Universität Hamburg
DER FORSCHUNG | DER LEHRE | DER BILDUNG

FAKULTÄT
FÜR RECHTSWISSENSCHAFT

UHH · Fakultät Rechtswissenschaft · Rothenbaumchaussee 33 · 20148 Hamburg

Mr. Ahmed Shaheed
Special Rapporteur on Freedom of Religion or Belief

c/o Office of the High Commissioner for Human Rights
United Nations at Geneva
Switzerland

via email

Dr. Jan Christoph Bublitz

Fakultät für Rechtswissenschaft
Institut für Kriminalwissenschaften
Rothenbaumchaussee 33
20148 Hamburg
Germany
christoph.bublitz@uni-hamburg.de

08.06.2021

Consultation on the Right to Freedom of Thought

Dear Mr. Shaheed,

it was a great honor to participate in your consultation on the right to freedom of thought.

With this letter, I wish to submit some further considerations on the matter, based on the questions on your call for input.

Moreover, I spent considerable time last year analyzing the *travaux préparatoires* of the Universal Declaration and the Covenant on Civil and Political Rights specifically in regard to the right to freedom of thought. Although they do not provide many answers to your questions, they contain some interesting clues that have not been fully appreciated in the legal literature. The analysis is unpublished as the book for which it was written is still under consideration. I will revise the chapter and send it to you before the end of the month. While it may not solve any problems, it may spare your team digging through the archives.

Finally, let me express my appreciation of your work and your timely choice to explore freedom of thought. Let me know if I can be of any further assistance.

With highest regards,

Universität Hamburg

DER FORSCHUNG | DER LEHRE | DER BILDUNG

FAKULTÄT
FÜR RECHTSWISSENSCHAFT

Dr. Jan Christoph Bublitz

Fakultät für Rechtswissenschaft
Institut für Kriminalwissenschaften
Rothenbaumchaussee 33
20148 Hamburg - Germany
christoph.bublitz@uni-hamburg.de

To the Special Rapporteur on Freedom of Religion and Belief

Statement for the Report on Freedom of Thought to the General Assembly

With few exceptions, the right to freedom of thought pursuant to Art. 18 CCPR has neither been applied by courts, nor received attention in legal scholarship. The *travaux préparatoires* of the Universal Declaration and the CCPR leave central issues unaddressed. The following input is thus solely based on the author's scholarly opinion arising from a decade of thought on the topic. Given the constraints of space, it addresses only some of the Special Rapporteur's questions and largely omits references.

Question 1 – Content and Scope of the Right

Transforming freedom of thought from a dead letter to a living right poses the challenge to render an abstract idea concrete. The following wishes to lay out a path by which this might be accomplished.

This requires appreciating different understandings of the concept. First and foremost, freedom of thought is one of the grand notions of the Enlightenment. It calls, among others, for independent and critical thinking, which not only questions authorities, but also itself. It calls for a societal climate conducive to open discourse, tolerant of diverging viewpoints, free from repercussions for thought. It is closely related to freedom of expression, the scientific method and has rationalist connotations. A litmus test is how thinkers expressing dissenting thoughts, beliefs, or opinions are treated by others, especially by the majority. In many ways, opposing views can be appreciated or repressed. Whereas many social groups exhibit tendencies for the latter, freedom of thought calls for the former. It does not, however, imply equivalence between all thoughts or beliefs; not all are equally well-grounded, some are false. The Enlightenment notion of freedom of thought is committed to the search for truth. This merits emphasis with respect to irrational "post-truth" tendencies.

<u>Scope of Art. 18</u>

To define the scope of Art. 18, these abstract ideas need to be rendered more precise. The right should also not be restricted to a specific Enlightenment understanding, freedom of thought may have many facets. However, it allows an essential, non-exhaustive proposal for a construction of the scope.

According to it, freedom of thought has two main objects of protection: Diverse mental actions, *thinking*, as well as specific mental states, *thoughts*. It has an active and passive dimension (henceforth, "thought" includes both).

These are protected against four main types of interference:

a) legal duties or prohibitions of thoughts ("forbidden thoughts"),
b) sanctions or punishments for (*cogitationis poenam nemo patitur*),
c) factual interferences with thoughts (actions that weaken thinking capacities or change thoughts through undue influence),
d) privacy of thought (involuntary revelations).

These four types of interferences can be deduced from the concept of freedom of thought (Bublitz, 2014).

Furthermore, and without prejudice to general restrictions of positive obligations under the CCPR, Art. 18 should entail positive obligations

e) to support people's abilities for free thinking, through a variety of measures from education and the provision of necessary tools to treatment of disorders of thought; and
f) to protect rightholders against interferences by other private actors.

Thoughts are, roughly, representational mental states; thinking comprises mental actions such as reasoning, calculating, remembering, drawing inferences, etc. Distinctions between thoughts and other mental states and processes are not clear-cut; psychology shows that emotional and cognitive processes are deeply interwoven. However, the absolute level of protection of Art. 18 speaks against wide interpretations. It can only cover the central aspects of thought against substantive interferences.

The paradigmatic case of freedom of thought is reasoning, i.e., rational thinking and rational belief formation, e.g., according to evidence, consistent with other beliefs, and observant of epistemic rules. Although neglected in current scholarship, this rationalist conception corresponds to a widely shared historical understanding of freethinking, which is indirectly referenced in the *travaux*. Moreover, the capacity of persons for reason is also an anthropological assumption underlying the law; many norms make sense only in its light. The right to freedom of thought protects these capacities, activities, and the underlying psychological and brain mechanisms and processes.

Abstractly speaking, Art. 18 commands:

Everyone is to be respected as a rational free thinker.

Rational thought does not exhaust the scope of Art. 18, which many and should include other modes of thought, from imagining to artistic thinking and sexual fantasizing. But rationalist thought should form a central pillar of the right.

Another facet of utmost importance is control of the person over thinking and belief-forming processes. Such control is often limited (Metzinger, 2015). Many thoughts arise unbidden. More generally, human psychology has many weaknesses and vulnerabilities which undermine control and render persons susceptible to non-rational influences. This is the reason why protection of Art. 18 against interferences exploiting weaknesses is necessary.

Question 4 – Relation to Freedom of Belief and Opinion

In the context of Art. 18, "belief" is often understood as "conviction", narrower than its ordinary meaning of "taking something to be the case". This understanding transpires from the specific cases of religious and conscientious beliefs. However, it stands in latent tension with a wide understanding of thought – "on all matters", as in the words by the Human Rights Committee (1993). Beliefs, ordinarily understood, are a type of thought. Freedom of thought is then broader than freedom of belief, at least with respect to the internal side.

However, since beliefs are accorded a prominent place in Art. 18, they should be considered a central case. Freedom of thought then protects rationally forming beliefs about all matters against undue interferences, just as freedoms of conscience and religion protect specific beliefs. A possible reason for listing them separately in Art. 18 is that the standards for undue interference with the latter beliefs may diverge. For instance, religious influence may permissibly appeal to emotions (fear of death, existential dread), or take place in vulnerable situations (life crises), where non-religious influences would be impermissible.

Question 3 – Relation between Freedom of Expression and Thought

The relation between freedom of expression and freedom of thought is noteworthy. They share a long history, both terms are often used interchangeably, but they are legally distinct. As rights of the same person, they complement each other, inner reasoning and outward expression. Between persons, however, they may contravene and limit each other. Freedom of thought as the right to remain free from interferences can conflict with freedom of expression as the right to send thought-altering stimuli. This tension is not always fully recognized in freedom of expression scholarship. Given its absolute nature, freedom of thought should often take priority. This tension is best addressed as a question of interference with freedom of thought.

Question 10 – Undue Interferences

Art. 18(2) speaks of "coercion". But this wording resulted historically from a political compromise and is without prejudice to other forms of interferences such as manipulation. These are abstract and vague terms. The key challenge arises from the fact that people constantly seek to change each other's thoughts, beliefs, or mental states, and often succeed doing so. However, a compelling argument hardly violates Art. 18. Not every change in another's thought interferes with the right.

Accordingly, a framework of impermissible interferences needs to be developed. It must accommodate a range of context-specific considerations. For instance, not all beliefs are formed fully rational (they involve preferences, values, desires); people do not expect and need not be treated as rational thinkers in all life situations. However, they should be so as the default rule. This allows for an abstract test:

Does an action that intentionally aims at changing thoughts of another person ("intervention") respect that person as a free and rational thinker in control of her thoughts and thinking processes?

Answers must take a range of consideration into account, among them:

1. Effects: The intervention must substantially affect thought in a negative way (or attempt doing so). This includes weakening the psychological capacities for, or mechanisms of thought, undermining control over thought and thinking, or changing relevant contents of thoughts.

2. Means: These effects have to be brought about on specific ways. Interventions that bypass mechanisms of control over thought and thinking, rational belief formation, or exploit pertinent psychological weaknesses usually disrespect rational and free thought. Interventions which are instances of expression (supra) need additional considerations.

This suggests the following coarse distinction (cf. Bublitz, 2020):

a) Direct interventions into thought are those that primarily work through neurobiology, i.e., electric, magnetic stimulations of the brain or pharmaceuticals. They bypass rightholders' control, and they are not expressions of intervenors. Tampering with people's brains is not respecting them as free thinkers. This is a paradigmatic interference with freedom of thought (Nowak, 2005).

b) Indirect interventions alter thoughts through inputs via the senses, i.e., auditory, visual or other stimuli. They cover a broad spectrum of interventions.

Some bypass control and rational capacities of recipients, e.g. subliminal stimuli. Others attempt to change people's thoughts via peripheral ways of perception, or by triggering shallow psychological procession mechanisms. Still others are ordinary forms of communication in situations which weaken people's mental control. Interventions as such do not respect

recipients as free and rational thinkers, but bypass control or exploit weaknesses. Even if they are protected expressions of intervenors, freedom of thought should prevail.

By contrast, other indirect stimuli are rational forms of communication. In the best case, they observe conditions of ideal speech situations (Habermas, 1990). They do not fail to respect the other as a free and rational thinker and they are protected expressions.

Most forms of communication fall on a spectrum in-between those examples. Their evaluation requires more fine-grained analyses with further context-specific criteria.

Question 12 – Examples of Practices Contravening Art. 18

As laying out those criteria exceeds the confines of this statement, I wish to draw attention to five areas which give rise to concerns:

First, I wish to remind of practices of coercive persuasion that aim to alter beliefs, often of dissidents or political prisoners. They violate Art. 18 (in combination with Art. 19, *Kang v. Republic of Korea*). Such practices are still employed by some states. Means and prevalence of such methods may warrant public scrutiny and a systematic study.

Secondly, I wish to draw attention to the fields of advertisement/marketing: They systematically study ways in which persons can be brought to change their thoughts, beliefs, preferences by the presentation of well-orchestrated and fine-tuned stimuli. They are often indirect interventions and forms of expression, but many of them are designed to operate via arational factors. The impact of stimuli rather than respect for recipients as free and rational thinkers seems to stand in the foreground of many such attempts, which, among others, may seek to bypass recipients' control over mental processes or exploit weaknesses of them so that they form positive beliefs about a product, company or a proposition. While most individual stimuli may not raise to the level of seriousness to interfere with Art. 18; the aggregated effects and the systematic underappreciation of the value of freedom of thought in such endeavors give rise to concern. They may exacerbate with novel methods such as microtargeting.

Thirdly, coercive psychiatric interventions are concerning. Although this complex topic requires finer evaluations with respect to specific methods and aims of treatments, it merits attention as it has received little attention under Art. 18, even though some interventions constitute paradigmatic interferences: Forceful administration of substances that bypass control of recipients, under coercive conditions, sometimes with the expressed aim to change thoughts or beliefs. If this does not qualify as an interference, not much will.

The fact that affected people suffer from mental disorders should not deflect from this. Some of the disorders indeed undermine rational thinking. Nonetheless, the scope of the right should not be narrowed to exclude thoughts which meet (normatively defined) psychiatric criteria. Moreover, this would not evade the problems as the factual effects of such

interventions are often much broader, affecting a range of mental states and processes, including subduing or slowing down thinking.

The real problem is that some of such interventions seem ethically justifiable, and that some improve freedom of thought. This does not negate the interference, but requires an exception to the absolute protection of Art. 18 – an intriguing question that needs to be explored. In any case: such exceptions are arguable only under narrow conditions, among them that interventions are in the best interest of a person who is incompetent to make a medical decision.

However, attention should be drawn to the fact that some countries carry out such interventions for other purposes, not in the interest of affected persons, e.g. to render them competent to stand trial, or even to be executed. In addition, such means might be used by law-enforcement to get people to perform specific actions. They may also be used in criminal rehabilitation of offenders. Novel neurotechnologies will very likely improve the range of possible applications. A bright line against direct interventions into thought (arguably with narrow exceptions) should therefore be drawn.

Fourthly, with respect to privacy of thought, neuroimaging technologies that detect and read-out brain activity raise concern insofar as they afford inferences about content of thoughts or the type of thinking a person perform. First applications allegedly afford this. For instance, variations of the "brain fingerprinting" method are used by law-enforcement agencies in some countries (Farwell, 2012). Its reliability is not independently verified. Persons are exposed to stimuli (e.g. showing them, voluntarily or involuntarily, a picture of a crime scene) and their brain reactions to it are detected (the P300-brain wave, via EEG). These reactions are not under control of the person. They supposedly allow inferences about whether the person previously encountered the stimulus, revealing "knowledge", "information" or "even an experience" (so different descriptions of the methods). This should qualify as a thought in the context of Art. 18, which can be conscious ("I know this place") or non-conscious. While both the intervention and the imaging may individually not raise to the level of concern, their combination does so because it elicits and registers involuntary thoughts. This is the point where the privacy of thoughts begins to be encroached upon.

Fifthly, states may be under a positive obligation to provide tools which enable thinking. This includes offering voluntary treatments for mental health disorders negatively affecting capacities of thought, but also basic tools that enable specific forms of thinking. For instance, ordering one's thoughts sometimes requires writing them down on a piece of paper. Such external actions should, in narrow conditions, be considered thinking (Clark/Chalmers, 1998). Restrictions of them then interferes with Art. 18 ("indirect interference"). Tools for thought such as pen and paper should be provided to everyone, on request, especially in situations of confinement.

References

Kang v. Republic of Korea, CCPR/C/78/D/878/1999, UN Human Rights Committee, 16 July 2003.

Bublitz, C. (2020). Why means matter: Legally relevant differences between direct and indirect interventions into other minds. In: Vincent/Naddelhoffer/McCay, *Neurointerventions and the Law: Regulating Human Mental Capacity*. Oxford University Press, 49-88.

Bublitz, C. (2014). Freedom of Thought in the Age of Neuroscience. A Plea and Proposal for the Renaissance of a forgotten fundamental right. *Archiv fuer Rechts- und Sozialphilosophie*, 1-25.

Clark, A., & Chalmers, D. (1998). The extended mind. *Analysis*, 7-19.

Farwell, L. (2012). Brain Fingerprinting: a comprehensive tutorial review of detection of concealed information with even-related brain potentials. *Cognitive Neurodynamics*, 115-154.

Habermas, J. (1990). Discourse Ethics: Notes on a Program of Philosophical Justification. In: *Moral Consciousness and Communicative Action*. Cambridge: MIT Press, 43-115.

Human Rights Committee (1993), General Comment No. 22. CPR/C/21/Rev.1/Add.4.

Metzinger, T. (2015). M-Autonomy. *Journal of Consciousness Studies*, 270-302.

Nowak, M. (2005). *CCPR Commentary*. 2nd Ed. Engel 2005.