 135–152 <https://doi.org/10.1080/17577632.2021.1992128>.

101 Orban et others v. France, 20985/05, Judgement of 15 January 2009. See also: Sunday Times v. UK, Observer & Guardian v. UK.

102 Jarass, *Charta der Grundrechte der EU*, Rn. 19. CJEU, C-43/82 – Vlaamse Boekweten, Slg. 1984. 19. Rn. 34. See also previous references to US interpretations, and to Justice Scalia, who emphasised that the First Amendment was written in terms of "speech", not speakers – meaning that it fosters an inclusive understanding of speakers of all kind. *Citizens United v. FEC* (2010).

103 The industrial interpretation as described by Volokh could be understood like that, but Volokh proves that it did not prevail throughout the history of the American free speech jurisprudence.

104 BVerfGE 59, 231/258, Jarass/Pieroth GG. Rn. 49.

105 This is reflected among others in the definition of public service duties, which are to "inform, educate and entertain", and in the importance that is attributed to the cultural role of media, which is not directly in connection with the democratic governance. Robert Bork also has stated, that "many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve

Freedom of expression and freedom of the media are two rights that are not precisely separated in the case of media companies. After all, media companies are entitled to refrain from publishing certain content,<sup>106</sup> and to define their editorial guidelines as they see it most profitable, for instance. When it comes to the enforcement of the right, it is usually claimed by media companies,<sup>107</sup> and sometimes by journalists or editors,<sup>108</sup> but not by members of the audience. The audience's right to receive free and plural media services would be consumed by their right to access to information.<sup>109</sup>

This brings us back again to the difference between American and European approach to media freedom. Even though the American First Amendment declares the freedom of the press, it is a pure extension of freedom of expression to media companies and other speakers when speaking through media. Its stance is purely negative: the state institutions are obliged to refrain from interference with the media. Even any definition of "media" would already be regarded as a state intervention, by limiting the scope of those protected.<sup>110</sup> Although the discussion whether the First Amendment's objective is to promote the public debate, is present in American legal scholarship<sup>111</sup>, dominant theorists deny this "collectivist" theory.<sup>112</sup> Jack Balkin writes about "deconstitutionalisation" of speech regulation in order to impose public obligations on digital companies that play an outsized role in

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protection". Michael W. McConnell, "The First Amendment Jurisprudence of Judge Robert H. Bork," 9 *Cardozo Law Review* 63. at (1987): 70. Note that his opinion is inconsistently represented by various authors, e.g. "Bork argued First Amendment meant to protect only political speech" by Martin Gruberg, (2023) Robert Bork, Free Speech Center, or Kinsley, Michael (1987) Bork's Narrow First Amendment, *The Washington Post*.

106 Jarass, Charta... Rn. 18.

107 RTBF v. Belgium, ECtHR, 29/03/2011 – 50084/06.

108 Jersild v. Denmark, (1995) 19 EHRR 1.

109 Jarass/Pieroth, GG für die BRD, Rn. 46.

110 Oster, *Media Freedom*, 25–26.

111 See Robert H. Bork, *How much freedom of the press?* (Santa Barbara, CA: Center for the Study of Democratic Institutions, 1982) See also the works of Owen Fiss, or Alexander Meiklejohn.

112 Robert Post, (1993) "Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse," Yale Law School, Faculty Scholarship Series. <http://hdl.handle.net/20.500.13051/1315>. Note that Post's conclusion is that "We should reserve the [collectivist] theory for those discrete and hopefully rare moments when its use will be necessary to sustain the enterprise of self-governance that continues at least nominally to claim our allegiance." at p. 1137.

our public life. This is necessary because the American binary construction of the First Amendment theory allows that platforms are assigned First Amendment rights,<sup>113</sup> without bearing the responsibilities of publishers; users are perhaps negative externalities in this picture, casualties, or at most useful idiots, who provide the raw material for the business of selling advertisements. This twisted interpretation of the First Amendment appears to empower digital companies to decide third party content removal, upranking or downranking, but does not protect end-users against companies' arbitrary decisions.<sup>114</sup>

Balkin argues that speech becomes more a collection of measurable data and network connections that empower companies and governments to predict social behaviour, and influence users.<sup>115</sup> This disillusioned perspective underscores the argument that the online informational environment requires a public policy in order to ensure, or at least respect (and not destroy), the rational discourse. The European approach is generally favourable with the state having obligations in ensuring media freedom through positive actions, i.e. media policy. This is even more the case with media pluralism, which is hardly conceivable without state regulation.<sup>116</sup>

In state regulation which aims to ensure media freedom or media pluralism, media companies are often treated as passive objects. This relationship is explicitly shown in the wording of the German Basic Law: "Freedom of the press and freedom of reporting by radio and film are warranted."<sup>117</sup> The right to develop and maintain a free and plural media system (Ausgestaltung) is not merely a right but also an obligation of the German state. This state interference is not regarded as a limitation of media freedom.<sup>118</sup> At the same time, media freedom would prohibit that the state influences (even indirectly) the selection and formation of media content.<sup>119</sup>

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113 Jack M. Balkin, "Free Speech Versus the First Amendment," UCL Law Review, Forthcoming – Yale Law and Economics Research Paper Forthcoming last modified 3 Jan 2024. Draft (2023): 24.

114 Manhattan Cnty.Access Corp. v. Halleck, 139. S. Ct. 1921, 1930 (2019). cited by ibid.

115 Balkin, *Free Speech*: 4–9.

116 Jarass, Charta Rn. 24, Kühling HN § 28 Rn. 54, CJEU C-250/06 – United Pan-Europe Communications Belgium u.a.

117 "Die Pressefreiheit und die Freiheit der Berichterstattung durch Rundfunk und Film werden gewährleistet." German Basic Law, Article 5.

118 Jarass/Pieroth GG. Rn. 54–55.

119 BVerfGE 90, 60/88f; BVerfGE 73, 118/183. BVerfGE 90, 60/90, BVerfGE 83, 238/323. Jarass/Pieroth GG. Rn. 54a.

### 2.1.3 The content of media freedom

The theoretical category of media freedom contains several contradictions. First, its aim is to ensure the democratic public discourse, which is also a goal of the human right to freedom of expression, and of its counterpart freedom of information. Second, the entitled subjects of media freedom are media companies and journalists, whereas the benefit is a social benefit. Third, it is not an individual human right: if a journalist claims protection for something that he said as an individual, the adequate right would be freedom of expression, and not media freedom.<sup>120</sup> The right of legal persons (entities) to publish something or to refrain from publishing something, is covered (and consumed) by entrepreneurial freedom. Media freedom lies at the intersection of the right to freedom of expression, freedom of information, and the right to entrepreneurial freedom.<sup>121</sup> It includes all of the three rights, which also means, that depending on the situation, technically taken, it could also be substituted by one of these rights. Logically, it appears that these three rights might consume media freedom, had it not been artificially created as a separate category. However, media freedom is more than just the sum of these freedoms, because it represents a concept, that of an independent and critical public sphere – which is a democratic value and a prerequisite for liberal democracy. As Oster argues, media freedom is justified not only by the individual liberty of the publisher, but by the media's importance for the public discourse.<sup>122</sup> Several authors argue that media freedom should be recognised as a distinct human right, at least at the European level.<sup>123</sup> Tambini agrees with Oster that there should

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120 Jarass/Pieroth, GG. Rn. 46, Grabenwarter DHS 723.

121 As put by the ECtHR: "Not only does the press have the task of imparting [...] information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'. *Lingens v Austria* (1986) 8 EHRR 407.

122 Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge: Cambridge University Press, 2015): 29.

123 Damian Tambini, (2021). „A theory of media freedom,” *Journal of Media Law* 13, no. 2 (2021): 135–152., Webke Lamer, *Press Freedom as an International Human Right*, [https://doi.org/10.1007/978-3-319-76508-2\\_2](https://doi.org/10.1007/978-3-319-76508-2_2); Jan Oster, (2015). *Media Freedom as a Fundamental Right* (Cambridge Intellectual Property and Information Law, pp. 24–54). (Cambridge: Cambridge University Press, 2015): 24–54. doi:10.1017/CBO9781316162736.004; Peter Coe, "(Re)embracing Social Responsibility Theory as Basis for Media Speech: Shifting the Normal Paradigm for Modern Media," *Northern Ireland Legal Quarterly* 69, no. 4 (2018): 403–432.

be a fundamental right to media freedom, but, like Oster, and also Coe, argues that this media freedom needs to embrace the positive approach.<sup>124</sup> And, as Tambini writes, when new structures emerge, our theories must be revisited, and we need novel, firm theories which are commonly agreed upon, to govern future policy legislation and civil society standards.<sup>125</sup>

I wish to take this argumentation a step further. It is not so much the declaration of a distinct freedom that would make a difference, but rather an agreement in the content of that freedom. Let us take the example of the American Constitution which declares the freedom of the press, but interprets this clause as the state's obligation to non-interference, and – at least as the dominant approach holds – includes no privileges for the press, and no protection against market concentration.<sup>126</sup> Nevertheless, even the First Amendment jurisprudence, as developed by the Department of Justice guidelines, and by the district courts, have created principles to protect journalists from subpoenas in the interest of source protection, and other protective clauses.<sup>127</sup> There are criticisms both in the journalistic<sup>128</sup> and in the academic community<sup>129</sup> of this sporadic protection. As Tambini puts it: the time may have come for defenders of negative rights, (...) to re-assess their positions.<sup>130</sup>

Importantly, media freedom is an instrumental freedom and not an inherent one. Its justification is that it serves the rational public discourse.

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124 Peter Coe, "Redefining 'media' using a 'media-as-a-constitutional-component' concept: an evaluation of the need for the European Court of Human Rights to alter its understanding of 'media' within a new media landscape," *Legal Studies* 37, no. 1 (2017): 25–53.

125 "Ideas matter when old institutions break down and multiple actors are engaged in constructing new institutions." Tambini, "A Theory of media", 124., 140.

126 *Citizens United v FEC* 130 S Ct, 905 (2010) majority decision; Volokh, "Freedom for the Press as an Industry, or the Press as a Technology? From the Framing to Today" *University of Pennsylvania Law Review*, 60 (2012).

127 Electronic Code of Federal Regulations (e-CFR) 28 § 50.10(c, j).

128 <https://www.aclu.org/issues/free-speech/freedom-press/media-protection-laws> <https://www.aclu.org/news/free-speech/no-more-spying-on-journalists>; <https://www.newsmediaalliance.org/fed-shield-law-2018/>.

129 Tambini: "In the age of powerful data and AI driven media, the negative rights philosophy of minimal restraint needs to be revisited, or we will witness the rise of powerful, unchecked, robo-media". See also in Damian Tambini, in *The New Robopolitics, Social Media has Left Newspapers for Dead* *The Guardian* (18 November 2016).

130 Damian Tambini, „A theory of media freedom," *Journal of Media Law* 13, no. 2 (2021): 135–152., 146.

This foundation provides the grounds for limitation as well: a freedom with a string. Therefore, when balancing an interference with media freedom, beyond the usual test of legality, legitimacy and proportionality, we should also weight whether the media fulfils its function as a contributor to the public discourse, where the journalist standards may also be instructive.<sup>131</sup> If it is not an inherent freedom, neither media companies, nor journalists can reason with their self-autonomy or dignity to publish things which do not serve, or even harm the public discourse. Their right to do so is ensured by the right to freedom of expression and entrepreneurial freedom, and even would be so, in the American First Amendment's industrial interpretation of freedom of the press. In this sense, it seems to be a misunderstanding to talk about "duties" of the media: rather than duties, those are the very content of the freedom that they may, or may not exercise.<sup>132</sup> If their activity does not do a service to the public discourse, than it is no media service, and there is nothing there to be protected. This logic elevates the public discourse contribution to the level of definition, which correlates to Coe's proposed definition of citizen media.<sup>133</sup> Still, my suggestion does not tell how to distinguish quality content and information (whether truth or honest mistake), from harmful, disinformative, manipulative content. Which content contributes to the public discourse, and which one should be considered harmful, and mostly: who should decide between the two? Obviously, untrue content, or ideas that shock, offend and disturb should also belong to the rational discourse, but the process of transmitting and organising them should be ethical. Similarly to ethical standards of journalism, which are not about the truth of the conveyed information but about the process that a journalist must follow in order to act ethically, new media regulation should also address the process of content governance and not content itself.

Moore and Tambini argue that a new social contract should be concluded, and that the autonomy of large communication intermediaries should no longer be unconditional, but connected to ethical behaviour and following certain norms. They regard the Digital Services Act as a framework for

131 Oster, *Media Freedom*, 268-269.

132 Wragg also questions whether these can be duties when they are not to be enforced. Paul Wragg, *A Free and Regulated Press: Defending Coercive Independent Press Regulation* (London: Bloomsbury Publishing, 2020).

133 Cf. Coe, „Redefining ‘media’”, 36.

a new social contract.<sup>134</sup> As argued below in Chapter 6, there is still room to fill this framework with standard principles.

#### 2.1.4 Platforms in the context of media freedom

Platforms are gatekeepers between the media and its audience, and therefore play a key role in the democratic public discourse. It is not possible to develop a new theory on the public discourse without recognising platforms' role, and defining their rights and duties. Because platforms, as private actors, effectively are in the position to restrict both freedom of expression and media freedom, while of course also facilitating the exercise of these freedoms. They grasped the power to sovereignly control these freedoms and thereby influence how users can exercise their human rights.<sup>135</sup> Even though they are private entities, there is a considerable information and power asymmetry between them and their users.<sup>136</sup>

Online platforms represent a new type of layer between speakers and audience. This layer had not existed in the old millennium, where publishers and content distributors ruled the landscape. Platforms' activity is more than that of traditional distributors. Their content-organising function is profoundly formative of the information landscape. They are to some extent similar to a library or bookstore, where some popular volumes are visibly put on the shelves, whereas others are hidden in the storage and visitors must actively search and request them in order to access. However, there are at least two important differences compared to classic distributors: 1) There are several bookstores for comparison, which is not the case with Facebook, Twitter or Google. 2) If a bookshelf is biased, it is seen by everybody and passers-byes can form, share and discuss their opinions. There are chances that an open discussion develops, and the object of discussion would become a shared version of reality. Whereas, in platforms, each user gets a different view of the shelves. Parallel versions of reality exist in a fragmented informational landscape.

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<sup>134</sup> Martin Moore, and Damian Tambini, eds., *Regulating Big Tech: Policy Responses to Digital Dominance*. (Oxford: Oxford University Press, 2021): 24.

<sup>135</sup> Claudia Padovani, and Mauro Santaniello, "Digital Constitutionalism: Fundamental Rights and Power Limitation in the Internet Eco-system" (2018) 80(4) *The International Comm Gazette* 295–301 <https://doi.org/10.1177/1748048518757114>.

<sup>136</sup> Such information asymmetries have been reacted on by regulatory policy in the case of banks, telcos, and in the form of consumer protection.

Theoretically, social media platforms carry only third party content, and therefore do not qualify as publishers. However, Meta has sometimes defined itself as a media company,<sup>137</sup> and – for a while – experimented with various approaches to the news industry. In 2019, it started its Journalism Project, a support fund, which it gradually let drop.<sup>138</sup> In the same year it started "Facebook News" in an attempt to feature trustworthy news, and "Bulletin" in 2021. In 2022, the company turned into a new direction, building down its activities that may have shown it as a content provider, rather than a mere intermediary (hosting provider).<sup>139</sup> It also stopped using the term "news feed",<sup>140</sup> to de-emphasize its investment in news content, and terminated "Facebook News" also in Europe.<sup>141</sup>

In 2023 in Canada, Meta, and also Google<sup>142</sup> stopped the carrying of news, disabling the "news" tag, and disallowing users to share news, as a response to an act that required that they conclude a deal with news publishers to pay for their content.<sup>143</sup> A similar move finally led to agreement in Australia.<sup>144</sup>

Some instances of court cases held platform intermediaries are responsible for third party content,<sup>145</sup> but these were rather the exception. In Europe, the DSA has settled that platforms count as hosting providers,

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137 See a detailed discussion of this in Coe, „Redefining ‘media’”, 36, 60–62.

138 Mathew Ingram, “Is Facebook quitting the news business?” *Columbia Journalism Review*, last modified December 7, 2022. [https://www.cjr.org/cjr\\_outbox/is-facebook-quitting-the-news-business.php](https://www.cjr.org/cjr_outbox/is-facebook-quitting-the-news-business.php).

139 See more in Chapter 6 on DSA.

140 Sara Fischer, “Sweeping changes remake Facebook app in TikTok’s image,” last modified July 21, 2022. <https://www.axios.com/2022/07/21/facebook-tiktok-feed-changes>.

141 “Meta: An Update on Facebook News in Europe,” last modified September 5, 2023. <https://about.fb.com/news/2023/09/an-update-on-facebook-news-in-europe/>.

142 Marie Woolf, “Google to cut off access to Canadian news as Facebook cancels deals with publishers,” *The Globe and Mail*, last modified July 1, 2023. <https://www.theglobeandmail.com/politics/article-google-says-it-wont-show-canadian-news-links-over-bill-c-18-as/>.

143 Tumilty Ryan, “Facebook parent company Meta ends news sharing in response to C-18,” *National Post*, last modified August 1, 2023. <https://nationalpost.com/news/politics/facebook-parent-company-meta-ends-news-sharing-in-response-to-c-18>.

144 Mark Gollom, “Australia made a deal to keep news on Facebook. Why couldn’t Canada?” *CBC*, last modified August 3, 2023. <https://www.cbc.ca/news/world/meta-australia-google-news-canada-1.6925726>.

145 Delfi v. Estonia, no. 64569/09, Judgement of 16 June 2015. Australian case of *Fairfax Media v Voller* [2020] NSWCA 102; *Defteros v. Google*, [2020] VSC 219. discussed by Coe at p. 64.

which are not liable for third party content as long as they are unaware of it, or if aware, diligently act against it.<sup>146</sup> The CDA 230 in the US is under debate with a similar meaning: whether to lift the unconditional immunity and retain it only for cases where the platform is not actively involved in content governance through its algorithms.<sup>147</sup> A major case is still under consideration at the time of writing, trying to respond whether Facebook is responsible for not moderating out inciting content that led to terrorist act.<sup>148</sup>

In sum, platforms perform a distinct service that is less what content media providers do, and more what intermediary hosting providers do. Should they engage in providing their own content, they would become subjects not only of media freedom but to the duties and ethical standards of media providers as well.<sup>149</sup> As giant companies, their dominant position would certainly justify stricter regulation<sup>150</sup>, which they are trying to avoid. Their actual service is still under consideration, and still about to be named: I call it content governance, others call it facilitation or editorial-like services.<sup>151</sup> Crucially, platforms organise content, thereby influence the user experience of information consumption, and do so along consciously designed algorithmic principles that are concealed from public, academic, or official scrutiny. This should raise suspicion; especially that their dominance competes with that of states.<sup>152</sup> More than half of the market in all European

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146 See in detail in Chapter 6 on DSA. Similar conclusion was reached in *Tamiz v Google Inc* [2013] 1 WLR 2151.

147 See: Rosemarie Vargas, et al. v. Facebook, Inc. <https://cdn.ca9.uscourts.gov/datasstore/memoranda/2023/06/23/21-16499.pdf> Plaintiff Vargas claimed being discriminated by Facebook algorithm.

148 *Gonzalez v. Google LLC*, 598 U.S. 617 (2023) remanded for reconsideration in light of the court's decision in *Twitter, Inc. v. Taamneh*.

149 Coe, „Redefining ‘media’”, 36., 65.; Judit Bayer, “Between Anarchy and Censorship: Public discourse and the duties of social media,” *CEPS Paper in Liberty and Security in Europe* No. 2019–03, May 2019.

150 Jan Kalbhenn, „Medien- und wettbewerbsrechtliche Regulierung von Messenger-Diensten,” *ZUM* 66 no. 4 (2022): 266; see also: BVerfG, Beschluss des Ersten Senats vom 06. November 2019. – 1 BvR 16/13 –, Rn. 1–157, [https://www.bverfg.de/e/rs2019106\\_lbvr001613.html](https://www.bverfg.de/e/rs2019106_lbvr001613.html).

151 Natali Helberger, “Facebook is a new breed of editor: a social editor,” *LSE Blog*, last modified September 15, 2016. <https://blogs.lse.ac.uk/medialse/2016/09/15/facebook-is-a-new-breed-of-editor-a-social-editor/>.

152 Obviously, we would not accept such activity done by any state. Cf. Frederick Schauer, *Free Speech: A Philosophical Inquiry* (Cambridge, UK: Cambridge University Press, 1982).

Member States, and two third of the digital advertising market in most countries were dominated by the top two online platforms in 2018–2019<sup>153</sup> and it has grown since. Facebook had 307 million daily users only in Europe in 2022, which is a decline by two million compared to the same period of 2021.<sup>154</sup> This is incomparable to any media concentration at the traditional media market, where Japan's Yomiori Shinbun has the largest subscriber base with approx. 10 million, followed by the Wall Street journal with 2.2 million subscribers.

The comparison clearly has its limits as platforms refrain from providing own content, as explained. However, platforms and traditional media companies compete for the same clients: advertisers. The advertising revenues flowing to platforms have left traditional media companies without a sufficient and stable revenue stream.<sup>155</sup> Trying to leverage the network effect,<sup>156</sup> which makes big actors bigger, and pushes small actors further down to the peripheries,<sup>157</sup> media mergers started to proliferate, some of which were disapproved (blocked) by the national competition authorities<sup>158</sup> and

153 *Media Pluralism Monitor 2020*, CMPF: Monitoring Media, Albert-László Barabási, "Linked: The new science of networks." (2003): 409–410. "Pluralism in the Digital Era," <https://cadmus.eui.eu/bitstream/handle/1814/74712/MPM2022-EN-N.pdf?sequence=1&isAllowed=y>.

154 First quarter of the year in both cases. <https://www.statista.com/statistics/745383/facebook-europe-dau-by-quarter/>.

155 This is likely to change in the future, due to national and regional legislative efforts, see the Australian and Canadian attempts to push Facebook to conclude a contract with publishers. In the EU, the new Copyright Directive allows press publishers to be remunerated for the use of newspapers and magazines by online service providers. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

156 Michael L. Katz, and Carl Shapiro, "Systems Competition and Network Effects," *Journal of Economic Perspectives* 8, no. 2 (1994): 93–115. DOI: 10.1257/jep.8.2.93; See also: Albert-László Barabási, *How Everything Is Connected to Everything Else and What It Means for Business, Science, and Everyday Life* (London: Hachette, 2014).

157 Albert-László Barabási, *Network Science* (Cambridge, UK: Cambridge University Press, 2016) <https://barabasi.com/f/622.pdf>, or <http://networksciencebook.com/ chapter/5>.

158 Oliver Budzinski, and Katharina Wacker, "The Prohibition Of The Proposed Springer-Prosiebensat.1 Merger: How Much Economics in German Merger Control?," *Journal of Competition Law & Economics* 3, no. 2 (2007): 281–306. <https://doi.org/10.1093/joclec/nhm008>.

are still watched with suspicion.<sup>159</sup> While the law of networks has always influenced social and market structures, the internet network accelerated this effect, leaving traditional media companies behind.

## 2.2 *The effects of algorithmic content ranking*

Masses of people receive information daily through opaque algorithmic ranking systems. Algorithms' effect on consumed content worldwide is massive. From the perspective of democracy, we should be concerned.<sup>160</sup> Giant social media platforms can be regarded as political opinion-shapers: their algorithms have a relevance in the democratic functioning.<sup>161</sup>

Authors of various media effect theories have analysed and discussed how media content is processed by the audience. It is well known that the media is not a "magic bullet"<sup>162</sup> and that media content is not accepted uncritically by the audience. The effect of the surrounding society, influential friends, relatives, role models and political figures all shape how the audience members interpret the received content.<sup>163</sup> However, this surrounding environment has undergone a dramatic transformation as well. Habermas claimed that the public and the private sphere become more intertwined in the second half of the 20th century.<sup>164</sup> In the social media age, these are becoming ultimately entangled. Besides professional media content, the contributions, reflections and comments of family members, friends and colleagues, seasoned with the posts by influencers and political actors, are

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159 E.g. merger plans of France's two leading television groups: <https://www.euractiv.com/section/media/news/france-debates-merger-that-would-lead-to-huge-media-group/>.

160 Consuming news through social media platforms and other giant news aggregator platforms is growing among 16–24 old youths, based on OFCOM studies "News Consumption in the UK" 2019, 2020. Coe „Redefining 'media'", 59.

161 Natali Helberger, "The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power," *Digital Journalism* 8, no. 6 (2020): 842–854. <https://doi.org/10.1080/21670811.2020.1773888>.

162 Harold D. Lasswell, *Propaganda technique in world war I*. (Cambridge, MA: MIT Press, 1927/1971).

163 Elihu Katz, and Paul Lazarsfeld, *Personal influence* (New York NY: FreePress, 1955).

164 Craig Calhoun, "The Public Sphere in the Field of Power," *Social Science History* 34, no. 3 (2010): 301–35. <http://www.jstor.org/stable/40927615> Martin Seeliger, and Sebastian Sevignani, "A New Structural Transformation of the Public Sphere? An Introduction," *Theory, Culture & Society* 39, no. 4 (2022): 3–16. <https://doi.org/10.1177/02632764221109439> See also: Calhoun, *Habermas and the Public Sphere*, 10.

combined by platforms, and this mixture is, again, organised by opaque algorithms. As a result, the private impressions and the public impressions are filtered by the same intermediaries, when those decide about up-ranking and down-ranking of content. In other words, the social environment that used to have a moderating effect on media perception, itself became mediatised.

One important step is missing: the benign confrontation of the information that is perceived by the user with people who have a different opinion, and who might have a formative effect on one's opinion, but whose content would not appear in the algorithmic feed. Random encounters with colleagues or neighbours, whose worldview is different, did, and to some extent, still do shape this societal experience.

In the offline age, the presence of friends and family were considered as a balancing factor in regard of information processing. In the social media context, however, their contribution increases polarisation. Even if the principles of ranking were known, simply the fact that the same ranking is applied for receiving and sharing content in the private and public realm would reduce the plurality of the impressions that users receive. Their content consumption gets uniformised, and all impressions – including friends' and family members' posts – become filtered according to the same criteria, that reduces their informational experience and consequently, limits their horizon.

Another effect theory identified the media's power in setting the agenda of public matters, thereby defining *what people talk about*, while leaving them free in how they form their opinion about the matters.<sup>165</sup> Now this agenda setting function has also been largely taken over by content ranking algorithms. Certain content items become viral; others get less than ten likes. Up-ranking certain content will lead to obscuring others, thereby influencing public opinion, and also revenue streams. Agenda setting used to be performed by content media, which did so along consciously, and more-or-less transparently defined editorial guidelines, bearing responsibility and accountability for its content selection. The problem has been

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<sup>165</sup> Maxwell E. McCombs, Donald L. Shaw, "The Agenda-Setting Function of Mass Media," *The Public Opinion Quarterly* 36 no. 2 (1972): 176–187. <http://www.jstor.org/stable/2747787>.

described in detail by the Steering Committee for Media and Information Society (CDMSI).<sup>166</sup>

Clearly, algorithmic content ranking is necessary. Without it, an unstructured content stream would be much less relevant and enjoyable. Algorithmic structuring of the vast information is necessary for "noise reduction",<sup>167</sup> but the questions of control and responsibility remain unresolved.<sup>168</sup> Responsible structuring opens the opportunity for content diversity and pluralism, and to foster a meaningful public discourse, whereas an abuse of this power carries the potential to manipulate the public agenda, deteriorate the level of users' exposure to diverse content. By manipulating the public agenda, intermediaries are also able to *frame public debate about their own policies and practices*.<sup>169</sup>

Data-driven algorithmic ranking can also reinforce pre-existing patterns of information consumption.<sup>170</sup> Research has shown that users with poor demographic profile are shown worse shopping offers, lower-paid jobs, and generally different content offer than other people.<sup>171</sup> By decreasing the likelihood that disadvantaged populations will receive quality content, they threaten with the perpetuation of inequalities.<sup>172</sup> The same pattern also

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166 20th plenary meeting, 1–3 December 2021, Guidance Note on the Prioritisation of Public Interest Content Online. <https://rm.coe.int/cdmsi-2021-009-guidance-note-on-the-prioritisation-of-pi-content-e-ado/1680a524c4> An intergovernmental committee under the authority of the Committee of Ministers that has collected the harms that are presented by intransparent ranking and lists the potential directions of solution. <https://www.coe.int/en/web/freedom-expression/cdmsi>.

167 Tambini, *Media Freedom*, 18–19.

168 Schauer, *A philosophical inquiry*. He emphasised that the government is not to be trusted in regulating speech. See also: Boris Paal, "Intermediäre: Regulierung und Vielfaltssicherung." *LfM* (2018): 43.

169 Paal, *Intermediäre*.

170 Judit Bayer, "The illusion of pluralism. Regulatory aspects of equality in the new media," in *Digital Media Inequalities. Policies against divides, distrust and discrimination*, ed. Josef Trappel (Göteborg: Nordicom, 2019): 127–140. See also: Bernal, *The Internet*.

171 Mike Walsh, "Algorithms Are Making Economic Inequality Worse," *Harvard Business Review*, last modified October 22, 2020. <https://hbr.org/2020/10/algorithms-are-making-economic-inequality-worse> See also: Karen Hao, "The coming war on the hidden algorithms that trap people in poverty," *MIT Technology Review*, last modified December 4, 2020. <https://www.technologyreview.com/2020/12/04/1013068/algorithms-create-a-poverty-trap-lawyers-fight-back/>.

172 Tristan Mattelart, Stylianos Papathanassopoulos, and Josef Trappel, «Information and news inequalities," in *Digital media inequalities: Policies against divides, distrust and discrimination*, ed. Josef Trappel (Göteborg: Nordicom, 2019): 215–228.

deepens structural imbalances between content providers and dominant platforms.

Regarding the effects, the analyses find that equality is not ensured in spite of the technological possibility that would theoretically allow it. Substantial literature has been raised about how algorithms discriminate in hiring, credit scoring, social welfare and other areas, but much less about how they influence access to information. People are regarded as autonomous in their information consumption, and they are thought to be responsible for their own "filter bubble" and participating in their "echo chambers" which constantly reinforce their – perhaps delusional – worldviews.<sup>173</sup> But do they really have a free choice? According to Harari (2021) our choices are tailored by the options that are offered us through the algorithms.<sup>174</sup> He calls humans "hackable animals" whose every choice depends on biological, social and personal conditions that are beyond their decisions. These conditions, as well as our pre-existing fears, biases and other vulnerabilities are now open book for governments and corporations. This knowledge can inform not only prediction but also reengineering.<sup>175</sup> The implications of this perspective for democracy and human future *en bloc* are disheartening.

To conclude, I argued that the alleged autonomy of citizens that is presumed by the libertarian theory of free speech is even less existent as it ever may used to be. It has been impaired by the "surveillance economy",<sup>176</sup> the relating behavioural recommending systems, and the ritualisation of media and politics.<sup>177</sup>

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173 Damian Tambini, Sharif Labo, Emma Goodman, and Martin Moore, "The new political campaigning," *Media policy brief* 19. (2017) See also: Judith Möller, Damian Trilling, Natali Helberger, and Bram van Es, "Do not blame it on the algorithm: an empirical assessment of multiple recommender systems and their impact on content diversity," *Information, Communication & Society* 21, no. 7 (2018): 959–977, <https://doi.org/10.1080/1369118X.2018.1444076>.

174 See: Yuval Noah Harari, *21 Lessons for the 21st Century* (London: Vintage, 2019); Relying on Ray Williams, 'How Facebook Can Amplify Low Self-Esteem/Narcissism/Anxiety', *Psychology Today* 20 May 2014.

175 Ibid.

176 Shoshana Zuboff, "The age of surveillance capitalism," in *Social Theory Re-Wired*, ed. Wesley Longhofer, and Danil Winchester (London: Routledge, 2023): 203–213.

177 It is beyond the limits of this work to go into detail in this respect. I am referring to the identity-based national, and the constrained global politics, see Francis Fukuyama, "Against identity politics: The new tribalism and the crisis of democracy," *Foreign Affairs* 97, no. 5 (2018): 90.

### 2.3 *The value added by journalists and platforms' attempt for substituting them*

Media pluralism has many angles.<sup>178</sup> For a democratic public discourse to function, a wide range of different voices should express a diversity of opinions. In communities exceeding approximately 50 individuals,<sup>179</sup> discursive communication proves ineffective unless properly structured. In groups larger than a few thousands, even structuring would remain insufficient, therefore communication needs to be mediated. Mediation's function lies in aggregating the diverse voices, streamlining them through analysis and interpretation, and subsequently organising and channelling them to enhance comprehensibility for the audience. Traditional media has transformed the societal voices through employed professional mediators: journalists. Journalists lend (and still do lend) their own voices to social opinions, their own perspectives to events and reports. Through interpreting those and adding their own reflections, they create a standardised, moderated and more balanced content.

Online social media platforms do not provide this "service" and they remain at the level of "structuring" content. All societal voices are directly transmitted, without the added value of journalistic pre-digesting. New technology allows the structuring to be more efficient, but the aggregation, interpretation and reflection on the main opinion threads is still missing. Platforms try to organise and bundle the mediated content in an attempt to add value. However, in this process, they lack accountability, transparency, and also standardised professional guidelines, unlike journalists. While journalists juxtapose and interpret facts and opinions, the platforms just reorder the content so that it seems familiar, sympathetic, and seemingly connected to the user. This is a treacherous way of making order in chaos, omitting the intellectual work of journalists who synthetise and analyse. This functioning furnishes platforms and search engines with a special responsibility to society compared to companies in other economic sectors.<sup>180</sup>

The structuring function of platforms roots in the features of the network and the algorithms which connect the dots according to certain criteria.

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178 The MPM originally had 6 indicators, then reduced to 4.

179 Vilmos Csányi, "The "Human Behavior Complex" and the Compulsion of Communication: Key Factors of Human Evolution," *Semiotica* 128, no. 3/4 (2000): 45–60.

180 Boris P. Paal, „Vielfaltsicherung im Suchmaschinensektor,“ *Zeitschrift für Rechtspolitik* 48, no. 2 (2015): 34–38. at p. 34–35.

### 2.3 The value added by journalists and platforms' attempt for substituting them

The task of aggregating and transmitting information between its nodes is perfectly executed. Social networks create connected groups and information, "small worlds" where the information and the users are interlinked, while connections to external groups remain weaker.<sup>181</sup> At the societal level, this translates to the creation of numerous like-minded social groups, but a growing distance between the peripheries of this social landscape.<sup>182</sup> In addition, the commonly shared information among polities diminishes as the organising criteria of such groups diverge from those of the polity: instead of geographical proximity or a shared mother tongue, common interests and values serve as the cohesive forces binding group members together.<sup>183</sup>

As a result, the members of a particular democratic society have different media experiences. The shared narratives, that were resourced from journalistic storytelling, are no longer the cementing power of a geographical community. They still exist, but the communities that they bind together, are geographically and often nationally diverse: they share beliefs, lifestyle or other features and extend over entire regions or across continents. When epistemic polities grow over national boundaries, and the communities between the borders have less in common, important implications for nationally organised democratic processes arise. Consequently, this fragmentation also bears profound ramifications for the regulation of media pluralism: defining the relevant market on which media pluralism should be achieved, has become ambiguous. It is not solely media companies that are internationalising: also the audience is reaching beyond national borders to consume content. This underlines the need for a treatment of media pluralism in a supranational perspective.

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181 Albert-László Barabási, *Linked: The new science of networks* (New York, NY: Plume Books, 2003): 409–410.

182 Gilad Abiri, and Johannes Buchheim, "Beyond True and False: Fake News and the Digital Epistemic Divide" (April 7, 2022). Michigan Telecommunications and Technology Law Review, Forthcoming, Peking University School of Transnational Law Research Paper, Available at SSRN: <https://ssrn.com/abstract=4078149> or <http://dx.doi.org/10.2139/ssrn.4078149>.

183 Rainer Mühlhoff and Hannah Ruschemeier, "Predictive analytics und DSGVO: Ethische und rechtliche implikationen." *Telemedicus-Recht der Informationsgesellschaft: Tagungsband zur Sommerkonferenz*, (2022): 38–67.

## 2.4 Dimensions of Media Pluralism

Media freedom and pluralism are used as one expression, in particular by Article 11 (2) of the European Charter of Fundamental Rights which declares that they should be respected.<sup>184</sup> Although, media freedom and media pluralism are conflicting rights: ensuring pluralism will require limiting the freedom of media enterprises.

When the notion of media pluralism emerged, audiovisual media in Europe was a state monopoly. The terrestrial frequencies that were the only technologically possible instruments for transmission, were – and still are – inalienable state property. Broadcasting was seen as a privilege even as it was gradually opened up to private competitors. The formalised public tender that served to take a responsible decision about the allocation of this privilege, required, in most European states, commitments from the broadcasters that their programme content will serve the public good. This scarcity of the available resources (primarily: frequencies) provided the justification to a stricter regulation of the audiovisual media as compared to the print media, even in the US with its more liberal free speech regime.<sup>185</sup> Beyond the scarcity of frequencies, further barriers hindered market entry and increased the exceptionality of the privilege to hold broadcasting licences.<sup>186</sup> Part of these were financial barriers, as the operation of a broadcaster – especially that of audiovisual – was costly and required a professional staff. The employment of professional journalists and media experts also raised a barrier against the representation of the "*vox populi*." Such barriers vanished in the online environment, including financial, quantitative and educational ones. While the amount of information may be indeed unlimited, human attention is not: therefore, the discussion of media pluralism shifted its focus on "attention pluralism". Content that attracts more attention is better sponsored, and therefore gains even more attention.<sup>187</sup> This

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184 Article 2 of TEU sets out "pluralism" as a separate value itself.

185 The US broadcasting model was from the beginning overwhelmingly private, as there was no central public service broadcaster. Besides, frequencies were allocated to the highest bidder, rather than in a "beauty contest", based on the merit of the programming plan.

186 A detailed review in: Charles W. Logan, "Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation," *California Law Review* 85, no.6 (1997): 1687.

187 The expressions "attention economy" and "attention scarcity" have been coined by Herbert Simon. He has allegedly also noted that: "a wealth of information creates

cycle generates trending contents that are popular not for their merit: truth, quality, or relevance are not among the winner qualities in this race.<sup>188</sup> The remaining, less popular information by the myriads of smaller actors form the "long tail" of information,<sup>189</sup> which offers a wide range of options, but do not become part of the common narrative. What really matters is not the diversity of the available information, but how diverse is the information to which users are exposed (exposure diversity).<sup>190</sup> To address the goal of diverse exposure, some prominent authors have recommended diversity-sensitive software designs.<sup>191</sup> For example, they suggested that algorithms select and recommend content from the "long tail". This would also improve access to minority and controversial viewpoints.<sup>192</sup> Further research has also found that algorithms are capable of creating a diverse exposure (although the research was limited both in scope and time).<sup>193</sup>

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a poverty of attention". *Berkeley Economic Review*, Paying Attention: the Attention Economy. <https://econreview.berkeley.edu/paying-attention-the-attention-economy/> See also: Vincent F. Hendricks, and Mads Vestergaard, "The Attention Economy," *Reality Lost* 8 September 2018: 1-17. [https://doi.org/10.1007/978-3-030-00813-0\\_1](https://doi.org/10.1007/978-3-030-00813-0_1).

188 "Falsehood diffused significantly farther, faster, deeper, and more broadly than the truth," writes the MIT Study DOI: 10.1126/science.aap9559 by The spread of true and false news online Soroush Vosoughi [HTTPS://ORCID.ORG/0000-0002-2564-8909](https://ORCID.ORG/0000-0002-2564-8909) Deb Roy and Sinan Aral [HTTPS://ORCID.ORG/0000](https://ORCID.ORG/0000).

189 Chris Anderson, *The Long Tail: Why the Future of Business is Selling Less of More* (New York, NY: Hyperion, 2006).

190 Philip M. Napoli, "Exposure Diversity Reconsidered,". *Journal of Information Policy* 1, no.1 (2011): 246–259.  
See also: Philip M. Napoli, "Deconstructing the Diversity Principle," *Journal of Communication* 49 no.4 (1999): 7–34.

191 Natali Helberger, Kari Karppinen, and Lucia D'Acunto, "Exposure diversity as a design principle for recommender systems," *Information, Communication & Society* 21, no.2 (2018): 191–207. <https://doi.org/10.1080/1369118X.2016.1271900>.

192 Natali Helberger – Kari Karppinen – Lucia D'Acunto cite Gediminas Adomavicius, and Youngkook Kwon, "Improving Aggregate Recommendation Diversity Using Ranking-Based Techniques," Working Paper, *IEEE Transaction on Knowledge and Data Engineering* 2009. Retrieved from <https://ieeexplore.ieee.org/document/5680904>.

193 The research was carried out in the closed environment of one high-quality broadsheet paper in one country. Judith Möller, Damian Trilling, Natali Helberger, and Bram van Es, "Do not blame it on the algorithm: an empirical assessment of multiple recommender systems and their impact on content diversity," *Information, Communication & Society* 21, no.7 (2018): 959–977. <https://doi.org/10.1080/1369118X.2018.1444076>.

Good management of the scarce attention implies various strategies for users, market actors and the state. Market actors and users seemingly have common interests: to optimise user satisfaction through personalised content. However, the interests and preferences of the users vary. Some users actively seek high-quality and diverse information, and some media companies are devoted to cater for these expectations, following a mission to serve the public interest.<sup>194</sup> Other users prefer tailored, fast, easy-to-digest and entertaining content. Users change their preferences according to their mood, even. However, the interests of a democratic process would require that voters access, besides the entertaining and personalised content offer, also rational and relevant content of public interest, and even more importantly: that they consult opinions that are different from their own.<sup>195</sup> Of course, users should not be nudged into what content they should consume, because as adult citizens, they are perfectly free to decide (more on this below in Chapter 3 on states' obligations).<sup>196</sup> If they choose to spend their time exclusively with panda videos, it is they right to do so. However, ideally, they would have options to choose another selection of content, if they wish so. This presupposes that they are aware of the other content and of the particular nature of their own choice. While it is possible to switch to other platforms or websites, platforms currently do not offer different content selection options. (See more on this requirement below under DSA and the Code of Practice on Disinformation.) In contrast to the traditional newsstand, where quality and tabloid newspapers are visibly displayed, allowing buyers to choose with a single move, online users may not be even aware of the existence of other news bubbles.

Providing democratically relevant content has been the duty of public service media.<sup>197</sup> Its task is to disseminate certified, trustworthy content, representing the whole society, to counterbalance private actors by follow-

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194 Balázs Bodó, Natali Helberger, Sarah Eskens, and Judith Möller, "Interested in Diversity," *Digital Journalism* 7, no.2 (2019): 206–229. <https://doi.org/10.1080/21670811.1521292>.

195 Cass R. Sunstein, *Republic.com* (Princeton, NJ: Princeton University Press, 2001).

196 Natali Helberger, "On the Democratic Role of News Recommenders," *Digital Journalism* 7, no.8 (2019): 993–1012. <https://doi.org/10.1080/21670811.2019.1623700>.

197 Bernd Holznagel, Dieter Dörr, and Arnold Picot, *Legitimation und Auftrag des öffentlich-rechtlichen Fernsehens in Zeiten der Cloud* (Frankfurt am Main: Peter Lang Verlag, 2016): 110. See also: Holznagel Bernd, and Willi Steul, Hrsg., *Öffentlich-rechtlicher Rundfunk in Zeiten des Populismus* (Berlin: Vistas Verlag, 2018): 147.

ing a different rational than the commercial one.<sup>198</sup> It is supposed to correct the "market failure", i.e. the deficiency in diverse ideas which occurs when market actors compete on the marketplace of ideas for the attention of the audience. However, the number of states where public service media truly fulfils this duty, remains limited. Even if it does so, it often does not reach the relevant audience, especially young citizens.<sup>199</sup> Below, the factors that define the dimensions of media pluralism are enumerated.

#### 2.4.1 Institutional independence

In theory, both economic and political power should stay clear of media freedom.<sup>200</sup> In a democratic state, the system of checks and balances, and the self-restraint of the government should ensure that the political power respects independence, freedom and pluralism of the media. The limitation of economic influence should be ensured by legal supervision and professional self-regulation.<sup>201</sup> The restructuring of the media scene that has occurred in the recent decade left a vacuum: no legal supervision protected media freedom from the new power of platforms, and the professional media industry's self-regulatory power also diminished. When such a power vacuum emerges, the most agile actor is prone to fill that void. In some states, authoritarian governmental power has seized control over media governance.<sup>202</sup> However, in most liberal democracies, social media platforms, as the contemporary purveyors of economic power, have assumed a predominant position in the governance of content. Their power is capable of limiting the exercise of individual fundamental rights with

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198 Jarass/Pieroth, GG Kommentar, Rn. 104.

199 Philip M. Napoli, *Toward a model of audience evolution: New technologies and the transformation of media audiences* (Bronx, NY: McGannon Center, 2008).

200 Eric Barendt, (1985) Freedom of Speech, Oxford. First Chapter: Why protect free speech?

201 More on the independence from both economic and political influence in the chapter on media pluralism and on EMFA, Chapter 5.

202 Ágnes Urbán, Gábor Polýák, and Zsófia Szász, "Media Transformation Derailed," in *Media in Third-wave Democracies: Southern and Central-Eastern Europe in a Comparative Perspective*, ed. Péter Bajomi-Lázár (Budapest; Paris: L'Harmattan, 2017): 136–163.

an effect similar to state authority.<sup>203</sup> Consequently, akin to state authority, mechanisms for checks and balances should be instituted to regulate and mitigate this power.<sup>204</sup>

As print media has often been used to acquire social power, platforms (or other aggregators) can similarly be used for that purpose.<sup>205</sup> Legacy media outlets have been occasionally bought precisely with the purpose to exercise such power,<sup>206</sup> and social media companies are also for sale. The first large takeover which made such waves was that of Twitter (now X) by Elon Musk, who, as a new owner, caused considerable turmoil around the internal rules of the platform, and renounced cooperation in the Strengthened Code of Practice.<sup>207</sup> We tend to assume that platforms follow the commercial logic. At this moment, – despite inquiries – there is no conclusive evidence that platforms would pursue any ideological or political agenda. However, the possibility cannot be dismissed that such motives could emerge in the future.<sup>208</sup> We only know that platforms are not neutral, they assume an active curatorial or editorial role.<sup>209</sup> They carry opportunities in defining the agenda through consciously designed and more sophisticated algorithms. They could foster diversity (diversity-sensi-

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203 Giovanni De Gregorio, "The Rise of Digital Constitutionalism in the European Union" (2021) 19(1) *International Journal of Constitutional Law* 41–70 <https://doi.org/10.1093/icon/moab001>.

204 Timothy Garton Ash, (2016) *Free Speech: Ten Principles for a Connected World* (New Haven, CT: Yale University Press, 2016) "In the second decade of the twenty-first century, the limiting, distorting and corrupting power of money is the biggest single cause for concern around free speech."

205 Valeria Resendez, Thea Araujo, Natali Helberger, and Claes de Vreese, „Hey Google, What is in the News? The Influence of Conversational Agents on Issue Salience,” *Digital Journalism* July (2023): 1–23. (‘Latest articles’).

206 Reuters (2015) PM Orban's ally buys Hungary's second largest TV group. Reuters.

207 Vittoria Elliott, “Elon Musk Has Put Twitter’s Free Speech in Danger,” *WIRED* Nov. 7. 2022. <https://www.wired.com/story/twitter-free-speech-musk-takeover/>.

208 See more in Paul Bernal, *The Internet, Warts and All: Free Speech, Privacy and Truth* (Cambridge University Press, 2018).

209 Natali Helberger, “Facebook is a new breed of editor: a social editor,” *LSE Blog* 2016. See also: Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (Yale University Press, 2018). See also: Council of Europe Recommendation 2022/II. see above.

tive algorithmic design),<sup>210</sup> or misuse algorithmic design to employ undue political or ideological influence.<sup>211</sup>

#### 2.4.2 Resilience of market and society

A free media system with a diversity of actors and voices tolerates a certain level of market failure. After all, free speech is about constantly searching for truth: even falsehood and mistakes can be useful, because only through the consideration of these can society reach the truth.<sup>212</sup> Even if disinformation, hate speech and other harmful content are present, we may count on the reason and sobriety of the audience to separate the wheat from the chaff – to a certain extent. However, it is not known when a malfunction reaches the tipping point, when hatred and disinformation may sway public opinion to a degree that poses a threat to democratic principles. Rational political decisions should be based – at least partly – on rational arguments that are discussed in a public discourse.<sup>213</sup> If the democratic process fails, then the political environment can turn unfavourable even for the market actors. Authoritarian and populistic governments are statistically more likely to put pressure on the media and on platforms. Hence, safeguarding public discourse aligns with the interests of market participants. Once the decline of media pluralism gets beyond the tipping point, the resilience of the entire media ecosystem to sustain rational discourse becomes compromised. Consequently, the audience becomes vulnerable to disinformation and propaganda, while the opinion market lacks the capacity for self-correction. Therefore, over the medium to long term, the apparent divergence of interests among public policy, market actors, and users is merely superficial. Although there appears to be a competition for user attention, the underlying interest of all parties lies in upholding democracy, thereby safeguarding rational public discourse.

Consequently, the values of pluralism remain no less, but even more timely in the age of content abundance. However, the achievement of

<sup>210</sup> Natali Helberger, “On the Democratic Role of News Recommenders,” *Digital Journalism* 7, no.8 (2019): 993–1012. <https://doi.org/10.1080/21670811.2019.1623700>.

<sup>211</sup> Napoli-Caplan (2017) ‘Why Media Companies Insist They’re Not Media Companies, Why They’re Wrong, and Why It Matters’ 22(5) *First Monday*.

<sup>212</sup> John Stuart Mill, *On Liberty* (Boston: Ticknor and Fields, 1863): 50–58.

<sup>213</sup> BVerfG: 1 BvR 619/63 26. Febr. 1969; and BVerfG, 18. Juli 2018 – 1 BvR 1675/16 -, Rn. 1–157,

[https://www.bverfg.de/e/rs20180718\\_lbvr167516.html](https://www.bverfg.de/e/rs20180718_lbvr167516.html); and see also ECJ C-492/17.

pluralism needs different means in the platform environment. While ownership concentration remains an important aspect, its scale has shifted: to compete with the global giants, national content media companies are insufficient on their own.

#### 2.4.3 Structural diversity

The sheer market dominance of giant platforms should be a cause for concern even if they would offer a wider selection of transparent algorithms for their users who would take more autonomy in choosing their own content menu. That would still be merely a more carefully tailored selection, all defined by the same provider.<sup>214</sup> For this reason, ensuring diversity at the infrastructural level is the ground zero for ensuring content pluralism. Research has shown that participating in several social media networks reduced mass political polarisation and echo chambers.<sup>215</sup> Infrastructural diversity can also have several aspects: first, diversity at the level of market actors, second, diversity at the algorithmic level. The first aim is addressed by the Digital Markets Act (DMA) which ambitions to curb platform dominance and platforms' monopolistic behaviour. Algorithmic diversity is aimed by the DSA and the Strengthened Code of Practice on Disinformation – both applicable mainly on VLOPs only (see below in detail).

At the time of writing, very large online platforms and search engines (VLOPs) have a financial capacity comparable or even bigger than that of some states, they reach more people and have a considerable impact on human rights, as well as on public values. Their social power has filled in a vacuum where states have failed to exercise their sovereignty for the protection of these rights and values. In order for state regulation to recover this power, they either need to exercise it themselves, substantially limiting platforms' freedoms, or they need to officially transfer regulatory power on very large platforms – thereby extending platforms' power. The current European regulatory policy attempts to combine both approaches by curbing some rights and privileges of platforms (e.g. in DMA) and also imposing on them more responsibility through the risk-based approach and co-regu-

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<sup>214</sup> John Charney, *The Illusion of the Free Press* (London: Hart Publishing, 2017): 133.

<sup>215</sup> Bertin Martens, Luis Aguiar, Estrella Gomez-Herrera and Frank Mueller-Langer, “The digital transformation of news media and the rise of disinformation and fake news – An economic perspective,” Digital Economy Working Paper 2018–02: 27.; *JRC Technical Reports* <https://ec.europa.eu/jrc/sites/jrcsh/files/jrc111529.pdf>.

lation (DSA). The devil is in the enforcement: for a successful enforcement, a sovereign power needs to have at least a comparable economic, political and social power than the regulated entity.



### 3 The state's obligation in building a democratic media order

#### 3.1 *Microscopical rights and Big Data*

Human rights, and among them the right to free expression are interpreted in relation to the individual, with protection afforded based on the basis of individual claims. However, communication is not an individual action. It needs at least two persons: a sender and a receiver. Public discourse further presupposes an undefined, but inevitably large number of persons who are members of a society. A rational public discourse can be generated only by collaboration of several members of the polity, who are jointly exercising their rights to free expression. Similar to minority rights, the right-holders can take avail of their rights only if those rights are granted to, and exercised by a collective, rather than one individual only. "Much that is worthwhile is intimately bound up with cooperative activity."<sup>216</sup> Based on the assumption that the rational public discourse is one of the objectives of free speech, we must assume that the right to free speech also entitles the collective community to encounter the public discourse, both actively and passively. This is in harmony with the passive side of freedom of expression, the right to receive information. I propose a concept that regards the public discourse as a value, generated by the exercise of the rights to freedom of expression and of information, as well as media freedom and pluralism. The positive obligation of the state to ensure media freedom and pluralism includes the necessity to take the appropriate measures to establish and maintain a media order that is able to foster the democratic, rational public discourse.

The prevailing structural framework of human rights, which conceptualizes these rights as inherently tied to the individual and subject to redress through individual claims in the event of violations, appears inadequate in addressing the microscopic violations of fundamental rights occurring

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<sup>216</sup> Leslie Green, "Two Views of Collective Rights," *Canadian Journal of Law and Jurisprudence* 4, no.2 (1991): 315–328. [https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1811&context=scholarly\\_works&httpsredir=1&referer=](https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1811&context=scholarly_works&httpsredir=1&referer=)

daily within the contemporary digital landscape.<sup>217</sup> The internet and with it social media provide excellent opportunities to exercise the right to free expression, the right to access information, and to increase personal autonomy, as an aspect of privacy. At the same time, the exact same rights are also systematically and constantly violated to a minor extent, which, however, adds up in the perspective of global communication.

This violation is rather abstract: in the perspective of one individual user, the harm is so minor that it would not reach the threshold where interference to protect this right is deemed necessary. Besides, the act of providing protection is reactive: the protective mechanism can be triggered by user complaint after the harm is done. As the individual harm is minor or not even perceived, no human rights claims can be expected. Even if an individual would take the courage and the resources to start a claim, the outcome would be questionable, because courts are not used to adding together the harms, instead focus only on the case which lies before them. As the harm is done by private actors, the violation is not officially a human rights violation: only states are obliged to protect human rights (see discussion of horizontal effect below). In addition, platforms shield their responsibilities by users' consenting submissions. They can also hide behind the algorithm, which does the ranking "automatically" (avoiding the question of programming the algorithm).

Several scholarly and civil works call attention to how the exercise of some human rights are limited in the online environment by online platform providers' algorithmic governance.<sup>218</sup> However, the normative premises of human rights remain significant even in the context of changed realities.<sup>219</sup>

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217 Rainer Mühlhoff, *Prädiktive Privatheit: Kollektiver Datenschutz im Kontext von Big Data und KI* (Baden-Baden: Nomos, 2022) DOI:10.5771/9783748913344-31, <https://www.nomos-elibrary.de/10.5771/9783748913344-31.pdf> in: *Künstliche Intelligenz, Demokratie und Privatheit*, ed. Michael Friedewald et al. (Baden-Baden: Nomos, 2022) [https://www.nomos-elibrary.de/10.5771/9783748913344.pdf?download\\_full\\_pf=1&page=0](https://www.nomos-elibrary.de/10.5771/9783748913344.pdf?download_full_pf=1&page=0).

218 Lorna McGregor, Daragh Murray, and Vivian Ng, "International Human Rights Law as a Framework for Algorithmic Accountability," *International and Comparative Law Quarterly* 68, no.2 (2019): 309–343. <https://doi.org/10.1017/S00205893190046> Also: Balkin, "Free speech," 3.

219 Wolfgang Hoffmann-Riem, *Recht im Sog der digitalen Transformation. Herausforderungen* (Tübingen: Mohr Siebeck, 2022): 100. Hoffmann-Riem cites also: S. BVerfGE 49, 89, 137; decision of 24.03.2021, EuGRZ 2021, 242.

Ever more human actions depend on the digital infrastructure and on algorithms. Abilities to exercise these rights are managed by platform operators, keeping their own interest in the fore. All online human action that is assisted – and thereby limited – by algorithms, represents a conflict of rights: the right of the individual versus the right of the platform provider. Specifically, when platforms exercise their prerogative to curate, demote, or remove content, their assertion of this right clashes with the rights of users who contributed the content.<sup>220</sup> Claims that platforms must respect users' rights rely on the uncertain ground of "horizontal effect" of human rights. This approach is gaining traction since the end of the 20th century, with growing academic literature and court practice. However, its exact interpretation is still in development.<sup>221</sup>

German Basic Law has had an indirect effect on individuals as third parties in relation to private entities (indirect third-party effect) since the Lüth case (1958).<sup>222</sup> The principle has been reinforced several times in German courts.<sup>223</sup> Decisions specific to online platforms found that while platforms were not directly bound by the Basic Law, they still should respect fundamental rights.<sup>224</sup> The boundaries of this legal requirement are subject to academic discussion.<sup>225</sup>

International human rights bodies assert that states must protect human rights even in relation to private entities, allowing individuals to seek redress for violations. States are thus obliged under international law to

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220 Balkin, Jack M., Free Speech Versus the First Amendment (April 10, 2023). *UCLA Law Review*, Forthcoming, *Yale Law & Economics Research Paper Forthcoming*, Available at SSRN: <https://ssrn.com/abstract=4413721>p.22.

221 McGonagle and Agnès Callamard, "The Human Rights Obligations of Non-State Actors" in *Human Rights in the Age of Platforms*, ed. Rikke Frank Jørgensen and David Kaye. (Cambridge, MA: MIT Press, 2019); see also: Gunther Teubner, "Horizontal Effects of Constitutional Rights on the Internet: A Legal Case on the Digital Constitution", *The Italian Law Journal* 3, no. 1 (2017): 193–205. Mark Tushnet, "The issue of state action/horizontal effect in comparative constitutional law," *International Journal of Constitutional Law* 1, no. 1 (2003): 79–98.

222 BVerfG, 15.01.1958 – 1 BvR 400/51.

223 Judgment of the German Constitutional Court, BVerfG, 11.04.2018 – 1 BvR 3080/09, Stadionverbot, NJW 2018, 1667.

224 LG Frankfurt/Main, 10.09.2018 – 2–03 O 310/18, MMR 2018, 770; LG Frankfurt/Main, Beschluss vom 14.05.2018 – 2–03 O 182/18, MMR 2018, 545; see also BVerfG Lüth-Urteil, 15.01.1958 – 1 BvR 400/51, NJW 1958, 257.

225 Jörn Reinhardt, and Melisa Yazicioglu, "Grundrechtsbindung Und Transparenzpflichten Sozialer Netzwerke", *Den Wandel Begleiten – IT-Rechtliche Herausforderungen Der Digitalisierung*, (2020): 819.

prevent, punish, and remedy human rights violations by private entities,<sup>226</sup> although the UN's position is held to be of the "risk assessment" type.<sup>227</sup>

The Council of Europe adopts a proactive stance in this regard. Under the European Convention on Human Rights, states are mandated to take action to prevent, safeguard against, and rectify human rights violations committed by private entities. In its 2012 Recommendation on the Protection of Human Rights concerning Social Networking Services, the Committee urged online intermediaries to adhere to "human rights and the rule of law" by instituting self- and co-regulatory measures, encompassing procedural safeguards and easily accessible, effective remedies.<sup>228</sup> Further, its 2014 Recommendation suggested that platforms should respect the standards of the ECHR in their content removal, deletions and suspensions of user accounts.<sup>229</sup> Also the EU Charter of Fundamental Rights appears to be attributed horizontal effect.<sup>230</sup>

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226 UNHR Committee, General Comment no. 31. The nature of the general legal obligation imposed on state parties to the Covenant, (CCPR/C/21/Rev.1./Add.13) 2004, para. 8 (p.54 – 55).

227 Rikke Frank Jørgensen, and Lumi Zuleta, "Private Governance of Freedom of Expression on Social Media Platforms," *Nordicom Review* 41, no.1 (2020): 51- 67. <https://doi.org/10.2478/nor-2020-0003>.

228 Recommendation CM/Rec (2012)4 of the Committee of Ministers on the Protection of Human Rights with Regard to Social Networking Services. Further, it explicitly referred to the UN Guiding Principles in its 2014 Recommendation as a guide to human rights for Internet users, and suggested that platforms should respect the standards of the European Convention on Human Rights (ECHR) in their content removal, deletions and suspensions of user accounts.

229 Recommendation CM/Rec (2014)6 of the Committee of Ministers on a guide to human rights for Internet users suggests that platforms should respect the standards of the ECHR in their content removal and account for removal decisions, at 53.

230 Joined cases C-569/16 and C-570/16 *Stadt Wuppertal v. Maria Elisabeth Bauer and Volker Willmeroth v. Martina Broßonn*, Judgment of 6 November 2018, discussed by Dorota Leczykiewicz, "The Judgment in Bauer and the Effect of the EU Charter of Fundamental Rights in Horizontal Situations", *European Review of Contract Law* 16, no. 2 (2020): 323–333, <https://doi.org/10.1515/ercl-2020-0017> Eleni Frantziou, "The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality", *European Law Journal* 21, no. 5 (2015): 657–679, <https://fra.europa.eu/en/node/35696>.

### 3.2 The right to receive information

The right to receive information is becoming a centripetal point in the concept of microscopical rights protection in the context of the media environment. This right is regarded as counterpart of the freedom of expression; an inalienable part of the constitutive justification of free speech. Political participation does not work without this right.<sup>231</sup> Even receiving foreign propaganda materials by post was regarded as protected by First Amendment.<sup>232</sup> The majority judgement found that the restricting act inhibited the open debate protected by the First Amendment, and Justice Brennan in his concurring opinion called the right to receive information a corollary of free speech.<sup>233</sup>

The speech of a journalists or a scientist is protected not for the function that it plays in the life of the speaker, rather, others' right to listen is the goal of the protection.<sup>234</sup> If the goal would be the speakers' self-realisation, the speech would be less protected when it causes harm or offends others.<sup>235</sup>

The African Convention on Human Rights provides a comprehensive protection of this right in the context of journalism. According to the South-African Supreme Court, "The right to receive others' expressions has more than merely instrumental utility, as a predicate for the addressee's meaningful exercise of her own rights... also foundational to each individual's empowerment to autonomous self-development".<sup>236</sup> Sajó cites Scanlon who argued that the justification of harmful speech is that we respect the autonomy of the listeners.<sup>237</sup>

In contrast, this right is mainly understood by the ECtHR as right to access public information, information held by authorities or official bodies.<sup>238</sup> Although, the limitation of the understanding does not arise from

231 Emerson, *Toward a General*, 5.

232 *Lamont v. Postmaster General*, 381 U.S. 301. (1965).

233 *Lamont*, pp. 92 U.S. 307–308.

234 Sajó, *Militant Democracy*, 23.

235 Wojciech Sadurski, "Offending with impunity: Racial vilification and freedom of speech." *Sydney L. Rev.* 14 (1992): 163. cited by Sajó, *Militant Democracy*, 23.

236 Justice Mokgoro, "Curtis and the Minister of Safety and Security," *Constitutional Court of South Africa*, 21/95. 1996.

237 Thomas Scanlon, "A Theory of Freedom of Expression," *Philosophy and Public Affairs* 1, no. 2 (1974): 204–226. cited by Sajó, *Militant Democracy*, 23.

238 This right "prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him ... [but] cannot be construed as imposing on a State ... positive obligations to collect and disseminate

legal documents or court decisions. Nita differentiates three types of the right based on the source of information, and one of them relates to the media: the right to be informed by public institutions, the right to request information, and the right to be informed by the media about important public matters.<sup>239</sup>

Still, human rights law currently does not recognise the importance of this right, or at least not consequently. That citizens have access to information on public matters, is still regarded as a matter of political interpretation and as a normative value. Although, the underlying social objective of the right to receive information is to facilitate participation in the rational discourse. Essentially, individuals possess the right to access all types of information, yet the state is not compelled to guarantee this access. At most, the state may have a positive obligation to establish the necessary framework enabling individuals to exercise their rights. A diversity of various information types should and can be part of the information package, this diversity ought to be a precondition of the rational discourse. If the informational environment is systematically distorted, then the individuals are unable to enjoy their right to receive information. A systematically distorted informational environment would be one where the available information is not sufficiently diverse, not representative of the social opinions, or is misleading due to the overwhelming representation of mis- and disinformation.

As mentioned above, several obstacles stand in face of enforcing this right: the individuals may be unaware of the harm that they suffer, they may consent to enduring it, the cause of the harm is difficult to be identified, or if identified, the responsibility for it is dispersed among many actors.<sup>240</sup> Still, these are external factors of enforcement and do not change the fact that the right of individual users to receive information and thereby to

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information of its own motion". *Leander v. Sweden* (26 March 1987, Series A no. 116. *Magyar Helsinki Bizottság v. Hungary* 18030/II. 08/II/2016.

See also: Alasdair S. Roberts, "Less government, more secrecy: Reinvention and the weakening of freedom of information law." *Public Administration Review*, 60, no. 4 (2000): 308–320.

<sup>239</sup> Anca Jeanina Nita, "The Freedom of Expression and the Right to Information-Fundamental Rights Affected by Fake News?" *Technium Social Sciences Journal* 38, no. 1 (2022): 176–184.

<sup>240</sup> Smuha describes three categories: the "knowledge gap", the "threshold problem", and the "egocentrism problem". Nathalie A. Smuha, "Beyond the individual: governing AI's societal harm," *Internet Policy Review* 10, no. 3 (2021) <https://doi.org/10.14763/2021.3.1574>.

enjoy the right to freedom and pluralism of the media is restricted. Even if the restriction is of minor importance at the individual level, the number of effected users reaches millions or even billions – masses of people in any case. The classic Western human rights theory is fully built on individual rights; these weigh more than public interest. Collective rights (group rights) are limited in scope, or even their existence is disputed, claiming that all rights should be bestowed upon the individual, rather than a collective community.<sup>241</sup> It is also questionable whether it is justified to restrict individual rights in order to grant better exercise to collective rights.<sup>242</sup> This logic is not alien to the German Constitutional Court which found that the protection of the climate is a state obligation in order to protect the fundamental rights of the future generation.<sup>243</sup> The Court referred to these rights as individual rights, without finding it necessary to identify the right holders, or those who cause the harm. Finally, as no obligor can be identified who is individually responsible for causing this harm, the onus and the obligation is on the state to create appropriate policy, to establish the frameworks of an informational environment where such systemic harm does not occur, or can be minimised. In specific situations, like elections or crisis situations (e.g. pandemic, war), the stake may increase; a limitation of the right to information may entail injury of other rights, such as the right to life or bodily integrity.

Clearly, there is no right specifically to truth.<sup>244</sup> Intentional dissemination of established falsehoods that are harmful and devoid of value to the public discourse, such as Holocaust denial, are not afforded protection.<sup>245</sup> At the same time, certain discourses, while potentially appearing harmful, may remain an integral part of the public discourse.<sup>246</sup> Furthermore, there

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241 Jeremy Waldron, ed., *Nonsense on Stilts: Bentham, Burke and Marx on the Rights of Man* (London: Routledge, 1987): 190–209.

242 Jan Narveson, “Collective Rights?” *Canadian Journal of Law & Jurisprudence* 4, no. 2 (1991): 329–345. <https://doi.org/10.1017/S0841820900002964>.

243 BVerfG, *Order of the First Senate of 24 March 2021 – 1 BvR 2656/18* –, paras. 1–270, [http://www.bverfg.de/e/rs20210324\\_1bvr265618en.html](http://www.bverfg.de/e/rs20210324_1bvr265618en.html).

244 Coe, at143, citing Wragg, P. (2013) ‘Mill’s Dead Dogma: The Value of Truth to Free Speech Jurisprudence’ (2013) April, *Public Law* 363, 368–369), p. 372.

245 BVerfG, Beschluss des Ersten Senats vom 13. April 1994–1 BvR 23/94 –, Rn. 1–52. See also the decision on inadmissibility of Application no. 7485/03 by Hans-Jürgen Witzsch.

246 See for example the "Historikerstreit", Ernst Reinhart Piper (Hrsg.): „Historikerstreit“. Die Dokumentation der Kontroverse um die Einzigartigkeit der nationalso-

is information that is both true and benign, and yet irrelevant to rational discourse.

The scope of information considered subject to the right to access should extend beyond governmental data to encompass at least information on matters of public importance. This expanded understanding aligns with the discourse on press freedom, which has long emphasised the significance of ensuring access to information essential for fostering informed public discourse and democratic participation. However, the state's role is limited to creating an enabling environment or framework that facilitates individuals in exercising their right to access information. This could encompass measures such as establishing transparent and accessible information infrastructure, fostering a diverse media landscape, and promoting media literacy.

### 3.3 User autonomy and nudges

The human right to receive information – the passive side of Article 10 – is activated only if users claim this right. Users need to *want* (by taking action) to receive the information and not just passively wait to be served. It cannot be objectively *ensured* that users have access to relevant and high-quality information on public matters, if they prefer to consume sensational and disinformative content instead. Commentators are divided on the assumption, how much agency users dispose of in this respect. In one school of thought, users are exposed at the mercy of the data-driven media economy, and their attention is to a large extent enslaved to content that is defined by providers along commercial interests (exposure model). In the other school of thought, users are active agents who select and reasonably interpret content (selection model). Both approaches have ample substantiation from empirical studies.<sup>247</sup> Obviously, reality embraces a mixture of

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zialistischen Judenvernichtung. Piper Verlag, München/Zürich 1987, ISBN 3-492-10816-4. See also: Jersild v. Denmark, *Jersild v Demark* (1995) 19 EHRR 1.

247 Natali Helberger, Kari Karppinen, and Lucia D'Acunto, "Exposure diversity as a design principle for recommender systems," *Information Communication and Society* 21, no. 2 (2018): 191–207. <https://doi.org/10.1080/1369118X.2016.1271900>; Judith Möller, Damian Trilling, Natali Helberger, and Bram van Es, "Do not blame it on the algorithm: an empirical assessment of multiple recommender systems and their impact on content diversity," *Information Communication and Society* 21, no. 7 (2019): 959–977. <https://doi.org/10.1080/1369118X.2018.1444076>; Philip M. Napoli,

both types, even within one single individual, depending on mood, time of the day, and other factors.

In the liberal model, adult citizens are autonomous beings, and are free to make even bad choices. They may drink alcohol, smoke, eat junk food and spend too much time with their screens. At the same time, the sale of alcohol is heavily regulated, finding cigarettes and a place to smoke is a real hurdle.<sup>248</sup> Drivers must not only respect speed limit for the protection of others, but put on their seatbelt for their own safety. Still, a strong stream of opinions represents the view that people cannot be forced to participate in the public discourse. In the context of political choices, the level of voters' autonomy when voting for populistic, authoritarian leaders has been contemplated.<sup>249</sup> On the one hand, people choose from available options;<sup>250</sup> on the other hand, psychological factors, beliefs and attitudes play a role,<sup>251</sup> (see also Chapter 6), and human autonomy and freedom are unavoidably restricted in the context of content prioritization. Prioritizing a particular media service or content provider over others is a deliberate decision that platforms perform on behalf of users, without having a mandate – although this would be possible, if more autonomy would be allowed for users to choose between various content ranking algorithms. This influence may be regarded as constituting a form of censorship.<sup>252</sup>

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“Exposure Diversity Reconsidered,” *Journal of Information Policy* 1, no. 2 (2011): 246–259. <https://www.jstor.org/stable/10.5325/jinfopol.1.2011.0246>; Natali Helberger, Katharina Kleinen-von Königslöw, and Rob van der Noll (2015), “Regulating the new information intermediaries as gatekeepers of information diversity,” 17, no. 6 (2015): 50–71. <https://doi.org/10.1108/info-05-2015-0034>.

248 The places where smoking is allowed have been heavily limited, advertisements for tobacco are banned and tobacco packages must “nudge” the user to quit.

249 Gábor Halmai, “Populism, authoritarianism and constitutionalism,” *German law journal* 20, no. 3 (2019): 296–313., 300.

250 Halmai (2019) at p. 301, referencing Kim Lane Schepppele, *The Party’s Over*, in *Constitutional Democracy in Crisis?* (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018).

251 Ronald F. Inglehart, and Pippa Norris, “Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash,” HKS Faculty Research Working Paper Series 2016. No. RWPI6–026.

252 Eleonora Maria Mazzoli, and Damian Tambini, *Prioritisation Uncovered. The Discoverability of Public Interest Content Online* (Strasbourg: Council of Europe, 2020): 29., 42–45.

Nudging is a widely applied policy instrument, both by state and by private actors.<sup>253</sup> Private companies impose nudges on users to push them into making choices that serve the companies' financial interests (a.k.a. "dark patterns"). Certain types of nudging behaviour are now prohibited by the DSA (see below). Would it also be acceptable for states to, rather than prohibit, oblige platforms to apply nudges in the public interest? Following the analogy of car seatbelts: users of a personal vehicle are fined if they do not fasten the seatbelt. However, the breakthrough in complying with this obligation happened only when car manufacturers built in auditive signals to nudge users to fasten their seatbelt. These seatbelt alarms are now compulsory in the EU in every new-built car.<sup>254</sup> Nudges are getting more accepted also in the fight against disinformation, but their subject, their extent and exact content is still subject to dispute.<sup>255</sup> Spreading disinformation is comparable to smoking: even passive recipients suffer the harm, but the issue of speech raises more questions than a drug: the definition of truth is not up to the state, and the causal connection between harm and disinformation is yet unproven. In the case of seatbelt, the connection of cause and effect are clear, no fundamental rights are essentially restricted by the obligation, and the achieved result is quantifiable. A further analogy would be food safety regime which is built on risk management, transparency labelling, an alert system, and which does not restrict consumers, but imposes obligations only on providers.<sup>256</sup>

Mandated nudges would represent a further level of outsourced regulation, imposing even more duties and with that, power on platforms.<sup>257</sup> It is not for the state to decide on the quality of content,<sup>258</sup> however, platforms are certainly not better situated for the same, at least not without ethical

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253 Richard H. Thaler, and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (London: Penguin Books, 2009).

254 EC: UNECE Regulations, [https://single-market-economy.ec.europa.eu/sectors/automotive-industry/legislation/unece-regulations\\_en](https://single-market-economy.ec.europa.eu/sectors/automotive-industry/legislation/unece-regulations_en).

255 Gilad Abiri, and Johannes Buchheim, "Beyond True and False: Fake News and the Digital Epistemic Divide," (April 7, 2022). *Michigan Telecommunications and Technology Law Review* (Forthcoming), *Peking University School of Transnational Law Research Paper*, Available at SSRN: <https://ssrn.com/abstract=4078149> or <http://dx.doi.org/10.2139/ssrn.4078149>.

256 EC: Food Safety in the EU. [https://european-union.europa.eu/priorities-and-action/s/actions-topic/food-safety\\_en](https://european-union.europa.eu/priorities-and-action/s/actions-topic/food-safety_en).

257 Balkin calls this "new-school speech regulation", see: Jack M. Balkin, "Old-School/New-School Speech Regulation," *Harvard Law Review* 127, no.8 (2014): 2296–2342.

258 Justice Kennedy: "We do not need an Orwellian Ministry of Truth" – US v. Alvarez. 567 U.S. 709 (2012).

standards and safeguards for neutrality that would take after the standards of responsible journalism.

Media policy is between a rock and a hard place: the absence of imposed obligations allows platforms to employ their own nudges, often only to further their own interests, thereby placing a burden on public discourse. If nudging would be a legal obligation, both platforms and users might complain of overregulation and censorship. In both cases, ethical standards would be key to success. As citizens cannot be forced to be "better citizens", companies could still be obliged to be "better platforms" and to provide better services in content governance. The state could, at the very least, mandate platforms to establish frameworks that support users in selecting content conducive to fostering public discourse, such as public service algorithms. If that is enough, nudges would not be needed.

As we will see below, the current regulatory framework imposes a few such negative and positive obligations on content governance habits, to promote a safe and trustworthy informational environment for users.

### *3.4 The state's obligation to protect pluralism*

In the online environment, the theoretically clear relationship of users and the state is coloured by multipolar and asymmetrical relations between private actors. The multipolarity arises from the emergence of platforms as novel factors previously absent in traditional relationships. Even though platforms are private entities which have equal legal standing with users, the relationship between users and gatekeeper platforms is asymmetrical. To further complicate the picture, certain users themselves can grow to become very powerful compared to other speakers, due to the network effect. Popular politicians, influencers, celebrities have many million followers and practically function as media providers, although they are still "users".

The state's positive obligation to protect human rights is known in several jurisdictions, and in the European Court of Human Rights' case law. In particular, the German Constitutional Court has a consistent practice prescribing this state obligation.<sup>259</sup> As the effective exercise of certain freedoms may require positive protective measures even in interactions between individuals, the constitutional obligation primarily revolves around preventing

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<sup>259</sup> Bernd Holznagel, and. Pascal Schumacher, "Netzpolitik Reloaded: Pflichten und Grenzen staatlicher Internetpolitik," *Zeitschrift für Rechtspolitik* 44, no. 3 (2011): 75.

harms inflicted by third parties. The German Constitutional Court based this obligation on Article 1 of the German Basic Law, the protection of human dignity, and then expanded the scope of application to several other fundamental freedoms.<sup>260</sup> In particular, Article 5 of the German Basic Law protects the media in a comprehensive manner; not merely in a defensive way against state interventions, but also in regard of its function as an instrument in the formation of individual and public opinions as a precondition for democracies.<sup>261</sup> In this regard, the state's positive obligation has a specific angle, to ensure the necessary conditions (*Ausgestaltung*) for a plural media system. This goes even beyond the defensive obligation (*Schutzpflicht*) that may apply in relation to other fundamental rights.<sup>262</sup>

The ECtHR has a considerable case law in regard of positive obligations of the state to ensure Article 10 ECHR.<sup>263</sup> Among others, states are also required to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear.<sup>264</sup> This would include to stand up against hate speech and harassment online, especially after evidence has been provided that hate speech, in particular when directed against concrete individuals, indirectly restricts their right to speak, because it silences the effected individuals.<sup>265</sup>

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260 BVerfGE 39, 1 (41) = NJW 1975, 573; BVerfGE 46,160 (164) = NJW 1977, 2255; BVerfGE 115, 118 (145) = NJW 2006, 751. See in more detail: Holznagel – Schumacher, “Netzpolitik Reloaded.”

261 BVerfG v. 5.8.1966 – 1 BvR 586/62, BVerfGE 20, 162 Rz. 36 (juris). See in: Matthias Cornils, and Katrin Gessinger, “Möglichkeiten öffentlicher Förderung von Lokal- und Regionaljournalismus unter Wahrung der Staatsferne,” *AfP* 52, no. 4 (2021): 285–293.

262 Bernd Holznagel, “Meinungsbildung im Internet,” *NordÖR* 205. (2011): 210. in German constitutional jurisprudence, media freedom is defined along the lines of transmission method: frequency, or print. This leaves little or no flexibility to find the place for online content in this structure.

263 [https://www.echr.coe.int/documents/research\\_report\\_article\\_10\\_eng.pdf](https://www.echr.coe.int/documents/research_report_article_10_eng.pdf).

264 Dink v. Turkey, no. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, September 14, 2010. § 137.

265 Katharine Sarikakis et al., “My haters and I: personal and political responses to hate speech against female journalists in Austria,” *Feminist Media Studies* 23, no. 1 (2023): 67–82. <https://doi.org/10.1080/14680777.2021.1979068>; Freedom House report on the Internet freedom in Italy. 2019 <https://freedomhouse.org/country/italy/freedom-net/2019>; Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, MA; London, UK: Harvard University Press, 2012); <https://www.politico.eu/article/sanna-martin-finland-online-harassment-women-government-targeted/>.

In order for the state to proactively interfere, a strong case should be shown that the state's obligation extends to "ensuring" the right. For example, states owe a positive obligation to ensure media pluralism,<sup>266</sup> although they have a broader margin of appreciation than in the realm of their negative obligations.<sup>267</sup> They have more options to adapt to changing social and market developments, however, one of the possible ways is maintaining a public service media. The German Constitutional Court's jurisprudence holds that the state must guarantee the existence and development of public service media,<sup>268</sup> in order to ensure access to relevant and trustworthy information.<sup>269</sup> This societal need did not diminish with the abundant content offer by platform media, because the audience cannot be expected to select the quality and trustworthy information from the information overload.<sup>270</sup> In the dual broadcasting system, the guarantee of freedom of broadcasting includes the assurance of the functioning of public broadcasting, including its needs-based financing.<sup>271</sup> Accordingly, public service broadcasters have a fundamental rights-based entitlement to funding. The fulfilment of this claim is the responsibility of the German Länder as a collective, forming together a federal community of joint responsibility, where each Land is jointly responsible,<sup>272</sup> said the German Constitutional Court. In its logic, freedom of broadcasting serves the free formation of opinion both for individuals and for the public.<sup>273</sup> The mandate to guarantee freedom of broadcasting aims at creating a media order that ensures that

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266 Tarlach McGonagle, "The Council of Europe and Internet Intermediaries: A Case Study of Tentative Posturing", in Rikke Frank Jørgensen, and David Kaye, eds., *Human Rights in the Age of Platforms*, (Cambridge, MA: MIT Press, 2019).

267 Walter Berka, and Hannes Treter, *Public Service Media Under Article 10 of the European Convention on Human Rights* (Geneva: European Broadcasting Union, 2013) [https://www.ebu.ch/files/live/sites/ebu/files/Publications/Art%2010%20Study\\_final.pdf](https://www.ebu.ch/files/live/sites/ebu/files/Publications/Art%2010%20Study_final.pdf).

268 BVerfGE 12, 205 – vom 28. Februar 1961. See also: Grote/Wenzel, in Grote/Marauhn (eds), EMRK/GG. Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz (2006) 916.

269 BVerfGE 12, 205 – vom 28. Februar 1961, BVerfGE 149, 222 in ZUM, 680. See also.

270 BVerfGE 149, 222 in ZUM, 680. Rn. 79. "Dieses Leistungsangebot wird durch die Entwicklung der Kommunikationstechnologie und insbesondere die Informationsverbreitung über das Internet weiterhin nicht infrage gestellt."

271 cf. BVerfGE 119, 181, 214.

272 BVerfG, Beschluss des Ersten Senats vom 20. Juli 2021 – 1 BvR 2756/20 –, Rn. 1–119, [http://www.bverfg.de/e/rs20210720\\_1bvr275620.html](http://www.bverfg.de/e/rs20210720_1bvr275620.html).

273 cf. BVerfGE 57, 295 <319>; 136, 9 <28 Rn. 29>; stRsp (can we translate as this: 28 marginal no. 29>; case law?).

a diversity of existing opinions is expressed in the greatest possible range and inclusiveness.<sup>274</sup> It is the legislature's duty to shape (*Ausgestaltung*) this order, with a broad scope of potential actions, for example, it is able to differentiate according to the type and the density of regulation.<sup>275</sup>

Maintaining a public service media is also in line with the European standard audiovisual model, but an obligation cannot be deducted from the Convention, unlike the obligation to take all necessary measures and provide for a pluralistic media system.<sup>276</sup> Private media companies are also able to provide ample quality and trustworthy content, and public broadcasting raises questions of fair competition. According to the ECtHR, while the state may confer duties on private institutions, it "cannot completely absolve itself of its responsibility by delegating its obligations in this sphere on private bodies or individuals."<sup>277</sup> It is therefore viewed as the ultimate guarantor of (media) pluralism, which must ensure that the public has access to impartial and accurate information and a range of opinions and comments.<sup>278</sup> What can be concluded in any case is, that in the European human rights framework, states are obliged to maintain a plural media order.

This obligation can be fulfilled by maintaining a public service media provider, or also through pluralistic market actors. In both cases, the traditional interpretation of this state obligation applied only to linear media content, a distinction that lost its relevance in the platform era. Even the linear transmission alone is in abundance as the digital transformation enabled the spectrum to carry more channels. In addition, smart TV solutions include the open internet and a number of streaming platforms. As the scarcity factor lies not in the content offer, but in the human attention, the key actors are not those who offer the content, but those who govern the content selection, or exposure to content (depending on the actual perspective on users' level of agency). These governors form an additional layer on the media market between content providers and the audience.

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274 cf. BVerfGE 57, 295 <319 et seq.>; 73, 118 <152 et seq.>; 90, 60 <88>; 114, 371 <387 et seq.>; 136, 9 <28 marginal no. 29.

275 (cf. BVerfGE 119, 181 <214>; 136, 9 <37 marginal no. 45>; established case-law).

276 Berka, and Tretter, *Public Service*, 22.

277 ECHR Judgement Storck v. Germany, no. 61603/00, § 103, 16 June 2005.

278 ECHR Judgements: Informationsverein Lentia and Others v. Austria – 13914/88, 15041/89, 15779/89 et al. Judgment 24.11.1993, Manole and others v Moldova, judgment of 17 September 2009, no 13.936/02, §107.

Like meat in a sandwich, they tend to dominate the entire meal. This is why regulation that strives to maintain pluralism, targets intermediaries.<sup>279</sup>

One main regulatory approach has been to regulate the range of legitimate content selection criteria, in order to overhaul the dominance of purely commercial aspects. Rather than giving priority always only to content that is popular, the content governance should also embrace other criteria. The new (2020) German Media State Treaty (MStV) pioneered with important requirements in regard of distributors of television-like programmes. Article 84 MStV provides that intermediaries, who aggregate and distribute broadcast content,<sup>280</sup> must give prominence to public service programmes and programmes with public value ("regimes of prominence").<sup>281</sup> In addition, they are prohibited from discriminating through arrangement or presentation within the user interfaces, or hinder their findability, and recommendations are given as to the permissible criteria (alphabet, genres or range of use).<sup>282</sup> The determination of which private programs are deemed to possess public value is not delegated to service providers; rather, it is delineated by the State Media Authorities on a triennial basis. The first list of such programmes includes more than 300 programme services, which raises concerns regarding its practical utility.<sup>283</sup> However, users should be able to personalise their own order of programme offer in an easy and permanent way.<sup>284</sup>

The difference between social media platforms and media distributors, like Netflix or Amazon, is obvious. Social media gives room primarily to user-generated content, albeit in a mix with professional media content. Using the trustworthiness criteria is not a requirement for social media platforms (in the German law), merely for media distributors.

279 Balkin, "Old-School/New-School," 2296.

280 User interfaces of broadcasting, broadcast-like telemedia and telemedia ("Benutzeroberflächen Rundfunk, rundfunkähnliche Telemedien und Telemedien), §84(1) German Media Law (hereafter: MStV).

281 The idea was promoted already in 2012 by Holznagel and Schumacher, see: Bernd Holznagel, "Die Freiheit der Internedienste," in *Funktionsauftrag, Finanzierung, Strukturen-Zur Situation des öffentlich-rechtlichen Rundfunks in Deutschland* ed. Jürgen Becker, and Peter Weber (Baden-Banden: Nomos Verlagsgesellschaft, 2012): 163–180.

282 § 84 (2) MStV.

283 Franziska Löw, „Medienplattformen und Benutzeroberflächen vor den Herausforderungen der neuen Medienregulierung.“ *MMR* 25, no. 8 (2022): 637. See also: Stefanie Schult, „Auffindbarkeit in Benutzeroberflächen – Wer suchet, der findet?“ *MMR* 26, no. 2 (2023): 97–99.

284 Article 84 (6) MStV.

Platform operators, typically social media platforms<sup>285</sup> are merely obliged to refrain from discrimination when presenting journalistic content. Discrimination is defined as systematically deviating from their own, pre-published criteria without objectively justified reason, or if these criteria directly or indirectly, unfairly and systematically hinder access to such content.<sup>286</sup> Importantly, the criteria that would determine access to content or hindering its access, must be published, and so must the central criteria of aggregation selection and presentation of content and their weighting, including information on the functioning of the algorithms, in comprehensible language, and an immediately and permanently accessible way.<sup>287</sup> Social media providers that have a thematic specialisation, shall be obliged to display that transparently.<sup>288</sup> This is more than what the DSA requires from social media providers. However, the Strengthened Code of Practice against Disinformation (COP) and the European Media Freedom Act (EMFA) have incorporated further positive requirements: the Code recommends signatories to prioritise trustworthy content, and EMFA requires fair treatment of media service providers (see below both in more detail). The core issue in both cases is: who defines trustworthiness, and who defines what exactly is a media service provider? All definitions carry the risk of bias, and further distortion of pluralism. In addition, prioritising public service media that is not independent from the governing power would further institutionalise state propaganda, and in fact, any official prioritisation may suppress legitimate criticism in authoritarian states.<sup>289</sup>

### 3.5 Why the EU?

As stated, the *de facto* power of some very large online platforms exceeds that of an average state, at least in the fields of economic and social influence. Politicians aspiring for election cannot disregard the influence wielded by platforms over public opinion. In addition, their economic strength renders platforms insensitive to financial penalties or market sanctions.

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<sup>285</sup> In the German terminology, these are "Medienintermediäre", defines as actors who aggregate, select and present generally accessible journalistic-editorial offerings of third parties without combining them into an overall offering. Article 2 (2) 16.

<sup>286</sup> Article 94 (1-2) MStV.

<sup>287</sup> Article 93 (1) MStV.

<sup>288</sup> Article 93 (2) MStV.

<sup>289</sup> Mazzoli, and Tambini, *Prioritisation Uncovered*, 42–45.

Acting individually, nation states possess limited leverage over online platforms whose activities, user base and resources transcend national borders and continents. All these factors underline the importance of international cooperation. If states are genuinely committed to fulfilling their obligations to safeguard human rights, most effective approach is through a coalition of states. This could take the form of an ad-hoc alliance or a more established entity such as the UN or the Council of Europe. The EU holds the advantageous position of being able to swiftly generate and enforce mandatory legal norms compared to classic international covenants.

Since the Lisbon Treaty, also the EU's Charter on the Fundamental Rights has become compulsory to both the EU and the Member States, in the realm of applying EU law.<sup>290</sup> This still does not create competence to the EU to legislate in the field of human rights and democracy, which have been prime values in the forefront of the regulatory plans targeting the digital environment. Historically, human rights within the EU have derived from national constitutional traditions.<sup>291</sup> Even though Member States are bound by international human rights duties which harmonise their fundamental rights framework, this international obligation exists between states and international organisations, cutting across the EU's broad umbrella as though through an empty space. With the Lisbon Treaty, the EU's human rights vacuum got filled in, however, Member States agreed to impose those EU law human rights limitations on the EU law and EU institutions, but not on themselves (except when they apply EU law).<sup>292</sup> Denying the human rights competence to the EU has been a symbolic protection of national sovereignty, due to the mutual dependence between the two.<sup>293</sup>

However, regulation of the platform economy has been necessary to ensure the seamless operation of the common market. The regulation of platforms, in particular of their liability, has been overdue, as the E-Commerce Directive did not extend to their services, which became increasingly influential on both the market and in society. Still, the sudden trigger to regulate platform economy and platforms as actors has arisen from the cumulative fundamental rights violations, and a direct threat to democratic political

290 See more on effect of the Charter and its coherence with the ECHR in: Cornils, M. (2021, November). § 7 Schrankendogmatik. in *Europäischer Grundrechteschutz* (Baden-Baden: Nomos Verlagsgesellschaft mbH & Co. KG, 2021): 295–358.

291 Samantha Besson, "Human rights and democracy in a global context: decoupling and recoupling," *Ethics & Global Politics* 4, no. 1 (2011): 19–50.

292 Article 51 EU Charter, Article 6 TEU.

293 Besson, "Human rights", 19–50.

systems that were recognised during revelations in 2016 and thereafter. Therefore, although the new legislative package regulates market actors, it addresses also those activities and behaviours of market actors that have threatened the basic values of the European Union, such as human dignity, democracy, the rule of law and human rights, as expressed in Article 2 of the Treaty, and forming the basis of the mutual trust between the Member States.<sup>294</sup> In addition, the European Charter of Fundamental Rights applies when a new regulation is passed, and fundamental rights must reflect in the new laws.<sup>295</sup>

While ensuring these values is the duty of Member States, the EU should facilitate and enable Member States to be in the position of ensuring them.<sup>296</sup> Should the decline of public discourse cause democratic deficit in one Member State, it would affect the democracy in the entire European Union.<sup>297</sup> First, through the elections of the European Parliament which takes place directly in the Member States; second, through the other elected officials who are delegated by the Member States into the Commission and other EU institutions. If elections are not fair in a Member State, its effects will spill over to the level of European democracy.<sup>298</sup>

In order to comply with European values and to enable the seamless functioning of the common market, the Member States owe to ensure the rule of law, democracy and human rights, including pluralism to maintain mutual trust in the common market. This obligation binds them not only through their own constitution (if so), or their international obligations (like ECHR) but also through the Treaty of Lisbon. And to protect these values for each EU *citizen*, the obligation binds not only Member States but also the EU as a whole.<sup>299</sup>

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294 Koen Lenaerts, "New Horizons for the Rule of Law within the EU," *German Law Journal* 21, no. 1 (2020): 29–34.

295 Article 51 EU Charter.

296 Jan-Werner Müller, "Should the EU protect democracy and the rule of law inside member states?," *European Law Journal* 21, no. 2 (2015):141–160.

297 Kim Lane Scheppelle and others, "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union," *Yearbook of European Law*, 39, (2020): 3–121, <https://doi.org/10.1093/yel/yeaa012>.

298 Petra Bárd, "In courts we trust, or should we? Judicial independence as the precondition for the effectiveness of EU law," *European Law Journal* 27, no. 1–3, (2021): 185–210.

299 Jan-Verner Müller, "Should the EU protect democracy", 141–160. See also: Petra Bárd, and Dmitry Vladimirovich Kochenov, "War as a pretext to wave the rule of

Nevertheless, international covenants cover a wider geographic area and a higher number of state actors. International agreements for the protection of human rights in the online environment and the digital world will also become necessary. We are expecting this to happen in the field of AI. In the field of media, in spite of a general "Brussels-effect"<sup>300</sup>, even a transatlantic agreement appears unlikely because of the basic differences in free speech theory.

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law goodbye? The case for an EU constitutional awakening," *European Law Journal* 27, no. 1-3 (2021): 39–49. A more radical version of this approach has been presented as the "Reverse Solange" concept, not endorsed here: Armin Von Bogdandy, and Lars Detlef Spieker. "Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges." *European Constitutional Law Review* 15, no. 3 (2019): 391–426. doi:10.1017/S1574019619000324.

300 The term, spread by Anu Bradford, refers to the sophisticated regulatory culture of the EU which tends to influence third states to follow. Given the co-regulatory nature of EU rules that are discussed here, the attitude of platforms will determine the development of policies outside Europe; they may simplify their operation by adhering the same principles in all states.

