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Title	Introduction: Mapping and implementing legal protection of the right to freedom of thought
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Publication date	2025-03-06
Original Citation	O'Callaghan, P. and Shiner, B. (2025) 'Introduction: Mapping and implementing legal protection of the right to freedom of thought', in O'Callaghan, P. and Shiner, B. (eds.) The Cambridge Handbook of the Right to Freedom of Thought. Cambridge Law Handbooks. Cambridge University Press, pp. 3-14. https://doi.org/10.1017/9781009539616.003
Type of publication	Book chapter;book-chapter
Link to publisher's version	10.1017/9781009539616.003
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Download date	2026-11-05 22:40:46
Item downloaded from	https://hdl.handle.net/10468/18359

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Introduction

Mapping and Implementing Legal Protection of the Right to Freedom of Thought

Patrick O'Callaghan and Bethany Shiner

INTRODUCTION

The main part of this handbook consists of 'country reports' setting out the legal protection of the right to freedom of thought in eighteen countries across Asia, Europe, Africa and the Americas, as well as three regional human rights treaties: the European Convention on Human Rights (ECHR), the African Charter on Human and Peoples' Rights (ACHPR) and the American Convention on Human Rights (ACHR). Preceding these chapters is this short editors' introduction followed by Bublitz's consideration of freedom of thought's insertion into the Universal Declaration on Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) in Chapter 2. The final part of the handbook includes a series of analytical chapters which examine the right to freedom of thought in relation to specific challenges or in light of conceptual difficulties bound up with the right.

There is something paradoxical about the right to freedom of thought. On the one hand, it is a right that features prominently in popular discourse. Yet, on the other hand, despite the right to freedom of thought being protected under various international, regional and domestic human rights instruments,[1] it remains one of the least understood and explored rights in legal practice and scholarship. Indeed, few domestic courts have engaged with it as a distinct right, with the courts only in Japan and Colombia having prescribed specific content and scope to it. There are two ways we might explain this situation. First, colloquially, the right to freedom of thought is often used as a synonym for 'free speech' or 'freedom of expression'. So often, when people refer to the right, what they really mean is that they are concerned about perceived restrictions on the *manifestation* of thoughts in speech and action. Second, even though the right to freedom of *unmanifested* thought is recognised as a distinct right in international, regional and many domestic human rights instruments,[2] lawyers tend to assume that while such a right may be of symbolic importance, it has little practical effect.[3] Why, lawyers may ask, does the law need to concern itself with the unmanifested thoughts of the inner self? Concerns that someone can access your inner thoughts without your consent or force you to change your

[1] Article 18 of the Universal Declaration of Human Rights; Article 18(1) of the International Covenant on Civil and Political Rights; Article 9(1) of the European Convention on Human Rights.

[2] Ibid.

[3] P. O'Callaghan, O. Cronin, B. Kelly, B. Shiner, J. Walmsley and S. McCarthy-Jones, 'The Right to Freedom of Thought: An Interdisciplinary Analysis of the UN Special Rapporteur's Report on Freedom of Thought' (2024) 28(1) *International Journal of Human Rights* 1–23.

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thoughts against your will have long seemed too incredible to take seriously. As one English judge is reputed to have said in 1477: 'It is common learning that the thought of man is not triable, for the Devil knows not the thought of man'[4] (though of course, as history has demonstrated, this has not prevented people from being persecuted, punished or even killed because of the alleged content of their thoughts). Or, as Martin Luther put it some fifty years later (and making reference to St Augustine's writings over a millennium before): 'It is futile and impossible to command or compel anyone by force to believe one thing or another. … [I]t is a matter for each person's conscience how he believes or does not believe ….'[5]

Recent scholarship has begun to challenge these orthodox views. On accessing somebody's private thoughts, scholars and activists have pointed to developments in neurotechnology, with emerging scholarship highlighting this technology's capacity for ever more accurate reading of brain data or 'mind reading'. In this handbook, these developments are explored by Istace and Van de Heyning in Chapter 26 and, specifically in the criminal justice system, by Ligthart and van de Pol in Chapter 27. As for compelling someone to believe one thing or another, scholars have also raised concerns about algorithmic processes such as recommender and advertising systems that increase the chances of falling victim to misinformation and disinformation or nudge us towards making certain decisions online, without even realising we have been influenced in the first place.[6] The 'age-old question' of what forms of manipulation are acceptable thus also emerges in the online context, and this is explored by Keese and Leiser in Chapter 25.

It is against this background that legal scholars, international organisations and governments have begun to pay attention to the potential practical application of the right to freedom of thought as a distinct right, uncoupled from any related right such as the right to freedom of expression or freedom of religion. The more accurate label for this right is a 'right to freedom of unmanifested thought', though as McCarthy-Jones and Walmsley explore in Chapter 24, there are some conceptual and practical difficulties in understanding 'thought' in this way. In 2021, the then United Nations Special Rapporteur for Freedom of Religion or Belief, Ahmed Shaheed, completed the first ever UN-level report on the right to freedom of thought as a distinct right, considering, among other areas, 'existing and emerging technologies' as a potential field where the right could be applicable.[7] In 2022, the Advisory Committee to the United Nations Human Rights Council received a mandate to prepare a report on 'neurorights', potentially paving the way for guidelines and a General Comment on Article 18 ICCPR in this context.[8]

Much of the legal scholarship to date on the right to freedom of unmanifested thought has examined it in the context of socio-technological transformations, mostly from a conceptual or philosophical perspective. While such work is essential if we are to conceptualise the substance of the right, we believe that doctrinal and comparative analysis of the right is also necessary.[9]

[4] F. Cranmer, 'The Right to Freedom of Thought in the United Kingdom' (2021) 8(2–3) *European Journal of Comparative Law and Governance* 146–170, 148 quoting Chief Justice Bryan in 1477.

[5] M. Luther, 'On Secular Authority: To What Extent It Must Be Obeyed' in T. Helfferich (ed. and trans. by), *Martin Luther: The Essential Luther* (Indianapolis: Hackett Publishing, 2018) pp. 135–136.

[6] S. Alegre, 'Rethinking Freedom of Thought for the 21st Century' (2017) 3 *European Human Rights Law Review* 221–233.

[7] Interim report of the Special Rapporteur on freedom of religion or belief: Freedom of Thought. A/76/380. United Nations, Geneva. Retrieved from www.ohchr.org/sites/default/files/Documents/Issues/Religion/A_76_380_AUV.docx

[8] See Resolution A/HRC/51/L.3 on Neurotechnology and Human Rights (29 September 2022).

[9] Note that this project builds on a smaller pilot study. See Shiner and O'Callaghan (eds.), 'Special Issue: Comparative Study of the Right to Freedom of Thought' (2021) 8(2–3) *European Journal of Comparative Law and Governance*.

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Before we can propose what the content of the right to freedom of thought ought to be, and before we can apply it to specific problems, we first need a handle on how the right is currently given legal expression. To that end, this handbook brings together legal scholars from across the globe who have written chapters or 'country reports' on the right to freedom of thought in their respective legal systems. These include five legal systems in Asia (Japan, China, Vietnam, Malaysia and India), five in Europe (Türkiye, Germany, France, the UK and the ECHR), five in Africa (Kenya, Zambia, Mauritius, South Africa and the ACHPR) and six in the Americas (Brazil, Chile, Colombia, the US, Canada and the ACHR). While there were many more legal systems that could have featured in the book, we believe that the list of legal systems we have surveyed is a 'good sample', to borrow scientific language, in our efforts to understand how the right to freedom of thought is given expression internationally. Importantly, our handbook features contributions from jurisdictions that do not commonly feature in legal comparative studies published in the English language, thus providing a richer and more inclusive overview of the right. We were also of the view that growing interest in the right should not fall into the trap of ethnocentrism as an epistemological phenomenon (i.e., a mode of judgement) where the dominating literature is bound by perspectives shaped by European and North American approaches to rights entitlements and associated obligations. The right to freedom of thought is sometimes presented as the most fundamental of fundamental rights, 'the basis and origin of all other rights',[10] a universal right *par excellence*. In his contribution to this handbook, Nxumalo argues that '[f]reedom of thought is the water that nourishes the tree of other human rights, democracy, and development.'[11] If lawyers are to assess claims such as these, a truly global overview of the right is warranted.

In making our approaches to various constitutional or human rights scholars, and in working with some of the authors, it became apparent (if it was not before) that scholars and human rights practitioners are at risk in many legal systems, facing threats of sedition for critiquing government policy, law and practices. Internationally there are relatively few legal scholars who have written in this specific area and so, as editors, we made efforts to approach constitutional and human rights scholars who might have expertise in ancillary rights like expression, or religion, and invited them to join us in this collaborative project. We are grateful that so many of them agreed! Authors of the country reports were given the following prompts to help them think about how to approach writing their chapters:

1. Is there a specific right to freedom of thought in the jurisdiction under consideration?
2. If so, what is its status in law? (Constitutional right (vertical and/or horizontal effect?); International Human Rights Treaty (monist or dualist system?); is it provided by statute? Has it been developed by the courts?)
3. Is the right justiciable? What remedies are available in case of infringement of the right?
4. What is the scope of the right? Is it a negative or positive right? Is it considered to be qualified/limited or absolute? If it is a qualified/limited right, what are the limits? If it is an absolute right, what does this mean in practice?
5. What is the essential history of the right within the jurisdiction under consideration (drafting history; how has the interpretation of the right evolved over time? What are its philosophical/historical roots?)?

[10] United Nations, Commission on Human Rights, Summary Record of 16th Meeting (4 June 1948) E/CN.4/SR.60, p. 10.

[11] S. B. Nxumalo, 'The Right to Freedom of Thought in the African Charter on Human and Peoples' Rights' in Chapter 17.

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6. What are the contours and context of the right? How does it interact with other rights (e.g., freedom of expression, belief, privacy and freedom of association)?
7. How much prominence does the right have in jurisprudence, academic scholarship and policy debates in the selected jurisdiction? Are there any law reform proposals in this jurisdiction concerning this right?
8. Critically discuss the applicability of the right and how the right might be developed in the contemporary context of political speech, technology, surveillance and so on.
9. If there is no specific right to freedom of thought in the selected jurisdiction, are there any other rights that protect or have the potential to protect freedom of thought? Are they effective? Should a specific right to freedom of thought be introduced?

So understood, the country reports are primarily doctrinal or 'blackletter' in orientation and, taken together, provide a rich repository of information about the sources, evolution and nature of the right to freedom of thought internationally. At the same time, the reports are not exclusively doctrinal analyses. In Chapter 29, Francis and Francis discuss the social and political dimensions of protecting freedom of thought in the 'non-ideal world in which we live'.[12] As editors, we acknowledge the importance of the non-ideal which is why we guided all authors of the country chapters to contextualise the right in the social, historical and political contexts of their jurisdictions. Important themes and issues emerge against this background. For example, reports reveal that freedom of thought is sometimes politicised in a similar way to freedom of speech or expression, used as a rhetorical tool by some actors seeking to control the public space for political discussion (consider here some of the recent legislative initiatives outlined in the Brazilian report in Chapter 18, apparently proposed for the public good).[13] Another underlying theme across several chapters is the role of imperial laws, particularly crimes such as treason and sedition in Commonwealth countries, which were introduced to suppress resistance to British colonial rule but which stayed on the statute book long after independence only to be used to suppress political dissent domestically (as mentioned in the Malaysian, Indian, UK, Kenyan, Zambian and Mauritian country reports in Chapters 6, 7, 11, 13, 14 and 15, respectively). While the political and historical discussions provide important context in helping us better understand the right, the main aim of the reports is to provide doctrinal analysis. We now present some of the main findings of our comparative study of these analyses.

THE RIGHT TO FREEDOM OF THOUGHT: MAPPING THE LEGAL LANDSCAPE

Our discussion in this section revolves around three core questions or sets of questions that emerged from the doctrinal analysis in the country reports. The first set of questions concerns the source of the right in individual legal systems: does a right to freedom of thought exist in (written) positive law? Has it been developed by the courts? Or is it understood more so as an underlying value or principle in the politico-legal order? The second question is about the content of the right: what interests does the right protect? The final question concerns the scope of the right: in what circumstances does the right afford absolute protection to thought?

[12] L. Francis and J. Francis, 'Non-ideal Theory and Protecting Freedom of Thought' in Chapter 29.
[13] L. Oliveira Vianna, 'The Right to Freedom of Thought in Brazil' in Chapter 18.

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The Sources of the Right to Freedom of Thought

In analysing the sources of the right to freedom of thought as discussed in the country reports, it is instructive to group the eighteen domestic legal systems into the following categories:

The right to freedom of thought explicitly features in the domestic constitution or legislation. Only six legal systems fall into this category: Japan, Türkiye, Kenya and Canada recognise it as a distinct right, whereas in Zambia and Mauritius, the freedom is treated as a component or aspect of freedom of conscience. Arguably, we could add France to this list since, as the author to that country report explains in chapter 10, Article 10 of the Declaration of the Rights of Man and of the Citizen, could be interpreted as a legal basis for a right to freedom of unmanifested thought, but the courts do not seem to have elaborated this right and it remains under-explored in the academic literature.[14]

A distinct right to freedom of thought has been explicitly recognised by the courts. In one legal system, Colombia (Chapter 20), a distinct right to freedom of unmanifested thought has been explicitly recognised by the Constitutional Court, identifying three possible legal bases: (1) as a foundational principle of liberal democracy, closely connected to the principle of pluralism in Article 1 of the Constitution; (2) as 'inextricably related' to freedom of expression in Article 20 and freedom of conscience in Article 18 of the Constitution; and (3) arising from the recognition of the right to freedom of thought in the ICCPR and the ACHR, which form part of the Colombian constitution in light of the 'constitutional block' doctrine that is rooted in Article 93 of the Constitution.[15]

The right to freedom of thought is not a distinct right in the domestic constitution, legislation or case law but is part of domestic law by virtue of the State's obligations under international law. Many countries featured in the book are also signatories and have ratified at least one of the main international (ICCPR) or regional human rights treaties that explicitly provide for the right (note that the ECHR and ACHR do but the ACHPR does not) bringing those rights into the domestic legal system. For example, while the Chilean constitution now provides a right to mental integrity, it does not recognise a distinct right to freedom of thought. However, the authors of the Chilean country report in Chapter 19 explain that Chile's ratification of international human rights treaties means that this norm has been 'integrated into the national legal order' (via Article 18 ICCPR and Article 13 ACHR).[16]

The right to freedom of thought is not explicitly recognised as a distinct right in domestic positive law, but freedom of thought is understood to be a value or underlying principle of the politico-legal order. There are three legal systems in our handbook that fall into this specific category even though it is surely possible to argue that freedom of thought is an underlying value in all legal systems that are founded on the rule of law and human rights. In India (Chapter 7), freedom of thought features as a value in the preamble to the constitution, but there is no distinct right to this freedom in the constitution itself. This situation inspires an interesting discussion in the Indian report about the legal status of the preamble in Indian constitutional law.[17] In the USA (Chapter 21), a right to freedom of thought that is independent of the right to free speech does not feature in the Bill of Rights and has not been recognised by the courts. However, the courts have stressed

[14] M. L. Paris, 'The Right to Freedom of Thought in France' in Chapter 10.
[15] D. González Medina and S. Rubiano-Groot Gómez, 'The Right to Freedom of Thought in Colombia' in Chapter 20.
[16] E. A. Chia and F. Quezada, 'The Right to Freedom of Thought in Chile' in Chapter 19.
[17] K. Dhru, 'The Right to Freedom of Thought in India' in Chapter 7.

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freedom of thought's importance as an underlying value of the politico-legal order, including specific rights such as the right to free speech. In the UK (Chapter 11), in the very least and until the courts explicitly recognise freedom of thought as a right, it is an underlying value. As a value, it can be taken to sit beneath various specific legal rules and causes of action that could emerge in the common law to provide remedies in specific cases where there has been a violation of the right. Importantly, for the courts to develop the law in this way, freedom of thought as an underlying value and a legal principle need not be specifically defined.

The right to freedom of thought is not explicitly recognised as a distinct right, but there are other rights in domestic law that are understood to safeguard the core components of the freedom. In several legal systems where there is no distinct right to freedom of thought, the core components of the right are understood to be safeguarded in large part by other rights. In Germany (Chapter 9), Article 4 of the Constitution protects freedom of belief, conscience and religion, while Article 5 guarantees freedom of expression and information. Any gaps in protection that remain could be covered by the General Personality Right as recognised by the Constitutional Court, stemming from Articles 1(1) and 2(1) of the Constitution. The author of the German report explains that this right 'could provide the most comprehensive protection for a person's inner freedom' albeit the Court has yet to take this explicit step.[18] We can also include South Africa, France, Chile, India and the USA in this category (Chapters 16, 10, 19, 7 and 21, respectively). While in the USA, for example, the right to free speech looms large, the protection offered by this right arguably extends to thought since courts recognise that 'thought doesn't simply give rise to speech, it arises from – and is sculpted with – speech'.[19] The intricate connections between thought and speech are recognised in the 2002 case of *Ashcroft* v. *Free Speech Coalition*, in which Justice Kennedy wrote that '[t]he right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought'.[20]

The right to freedom of thought does not find explicit recognition in domestic positive law and other rights do not appear to safeguard the core components of the freedom. There are three legal systems in our study that appear to fall into this category: China, Vietnam and Malaysia (Chapters 4, 5 and 6, respectively). While the concept of 'conscience' has a rich cultural history in China, the right to freedom of thought does not feature in the current constitution. Other related rights are explicitly recognised, including the freedoms of expression, religion, press and assembly. However, a search of the new China Judgments Online database reveals there has been only limited engagement with these rights in Chinese courts.[21] In Vietnam, there is no right to freedom of thought, and related rights to freedom of expression and religion can be significantly restricted by the State. At the same time, there are no recorded cases in which a Vietnamese citizen has successfully taken an action against the State for violating these rights.[22] In Malaysia, while there is no explicit legal protection for the right to freedom of thought, the rights to freedom of expression and freedom of religion are provided for. However, there is insufficient evidence in Malaysia that these rights offer adequate protection of the inner self. The author of the Malaysian report explains that the qualifications placed on freedom

[18] N. Hertz, 'The Right to Freedom of Thought in Germany' in Chapter 9.
[19] Marc Jonathan Blitz, 'The Right to Freedom of Thought in the United States' in Chapter 21.
[20] *Ashcroft* v. *Free Speech Coal*, 535 U.S. 234, 253 (2002), cited by Blitz ibid.
[21] H. Dang, 'The Right to Freedom of Thought in China' in Chapter 4.
[22] G. Vu Cong, 'The Right to Freedom of Thought in Vietnam' in Chapter 5.

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of expression are significant with parliament having the power to pass wide-ranging laws restricting speech. As for freedom of religion, this freedom is also 'highly circumscribed', and the interpretation of this freedom is shaped by the special status accorded to Islam under the Malaysian constitution.[23]

The Content of the Right to Freedom of Thought

While the content of the right to freedom of thought has previously been an under-explored question in most of the legal systems we surveyed, some countries have an existing doctrinal framework on which to draw. This is the case in Colombia (Chapter 20) and Japan (Chapter 3) where there is a sophisticated and rich jurisprudence about the content and contours of the right. González Medina and Sebastián Rubiano-Groot Gómez explain that the Colombian Constitutional Court has recognised four main attributes of the right:[24]

1. 'The right to develop one's thoughts autonomously and to freely adopt and live by any ideology, philosophy or cosmovision.' This is also known as the 'positive dimension of freedom of thought;'
2. 'The State and third parties should not access or discover a person's thoughts without their consent, nor coerce them to think in a certain way, nor can they interfere with an individual's cognitive processes.' This is otherwise known as the 'the negative dimension of freedom of thought;'
3. 'The right not to reveal one's thoughts', meaning that nobody 'can be compelled to manifest his/her thoughts;' and
4. 'The right not to be "sanctioned or harassed for the expression of thoughts and moral convictions".'[25]

The Supreme Court of Japan (SCJ) has identified at least four ways that the right to freedom of thought and conscience, sometimes called 'inner freedom', can be infringed.[26] These situations are:

1. Where someone is compelled to have a particular thought;
2. Where having a particular thought is prohibited;
3. Where someone is compelled to confess the existence of a particular thought; and
4. Compelling someone (e.g., a teacher) to 'indoctrinate [e.g. their students with] one-sided ideals and principles'.[27]

Interpreting the case law of the SCJ, the author of the Japanese report argues that there is perhaps a fifth way that this right could be infringed: that is compelling someone to act in a way that is contrary to their 'historical view or vision of the world'.[28]

Canada (Chapter 22) is also worth mentioning here. While there is little relevant case law, the author of the country report writes that there is 'a nascent recognition' of components of the right emerging in relevant jurisprudence.[29] These elements concern '(1) punishment

[23] K. Sivabalah, 'The Right to Freedom of Thought in Malaysia' in Chapter 6.
[24] D. González Medina and S. Rubiano-Groot Gómez, 'The Right to Freedom of Thought in Colombia' in Chapter 20.
[25] Constitutional Court, judegment C-055/2022 cited by González Medina and S. Rubiano-Groot Gómez ibid.
[26] S. Yokodaido, 'The Right to Freedom of Thought in Japan' in Chapter 3.
[27] Ibid.
[28] Ibid.
[29] D. Newman, 'The Right to Freedom of Thought in Canada' in Chapter 22.

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for one's thoughts; (2) unduly intrusive or inappropriate investigation of one's thoughts; and (3) impermissible manipulation of one's thoughts.'[30]

In Zambia and Mauritius (and in Kenya up until the promulgation of the 2010 Constitution), freedom of thought is understood as an aspect of freedom of conscience, and the respective constitutions provide that 'no person shall be *hindered* in the enjoyment of [this] freedom' [emphasis added].[31] The verb 'to hinder' is an interesting choice in that it seems to capture both positive and negative aspects of the right. From a positive perspective, if the State has a duty not to hinder freedom of thought, it might be argued that this implies a duty to promote or at least facilitate freedom of thought. From a negative perspective, the reference to 'hindering' would seem to represent a lower threshold than alternative verbs such as 'to infringe' or 'to interfere' in respect of the point at which the right to freedom of thought becomes engaged. In this context, one could imagine all sorts of complaints coming before courts: for example, could someone who is unhappy with the education they are receiving in a State-run school argue that their freedom of thought has been hindered? However, the right to freedom of thought in both the Zambian and Mauritian constitutions is a qualified right and, interestingly, the relevant provisions expressly state that a person can *consent* to their freedom of thought being hindered, all of which makes it more difficult to successfully claim that freedom of thought has been hindered in the first place.

Other legal systems have less developed doctrinal frameworks in respect of the right to freedom of thought. However, in ascertaining the content of the right, many authors of country reports took as their starting point the four attributes of the right identified by the former United Nations Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed, in his 'Report on Freedom of Thought' submitted to the General Assembly in October 2021. The Special Rapporteur identified these attributes following an analysis of international human rights jurisprudence and commentary. The four attributes are:

(a) not being forced to reveal one's thoughts;
(b) no punishment/sanctions for one's thoughts;
(c) no impermissible alteration of one's thoughts; and
(d) States fostering an enabling environment for freedom of thought.

Authors of the country reports sought to ascertain the extent to which these attributes of the right are reflected in the doctrine and jurisprudence of their legal systems, and we find that several countries have developed varying levels of protection for these attributes. For example, the constitution of Türkiye (Chapter 8) prohibits the forced disclosure of thoughts; the Supreme Court of the United States long ago and explicitly declared unconstitutional any punishment of thought; Germany has caselaw prohibiting indoctrination and brainwashing, albeit extreme forms of impermissible alteration of one's thoughts; and finally, France would consider its commitment to secularism as forming part of an enabling environment for freedom of thought. Perhaps even more concretely, the provision protecting freedom of thought under Article 13 ACHR protects not only freedom of expression but also enables freedom of thought by, for example, prohibiting media monopolies, ensuring media independence and prohibiting propaganda (Chapter 23).

[30] Ibid.
[31] See C. Phiri, 'The Right to Freedom of Thought in Zambia' in Chapter 14; N. Raamandarsingh Purmah, 'The Right to Freedom of Thought in Mauritius' in Chapter 15 and V. Miyandazi, M. Mudeyi and H. Okoth Otieno, 'The Right to Freedom of Thought in Kenya' in Chapter 13.

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The Scope of the Right to Freedom of Thought

The Cartesian dualist distinctions between mind and body, the inner and outer or the *forum internum* and *forum externum* loom large in most legal systems surveyed in this book. As the authors of the Chilean report put it, thought is conceived as being 'part of one's irreducible inner self, thus constituting mental structures exempt from juridical intrusion or oversight'.[32] McCarthy-Jones and Walmsley argue that this legal conception of thought is incomplete because it does not allow that thought can be formulated in the *forum externum*.[33] They explain that thought can emerge in the context of the extended mind hypothesis and as 'thought-speech', thought that occurs as we converse with others. The authors propose that not only *forum internum* thought but also thought that occurs in the *forum externum* should be subject to absolute protection where this is (1) extended thought that is 'related to self-government' or (2) 'thoughtspeech' that concerns truth-seeking.[34] While the authors pursue an innovative conceptual argument, questions remain about how such a scheme could be implemented in practice. Once thought is manifested in our behaviour or speech, the rights and interests of others at the horizontal level and the interests of the State at the vertical level come into the picture. So understood, there are significant challenges in operationalising a right to freedom of manifested thought as an absolute rather than a qualified right.

Against this background, we can better understand why lawyers tend to draw the Cartesian distinction between unmanifested and manifested thought. The most coherent legal position would seem to be that the right to freedom of thought affords absolute protection to unmanifested thought while other rights such as the right to freedom of expression, the right to privacy, the right to freedom of association and the right to freedom of assembly provide qualified protection to manifested thought. But does this mean that absolute protection should extend to all unmanifested thoughts, even the most trivial? This question can be best conceptualised in the context of neurotechnology, particularly 'brain-reading' technologies.

One approach is to say that because the capacity to think and to have private thoughts are essential elements of personhood, the unauthorised intrusion upon or manipulation of our thoughts is absolutely prohibited as a matter of basic principle because such intrusion or manipulation undermines the very dignity and autonomy of human beings. Another approach reaches the same conclusion but for different reasons. Blitz explains that the drafters of the US Constitution were influenced by a Lockean understanding that 'opinions were sacrosanct because they were understood to be *non*-volitional'.[35] In other words, '[w]e are not able to control what we think or perceive in the way we are able to control our physical conduct'.[36] As such, in the United States, an individual's inner life ought to be protected no matter its content; whether it be 'rich or sordid'.[37]

Most of the remaining legal systems surveyed in this book are not explicit on this point, the exception being Japan where the answer seems relatively clear: the right to freedom of thought 'is not as broad as including all mental activity of the inner realm of a person,

[32] E. A. Chia and F. Quezada, 'The Right to Freedom of Thought in Chile' in Chapter 19.
[33] See S. McCarthy Jones and J. Walmsley, 'What is thought and what makes it free? Or, how I learned to stop worrying and love the forum externum' in Chapter 24.
[34] Ibid.
[35] J. Campbell, 'Natural Rights and the First Amendment' (2017) *Yale Law Journal*, 127, 281 as cited by Marc Jonathan Blitz, 'The Right to Freedom of Thought in the United States' in Chapter 21.
[36] Blitz, ibid.
[37] *United States* v. *Reidel*, 402 U.S. 351 (1971) (Harlan, J., concurring), as cited by Blitz ibid.

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yet not as narrow as only guaranteeing religious beliefs'.[38] There are three reasons why we might argue that the Japanese position is the most convincing one from a legal perspective. First, internationally and in domestic legal systems, law and jurisprudence tend to elevate the importance of 'higher order' thinking, implying that other forms of thought or mental activity are of less importance. Consider, for example, the opening provision of the UDHR, which, as one scholar has put it, 'provides the theoretical scaffolding that sustains all human rights norms'.[39] Article 1 states that '[a]ll human beings are born free and equal in dignity and rights. They are endowed with *reason and conscience* and should act towards one another in a spirit of brotherhood' [emphasis added]. The European Court of Human Rights (Chapter 12), in ascertaining whether a 'belief' can be protected by Article 9 ECHR, assesses whether the belief has attained 'a level of cogency, seriousness, cohesion and importance' (the *Campbell and Cosans* test).[40] Secondly, and following on from this first point, even when rights are understood as affording absolute protection, courts usually employ *de minimis* thresholds meaning that only those infringements that meet a certain threshold are actionable. The *Campbell and Cosans* test is one such example but consider too the right to dignity in Germany, which is understood to be 'inviolable' under Article 1(1) of the Constitution, inviolability meaning that justifications for violations of dignity are not permitted. But, as the author of the German report explains, this does not been that all alleged infringements of dignity are actionable. Rather a violation of dignity means that the 'intrinsic value of the human being must be denied as a matter of principle and absolutely', this setting a relatively high threshold test for complaints that the right to dignity has been infringed.[41] Third, there appears to be an emerging consensus in the literature that a threshold test of some sort is necessary. In Chapter 27, Ligthart and van de Pol predict that protection (in the context of non-consensual brain-reading and neurointerventions) will 'likely depend on what kind of mental states or functions they affect and whether [these states or functions] qualify as a "thought" within the meaning of Article 9 ECHR'.[42] Ligthart has previously argued that protected thoughts must first attain a certain threshold (e.g., be thoughts related to philosophical, political or scientific views) as per the standard provided by the *Campbell and Cosans* test discussed above.[43] Similarly, the author of the German report states that the scope of the right should be construed narrowly to protect 'special thoughts, namely a person's beliefs and convictions, but not inner freedom as such'.[44]

Scholars have further proposed a range of factors that may be relevant in determining whether the absolute right to freedom of thought is engaged or not. One of us has argued that one can maintain a broad definition of thought as long as a threshold test is applied, one that takes into account aggravating factors such as whether there is the presence of powerlessness, coercion, exploitation and/or deception as well as consideration of the intention, purpose and/or motivation of the interference along with a weighing up of the consequence,

[38] S. Yokodaido, 'The Right to Freedom of Thought in Japan' in Chapter 3.
[39] F. J. Rivera Juaristi, 'Article 1: Dignity and Equality' in H. Cantu Rivera (ed.), *The Universal Declaration of Human Rights: A Commentary* (Brill, 2023) p. 12.
[40] *Campbell and Cosans* v. *United Kingdom* [1982] echr 7511/76 and 7743/76 at [36].
[41] N. Hertz, 'The Right to Freedom of Thought in Germany' in Chapter 9.
[42] 'Freedom of Thought: Absolute Protection of Mental Privacy and Mental Integrity? Considering the Case of Neurotechnology in Criminal Justice' in Chapter 27.
[43] S. Ligthart, *Coercive Brain-Reading in Criminal Justice* (CUP, 2022); for example, *S.A.S.* v. *France* [GC] (no. 43835/11, 1 July 2014) §55.
[44] N. Hertz, 'The Right to Freedom of Thought in Germany' in Chapter 9.

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disadvantage or degree of harm caused.[45] Ligthart and van de Pol have identified three 'general factors' that are relevant in determining whether absolute protection under Article 9 or qualified protection under Article 9 is available. These include: '(1) the mental effects of an interference and the method of inducing them; (2) the victim's vulnerability, and (3) the context of a mental interference.'[46] In the specific context of online manipulation, in Chapter 25, Keese and Leiser suggest that the following factors are relevant in seeking to establish whether a manipulative practice infringes the right to freedom of thought: '(1) Concealment or obfuscation'; (2) 'vulnerability/information and power asymmetry'; (3) whether 'the attempted influence (a) aims to modify a thought which attains a certain level of cogency, seriousness, cohesion and importance; and/or (b) targets mental processes intimately linked with core aspects of autonomy in the *forum externum*'; and potentially (4) 'frequency and duration'.[47]

Taken together, what all of this suggests is that the absolute protection of the right to freedom of thought should be trigged only when intrusion upon or manipulation of thought meets a principled *de minimis* threshold. This is surely necessary if the right is to have any practical utility rather than mere symbolic value, notwithstanding that such symbolism is important in itself.

CONCLUSIONS

Scholarship on the right to freedom of thought as a distinct right is still in its infancy and important questions about the nature and scope of the right remain unresolved. However, if there is one thing that the chapters in this handbook demonstrate it is that the right has significant potential. Paying close attention to how we can further develop this right opens up exciting opportunities for human rights more broadly which are being increasingly challenged not only by socio-technological developments but also by democratic backsliding and autocracy intensified by shifts in the 'global order'. As many authors sought to emphasise, the right to freedom of thought has a significant societal dimension which is strongly correlated to democracy. Understanding the core aspects of the right to freedom of thought as well as its normative underpinnings can also help us better protect the ancillary rights that feed off it. This is because our understanding of why those ancillary rights are important will be enriched and, as a result, we may demand clearer and better justifications for restricting enjoyment of them.

Building on pioneering scholarship on the right to freedom of thought,[48] this handbook seeks to further ingrain the right in the international human rights agenda. In so doing, we hope this handbook will help focus the minds of key actors in international and regional institutions, as well as domestic bodies, when it comes to the effective and careful regulation of, most obviously, neurotechnology but also of the digital sphere in general. Not only is there potential

[45] B. Shiner, 'Protecting the *forum internum* absolutely: The threshold for "thought" under Article 9 ECHR' (forthcoming, manuscript with author).

[46] Ligthart and van de Pol, 'Freedom of Thought: Absolute Protection of Mental Privacy and Mental Integrity? Considering the Case of Neurotechnology in Criminal Justice' in Chapter 27.

[47] N. Keese and M. R. Leiser, 'Online Manipulation as a Potential Interference with the Right to Freedom of Thought' in Chapter 25.

[48] See, for example, Marc Jonathan Blitz, 'Freedom of Thought for the Extended Mind: Cognitive Enhancement and the Constitution', (2010) 4 *Wisconsin Law Review* 1049–1118; J. C. Bublitz, 'Freedom of Thought in the Age of Neuroscience' (2014) 100 (1) *Archiv für Rechts- und Sozialphilosophie* 1–25; S. Alegre, 'Rethinking Freedom of Thought for the 21st Century', (2017) 3 *European Human Rights Law Review* 221–233.

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for the right to inform the interpretation of key laws and regulatory instruments such as the European Digital Services Act and AI Act, but lawyers might also develop innovative ways to make use of the right in strategic litigation, as explored by Wodajo in Chapter 28. At the very least, we hope that this handbook will be a useful aid to those curious about the right as well as those scholars, practitioners and activists who are seeking to ensure it enjoys effective protection internationally.

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