CHAPTER 3

Freedom of Thought as an International Human Right: Elements of a Theory of a Living Right

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Introduction

Only few political and philosophical notions match the grandeur of freedom of thought. With roots reaching at least to Roman times, it is perhaps *the* slogan of the Enlightenment; *sapere aude*, in Kant's famous phrase, having the courage to think for oneself rather than blindly believing authorities. Intimately related to freedom of speech, freedom of thought paves the way for liberal legal orders and the scientific method, for democracy and the disenchantment of the world. It thereby profoundly altered the *conditio humana*. In this sense, freedom of thought lies at the ground of modern societies.

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Freedom of thought is also one of the core human rights. Since its adoption in the Universal Declaration of Human Rights (UDHR, henceforth the "Declaration") in 1948 and the Covenant on Civil Political Rights (CCPR, "Covenant") in 1966, it has been reiterated in most major instruments. However, content and meaning of the right are not well-defined. Neither case law, nor substantive commentary from Committees, Councils, or Rapporteurs elaborate upon its scope and limits; not even legal scholarship devotes much attention to it. In fact, a single case at the international level in which it was the decisive issue is hard to locate—freedom of thought might well be the only human right without real application (Bublitz, 2014). This may surprise as interferences with it are well conceivable. For instance, the second half of the twentieth century saw bitter political ideological struggles over "men's minds." With the dawning of modern psychology in the early twentieth century, thoughts and thinking became the objects of systematic scientific study as well as targets of manifold attempts to modify them. Especially the shaping the public opinion has been at the fore since the days of Lippmann (2007) and Bernays (2005) a century ago. Today, entire subfields of psychology, psychiatry, and neuroscience seek ways to influence and alter how people think and act, and so do multibillion non-medical fields such as marketing. Human rights law acknowledges dangers to freedom of thought posed by severe practices associated with the former—"brainwashing," "reeducation," and "indoctrination"—but remains largely silent about the latter, even though—or perhaps because—many people are exposed to such stimuli on a daily basis, governments may resort to such means in a variety of contexts, and they stand in a latent tension with the idea of democracy (Paulo & Bublitz, 2016). While many of such influences may not rise to the level of seriousness of a violation of Articles 18 UDHR and CCPR, some well do. Identifying them requires a firmer understanding of the rights that oppose such influences. Freedom of thought is one of them. The time is ripe for a renaissance of the right in light of various challenges posed by psychology, psychiatry, and neuroscience today and in the near future.

Turning Articles 18 UDHR and CCPR into living rights requires a theory of freedom of thought. This chapter provides some material and several suggestions. To begin, different conceptions of freedom of thought are disambiguated and an overview of the norms in international covenants and treaties is presented, the focus of the chapter lies in Articles 18 UDHR and CCPR. Five explananda that every theory

of the right to freedom of thought must address are suggested. The second section lays out what is known and unknown about the right and points to several underexplored yet foundational problems: What do "freedom" and "thought" mean in the context of Art. 18, how do they relate to "belief," what interferes with the right? It discusses three relevant cases before the UN Human Rights Committee (HR Committee) and the European Court of Human Rights (ECtHR), as well as the meaning of "coercion" in Art. 18.2 CCPR. The third section submits suggestions for the construction of the right. It should protect *thoughts* and *thinking* against the imposition of duties over and punishment for thought, interferences with thought as well as revelations of thought. This should include, freedom of belief, widely understood, as a subform to which special rules apply. Elements for a taxonomy identifying impermissible inferences and a rough test for interferences with the right are suggested. Furthermore, tensions between different conceptions of freedom of thought can arise; some narrow exceptions to the categorical ban of interferences are suggested. The chapter concludes with reflections on the absolute nature of the right.

Meaning of the Right

Many Freedoms of Thought

At the outset, it is worth noting that several conceptions of freedom of thought need to be kept apart. In grand political proclamations and historical writings, freedom of thought often denotes, broadly and loosely, societal conditions conducive to the flourishing of free thinking, e.g., an open climate for discourse and exchange, freedom of speech and press, a marketplace of ideas that includes and tolerates diverse views; *freedom is the freedom of those who think differently*, in the words of the German socialist Rosa Luxemburg.[1] This broad sense of freedom of thought is alluded to when the European Union awards the Sakharov Prize for Freedom of Thought to human rights activists. By committing to freedom of thought, states may incur political and moral obligations to facilitate

[1] Similarly, Justice Holmes writes "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate" (*United States v. Schwimmer*, at 655, dissenting). For the history of the broad idea see Bury (1947), with respect to freedom of expression Waclawczyk (2019).

such societal and institutional conditions. However, these commitments do not straightforwardly translate into specific and operational legal claims of individuals that courts can apply and governments must observe.[2] Most western states can, by and large, claim to embrace this broader idea of freedom of thought. Nonetheless, they may regularly violate the more specific *legal right* of individuals. Therefore, when speaking about freedom of thought, one has to be precise as to whether one refers to a larger political-societal idea, to a moral or natural right, or to a distinct legal right. In the latter case, is a technical concept with peculiar features, embedded in, and constrained by several legal frameworks. As their parameters prefigure constructions, the right can only be interpreted in the context of a specific legal order. The broader political and philosophical ideas surrounding freedom of thought may become relevant within these confines as material inspiring and influencing interpretations.

Turning Articles 18 UDHR and CCPR into a living right not only requires transforming the political-philosophical idea into a legal right, but also transforming the abstract and general human right to the level of individual cases. This move from the universal to the particular is not a straightforward application of a right to a case since it presupposes intermediate interpretative steps. Courts can render rights more precise when deciding a concrete case, but they seem hesitant doing so, likely because the meaning of the right is too ambiguous or multi-layered. It should also be noted that lawmakers could (and possibly should) render the idea of freedom of thought more precise by domain-specific legislation. Thus, it is often impossible to deduce from first principles how a human or constitutional right applies to a particular case, as many context-specific considerations may come in. The main task for a theory of the right is sketching these transformative steps and putting their inherent normative considerations to discussion. This is the aim of the following.[3]

[2] And possibly other actors; the question of applicability of Art. 18 CCPR in the horizontal relation between citizens, either directly or indirectly via positive obligations of the state to protect freedom of thought against interferences by private actors, is left aside in this chapter.

[3] This may allow a remark on some recent suggestions invoking freedom of thought with respect to worries over influences on thoughts and opinions through online advertisement or breaches of data protection laws. Without doubt, some of those practice may violate the right to freedom of thought; however, many may not rise to the level of seriousness of a human rights violation and are better addressed by norms of ordinary positive law. Again, the broad idea of freedom of thought is implicated, but not necessarily the

The Landscape of Norms

To complicate matters, there are several legal rights to freedom of thought, often enumerated or implied in domestic Constitutions. In the United States, it has been argued that a right to freedom of thought might be implied by the First Amendment to the Constitution (Blitz, this volume). It would then inherit some of its features and hence not be an absolute, unconditionally protected right. The Preamble to the Indian Constitution proclaims ensuring "liberty of thought" as one of the aims of the Constitution. In German Constitutional law, freedom of thought is considered as implied in the right to human dignity pursuant to Art. 1.1 Basic Law (BVerfG 1989, at 40, dissenting opinion). It is thus an absolute right, sometimes not even waivable by rightholders. These examples demonstrate that rights to freedom of thought may differ in relevant nuances; arguments from one jurisdiction might not generalize to others.

The present interest lies in the right in international human rights law. Even there, freedom of thought is codified in several norms, as it is enshrined in the core international and most regional human rights treaties. Its *urform* is Art. 18 UDHR:

> *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.*

The first aspect to note is that Art. 18 UDHR protects freedom of thought alongside its sisters, freedom of conscience and religion. They are often referred to in the singular, as one right or freedom. Although they are interconnected and overlapping, it is suggested to consider them as distinct freedoms as scopes and possible interferences might vary. Art. 9.1 of the European Convention on Human Rights (ECHR), Art. 10 of the European Charter of Fundamental Rights and Freedoms (ECFR),

human right. Inflating concerns is not conducive to the development of a persuasive and coherent human rights framework that, because of its nature, can only cover substantive and sufficiently clear cases. Nonetheless, given the lack of case-law, such scenarios may have heuristic value as they exemplify interferences.

Art. 22 of the Asean Human Rights Declaration (AHRD) more or less echo the wording of Art. 18 UDHR.[4]

Art. 18 CCPR slightly differs. Of its four paragraphs, the first two are relevant for present purposes:

> Art. 18.1: *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice […]*

The first paragraph is largely repetitive of Art. 18 UDHR. Apart from stylistic matters, the freedom "to have or adopt" replaced the freedom to "change" religion or belief. The main difference is the addition of a second paragraph outlawing coercion:

> Art. 18.2: *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. […]*

This formulation is mirrored, e.g., by Art. 1 of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (1981). The fact that Art. 18.2 CCPR specifies interferences raises two questions: Does Art. 18 UDHR *not* ban coercion, and is coercion the only type of interference, i.e., does its explicit mentioning rule out other infringements? Both pertain to the larger question whether the scope and protection provided by Art. 18 UDHR and its regional counterparts are identical to Art. 18 CCPR. The difference in wording would allow for a difference in construction.

The American Convention on Human Rights (ACHR, adopted 1969) is a slight exception as it protects the freedoms of conscience and religion without "thought" (Art. 12). Instead, it couples freedom of thought with free speech in the "right to freedom of thought and expression" (Art. 13). Freedom of expression is a separate right in Declaration and Covenant (Articles 19). The ACHR speaks of "thought" where the latter speak of "opinion." Nonetheless, this difference does not seem to be based on substantive considerations.

[4] Two exceptions: The African Charter of Human Rights, adopted in 1981, does not enumerate freedom of thought, only freedom of conscience and religion (Art. 8). The Arab Charter on Human Rights, adopted in 2004, protects "freedom of thought, conscience and religion" but allows for restrictions provided by law (Art. 30.1).

In the interest of coherence, it is suggested to avoid incompatible constructions of these rights and consider freedom of thought as the same right across instruments. Without further specification, the following discussion refers to the original norm, Art. 18 UDHR, but it should equally apply to its regional counterparts such as Art. 9 ECHR and to Art. 18 CCPR.

Scope of the Right

Key Features

The right possesses some salient features. The first is its two-sided structure: It comprises an *internal* side of thought, conscience, and religion (sometimes referred to as the *forum internum*), as well as an *external* side of actions manifesting thoughts, religious, or conscientious beliefs (*forum externum*). The *forum internum* is a metaphorical term for (parts of) the mind or a person's "inner space". Originally developed in the context of freedom of religion and conscience, it denotes the inner connection to, and space of dialogue with God as well as the "inner court" where sins are confessed, as in today's picture of conscience. The text of Art. 18 UDHR refers to the inner side in "change religion or belief," which is understood as the espousing or rejecting faith and, more generally, the forming, holding, and discarding of beliefs and unexpressed thoughts.[5]

The external side comprises actions in the world that manifest religious or conscientious beliefs such as worship. Internal and external sides of the norm are not symmetrical. The three internal elements—thought, conscience, religion—are not mirrored at the external side, which only speaks about religion and belief. The understanding is that thoughts are manifested through expression, which is protected separately in Articles 19 UDHR and CCPR. The crucial aspect of the *forum externum* is that it privileges actions in the external world because of their inner relation to religion and belief with the effect that such behavior—with all social consequences—might be permissible whereas the same behavior might be curbed without an religious or conscientious grounding. In other words,

[5] There are a few excellent works of scholarship on freedom of religion (C. Evans 2001; M. D. Evans 1997; Lindkvist 2017; Taylor 2005) and conscience (Hammer 2002), but they deal with freedom of thought at best peripherally.

rightholders are exempted from some behavioral duties because of religion or belief, e.g., in conscientious or religious objection to military service.[6]

The second key feature of Art. 18 UDHR is that the internal side, the *forum internum*, is considered off-limits for state interventions, the protection is *unconditional* or *absolute*, whereas external manifestations can be restricted for various purposes according to limitation clauses such as Art. 18.3 CCPR.[7] Unconditional guarantees are rare in international human rights law. Even more, the right is also non-derogable pursuant to Art. 4.2 CCPR, which means that it cannot be restricted even in times of public emergencies threatening the life of the nation (affirmed by the HR Committee, 2001, at 7). The inner side enjoys an extraordinary level of protection; it takes priority over virtually all other interests of individuals or society, legitimate and pressing as they might be. This underlines the importance of the right, but also calls for a well-grounded justification. A traditional argument is that the internal side is not of direct relevance to social life, the regulation of which is the main rationale of the law. The line between *internum* and *externum* is thus the line between the private sphere of the individual outside of governmental regulation and the social sphere.

So much for a first impression of the right. It shows five key characteristics that a theory of freedom of thought has to explain and possibly justify: the meaning of freedom of thought and the scope of the right, its peculiar internal and external structure, the absolute protection of its inner side (*forum internum*), coercion and potential interference as well as the relation of thought to conscience, religion, and opinion. Although some of these *explananda* are better understood than others, there are many open questions about all of them.

Case Law and Scholarship

The significance and the exalted status of the right to freedom of thought are widely avowed. During the drafting of the Declaration, the later

[6] One may wonder why such a privilege is justified with respect to religion (Leiter 2013) or conscience (Boucher & Laborde, 2016), a question not further pursued here.

[7] This view was affirmed by the HR Committee in General Comment No. 22 ("does not permit any limitations whatsoever," at 3) and by the Special Rapporteur on Religion or Belief (2010, at 53).

Nobel-Laureate and President of the ECtHR, René Cassin, called it the "origin of all other rights" (Commission on Human Rights, 1948, 13). This stands in contrast to the lack of practical relevance of the right. Litigation on Art. 18 CCPR almost exclusively concerns the external sides of its sister freedoms of religion and conscience, i.e., the manifestation of religion or belief.[8] The few cases about the internal side primarily concern the special case of involuntary *external* actions that may interfere with the *internal* sides of conscience or opinion, e.g., military service of conscientious objectors. But how precisely such external actions affect the internum is controversial (see, e.g., judgment and opinions in *Atasoy and Sarkut v. Turkey; Kim v. Republic of Korea*). Religious conversion, proselytism, and Art. 9 ECHR are addressed below. In general, commentators diagnose—and criticize—the lack of engagement with the *forum internum* by courts.[9]

There is no relevant jurisprudence on the internal side of thought (Alegre, 2017; Bublitz, 2014; Loucaides, 2012; O'Callaghan & Shiner, 2021; Schabas, 2016), with few exceptions discussed in a moment. Apart from them, freedom of thought is largely a dead letter.

The scholarly literature provides rough sketches of the right. In his commentary on the CCPR, Nowak describes it as the right "to develop autonomously thoughts and a conscience free from impermissible external influence" and notes that delineations between permissible and impermissible influences are not easy (Nowak, 2005, 412). With respect to the European Convention, the right is summarized as the guarantee that "the state may never interfere in this most intimate and inner sphere, for instance, by dictating what a person has to believe, by taking coercive steps to make him change his beliefs […] or by using inquisitorial methods" to discover thoughts (Vermeulen & Roosmalen, 2018, 738). The former judge of the ECtHR, Loucaides, notes that "very little has been written about this freedom and there is not much substantive discussion

[8] For an overview of most relevant matters, see Joseph and Castan (2013) and the summary by the Special Rapporteur on Religion or Belief (2017). Freedom of thought, as a distinct area of protection, has neither been addressed in the Rapporteur's annual reports to the Human Rights Committee or to the General Assembly of the last decade, nor in the Rapporteur's Digest (2011) on the years 1986–2011. The right will be addressed for the first time in the 76th report to the General Assembly in 2021.

[9] E.g., Taylor (2005, 202) "the fundamental nature of the *forum internum* has been undermined by European institutions through persistent avoidance of principles that permit the *forum internum* rights to be asserted".

about it in the case-law of judicial organs including the European Court of Human Rights" (Loucaides, 2012, 80). These remarks largely restate the norm. The intriguing problems emerge when it is rendered more concrete, which requires disassembling and reconstructing its elements.

Elements

Thought and Belief: An Inconsistency

Basic questions about the right are not settled: Already the object of protection, "thought", is ambiguous. Does it refer to a mental faculty (reason), to mental activities (thinking), to the contents of occurrent mental states (thoughts), or to the entirety of subjective experience—and does "thought" comprise all mental states or only some, e.g., rational ones, and what about affective states? For clarity in the following discussion, I wish to suggest already at this stage that the scope should comprise thoughts as mental states and thinking as a mental action. It is helpful to consider both when addressing specific questions.

With respect to protected thoughts, the HR Committee provides some guidance in General Comment No. 22. It writes that Art 18.1 CCPR is "far-reaching and profound; it encompasses freedom of thought on all matters" (at 1). In a similar vein, the European Commission commented with respect to the name parents wish to give to their child that "taking into consideration the comprehensiveness of the concept of thought, this wish can be deemed as a thought in the sense of Article 9" (*Salonen v. Finland*, p. 3). These remarks favor a wide understanding of "thought."

Another central element in Articles 18 UDHR and CCPR is *belief*; the right is often referred to as the freedom of religion or belief. But the relation between "thought" and "belief" is rarely explicated. In ordinary language, believing roughly means taking a proposition to be true. If a person believes X, she thinks that X is the case (or is likely the case). Philosophers view beliefs as favorable attitudes toward a proposition (Schwitzgebel, 2019). Beliefs are also the elements of knowledge, which is often defined as justified true beliefs. Beliefs are *occurrent* when a person is consciously entertaining them or *dispositional* when she could do so. The former beliefs, and possibly the latter, seem to be prime examples of thought (e.g., having the belief "Covid is more than a mere flue" is a belief and a thought).

However, in the context of Art. 18, it is widely assumed that "belief" has a narrower technical meaning akin to conviction, as in the authoritative French version of the Declaration. It comprises only significant personal beliefs such as those experienced as binding dictates of consciousness or those that relate to wider belief systems one adheres to, such as atheism, feminism, or socialism. The rationale behind this narrower view of "belief" is that not every action related to mundane beliefs should be privileged by Art. 18. This privilege, after all, means setbacks to rights of others and public interests as it exempts rightholders from general duties. It is thus only justified with respect to serious and significant beliefs. The ECtHR adopted this narrow view in its jurisprudence; a belief must "attain a certain level of cogency, seriousness, cohesion and importance" (*Eweida v. United Kingdom*, 2013, at 81).

This narrow understanding of belief as conviction is not consistent with the wide understanding of thought "on all matters." All beliefs, cogent or trivial, are thoughts. This creates a *thought-belief inconsistency* in Articles 18 UDHR and CCPR and regional counterparts. There are three solutions to it. The first is considering belief as *lex specialis*, so that the right covers thoughts on all matters, but not belief on all matters. This would create an oddly fragmented scope comprising thoughts on all matters as long as they are not beliefs. But beliefs, in the wide ordinary sense, are surely among the most important thoughts. Another solution is understanding the entire right to freedom of thought narrowly as a right to freedom of conviction, only pertaining to important beliefs. This would curtail the scope of Art. 18 considerably, leaving little scope for "thought" independent from "conscience." The text also speaks against this approach as "belief" is listed as a non-exhaustive example ("includes"). Furthermore, there is no indication that such a narrow understanding was intended by drafters or courts. Moreover, the Declaration aspires to be a document understandable to ordinary people, which suggests interpreting "thought" as what is ordinarily considered as such, a type of mental state and a bundle of mental activities—thinking.

The third and preferred way to solve the inconsistency is by drawing a distinction between the *internum* and the *externum*. The reason motivating the narrow understanding of belief is that it privileges actions in the external world and that this privilege must remain exceptional. But this rationale does not apply to thoughts as internal mental states; privileging them does not cause direct setbacks to others. Accordingly, "thought"

should be understood widely with regard to the internal side and encompass beliefs "on all matters," whereas it should be construed narrowly with regard to the external side. This interpretation harmonizes the views of the HR Committee, the ECtHR, and scholarship. It seems to be the best textual and teleological interpretation.

Freedom of Thought

"Freedom" of thought is equally ambiguous. Subtly diverging meanings pull into different directions and may affect the core understanding of the right and potential interferences. The first question is whether "freedom" refers to a normative property—to a liberty in a legal-technical sense—or to a descriptive or factual property of thought—free as opposed to unfree or involuntary. Common sayings such as "thoughts are free, no one can touch or know them" refer to factual properties, the physical untouchability and perceptive inaccessibility of thoughts. The wording of Art. 18.2 CCPR seems to do likewise since "coercion" cannot "impair" the normative, but only the *factual* freedom to have or adopt a belief. In addition, the formulation a "right to freedom of thought" seems to refer to a factual property, since a right *to* a legal liberty appears tautological—a liberty is part of a bundle of positions called a right.[10] These aspects suggest that "freedom" in Art. 18 refers to a descriptive or factual property of thought.[11] But what might this property be—when is thought free?

Several understandings are possible. It could mean, in analogy to free will, *indeterminate* thought, in the sense that an occurring thought was neither fully determined by preceding thoughts and psychological states, nor by the underlying physiological and psychological mechanisms. It could also mean, in analogy to the Principle of Alternate Possibilities (Frankfurt, 1969), that thought is free if a thinker could have thought differently, *ceteris paribus*. These are interesting but also demanding conceptions; it is not evident that freedom of thought in these forms exists at all.

A weaker, but by no means undemanding understanding considers free as *voluntary* thought, in analogy to free actions. This may seem attractive. Free thinking is then the voluntarily controlled performance

[10] According to the standard model based on Hohfeld (1913), *supra*.

[11] The idea of a normative liberty will be taken up *infra*.

of various mental actions that qualify as thinking. However, it is important to note that a large share of thoughts is not under voluntary control, they come and go unbidden in the stream of consciousness. Our minds constantly wander; keeping thoughts focused and ordered is effortful and often short-lived (for a revealing view at the limits of control people have over minds see Metzinger [2015]).

If the scope of the right was limited to free thoughts in these senses, it would be narrow and not provide protection against interferences with other, "non-free" thoughts, e.g., those over which people lack voluntary control. Such a narrow scope runs counter to the rationale of the protection, which seems necessary especially with respect to aspects over which people lack control. Voluntary control over thought should be protected where it exists, but the scope of the right should not be limited to it.

Alternatively, freedom of thought could be understood as free thought or freethinking, summary terms for modes of thought and reasoning that are committed to rational standards and the search for truth, historically associated with the freethinker movement. The Nobel Laureate Bertrand Russell describes the hallmark of free thought as "freedom from the force of tradition and the tyranny of one's own passions; free thought does not mean not absolute freedom, but thought within the intellectual law" (Russell, 1957, p. 45). In other words, free thought is critical thinking, open-minded and open-ended reasoning that neither accepts externally prescribed results, ideologies, dogmatism, nor distortions of thought from cognitive distortions, biases, or emotions. As "free" here primarily means rational, this view is henceforth called the *rationalist conception* of freedom of thought.

Is this conception appropriate in the context of Art. 18? It would narrow the scope to specific classes of thought, thinking, and rational reasoning, and it would exclude non-rationalist forms. Some of the latter, however, appear as prime candidates for protection by Art. 18, e.g., artistic, associative, imaginative, or non-linear forms of thought "out of the box." These modes of thinking should not be excluded from the scope *ab initio*. Moreover, the inclusive spirit of the remarks by the HR Committee may likely not only refer to the content of thoughts "on all matters" but also to the type of thinking "in all forms".

However, the grand political-philosophical concept may have something to contribute to legal interpretation here. Free thought and reason according to the rationalist conception was an idea integral to the Enlightenment, the Age of Reason. It was the inspiration for adopting a right

to freedom of thought and may therefore shape its interpretation. To Nowak, the right demonstrates that the Covenant "is based on the philosophical assumption that the individual as a rational being is master of his or her own destiny" (Nowak, 2005, 408). The rationalist conception should thus be considered a central category of the right, even though it may not exhaust its scope. We will return to this with respect to freedom of belief.

Further possible understandings of freedom of thought are sometimes explained with reference to Isaiah Berlin's influential distinction between negative and positive liberties—freedoms *from* and *to* (Berlin, 1969). In legal contexts, this distinction invites misunderstandings because in the law, "liberty" is a technical term and positive dimensions of a right refer to claims of rightholders against others to the performance of an action (correlatively, "positive obligations" denote duties to act), whereas in Berlin's usage, positive freedoms refer to capacities of self-mastery. It is thus helpful to speak of freedom from interferences with thought and of freedom to think in the sense of thinkers having, controlling, and exercising capacities for thought. The former corresponds to rights to non-interference, the standard legal way of understanding freedoms (Nowak, 2005). It suggests a broad scope that protects all kinds of thoughts against external interferences. The positive understanding, by contrast, protects the freedom to think, the performance of diverse mental actions which qualify as thinking, and arguably also the mental capacities and powers underlying and enabling them.

Thus, freedom of thought can be understood differently—as specific forms of reasoning, voluntary control, freedom from interferences, or capacities—and the subtly different conceptions may shape the scope of the right, interferences, and (intuitive) evaluation of cases. These conceptions of freedom allow for graduations: A person can have more or less cognitive abilities, an interference can be more or less invasive or effective. (This has the odd consequence that thought might be free to different degrees.)

Freedom of Belief

Articles 18 UDHR and CCPR are often also referred to as freedom of belief. As suggested earlier, the meaning of belief is ambiguous. With respect to the external side, it has to be construed narrowly in the sense of conviction. But with respect to the internal side, it should be construed

widely, as a special kind of thought. Freedom of belief is thus not a homogeneous concept. Furthermore, beliefs possess some peculiar features that require additional remarks. As said, beliefs are affirmative attitudes toward a proposition; believing X means taking X to be true or correct. Moreover, beliefs can refer to different matters, in the context of Art. 18 to three: religious beliefs, conscientious beliefs, and beliefs about facts of the world. These beliefs differ in some respects, e.g., whether they can be true or false, correct or incorrect, and the respective standards for assessing this. Religious beliefs, for instance, are matters of faith precisely because they can be neither proven nor disproven. Conscientious beliefs have a peculiar standard of correctness, correspondence to an inner experience or a "voice of conscience." These aspects do not apply to ordinary beliefs about the world, which are truth-apt, i.e., they can be true or false. These are of interest in the following.

Importantly, forming, holding, or discarding beliefs is, to a large extent, a *non-voluntary* exercise. This is evident with respect to religious or conscientious beliefs which are sometimes defined as binding dictates of conscience—*here I stand, I can no other*. But notably, the same is true, *mutatis mutandis*, for ordinary beliefs. Usually people cannot choose at will what they take to be true, believing requires supporting reasons, evidence, and consistency with other beliefs. It is psychologically impossible to consider a random proposition to be true in the absence of or even against evidence. Whenever one tries to form a belief, one searches for evidence supporting or refuting it. In this sense, people lack voluntary control over belief formation (so-called *doxastic involuntarism*). Rather, the cognitive system seems to form and revise beliefs largely automatically, non-consciously, and without voluntary control in response to experiences in the world. Therefore, people have all sorts of belief without having consciously formed them.

The rules by which beliefs are formed are not transparent to believers. By contrast, there are rules by which beliefs *should* be formed, rules of rational belief formation or *epistemic rationality*. Its standard is the truth or correctness of beliefs. Controversial in detail (e.g., Bondy, 2018), rules of epistemic rationality demand, among others, that beliefs are adjusted to the strength of available evidence and are revised if necessary. Psychology and life-experience shows that belief-forming mechanisms are susceptible to a range of factors that do not observe epistemic rationality, such as one-sided reasoning, biases, and rationalizations.

However, thinkers have some indirect forms of control, such as selectively attending to pieces of evidence, encouraging or stifling doubts. In particular, they can call their beliefs into question and scrutinize them from various perspectives. Such powers exist, but they are limited. They not only require cognitive resources, but they are also constrained by features of the belief-forming mechanisms; they do not confer thinkers control over the belief, but trigger an internal belief revision program. Thereby, they provide some indirect influence over one's belief formation.

What does this mean for Art. 18? Well, it raises the question what *freedom* of belief refers to. Strictly speaking, adopting a belief of one's choice—as guaranteed by Art. 18 CCPR—is often *impossible*. People neither freely choose their convictions, nor their beliefs about the world. Thoughts can be commanded, but beliefs cannot. This insight should motivate a wider and less literal understanding of the provision, and it underlines why special consideration of freedom of belief, in addition to freedom of thought, may often be necessary. Moreover, freedom of belief may mean the absence of interference with the belief-forming system, or the capacity to rational belief formation (i.e., the rationalist conception applied to beliefs). Both may lead to different scopes (a point we will return to).

Interferences

Another relevant element are interferences with the right. The literature refers to a few drastic examples: brainwashing (whatever it means precisely), indoctrination, reeducation camps (Nowak, 2005, 413). This confers the impressions that interferences necessitate severe and powerful measures, less severe means appear insufficient. Such a restrictive view, however, is not self-evident as the converse is at least equally plausible: A great many actions seek to change other peoples' thoughts and beliefs, and often succeed doing so, from persuasion in written communication over psychological pressure to coercive administration of thought-altering drugs. Such actions (henceforth "interventions") are ubiquitous, but that does not place them beyond concern. Accordingly, a different perspective is suggested: Rather than conceiving of thought and thinking as largely invincible, only intrudable by powerful means, the malleability and vulnerability of human thought as well as its in-principle openness to external influence should be acknowledged. People change each other's minds all the time on a myriad of ways. The challenge lies in separating permissible from impermissible interventions. This requires developing normative

criteria which should be put to discussion, to be refined and defended. This normative groundwork is still largely outstanding (see discussions in Bielefeldt et al. [2016] and Bublitz [2020a]).

A crucial aspect is that some interventions are themselves protected by rights of intervenors, e.g., as exercises of freedom of speech and expression (Articles 19 UDHR and CCPR). This creates a tension between the right to send potentially mind-altering stimuli to others—free expression—and the right to remain free from such stimuli—freedom of thought. This tension is underappreciated in the scholarly literature, but it is important as it sets limits to freedom of expression (e.g., as rights of others pursuant to Art. 19.3 CCPR). Conflicts of rights are common features of legal orders that are usually resolved by methods of balancing or reconciliation. The peculiar problem in the present case is that the absolute nature of Art. 18 does not allow them since interferences cannot be justified; every action that interferes with freedom of thought *eo ipso* violates the right. The balancing stage in which adequate and context-specific solutions can be found is unavailable. This has the unintended and methodologically questionable, but practically inevitable consequence that such considerations affect the definition of interferences. The alternative, not accommodating potential rights of intervenors, would lead to absurd outcomes.

Art. 18.2 CCPR speaks of "coercion"—unlike Art. 18 UDHR and regional counterparts such as Art. 9 ECHR. This might be read as a specification of potential interferences, which raises the question what coercion means in this context, whether it is the only possible type of interference, and whether the scopes of the rights vary across documents. Coercion is a complex concept that roughly means to get a person to perform an action against her will through the use of force or unlawful threats. As the HR Committee explains in General Comment 22, coercion includes "the use of threat of physical force or penal sanctions to compel believers" to maintain or recant their beliefs (1993, at 5). So much is settled. The problem is that coercion of belief, in this strict sense, is often not possible, given that people are frequently impotent to change their belief at will (*supra*). Even at gunpoint, one cannot get oneself to believe that the Earth is flat. If coercion were the only modality to interfere with Art. 18 CCPR, it has a narrow scope of application. However, this narrow interpretation seems to miss the point of the guarantee of Art. 18.2 CCPR. It is primarily not a norm against coercion, but for the protection of beliefs. This suggests that coercion might not be the only form of interference. With this in

mind, let us look at three leading cases regarding Art. 18 CCPR and Art. 9 ECHR.

Kang v. Korea—Coercion

One of the few cases explicitly addressing the right to freedom of thought under the CCPR is *Kang v. Korea*. The complainant was held in solitary confinement for 13 years for terrorist charges and on the allegation (which he rejected) of being a communist. He was detained in a prison which ran an "ideology conversion system." Benefits, including parole, were offered if he renounced his beliefs and took a "law-abiding" oath. The Human Rights Committee recognized the "coercive nature of such a system […] applied in discriminatory fashion with a view to alter the political opinion of an inmate by offering inducements of preferential treatment within prison and improved possibilities of parole" (at 7.2.). Consequently, it found a violation of Art. 18.1. and Art. 19.1. CCPR, in conjunction with Art. 26 CCPR (non-discrimination on political grounds).

Presumably, 13 years of solitary confinement violate human rights *per se*. But how does this treatment interfere with freedom of thought or belief more precisely, and does it amount to coercion? The facts of the case are not entirely clear as to whether Kang was punished for holding a belief—a clear violation of freedom of thought. The communication by the HR Committee rather speaks about "offering preferential treatment" and withholding of a benefit (release). Whether offering benefits or preferential treatment can constitute an unlawful threat is controversial ("coercive offers"). But let us suppose that it is in the context of Art. 18.2 CCPR. How then does the offer affect freedom of thought?

It might seem that the offer does not undermine the freedoms set out above because it weakens neither thoughts nor thinking. The complainant may be motivated to profess a belief he does not hold (renouncing communism). This interferes with the *forum externum*, it coerces an (unwanted) expression, but it does not hinder the complainant to continue to believe in communism. Nonetheless, coercing someone to profess a belief is sometimes said to interfere with the *forum internum* (as an instance of an "indirect interferences").[12] Why could this be the case?

[12] Indirect interferences with the *forum internum* are not further analyzed here as the category is vague and tailored to religious and conscientious beliefs. The most salient case is mandatory military service for conscientious objectors. Does it interfere with the *external* manifestation of conscience—and hence be justifiable under specific conditions,

One way in which forceful expressions are problematic is that they lead to wrongful confessions. Given the history of the Inquisition and attempts to elicit false confessions, all attempts to obtain them should be banned in-principle. But the extraction of a confession is not at stake here. A different argument may point to the psychological harm such professions may cause (Bielefeldt et al., 2016, 80).

Another line holds that coerced expressions indirectly harm the thinker (Shiffrin, 2011; but also see Mawhinney, 2016). Drawing on the foregoing remarks about freedom of belief, here is a variation of this thought: The main point of concern about coercion in light of Articles 18 UDHR and CCPR is that it creates an inner conflict, the temptation to not only profess a belief, but to truly change beliefs, without evidence to do so. Although changing beliefs may not be possible at will (*supra*), there are indirect routes and psychological mechanisms that may cause belief changes. These mechanisms can be triggered by the psychologically burdening situation that creates pressures to alter beliefs in exchange for the satisfaction of other psychological needs—unmet, in this case, because of the long solitary confinement. In other words, the offer exploits a vulnerability to change beliefs for inadequate reasons, which means, roughly, against rational and personal standards. Psychological needs are no good reasons for changing a belief (provided they are unrelated to its content). Of course, renouncing communism may well be practically rational for a person in such a situation as it advances her overall interests. But it is not from the perspective of epistemic rationality. The offer strives to have the person abandon her own judgment and accept authority instead, without adducing reasons for the correctness of the belief—the opposite of freedom of thought.

Accordingly, the interference with freedom of thought lies in the creation and exploitation of psychological weaknesses which may move persons to (non-consciously) form beliefs on inadequate (non-rational) ways. This is worth noting as it is not a case of coercion in the classic sense, but rather a form of *psychological manipulation*.

Art. 18.3 CCPR—or does it interfere with the conscientious beliefs themselves? Under some conditions, it might be the latter as contributing to killing may cause grave inner turmoil and pangs of conscience. For the latter, see *Kim v. Korea*; and the concurring opinion of Kälin (fearing that a wide understanding of indirect interferences dilutes and jeopardizes "the very core meaning of conscience, namely that the *forum internum* must be protected absolutely"). For the former (*forum externum*), *Bayatyan v. Armenia* (ECtHR).

Kokkinakis and *Larissis v. Greece*—Proselytism

A second example concerns two leading cases on proselytism before the ECtHR. Although they address interferences with freedom religion, they are material to the present inquiry. The applicant in *Kokkinakis v. Greece*, a Jehovah Witness, was repeatedly convicted for proselytism. To protect freedom of belief, Greek law penalized proselytism, defined as "any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naïvety" (at 16).

In the concrete case, the applicant and his partner called at the door and "engaged in a discussion" with a resident, the wife of an Orthodox cantor. They told "her that they brought good news; by insisting in a pressing manner, they gained admittance to the house and began to read from a book on the Scripture […], encouraging her by means of their judicious, skillful explanations" to change her beliefs (at 9). The attempt remained unsuccessful; the woman testified that "the discussion did not influence my beliefs" (at 10). Nonetheless, the applicant was convicted to several months in prison.

The ECtHR had to solve the conflict between different elements of freedom of religion, the freedom to proselytize and propagate one's religion versus the freedom of the *forum internum*. To this end, it drew a distinction between proper ("bearing witness") and improper forms of proselytism. The latter include "exerting improper pressure on people in distress or in need," as well as "the use of violence or brainwashing." By contrast, merely discussing beliefs and teachings with others is not improper. As Greek authorities failed to establish additional aggravating elements, the Court found that the conviction violated applicant's freedom of religion.

The *Kokkinakis* judgment was not unanimous. To some judges, governments may curb even such basic conversion attempts, whereas to others, the state should not intervene in such conflicts at all.[13] The decision attracted many scholarly criticisms (e.g., Evans, 2017; Taylor, 2005).

[13] The partly dissenting opinion of Judge Martens suggests that the state should not intervene in conflicts between different religions because, among others, improper spiritual conversion is difficult to establish (at 18). But that would forgo the protection of the

By and large, however, the judgment points in the right direction. The tension between protection of the *forum internum* and the right to religious practice is only solvable by separating proper and improper means of influence, and the criteria proposed by the Court, vague as they are, appear adequate. The gray areas need to be rendered more precise, but this is a context-specific task that defies simple abstract definitions (Judge Pettit, concurring; Taylor, 2005, 67; Bielefeldt et al., 2016).

A few years later, the Court upheld convictions based on the same anti-proselytism law in *Larissis v. Greece*. The applicants, superiors in the army, read the bible to subordinates and encouraged them to visit church services, so that the latter felt obliged to do so. The Court held that their special role may suffice to turn an otherwise proper conversion attempt into undue influence: "the hierarchical structures which are a feature of life in the armed forces may colour every aspect of the relations between military personnel, making it difficult for a subordinate to rebuff the approaches of an individual of superior rank or to withdraw from a conversation initiated by him. Thus, what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power" (at 51).[14] While the Court's worry about undue pressure is understandable, it is worth remarking that reading the bible or encouraging church visits is hardly describable as a form of coercion, at least in the absence of threats. The Court's judgment appears nonetheless reasonable in light of the powers of social psychology and the psychological pressure such encouragements may generate.

The jurisprudence on proselytism allows for some lessons: Firstly, the two cases show that fine and context-specific lines of undue influence need to be drawn. Secondly, the incriminated measures are no forms of coercion *sensu stricto,* but rather forms of manipulation or exploitation of psychological weaknesses that may interfere with Art. 9 ECHR. This

forum internum as long as no other offenses are committed. States would fail to discharge their duty of protection. Gray areas are hardly an argument against drawing boundaries.

[14] See also Judge Valticos, partly dissenting, "any attempt going beyond a mere exchange of views and deliberately calculated to change an individual's religious opinions constitutes a deliberate and, by definition, improper act of proselytism, contrary to" Art. 9. "Attempts at 'brainwashing' may be made by flooding or drop by drop, but they are nevertheless, whatever one calls them, attempts to violate individual consciences and must be regarded as incompatible with freedom of opinion."

means, thirdly, that potential interferences are not restricted to coercion in the classic sense. Of course, the jurisprudence of the ECtHR concerns Art. 9 ECHR which does not contain a clause equivalent to Art. 18.2 CCPR specifying "coercion." But the findings are nonetheless transferable.[15] One reason is that the formulation of Art. 18.2 CCPR pertains to the often impossible adoption of a belief of one's choice (*supra*). As *Kang* demonstrates, there are equally problematic measures that should trigger Art. 18 CCPR protection.[16] Another reason is the following: The introduction of "coercion" and Art. 18.2 CCPR was a political compromise to appease worries of some (mainly Muslim) countries about religious proselytism; a worry that motivated their abstention from the Declaration (see for the Declaration, Morsink, 1999, 24; for the CCPR Nowak, 2005, 416; Taylor, 2005, 75). Art. 18.2 CCPR was meant as a clarification, making explicit what Art. 18 UDHR implicitly contained.[17] It was not meant to change the scope of, or possible interferences with, the right. On the contrary, it was supposed to strengthen and reinforce the protection of beliefs pursuant to Art. 18 UDHR and Art. 18.1 CCPR precisely against undue conversion attempt. It should thus not be read as restricting potential interferences to coercion. If Art. 18 UDHR or Art. 9 ECHR can be interfered with by non-coercive means, so should Art. 18 CCPR. Accordingly, non-coercive means such as "improper proselytism" may interfere with Art. 18 CCPR.[18]

Fourthly, one may wonder how the jurisprudence on proselytism relates to interferences with freedom of thought and non-religious beliefs. Interferences with religious beliefs are presumably not identical to those with other beliefs. What is permissible in proselytism may not be so

[15] Cf. the debates about the meaning of "coercion" during drafting in the report of the General Secretary, A/2929 at 110.

[16] The HR Committee also hints at a non-strict understanding of coercion when it writes that Art. 18 bars coercion and "[p]olicies and practices having the same intention or effect" (at 5). Furthermore, it is sometimes wondered why the HR Committee has not found a violation of Art 18.2 in *Kang* (Nowak, p. 417). The reason according to the present suggestion is that Art. 18.2 is not a separate right, it just illustrates a key part of the protection of Art. 18.1 CCPR.

[17] See the records of the meeting UN Doc. E/CN.4/SR.319; the retrospective report A/2929 at 108 et seq.; Hammer (2002, 42).

[18] Taylor (2005, 2020) might support a different view insisting on "coercion", as his criticism of the ECtHR case-law on proselytism draws on the point that actions were not coercive.

in other domains; convincing someone to vote for a political party or to buy a product by talking to them about death or existential dread is presumably impermissible. However, with the exception of context-specific considerations, interferences with these freedoms share common ground. The rough criteria established by the ECtHR for improper proselytism—violence, psychological pressure, exploiting weaknesses, influence in institutional hierarchies—also provide guidance about interferences with freedom of thought and conscience.

***Mockutė v. Lithuania*—Coercive Psychiatry**

Finally, attention is drawn to a recent case before the ECtHR, *Mockutė v. Lithuania*, which concerns the use of psycho-corrective methods to promote critical attitudes and self-reflection. The applicant was involuntarily placed in a psychiatric hospital due to an acute psychosis for a little less than two months. During hospitalization, she was forcibly administered antipsychotic medication and physically restrained, but in conformity with medical standards. The doctors suspected that her involvement in a spiritual meditation group was among the causes of her mental health problems. By contrast, the applicant experienced it—especially the meditation—as a source of inner peace. At the beginning of therapy, she showed uncritical and "categorical" attitudes toward her psychotic behavior and her situation, i.e., she did not understand her condition, a typical symptom of psychosis. The treatment aimed at moving her to develop a critical attitude toward her condition, including her spiritual group. To this end, doctors discouraged her from meditating (whether it was prohibited remains unclear) and applied "psycho-corrective methods" which are unfortunately not described in more detail. The treatment was successful insofar as the applicant developed understanding for her condition so that she agreed to further voluntary treatment post-release; but she did not change her categorical views about the meditation group. The case also concerns breaches of privacy through the dissemination of medical information and, more broadly, the restrictive stance Eastern European countries take against new religious movements. These aspects are left aside here.

With respect to psycho-corrective methods, the Court notes twice that a "State cannot dictate what a person believes or take coercive steps to make him change his beliefs" (at 119, 129). Given the circumstances of the involuntary hospitalization, it was satisfied that "pressure was exerted

on her to change her religious beliefs and prevent her from manifesting them," which interferes with Art. 9 ECHR (at 123).

However, after concluding that the "interference contravened Article 9 of the Convention" the Court continues examining whether interferences were justified. It draws on a provision of the Lithuanian Constitution according to which persons possess an inviolable sphere of private life that may not be limited in any way (at 129). The Court writes that it is "prepared to accept that the needs of psychiatric treatment might necessitate discussing various matters, including religion, with a patient, when he or she is being treated by a psychiatrist. That being so, it does not transpire from Lithuanian law that such discussions might also take the form of psychiatrists prying into the patients' beliefs in order to 'correct' them when there is no clear and imminent risk that such beliefs will manifest in actions dangerous to the patient or others" (at 129). The Court therefore assumes that the treatment was not in accordance with Lithuanian law, so that the interference cannot be justified for lack of a basis in domestic law.

This reasoning is remarkable. First and foremost, the Court examines justifications although interferences with the *forum internum* are not open to them. Unfortunately, it does not explain its approach. The Court might not have considered the measures as interfering with the *forum internum*, the term is not mentioned in the judgment. However, "psycho-corrective measures" that pressure a person to change her beliefs seem, by all standards, to impinge upon the *forum internum*. After all, in the words of Art. 18.2 CCPR, they impair the freedom to have a belief of one's choice. The reasoning is also surprising because the Court dismisses the measures by invoking an inviolable sphere guaranteed by the Lithuanian Constitution—under the idea of privacy—in lieu of the inviolable sphere guaranteed by Art. 9 ECHR.

A possible explanation for this unconventional reasoning emerges in a broader perspective. As the dissenting opinion by three judges remarks, the case might be primarily seen as "a complaint about the alleged improper treatment at a psychiatric hospital, whereas the religious aspect represents only one part thereof" (at 5). Coercive psychiatric medication is notoriously controversial, and the absence of jurisprudence on it by the ECtHR and other human rights courts is suspicious. Patient movements ("anti-psychiatry") have called for the abolition of coercive practices in psychiatry for years, often invoking freedom of thought. It was also a dominant theme with respect to the Convention on Rights of Persons

with Disabilities. The substantive dilemma is that some psychiatric interventions aim at changing thoughts, thought-patterns or beliefs and thus contravene the letter of the law. On the other hand, such interventions do not appear unjustifiable from the perspective of medical ethics. The Court seems to share this affirmative view when it writes: "it is for the medical authorities to decide on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves" (at 124). It thus adopts a deferential attitude regarding medically necessary coercive treatments. Here, the dilemma emerges: If the Court had found a violation of the *forum internum* of Art. 9 in the present case, the legal grounds for coercive psychiatry in its entirety would have been seriously undermined. A rational court seeks to avoid precedents with supposedly undesirable and also somewhat unforeseeable consequences. Against this backdrop, the straying reasoning of the Court appears as a doctrinal sleigh-of-hand: The weight of the case is placed on a domestic provision, which is different from freedom of religion and does not have an exact counterpart in the ECHR.[19] It thereby avoids setting precedents.

Moreover, the case touches upon the intriguing question whether encouraging someone to develop a critical attitude may interfere with freedom of thought or religion. The dissenting opinion observes: "The psychiatrist obviously wanted the applicant to reflect on her own mind and behaviour, and such reflection naturally forms part of psychiatric treatment" (at 13). According to this view, undermining of belief does not per se qualify as an interference; gaining understanding of oneself or one's situation; improving abilities for self-reflection may increase freedom of thought in the rationalist conception.

This line of reasoning is not without merits. Historically, the idea of freedom of thought is deeply linked to improving reason and overcoming, in Kant's words, mental immaturity (1784). Promoting critical reflection, overcoming "categorical views" and fixed ideas not open to evidence or counterargument is not necessarily worrying in light of freedom of

[19] The decision corresponds to what one may see as a general strategy of the Court to evade decisions which would provide contours to the *forum internum*, a feature of the jurisprudence criticized by others (Evans, 2017; Taylor, 2005). A related case in-point is *Riera Blume v. Spain*, in which applicants were detained in a hotel to "deprogram" their beliefs about a sect through psychological and psychiatric methods. The Court did not rule on the alleged violation of Art. 9 ECHR, but found a violation of Art. 5.1 ECHR (detention).

thought—on the contrary. Insofar as the psychiatric treatment made the applicant gain understanding of her condition, it may have promoted freedom of thought. However, the means to achieve this may have contravened freedom of thought at the same time. Although the psychocorrective methods are not described more fully, the setting in which they were applied—involuntarily hospitalized, physically restrained, forcibly administered drugs—must be seen as coercive. The dilemmatic question is thus: Can it be legitimate to interfere with freedom of thought, in the negative dimension, in order to promote the freedom to think in the rationalist conception? A question we will return to.

In the present case, matters are even more complex because the targeted belief was of spiritual nature, leading to a tension between freedom of thought and freedom of religion. Perhaps, such is the nature of religious beliefs that a critical attitude erodes them as it undermines emotional identification and promotes doubts. Interferences with the religious *forum internum* and freedom of thought may differ in precisely this point. This is another reason for developing separate taxonomies of interferences for the sister freedoms of Art. 18.

Finally, the case raises the question about the classification of bodily actions with substantive mental effects such as meditation. One might see them as external manifestations of belief to which limitation clauses apply. However, their strong mental effects—the experience of inner peace and stability,—concern the *forum internum*. Banning such practices may thus amount to an (indirect) interference with the inner side.

To summarize: Interferences with the *forum internum* can take various forms. No attempts are made in the sparse jurisprudence to render "coercion" pursuant to Art. 18.2 CCPR more precise; it seems to be understood loosely, also encompassing undue interference or psychological pressure. Because of the problems of coercing beliefs *sensu stricto*, this approach deserves support. Coercion is thus just one among several potential types of interference with Art. 18 CCPR. Furthermore, *Kokkinakis* and *Mockutė* show that the strict confines of the absolute protection of Art. 18 UDHR and CCPR require creative interpretations, as rights of others or paternalistic considerations may need to be accommodated. Interferences with freedoms of religion and thought may need to be evaluated by different standards, as the promotion of a critical attitude toward spiritual beliefs in *Mockutė* shows. Apart from *Kang*, none of the reported decisions was unanimous. This indicates the high degree of uncertainty in this area, which results from the lack of principled

or systematic approaches. Some suggestions are forwarded in the next section.

Suggestions for the Right

Scope: Thought, Thinking, Belief

Drawing on the foregoing, the following develops the contours of a right to freedom of thought. Let us start with "thought." As suggested, it should be understood in two ways, as having specific mental states—thoughts—and as performing various mental activities—thinking. Both concepts are clear at the core but vague at the margins. *Thoughts* might be understood roughly (and aware of the controversies in philosophy of mind) as mental representations. These representations often include semantic content such as propositions, but need not do so, e.g., mental imagery. A key question is whether "thought" also includes affective (emotional) states. Psychology has debunked the traditional dichotomy between emotion and rationality; emotions are important contributors to rational decision-making (Lerner et al., 2015). In spite of this, however, emotions and thought are distinct items of the mental furniture. Including emotions would create a freedom of emotion in Art. 18, a conception significantly different to freedom of thought. Emotions should thus not be included as objects of protection. They may become relevant indirectly, however, insofar as tampering with them affects thoughts and thinking.

Thinking comprises—and requires—a range of cognitive capacities and mental actions, from comprehending language and logic to rules of rationality, from associative over artistic thought to mental stimulation. These capacities and the psychological and neuronal mechanisms that enable and realize thinking should also enjoy protection against negative interferences.

The right further protects *freedom of belief*. Beliefs are understood in the wide ordinary sense (not only as convictions) as attitudes toward propositions about the world which can be true or false (*supra*). It comprises occurring and dispositional (or implicit) beliefs, which form the knowledge base of a person. Religious and conscientious beliefs are special cases of freedom of belief. In addition, Articles 19 UDHR and 19.1 CCPR protect opinions, which should be understood to include value judgments and desires, which stand in close relation to beliefs pursuant

to Art. 18. But these aspects must be left aside here. Freedom of belief is not an additional freedom, it derives from freedom of thought and thinking, but in view of the salient role Articles 18 UDHR and CCPR accord to beliefs and their psychological and philosophical peculiarities, it merits explicit mentioning and sometimes special consideration.

Scope: Freedom

It is suggested that "freedom" in Art. 18 refers to both a normative and a factual freedom. In the most abstract formulation, it guarantees a liberty in the technical normative sense, i.e., the absence of claims of others. The quintessence of the right is the following (Bublitz, 2014, 2015):

> *No one else, including the state, has legal claims over the content of a person's thoughts, or the type of her thinking.*

More precisely, a liberty of a person to think means that she is not under a duty not to think, and a liberty not to think means that she is not under a duty to think.[20] Art. 18 encompasses both variations. The correlative of the liberty of the rightholder is a no-claim of the duty-bearer. Accordingly, no one has claims about what another person thinks or, beliefs.

No Cognitive Duties

This interpretation also entails that the state cannot impose on rightholders any duty over thought or thinking. In this sense, it cannot prescribe what to think or not to think, or dictate what a person believes, as the ECtHR writes in *Mockutė* (also see *Ivanova v. Bulgaria*, 2007, at 79). Freedom of thought thus bans any norm of the type "it is prohibited to think T." Therefore, governments cannot argue that a "citizen was under a duty to think T" to justify governmental actions. This is the *no cognitive duties*-principle of Art. 18. It might appear evident at first glance but it is not without questions and counterexamples (in a moment). One may further ask whether changing or influencing thoughts and beliefs could ever be a legitimate governmental aim. This is sometimes denied by claims that thoughts or beliefs are outside of the purview of governments

[20] The concept of a liberty is not uncontroversial after Hohfeld, who spoke of "privileges." But the disputed matters are immaterial for present purposes, see Curran (2010) and Williams (1956).

(see Tussmann, 1977). But *the no cognitive duties*-principle does not entail the impermissibility of that aim, an additional argument to that end would be required. Rather, it is recognized that governments may pursue legitimate purposes through, e.g., information campaigns which influence or motivate thought-change in citizens, as long as limits of interferences are observed (*infra*).

However, the law in fact imposes some cognitive duties and *prima facie* justifiably so. For instance, citizens are expected to consider foreseeable consequences of their actions in almost every situation; the law does not promote thoughtless or careless behavior, it may even punish people for it. The law imposes a multitude of behavioral duties, and their performance may presuppose thought and thinking. A vivid example are duties of witnesses to testify accurately, which entails remembering past events truthfully (Kolber, this volume). How is this duty compatible with the *no cognitive duties*-principle? A distinction between behavior and thought needs to be drawn. Part of the *raison d'etre* of the state is controlling behavior; it imposes and enforces behavioral duties to this end. Complying with these duties is all that is required from persons. Compliance may factually require thinking, e.g., about the situation, but this does not transform the behavioral duty into a cognitive one. That the duty primarily pertains to behavior is also demonstrated by their enforcement at the behavioral level, e.g., through physical restraints, not via interventions into thought. Thinking necessarily related to behavior does not fall under above principle. This requires finer distinctions between cognitive and behavioral duties which cannot be drawn here, but which are well conceivable. However, some duties, such as the one of witnesses, seem to constitute cognitive duties—and thus contravene the *no duties*-principle. However, in ordinary cases, the interference with their freedom to think seems trivial whereas the public interest in fact-finding and law-enforcement seems compelling. The duty of witnesses to remember may thus amount to an exception to the absolute protection of freedom of thought.

In general, the absolute nature of the right to freedom of thought demands that states enforce behavioral duties through means not interfering with thought; persons can be motivated to perform actions by incentivizing or deterring them, or they can be physically constrained, including incapacitation. But the state has to resort to forces working externally on the person, rather than exerting control over them from within.

No Punishment for Thought (no Thought Crimes)
From the no cognitive duties-principle, the old Roman maxim *cogitationis poenam nemo patitur*—no one shall be punished for thoughts—follows.[21] Punishing someone for performing or omitting an action logically requires a prior duty not to perform or omit the action that an offender failed to discharge. Without such a duty, no punishment for the failure to comply. The illegitimacy of thought crimes originates in the lacking legitimacy of cognitive duties.

Yet again, as the state may impose behavioral duties and punish for non-compliance, the borders of the *cogitationis* maxim need to be rendered more precise (*infra*). Also, the question whether Art. 18 bans non-punitive sanctions for thoughts, e.g., loss of employment, requires further examination by future research.

No Interferences with Thought
A liberty allows rightholders to do as they please with respect to the object of the liberty. But it does not entail or ensure that they factually possess relevant capacities or skills, nor the absence of impediments or actions of others that may affect the domain of the liberty. For instance, interferences with thought of rightholders for reasons not presupposing a cognitive duty are possible. The liberty of thought and thinking is, by itself, naked or unprotected. To protect against factual interferences, it must be buttressed by claims against others to non-interference. This is the factual understanding of "freedom" in Art. 18 (interferences are analyzed *infra*).

No Revelation—Privacy of Thought
In regard to freedom of religion, it is widely accepted that it covers the privacy of belief; no one has to reveal one's belief (Loucaides, 2012; Schabas, 2016). This is an ancillary claim that protects the freedom to adopt and discard beliefs against negative sanctions (Evans, 2017). It should analogously apply to thought and thinking: no one has to reveal one's thoughts or the type of thinking one performs.

In ordinary life, people often observe the behavior of others and draw inferences about their thoughts all the time. This cannot be prohibited. Nor can manifested thoughts, in writing or behavior, give rise

[21] It is recorded in the Digests of Justiniam (48.19.18), cf. Gablow, this volume.

to privacy of thought claims which only concern *unexpressed thoughts* (for an exception below). For manifested thoughts, ordinary privacy and data protection laws are the adequate place of regulation. Nonetheless, freedom of unexpressed thought is not without application. For instance, some neuroimaging techniques read out brain states that afford inferences about unexpressed thought or thinking, which have found the attention of law-enforcement agencies.[22] Art. 18 bans their use without permission by rightholders.

Power of Waiver

The foregoing four principles are negative liberties. An important further element of a right is the *power* of rightholders to waive its protection, enabling them to consent to interferences (e.g., to enroll in thought altering cognitive therapy). Rightholders may also enter contractual obligations pertaining to thinking, many jobs in the mental economy in fact require performance of cognitive tasks. However, failures to meet these obligations are not enforceable via interferences with freedom of thought (but rather ground damages for non-performance).

Promoting Preconditions

In addition to these negative liberties, the right to freedom of thought may impose on states positive obligations. The extent of such obligations is controversial and differs across instruments. Under the ECHR and the Covenant on Economic, Social, and Cultural Rights, positive obligations are well-established, this is less so under the CCPR and the Declaration. This general issue is not further pursed here.[23] In substance, it should be noted that freedom of thought, especially the freedom to think and rationalist conceptions, have many preconditions. They require mental capacities and skills that must be acquired and matured through training and experience. In fact, this is an open-ended task, everyone can always become a better, more rational, less-biased thinker. An important aspect

[22] One example is a method called brain fingerprinting, see Farwell (2012) and Rosenfeld (2005).

[23] See Nowak, assuming "horizontal effects" for freedom of opinion, Art. 19.1 CCPR (2004, 441); the HR Committee assumes positive obligations in General Comment No. 31 ("fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents but also against acts committed by private persons or entities", at 8). See also Joseph and Castan (2013, 39); for the ECHR Mowbray (2004).

is the possession of knowledge. Beliefs are formed against the background of existing beliefs. The more and the better (true, correct) those are, the more and better beliefs a person forms. As Loucaides remarks: A "person who is ill-informed cannot think freely because, being deprived of all the necessary information, his intellectual process of thinking is barred from developing freely its optimum extent. Therefore, it cannot be emphasised enough, that a prerequisite to the exercise of freedom of thought, is the effective exercise of the right to freedom of information" (Loucaides, 2012, 87). Cutting a long story short: States should, and perhaps must, promote such preconditions of freedom of thought.

Protection Against Interferences by Third-Parties

Furthermore, states have the obligation to protect rightholders from interferences by third-parties. Notwithstanding the extent of such duties, they may do so through various measures, e.g., by passing new legislation that prohibits or even penalizes interferences with thought (Bublitz & Merkel, 2014). The interesting point is that this requires rendering the content of freedom of thought more precise with respect to specific contexts. An example might be regulations of digital services or social media platforms with respect to targeted advertisement. At many places, legal systems already provide protection against undue influence, manipulation, fraud, etc. But it seems that this is done unsystematically and without deeper recourse to freedom of thought. Therefore, some aspects such as the freedom from non-coercive manipulation are likely systematically underappreciated in domestic legal orders (regulations of advertisement are one example). The right to freedom of thought then calls for more recognition by legislators and stricter regulations. In this context, it is important to recall that human rights law only draws outer boundaries of permissible governmental action. Many intriguing questions, however, are not situated at these boundaries, but in the regulatory spaces before them. Shaping them is the prime task of legislators. Art. 18 and its counterparts may have the most impact by influencing regulations in these spaces.

These are the seven main dimensions of protection provided by Articles 18 UDHR and CCPR. In the remainder, only some of them can be examined a bit closer. The most challenging aspect in need of further elaboration are factual interferences with freedom of thought.

Scope: Interferences

Because of the absent balancing stage, definitions of interferences are crucial. A plausible construal of the right has to offer resources to define interferences more concretely; this presumably requires a taxonomy of interferences that accommodates various criteria. On the one hand, the widest possible construction considers every action altering thoughts or beliefs ("intervention") of another ("recipient") as a potential interference. Without qualifications, this leads to the absurd consequence that talking to someone on the street without prior consent could violate Art. 18. On the other hand, if only brainwashing, reeducation camps, and interventions of similar, almost torture-like intensity qualify, the norm would leave much—presumably too much—room for various dubious and worrisome interferences. The previous discussion of the case law has shown that "coercion" pursuant to Art. 18.2 CCPR does not capture the range of possible manipulative interferences. To separate permissible from impermissible ones, a multi-layered taxonomy needs to be developed.[24] Here is a sketch:

Negative Effects on Thought and Thinking

To qualify as an interference, the intervention must have a substantially negative effect on thought and thinking, such as detrimental effects on cognitive abilities, e.g., a drug that weakens attention or causes thought disorders. Effects must pass a *de minimis* threshold; the myriad of stimuli that enter people's minds each day do not qualify for lack of a substantive effect. It is worth noting that the introspective feeling of whether stimuli are strong or effective might not be the best indicator as humans are not very good at introspectively identifying what influences them (and to which extent it does so). What are negative effects on thoughts? Scenarios are conceivable in which particular thoughts are induced or eliminated, e.g., through brain stimulation. But in general, thoughts are fleeting states that may easily vanish simply because the thinker is distracted or shifts attention. These are the limits of working memory. But ordinary and mundane effects on thoughts cannot qualify as interferences.

[24] For a related argument for a theory of freedom of religion to avoid "intuitive" but inconsistent decisions see Evans (2001, 33).

Undermining or Bypassing Control Over Thoughts and Thinking

Furthermore, at the conceptual level, speaking of an interference requires that the effect has been brought about by the intervenor, not the affected person herself. This relates to control of the person over the intervention, e.g., incoming stimuli, and its effect. Control over interventions varies in kind and degrees. People may exert control in many ways, e.g., they have to attend to stimuli or can turn away from them, some effects are easily resistible (elaborated more fully in Bublitz, 2020a). People have much control over a book they read; but less control over the advertisements on billboards which they peripherally perceive in the upper corner of their field of vision when driving at highways; and virtually no control over the effects of a drug that their drink is spiked with. Roughly, when rightholders retain sufficient control over an intervention, it is not an interference. Put conversely: interventions have to *undermine* or *bypass control* of affected person to qualify. This is a necessary, but not a sufficient condition, and it forms part of a test of interference: *Does an intervention respect the other as a free and self-controlled thinker; or does it undermine or bypass control?* The latter interferes with freedom of thought, the former may not.

Interferences with Freedom of Belief

Special considerations apply to beliefs. What does it mean to interfere with freedom of belief? Although forming and changing beliefs is often not under voluntary control (*supra*), this does not mean that all interventions causing changes in beliefs are in-principle dubious. Consider a compelling argument. It is compelling precisely because it does not leave any choice about its evaluation; it is compelling because it must be accepted. Although people lack voluntary control over the changes induced by it, one may say it was still them, not intervenors, who brought them about. After all, their belief-forming system was in control. This shows that a finer understanding of freedom of belief is necessary. It surely commands the absence of interferences impeding the working of the belief-forming system, e.g., via a drug. This would be a negative effect on a cognitive capacity as captured by above definition. More interesting are other manipulative interferences. Any interpretation of freedom of belief has to accommodate the fact that humans influence and potentially change each other's beliefs all the time. In virtually every conversation, the mechanisms forming and revising beliefs are operative and leave thinkers only limited, indirect voluntary control. However, this

does not call for a stop of (unwanted) conversations. Freedom of belief cannot imply the absence of any input into the belief-forming system.

Rather, it is suggested that freedom of belief opposes actions that weaken or undermine the ability of rightholders to form rational beliefs (as in the rationalist conception). Only then, they potentially interfere with freedom of belief. The reason behind this is that freedom of thought can only protect against grave negative effects; bringing someone to rationally form a belief against their will might be a nuisance or have detrimental psychological effects, but cannot trigger freedom of thought protection.[25] After all, one of the justifications for the absolute protection, so I can only suggest here without further argument, is the search for truth.

Another perspective supports this suggestion. The right regulates interpersonal relations. The question is thus: How should people treat each other, given the fact that beliefs are constantly formed and revised without much direct control of believers? The answer must be this: As the default mode, people should respect each other as rational believers, i.e., as people who want to form their beliefs according to evidence and rational standards. This allows them to form correct beliefs, to understand the world and find truth. As long as people respect each other as rational believers, freedom of thought is not implicated.[26]

This understanding neither implies nor presupposes that people are usually rational believers, only that they can be such. Rather, it concerns the ways in which people *should* engage with each other. What does respecting others as rational believers mean? In abstract, it means to refrain from exploiting rational weaknesses and susceptibilities of another person's belief-forming system. This is what happened in *Kang*. While one may not have a duty to counteract those weaknesses, one should

[25] The casebook example of such detrimental effects are parents who are deceiving themselves about the bad character of their children. Another could be coping strategies to alleviate inner conflicts. No one is under a legal duty to be a rational believer (though there might be such ethical duties), but freedom of thought may not, and possibly cannot, protect against mental distress or similar effects.

[26] Further support for this interpretation can be derived from philosophy. Forming beliefs according to rational standards has often been equated with freedom of thought, not only by Russell, but, e.g., also by Pettit and Smith (1996).

neither exacerbate nor exploit them.[27] This allows for a second part of the test of interferences with regard to freedom of belief:

> *Does the intervention respect the recipient (the rightholder) as a rational believer, i.e. as a person who forms beliefs in light of evidence, other beliefs and rational standards; or does it seek to exploit rational weaknesses or move her to form beliefs for other, non-related grounds such as psychological needs?*

The latter interferes with freedom of belief, the former may not. This test reflects default norms for interactions and may need further context-specific adaption to the particulars of a case. Works of art do not have to treat recipients as rational believers, nor do chefs or lovers. Religious and conscientious beliefs may require distinct standards; and so do the forming of desires and emotions. With these caveats, the test provides rough guidance about interferences with freedom of belief.

Countervailing Rights of Intervenors: Free Expression

If the test indicates an interference, a further step has to accommodate the fact that some interventions are themselves exercises of rights of intervenors, primarily freedom of expression (for more on this conflict see Bublitz, 2020a). Freedom of expression is the right to send stimuli that potentially affect thought of recipients, and it is not restricted to stimuli preserving their control or rational belief formation. The scopes of freedom of expression and freedom of thought are thus not neatly separated but partly overlap. None of the two rights can claim lexical priority over the other. Although freedom of thought is unconditional whereas freedom of expression is conditional, the latter deserves a robust scope of application. Striking balances between both is thus unavoidable. A first distinction can be drawn between *actions* and *effects*. Freedom of expression entitles rightholders to actions such as speaking but does not confer any claims about the effects of the speech in recipients (corresponding to the *no claims over others' thoughts*-principle). Speakers may speak but no one has to listen. But if expressions happen to have effects, e.g., because recipients are exposed to them in public, freedom of expression can justify

[27] One may wonder what this implies for providing false information. As such, it does not exploit a weakness in the belief-forming system which checks information but against other beliefs. Systematic disinformation may qualify, as this erodes the ability to check against other, true beliefs.

these effects. The deeper reason is this: Some actions protected by rights imply a *pro tanto* permission to affect others' thoughts. A right to build a house entails that others might see it or be psychologically affected by the architecture; a right to open a shop entails the presentations of goods; expression and communication inherently affect others. In such situations, freedom of expression and freedom of thought need to be reconciled in light of various criteria such as intensity and strength of the effect, the importance of the expression, the degree of control it leaves, whether there are less intense means for expressions. Balances between freedoms may suggest that expressions are permissible provided they observe, as far as possible, freedom of thought of recipients, e.g., by avoiding unwanted communications or captioned audiences, not deploying control-bypassing elements, explicitly informing recipients about stimuli and their effects, etc.

Other methods of intervention, by contrast, are not protected by rights of intervenors (or only weakly so). This is especially true for direct brain interventions such as administering drugs or neuro-interventions in rightholders. These actions usually do not pursue any aim of intervenors other than altering thought and thinking of recipients. To this, intervenors have no claim (*no claims over others' thoughts*). Unlike expression, the intervening action as such is trivial (e.g., injecting a substance, setting up a magnetic field), and the freedom of perform this action does not entail a *pro tanto* permission to affect others. People may play around with electric or magnetic stimulators, but must stop when others are affected by them. As a consequence of this normative difference between interventions, some means to change others' thoughts might be permissible (expression), whereas the same effect brought about by another might not. This adds a last criterion to the test which now reads in full:

> *Does an intervention respect the rightholder as a free and self-controlled thinker or a rational believer who forms beliefs in light of evidence and rational standards– or does it undermine or bypass her control, exploit rational weaknesses or move her to form beliefs for other, non-related grounds such as psychological needs? If so, is the intervention an exercise of an important rights of intervenors which entails a* pro tanto *permission to affect thoughts?*

Consequences

From these considerations, a rough distinction between direct and indirect interventions arises. Indirect interventions are those that reach the mind/brain of recipients via the outward senses, they are often informational inputs into the cognitive machinery of rightholders. Direct interventions are those that reach the mind/brain on other, primarily neurobiological ways, such as brain stimulation or drugs (for a further elaboration see Bublitz, 2020a, and the criticism by Levy, 2020). They differ in virtue of their normative protection and the amount of control recipients can exert over them. People have most control over consciously perceived indirect interventions, e.g., perceptual stimuli, less over non-consciously perceived stimuli (e.g., subliminal stimuli), and almost no control over direct interventions.[28] This leads to the following taxonomy:

1. Direct brain interventions
2. Indirect interventions: non-consciously processed stimuli (subliminal)
3. Indirect interventions: consciously processed stimuli
4. Indirect interventions: Communication fully respecting rationality

The first and—depending on circumstances, the second—class of interventions regularly interfere with freedom of thought, whereas the fourth and—depending on circumstances, the third—may not. Many interventions fall on a spectrum in-between and require evaluation in light of the suggested test and further context-sensitive considerations as those formulated by the ECtHR in *Kokkinakis* and *Larissis*.[29] This taxonomy

[28] The distinction between direct and indirect interventions is not based on crude mind-brain dualism, but on different causal pathways of interventions. That this is a suitable criterion to distinguish between interventions for normative purposes has been disputed (Levy 2007, 2020). However, normative as well as factual differences between interventions are key criteria. The alternative is an assessment solely based on effects. It would neglect normatively different protections of interventions and the privileged status of expressions.

[29] A third category that led to discussions in neuroethics are environmental alterations. They may change thoughts or beliefs, but might not be conceptualized as an intervention. Architecture, for instance, may affect how people feel and think in a place (open space vs. narrow confines). Intervenors may avail themselves of such effects (the prison as a Panopticon), see Bublitz, 2018. Recently, choice architecture through nudges has received much attention (Thaler & Sunstein, 2009). The question in these cases is whether alterations to

corresponds and reconstructs various views on the matter. For instance, the Special Rapporteur on Freedom of Opinion considers "forced neurological interventions" a violation of Art. 19(1) (2018, at 23). Correctly so—these are direct brain interventions that bypass control, do not respect recipients as rational believers and are likely no expression of rights. Subliminal stimuli, banned by laws on marketing and broadcasting, fall into the second category and are prohibited as they bypass control capacities. Moreover, interventions that are by themselves innocuous might be assessed in combination with others: While talking to a therapist for an hour might be beyond concern, participating in several cognitive therapy sessions changing thought dispositions and involving a range of subtle psychological mechanisms may amount to an interference (and therefore requires informed consent).

With respect to dubious indirect interventions such as advertisement, much depends on the strength of their effects and the mechanisms which produce them. The important general lesson is that such interventions are worrisome even if they fall short of constituting coercion or inducing uncontrollable buying urges, it may suffice that they change people's beliefs about a product on control-bypassing ways not respecting recipients as rational believers. Many mechanisms deployed in marketing raise such worries. A simple example: According to the mere exposure effect, the repeated exposure to a stimulus, say a message, leads people to evaluate it more positively. Simply repeating a message makes it psychologically more believable (Bornstein & D'Agostino, 1992). A so caused increase in the degree of belief is not warranted by standards of rational belief formation. Employing this mechanism by repeatedly exposing people to messages without providing further reasons to change beliefs fails to respect them as rational believers, it exploits rational weaknesses in their belief-forming system. If effects are severe enough, this constitutes an interference. (It seems unlikely that the pursued aim is

the environment affect freedom of thought; but a range of further considerations come into play. For instance, buildings have to be designed in some way, and proprietors have a right to design them, just as store-owners have a pro tanto claim to design their store as they please, including the placement of products. Nonetheless, if such environmental alterations have substantive effects on thinkers, the right to freedom of thought has to be taken into account. This requires context-specific assessments. Rules for prisons are different than for supermarkets. A simple solution would be informing customers about the choice architecture, improving her ability to form rational decision as they become aware of arational influences.

significant enough to justify it.) Another example is stimuli so designed that recipients process them only superficially by so-called peripheral routes of processing (Petty & Cacioppo, 1984). This bypasses control of recipients, fails to respect them as rational believers, and thus raises freedom of thought concerns. These examples show how the developed criteria allow concrete assessments.

Tools and the Freedom to Think

A different form of interference merits attentions as it animated the Cognitive Liberty movement (Boire, 2001; Sententia, 2006, also see Bublitz, 2013). Previously, thinking has been understood as a natural ability. But it is constrained by parameters of the cognitive system and can be greatly enhanced by tools for thought, cognitive artifacts (Clark, 2008). A good example is calculating. Numbers and operations easily become too complex to be carried out in the head; writing them down and calculating with symbols vastly increases powers for calculating. The same is true for ordering thoughts or writing a longer piece of text. Many technological innovations might be viewed as ways to augment cognitive capacities. This cannot be without relevance for the right to freedom of thought, especially the freedom to think.

An intriguing philosophical theory proposes a radical perspective: Thinking is not only taking place inside brain and skull, but in the external world—the mind extends into the world. Accordingly, a piece of paper, a calculator or an iPad can become part of the mind (Clark & Chalmers, 1998; Menary, 2007). If applied to the law, the Extended Mind Thesis would have far-ranging consequences. Material objects, chattel, would become parts of the mind, and thereby, of the person (Blitz, 2010). This view is hardly reconcilable with foundational legal distinctions between persons and objects, nor with the internal/external distinction of Articles 18 UDHR and CCPR, and hence cannot guide delineations of their scopes.

But even though legally, they are not part of the mind or person, cognitive artifacts such as pen and paper or iPads could be enabling conditions of thinking, and therefore fall under the protection of Art. 18. This seems plausible if they enable basic forms of thinking and ordinary cognitive functioning. Depriving a thinker of such tools might amount to an interference with freedom of thought, and states might be obliged to provide such basic tools to rightholders in specific conditions such as prisons.

However, as such external actions concern the social sphere, an absolute right can not be warranted—it can still be a strong right. Moreover, the writing might then fall under the privacy provision of Art. 18, even though it is expressed thought.

This freedom to think also covers bodily practices with strong effects on thought such as meditation. Conceiving of it merely as bodily movement might miss its point. Provided effects are substantive, a prohibition of meditation (as alleged in *Mockutė*), might interfere with freedom of thought. In addition, this dimension comprises medical tools of thought, e.g., medications against cognitive impairments from ADHD to Alzheimer disease. It might also cover tools as those advocated by the Cognitive Liberty movement at least insofar as they enable modes of thoughts or thinking otherwise not attainable (Walsh, 2010). Because of the social dimension, this cannot be an absolute right; but it may be strong and affect drug policy nonetheless (Bublitz, 2016).

Tensions Between Different Conceptions & Exceptions

So much for interferences. A problem that has colored some previous examples and that gives rise to thorny questions arises from inner tensions of the idea of freedom of thought. Different conceptions may pull into different directions. Structurally, the problem arises when an intervention contravenes the negative freedom from interferences but aims at promoting other aspects such as the freedom to think by improving mental capacities or rational belief formation.

The psychiatrists in *Mockutė*, for instance, succeeded in moving the applicant to adopt a critical view on "categorical" thoughts. This supposedly increased her freedom to think different thoughts, overcame internal impediments due to the mental disorders and promoted rational belief formation. But it nonetheless encroached upon the freedom *from* control-bypassing interferences. In a philosophical view, one might say that the applicant's freedom of thought was not violated because her thinking was not free whereas in a legal sense, there was an interference. The question is thus whether the ends can justify the means.

A similar conflict arises with respect to educational institutions such as the picture of schools as places of "thought control." Mandatory schooling fulfills the criteria of an interference: It is conducted in a coercive (mandatory) setting, involves a relationship of unequal power between an authority and vulnerable persons whose abilities of thought are not fully developed, and whose future life courses depend on grades.

This situation, offers significant incentives for adopting one's thinking to the demanded norms. It does not respect schoolchildren as rational believers, they are none yet. It interferes with freedom of thought. However, the larger aim behind schooling is promoting preconditions of freedom of thought: Various cognitive abilities and skills, rational thinking and belief formation, the absence of impediments, a large knowledge base, self-trust and intellectual curiosity. These conditions have to be created and fostered—the prime aim of education, properly conceived. Freedom of thought and especially rational believing demand such interventions in cognitively not fully developed children. This calls for institutions such as schools, even mandatory ones.

Furthermore, the tension can also arise with respect to competent adults insofar as interventions do not seek to exploit but to alleviate weaknesses in belief formation. As an example, people discount bad information and overestimate good information in the updating of belief, creating biases. A study showed that a few pulses of transcranial magnetic stimulation (TMS) applied to the inferior frontal gyrus eliminates this effect (Sharot et al., 2012). If such pulses are applied without consent (and without other side-effects), does it interfere with Art. 18?

A categorical insistence on the absolute protection denying any interference is not persuasive. Plausible constructions of the right have to accommodate the fact that freedom of thought has conditions that may need to be created and promoted through interferences with freedom of thought. There is no way around this insight. As a consequence, strict exceptions might need to be developed and clearly defined. They might be justified because the need for them arises from within the concept of freedom of thought. They promote the value of freedom of thought, not other values or public interests. They might be construed, as Loucaides mentions in passing with respect to the ECHR, as "inherent limitations" of the right (2012, 86). Assuming the general justifiability of paternalistic measures, here is a suggestion:

An intervention contravening the freedom from interferences might be permissible if (a) the person is not competent to make a decision about such interventions herself, (b) the intervention aims at improving the freedom to think by alleviating substantial deficits in thinking abilities or rational belief formation, (c) it is in the best (medical) interest of the person, (d) there are no less invasive means, and (e) the benefits of the intervention outweigh the setbacks, all things considered. These criteria may need refinement for different purposes, from schools to psychiatry

(and alignment with domestic mental health laws). In addition, given the dangers of misuse of such exceptions, it should be ensured that (f) interventions do not primarily pursue other governmental goals and (g) that they do not seek to imprint moral, political, or other values, they must strive to be content neutral. The primary and dominant characteristic of the intervention must be the promotion of freedom of thought. Under these conditions, and only then, interferences with freedom of thought may not lead to a violation of the right because it advances freedom of thought in affected persons.

An exception along those lines provides the resources to explain why and under which conditions mandatory education does not contravene freedom of thought. Moreover, it shows why psychiatric interventions, e.g., in acute psychotic states, with the aim to restore freedom to think, might be warranted. The psychiatric measures in *Mockutė* may fall under the exception. However, their attempts to address religious beliefs may not since rules for this particular type of belief may be different (*infra*). The use of the TMS device without consent in competent adults violates Art. 18.

Several further practices likely not falling under the exception merit mentioning: Forcibly administering thought-altering drugs to render persons competent to stand trial (*Sell v. USA*) pursue aims not in the best interest of the person. This is true *a fortiori* for interventions establishing the (cynical) competency to be executed. Furthermore, people, e.g., in institutions such as prisons or care homes are sometimes sedated so that dealing with them is easier—this is not promoting freedom of thought and hence violates it. A particularly thorny issue is criminal rehabilitation of offenders. Special considerations may apply because of the permissibility of punishment, which allows states to treat citizens in ways otherwise prohibited. But in general, human rights including the right to freedom of thought have to be observed by penal institutions, even though this may limit available means to reform offenders. The Ludovico Technique of the novel Clockwork Orange (Burgess, 1962) would flout freedom of thought (Bublitz, 2018).

Reflections on the Absolute Nature

This brings us to concluding remarks on the absolute nature of the right. Without calling its supreme importance into question, several examples have shown that an unconditional protection is hard to maintain in light

of real cases: interferences through expressions; paternalistic improvements of free thinking, the duty to remember, and attempts of courts to bypass the perimeters of the *forum internum*. More examples can likely be found. This places justificatory pressure on the right.

Future examinations have to investigate the reasons for the absolute protection with a view on the *travaux préparatoires*, the history of ideas and current debates in philosophy. Some philosophers recently argued that some interferences with freedom of thought might be permissible as they are the most effective way to prevent crimes, reform offenders, or promote other pressing societal goals (Douglas, 2014; Persson and Savulescu, 2012). In their often hypothetical scenarios, these interferences with thought are the only available means to pursue an exceptionally significant goal, e.g., saving the world from climate change by altering how people think about long-term costs of their actions. Under such conditions, the absolute protection of the right becomes indeed arguable. However, such thought-experiments are not necessary guides for good interpretations of a right or for practical policy. There will always be hard-cases and good arguments for exceptions. Every deontological right can be countered by an consequentialist thought-experiment pointing to better overall outcomes. That, as such, is not surprising. What ultimately matters are reasonable regulations for real life. The absolute protection of freedom of thought is predicated on the assumption that the state can mobilize all its physical forces and that this usually suffices to control people's behavior and achieve societal goals.[30] And this assumption seems to be largely true.[31]

However, these thought-experiments have merit as they underscore a somewhat neglected topic in writings on the right: Interferences with freedom of thought can be genuinely benign. In classic treatments, the roles of the good and the bad are clearly and stereotypically distributed: Dictators versus the oppressed, the church versus science, the monarchy versus the Enlightenment—constellations in which one cannot but champion freedom of thought. The challenging cases of today, however, are different: What about an effective but manipulative control-bypassing

[30] According to the HR Committee in General Comment No. 29, Art. 18 CCPR is non-derogable because "derogation can never become necessary" (2001, at 11). This is, ultimately, an empirical claim.

[31] See the discussion in Bublitz (2019) and the reply by Persson and Savulescu (2019).

intervention that alleviates racial or gender biases—should it be mandatory? Many people might consider this a price worth paying for a less discriminatory society. An absolute construction of the right to freedom of thought needs to provide good reasons to show why they are wrong. This requires sustained debate about the foundations of the right and ultimate grounds of the legal order.

Finally, the absolute protection seems to be among the causes for the lacking practical relevance of the right. This is the *tragedy of absolute rights* (Bublitz, 2014). They are so strong that courts will attempt to keep clear of their ambit because options to find reasonable decisions for individual cases are severely limited; they seek to avoid precedents without room for maneuvers in the future. The case law of the ECtHR might well be read in this manner. Turning freedom of thought into a living and practically effective right requires a broader scope and has to accommodate the fact that people change each other's thought on potentially worrisome ways all the time. Finding reasonable solutions for those cases requires more fine-grained and context-sensitive considerations than an absolute right can provide. Perhaps, the absolute protection must be softened to create some "discretionary edges" (Evans, 2017, 88). Perhaps, *forum internum* and *externum* should be seen less as mutually exclusive categories but as an overlapping continuum, as the former Special Rapporteur on the right suggests (Bielefeldt et al., 2016). Perhaps, another non-absolute right such as the right to mental integrity (Bublitz, 2020b; Ienca & Andorno, 2017) should complement freedom of thought and absorb minor cases. In any case, the grounding of the absolute protection need to be revisited for the right to become an effective legal guarantee.

Summary

Freedom of thought is not a homogeneous concept. It comprises several conceptions at multiple layers. The grand political and philosophical idea is not identical with a legal conception, and both should be kept apart in discussions. There are several rights to freedom of thought at the domestic and international level, prefigured and constrained by the legal orders in which they are embedded. International human rights to freedom of thought are modeled after Articles 18 UDHR, with slightly diverging wordings. It is suggested to consider the right as identical across documents, as far as possible, to allow a coherent international understanding. This, of course, will ultimately depend on the courts applying

and interpreting the right. The hallmark of Articles 18 UDHR and CCPR as well as regional counterparts such as Art. 9 ECHR is their absolute nature, interferences are not open to justification. This influences the interpretation of the right and is likely one of the reasons for its practical irrelevance.

More concretely, theories of the right to freedom of thought must explain five explananda: its content and meaning, interferences, the internal/external structure, its absolute character as well as its relation to other rights. The foregoing discussion yields some suggestions:

First, the scope of the right should comprise thought and thinking. Second, "belief" plays a salient role in the norm. Its restrictive interpretation as conviction is correct with respect to the privileging of external actions but runs into inconsistencies with respect to mental states since all beliefs are thoughts. Therefore, with respect to the internal side, the right should protect the freedom of *all* beliefs. And as beliefs—affirmative attitudes toward propositions about the world which can be true or false—possess several peculiarities, freedom of belief deserves and requires special consideration. Accordingly, without unduly enlarging the scope, Art. 18 covers freedom of thought, thinking, and belief.

Third, freedom of thought, conscience, and religion should be seen as three distinct freedoms as their scopes and possible interferences may vary. For instance, conscientious and religious beliefs are not truth-apt; attempts to persuade others in spiritual matters, proselytism, might legitimately take forms different to persuasion with respect to scientific or political beliefs. Nonetheless, the three freedoms share common ground, so that doctrines and jurisprudence on one often apply to the others.

Fourth, Art. 18 provides protection in seven dimensions: Its essence lies in a normative liberty, according to which rightholders are not under any thought-related duty. Correlatively, no one has claims over thoughts and thinking of another person. From this, the venerable *cogitations* maxim—no punishment for thoughts—emerges. The right also bars factual interferences negatively affecting thought, thinking, or rational belief formation. It also guarantees the privacy of thoughts. Insofar as states have positive obligations, it calls for the provision of preconditions of free thinking, from education to tools, as well as protection against interference by third-parties.

Fifth, the peculiar inner and outer structure of Art. 18 stems from the idea of a *forum internum* of religion and conscience. The extent to which this metaphor applies to freedom of thought needs further examination.

It roughly denotes the inner psychological space in which persons think and reflect about themselves. Whether this metaphor usefully adds something to defining the scope of the right remains to be shown; the present proposal does not draw on it in any detail. Furthermore, the inner side of thought has to be delineated in several respects: One border concerns the step from mere thought to action and the difference between cognitive and behavioral duties. Intentions might be the dividing line. Another line concerns the external side of thought. The philosophical Extended Mind Thesis that cannot guide the interpretation of the scope of Art. 18 because of its internal/external structure. It is important to note that the law is not bound by supposedly ontological distinctions, as it may cut the world in way pursuant to normative considerations. Because of the internal/external structure of Art. 18 as well as the foundational legal distinction between objects and persons, the Extended Mind Thesis is inapplicable. However, the Extended Mind Thesis demonstrates the extent to which cognition is integrated with artifacts and the environment. This insight calls at least for the provision of simple tools to enable basic cognitive functioning such as pen and paper for prisoners.

Sixth, one of the key challenges for the right is defining permissible and impermissible interferences. Instead of assuming that only powerful interventions may affect thought, interpretations should accommodate the fact that changing others thought and thinking, also in negative ways, is a common occurrence. Art. 18.2 CCPR speaks about coercion. But the analysis of the rare case law, as well as considerations about the nature of beliefs and coercion, show that this is neither a precise nor an exhaustive definition of possible interferences. Many dubious ones are better described as manipulative interferences. Moreover, some interventions are protected by rights of intervenors which entail a *pro tanto* permission to affect other's minds, especially freedom of expression. As the scopes of freedom of thought and expression cannot be interpreted in a way that both do not overlap, balances need to be struck. The following test for interferences is suggested (it may need context-specific modifications):

> *Does an intervention respect the rightholder as a free and self-controlled thinker or a rational believer who forms beliefs in light of evidence and rational standards – or does it undermine or bypass her control, exploit rational weaknesses or move her to form beliefs for other, non-related grounds such as psychological needs? In the former two cases, the intervention may not interfere with freedom of thought, whereas it does so in the latter. Then, one*

has to further ask : Is the intervention an exercise of an important right of intervenors which entails a *pro tanto permission to affect thoughts?*

Seventh, the absolute nature of the right needs reconsideration. The reasons for it are not entirely clear, and interestingly, nowhere stated more precisely. The discussion of cases as well as legal practice seems to indicate that a living right to freedom of thought with a relevant scope may need to allow more nuanced decision, taking into account competing rights, different social situations, as well as practical considerations. Without firmer and finer explanations of its grounds and limits, courts will likely remain reluctant to apply Art. 18, if only for the fear of unforeseeable precedents.

Finally, the grand political idea as well as the general human right might be too abstract and lofty to provide answers to concrete cases. It is not only the task of courts, assisted by legal scholarship, to render the right more precise, but also of lawmakers in regulating of specific domains, such as advertisement. Human rights can only provide the outer limits of what governments, and by extension, third-parties, might do. But many of the intriguing questions are not situated at these borders. Lawmakers should regulate these gray areas and thereby render the right more precise. In this regard, one may presumably speak of a systematic neglect of freedom of thought in several domains. Although this may need closer examination in detail, freedom of thought may not have received the attention it is accorded to by international human rights law. Novel technologies provide opportunities to remedy these shortcomings. As such issues are complex and easily surpass the horizons of courts in daily business or individual lawmakers, this is a moment for effective scholarship. By offering persuasive operationalizable theories of the right as well as concrete policy suggestions, it can illuminate the path of its further construction and decisively shape the future of freedom of thought.

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