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# The Right to Construct Yourself and Your Identity: The Current Human Rights Law Framework Falls Short in Practice in the Face of Illegitimate Interference to the Mind

Emine Ozge Yildirim-Vranckaert

KU Leuven Center for IT and IP Law, Leuven, Belgium  
Email: emineozge.yildirim@kuleuven.be

## Abstract

Propaganda and manipulation have long been employed to influence and shape individuals' thoughts and identities. In the advent of the digital era, these techniques have become more sophisticated and invasive, and are utilized to further various causes. This article investigates the extent to which international human rights law affords protection against manipulation techniques such as microtargeting and behavioral reading, which can negatively impact individuals' mental health and autonomy by threatening their right to construct their own identity. The right to freedom of thought in the Universal Declaration of Human Rights (Article 18), the International Covenant on Civil and Political Rights (Article 18), and the European Convention on Human Rights (Article 9) offers absolute protection to individuals' inner selves and covers the protection against manipulation on paper. However, in practice, the right has not received much attention and has not reached its full potential due to its abstract and ambiguous nature. This Article analyzes the preparatory works of these human rights law instruments, with a particular focus on the right to freedom of thought, to clarify its origins and the intention behind its creation. The Article contends that the historical origins of the right do not provide sufficient answers to the current issue and contribute to the ineffective application of the right against emerging manipulative practices. The Article also proposes potential ways to clarify and strengthen the legal framework related to the right to freedom of thought.

**Keywords:** Freedom of Thought; Mental Autonomy; Digital Manipulation; Propaganda; Cognitive Liberty; Human Rights Law

“The politico-religious struggle for the mind of man may well be won by whoever becomes the most conservant with the normal and abnormal functions of the brain, and is readiest to make use of the knowledge gained.” - William Sargant, 1997<sup>1</sup>

## I. Introduction

Digitization is akin to a double-edged sword. It allows individuals to make powerful contributions to political movements and helps bring about societal changes in unconventional ways.<sup>2</sup> However, malicious actors can also utilize digitization to manipulate the masses or micro-target individuals,<sup>3</sup> disregarding their mental autonomy and dignity. Whether targeted by political or financial interests, the mind is a private realm, which should enjoy its privacy free from impermissible interference by external actors. In order to cultivate self-determinate and self-governing individuals, it is crucial to ensure that the

<sup>1</sup>WILLIAM W. SARGANT, BATTLE FOR THE MIND. A PHYSIOLOGY OF CONVERSION AND BRAIN-WASHING, at xxviii (1957).

<sup>2</sup>ZEYNEP TUFEKCI, TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST 6-7 (2017).

<sup>3</sup>Karen Yeung, 'Hypernudge': Big data as a mode of regulation by design, 20 INFO. COMM'N. & SOC'Y 118, 123-24 (2017).

“self-rulers” can think for themselves while developing their mental faculties.<sup>4</sup> This also means that, in order to consciously construct one’s identity and reflect wholly on oneself,<sup>5</sup> one’s autonomy must be relatively insulated from outside interference and scrutiny, allowing one to experiment with “every conceivable type of taste and behavior that expresses and defines self.”<sup>6</sup>

At the same time, human beings do not exist in a vacuum; mental autonomy does not imply cognitive isolation.<sup>7</sup> Our interactions and relationships with others shape us daily. Nevertheless, certain forms of interference or influence with the mind may be impermissible. In these cases, it is crucial to consider whether the illegitimately manipulated individuals—risking harm to their mental health, mental autonomy, and the right to construct their identity—have any effective protection or preventive mechanisms under the current human rights law framework.

Despite national and supranational policy efforts to address the issue of micro-targeting through the implementation of secondary legislation and non-binding policy guidelines, the fundamental right to freedom of thought, as enshrined in Art. 18 Universal Declaration of Human Rights (UDHR), Art. 18 International Covenant on Civil and Political Rights (ICCPR), and Art. 9 European Convention on Human Rights (ECHR), has been largely overlooked. This right affords absolute protection to individuals by seeking to safeguard the “forum internum”—a person’s inner sanctum (mind) where mental faculties are developed, exercised, and defined<sup>8</sup>—by preventing state or private interference with the individual’s mind, allowing them to construct themselves, their identity, conscience, and religion. Yet, the right to freedom of thought has received little attention in practice, resulting in the concept of absolute protection being effective only in theory and leading to the ambiguity surrounding its meaning. As a result, legal practice in its current form fails to provide a satisfactory answer to the question at hand.

This Article aims to determine whether the international human rights law framework offers effective preventive and protective mechanisms against contemporary manipulation and propaganda techniques through an examination of the intentions of the drafters in the travaux préparatoires (hereinafter “preparatory works”) of the UDHR, ICCPR, and ECHR.<sup>9</sup> The focus on these instruments is due to their greater geographical impact in the realm of human rights law. Furthermore, freedom of thought, according to Alegre’s interpretation of Vermeulen’s definition, consists of three key elements: the right not to reveal one’s thoughts or opinions, the right not to have one’s thoughts or opinions manipulated, and the right not to be penalized for one’s thoughts. This Article specifically focuses on the second right: “the right not to be manipulated.”<sup>10</sup>

The Article proceeds in three parts. The first analyzes how microtargeting and behavioral reading technologies have changed our understanding of traditional manipulation and propaganda tools in the media context and the significance of this shift for individuals’ mental autonomy. It also discusses the potential mental health and freedom of thought concerns arising from microtargeting on online platforms. The second consists of an overview of the drafters’ intentions in drafting the right to freedom of thought in the UDHR, ICCPR, and ECHR and explains that the preparatory works do not allow for a better interpretation of this so-called abstract-metaphysical right. The third identifies four main challenges, based on the drafters’ intentions and the lack of prima facie precedent, that hinder the effective protection of this right in practice. The Article concludes by arguing that the current freedom of

<sup>4</sup>COREY L. BRETTSCHEIDER, *DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT* 45 (1st ed. 2007).

<sup>5</sup>John Christman, *Autonomy in Moral and Political Philosophy*, *STAN. ENCYCLOPEDIA PHIL.*, Fall 2020, at 9-10.

<sup>6</sup>Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 *STAN. L. REV.* 1373, 1425 (2000).

<sup>7</sup>Richard G. Boire, *On Cognitive Liberty, Part I*, 1 *J. OF COGNITIVE LIBERTIES*, Winter 1999/2000, at 7-13.

<sup>8</sup>Ahmed Shaheed (Special Rapporteur on Freedom of Religion or Belief), *Promotion and Protection of Human Rights: Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, U.N. Doc. A/76/380, ¶2 (Oct. 5, 2021).

<sup>9</sup>See Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331 (explaining that when the ordinary meaning of the words of a treaty cannot be determined, its interpretation may be assisted by considering the treaty’s travaux préparatoires and the circumstances surrounding its conclusion).

<sup>10</sup>Susie Alegre, *Rethinking Freedom of Thought for the 21st Century*, 3 *EUR. HUM. RTS. L. REV.* 221, 225 (2017) (citing Ben P. Vermeulen, in *Theory and practice of the European Convention on Human Rights* 752 (Pieter van Dijk et al. ed., 2006)).

thought framework is neither future-proof nor efficient in practice, as it lacks the anticipation and definitions of emerging manipulation and propaganda tools.

## II. Microtargeting as an Enabler of Manipulation

Propaganda to influence, shape, and manipulate the public discourse using emotional vulnerability and unconscious fears and desires is nothing new. Edward Bernays, the father of public relations and Sigmund Freud's nephew, wrote in his 1928 book *Propaganda* that "Propaganda does exist on all sides of us, and it does change our mental pictures of the world... Anyone with sufficient influence can lead sections of the public at least for a time or for a given purpose."<sup>11</sup> Bernays' work in action could be seen in the "Torches of Freedom Campaign," where smoking, which was considered a male product and immoral for women to use or smoke in public, was advertised as female emancipation and equality during the early first-wave of feminism in the United States. This campaign was perceived by many as a textbook example of targeting sensitivities and vulnerabilities and media manipulation to advance a cause.<sup>12</sup> The advertisement, which associated "women empowerment" with "the right to smoke," caused a drastic increase from 5% to 33.3% in women's consumption and purchase of cigarettes between 1923 and 1965.<sup>13</sup>

Regarding more powerful methods of thought interference: Maoist Thought Reform in China and the Nazi Indoctrination of Youth in Germany are significant examples of ideological manipulation in the form of "brainwashing."<sup>14</sup> Subsequently, concerns over "brainwashing" became widely popular in the United States after the Korean War, as the American soldiers who returned home showed signs of Communist indoctrination.<sup>15</sup> The term even went on to appear in the Diagnostic and Statistical Manual of Mental Disorders<sup>16</sup> under Atypical Dissociative Disorder describing that a dissociative state could occur in a person "who has been subject to periods of prolonged and intense coercive persuasion (brainwashing, thought reform, and indoctrination while the captive of terrorists or cultists)."<sup>17</sup>

So much and so little has changed since Bernays authored *Propaganda* in 1928. The once-upon-a-time-concern about the concentration of media ownership in the hands of a few wealthy businessmen tailoring the content<sup>18</sup> was replaced by a few wealthy businessmen who started from their "basements," with the promise of making "cheap speech"<sup>19</sup> available, later dominating the digital media landscape. These actors still influence the public discourse, the information we receive, and how we shape ourselves and our identity. Propaganda and manipulation are still present in the digital era—in even more colorful and intrusive ways.

Traditional advertising and targeting were based on breaking people into large categories "using variables that served as proxies for meaningful behavior."<sup>20</sup> As with "Torches of Freedom," women's

<sup>11</sup>EDWARD L. BERNAYS, *PROPAGANDA* 26-27 (1928).

<sup>12</sup>Tatiane Leal et al., *Torches of Freedom: Women, cigarettes and consumption*, 13 *COMUNICACAO, MIDIA & CONSUMO* 47, 55-58 (2016); Vanessa Murphree, *Edward Bernays's 1929 "Torches of Freedom" March: Myths and Historical Significance*, 32 *AM. JOURNALISM* 258, 259 (2015).

<sup>13</sup>Anne M. O'Keefe & Richard W. Pollay, *Deadly Targeting of Women in Promoting Cigarettes*, 51 *J. AM. MED. WOMENS ASS'N* 67, 68-69 (1996).

<sup>14</sup>See generally ROBERT J. LIFTON, *THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM: A STUDY OF 'BRAINWASHING' IN CHINA* (1989).

<sup>15</sup>Simon McCarthy-Jones, *Freedom of Thought: Who, What, and Why?*, in 1 *THE LAW AND ETHICS OF FREEDOM OF THOUGHT* 28-32 (2021).

<sup>16</sup>AM. PSYCHIATRIC ASS'N, 300.15 *Atypical Dissociative Disorder*, in *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3rd ed. 1980).

<sup>17</sup>*Id.*

<sup>18</sup>See generally NOAM CHOMSKY, *MEDIA CONTROL: THE SPECTACULAR ACHIEVEMENTS OF PROPAGANDA* (1997).

<sup>19</sup>Eugene Volokh, *Cheap Speech and What It Will Do*, 104 *YALE L.J.* 1805 (1995).

<sup>20</sup>Jessica Dawson, *Microtargeting as Information Warfare*, 6 *CYBER DEF. REV.* 63, 66 (2020) (citing Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (2017)).

desires and sensibilities were broadly and imprecisely targeted as a large category. Eventually, persuasion became a less effective approach to manipulating individual vulnerabilities. Since the early 2000s, emerging technologies have allowed for a shift away from traditional manipulation methods towards computational ones that incorporate psychoanalytic techniques, behavioral microtargeting, personalized content delivery, and widely accessible social media platforms. Once, the mind was seen as intangible, and thus beyond the reach of intervention.<sup>21</sup> A different picture exists today. Human behaviors, expressions, and online posts can reveal a lot about the actor's personality—including mental health problems, stress levels, and political or otherwise views and opinions—making it easier for malicious forces to profile and exploit emotional vulnerabilities. Such microtargeting tailored based on psychological profiling of individuals has the potential to influence individual choices<sup>22</sup> and persuade them to act against their best interests,<sup>23</sup> potentially causing a decline in mental health and a weakening of mental autonomy.

Perhaps a more salient example of this concept is the Cambridge Analytica incident, which served as an alert to the extent microtargeting could go in the political sphere.<sup>24</sup> There, whistleblower Frances Haugen leaked documents known as the “Facebook Files” (owned by then-Facebook, today Meta) containing internal research linking Instagram usage to negative mental health consequences, especially on young users,<sup>25</sup> all around the world.<sup>26</sup> Since then, the public has become more attentive to the scope of various actors' decisions to target consumers' mental spheres.

Consistent with Haugen's leak, other research (though still in the early phases) shows a correlation between social media use and a decrease in psychological well-being among children, adolescents, and adults.<sup>27</sup> Such mental health concerns include body dysmorphic disorder, eating disorders, anxiety, depression, attention deficit disorder, and even suicide.<sup>28</sup> According to Twenge, “as social media started gaining popularity in the mid-2000s, the mental health of adolescents and young adults in the United

<sup>21</sup>See CORNELIS D. DE JONG, *THE FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION OR BELIEF IN THE UNITED NATIONS: (1946-1992)* (2000); Christoph Bublit, *Cognitive Liberty or the International Human Right to Freedom of Thought*, in *HANDBOOK OF NEUROETHICS* 1309, 1313 (Jens Clausen & Neil Levy eds., 2014).

<sup>22</sup>U.N. GAOR, 69th Sess., UN Doc. A/69/286 ¶28, ¶32 (Aug. 8, 2014);Brahim Zarouali et al., *Using a Personality-Profiling Algorithm to Investigate Political Microtargeting: Assessing the Persuasion Effects of Personality-Tailored Ads on Social Media*, 49 *COMMUN. RSCH.* 1066, 1066-91 (2022).

<sup>23</sup>See generally, Sandra C. Matz et al., *Psychological Targeting as an Effective Approach to Digital Mass Persuasion*, 114 *PROC. NAT'L ACAD. SCI. U.S.* 12714, 12714–19 (2017).

<sup>24</sup>Frederik J. Zuiderveen Borgesius et al., *Online Political Microtargeting: Promises and Threats for Democracy*, 14 *UTRECHT L. REV.* 82, 83 (2018). Cambridge Analytica used the psychographic OCEAN model of personality to analyze data from 87 million Facebook users, using 4,000-5,000 data points per user. This allowed the company's customers, including Donald Trump, Ted Cruz, the United Kingdom Independence Party, and Leave.EU, to tailor their political messages to individual voters and exploit their sensitivities for their own political gain. Olivia Goldhill, *A 'Big Data' Firm Sells Cambridge Analytica's Methods to Global Politicians*, *DOCUMENTS SHOW*, QUARTZ (Aug. 14, 2019), <https://qz.com/1666776/data-firm-idea-uses-cambridge-analytica-methods-to-target-voters> [perma.cc/SMA3-DD6H]; Jeff Horwitz, *Who is Facebook whistleblower Frances Haugen? What to Know after her Senate Testimony*, *WALL ST. J.* (Oct. 6, 2021) <https://www.wsj.com/articles/who-is-frances-haugen-facebook-whistleblower-11633409993> [perma.cc/7RZJ-EGQ8].

<sup>25</sup>Georgia Wells et al., *Facebook knows Instagram is toxic for teen girls, company documents show*, *WALL STREET J.* (2021), <https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739> (last visited Dec 29, 2022) [https://perma.cc/QJ4J-AST9].

<sup>26</sup>Nilesh Christopher et al., *Instagram impacts teen mental health in the west. what about everywhere else?*, *REST OF WORLD* (2021), <https://restofworld.org/2021/instagram-impacts-teen-mental-health/> (last visited Dec 29, 2022) [https://perma.cc/H6GT-ZP6V].

<sup>27</sup>Jean M. Twenge & W. Keith Campbell, *Media Use Is Linked to Lower Psychological Well-Being: Evidence from Three Datasets*, 90 *PSYCHIATRIC Q.* 311, 311 (2019). It is important to note that some other studies suggest otherwise, as the variables and the dataset pool differ from research to research. See generally, Andrew K. Przybylski & Netta Weinstein, *A Large-Scale Test of the Goldilocks Hypothesis*, 28 *PSYCH. SCI.* 204, 204-15 (2017).

<sup>28</sup>Chaelin K. Ra et al., *Association of Digital Media Use with Subsequent Symptoms of Attention-Deficit/Hyperactivity Disorder Among Adolescents*, 320 *JAMA* 255, 255-63 (2018); Simon M. Wilksch et al., *The Relationship between Social Media Use and Disordered Eating in Young Adolescents*, 53 *INT'L J. EATING DISORDERS* 96, 96–106 (2019).

States began to worsen.<sup>29</sup> For instance, the total number of adolescents, aged twelve to seventeen, who reported experiencing a major depressive episode increased from 8.1 percent to seventeen percent between 2009 and 2020.<sup>30</sup> Over the same period, suicides became more prevalent and are now the second leading cause of death for individuals aged fifteen to twenty-four.<sup>31</sup> Scholars have hypothesized that the rise of behaviorally targeted ads and “the rapid adoption of smartphone technology in the early 2010s may have had a marked negative impact on adolescents’ psychological well-being,”<sup>32</sup> leading to a feeling of self-consciousness, low self-esteem, and negative self-perception.<sup>33</sup> Furthermore, a recent study analyzing the mental health effects of Facebook on university students at Harvard and other colleges between 2004 and 2006 demonstrated that Facebook might have adversely impacted mental health since its very inception.<sup>34</sup> The researchers attributed this finding to unfavorable social comparisons as the leading mechanism.<sup>35</sup>

Additionally, many policymakers seek to address the issue by safeguarding certain individuals from manipulative practices, such as the AI Act proposal in the European Union (“EU”) or the Kids Online Safety Act Bill of 2022 in the United States. One could see that these initiatives attempt to categorize and protect certain individuals as “vulnerable groups,”<sup>36</sup> rather than seeking a precise and clear legal framework without distinctions. However, in contrast to the traditional belief that certain “vulnerable groups” are more prone to be manipulated—which seems to be adopted by some legislators around the world—recent behavioral science research on conspiracy theories indicates that individuals do not necessarily have to possess certain personality traits to be deemed vulnerable to manipulation.<sup>37</sup> Any individual’s sensitivities and vulnerabilities could be exploited by malicious actors with sophisticated profiling and microtargeting practices. Thus, policy efforts that focus on vulnerable populations neglect the more capacious problem of impermissible interference with individual mental autonomy generally.

<sup>29</sup>Luca Braghieri et al., *Social Media and Mental Health*, 112 AM. ECON. REV. 3660, 3660 (2022); see Vikram Patel et al., *Mental Health of Young People: A Global Public-Health Challenge*, 369 LANCET 1302, 1302–13 (2007); Jean M. Twenge et al., *Age, Period, and Cohort Trends in Mood Disorder Indicators and Suicide-Related Outcomes in a Nationally Representative Dataset, 2005–2017*, 128 J. ABNORMAL PSYCH. 185, 185–199 (2019); Twenge & Campbell, *supra* note 27, at 311–31.

<sup>30</sup>U.S. DEP’T OF HEALTH & HUM. SERVS. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., NATIONAL SURVEY ON DRUG USE AND HEALTH (2020), Administration, <https://www.datafiles.samhsa.gov/dataset/national-survey-drug-use-and-health-2020-nsduh-2020-ds0001> [perma.cc/KN9M-E3ET] (last visited Jan. 1, 2023); See also U.S. DEP’T OF HEALTH & HUM. SERVS. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2020 NATIONAL SURVEY ON DRUG USE AND HEALTH, <https://www.samhsa.gov/data/sites/default/files/reports/rpt35325/NSDUHFFRPDFWHTMLFiles2020/2020NSDUHFFR102121.htm#mde1> [perma.cc/9MJ3-SPQR].

<sup>31</sup>See CTR. FOR DISEASE CONTROL & PREVENTION (CDC), TABLE 7. LEADING CAUSES OF DEATH AND NUMBERS OF DEATHS, BY AGE: UNITED STATES, 1980 AND 2019 (2020–2021), <https://www.cdc.gov/nchs/data/hus/2020-2021/LCODAge.pdf> [perma.cc/8CBZ-FFKL] (last visited Jan. 1, 2023).

<sup>32</sup>Braghieri et al., *supra* note 29, at 3360–93; Jean M. Twenge et al., *Decreases in Psychological Well-Being Among American Adolescents after 2012 and Links to Screen Time During the Rise of Smartphone Technology*, 18 EMOTION 765, 778 (2018).

<sup>33</sup>Christopher A. Summers et al., *An Audience of One: Behaviorally Targeted Ads as Implied Social Labels*, 43 J. CONSUMER RSCH. 156, 156–78 (2016); Jonathan Haidt, *The Dangerous Experiment on Teen Girls*, ATL. (Nov. 21, 2021), <https://www.theatlantic.com/ideas/archive/2021/11/facebooks-dangerous-experiment-teen-girls/620767/> [perma.cc/CT6C-SHG7].

<sup>34</sup>Braghieri et al., *supra* note 29, at 3689.

<sup>35</sup>*Id.*

<sup>36</sup>The AI Act proposal Title II, Article 5(1)(b) prohibits the use of AI systems that exploit vulnerabilities of specific groups in a way that causes harm. *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, at 43, COM (2021) 206 final (Apr. 21, 2021); Press Release, Senator Richard Blumenthal (D-CT) & Senator Marsha Blackburn (R-TN), *The Kids Online Safety Act of 2022*. “The Kids Online Safety Act empowers kids and their parents to take control over kids’ online experiences to better protect their mental health and well-being.” *Id.*

<sup>37</sup>See Scott Radnitz & Patrick Underwood, *Is Belief in Conspiracy Theories Pathological? A Survey Experiment on the Cognitive Roots of Extreme Suspicion*, 47 BRIT. J. POL. SCI. 113, 124–25 (2015).

### III. Preparatory Works of the Right to Freedom of Thought in the International Human Rights Law Instruments

#### A. Article 18 of The Universal Declaration of Human Rights

The UDHR is arguably the most prominent human rights law instrument that exists today. Although many have criticized the declaration as being a purely academic or theoretical statement<sup>38</sup> due to its legally non-binding character, it does possess legal value.<sup>39</sup> The Declaration seeks to have “moral force and would serve as a guiding light to all those who endeavored to raise man’s material standard of living and spiritual condition.”<sup>40</sup> According to Schabas, decades after its adoption, the Declaration has established and confirmed its role as a source of a legal obligation, as it was also considered the authoritative statement of international human rights law by many proceeding instruments, including the European Convention on Human Rights (ECHR).<sup>41</sup>

#### 1. The emergence of an International Bill of Rights

The origins of the UDHR can be traced back to the outbreak of World War II.<sup>42</sup> Due to the emergence of brutal suppression of free speech and political opposition during wartime, President Franklin D. Roosevelt recognized “four freedoms” in January 1941: freedom of speech, freedom of worship, freedom from want, and freedom from fear, securing essential human rights.<sup>43</sup>

These principles later found life in the discussions and spirit of the UDHR.<sup>44</sup> Consequently, after the Declaration and the Charter of the United Nations were adopted, the most pressing need moving forward was addressed as a system of international protection<sup>45</sup> of freedom, equality, and self-determination.<sup>46</sup> Thus, the Nuclear Commission on Human Rights recommended a full Commission on Human Rights should draft an International Bill of Rights and elected Eleanor Roosevelt as the Chairman.<sup>47</sup>

#### 2. Charles Malik, a Pioneer in Defending One’s Dignity and Inner Freedoms

During the inception of the meetings of the full Commission, the idea of the inclusion of the right to freedom of thought and conscience is said to be coined by the Lebanese philosopher and mathematician Charles Malik. Malik, representing Lebanon as a delegate in the full Commission, expressed his country’s deep interest in the fight for freedom of thought and conscience. Thus, he reasoned, an international bill of rights must provide not only such freedoms but should also provide the mechanisms to acquire these freedoms, to enable “the freedom of being and becoming what one’s conscience required one to

<sup>38</sup>H. Lauterpacht, *The Universal Declaration of Human Rights*, 25 BRIT. Y.B. INT’L L. 354, 369-70 (1948); see also Josef L. Kunz, *The United Nations Declaration of Human Rights*, 43 AM. J. INT’L L. 316, 321 (1949).

<sup>39</sup>U.N. GAOR, 3d Sess., 118th plen. mtg. at 866, U.N. Doc. A/PV.180 (Dec. 9, 1948).

<sup>40</sup>*Id.* at 873; see also William A. Schabas, *Introductory Essay: The Drafting and Significance of the Universal Declaration of Human Rights*, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE TRAVAUX PRÉPARATOIRES* cxviii (William A. Schabas ed., 2013).

<sup>41</sup>*Id.* at cxiv-cvx.

<sup>42</sup>*Id.* at lxxiii. See also Johannes Morsink, *World War Two and the Universal Declaration*, 15 HUM. RTS. Q. 357, 357 (1993).

<sup>43</sup>87 CONG. REC. 46-47 (1941).

<sup>44</sup>G.A. Res. 217 (III) A, *Universal Declaration of Human Rights*, at 71-77 (Dec. 10, 1948). The Preamble of the UDHR also refers to these four freedoms: “Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy the freedom of speech and belief and freedom from fear and want has been proclaimed the highest aspiration of the common people.” *Id.* at 71. See also U.N. GAOR, *supra* note 39, at 857.

<sup>45</sup>Schabas, *supra* note 40, at lxxvi (citing Pan American Union, *Inter-American Conference on War and Peace*, Washington, DC: Pan American Union, 1945.).

<sup>46</sup>United Nations Information Organization, 3 DUMBARTON OAKS PROPOSALS COMMENTS AND PROPOSED AMENDMENTS 2 (1945).

<sup>47</sup>Rep. of the Comm. on Human Rights, at 3-4, U.N. Doc. E/38 (May 17, 1946).



become.”<sup>48</sup> Malik also emphasized the danger of the exclusive concentration on the material needs of the man while neglecting the man’s worth and dignity in the inner sphere. According to him, “man must be able to think and choose freely and even to reject freely and to rebel freely.”<sup>49</sup> Nevertheless, the initial drafts made no mention of the freedom of thought, as they generally concerned the freedom of conscience and belief in one provision, while including another provision on the freedom to form and hold opinions.<sup>50</sup>

In line with Malik’s ideals, the Commission also received several communications from individuals urging that “the rights of the free thinkers should be protected... equal to those granted to religious persons and religion.”<sup>51</sup> The first notable mention of freedom of thought and conscience as being an *absolute and sacred right*, along with the recognition of the object of society to afford equal opportunity for the full development of one’s spirit, mind, and body emerged in the delegate of France’s submission of suggestions and the draft of Working Group of Drafting Committee.<sup>52</sup> According to Lindkvist,<sup>53</sup> one of the reasons the right finally made an entrance to the draft bill of rights might be that Prof. Rene Cassin, representing France, welcomed Malik’s ambition of including such a right<sup>54</sup> by stating that “the right to freedom of conscience... gives the human persons his worth and dignity.”<sup>55</sup>

### 3. The Forum Internum as “Absolute and Sacred”

Regarding the “absolute and sacred” nature of the right to freedom of thought and conscience, Cassin and Malik clarified that freedom of conscience, of thought, of worship, and of opinion exclusively deal with the man’s inner convictions and beliefs differing from “a public manifestation in the exercise of a form of worship or through the communications of others.”<sup>56</sup> Thereby, their statements implied that the *forum internum* was deemed absolute and sacred, while the *forum externum* might not be. This conclusion can also be inferred from the revised draft, which splits the relevant provision into two separate paragraphs: the former mentioning the absolute nature of individual freedom of thought and conscience and to hold or change beliefs, while the latter sets forth that manifestation of those could only be subject to “such limitations that are necessary to protect public order, morals, and the rights and freedoms of others.”<sup>57</sup>

<sup>48</sup>William A. Schabas, *Volume I, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE TRAVAUX PRÉPARATOIRES* 64 (William A. Schabas ed., 2013) (citing U.N. ESCOR, 2d Sess., 5th mtg., U.N. Doc. E/SR.19 (May 31, 1946)).

<sup>49</sup>U.N. ESCOR Comm. on Human Rights Drafting Subcomm., 2d Sess., 21st mtg. at 7, U.N. Doc. E/CN.4/AC.1/SR.21 (May 7, 1948).

<sup>50</sup>See *Draft Outline of International Bill of Human Rights (prepared by the Division of Human Rights)*, Comm. on Human Rights Drafting Subcomm., U.N. ESCOR at Arts 14-15, U.N. Doc. E/CN.4/AC.1/3 (June 4, 1947); *Text of Letter from Lord Dukeston, the United Kingdom Representative on the Human Rights Commission, to the Secretary-General of the United Nations* at Arts. 13-14, Comm. on Human Rights Drafting Subcomm., U.N. ESCOR, U.N. Doc. E/CN.4/AC.1/4 (June 5, 1947) (United Kingdom proposed draft International Bill of Human Rights); *United States Suggestions for Redrafts of Certain Articles in the Draft Outline E/CN.4/AC.1/3* at Art. 15, Comm. on Human Rights Drafting Subcomm., U.N. ESCOR, U.N. Doc. E/CN.4/AC.1/8 (June 11, 1947) (United States amendments). See also *International Bill of Rights Documented Outline: Texts*, Comm. on Human Rights, Drafting Subcomm., U.N. ESCOR, U.N. Doc. E/CN.4/AC.1/3/Add.3 (June 10, 1947) (addenda to the draft outline).

<sup>51</sup>Schabas, *supra* note 48, at 303 (citing Communications Received Requesting the Inclusion of Certain Specific Provisions in the International Bill of Rights, Comm. on Human Rights, U.N. ESCOR, U.N. Doc. E/CN.4/AC.1/6 (June 6, 1947)).

<sup>52</sup>Comm’n. on Human Rights, Drafting Comm., Draft Int’l Declaration of Rights Submitted by Working Group of Drafting Comm., U.N. Doc. E/CN.4/AC.1/W.2/Rev.2, Art. 20, Art. 21 (1947); Comm’n on Human Rights, Drafting Comm., International Bill of Rights, U.N. Doc. E/CN.4/AC.1/W.1, Art. 2 (1947).

<sup>53</sup>LINDE LINDKVIST, RELIGIOUS FREEDOM AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, 26–27 (2017).

<sup>54</sup>Comm’n on Human Rights, Summary Rec. of Fourteenth Meeting, U.N. Doc. E/CN.4/SR.14, at 3 (1947) Malik stated that the human person’s mind and conscience are their most sacred and inviolable possessions and that any social pressure from the state, religion, or race that involves automatic consent from the person is reprehensible. *Id.*

<sup>55</sup>*Id.* at 6-7.

<sup>56</sup>Comm’n on Human Rights, Drafting Comm., First Session, Summary Rec. of the Eighth Meeting, U.N. Doc. E/CN.4/AC.1/SR.8, at 12-13 (June 20, 1947).

<sup>57</sup>Comm’n on Human Rights, Drafting Comm., Int’l Bill of Rights, Suggestions Submitted by the Representative of France for Articles 7-32 of the International Declaration of Rights, U.N. Doc. E/CN.4/AC.1/W.2/Rev.1, Art. 20 (June 18, 1947).

#### 4. *The Sub-Commission on Freedom of Information and the Press Sought to Bundle Freedom of Thought with Freedom of Expression*

During the discussions of the Sub-Commission on Freedom of Information and the Press (the “Sub-Commission”) analyzing the full Commission’s draft, much attention was focused upon the freedom to hold and form opinions concerning freedom of information.<sup>58</sup> Some members emphasized that freedom of information and freedom of opinion are two separate fundamental rights, the latter implying a personal judgment of an interpretative or appreciative character, while the former meant the objective knowledge of facts.<sup>59</sup> As a result, it was established that the latter should be protected without interference.<sup>60</sup>

In distinguishing between freedom of thought and freedom of expression in the draft article, some delegates objected that freedom of communication encapsulates both freedoms, rendering separate mentions irrelevant.<sup>61</sup> Later in the discussion, on the United Kingdom’s proposal of then-Art. 17, freedom of thought and freedom of communication<sup>62</sup> (including freedom to hold opinions without interference, appeared in one single provision).<sup>63</sup> They established that the provision concentrating on freedom of conscience and belief should be distinguished from freedom of thought, because freedom of thought is more about the communication dimension, like freedoms of opinion and expression.<sup>6465</sup>

#### 5. *Freedom of Thought Was the Basis and Origin of All Other Rights with Its Metaphysical Significance*

The full Commission continued their meetings while the Sub-Commission analyzed their draft. On a proposal subjecting the right to freedom of thought to a limitation clause, Malik referred to the “natural rights” nature of the provision, suggesting that “the article dealt with the rights and freedoms that were above the law and, as it were, outside it. A provision based on religion or morals could not be amended by law.”<sup>66</sup> However, in Lebanon’s proceeding amendment concerning the provision, freedom of thought was removed, leaving the provision to provide for the freedoms of religion, conscience, and belief, in line with the Sub-Commission recommendations. The delegate of the Soviet Union (USSR) strongly criticized the absence of the freedom of thought from the amendment, stating that “science had a right to protection on the same terms as religion.”<sup>67</sup> Prof. Cassin, agreeing with the USSR delegate’s objection to the deletion of the reference to freedom of thought, argued that this right is “the basis and the origin of all other rights” and differs from freedom of expression, which can be restricted for the sake of public order. According to him, the right to freedom of thought must be formally protected, because it can be attacked directly and the opposite of inner freedom of thought is the outward obligation to profess a belief that one does not hold.<sup>68</sup>

<sup>58</sup>Comm’n on Human Rights, Second Session, Draft Annex A, Draft Int’l Declaration on Human Rights, U.N. Doc. E/CN.4/77/Annex A (Dec. 16, 1947).

<sup>59</sup>Comm’n on Human Rights, Sub-Comm’n on Freedom of Information and of the Press, Second Session, Summary Record of the Fourth Meeting, U.N. Doc. E/CN.4/Sub.1/SR.27, at 3-4 (Jan. 22, 1948).

<sup>60</sup>*Id.* at 4.

<sup>61</sup>*Id.* at 6.

<sup>62</sup>Comm’n on Human Rights, Rep. of the Second Session of the Sub-comm’n on Freedom of Info. and of the Press, U.N. Doc. E/CN.4/80, at 4-5 (Feb. 6, 1948). This was later reworded as “freedom of expression.” *Id.*

<sup>63</sup>Comm’n on Human Rights, Sub-Comm’n on Freedom of Info. and of the Press, Second Session, Rep. of the Comm. Appointed to Draft a Proposed Article for the Declaration on Human Rights, U.N. Doc. E/CN.4/Sub.1/48 (Jan. 20, 1948).

<sup>64</sup>Comm’n on Human Rights, Sub-Comm’n on Freedom of Information and of the Press, Second Session, Summary Record of the Fifth Meeting, U.N. Doc. E/CN.4/Sub.1/SR.28 at 3-4 (Jan. 21, 1948); Draft Resolution, U.N. Doc. E/CONF.6/C.4/71 (Apr. 14, 1948), *reprinted in* 2 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE TRAVAUX PRÉPARATOIRES 1402 (William Schabas ed., 2013).

<sup>65</sup>Comm’n on Human Rights, Third Session, Opinion of the United Nations Conference on Freedom of Information on Articles 17 and 18, U.N. Doc. E/CN.4/84, at 2 (Apr. 30, 1948). Then-Art. 17(1) was later amended, by adding without interference by governmental action after the freedom of thought and freedom of expression. *Id.*

<sup>66</sup>Comm’n on Human Rights, Third Session, Summary Rec. of the Sixtieth Meeting, U.N. Doc. E/CN.4/SR.60, at 7 (June 23, 1948).

<sup>67</sup>*Id.* at 10.

<sup>68</sup>*Id.*



Some delegates objected that the provision essentially dealt with freedom of religion, claiming that freedom of thought should be mentioned along with freedom of expression. The USSR delegate also objected, stating that the article as a purely religious one would be quite unjustified as atheists also had the right to have their freedom of thought protected.<sup>69</sup> Prof. Cassin supported this view, stating that according to the European conception, freedom of thought with its metaphysical significance is an unconditional right that cannot be restricted for any public purpose, unlike the other rights that are subject to certain limitations. He also pointed out the significant differences between freedom of thought and freedom of opinion or freedom of expression, arguing that the former should be mentioned first among the freedoms enumerated in then-Art. 16.<sup>70</sup>

#### 6. Art. 18 Finally Came into Life Protecting Freedom of Thought

While the final version of the draft declaration prepared by the full Commission<sup>71</sup> was being considered by the General Assembly, Malik warned the representatives about the dangers of neglecting the mind and spirit of man.<sup>72</sup> The delegate from China, drawing from Confucianist philosophy “ren,” emphasized the importance of the plurality of the mind in human interactions, which was missing in then-existing human rights law instruments.<sup>73</sup> Other delegates added that recognizing the rights to freedoms of thought, conscience, and religion was the way to protect the physical and spiritual well-being of humanity,<sup>74</sup> as doing ensures freedom not only in the outward manifestation of one’s daily life but also in the development and integrity of one’s inner being in determining one’s destiny.<sup>75</sup> After initially proposing another amendment,<sup>76</sup> the USSR eventually supported the adoption, as the protection for freedom of thought ‘at least’ guaranteed the position of the science.<sup>77</sup> The draft declaration prepared by the full Commission was eventually adopted as Article 18 by the General Assembly,<sup>78</sup> formally recognizing the right to freedom of thought in history. The article states that “[e]veryone 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.”<sup>79</sup> Finally, Malik’s influence could also be seen in Art. 1 of the Declaration, which states: “all human beings are born free and equal in dignity... endowed with reason and conscience.” Art. 1 could be interpreted as supporting the idea of the absolute character of the *forum internum*, positing it as being “above the law” as well.<sup>80</sup>

Despite the incorporation of his ideas in a few provisions, Malik expressed disappointment with many articles of the Declaration, which were mostly focused on securing man’s material well-being.<sup>81</sup> He added, however, that by recognizing Articles 1 and 18, the Declaration made a “faint effort” to restore “the sense of responsible, authentic, personal dignity to the individual human being.”<sup>82</sup>

<sup>69</sup>*Id.* at 11-13.

<sup>70</sup>*Id.* at 13.

<sup>71</sup>Comm’n on Human Rights, Rep. of the Third Session of the Commission on Human Rights, U.N. Doc. E/800 (June 28, 1948).

<sup>72</sup>U.N. GAOR, 3rd sess., 145th plen. mtg. at 169, U.N. Doc. A/PV.145 (Sept. 27, 1948).

<sup>73</sup>U.N. GAOR, 3rd sess., 3rd Comm. at 397-98, U.N. Doc. A/C.3/SR.127 (Nov. 9, 1948); see also SUSIE ALEGRE, FREEDOM TO THINK: THE LONG STRUGGLE TO LIBERATE OUR MINDS 20 (2022).

<sup>74</sup>U.N. Doc. A/PV.180, *supra* note 38, at 873.

<sup>75</sup>U.N. Doc. A/C.3/SR.127, *supra* note 73, at 399.

<sup>76</sup>Rep. of the Comm’n on Hum. Rts, *supra* note 71, at 37-39; U.N. GAOR, 3rd sess., 3rd Comm. at 47, U.N. Doc. A/C.3/SR.91 (Oct. 2, 1948). The USSR proposed an amendment to the UDHR that was rejected because it sought to prioritize the state over the individual’s dignity. The amendment stated that everyone has the right to freedom of thought and the freedom to practice their religion, but only as long as it complies with the laws of the country and public morality. *Id.*

<sup>77</sup>U.N. GAOR, 3rd sess., 3rd Comm. at 406, U.N. Doc. A/C.3/SR.128.

<sup>78</sup>See generally, U.N. GAOR, 3rd sess., 182d plen. mtg., U.N. Doc. A/PV.182 (Dec. 10, 1948).

<sup>79</sup>G.A. Res. 217 (III) A Art. 18, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>80</sup>MARTIN SCHEININ, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY 266 (Asbjørn Eide et al. eds., 1992).

<sup>81</sup>LINDKVIST, *supra* note 53, at 45.

<sup>82</sup>Charles Malik, *Human Rights and Religious Liberty*, 1 ECUMENICALREV. 404, 404 (1949).

### B. Article 18 of the International Covenant on Civil and Political Rights

The preparatory works of the ICCPR can provide further insight into the intentions of the drafters, because the draft version of the provision containing the right to freedom of thought was also drafted by the full Commission that worked on the UDHR. Early during the drafting process, the Commission decided that a declaration and a covenant would be drafted separately but simultaneously. While the Declaration sought to set the fundamental principles for international human rights, a covenant was necessary to provide guidance in applying these principles.<sup>83</sup> Accordingly, in order to make the interpretation and the implementation of the “bare statements of principles” outlined in the Declaration more effective in legal and administrative contexts,<sup>84</sup> the Covenant sought to use more precise and legally oriented language than the Declaration.<sup>85</sup> Thus, the discussions of the full Commission Art. 18 of the ICCPR overlap with the discussion on Art. 18 of the UDHR, and only relevant parts will be mentioned to clarify the intentions of the drafters.

#### 1. Forum Internum As Absolute, Sacred, and Inviolable

During the debates, the rights to the freedoms of thought, conscience, and religion were often characterized as absolute, sacred, and inviolable,<sup>86</sup> linked with the inherent dignity of the individual.<sup>87</sup> These freedoms, derived from a naturally sovereign right<sup>88</sup> relating to one’s inner thought or attitude, should not be “subject to any external authority or limitation.” However, the expression of these thoughts, or the manifestations of religion or belief, may be subject to essential and legitimate limitations<sup>8990</sup> where the rights of individuals or communities were at stake.<sup>91</sup> Therefore, it was proposed that the first paragraph of the provision on inner freedoms should affirm the principle laid out in Art. 18 of the UDHR<sup>92</sup> in a simple, general way without superfluous details or any limitation clauses.<sup>93</sup>

A similar conclusion could be drawn from the discussion on the distinction between the right to freedom to hold opinions without interference and the right to freedom of expression. The former was considered a “private matter, belonging to the realm of mind,” while the latter was considered a “public matter or a matter of human relationships.”<sup>94</sup> Though a person could be influenced by the external world, no law could regulate a person’s opinions and no power could dictate what opinions a person should or should not entertain.<sup>95</sup> Additionally, some debate existed during the meetings of the full

<sup>83</sup>UN Comm’n on Hum. Rts, 5th Sess., 117th mtg. at 3, Doc. E/CN.4/SR.117 (June 9, 1949).

<sup>84</sup>*Id.*

<sup>85</sup>*Id.* at 4. The Covenant was initially drafted as a single document in 1954. In 1966, it was opened for signature and ratified as two separate treaties: the ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR). This separation was made in order to more clearly distinguish and specify the civil and political rights protected under the ICCPR and the economic, social and cultural rights protected under the ICESCR. See DANIEL J. WHALEN, *INDIVISIBLE HUMAN RIGHTS: A HISTORY* 112-18 (2011).

<sup>86</sup>MARC J. BOSSUYT, *GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 355 (1987).

<sup>87</sup>UN Comm’n on Hum. Rts, 8th Sess., 319th mtg. at 8, U.N. Doc. E/CN.4/SR.319 (June 3, 1952).

<sup>88</sup>UN GAOR, 15th Sess., 1022nd<sup>nd</sup> mtg. at 199, U.N. Doc. A/C.3/SR.1022 (Nov. 15, 1960).

<sup>89</sup>Bossuyt, *supra* note 86.

<sup>90</sup>UN Comm’n on Hum. Rts., *supra* note 83, at 8, 13.

<sup>91</sup>UN GAOR, *supra* note 88.

<sup>92</sup>G.A. Res. 2200 (XXI) Art. 18, International Covenant on Civil and Political Rights (Dec. 16, 1966). Article 18(1) of the ICCPR is identical to Article 18 of the UDHR except for a wording difference *Id.*; see also G.A. Res. 217 (III) A, Universal Declaration of Human Rights, *supra* note 51, at 74.

<sup>93</sup>See UN Comm’n on Hum. Rts, *supra* note 83, at 6; U.N. ESCOR, 5th Sess., 116th mtg. at 14, U.N. Doc. E/CN.4/SR.116 (June 17, 1949).

<sup>94</sup>See U.N. ESCOR, Comm’n on Human Rights, 6th Sess., 174th mtg. at 6-8, U.N. Doc. E/CN.4/SR.164 (May 1, 1950); see U.N. ESCOR, Comm’n on Human Rights, 8th Sess., 320th mtg. at 6, 11, U.N. Doc. E/CN.4/SR.320 (June 18, 1952); MANFRED NOWAK, *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS* 441 (2nd rev. ed. 2005).

<sup>95</sup>U.N. ESCOR, Comm’n on Human Rights, *supra* note 94, at 6, 11; U.N. ESCOR Comm’n on Human Rights, *supra* note 94, at 4.

Commission about whether there was a distinction between freedom of thought and freedom of opinion.<sup>96</sup> Some delegates argued that these concepts were similar or complementary, and others claimed that freedom to hold any opinion was a truism and therefore superfluous.<sup>97</sup> Nowak, in interpreting the drafter's intentions, clarifies that these two freedoms overlap; freedom of thought contributes to "freedom of opinion in that opinions usually represent the result of a thought process."<sup>98</sup> Accordingly, the complimentary but distinctive rights to freedom of thought and freedom of opinion both fall under the category of inner freedoms, which are absolute and not subject to any limitations by the state or any other power.

### 2. Religious Beliefs or Beliefs in Their Broadest Sense?

The debates also contained extensive discussions of whether the term "belief" encompassed only "religious belief" or if it also included "secular convictions."<sup>99</sup> There was also uncertainty about the meaning of the term "religion" in context of the phrase "freedom to maintain or to change his religion or belief"<sup>100</sup> and in the broader context of freedom of religion. The group established that defining religion was difficult, as it meant different things to different communities.<sup>101</sup> As a result, many different definitions of the term "religion" were proposed by the representatives during the General Assembly. Some claimed that the terms "religion" and "belief" must be understood in their broadest senses, as expressions of the human spirit,<sup>102</sup> but only for beliefs based on some divine power.<sup>103</sup> Others maintained that the word "belief" had a very broad meaning, "referring explicitly to all beliefs, religious or non-religious," including atheist and scientific views.<sup>104</sup>

Due to the disagreement over terminology, the Secretariat sought further clarification of the meanings of "religion" and "belief." Mr. Humphrey, the Secretariat of the General Assembly, while avoiding indicating personal or Secretariat-level interpretation, referred to the Study on Discrimination in the Matter of Religious Rights and Practices, which stated that "in view of the difficulty of defining 'religion,' the term 'religion or belief' is used in this study to include, in addition to various theistic creeds, such other beliefs as agnosticism, free thought, atheism, and rationalism."<sup>105</sup>

### 3. Freedom of Religion as an Aspect of Freedom of Thought

The second sentence of Art. 18(1) mentioned only religion, and lacked reference to maintaining or changing one's conscience or thought; some delegates argued that including these terms would be inappropriate, because conscience is too intimate, and thought is too fleeting and uncontrollable, for either to be included.<sup>106</sup> However, the Commission emphasized that the absence of these terms did not mean the right articulated in Art. 18 excluded the freedom to exercise choice in matters of conscience and thought.<sup>107</sup> Accordingly, a proposal on removing the phrase "the right to maintain or change"<sup>108</sup> faced

<sup>96</sup>U.N. ESCOR, Comm'n on Human Rights, *supra* note 94.

<sup>97</sup>Bossuyt, *supra* note 86, at 379; see U.N. ESCOR, Comm'n on Human Rights, 162nd mtg. at 8, 11, U.N. Doc. E/CN.4/SR.162 (Apr. 28, 1950).

<sup>98</sup>Nowak, *supra* note 94.

<sup>99</sup>U.N. GAOR, 15th Sess., mtg. 1027th, at 227, U.N. Doc. A/C.3/SR.1027 (Nov. 18, 1960); see also, U.N. ESCOR, Comm'n on Human Rights, 5th Sess., 119th mtg., at 15, U.N. Doc. E/CN.4/SR.119 (June 13, 1949).

<sup>100</sup>U.N. GAOR, *supra* note 88, at ¶18.

<sup>101</sup>U.N. GAOR, 15th Sess., 1024th mtg., at 210, U.N. Doc. A/C.3/SR.1024 (Nov. 16, 1960).

<sup>102</sup>U.N. GAOR, 15th Sess., 1025th mtg., at ¶22, U.N. Doc. A/C.3/SR.1025 (Nov. 17, 1960).

<sup>103</sup>*Id.* at ¶30.

<sup>104</sup>U.N. GAOR, 15th Sess., 1026th mtg., ¶6, U.N. Doc. A/C.3/SR.1026 (Nov. 18, 1960).

<sup>105</sup>U.N. GAOR, *supra* note 104, ¶¶ 26, 34; Arcot Krishnaswami (Special Rapporteur of the Comm'n on Prevention of Discrimination & Prot. of Minorities), *Study of Discrimination in the Matter of Religious Rights and Practices*, at 1 n.1, U.N. Doc. E/CN.4/Sub.2/200/Rev.1 (1960).

<sup>106</sup>U.N. GAOR, *supra* note 88, ¶6.

<sup>107</sup>See U.N. GAOR, *supra* note 104, ¶¶8-10; U.N. GAOR, *supra* note 104, ¶2.

<sup>108</sup>U.N. GAOR, 15th Sess., 1021st mtg., at ¶15 U.N. Doc. A/C.3/SR.1021 (Nov. 14, 1960).

criticism, because such removal threatened to compromise the safety of non-conformists in terms of freedom of thought and conscience.<sup>109</sup>

Representatives in favor of complete freedom of thought argued that freedom of religion should not restrict or encroach upon freedom of thought.<sup>110</sup> They posited that organized religions and dogma had historically undermined the fundamental right to think for oneself through their dangerous and discreet techniques of imposing themselves.<sup>111</sup> It was, therefore, crucial that

doctrines of any kind, whether agnostic, scientific, deist, or religious, should encourage the progress of human society” because they represent the value of human thought....<sup>112</sup> faith, belief, and religion in reality derived from thought, and the stages in the development of a person’s thought could not be distinguished.<sup>113</sup>

Consequently, these representatives emphasized that each element of this right deserved to be given the same amount of importance, as freedom of religion is only one aspect of freedom of thought.<sup>114</sup>

#### 4. Interferences by the State and Private Parties

Art. 18(1), as with the articles articulating other rights, was designed to impose certain duties and obligations on the State, including the duty of affording a stronger guarantee against actions that seek to interfere with individual’s right to freedom of thought.<sup>115</sup> For this reason, some representatives urged that both direct interventions and the dangers of indirect compulsion by the State should carefully be considered in defining this duty.<sup>116</sup> Additionally, drawing from the discussion on the right freedom of opinion without interference, the Commission established that this protection extends to all kinds of interferences,<sup>117</sup> including those from private parties, not just governmental action.<sup>118</sup>

Moreover, Art. 18(2) of the ICCPR states that “[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.” Some representatives argued that while “coercion,” as a form of interference, should not be construed as applying to moral or intellectual persuasion<sup>119</sup> or appeals to conscience,<sup>120</sup> it could be understood as covering both physical coercion and more subtle, indirect forms, including improper inducements<sup>121</sup> by the State or private parties. All external coercion is, therefore, prohibited under Art. 18(2) without exception, even in the case of a public emergency, as the prohibition does not allow for derogations.<sup>122</sup> The wording of Art. 18(2) might create confusion about whether the prohibition against coercion only applies to religion. Nevertheless, as the rights to freedom of thought and conscience were all designed to ward off outside interference, the prohibition applies to all the enumerated rights in Art. 18.<sup>123</sup>

<sup>109</sup>U.N. GAOR, *supra* note 88, ¶ 11.

<sup>110</sup>U.N. ESCOR, *supra* note 94, at 9; U.N. GAOR, *supra* note 104, ¶ 41.

<sup>111</sup>U.N. GAOR, *supra* note 104, ¶ 19.

<sup>112</sup>*Id.*

<sup>113</sup>U.N. GAOR, *supra* note 88, ¶ 23.

<sup>114</sup>U.N. GAOR, *supra* note 104, ¶ 18.

<sup>115</sup>See U.N. GAOR, *supra* note 104, ¶ 3; U.N. GAOR, *supra* note 88, ¶ 20.

<sup>116</sup>See U.N. ESCOR, *supra* note 90, at 7-8.

<sup>117</sup>BOSSUYT, *supra* note 94, at 379.

<sup>118</sup>See U.N. ESCOR, 6th Sess., 160th mtg., ¶¶ 45-46, U.N. Doc. E/CN.4/SR.160 (Apr. 27, 1950); U.N. ESCOR, 6th Sess., 161st mtg., ¶ 89, U.N. Doc. E/CN.4/SR.161 (Apr. 28, 1950); U.N. ESCOR, *supra* note 108, ¶ ; U.N. ESCOR, 6th Sess., 163d mtg., ¶ 32, U.N. Doc. E/CN.4/SR.163 (May 2, 1950); U.N. ESCOR, 6th Sess., 165th mtg., ¶ 13, U.N. Doc. E/CN.4/SR.165 (May 2, 1950); U.N. ESCOR, *supra* note 104, at 11.

<sup>119</sup>BOSSUYT, *supra* note 94, at 361.

<sup>120</sup>U.N. ESCOR, *supra* note 94, at 7.

<sup>121</sup>U.N. GAOR, *supra* note 104, ¶ 47.

<sup>122</sup>NOWAK, *supra* note 94, at 412.

<sup>123</sup>NOWAK, *supra* note 94, at 416.

### C. Article 9 of the European Convention on Human Rights

The Council of Europe (“CoE”) adopted the ECHR in November 1950<sup>124</sup> with the goal of promoting and furthering<sup>125</sup> human rights and fundamental freedoms<sup>126</sup> among its member states and taking “the first steps for the collective enforcement”<sup>127</sup> of certain rights outlined in the UDHR.<sup>128</sup> Therefore, the ECHR was drafted based on the respect for the spirit and universal principles of the UDHR, while also serving as an instrument that would act as an enforcement mechanism to serve the public order of Europe.<sup>129</sup> These goals are evident in the drafting history of Art. 9 of the ECHR on Freedom of Thought, Conscience, and Belief, as during the initial phase of the discussions, Art. 2 of the draft submitted to the Consultative Assembly stated, “*In this Convention, the Member States shall undertake to ensure to all person residing within their territories... (5) Freedom of thought, conscience, and religion, in accordance with Article 18 of the United Nations Declaration.*”<sup>130</sup>

#### 1. The Drafters of the ECHR Followed the Footsteps of the Drafters of the UDHR and ICCPR

Unfortunately, the preparatory works do not provide adequate material regarding the concepts mentioned in Art. 9, other than that it was considered an elementary right that must be accepted and defended.<sup>131</sup> However, an important statement regarding the drafters’ intentions is found in the report presented by M. Teitgen:

In recommending a collective guarantee...of thought...the Committee wished to protect all nationals of any Member state, not only from ‘confessions’ imposed for reasons of State *but also from those abominable methods of police enquiry or judicial process which rob the suspected or accused person of control of his intellectual faculties and of his conscience.*<sup>132</sup>

After embodying this reasoning, with the establishment of the Committee for Experts on Human Rights, due attention was decided to be paid to the achieved progress of Art. 16 of the draft International Covenant on Human Rights Art. 16 (now Art. 18 ICCPR).<sup>133</sup> Hence, the preliminary draft of the Convention was identical to Art. 18 UDHR.

During the meetings of the Committee, similar to the UDHR and ICCPR, much debate was about the manifestation of beliefs and religion aspect (*forum externum*) rather than freedom of thought (*forum internum*). This phenomenon could be observed especially from the amendments suggested by the

<sup>124</sup>The ECHR came into force in September 1953. *The Convention in 1950*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/human-rights-convention/the-convention-in-1950> (last visited Apr. 9, 2023) [perma.cc/Y9J7-Z5F6].

<sup>125</sup>WILLIAM A. SCHABAS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY* 65-66 (2015) (citing *Stummer v. Austria* [GC], no. 37452/02, [2011] ECHR, Partly Dissenting Opinion of Judge Tulkens §3) (stating that “‘further realisation’ allows for a degree of innovation and creativity, which may extend the scope of the Convention guarantees.”).

<sup>126</sup>Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222; Eur. Comm’n of Hum. Rts., *Preparatory Work on Article 9 of the Eur. Convention on Hum. Rts.* 2, Doc. ART9-DH(56)14 (1956).

<sup>127</sup>“...be interpreted and applied so as to make its safeguards practical and effective.” *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶87 (1989).

<sup>128</sup>European Convention on Human Rights, *supra* note 126, at the 5th Recital.

<sup>129</sup>*Cyprus v. Turkey*, no. 8007/77, Eur. Ct. H.R. at ¶11 (1978).

<sup>130</sup>Eur. Consult. Ass., *European Commission of Human Rights Preparatory Work on Article 9 of the European Convention on Human Rights*, Doc. DH(56)14 (1945) (citing Concil of Europe Doc. AS(1)77, 204) [hereinafter “Preparatory work on Article 9”]; cf. also U.N. Secretary-General, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/66/290, ¶27 (Aug. 10, 2011).

<sup>131</sup>Eur. Consult. Ass., *European Commission of Human Rights Preparatory Work on Article 10 of the European Convention on Human Rights*, Doc. CDH (75)6, 4 (1975).

<sup>132</sup>Preparatory Work on Article 9, *supra* note 130, at ¶4.

<sup>133</sup>*Id.* at ¶5-6 (citing Council of Europe Doc. AS(1)116, 288-289, ¶6; ESCOR, *Report of the Fifth Session of the Commission on Human Rights to the Economic and Social Council*, U.N. Doc. E/1371, 33 (1949). Then-Art 16 stated: “1- 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...” *Id.*

Turkish and Swedish experts,<sup>134</sup> which were later removed after provoking so much controversy.<sup>135</sup> As a result, Art. 9(2) was revised multiple times, while Art. 9(1) remained unchanged. Eventually, Art. 9 took its current shape, with no changes proposed by the Consultative Assembly and no particular mention during the debate.<sup>136</sup>

Also worth noting is that Art. 9 only slightly differs from draft Art. 16 of the ICCPR (now Art. 18), as the drafters intended to create a universally acceptable Convention rather than reinventing the wheel. The *forum internum* dimension of Art. 9(1) of the ECHR states: “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...”<sup>137</sup>

## 2. Lack of Precedent on Art. 9(1)

The ECHR has been deemed a living instrument, meaning that the European Court of Human Rights (“ECtHR”) must interpret it dynamically in light of present-day conditions.<sup>138</sup> At the time of writing, most decisions regarding Art. 9(1) on the ECtHR level concerned the freedom of religion or freedom of conscience. While the Court has not defined what “thought” is, or clarified what the right to freedom of thought encompasses, there also has been little discussion concerning freedom of thought in European human rights law.<sup>139</sup> The former ECtHR Judge Loukis Loucaides argues that the reason for the lack of attention given to the protection of “unmanifested thoughts” before the ECtHR “may be attributed to the fact that freedom of thought as a general rule may create a problem only when manifested.”<sup>140</sup> Nevertheless, the Court has provided somewhat inadequate clarification on the conscience and belief dimensions, which could be useful for the interpretation of freedom of thought as well. According to the Court, because the Convention’s core is respect for human dignity and freedom,<sup>141</sup> “a state cannot dictate what a person believes or take coercive steps to make him change his beliefs.”<sup>142</sup> Thus, the state cannot interfere with one’s most intimate sphere<sup>143</sup>—*forum internum*—in the form of brainwashing,<sup>144</sup> indoctrination,<sup>145</sup> use of violence, or even the application of improper pressure.<sup>146</sup> Thus, Art. 9(1) provides absolute protection for the *forum internum* dimension, which cannot be restricted, unlike the *forum externum* dimension of Art. 9(2) which is a qualified right.

In addition to imposing negative duties on the State, Art. 9 also suggests that the state has an affirmative obligation to protect the individual from “impermissible” interferences by finding a balance between the individual and the community as a whole, subject to the state’s margin of appreciation.<sup>147</sup>

<sup>134</sup>Preparatory Work on Article 9, *supra* note 130, at ¶¶10, 13 (citing Council of Europe, Doc. A.833, 3); *Cf. also* Preparatory Work on Article 9, *supra* note 130, at ¶¶10, 13 (citing Council of Europe, Doc. A.809, Article 8(b), 7).

<sup>135</sup>SCHABAS, *supra* note 125, at 419. The removed part stated: “...provided that nothing in this Convention may be considered as derogating from already existing national rules as regards religious institutions and foundations, or membership of certain confessions.” *Id.*

<sup>136</sup>Preparatory Work on Article 9, *supra* note 145, at ¶18-19 (citing Council of Europe, Doc. AS(2)104, Art. 9, 1032-1033).

<sup>137</sup>*Id.*

<sup>138</sup>*Tyrer v. United Kingdom*, No.5856/72, Eur. Ct. H.R., ¶31 (1978).

<sup>139</sup>SCHABAS, *supra* note 125, at 419-20.

<sup>140</sup>Loukis G. Loucaides, *The Right to Freedom of Thought as Protected by the European Convention on Human Rights*, 1 CYPRUS HUM. RTS. L. REV., 79, 80 (2012).

<sup>141</sup>Patrick O’Callaghan & Bethany Shiner, *The Right to Freedom of thought in the European Convention on Human Rights*, 8 EUR. J. COMPAR. L.& GOVERNANCE 112, 144–45 (2021) (citing *Pretty v. United Kingdom*, no. 2346/02, Eur. Ct. H.R., ¶65 (2002); *Christine Goodwin v. United Kingdom*, no. 28957/95, Eur. Ct. H.R., ¶90 (2002)).

<sup>142</sup>*Ivanova v. Bulgaria*, No. 52435/99, Eur. Ct. H.R., ¶79 (2007); *Masaev v. Moldova*, No. 6303/05, Eur. Ct. H.R., ¶23 (2009).

<sup>143</sup>SCHABAS, *supra* note 125, at 420-21; *see generally* *Tamara Skugar and Others v. Russia*, No. 40010/04, Eur. Ct. H.R. (2009); *Blumberg v. Germany*, no. 14618/03, Eur. Ct. H.R. (2008).

<sup>144</sup>BEN P. VERMEULEN & MARJOLEIN VAN ROOSMALEN, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 738, 752 (P. van Dijk et al. eds., 2018).

<sup>145</sup>*See* Eur. Ct. H.R., *Guide on Article. 2 of Protocol I to the European Convention on Human Rights* (Aug. 31, 2022).

<sup>146</sup>*See generally* *Kokkinakis v Greece*, App. No. 14307/88, (May 25, 1993).

<sup>147</sup>*See generally* *Eweida and Others v. United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10, & 36516/10 (Jan. 15, 2013).



This margin of appreciation may be very narrow or almost non-existent when it comes to the right to freedom of thought.<sup>148</sup> According to Loucaides, the State could fulfill this positive obligation through legislation that “prohibits indoctrination, propaganda, dissemination of false information to the public,” and by imposing sanctions on “behavior or activities which amount to manifestation of a school of thought.”<sup>149</sup>

Another obligation of the State is promoting pluralism and broadmindedness<sup>150</sup> by fostering tolerance among competing groups in a democratic society,<sup>151</sup> rather than removing causes of tension.<sup>152</sup> As Shiner and O’Callaghan emphasize, without such an obligation of guaranteeing freedom of thought imposed on the State, “scientific progress and authentic artistic creativity would not be possible.”<sup>153</sup> This is also in line with the State’s obligation to ensure the effective exercise of the right to freedom of information to safeguard the exercise of freedom of thought.

#### IV. Analysis of the Current Freedom of Thought Framework in the Light of the Preparatory Works

##### A. Lack of Definition of What Thought Means and What Freedom of Thought Entails

It is clear from the analysis of the preparatory works in Part III that all three human rights law instruments were drafted in the post-Second World War era spirit to mitigate the fundamental rights concerns that arose during the war. Thus, the destructive effects of propaganda, such as that used by the Nazi and Fascist regimes, were widely recognized by the delegates as a significant issue to be addressed to prevent history from repeating itself. In addition to the war-era propaganda, there was also a strong belief that the freedom of maintaining and changing one’s religion was of vital importance, given the long history of religious suppression through wars and dogmatism. Perhaps this historical context elucidates why freedom of thought received relatively scarce attention, while freedom of religion was at the center of many debates during the drafting processes.

The drafters of the UDHR and ICCPR believed that freedom of thought was so intrinsic to being a “human person” that it was considered to be above the law. As a result, formally recognizing this inner freedom was important due to its metaphysical significance and its role in one’s spiritual well-being, protecting “free thinkers, scientists, and dissidents.”<sup>154</sup> Nonetheless, such recognition did not go a step further, as the drafters did not expand on either what this freedom entails or the definition of the “thought” term. Though it is possible that they intended to leave the concept open to future interpretation as science and technology progressed,<sup>155</sup> this vagueness may have contributed to the perception that freedom of thought is “the only human right without any real application.”<sup>156</sup>

<sup>148</sup>O’Callaghan & Shiner, *supra* note 141, at 125. “In respect of Article 8 ... the Court has held that the State’s margin of appreciation is narrower ‘where a particularly important facet of an individual’s existence or identity is at stake’. See *Hämäläinen v. Finland* [2014] ECHR no. 37359/09 at [42]. It hardly needs to be pointed out that freedom of thought is ‘a particularly important facet of an individual’s existence.’” *Id.* at 125 n.69.

<sup>149</sup>Loucaides, *supra* note 140, at 86-87; see also LOUKIS G. LOUCAIDES, *The Right to Information, in* ESSAYS ON THE DEVELOPING LAW OF HUMAN RIGHTS 3, 19-23 (1995).

<sup>150</sup>*Handyside v. United Kingdom*, App. No. 5493/72, ¶ 49 (Dec. 7, 1976).

<sup>151</sup>*Bayatyan v. Armenia*, App. No. 23459/03, ¶ 120 (July 7, 2011); *Church of Scientology Moscow v. Russia*, App. No. 18147/02, ¶ 72 (Sept. 24, 2007); *Metropolitan Church of Bessarabia and Others v. Moldova*, App. No. 45701/99, ¶¶ 114-16 (Mar. 27, 2002).

<sup>152</sup>*Serif v. Greece*, App. No. 38178/97, ¶ 53 (Mar. 14, 2000); *Members of the Gladani Congregation of Jehovah’s Witnesses and 4 Others v. Georgia*, App. No. 71156/01, ¶ 132 (Aug. 3, 2007); *Leyla Sahin v. Turkey*, App. No. 44774/98, ¶ 107 (Nov. 10, 2005).

<sup>153</sup>O’Callaghan & Shiner, *supra* note 141, at 122.

<sup>154</sup>Ahmed Shaheed (Special Rapporteur on Freedom of Religion or Belief), *supra* note 8, at ¶ 3.

<sup>155</sup>*Id.* at ¶ 7.

<sup>156</sup>*Id.* at ¶ 95 (quoting the submission received from Jan Christoph Bublitz).

Decades later, the UN Human Rights Committee (HRC) further clarified that freedom of thought encompasses thought on *all* matters, extending beyond religious thoughts,<sup>157</sup> including the “right to hold deviant ideas.”<sup>158</sup> The HRC also explicitly emphasized that “the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief.”<sup>159</sup> Nevertheless, the current International law practice still lacks clarity on the definition of “thought,” or a comprehensive understanding of what freedom of thought encompasses.

### *B. The lack of clarity in defining “impermissible interference”*

According to the preparatory works of the ICCPR and ECHR, the state has a negative duty to refrain from acts of intervention, as well as an affirmative obligation of guaranteeing strong protection against all kinds of interference with the individual’s right to freedom of thought. However, despite mentioning coercion and other possible prohibited practices, the drafters did not provide further means to interpret when the right to freedom of thought could be deemed violated, or what constitutes “impermissible external interference.” Nowak suggests that as a right primarily defensive in nature, freedom of thought requires the State “to refrain from interfering with an individual’s spiritual and moral existence—whether through indoctrination, brainwashing, influencing the conscious or subconscious mind with psychoactive drugs or other means of manipulation—and to prevent private parties from doing so.”<sup>160</sup> He also notes that it can be difficult to distinguish permissible and impermissible interference or influence in the context of practices such as “media, private advertising, or state propaganda.”<sup>161</sup> Accordingly, he explains, “Influencing is... impermissible when it is performed by way of coercion, threat, or some other prohibited means against the will of the person concerned or without at least his or her implicit approval.”<sup>162</sup>

Although Nowak’s commentary sheds some light, in the face of contemporary manipulation practices, interferences may not rise to the level of “coercion” or “threat” while altering or manipulating thoughts. Thus, despite the strong protection indicated by the drafting history, Art. 18 of the ICCPR and Art. 9 of the ECHR fall short in practice due to the legal uncertainty they create.

In cases where the drafting history or the text of a human rights instrument is ambiguous, the precedent established by courts could provide further guidance. However, the HRC has thus far only found a single violation of the right,<sup>163</sup> as they chose to analyze claimants’ violation claims under other human rights provisions (i.e., Art. 19 on freedom of expression).<sup>164</sup> The ECtHR has also only rarely

<sup>157</sup>U.N. Secretariat, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. 1), 206-207 (May 27, 2008).

<sup>158</sup>See generally Clay Calvert, *Freedom of Thought, Offensive Fantasies and the Fundamental Human Right to Hold Deviant Ideas: Why the Seventh Circuit Got It Wrong in Doe v. City of Lafayette, Indiana*, 3 PIERCE L. REV. 125 (2005).

<sup>159</sup>U.N. Secretariat, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev. 1, 35 (July 29, 1994).

<sup>160</sup>See NOWAK, *supra* note 94, at 412-13.

<sup>161</sup>*Id.* at 413.

<sup>162</sup>*Id.*

<sup>163</sup>The Human Rights Committee made the determination that it was unnecessary to examine allegations of violations of freedom of thought in two cases, as they had already established violations of freedom of expression and freedom of association. See U.N. Hum. Rts. Comm., Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights Eighty-fourth Session Concerning Communication No. 1119/2002 U.N. Doc. CCPR/C/84/D/1119/2002, ¶ 7.4 (Aug. 23, 2005); see also U.N. Hum. Rts. Comm., Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights Sixty-fourth Session Concerning Communication No. 628/1995, U.N. Doc. CCPR/C/64/D/628/1995, ¶ 10.5 (Nov. 3, 1998).

<sup>164</sup>See U.N. Hum. Rts. Comm., Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights Seventy-eighth Session Concerning Communication No. 878/1999, U.N. Doc. CCPR/C/78/D/878/1999 (July 15, 2003) The HRC found that Mr. Kang’s freedom of thought, conscience, and religion were violated when he was imprisoned for refusing military service due to his religious beliefs. The government was ordered to prevent similar violations from occurring in the future. *Id.*

mentioned the freedom of thought dimension of Art. 9(1) in its decisions,<sup>165</sup> but none of those decisions bore any relation to mental autonomy and *forum internum*. Nevertheless, the lack of precedent does not mean violations concerning the right do not happen. Shiner and O’Callaghan argue that “a close examination of ECtHR jurisprudence reveals that cases that could have been framed as infringements of freedom of unmanifested thought but were instead decided on other grounds.”<sup>166</sup> (i.e., Art. 3 on the prohibition of inhuman and degrading treatment, Art. 10 on freedom of expression, and Art. 11 on freedom of assembly.) Consequently, the precedent also fails to provide further clarification on the line between “permissible” and “impermissible” interferences with the mind.

### C. The Right Stays Effective Only in Theory and Is Not Future-Proof

Although the phrase “absolute, sacred, and inviolable” was removed from the final version of Art. 18 of the UDHR for linguistic purposes, Art. 18 of the ICCPR, like Art. 9 of the ECHR, ascribes absolute protection to freedom of thought, protecting the freedom “unconditionally,” and does not permit “any limitations whatsoever.”<sup>167</sup> According to a UN General Assembly Note, “despite its proclaimed importance and absolute nature, the right’s scope and content remain largely underdeveloped and poorly understood.”<sup>168</sup> One explanation for why the right remains effective only in theory is that it is too vague and strong to provide reasonable guidelines for solving practical cases.

It is also difficult to provide proof and establish causation.<sup>169</sup> Accordingly, unlike the Roman tort law concept of *damnum absque injuria*—loss or damage without injury—mental harm is very hard to prove in today’s legal frameworks. Remedies for harm are usually measured by proof of somatic injury,<sup>170</sup> while emotional or mental harms are considered serious when they rise to a certain, and often physical, level (e.g., the U.S. concept of “intentional infliction of emotional distress”).<sup>171</sup>

Another possible explanation is that the right’s absolute nature may make courts hesitant to adjudicate it in the first place. Like the absolute prohibition against torture,<sup>172</sup> balancing absolute rights against other rights may require finding ways around definitions, as they cannot be balanced against other rights. As a result, Bublitz suggests that the absolute character of the living right to freedom of thought may need to be reconsidered in light of its relations to other rights.<sup>173</sup> He adds, “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.”<sup>174</sup>

Consequently, with the current understanding of the right to freedom of thought, individuals have no efficient remedies or preventive mechanisms to ensure that they are free to develop their mental faculties

<sup>165</sup>See *Salonen v. Finland*, App. No. 27868/95, (July 2, 1997) (rejecting Art. 9 claims because the desire to give a child a unique name did not fall within the scope of the right to freedom of thought and therefore could not be protected as a belief).

<sup>166</sup>O’Callaghan & Shiner, *supra* note 141, at 132.

<sup>167</sup>Hum. Rts. Comm., Gen. Comment Adopted by the Hum. Rts. Comm. Under Article 40, Paragraph 4, of the Int’l Covenant on Civ. & Pol. Affs., U.N. Doc. CCPR/C/21/Rev.1/Add.4, ¶ 3 (Sep. 27, 1993).

<sup>168</sup>Ahmed Shaheed (Special Rapporteur on Freedom of Religion or Belief), *supra* note 8, at ¶ 4.

<sup>169</sup>Bublitz, *supra* note 21, at 1316.

<sup>170</sup>See Jan C. Bublitz, *The Nascent Right to Psychological Integrity and Mental Self-determination*, in *THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS* 387, 387–93 (Andreas Von Arnald, Kerstin Von Der Decken, & Mart Susi eds., 2020).

<sup>171</sup>Jan C. Bublitz & Reinhard Merkel, *Autonomy and Authenticity of Enhanced Personality Traits*, 23 *BIOETHICS* 360, 368 (2009); *Hyatt v. Trans World Airlines, Inc.*, 943 S.W.2d 292, 297 (Mo. Ct. App. 1997) (The tort of intentional infliction of emotional distress requires that the defendant act intentionally or recklessly, engage in extreme and outrageous conduct, and cause severe emotional distress.).

<sup>172</sup>See *Gafgen v. Germany*, App. No. 22978/05, ¶ 87 (June 1, 2010). The ECHR had to balance the absolute prohibition on torture with the obligation to hold a criminal accountable for their actions. The authorities attempted to extract information from the accused, leading to a conflict with the obligation to respect human rights. The ECHR had to weigh these competing considerations in reaching its decision. *Id.*

<sup>173</sup>Jan C. Bublitz, *Freedom of Thought as an International Human Right: Elements of a Theory of a Living Right*, in 1 *THE LAW AND ETHICS OF FREEDOM OF THOUGHT*, 94 (Marc Jonathan Blitz & Jan Christoph Blitz, eds., 2021).

<sup>174</sup>*Id.* at 96.

and guard their intrinsic right to construct themselves and their identity. In the face of widespread microtargeting and advances in behavioral science and persuasive technologies, the right does not provide a substantial recourse to mitigate negative consequences. Arguably, this renders the right inefficient and potentially ineffective—until further action is taken to clarify its definition, what it entails, and the limits on what constitutes impermissible interference to the right, including the balancing act.

#### D. Speech-Thought Controversy and Anti-paternalism

Due to ambiguity about its scope and core attributes, the right to freedom of thought is sometimes used interchangeably with other rights, such as freedom of expression.<sup>175</sup> Many jurisdictions do not explicitly recognize a right to freedom of thought. For example, the First Amendment of the U.S. Constitution<sup>176</sup> does not enumerate freedom of thought or protect it under another provision,<sup>177</sup> leading to confusion about whether it is protected intertwined with or independent from speech.<sup>178</sup> Some Supreme Court opinions<sup>179</sup> adopt the intertwined view, whereas others<sup>180</sup> demonstrate that the Supreme Court may also follow the independent view.

It is distinctly possible that this vagueness is not incidental. Many European Constitutions and the EU Charter of Fundamental Rights<sup>181</sup> constitute rules that romantically and paternalistically attempt to protect one from even oneself. On the other side of the spectrum, the United States adopts an anti-paternalistic and exceptionalist view concerning fundamental rights,<sup>182</sup> perpetuating the idea that the government should not be in the business of protecting people from themselves.<sup>183</sup> In line with the idea of pervasive distrust of government and its institutions of<sup>184</sup> the Founding Fathers,<sup>185</sup> the U.S. Supreme Court precedent also posits—particularly with the intertwined view—that the government should not limit some persons' or groups' liberty or autonomy for its citizens' own good.<sup>186</sup>

Freedom of thought—the matrix of most freedoms—is the precursor to authentic expression.<sup>187</sup> In jurisdictions where the relationship between freedom of speech and freedom of thought is not clearly established, such as the United States, this can create legal uncertainty. This becomes particularly significant when freedom of thought (*forum internum*) must be balanced against expression/speech (*forum externum*). While the former is granted absolute protection under international human rights

<sup>175</sup> Ahmed Shaheed (Special Rapporteur on Freedom of Religion or Belief), *supra* note 8, at ¶17.

<sup>176</sup> U.S. CONST. amend. I. (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press...”).

<sup>177</sup> Freedom of thought claims could also be relevant under the 4th, 5th, and 14th Amendments.

<sup>178</sup> If thought is protected to promote freedom of speech and communication, it is deemed to be protected intertwined. However, if thought is protected in itself, regardless of its expression, it is protected independently.

<sup>179</sup> See *Wooley v. Maynard*, 430 U.S. 705, 714 (1997). (“[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”).

<sup>180</sup> See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (“The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”).

<sup>181</sup> See, EU Charter of the Fundamental Rights art. 3(1) (“Everyone has the right to respect for his or her physical and mental integrity.”).

<sup>182</sup> Ronald J. Krotoszynski Jr., *Free Speech Paternalism and Free Speech Exceptionalism: Pervasive Distrust of Government and the Contemporary First Amendment*, 76 OHIO ST. L.J. 659, 660-61 (2015).

<sup>183</sup> *Ravin v. State*, 537 P.2d 494, 508 (Alaska 1975).

<sup>184</sup> Krotoszynski, *supra* note 182, at 670.

<sup>185</sup> See Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 637 (2004).

<sup>186</sup> See Letter from Thomas Jefferson to David Humphreys (Mar. 18, 1789), in 14 THE PAPERS OF THOMAS JEFFERSON, 8 OCTOBER 1788 TO 26 MARCH 1789, 676-79 (Julian P. Boyd ed., 1958) (“There are rights which it is useless to surrender to the government, and which governments have yet always been found to invade. These are the rights of thinking, and publishing our thoughts by speaking and writing ...”).

<sup>187</sup> *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (Cardozo, J.) (“[O]ne may say that [the freedom of thought and speech] is the matrix, the indispensable condition, of nearly every other form of freedom.”).

law, the latter may be subject to limitations in certain circumstances. However, ensuring adequate safeguards for mental autonomy in the face of technological advances does not necessarily mean restricting or suppressing speech. To allow for the outward manifestation of thoughts without impermissible external interferences, thought protection must be guaranteed. Only then can freedom of speech, an essential component of participation in public debate, be guaranteed for individuals with the ability to make autonomous decisions. While the principle of anti-paternalism has contributed to the expansion of personal liberties, including freedom of speech, the current prevalence of intrusive and manipulative practices necessitates state action to protect individuals from illegitimate interferences with their thoughts. This includes protecting them from themselves to a certain extent and allowing them the opportunity to construct authentic identities, without anyone infringing upon their mental autonomy.

## V. Conclusion

Under the current application of international human rights law, individuals who have been illegitimately manipulated through microtargeting and other techniques have no effective recourse or preventive mechanisms to protect their right to freedom of thought. The drafting histories of the UDHR, ICCPR, and ECHR demonstrate that the right to freedom of thought was constructed upon abstract metaphysical premises, lacking a clear definition of its scope. Such abstractness, and the absolute nature of this right, may discourage courts from examining claims of violations, leading to a lack of precedent in this area. The threat of emerging intrusive practices has rendered it necessary to clarify what is considered a permissible and impermissible interference with the right to freedom of thought. Doing so requires leaving behind the old notion of the unreachability of the mind while at once recognizing that impermissibility does not always have to stem from extreme methods such as coercion or brainwashing. Further interdisciplinary research is required to fully assess whether the absolute nature of the right is problematic, and whether creating a subcategory of fundamental rights fit for the digital age, such as the right to mental autonomy and integrity (encapsulating the right not to be manipulated) would address this issue.

Regardless, without prompt action, freedom of thought will remain the only human right non-actionable in practice, and will continue to be unprotected by future-proof safeguards against advancing manipulative methods that could weaken individuals' abilities to shape themselves and make decisions autonomously.

**Emine Ozge Yildirim-Vranckaert** is a doctoral researcher at KU Leuven Center for IT and IP Law, where she is writing her Ph. D. thesis on 'Preserving Our Mental Autonomy: Freedom of Thought in the Speech 4.0 Era.' She is involved in the European Union's Horizon 2020 research and innovation program under grant agreement No. 951911 "Artificial Intelligence for the Society and the Media Industry" (AI4Media) and Research Foundation Flanders (FWO) project "understanding ALGorithmic gatekeepers to promote EPistemic welfare" (ALGEPI). Emine holds an LL.M. degree from Georgetown University Law Center and is qualified to practice law in New York State. Before her academic career, she worked as a legal and policy professional in San Francisco and Washington, DC for notable tech policy organizations.