
Open for whom? The role of intermediaries in data publication

Annemarie Balvert

Tilburg University, Tilburg, Netherlands. E-mail: a.l.balvert@tilburguniversity.edu

Gijs van Maanen

Tilburg University, Tilburg, Netherlands. E-mail: g.vanmaanen@tilburguniversity.edu

Resumo

For about ten years, governments have been experimenting with ‘open government’ and ‘open data’. Stimulating a transparent and open government by publishing data is thought to be a new phase in the democratization and emancipation of citizens. Open data enthusiasts (sometimes) argue that these advantages are to be achieved through the dissemination of data to ‘intermediaries’, and not necessarily to the average citizen. Groups like journalists, data-analysts and activists are considered to be the pathways through which governmental data is and should be transformed into information and communicated to the public. Within the legal environment of access to government information, the notion that intermediaries have a more pressing claim to government information seems to allow for an analogy to the so-called ‘public watchdog’ approach the ECtHR has taken under article 10, related to freedom of expression. Article 10’s remit can cover a limited right to information, but only for those performing this watchdog function. However, in many of the laws dealing more directly with government information, the implicit or explicit criterion is that ‘anyone’ has the same access in principle. In this essay, we analyse the role and function(ing) of intermediaries in the context of Dutch open data policy from two different perspectives. In our legal analysis, we explore the linkages between various international levels touching upon a right to information and Dutch open data policy. From the perspective of political philosophy, we question the distinction drawn between intermediaries and the public, in terms of data and information dissemination. To what extent does it make sense to differentiate between citizens on the basis of their function or job? What is the moral difference between a journalist and a citizen in this respect? The expectations of access to government information are sky-high. To what extent are we subcontracting them?

Palavras-chave

Data publication; Role of intermediaries; Open government.

Abertos para quem? O papel dos intermediários na publicação de dados

Abstract

Por cerca de dez anos, os governos vêm experimentando as ideias de "governo aberto" e "dados abertos". Pensa-se que estimular um governo transparente e aberto através da publicação de dados seja uma nova fase na democratização e emancipação dos cidadãos. Entusiastas de dados abertos (às vezes) argumentam que essas vantagens devem ser alcançadas por meio da disseminação de dados para 'intermediários' e não necessariamente para o cidadão comum. Grupos como jornalistas, analistas de dados e ativistas são considerados os caminhos pelos quais os dados governamentais são e devem ser transformados em informações e comunicados ao público. No regime legal de acesso às informações do governo, a noção de que os intermediários têm uma reivindicação mais premente das informações do governo parece permitir uma analogia à chamada abordagem de "vigilância pública" que o Tribunal Europeu de Direitos Humanos adotou no artigo 10, relacionado à liberdade de expressão. O mandamento do artigo 10 pode abranger um direito limitado à informação, mas apenas para aqueles que executam essa função de fiscalização. No entanto, em muitas das leis que lidam mais diretamente com informações do governo, o critério implícito ou explícito é que qualquer pessoa tenha o mesmo acesso em princípio. Neste artigo, analisamos o papel e a função de intermediários no contexto da política holandesa de dados abertos a partir de duas perspectivas diferentes. Em nossa análise jurídica, exploramos os vínculos entre vários níveis internacionais relacionados ao direito à informação e à política de dados abertos da Holanda. Do ponto de vista da filosofia política, questionamos a distinção estabelecida entre intermediários e público em termos de divulgação de dados e informações. Até que ponto faz sentido diferenciar os cidadãos com base em sua função ou trabalho? Qual é a diferença moral entre jornalista e cidadão a esse respeito? As expectativas de acesso às informações do governo são altíssimas. Até que ponto estamos subcontratando-os?

Keywords

Publicação de dados; Papel dos intermediários; Governo aberto.

Table of Contents | Sumário

Introduction; 1. Intermediaries in laws on information: an overview in the European and Dutch system; 1.1 The ECtHR; 1.2 At the EU level; 1.3 Dutch Administrative Law; 2. The courts' approach queried; 2.1 The ECtHR; 2.2 The CJEU; 2.3 The Council; 3. Discussion; 3.1 The participating citizen; 3.2 The participating government; 3.3 The participating intermediary; 3.4 The citizen as watchdog; 3.5 The participating market; 4. Concluding remarks; References.

Introduction

In the recent hype around big data, the idea that governments, historically some of the largest collectors of data,¹ should communicate what data they have to their citizens has gained popularity. The argument is even made that, as this data has generally been collected through public funds, it belongs to the citizens already.²

Within this debate, transparency has become a panacea. Transparency is generally seen as a means to an end,³ but in the data publication kerfuffle it is considered a means to many ends: on the one hand as a precondition for a democratic state bound by the rule of law,⁴ and on the other hand as a way to unleash all the value from the data that administrations have collected, but are unfit to make the most of.⁵ Data communication's aspirations include increasing accountability,⁶ diminishing the distance between citizen and administration, increasing trust, participation and democratic buy in,⁷ creating an increase in welfare through innovation and through facilitating citizens in making better decisions through having better information.⁸ Moreover, the open data debate seems united in the notion that more is always better: that (aside from privacy considerations) no one will really be harmed by the administration communicating more data.⁹

This seems ambitious. Data communication is only an equalising force when it is done well, as otherwise it could easily lead to exclusion. To understand whether it was or was not done well, data publication would need clearer goals than 'increased accountability and participation'. An often used counter-argument is that the idea of open data was not that data was a direct communication between the administration and the citizen, but that there was someone in between.¹⁰ In this model, the administration would publish the data, a data intermediary would

¹ R. Kitchin, *The Data Revolution: Big Data, Open Data, Data Infrastructures and their Consequences*, SAGE, 2014, at 48-55; see also J. C. Scott, *Seeing like a State: How certain Schemes to improve the Human Condition have failed*, Yale University Press, 1998.

² A. Buijze, *Transparency in the EU*, PhD thesis Utrecht University, 2013, at 28

³ *Ibid.*; for other transparency rationales see P. Frissen, *Het Geheim van de Laatste Staat*, Boom, 2016, at 31-37

⁴ Kitchin, *supra* 1, at 55

⁵ V. Mayer-Schonberger, K. Cukier, *Big Data: A Revolution that will Transform how we Live, Work and Think*, Mariner Books, 2013, at 116

⁶ See e.g. the Netherlands Midterm Report 2016-2018, Open Government Partnership, available at <https://www.opengovpartnership.org/documents/netherlands-mid-term-report-2016-2018-public-comment>

⁷ *Advies van de Raad van het Openbaar Bestuur, Gij Zult Openbaar Maken: naar een Volwassen Omgang met Overheidsinformatie*, 2012

⁸ P. John, *All Tools are Informational Now: How Information and Persuasion Define the Tools of Government*, 2013, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2141382

⁹ De Hoog et al, *Open Data, Open Gevolgen*, NSOB, 2012

¹⁰ See e.g. Tom Kunzler from the Open State Foundation, available at <https://ibestuur.nl/weblog/wie-neemt-er-regie-op-transparantie>

extract the value from it, and the intermediary would ensure that this value would find its way to the citizens in turn.

This is not the approach often taken by national legislation on freedom of information. In the Netherlands, the Dutch freedom of information act,¹¹ the Dutch implementation of the reuse legislation¹² based on the Public Sector Information directive from the European Union,¹³ as well as the proposed legislation designed to supplant the freedom of information act,¹⁴ all assume that ‘anyone’ is allowed to request government information. The law does not explicitly separate an intermediary position.¹⁵ However, the intermediary figure does come to the fore under the European Convention of Human Rights (the Convention). In a recent line of cases extracting a right to government information from the freedom of expression provided for in article 10 of the Convention, the European Court of Human Rights (ECtHR) has eventually recognised this right, when certain conditions are met, for public/social watchdogs such as journalists and NGO’s, rather than the general public. As the EU recognises the ECtHR’s interpretation of fundamental rights and the Netherlands is a party to the Convention, this intermediary has a role in their systems, too.

Thus, both in the non-legal context of the open data debate as well as in the legal area of freedom of speech, there is a reliance on a third party in order to realise societal aspirations. The question then becomes why. Why does our system expect intermediaries to be able to achieve what the general public cannot? This paper focuses on the reasoning behind ideas about intermediaries in information communication and compares the arguments from the three courts most relevant to Dutch data communication to foundations of the intermediary position in normative theory. The guiding question we answer is the following: what is the role of intermediaries within the legal context of European governmental data-dissemination? The way courts regard intermediaries is relevant for practical as well as theoretical reasons. Firstly, as demonstrated by the ECtHR’s watchdog case law, courts’ judgments have resounding effects in all linked areas of information law, by setting precedent but also by influencing new laws and their interpretation in this fast-paced area. Secondly, expectations of intermediaries may change as technology progresses and the arguments underlying them must then be adaptable to change. More theoretically, the assumptions about intermediaries’ role in current case law may not match the assumptions in the open data debate. Furthermore, both assumptions in law and assumptions

¹¹ Wet openbaarheid van bestuur, available at <https://wetten.overheid.nl/BWBR0005252/2018-07-28>

¹² Wet hergebruik van overheidsinformatie, available at <https://wetten.overheid.nl/BWBR0036795/2016-10-01>

¹³ Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information

¹⁴ Wet open overheid, a proposed law, available with other documentation at https://www.eerstekamer.nl/wetsvoorstel/35112_novelle_initiatiefvoorstel

¹⁵ In practice, requests are still often done by the media and like initiatives

in technology are value-laden, as they decide roles and expectations of various parties in a democracy. By explicating the values, we seek to support their informed debate.

Choosing to focus on case law implies certain limitations of the paper. Cases which do not go to either of the three courts in the scope are not discussed. Laws which are too recent to have much case law regarding them – such as the PSI Directive– fall outside of the investigative lines of this paper. Similarly, the paper looks mostly at information conveyed upon request rather than actively provided, as these cases are far more likely to go to court. There are no provisions yet which would force the Dutch government to provide information in this active manner (which also would be quite the paradox). The case law thus focuses on the right of the people to get information, rather than the duty of the government to provide it. The legal system itself as well as active publication are both very relevant for the intermediary position and should be further researched.

The search methodology within this case law comparison also has limitations. Cases were selected on the basis of being ‘key’ cases regarding access to information that dealt with an intermediary’s role, starting with the most recent. The ECtHR lists its own key cases, key cases for the others were established through references to these cases as well as through search terms that functionally described ‘intermediaries’.

To conclude these preliminary remarks, a short word on terminology. ‘Intermediaries’ is the term we use for the in-between actor standing between a government and a citizen in the process of data communication, as the closest approximation to the functional description that reflects both the legal and non-legal aspects of this paper. The ECtHR, CJEU and Dutch court use various different terms, such as ‘watchdog’ or ‘member of the media’. The open data debate uses a range of different terms, such as intermediary, but also private party or third party. In this paper, intermediary is thus not used in the sense of the strict legal definition it has in some EU laws, where the criterion is that the intermediary *does not* interact with the information in any way.¹⁶ Personally, we question whether that is a feasible definition, certainly in the area of data communication, as even structuring data means interacting with it. For this paper, the intermediary is someone who interacts with the data, as it is distributed from the government and communicated to the citizen in turn.

Related to this is the small point on the difference between data and information. While such a difference has been signalled in literature,¹⁷ in legal practice the line does not seem at all clear-cut. Most laws legislate on information, and most data that is discussed has been processed

¹⁶ See e.g. *Delfi AS v. Estonia* [GC], no. 64569/09, § 110, ECHR 2015

¹⁷ Kitchin, *supra* 1, at 10

in some way before it came to the court. For the purposes of this paper therefore, the terms used reflect the debates we describe.

Part 2 starts with a short overview of the position of intermediaries in the case law of the ECtHR, the CJEU, and the Dutch highest administrative court in general matters in turn. Next, we provide an analysis of the possible motivations behind the courts' various approaches to intermediaries, as well as some speculations about the reasons for divergence. This explanation relates to different ways of viewing information, as a resource versus as a public good, as well as different models of viewing public debate, from Habermas's public sphere to Mills' marketplace of ideas. To conclude, we briefly reflect on the implications of our analysis of the different argumentative models to the duties and rights of governments, intermediaries, and citizens within the context of governmental data-dissemination.

1. Intermediaries in laws on information: an overview in the European and Dutch system

The notion of 'information intermediaries' between the government and the citizen is not alien to the legal systems we review. Broadly speaking, there are two sides of the spectrum in information laws with regards to the audience of those laws or who would be able to gain a right to information under them. On the one hand, information is provided solely to intermediaries, who are then typically tasked with relaying this information to the public and entrusted with the information, provided they honour the responsibilities that entails. For example, this happens in a Finnish case,¹⁸ where media outlets get unencumbered access to tax records in bulk, whereas ordinary citizens do not. A different way of regulating information provision or collection to the same effect is to exempt the intermediary from laws that would impair its reception of information, which is the approach for some EU legislation on personal data.¹⁹ On the other, openness of information laws, especially at a national level, often provide access to information 'for anyone', as for example the Dutch FOIA does.²⁰

Though a claim to a right to government information is generally based on the notion of transparency that a democratic society warrants and necessitates across the board of the legal systems, it would seem as though these different ends of the spectrum are founded on

¹⁸ See below

¹⁹ See exemptions for journalism in for example the GDPR, article 85, this is a similar provision to the provisions in the older directives that will be discussed in the CJEU's case law below

²⁰ Art 3 Wet openbaarheid bestuur

contradictory theories of the use of access to government information in that democratic society. This difference is captured in the question of whether anyone or rather everyone has a legitimate interest in access to government information. If the citizen is the principal, who requires information to be able to hold his agent, the government, to account,²¹ then what is the legal foundation of an intermittent agent, an intermediary, between the two? Moreover, if more extensive legal protection is provided to intermediaries, this may well diminish the access that citizens themselves have to government information, thus making the necessity of the intermediaries' position a self-fulfilling prophecy. As the following legal analysis demonstrates, this is especially the case when courts do not accept a broad notion of which actors meet the criteria of intermediaries which have been set out in case law.

1.1 The ECtHR

When it comes to providing access to information for intermediaries, the ECtHR 'started it' within the European system. The Convention does not include an explicit right to government information. It does, however, uphold the fundamental right to freedom of expression, in article 10. Unsurprisingly, an argument soon found its way to the Chamber that in order for the right to freedom of expression to be effectively enjoyed, a freedom to receive and impart information had to be presupposed. The ECtHR was initially somewhat reluctant to accept this. Possibly, this decision not to recognise a right to information on the basis of article 10 was simplified by the fact that often, the ECtHR could still demand that access to the information was provided on the basis of article 8, as the documents in question in those cases concerned applicants' private or family life.²²

Clearly, this line of reasoning left a gap regarding invocation of the Convention to gain access to information on the basis of a purely *public* interest, such as holding the government to account in a matter that does not directly relate to the applicant themselves. This gap was dealt with in part by a sequence of cases that the ECtHR sees as simultaneous but distinct from the *Leander* line,²³ as they concern cases where the access to disputed information had been based on democratic interest as providing a legitimisation in national law, which had been recognised by a

²¹ P. Lindseth, Agents without Principals? Delegation in an Age of Diffuse and Fragmented Governance, 2006, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=605282

²² Magyar Helsinki Bizottság v. Hungary [GC], no. 18030/11, § 165, 8 November 2016, (after this: MHB) ECHR 2016, T. Mendel, A guide to the interpretation and meaning of article 10 of the European Convention on Human Rights, 22

²³ MHB,130

ruling by a national court, with which the administration had failed to comply.²⁴ In those cases,²⁵ the ECtHR held that the applicants, who were journalists, needed the information in order to be able to provide it to the general public, who had an interest in it. In order for a democratic debate to be possible, the information had to be released.

Closing the gap further by building on this reasoning²⁶ were cases that recognised a limited right to information as a necessary extension of the right to freedom of expression independently of the position of national law. In these cases,²⁷ the recognition of the ‘special’ position held by intermediaries that functioned as ‘social/public watchdogs searching for information in the interest of contributing to the public debate’ was transplanted from cases where domestic law had taken this interest into account in granting these parties the right to access the information to situations where that had not yet occurred, and thus these intermediaries were given a limited right to information as a necessary requirement to effectively enjoy the freedom of expression. These cases also established that not only journalists but also NGO’s could play this watchdog role.²⁸ The ECtHR also took into account that since the Convention’s implementation, there seemed to be a consensus among states party to the Convention and internationally on providing broad access to government information in order to foster democratic debate.²⁹ And yet, it did not go so far as to extend this right to information to anyone, but only to these designated intermediaries.³⁰

In part, this seems to stem from the requirement that rights be effectively enjoyed. This is a functional foundational theory of intermediation where an extra step between government and citizen benefits the citizen more than having no layer in between. Indeed, the ECtHR occasionally seems to presume that these intermediaries are the more effective providers of information to the general public, at least more effective than the government. Consider, for example, the occasions that the ECtHR has to take into account both content and form of information that is provided to the public. In these cases, it holds that in principle, it is not for it to say how the press should provide information of interest to the general public. The ECtHR seems to implicitly assume that the press will know best. These are often cases that do not feature the question of access to

²⁴ Decision by the European Court of Human Rights (Fifth Section), case of *Sdružení Jihočeské Matky v. Czech Republic*, Application no. 19101/03 of 10 July 2006 (hereafter: *Matky*)

²⁵ See also *Youth Initiative for Human Rights v. Serbia* - 48135/06, Judgment 25.6.2013 [Section II], *Matky*

²⁶ MHB, 132

²⁷ Judgment by the European Court of Human Rights (Second Section), case of *Társaság a Szabadságjogokért v. Hungary*, Application no. 37374/05 of 14 April 2009 (TASZ), *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria* - 39534/07 Judgment 28.11.2013 [Section I] (hereafter *Österreichische Vereinigung*), MHB

²⁸ W. Hins, *Het Wetsvoorstel Openbaarheid in het licht van Artikel 10 EVRM*, 4 *Mediaforum*, 110-113 (2014)

²⁹ MHB 139 and on

³⁰ *Ibid*, 164. At least explicitly, the right has not been further extended. It could be in future, though.

government information but information rather than a government would prefer withheld,³¹ but the line holds in more classical freedom of information cases such as *Satamedia*.³² It is only in rare cases that the ECtHR will judge on the manner in which the intermediary has chosen to impart knowledge to the public. This seems to acknowledge that among the many ways of ensuring a public debate on questions of common interest, some may work better than others. Perhaps the ECtHR assumes that the media has a more accurate understanding of bounded rationality and salience, concepts which suggest that people cannot process all information and that they focus on the information that seems important to them for some reason,³³ than governments do. A further glimpse of this can be seen in a recent case on hyperlinking, in which the ECtHR argued that hyperlinking allows users to make sense of the mass of information on the internet, which is important given the pivotal role that the internet plays in the public debate in a democratic society.³⁴ This suggests that the idea of information overload, that there can be such a thing as too much information, has taken hold.

At the same time, the ECtHR does not consider the intermediary role of the press and NGO's as 'watchdogs' in any sense in a purely descriptive manner. According to the Court, the media has as its *task* in a democratic society to contribute to the public debate and provide information of public interest,³⁵ a tacit and sometimes even explicit understanding that democracy cannot function without this intermediary player. With that job description come *duties and responsibilities*. The intermediary, whether journalist or NGO, has to set its own code on the gathering and publication of information, and abide by it in good faith.³⁶ They have to strive to provide accurate and reliable information. The information has to be in the public interest and necessary for the public debate,³⁷ and the public interest cannot be merely to gossip.³⁸ When the intermediary does not act in good faith and in the interest of the public, the protection and access to information does not hold. This could be a way to soften the blow to countries that did not feel that article 10 amounted to a right to information,³⁹ but it could also be another reason that the

³¹ Couderc and Hachette Filipacchi Associés v. France [GC], (Application no. 40454/07), 2015, hereafter Couderc

³² Case of Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, (Application no. 931/13) Judgment Strasbourg, 27 June 2017, Grand Chamber, 127, (hereafter *Satamedia ECtHR*) although in the present case the Court does investigate the methods (sheets and text services).

³³ C. Sunstein and R. Thaler, *Nudge: Improving Decisions About Health, Wealth and Happiness*, Yale University Press, 2008

³⁴ Case of Magyar Jeti ZRT v. Hungary (Application no. 11257/16), fourth section, December 2018, 73

³⁵ *Satamedia ECtHR*, at 126

³⁶ MHB, at 159

³⁷ *Ibid*

³⁸ Couderc, at 101-103

³⁹ See the debate in MHB

ECtHR feels that the intermediaries are better placed to impart information in the general interest to the public.

1.2 At the EU level

The Court of Justice of the European Union (CJEU) has taken due notice of the ECtHR's case law – and, incidentally, vice versa.⁴⁰ As is common practice, the CJEU interprets the Charter of Fundamental Rights of the European Union (Charter) in line with the interpretations given by the ECtHR, at least in those cases where there is significant overlap. Nevertheless, there are some differences, which can be explained only in part by the fact that the respective courts and their jurisdiction are dissimilar. To some extent, the justification for or role ascribed to intermediaries by the two courts seems different as well.

Generally, the intermediaries in cases before the CJEU have not (yet) come up in classic freedom of information cases, as the court does not typically regulate this matter. Often, however, they arise in a question of personal data versus freedom of expression and information, similar to the ECtHR's case law, causing the CJEU to have to balance Charter rights much like the ECtHR balances Convention ones. Freedom of information across the internal market, of course, is a key feature of EU regulation.⁴¹ The EU has an increasing interest in transparency⁴² and is a vested actor in the publication of government information. Crucially, with the Public Sector Information Directive⁴³ and its recent update, the EU envisages a marked increase in wealth by the full community tapping into previously undiscovered data mountains.⁴⁴ This internal market argument and the economic value of data and information, fairly invisible and irrelevant in the ECtHR's caselaw, is more prominent and actually unavoidable in the CJEU's approach, which translates into their understanding of information intermediaries while at the same time drawing on the justification of intermediaries that the ECtHR provides. Rather akin to what can be seen in the open data debate as a whole, here we see the arguments of transparency and economic value intertwine.

This is clearly visible in the case that has come before both the CJEU and later before the ECtHR (with different questions, naturally), namely the *Markkinapörssi and Satamedia* case. The

⁴⁰ See e.g. *Satamedia*, at 56-74

⁴¹ See e.g. judgments of 6 November 2003, *Lindqvist*, C-101/01, EU:C:2003:596 (hereafter *Lindqvist*)

⁴² *Buijze*, supra 2, at introduction; *Volker und Markus Schecke*, judgment of 9 November 2010, C-92/09; C-93/09, EU:C:2010:662, (hereafter *Volker*)

⁴³ The PSI Directive, most recently Directive 2013/37/EU

⁴⁴ Cons 2.

case concerned the publication of unquestionably big data, namely the tax records of an estimated one third of the Finnish population, by the journalistic companies Markkinapörssi and Satamedia. These tax records were publicly available in Finland at the time, in the sense that anyone could go to the archives and look into them, but they could not be copied. Journalists could receive the information digitally, but not all of it, only upon request, and only if they specified their objective in receiving the information. Markkinapörssi and Satamedia acquired the information the 'ordinary' way, not making use of the journalistic privileged access given to them,⁴⁵ and then published the records of 1.2 million Finnish taxpayers in accessible table format, along with sending out text messages about the information. The Finnish data protection Ombudsman intervened and the companies were forced to stop.

The question before the ECtHR was whether that had been an unallowable interference with the freedom of expression, or whether it was legitimate in light of the protection of private life of the taxpayers under article 8. In a rare judgment on the method of publication by the press, the ECtHR decided that given the manner of publication, which enabled voyeurism rather than a spirited public debate, indeed the interference was justified.⁴⁶

Earlier, before the CJEU, a preliminary reference had been made by the Finnish Administrative Court, regarding the Directive on personal data in use at the time. The important questions were on the one hand whether data which was already publicly available was still personal data, which the CJEU concluded that it certainly was,⁴⁷ and if so, then how to strike a balance between the protection of this personal data and the freedom of expression of the press. This was particularly relevant because the Directive provided, in the spirit of the ECtHR case law, an exemption to its application, in article 9, when the processing of this information was necessary for purely journalistic purposes.⁴⁸ Now, given that this was a preliminary reference procedure, the CJEU does not go so far as to provide the answer. It does, however, clarify how it envisions the interpretation of 'journalistic purposes', as such, the role of the intermediary, and seems to be willing to allow for a broader application of the concept than the ECtHR.⁴⁹ Certainly, it pays more attention to the market side of the equation, following the parties and the AG in accepting that the fact that an intermediary wants to turn a profit does not mean that its activities are not purely journalistic: journalism often is dependent on making a profit in order to exist.⁵⁰ It also would seek

⁴⁵ Clearly, Finnish law recognises intermediaries too

⁴⁶ Satamedia ECtHR, at 191

⁴⁷ Judgment of the Court (Grand Chamber) of 16 December 2008. *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy*, case C-73/07, hereafter Satamedia CJEU, at 48-49

⁴⁸ A similar provision can be found in the regulations applicable today.

⁴⁹ M. M. M. van Eechoud, *Een Uitgeversrecht voor Pluriforme Media?*, 40(41)6(1) AMI : Tijdschrift voor Auteurs-, Media- & Informatierecht, 16-23 (2017), at 19

⁵⁰ Satamedia CJEU, at 59

to extend the media protection to anyone engaged in a journalistic activity, and fairly independently of the format or method of communication, as the CJEU finds it important to take into account that the various and far-ranging methods of communication today may well be exemplary tools in the intermediaries' performance of their role.⁵¹

An interesting aside in the *Satamedia* cases is that this is the kind of case which in an age of big data and broader access to government data could occur much more frequently in the future. Indeed, the journalistic parties argued before the ECtHR that by sheer dint of size their infraction on article 8's protection of private life was lessened, as it increased anonymity. The ECtHR did not follow this reasoning, seeming to decide instead that the size and the fact that the big data format chosen by the paper facilitated combing through it and identifying specific individuals made it suitable for voyeurism. One can wonder whether this precedent would pose problems for the envisaged data intermediaries.

The differences between both European courts on intermediaries and economics are visible in other cases on information, too.⁵² In *Lindqvist*, the AG posited that the Directive (which was the same Directive as still applicable in *Satamedia*) should not apply to a certain behaviour because it was not an economic activity – Lindqvist had published personal data in the course of her volunteer work at the Swedish church.⁵³ The CJEU did not follow this reasoning, hinging the case instead on the principle of proportionality in light of a broad scope directive.⁵⁴ In the Google cases, it balances the economic interest of the intermediary, in this case Google, against the interest of privacy of those concerned. The AG in the most recent Google case has suggested that these cases should have more actively referred to article 11 of the Charter and the freedom of expression, to show the balancing of two fundamental rights. This would let the CJEU mirror the line of cases set out above by the ECtHR. Clearly, an economic interest which the open data narrative often presumes on the part of their data intermediaries would be strengthened by the courts if it did not exclude a link to the freedom of expression or to the public interest.

The broad understanding of intermediaries word is further highlighted in *Buivids*, where Buivids had recorded a video of police officials questioning him on an administrative matter and put it up on Youtube. The AG referenced the ECtHR's stance in *Magyar Helsinki*, arguing that whether someone is engaging in an activity for journalistic purposes hinges on the purpose of the person at the time and is independent of their official status.⁵⁵ The CJEU followed suit.⁵⁶ Whether

⁵¹ *Ibid*, at 60

⁵² These are not government information cases. Nevertheless, they seem to inspire government information cases, as can be seen in the citations.

⁵³ See AG Tizzano's opinion on the Lindqvist case, 19 september 2002

⁵⁴ Lindqvist, at 89

⁵⁵ AG Sharpston, opinion on Buivids, 27 september, 201852-53

⁵⁶ Buivids, at 55

the ECtHR would be willing to go this far in the right of information under the Convention, however, can be questioned: the entire line of argumentation about the duties and responsibilities of an intermediary is nearly negated by such a broad interpretation.

In *Buivids*, too, the form of the information provision, an upload on Youtube, was not a problem for the CJEU in allowing for the possibility of this serving a journalistic purpose, as ‘account had to be taken of the evolution and proliferation of methods of communication and the dissemination of information’.⁵⁷ In fact, both courts seem desirous of remaining attuned to the possibilities that the internet and technologies provide for intermediaries in facilitating their contribution to a public debate in a democratic society.⁵⁸ The CJEU however seems less to feel that intermediaries are *necessary* and tasked with the imparting of information in this world. Perhaps in line with the EU policies in transparency and data’s economic value, it still seems to uphold the notion that more information is generally better until it runs into data protection law.

1.3 Dutch Administrative Law

The Dutch Administrative Jurisdiction Section of the Council of State (Council) complies, as indeed it must, with both the ECtHR’s case law and the Convention, as well as the CJEU and the regulations and directives of the European Union. Moreover, it has the Dutch freedom of information act to contend with, as well as the reuse laws. Under both of these, access to government information is provided to ‘anyone’, not just intermediaries. A significant difference is that the reuse directive applies solely to information that is already public and is also heavily attuned to the economic value of this information,⁵⁹ which can be seen in its requirements on the open access format in which information should be provided. Moreover, one of its goals is to stimulate innovation,⁶⁰ thus targeting producers rather than consumers of information. In the language of this paper, it targets the intermediary rather than the citizen.

In light of a law that provides government information to anyone, without the need to state a purpose for wanting the information, the Council has proven decidedly unwilling to give intermediaries a layer of access that the citizen as such does not have. In general, if information cannot be obtained under the Dutch FOIA, article 10 ECHR will not mitigate this problem. This is because the Council holds that the exclusion grounds of the FOIA are in principle compliant with

⁵⁷ *Ibid*, at 53

⁵⁸ *Ibid*, at 57; ECtHR *Magyar Jeti*, at 73

⁵⁹ See e.g. B. Van der Sloot, ‘Van openbaarheid naar hergebruik van overheidsinformatie: of een vaarwel aan het sociaal contract’, *Nederlands Juristenblad*, 36, 2537-2543, 2015, in which the author suggests that the laws have these fundamentally different approaches

⁶⁰ PSI Directive cons. 3

the Convention, providing for a legal and legitimate ground to refuse access to information.⁶¹ It is not impossible for intermediaries to gain more access via 10 ECHR, however, if they show that circumstances are such that there is more than a usual importance of public interest to the cases, more than the FOIA article 10 and 11 tests usually take into account.⁶² This means that, unlike for the FOIA, the intermediary in question will have to state a purpose and demonstrate that in light of this purpose the balancing test in the FOIA constitutes an unwarranted interference. Unsurprisingly, this has not happened as of date.

When it comes to the question of whom this intermediary can be, the Council has duly accepted that journalists and NGO's can be social watchdogs and get an article 10 Convention right.⁶³ It has so far refused to accept that interested individuals may fulfil this role as well.⁶⁴ Clearly, this is not necessarily a problem in light of the FOIA and Reuse provisions that allow for anyone to get access to government information in principle, because generally, it means that anyone, not exclusively intermediaries, still will have access granted in most cases, and there will only be very few at the moment hypothetical cases where the intermediaries could acquire what the individuals will not.

However, there is one slight problem with intermediaries in the Council's caselaw under both the FOIA and the Reuse legislation, which occurs in light of the protection the Council grants government bodies against abuse. An established line of argumentation under the FOIA is that it does not matter, when a request is made for government information, who the requester is or what their purpose is, unless either of these or both seem to point to abuse.⁶⁵ This concept of abuse has been transplanted into the Reuse law.⁶⁶ A reason to assume abuse, in the context of other indications, seems to be that a requester has hired a third party to handle the proceedings for them. This is not a problem if a further criterion is that this party has a history of FOIA abuse, but it is a fine line, as intermediaries may find themselves quickly in that third party position. That would be problematic especially if the assumption about intermediaries indeed is that they are necessary to make sense of a big, messy, information-filled world. This is further worsened by the fact that the size and complexity of the request may also be indications of abuse.

⁶¹ ABRvS 25 oktober 2017, ECLI:NL:RVS:2017:2883, 12.2

⁶² ABRvS 12 september 2018, ECLI:NL:RVS:2018:2988, 17.2

⁶³ Ibid.

⁶⁴ ABRvS 18 juli 2018, ECLI:NL:RVS:2018:2427, at 6

⁶⁵ ABRvS 3 oktober 2018, ECLI:NL:RVS:2018:3147, at 4.4.

⁶⁶ C. Wolswinkel and A. Balvert, Annotation of the case of the 3rd of October 2018, 1 Mediaforum, (2019), at 23-26

2. The courts' approach queried

In this chapter we put forward a sympathetic rendering⁶⁷ of the arguments encountered in the previously discussed cases. If our analysis is appealing, we will end up with several argumentative models that can be inferred from the analysed judgments, which will allow for comparison and evaluation of the strength of the identified positions. This allows us, in the very end, to link these conclusions to the issue we initially started with: the role of intermediaries in Dutch open data policy.

2.1 The ECtHR

In the analysed judgments of the ECtHR, intermediaries seem to have been granted a special function. On the one hand intermediaries are considered⁶⁷ to be more effective media through which governments can disseminate information to the public. On the other hand the court also bestows the duty and responsibility on intermediaries to contribute to the public debate via the communication of publicly relevant information. Regardless of whether one engages in a purely functionalist or a more prescriptive reading of these judgments, the overarching aim of information dissemination according to the ECtHR is to stimulate the public debate. The public debate is understood as an important good which can be improved upon by communicating information to specific actors in society. It is, finally, important to note that the court seems to equate intermediaries and social/public watchdogs.

How, then, should we understand these arguments? In what way could the roles ascribed to intermediaries be justified? On the basis of the arguments found of the analysed judgments, we believe that there are two models, or approximations of these models, at work. The first one is an amended version of the marketplace of ideas. Secondly, based on the more prescriptive elements found in the ECtHR's reasoning, there are elements of a theory of the public sphere.

The idea of the marketplace of ideas can be traced back to the works of John Milton and John Stuart Mill, and eventually found its way into American jurisprudence in the early twentieth century. In 1919, Justice Holmes proclaimed that "the best test of truth is the power of thought to get itself accepted in the competition of the market".⁶⁸ The doctrine of the marketplace of ideas presupposes that the filtering mechanisms of the market will gradually replace bad ideas for their better counterparts. Governments should therefore not concern themselves with policies that

⁶⁷ Put differently, we apply the 'principle of charity' to the court's arguments.

⁶⁸ As quoted and introduced by S. Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1 *Duke Law Journal* (1984), at 3

prevent citizens from distributing ideas, or with acts of censorship of the press for the reason that any censored opinion might be (partly) true, or would lose its capacity to challenge dogmas prevalent in society.⁶⁹ Citizens within the theory are assumed to be perfectly capable to find and process information, and after rational consultation with themselves or their neighbours, communicate their conclusions back to the market, which will eventually be the place where politicians and policy-makers will look for the best solutions for society's problems.⁷⁰

Within the theory of the marketplace of ideas, freedoms of speech and press are of utmost importance.⁷¹ Limiting one of these freedoms amounts to a disruption of the functioning of the market, resulting in a decrease of the quality of the knowledge produced. But what does this doctrine have to do with judgments and policies that seem to disrupt the marketplace of ideas by only communicating information to a particular category of citizens? Wouldn't it be better if the government would let the market decide what's an epistemologically good or bad idea? The answer lies in the instrumentalist character of the theory: it assumes that the market fulfils a certain function better than other institutions (namely: tracking the truth), and since these institutions are but instruments which allow us to arrive at the important value of true belief,⁷² they can when malfunctioning be replaced by something else. This is simultaneously the objection to the argument that censorship is always problematic, and also the intuition guiding the idea that certain actors in society might have the capacity to increase the market's truth-tracking potential, by acting like a filter, watchdog, or gatekeeper.⁷³ These intermediaries might thus increase the epistemic quality of the products produced in the marketplace of ideas, and can precisely for this reason, be given a preferential treatment when communicating information as a government.

A second way of phrasing this argument, is the following. If one believes in the importance of not only the free flow of ideas in society, but also in the equal access of citizens to these ideas, and equal opportunities to communicate ideas, one can argue that disseminating information to particular groups in society equalizes everyone's access and communicative opportunities.⁷⁴ A hypothetical example would be the situation where open data would only reach a particular audience (developers, civil servants), and not *all* players in the marketplace of ideas. To make sure that everyone is able to access these files, test their truthfulness, and produce solutions for societal

⁶⁹ D. Brink, 'Mill's Moral and Political Philosophy', *Stanford Encyclopaedia of Philosophy*, 2018, <https://plato.stanford.edu/entries/mill-moral-political/>

⁷⁰ There are some (obvious) problems with the ideas as it currently stands (Brink, *supra* 69), and we will come back to some of these below. See also S. Rosenfeld, *Democracy and Truth: A Short History*, University of Pennsylvania Press, 2019

⁷¹ A. J. Nieuwenhuis, *Over de Grens van de Vrijheid van Meningsuiting*, *Ars Aequi Libri*, 2015, at 28

⁷² Brink, *supra* 69, at 67

⁷³ P. J. Shoemaker and T. P. Vos, *Gatekeeping Theory*, Routledge, 2009; B. Franklin et al., *Key Concepts in Journalism Studies*, SAGE, 2005, at 273

⁷⁴ Ingber, *supra* 68, at 51

problems, one can as a government disseminate the data to a particular organization that processes and communicates the publicly relevant information to a larger, or more specific, audience.

But the ECtHR's judgments also include prescriptive elements that cannot be related to the marketplace doctrine. These, rather, suggest the implicit usage of a theory about the public sphere. In 1962, Jürgen Habermas published *The Structural Transformation of the Public Sphere* introducing the idea of the public sphere.⁷⁵ Though it remains relatively ambiguous what exactly the status of the public sphere in the book was,⁷⁶ for our purposes it is sufficient to note that this is the realm, separated from state and market, where public debate takes place, and public opinion is constituted.⁷⁷ Historically the public sphere was brought into existence the moment collectives of private citizens started to discuss matters of societal interest.⁷⁸ People met in coffee houses, and salons and considered themselves as equals in comparison to the entity that was the object of their critical discussion: the state.⁷⁹ The realm they thereby constituted⁸⁰ formed the metaphorical space onto which the principle of supervision could establish itself.⁸¹ This principle confronted the conventional power hierarchy between the state and society, by demanding a different form of publicness, or openness from the administration. The state's apparatus should be susceptible to critical interrogation by those interested in its functioning, and also be open to revision or change if the public opinion emerging from the debates in the public sphere would make this demand.⁸²

But what would the role of 'intermediaries' like journalists and publishers be in this classic public sphere model? According to Habermas, the emergence and increase in quantity of both the trade in commodities and news around the 15th century ought to be understood as the necessary precondition for the establishment of the public sphere.⁸³ These developments broke down the dominant feudal structures, intensified long-distance trade, and because of that also generated an interest in trade-related news. And due to the competitive advantages that news consummation brought about, news even began to develop into a commodity itself.⁸⁴ Market and public sphere

⁷⁵ J. Habermas, *The Structural Transformations of the Public Sphere*, Polity, Polity Press, 1989 [1962], at 220

⁷⁶ See several chapters in C. Calhoun (ed.), *Habermas and the Public Sphere*, MIT Press, 1992

⁷⁷ J. Habermas, *The Public Sphere: An Encyclopedia Article*, 3 *New German Critique* 49-55 (1974 [1964]), at 49; J. Habermas, *Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research*, 16 *Communication Theory* 411-426 (2006), at 415-416; J. Habermas, *Between Facts and Norms*, Polity, 1996 [1992], at 360, 373

⁷⁸ Habermas, *supra* 74, at 27

⁷⁹ *Ibid.*, at 35

⁸⁰ Habermas, 1996, *supra* 76, at 362

⁸¹ Habermas, 1974, *supra* 76, at 52

⁸² Habermas, 2006, *supra* 76, at 415; Habermas, *supra* 77, at 83

⁸³ Habermas, 1989, *supra* 77, at 14-15, 74

⁸⁴ *Ibid.*, at 21

developed themselves simultaneously, and were also strongly dependent upon each other's functioning.

The press, as an intermediary between market and private citizens engaged in the rational-critical debate in the public sphere, was primarily concerned with the amplification and transmission of that debate.⁸⁵ Over the centuries, this function of the press slowly but steadily changed and developed from a seller of news into a producer of public opinion.⁸⁶ Newspapers, in this context, also started to publish commentaries and opinions, and by doing so, adopted more critical attitudes towards the political authorities.⁸⁷ While they thereby broadened the scope of activities wherein they were engaged, they did not yet, according to Habermas, endanger the autonomous functioning of the public sphere. The press was still in the hands of private individuals who were able to make money out of the selling of news and opinion, without commercializing the character of the latter too much.

As said, Habermas was not very clear about the actual status of his analysis of the public sphere in his 1962 work. This changed over the years and cumulated in his 1992 work on the interactions between law and democracy. The theory of democracy and law that he puts forward in *Between Facts and Norms* incorporates clear prescriptive elements based on values like autonomy, freedom, and legitimacy.⁸⁸ This is also reflected in Habermas' discussion of the role of the press. Because of the significant capacities of journalists, publishers, and others, to collect, select, and communicate information, Habermas ascribes a specific type of power to these intermediaries: media power.⁸⁹ And because of this special form of power, and the impact that accompanies it, normative and legal limitations are appropriate according to Habermas and these can be summarized in the following way:

“(...) the mass media ought to understand themselves as the mandatary of an enlightened public whose willingness to learn and capacity for criticism they at once presuppose, demand, and reinforce; like the judiciary, they ought to preserve their independence from political and social pressure; they ought to be receptive to the public's concerns and proposals, take up these issues and contributions impartially, augment criticisms, and confront the political process with articulate demands for legitimation.”⁹⁰

There are, if we follow Habermas' argument, certain normative criteria specific to the role and function of intermediaries who go far beyond the task of selecting and communication

⁸⁵ Ibid., at 188

⁸⁶ Habermas, supra 80, at 53. Note that public opinion is not synonymous with the results of opinion polls, Habermas, supra 79, at 362; Habermas, 2006, supra 76, at 417

⁸⁷ Habermas, supra 80, at 53; Habermas, supra 84, at 181-182

⁸⁸ See for the meta-ethical foundation of discourse ethics (the type of ethics central in *Between Facts and Norms*), J. Habermas, *Moral Consciousness and Communicative Action*, MIT Press, 1995 [1983]; A. Abizadeh, *In Defense of the Universalization Principle in Discourse Ethics*, 36:2 *The Philosophical Forum* 193-211 (2005)

⁸⁹ Habermas, supra 84, at 376; Habermas, supra 76, at 419

⁹⁰ Habermas, supra 88, at 378

information. The emphasis on duties and responsibilities by the ECtHR can be explained when understanding their arguments from within a public sphere-type of model. Intermediaries, because of their special role as facilitators and co-creators of public opinion, have these functionally specific tasks, which can also be demanded of them.

2.2 The CJEU

The CJEU emphasized transparency and economic value and put forward an interrelated and broad conception of intermediaries. This reduces the chance that it upholds a strong functionalist idea about the value of intermediaries and strengthens our intuition that some form of a marketplace model is buried in the argumentative structure of CJEU's judgments. We find one particular strand of thinking within the history of open data movements and policies illuminating in this regard. In his first attempt of writing a genealogy of open data, Jonathan Gray traces the debates on openness, transparency, and governmental data dissemination back to the nineties, and argues that from the start arguments about the economic potential of data publication were prevalent.⁹¹ One of the influential ideas Gray discusses in his genealogy is that of the government as platform. O'Reilly defends the view that governments should limit themselves to merely providing for an infrastructure onto which private parties would be able to build economically viable products.⁹² The publishing of data in an open format could be understood as such an infrastructure. It is important to consider the emphasis on transparency, combined with a broad conception of informational intermediaries found in CJEU judgments. This allows governments to disseminate information to a large variety of actors, which allows them to subsequently process and possibly economize the information received.

Information in the government as platform model is considered to be an economic resource, rather than a public good. The value guiding this line of thinking can therefore not be of epistemic, political, or legal nature. A very shallow interpretation of the model would be that it is aimed at strengthening of the economy—whatever one's definition. But there is also a slightly more substantive reading possible. Following Gray in this respect, a different but related strand of open data-discourse focuses not merely upon stimulating the economy, but also emphasizes the importance of government efficiency and the saving of costs linked to an increase of

⁹¹ J. Gray, *Towards a Genealogy of Open Data* (September 3, 2014). <https://ssrn.com/abstract=2605828> or <http://dx.doi.org/10.2139/ssrn.2605828> paper

⁹² Gray, *supra* 90, at 10; T. O'Reilly, *Government as Platform*, 6:1 *Innovations* (2010); see for a critical analysis of O'Reilly's activities Morozov, E. (2014, April 8). *The Meme Hustler*, 22 *The Baffler* (2014). Retrieved from <https://thebaffler.com/salvos/the-meme-hustler>

transparency.⁹³ Governments that merely provide the market with data/information would, in this model, be able to outsource services to private parties, which, due to market competition, are incentivised to produce services of higher quality than the government would be able to provide for.⁹⁴ This would amount to a decrease of the size of the government, which is a good thing, because the market can solve the majority of society's problems more efficiently anyway. In the case of the CJEU (and indeed that of the ECtHR) it might also be a handy way of avoiding questions on legitimacy and overzealous international regulation and adjudication, while still ensuring the desired effect, of information getting to people.⁹⁵

In line with this tendency to see information as an economic resource rather than a public good, the CJEU's case law is moreover the purest manifestation of the idea that more information is (virtually) always better. This can be seen in the CJEU's tendency to recognise a very broad scope of potential information intermediaries, namely all who seek to bring some matter of public interest to the public's attention as seen in *Buivids*. It is also clear in its equally broad understanding of seeking to bring some matter to the public's attention, which is so long as any part of the information is provided with the goal of contributing to a public debate as seen in *Satamedia*. The CJEU also holds this line unless the information infringes upon people's personal right to privacy and is both of a sensitive nature and for some reason 'wrong', for example if it is outdated, as it was in *Google Spain*. In other words, this concerns information that the CJEU regards as not or no longer *valuable*: by basing decisions on this information, overall utility would decrease.⁹⁶ In this line of thought, valuable information cannot be overprovided, and there is no such thing as too much transparency. Without it clashing with another value, such as in *Volker*, there is no reason to want less information.

2.3 The Council

In theory the Dutch court distinguishes between watchdogs and 'normal' citizens in line with the ECtHR's case law, where a broader right to information than the Dutch FOIA provides can be

⁹³ Gray, *supra* 91, at 14

⁹⁴ *Ibid*, at 15

⁹⁵ While it is not too difficult to connect the plea for a government as platform to austerity measurements, it is hard to read this latter discourse into the CJEU's judgments. While it might be (politically) advantageous to not explicate the 'true' reasons behind the transparency and intermediary arguments, we prefer at this moment to stick to the texts themselves and understand the CJEU's arguments primarily within the context of O'Reilly's government as platform model.

⁹⁶ It bears pointing out that law and economics tends to suggest that that does not mean that the information should be removed. If 'stupid' people want to make use of it and thus decrease their utility, they will underperform on the market, other more rational actors will overtake and the problem will solve itself. See e.g. R. A. Posner, *The Right of Privacy*, 12:3 *Georgia Law Review* 393-422 (1977)

extended to a watchdog intermediary. In practice, however, they did not find any situation which legitimized a preferential treatment of watchdogs when disseminating information. Information is distributed to everyone, or no one.

How should we understand this line of reasoning? The idea that information should be accessible to everyone, regardless of one's status, function, or motives, can be understood in at least two different ways. We could firstly interpret it as an operationalization of a marketplace of ideas theory. Governments should not differentiate between citizens when communicating information because that amounts to censoring which is problematic because, among other reasons, it would inadvertently strengthen the informational dominance of one particular party. Based on the Council's judgments, it is unfortunately not clear why this is of importance in the end. Does the equal access to governmental information foster public debate? Or should information be understood as an economic resource to which everyone should have equal access?

The character of the court itself might give us some hints for where to look for a more substantive interpretation of its reasoning. The Council as an administrative law court is concerned with the protection of citizens against governmental infringements of their freedom. How could information dissemination be related to such a task? One answer to this question is that an increase in access to information about the governments' functioning amounts to an increase in citizens' capacity to control and ultimately influence the (democratically) self-imposed limitations of their freedom. An increase in knowledge about the coercive actor (the state) would in other words increase citizens' self-legitimizing capacities. The Council also seeks to ensure maintained trust in the administration, which means that providing information allows for less of an information asymmetry between agent and principal as set out above. This could be undercut, in the view of the Council, by an accentuation on the intermediary role, because then the principal has to trust *another* agent instead. In the ECtHR case law, access to government information was controversial, because it was not granted explicitly by the Convention. In the Council's case law, access to government information is in principle given.

At the same time, the Council perhaps more than the other two courts is constantly engaged in ensuring, aside from protection of the citizens' rights, also the possibility for the administration to perform their duties effectively, and the laws with which it primarily deals in the context of information provision have a long and notorious history of abuse. The Council's work may thus be influenced more than the other two courts by the moments where the marketplace of ideas nor the public sphere really truly work, because people do not act in the public interest but rather in a self-interested manner or because people do not accurately value the information they request. This possible 'deterioration' will be discussed further in the next chapter.

3. Discussion

In the previous chapters we analysed judgments from several legal systems that have to do with the roles and functioning of informational intermediaries. We put forward several interpretations of these judgments which allowed for easier comparison of the arguments presented by the courts, and in this chapter, their evaluation.

3.1 The participating citizen

Two of the models we ascribed to the courts' judgments imply and necessitate a certain uptake, or participatory effort by and of the public. The marketplace of ideas model assumes citizens' capacities to process and communicate information that is distributed to the market (whether or not via intermediaries). The public sphere model presupposes that citizens are capable of rationally discussing the information received.

A moral objection to this strand of thinking would be to argue that the participation of individual citizens is irrelevant for democracy's functioning. The role of citizens is not to form a public opinion and to control the government on the basis of information about its functioning. Its role is to decide who will govern,⁹⁷ not necessarily who and under what circumstances this should be done.⁹⁸ From such an elitist conception of democracy the participatory capabilities of citizens are of lower importance than the preferential treatment of informational intermediaries, who with their newly acquired powers have more of a say in the government's functioning.

An easy response to this argument is that it *does* matter that individual citizens act and participate politically. Such a response would then have to refer to the infringement upon important values like freedom, autonomy, and justice that the elitist understanding of democracy would entail.⁹⁹ Assuming for the sake of the argument that this objection to this moral objection convinces, some other, *empirical* challenges need to be answered as well.¹⁰⁰ These challenges revolve around the functioning of several key actors within the ideal of the participatory citizen.

⁹⁷ Governing ought to be understood quite broadly here so as to also include those groups of experts and intermediaries that have an influence on the formal decision-making process. See, e.g., Marres, *The Issues deserve more Credit: Pragmatist Contributions to the Study of Public Involvement in Controversy*, 37:5 *Social Studies of Science* 759-780 (2007), at 766.

⁹⁸ J. A. Schumpeter, *Capitalism, Socialism and Democracy*, Unwin University Books, 1974, at chapter XXII; J. E. Green, *The Eyes of the People*, Oxford University Press, 2011. See also H. Dijstelbloem, *Het Huis van Argus: de Wakende Blik in de Democratie, Boom*, 2016, at 62-63. And for Walter Lippmann's interpretation of elitists democracy, see Marres, *supra* 96

⁹⁹ Dijstelbloem responds similarly to Green's 'plebiscitarian' model, Dijstelbloem, *supra* 97, at 68-69.

¹⁰⁰ Compare B. Williams, *In the Beginning was the Deed*, Princeton University Press, 2005, at chapter 13

These are: the governments themselves, the role of intermediaries (like the press), and again, that of citizens.

3.2 The participating government

In cases of government information, government bodies are by default the collector of the data, but there is some disagreement about whether their role should extend beyond that. This disagreement generally hinges upon the question of what one believes the government should do and/or should be capable of. Some feel that governments should interfere with the data as little as possible, not performing any tasks that the market might provide as well.¹⁰¹ This notion can be linked to the idea that government meddling could constitute a problem for either the marketplace of ideas or the public sphere all by itself. Until it releases the information and pulls its hands off it, government has a monopoly position regarding the information, which is anathema to a marketplace of ideas; and by stylising the communication of information, the government could be said to take charge of the public sphere which should really be done by citizens themselves. On the other hand, there are those that feel that it is the government's responsibility to ensure that information is equally accessible to all, to make sure that no one is left behind or excluded. If the government does not, the marketplace of ideas or the public sphere risk capture.¹⁰²

Empirically, of course, governments do have certain limitations, for example from being made up of many actors with different incentives and possibly inaccurate assessments of risks and goals of data communication.¹⁰³ And it can be questioned if governments currently have the skills to accurately communicate a message to all in a citizen-friendly manner. It depends, however, on one's moral view on the role of government whether one thinks that these skills *should* be acquired, or whether it means that they need to step aside.

3.3 The participating intermediary

But even if we would be able to manage and improve upon governments' capacity to effectively process and accommodate the input of citizens in respectively the marketplace of ideas, and the

¹⁰¹ Gray, *supra* 93, at 10 and on.

¹⁰² See e.g. W. E. Wagner, Administrative Law, Filter Failure, and Information Capture, 59 *Duke Law Journal* 1321-1432 (2010)

¹⁰³ K. Viscusi and T. Gayer, Behavioral Public Choice: The Behavioural Paradox of Government Policy, 38:3 *Harvard Journal of Law & Public Policy* 973-1007 (2010)

public sphere, scholars are still worried about the functioning of a group of key actors present in both of these spheres: intermediaries, like journalists and watchdogs. Habermas was one of the first to lament the intermediaries' functioning in the public sphere. In the last chapters of *The Structural Transformation* he describes the growing influence of individual interests onto the establishment of public opinion. Whereas in the past, the press functioned as a facilitator of the debate that took place between citizens when they met in their salons and cafes, it now also began to determine the debate itself.¹⁰⁴ Instead of the rational-critical debate that is often considered to be of huge importance for a well-functioning public sphere, citizens gradually transformed into consumers of products devoid of 'culture', and which were "emptied of elements whose appreciation required a certain amount of training".¹⁰⁵ While we have our reservations about Habermas' analysis that intermediaries did function like that in the past,¹⁰⁶ it is undeniable that media have developed into more than a 'mere' fourth power.¹⁰⁷ From the commercialization of public opinion and debate, informational intermediaries changed their business models and now even target our attention.¹⁰⁸ "The problem," as Neil Postman writes, "does not reside in what people watch. The problem is in that we watch."¹⁰⁹

In the two models under consideration here, intermediaries play an important role in redistributing governmental information as a means to improve the epistemic status of the debate, or the validity of public opinion. If we ought to believe the relatively pessimistic stories told by authors such as Tim Wu and Postman, media transformed from 'mere' intermediaries into institutions with a significant impact on the communicative processes in the market, and the public sphere. Theorists about the roles and functions of intermediaries in communicative processes that take place between governments and citizens should acknowledge these developments, and reconsider the naive belief that intermediaries only act like an informational sieve.

¹⁰⁴ Habermas, *supra* 84, at 188

¹⁰⁵ *Ibid.*, at 166, 161

¹⁰⁶ See again several critical contributions in Calhoun (ed.), 1992, and in specific Nicholas Garnham's. Garnham criticizes the implicit assumption of face-to-face communication present in both Habermas' public sphere, and Mill's marketplace models, N. Garnham, 'The Media and the Public Sphere', C. Calhoun (ed.), *Habermas and the Public Sphere*, 359-376, MIT Press, 1992

¹⁰⁷ J. Keane, *Democracy and Media Decadence*, Cambridge University Press, 2013

¹⁰⁸ T. Wu, *The Attention Merchants*, Alfred A. Knopf, 2016

¹⁰⁹ N. Postman, *Amusing Ourselves to Death: Public Discourse in the Age of Show Business*, Viking Penguin, 1985, 160

3.4 The citizen as watchdog

But if we assume for the moment that both governments and intermediaries function in a satisfactory way, then we are left with the capacity and motivation of our final category of participants, namely, the citizen itself. To what extent can s/he process the information communicated by governments into something valuable? We already discussed several scholars who are sceptical about this idea, and who for that reason prefer to opt for more elitist (or maybe technocratic) conceptions of collective self-rule.¹¹⁰ Individuals, according to these authors, are simply incapable of acting like the ideal participant of the political game. Citizens don't have clearly defined interests that inform the decisions they make on the market, nor do they have a will that can be aggregated into a 'common will', and which can function as input for the political decision-making process.

While there is research that attempts to evaluate the capacity of citizens to collectively arrive at rational conclusions in a democratically valid manner,¹¹¹ its focus primarily seems to be on small-scale democratic initiatives ('mini-publics'), while the scope of the issue we deal with in this paper is on the market or public sphere as a whole. Citizen participation in relation to the issue of informational intermediaries is an even more complicated problem.¹¹²

We have discussed several moral and empirical challenges to the implicit assumption that information dissemination by governments requires a certain social uptake by citizens. But what if this assumption in itself is defective? What if we would respond to these challenges in a different way, by redefining our notion of participation? Dijstelbloem argues that our conventional notion of political participation is too limited.¹¹³ Citizens, he writes, are indeed according to this idea passive, and uninformed. But that does not mean that they do not act in a politically relevant manner. Instead of the understanding citizen participation in its conventional *verbal* sense, he argues that we should also acknowledge its *ocular* dimensions. Citizens, by simply watching, survey and control the government. This ocular conception of democratic participation ties in with what Pierre Rosanvallon calls 'counter-democracy'.¹¹⁴ Citizens and organizations have the capacity to survey the government and by doing so act like watchdogs *themselves*. This is often understood as

¹¹⁰ Again, if true belief is so important, why not opt for a philosopher's king censoring the debate? Brink, *supra* 71

¹¹¹ Habermas, 2006, *supra* 76, at 420. And e.g. B. Ackerman and J. Fishkin, *Deliberation Day*, 10:2 *Journal of Political Philosophy* 129-152 (2002); B. Geissel and K. Newton, *Evaluating Democratic Innovations: Curing the Democratic Malaise?*, Routledge, 2012; J. S. Dryzek, *Foundations and Frontiers of Deliberative Governance*, Oxford University Press, 2010.

¹¹² Keane, *supra* 106, at chapter 1.

¹¹³ Dijstelbloem, *supra* 104, 189. Dijstelbloem draws here also from the work of amongst others Jeffrey Green, Pierre Rosanvallon, and John Keane.

¹¹⁴ P. Rosanvallon, *Counter-Democracy*, Cambridge University Press, 2008

a derivative of more active, *verbal* forms of political participation such as debate, deliberation and protest. Rosanvallon, by contrast, wants to argue that citizen participation is not in decline, but has changed in nature.¹¹⁵ This different form of counter-democracy (Rosanvallon) or ocular democracy (Dijstelbloem, Green) is the modern version of an idealized version of citizen participation that is no more. The people as watchdog, as our new participatory model of democracy.

Regardless of whether these recent attempts of redefining citizen participation by focusing on the monitory character of the citizen-government relationship are convincing, they do seem to correspond with our analysis of the Dutch administrative court. Precisely because citizens themselves should be able to judge the functioning of the government, the Council does not differentiate between intermediaries and citizens. There are no specific watchdogs. All Dutch citizens are. This all sounds very promising, but in the end again depends on whether citizens are capable of doing so. Even if one redefines participation in ocular rather than in verbal terms, citizens still require the capability to make sense of the data and information dissemination by the government. It is but an open question to what extent they are capable, or whether they might be needing a mediating agency, that pre-processes the data into something intelligible.

3.5 The participating market

So far we have been discussing the uptake of governmentally distributed data by a number of actors. One actor, however, remained undiscussed. This was the actor most noticeable within O'Reilly's government as platform model: the market. For O'Reilly the market in the form of companies working in the private sector is better suited to deal with society's collective problems than the state,¹¹⁶ and for that reason should be provided for with as much data as possible. The government, following this line of reasoning, has a duty to provide data in such a way that it not only improves its accountability, but more importantly, promotes the creation of innovative products and services.¹¹⁷ The uptake would be that the government itself would not have to provide these services anymore because the market actors would be able to offer them more efficiently instead.¹¹⁸

¹¹⁵ Rosanvallon, 2008, 19.

¹¹⁶ O'Reilly, *supra* 91, at 14.

¹¹⁷ *Ibid*, at 26: "Yes, it's a good think when government data is available so that journalists and watchdog groups like the Sunlight Foundation can disclose cost overruns in government projects or highlight the influence of lobbyists. But that's just the beginning. The magic of open data is that the same openness that enables transparency also enables innovation, as developers build applications that reuse government data in unexpected ways."

¹¹⁸ *Ibid*, at 31, 35.

What to make of this idea? An important argument at play within this model is that the market can solve societal problems in a more efficient way than the government. This is, firstly, an empirical issue. To what extent does the market solve our collective action problems more efficiently? O'Reilly himself puts forward the example of a group of residents of a Hawaiian island who repaired a road by themselves because they did not want to wait for the government to do so. They managed to perform their task with a large group of volunteers within eight days whereas it would have taken two years if they had waited for governmentally appointed construction workers.¹¹⁹ This is, of course, a very good story. Who would be against this sort of 'collective action'? The major problem is that it is not certain that there is a market-initiated initiative to be found for every governmental service.¹²⁰ There's no guarantee that particular services are really provided for by the market, and the implicit idea that citizens ought to receive a particular number of services carries our discussion from the empirical, to the moral realm.

Regardless of whether O'Reilly's theory works in practice, and whether the market really provides more and better services when supplied with governmental data, there are also some moral and political questions to be asked. Firstly, O'Reilly's ambiguous usage of the word 'openness', combined with a broadly understood notion of informational intermediary by the CJEU, allows one to present innovation as a politically neutral—because: technological—activity. Evgeny Morozov argues that the ambiguous usage of these concepts confuses ideals of 'transparency as accountability', with 'transparency as innovation'.¹²¹ This is not necessarily problematic. What *is* worrisome is that the latter ideal is parasitic upon the former and indirectly devours every political connotation we have with the idea of transparency (or openness).¹²² This has consequences for our ideas about participation, and in the end, for how to conceptualize the relationship between the governmental duty to publish data, and the rights of citizens to receive it.

If it is the case that the government as platform model stresses the acquisition of data, rather than the importance of governmentally facilitated services,¹²³ the idea that governments act in the public interest is also replaced by the idea that one distributes data for the sake of the interests of innovations.¹²⁴ Taking this reading to the extreme would imply that the right of citizens to certain minimal services provided for by the government would be replaced by the right of (a

¹¹⁹ Ibid, at 27

¹²⁰ See also Morozov, supra 91

¹²¹ Ibid.

¹²² See also Gray, supra 93, at 11

¹²³ Ibid., at 21

¹²⁴ Morozov, supra 120, at 11

particular group of) citizens to government data with which they can produce and sell their innovative products.

4. Concluding remarks

Chapter 3 analysed the arguments found in the argumentative models we attributed to the judgments of the three courts in chapter 2, to find out what role is allocated to intermediaries within the European legal context of governmental data-dissemination. We argued that each court uses (a) different idea(s) about the role of intermediaries, resulting in different argumentative models and related justifications for these presupposed roles. Interestingly, the function one ascribes to an intermediary is strongly related to one's view about the (ideal) relationships between government, citizen, and market. For example, the belief that citizens need information to perform their political duties as citizens could result in the view that intermediaries should not have a special role in the process of distributing governmental data. Is there anything to say about how the rights and duties of the various involved parties should be distributed? Answering this question will involve dealing with a large number of empirical issues, identified in chapter 3, which will necessitate further empirical research.

For now, based on our sketch of the various moral considerations in play, we consider it of great importance to not lose sight of the political dimension of information dissemination by governments. The communication of data by government is an inherently political process that can and should not to be reduced to the productivity and efficiency of market actors. Efficiency as a morale for data dissemination has the tendency to lead to a nullification of primary rights of citizens to governmental services. Courts, however, have a tendency to start from a consideration of primary rights, which could serve to balance this out. Laws that facilitate the dissemination of data and information should take both of these functions into account, and explicitly decide who the audience should be, as well as which functions of these actors the law presupposes. If the intermediary is put in charge of providing the information to the government, this shifts responsibility as well as accountability away. Courts approach this issue in case law by holding intermediaries to account under high standards of conduct.

Essentially, to some extent, regardless of whether these services are performed efficiently or not, citizens should have certain and secure access to these services and be able to hold some party accountable if these facilities are unavailable. Put differently, a government is not to be reduced to a mere platform, to be expanded upon by private actors. A government is an inherently problematic and inescapable entity on which citizen, intermediary, but also market, depend in this information age.

References

ABIZADEH, A. In Defense of the Universalization Principle in Discourse Ethics, 36:2 The Philosophical Forum 193-211 (2005).

ACKERMAN, B. Ackerman; FISHKIN, J. Deliberation Day, 10:2 Journal of Political Philosophy 129-152 (2002).

ADVIES VAN DE Raad van het Openbaar Bestuur, Gij Zult Openbaar Maken: naar een Volwassen Omgang met Overheidsinformatie, 2012

BRINK, D. 'Mill's Moral and Political Philosophy', Stanford Encyclopaedia of Philosophy, 2018, <https://plato.stanford.edu/entries/mill-moral-political/>

BUIJZE, A. Transparency in the EU, PhD thesis Utrecht University, 2013.

CALHOUN, C. (Ed.), Habermas and the Public Sphere, MIT Press, 1992.

DIJSTELBLOEM, H. Het Huis van Argus: de Wakende Blik in de Democratie, Boom, 2016.

DRYZEK, J. S. Foundations and Frontiers of Deliberative Governance, Oxford University Press, 2010.

FRANKLIN, B. et al., Key Concepts in Journalism Studies, SAGE, 2005.

FRISSEN, P. Het Geheim van de Laatste Staat, Boom, 2016.

GARNHAM, N. 'The Media and the Public Sphere', C. Calhoun (ed.), Habermas and the Public Sphere, 359-376, MIT Press, 1992.

GEISSEL, B.; NEWTON, K. Evaluating Democratic Innovations: Curing the Democratic Malaise?, Routledge, 2012.

GRAY, J. Towards a Genealogy of Open Data (September 3, 2014). <https://ssrn.com/abstract=2605828> or <http://dx.doi.org/10.2139/ssrn.2605828> paper

GREEN, J. E. The Eyes of the People, Oxford University Press, 2011.

HABERMAS, J. Between Facts and Norms, Polity, 1996 [1992].

_____. Moral Consciousness and Communicative Action, MIT Press, 1995 [1983].

_____. Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research, 16 Communication Theory 411-426 (2006).

_____. The Public Sphere: An Encyclopedia Article, 3 New German Critique 49-55 (1974 [1964]).

_____. The Structural Transformations of the Public Sphere, Polity, Polity Press, 1989 [1962].

HOOG, De et al, Open Data, Open Gevolgen, NSOB, 2012.

INGBER, S. The Marketplace of Ideas: A Legitimizing Myth, 1 Duke Law Journal (1984).

JOHN, P. All Tools are Informational Now: How Information and Persuasion Define the Tools of Government, 2013, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2141382

KEANE, J. Democracy and Media Decadence, Cambridge University Press, 2013.

KITCHIN, R. The Data Revolution: Big Data, Open Data, Data Infrastructures and their Consequences, SAGE, 2014.

LINDSETH, P. Agents without Principals? Delegation in an Age of Diffuse and Fragmented Governance, 2006, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=605282

MARRES, The Issues deserve more Credit: Pragmatist Contributions to the Study of Public Involvement in Controversy, 37:5 Social Studies of Science 759-780 (2007).

MAYER-SCHONBERGER, V.; CUKIER, K. Big Data: A Revolution that will Transform how we Live, Work and Think, Mariner Books, 2013.

MOROZOV, E. (2014, April 8). The Meme Hustler, 22 The Baffler (2014). Retrieved from <https://thebaffler.com/salvos/the-meme-hustler>

NIEUWENHUIS, A. J. Over de Grens van de Vrijheid van Meningsuiting, Ars Aequi Libri, 2015.

O'REILLY, T. Government as Platform, 6:1 Innovations (2010).

POSNER, R. A. The Right of Privacy, 12:3 Georgia Law Review 393-422 (1977).

POSTMAN, N. Amusing Ourselves to Death: Public Discourse in the Age of Show Business, Viking Penguin, 1985.

ROSANVALLON, P. Counter-Democracy, Cambridge University Press, 2008.

ROSENFELD, S. Democracy and Truth: A Short History, University of Pennsylvania Press, 2019.

SCHUMPETER, J. A. Capitalism, Socialism and Democracy, Unwin University Books, 1974.

SCOTT, J. C. Seeing like a State: How certain Schemes to improve the Human Condition have failed, Yale University Press, 1998.

SHOEMAKER, P. J.; VOS, T. P. Gatekeeping Theory, Routledge, 2009.

SUNSTEIN, C.; THALER, R. Nudge: Improving Decisions About Health, Wealth and Happiness, Yale University Press, 2008.

TOM KUNZLER FROM the Open State Foundation, available at <https://ibestuur.nl/weblog/wie-neemt-er-regie-op-transparantie>

VAN DER SLOOT, B. 'Van openbaarheid naar hergebruik van overheidsinformatie: of een vaarwel aan het sociaal contract', *Nederlands Juristenblad*, 36, 2537-2543, 2015.

VAN EECHOUD, M. M. M. Een Uitgeversrecht voor Pluriforme Media?, 40(41)6(1) AMI : Tijdschrift voor Auteurs-, Media- & Informatierecht, 16-23 (2017).

VISCUSI, K. Viscusi; GAYER, T. Behavioral Public Choice: The Behavioural Paradox of Government Policy, 38:3 *Harvard Journal of Law & Public Policy* 973-1007 (2010).

WAGNER, W. E. Administrative Law, Filter Failure, and Information Capture, 59 *Duke Law Journal* 1321-1432 (2010).

WILLIAMS, B. *In the Beginning was the Deed*, Princeton University Press, 2005.

WOLSWINKEL, C.; BALVERT, A. Annotation of the case of the 3rd of October 2018, 1 *Mediaforum*, (2019).

WU, T. *The Attention Merchants*, Alfred A. Knopf, 2016.

.....

Annemarie Balvert

Annemarie Balvert completed a Research Master in Law at Tilburg University before starting on a PhD project on citizen-friendly datacommunication in administrative law. In her research she likes to take into account the international dimension and different disciplinary perspectives on administrative law and the project can be seen in the larger context of responsive administration and technology.

Gijs van Maanen

Gijs van Maanen is PhD Candidate at Tilburg University. He has a background in history and philosophy of political science (both at Leiden University, cum laude). His interests include, but are not limited to, democratic theory, deliberative democracy, political legitimacy, philosophy of immigration, feminist theory, and the philosophy of history. Currently, he is working on a project on the ethics of big data usage by governments and citizens, with as working title 'Disassembling the black box: a philosophical ethnography of open data policy in the Netherlands'.

.....

Enviado em: 31 de julho de 2019

Aprovado em: 24 de novembro de 2019