Mental privacy as part of the human right to freedom of thought?

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Published in:
The law and ethics of freedom of thought

Publication date:
2023

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Penultimate draft. Forthcoming in M. Blitz and J.C. Bublitz (eds.), *The Law and Ethics of Freedom of Thought Vol. 2: Cognitive Liberty and Privacy* (Palgrave McMillan).

1. Introduction

The right to freedom of thought is evolving. Among others, lawyers, philosophers, psychologists, and neuroscientists are increasingly debating the content and scope of this legal human right.[2] In October 2021, the UN Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed, submitted a report on freedom of thought to the General Assembly of the United Nations. As the first UN document of recent times, the report considers the content and scope of the right to freedom of thought pursuant to Article 18 ICCPR.[3] Whereas the historical developments of Article 18 ICCPR and 18 UDHR almost exclusively focused on religion and conscience, the report seems to mark the beginning of a legal theory on the third element: "thought". As such, the invaluable work of a wide range of scholars pays out: the right to freedom of thought has been put firmly on the legal map of the 21st century.

Without doubt, the renaissance of this once forgotten right raises novel theoretical questions about the content, scope, and absolute nature of the human right to freedom of thought.[4] One of them, central to this chapter, is whether the right should cover the protection of mental privacy and, if so, how this protection should relate to the protection of mental privacy by other human rights, such as by the general right to privacy and the freedom of expression.[5] It is generally accepted that the right to freedom of thought guarantees three different substantive freedoms: (1) that one is not compelled to reveal one's thoughts, (2)

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[2] Enshrined in a variety of human rights instruments, such as in Art. 18 Universal Declaration of Human Rights (UDHR), Art. 18 International Covenant of on Civil and Political Rights (ICCPR), Art. 9 European Convention on Human Rights (ECHR), Art. 10 European Charter of Fundamental Rights (CFR), and Art. 13 of the American Convention on Human Rights (ACHR).

[3] *Report on the Freedom of Thought*, 5 October 2021, A/76/380 (UN Report 2021).

[4] As is clearly illustrated by the present Volume and Volume 1: M.J. Blitz & J.C. Bublitz (eds.), *The Law and Ethics of Freedom of Thought*, Volume 1, Cham: Palgrave Macmillan 2021.

[5] S. Ligthart, C. Bublitz, T. Douglas, L. Forsberg & G. Meynen, 'Rethinking the Right to Freedom of Thought: A Multidisciplinary Analysis' *Human Rights Law Review* 2022, 22.

that one's thoughts are not impermissibly altered, and (3) that one is not sanctioned for one's thoughts.[6] The UN Special Rapporteur remarks that the first freedom implies that *mental privacy* is a 'core attribute' of freedom of thought, arguably including a right to remain silent as well.[7] The present chapter explores the implications of this understanding of the right to freedom of thought from a legal point of view. With a focus on the ICCPR and ECHR, this chapter considers (1) the scope of the right to freedom of thought, (2) the absolute nature of the right, and (3) its relation to the right to privacy and the freedom of opinion and expression. But let us first briefly consider the background of the current debate on protecting mental privacy by human rights law.

2. Towards Human Rights Protection of Mental Privacy

For a long time, our inner, mental lives have been considered inaccessible to the outside world. Thoughts, memories, intentions, emotions, all of them we have traditionally conceived as being secluded from others, playing out in our brains, shielded by a thick and solid skull. But science and technology have challenged this long-lasting assumption. Today, a range of technologies are being developed that enable us to give insight in the mental realms of others.[8] One of the examples are digital technologies that constantly monitor Internet behaviour, allowing the inference of all kinds of preferences and emotions of users.[9] Another much debated technique that could reveal people's mental states, is the detection of brain activity with the use of neurotechnology. Especially fMRI and EEG have shown their ability to measure brain activity in a way that allows the drawing of inferences about what a person remembers, recognises, thinks, or how she is feeling.[10] With the development of such "brain-reading" technologies, Brownsword argues, 'researchers have a window into the brains and, possibly, into a deeper understanding of the mental lives of their participants.'[11] These concerns are likely to exceed the domain of medicine and scientific research, as the technology promises to be usable for other purposes too, including gaming, education, meditation, the

[6] UN Report 2021; J.C. Bublitz, 'Freedom of Thought as an International Human Right: Elements of a Theory of a Living Right', in Blitz & Bublitz 2021; B. Vermeulen & M. Roosmalen, 'Freedom of Thought, Conscience and Religion', in P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights*, Cambridge: Intersentia 2018.
[7] UN Report 2021, par. 26.
[8] N. Farahany, *The Battle for Your Brain. Defending the Right to Think Freely in the Age of Neurotechnology*, New York: St. Martin's Press 2023.
[9] S. Alegre, 'Rethinking Freedom of Thought for the 21st Century', *E.H.R.L.R.* 2017(3); UN Report 2021, par. 68-69.
[10] J.P. Rosenfeld (ed.), *Detecting Concealed Information and Deception*, London: Academic Press 2018; M.A. Just et al., 'Machine learning of representations of suicide and emotion concepts identifies suicidal youth', *Nature Human Behaviour* 2017, 1.
[11] R. Brownsword, 'Regulating brain imaging: Questions of privacy, informed consent, and human dignity', in S. Richmond, G. Rees & S.J.L. Edwards (eds), *I know what you're thinking*, Croydon: OUP 2012, p. 223.

military, and criminal justice. Since technological developments like these threaten to make our mental lives transparent in ways that were previously impossible, the need to protect the privacy of our mental states is loud and clear.[12]

Different definitions of mental privacy have been used in the present debate.[13] This chapter understands a right to mental privacy in a broad sense, as a right against interferences with the autonomy not to disclose what we think, remember, feel, want, belief, etc. In other words: a right not to reveal any unexpressed mental state.[14] How such a right could best be guaranteed by the law is yet unclear. Some have argued for a standalone human right to mental privacy,[15] while others contend that the right is already covered by existing human rights, such as the general right to privacy pursuant to Article 17 ICCPR and 8 ECHR.[16] Another potential candidate to serve as a legal basis for the right to mental privacy, is the right to freedom of thought.[17] According to the UN Special Rapporteur on Freedom of Religion or Belief, the right not to reveal thoughts implies a right to mental privacy and, arguably, a general right to remain silent. Among others, this right is supposed to be threatened by digital and neurotechnologies that allow to draw inferences about a variety of unexpressed mental states.[18] In what follows, this chapter provides three legal perspectives that are worth taking into account prior to developing a right to mental privacy as part of the freedom of thought.

3. Scope of the Right to Freedom of Thought

It has been argued that the right to freedom of thought should protect both the *content of thoughts* and

[12] E.g. UN Report 2021; M. Ienca, *Common human rights challenges raised by different applications of neurotechnologies in the biomedical field*, Council of Europe, October 2021; *OECD Recommendation on Responsible Innovation in Neurotechnology*, Adopted by the OECD Council on 11 December 2019; Report of the International Bioethics Committee of UNESCO (IBC) on the Ethical Issues of Neurotechnology, SHS/BIO/IBC28/2021/3 Rev. (15 December 2021); J.C. Bublitz & R. Merkel, 'Crimes Against Minds', *Criminal Law and Philosophy*, 2014, 8; M. Ienca & R. Andorno, 'Towards new human rights in the age of neuroscience and neurotechnology', *Life Sciences, Society and Policy* 2017, 13(5); S. Goering et al., 'Recommendations for Responsible Development and Application of Neurotechnologies', *Neuroethics* 2021, 14; Farahany 2023.

[13] Ienca & Andorno 2017; Goering et al. 2021; B-J. Koops et al, 'A Typology of Privacy', *U. Pa. J. Int'l L.* 2017, 38(2); A. Wajnerman Paz, 'Is Mental Privacy a Component of Personal Identity?', *Front. Hum. Neurosci*. 2021, doi.org/10.3389/fnhum.2021.773441.

[14] Cf. J.C. Bublitz, 'The Nascent Right to Psychological Integrity and Mental Self-Determination', in A. von Arnauld, K. von der Decken & M. Susi (eds.), *The Cambridge Handbook of New Human Rights*, Padstow: Cambridge University Press 2020, p. 400.

[15] Ienca & Andorno 2017; https://neurorightsfoundation.org/.

[16] S. Ligthart, T. Douglas, C. Bublitz, T. Kooijmans & G. Meynen, 'Forensic brain-reading and mental privacy in European human rights law: Foundations and challenges', *Neuroethics* 2021, 14; S. Michalowski, 'Critical Reflections on the Need for a Right to Mental Self-Determination', in Von Arnauld, Von der Decken &Susi 2020.

[17] S. Alegre, *Freedom to Think*, Croydon: Atlantic Books 2022, p. 27.

[18] UN Report 2021, para. 26, 69, 76, 94.

thinking as a mental process.[19] Although both are closely related, for mental privacy, the primary concern is about the secrecy of the *content* of personal mental states; *what* one thinks, *how* one is feeling, *why* one chooses, etc. Therefore, in what follows, I will focus on this part of the right. Meanwhile, some of the arguments may be relevant regarding the legal protection of thinking as a mental process too.

Understanding the right to freedom of thought as protecting mental privacy presupposes that the scope of the right is broad – protecting against the non-consensual disclosure of any unexpressed mental state. In line with the assumption that freedom of thought implies mental privacy, the UN Special Rapporteur has indeed suggested a broad understanding of the right to freedom of thought. In general terms, the Rapporteur concludes that '[f]reedom of thought is simultaneously "profound and far-reaching". It protects thoughts on "all matters", whether about conscience, religion or belief or other topics.'[20] Some of the concrete examples of current and potential threats to the right, considered by the Rapporteur, concern neurotechnologies such as memory detection in criminal justice and neuroimaging to infer suicidal thoughts. Furthermore, the report points at digital techniques that influence emotions, desires, and opinions, such as microtargeting in advertisement and political campaigns, and to certain treatments of mental health conditions, including compulsory medication.[21] Within such a broad conception of "thought", the freedom not to be compelled to reveal one's thoughts – including all kinds of memories, emotions, opinions, desires, intentions – is indeed likely to partially coincide with a right to mental privacy; a right not to be compelled to disclose any unexpressed mental state.

Whether such a broad understanding of "thought" in the meaning of Article 18 ICCPR and 9 ECHR is compelling, is open to debate, though. The exact scope of the right is as-yet unclear. Does it protect against the non-consensual disclosure of *any* mental state, regardless of the exact mental content, including emotions and trivial thoughts such as 'I like coffee'?[22] Or does freedom of thought only guarantee the secrecy of *particular* types of thoughts, such as thoughts that have a major impact on the person's way of living, such as political thoughts?[23]

In answering these questions, we should distinguish between the law as it is and the law as it ought to be. On the one hand, we should not deny that human rights are to be considered as a living instrument,

[19] J.C. Bublitz, 'Freedom of Thought as an International Human Right', in Blitz & Bublitz 2021, p. 75; S. McCarthy-Jones, 'The Autonomous Mind', *Front. Artif. Intell.* 2019, 2(19).
[20] UN Report 2021, para. 91.
[21] UN Report 2021, para. 68-82.
[22] J.C. Bublitz, 'Freedom of Thought in the Age of Neuroscience', *ARSP* 2014, 100; Alegre 2017; McCarthy-Jones 2019.
[23] K.J. Partsch, 'Freedom of Conscience and Expression, and Political Freedoms', in L. Henkin (ed.), *The International Bill of Rights*, NY: Columbia University Press 1981, p. 213-214; C.D. De Jong, *The Freedom of Thought, Conscience and Religion or belief in the United Nations (1946-1992)*, Antwerp – Groningen – Oxford: Intersentia – Hart 2000, p. 23-33; S. Ligthart, *Coercive Brain-Reading in Criminal Justice: An Analysis of European Human Rights*, NY: CUP 2022, Ch. 5.

which must be interpreted in light of present-day conditions. Historical considerations are not necessarily convincing when determining the present scope of the right to freedom of thought. Developments in digital and neurotechnologies may well give good reasons to broaden the right through an evolutive interpretation. Meanwhile, on the other hand, before we reinterpret or broaden the right to freedom of thought, it is essential to assess what the right exactly does and does not cover in its current understanding – also in relation to other rights, such as the right to privacy and to freedom of opinion and expression.[24] In a recent paper, Bublitz made a compelling argument against the adoption of novel, repetitive human rights over the mind, such as a right to mental privacy.[25] Likewise, we should avoid repetitive understandings of existing human rights as much as possible. For that, there is a need to assess the established scope of these rights under the law as it is, prior to reinterpreting specific rights towards the law as it ought to be. If the present scope of legal protection appears insufficient to protect against emerging threats to mental privacy, we may have a strong case to *reconsider* and *broaden* the understanding of, for example, the right to freedom of thought, so as to cover a right to mental privacy. But we should not just *assume* a broad understanding of freedom of thought in view of recent technological developments, without taking full account of legal historical considerations, relevant case-law and doctrine (although sometimes scarce), and the relationship with other rights.

From a legal point of view, this section argues that, at present, the scope of the right to freedom of thought pursuant to Article 18 ICCPR and 9 ECHR seems to be somewhat restricted, primarily covering thoughts that have a major impact on a person's way of living. As such, it is not clear at all that the right to freedom of thought *implies* the broader right to mental privacy – leaving us with the question of whether it should.

Elsewhere, I have argued that the drafting process of Article 18 UDHR provides no clear definition of freedom of "thought". Meanwhile, it does indicate that thought had to be included next to religion and conscience, in order to cover the protection of philosophy, politics, and science too, suggesting a somewhat limited understanding with a focus on thoughts that have a major impact on a person's way of living.[26] This interpretation is not typically narrow, as it is not restricted to religious-related thoughts only. Nor can it said to be wide, as it not includes just any thought, opinion, or idea about everything. Rather, this understanding of the right to freedom of thought can be qualified as moderate. Also, it might be considered a 'content sensitive' interpretation, as it connects the protective scope of the right to freedom of thought to the (significance of) different types of mental content. This section will not reiterate the arguments for such a moderate, content-sensitive interpretation of the freedom of thought's scope. Rather, it will focus on two

[24] Ligthart et al. 2022.
[25] J.C. Bublitz, 'Novel Neurorights: From Nonsense to Substance', *Neuroethics* 15, 2022.
[26] Ligthart 2022; S. Ligthart, 'Freedom of Thought in Europe: Do Advances in 'Brain-Reading' Technology Call for Revision?', *JLB* 2020, 7(1).

arguments that are often submitted for a wider understanding of "thought".[27] The first relates to the General Comment on Article 18 ICCPR by the Human Rights Committee, the second to the case of *Salonen v. Finland*, by the European Commission on Human Rights (EComHR).

General Comment No. 22; Article 18 ICCPR

As mentioned above, the UN Special Rapporteur on Freedom of Religion or Belief considers that the right to freedom of thought is "profound and far-reaching" and that it protects thoughts on "all matters", whether about conscience, religion or belief or other topics. Likewise, paragraph 1 of the General Comment No. 22 states that 'The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters.' At first sight, this statement seems to suggest a wide scope of the freedom of thought. After all, in the abstract, it clarifies that Article 18 ICCPR protects thoughts *on all matters*, which may well imply that it covers every thought about anything, without additional requirements. However, on the wordings of it, the comment does not provide a clear definition of what a "thought" is or could be.[28] It only states that thoughts that *are* protected may concern any matter. The text lends itself for at least two interpretations: (1) *any* kind of thought or mental state is protected, regardless of the exact mental content, and (2) only *certain types* of thoughts are protected, such as thoughts that have a major impact on a person's way of living, regardless their precise matter – that is, Article 18 ICCPR is not confined to religious thoughts only but also covers thoughts about philosophy, science, politics, and alike.[29]

The drafting process of the General Comment suggests that the latter interpretation aligns best with the intention of its creators. When discussing the draft of the Comment, Mr. Wennergren submitted that in the analysis of article 18 ICCPR, one aspect had remained neglected: the freedom of *thought*. According to Wennergren, it had to be clarified that freedom of thought was a far-reaching concept that embraces freedom of opinion. As such, the Comment would express that the Covenant aimed not only at guaranteeing freedom of opinion "without interference" in the sense of Article 19(1) ICCPR, but also at safeguarding this freedom absolutely as part of freedom of thought. According to Wennergren, this idea had been lacking in the General Comments of the Human Rights Committee, failing to attach due importance to the fact that freedom of thought was a specific right.[30] Furthermore, he argued:

[27] See e.g. Bublitz 2021, p. 58-59; Alegre 2017, p. 224-225; Alegre 2022, p. 25.
[28] Evans 1997, p. 213.
[29] Cf. De Jong 2000, p. 23.
[30] CCPR/C/SR.1162, par. 14.

> 'in the draft general comment, the concept of freedom of thought was closely associated with that of freedom of conscience, religion and belief. But freedom of thought was broader: it encompassed freedom of political and scientific thought, and so on. (…) Those aspects of freedom of thought were essential, yet they were not reflected in paragraph 1 of the draft. The fact was that freedom of thought was often associated with freedom of religion and belief, but it was not uniquely and necessarily so. In that light, it was important to mention the sphere of ideas and opinions in general, and to evoke, for example, the question of political opinions and scientific ideas. Likewise, in the second sentence, it could be said that the freedoms in question applied to all convictions and beliefs as well as to ideas and opinions of all sorts.'[31]

Accordingly, Wennergren suggested freedom of thought not only to encompass significant thoughts such as about politics and science, but also to comprise any idea or opinion, which was also covered by Article 19 ICCPR. Mr. Sadi agreed, but only in part. He proposed that to develop freedom of "thought", it should be clarified that the concept of freedom of thought, conscience and religion 'encompassed a whole range of personal and collective convictions in the political, economic, social, scientific and intellectual spheres. The meaning of freedom of thought encompassed all those aspects.'[32] This proposal gave significance to "thought" next to conscience and religion. At the same time, by requiring a personal or collective conviction in one of the mentioned spheres, Sadi clearly separated "thought" from the broader notions of "opinion" and "ideas" in the meaning of Article 19 ICCPR.

Miss Chanet agreed with Sadi. She argued that Wennergren had raised a problem regarding the freedom of opinion which may lead to confusion between Article 18 and 19 ICCPR. Indeed, in order to exercise freedom of opinion within the meaning of Article 19 ICCPR, people should first be able to exercise freedom of thought as guaranteed by Article 18 ICCPR. Meanwhile, she argued, although an overlap exists between both rights, the General Comment on Article 18 ICCPR had to clarify what separates both provisions (rather than absorbing freedom of opinion into freedom of thought, as proposed by Wennergren). Most important was that unlike freedom of opinion, freedom of thought was a non-derogable right pursuant to Article 4 ICCPR. Furthermore, Chanet argued that there was no need to state that the freedom of thought, conscience, and religion is "far-reaching". Instead, it would suffice to note that it encompasses the spheres of 'personal convictions, and so forth'.[33]

Finally, in order to express that freedom of thought is not limited to the sphere of religious thoughts only, Mrs. Higgins proposed a text that indicates that the concept of freedom of thought, conscience,

[31] Idem, par. 31.
[32] Idem, par. 34.
[33] Idem, par. 36. Cf. par. 27.

religion and belief encompassed freedom of thought "on all matters".[34] Accordingly, paragraph 1 of the General Comment had been adopted.[35] Although Article 18 ICCPR had often been interpreted as merely safeguarding personal convictions associated with religion,[36] the General Comment No. 22 now clarifies that the freedom of thought is a specific right, covering a whole range of personal and collective convictions, *inter alia* in the political, economic, social, scientific, and intellectual spheres. Freedom of thought on all matters.

As previously mentioned, historical considerations should not be decisive for our current understanding of the right to freedom of thought. But they do give some direction. At least, they challenge the assumption that freedom of thought covers the content of any mental state – trivial or profound – *because* Article 18 ICCPR guarantees freedom of thought "on all matters". The drafting process suggests that, unlike Article 19 ICCPR, the non-derogable freedom of thought not covers just any idea, opinion, or thought of all sorts. Rather, it is limited to the sphere of certain personal and collective convictions. Although the UN Special Rapporteur on Freedom of Religion or Belief has recently emphasised the distinctive nature of freedom of thought and freedom of opinion and expression,[37] their precise relation and delineation remains largely unexplored.[38] What exactly connects and distinguishes freedom of thought from freedom of opinion and the freedom to express all kind of information and ideas? The answer to this question is significant to the question of whether mental privacy is our should be covered by the right to freedom of thought or, possibly, by the right to freedom of expression, as will be discussed in Section 5.

Salonen v. Finland; Article 9 ECHR

In the case of *Salonen v. Finland*, the EComHR had to decide whether the applicants' wish to give their daughter a particular forename was covered by the right to freedom of thought.[39] The EComHR argued that '[t]aking into consideration the comprehensiveness of the concept of thought, this wish can be deemed as a thought in the sense of Article 9.'[40] Due to the emphasis on the comprehensiveness of the notion of "thought", it has been argued that this case indicates a broad understanding of the right to freedom of thought pursuant to Article 9 ECHR.[41]

[34] Idem, par. 40. See also UN Report 2021, par. 22; D.J. Harris et al., *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights*, NY: OUP 2018, p. 571: "The scope of Article 9 is wide, in that it covers forms of both religious and non-religious belief."
[35] CCPR/C/SR.1162, par. 50-52.
[36] CCPR/C/SR.1162, par. 43.
[37] UN Report 2021, par. 16, 18-21.
[38] See, for some exploration, Ligthart 2022; Ligthart et al. 2022.
[39] The name was: 'Ainut Vain Marjaana' (The One and Only Marjaana).
[40] EComHR 2 July 1997, 27868/95 (*Salonen/Finland*).
[41] Alegre 2022, p. 25; Alegre 2017, p. 224; Bublitz 2021, p. 58.

The persuasiveness of this claim is open to debate, as other cases might rather suggest a narrower understanding. The official, although non-binding *Guide on Article 9 of the European Convention on Human Rights*, notes that '[o]n the one hand, the scope of Article 9 is very wide, as it protects both religious and non-religious opinions and convictions. On the other hand, not all opinions or convictions necessarily fall within the scope of the provision'.[42] In *F.P./Germany*, for example, the EComHR considered that Article 9 ECHR 'is essentially destined to protect religions or theories on philosophical or ideological universal values'[43] In this case, Article 9 ECHR could not be invoked regarding the dismissal from the military service as a sanction for having made discriminatory remarks about Jewish people.[44] In contrast, the applicants' complaint in *Hazar and Açik/Turkey*, arguing that their prison sentences for belonging to the Communist Party of Turkey violated the right to freedom of thought, was admissible under Article 9 ECHR.[45] Likewise, the European Court on Human Rights (ECtHR) has considered a person's intention to vote for a political party to be essentially a thought confined to the *forum internum*,[46] protected by Article 9(1) ECHR.[47]

The amount of case-law on freedom of thought is still very limited. Nonetheless, when outlining the *general principles* or *preliminary remarks* in cases on freedom of conscience or religion, the Grand Chamber of the ECtHR seems to have formulated a general threshold for the qualification as either a thought, conviction, or religion in the meaning of Article 9(1) ECHR:

> 'The Court reiterates that, as guaranteed by Article 9 of the Convention, the right to freedom of *thought, conscience and religion* denotes only those views that attain a certain level of cogency, seriousness, cohesion and importance.'[48]

Whereas the Commission in *Salonen v. Finland* referred to the comprehensiveness of "thought", the Grand Chamber appears to restrict the scope of this notion, by requiring a certain level of cogency, seriousness, cohesion and importance. Typically, the jurisprudence of the ECtHR is highly casuistic. Rainey, McCormick and Ovey warn that regarding Article 9 ECHR, the case-law can sometimes even be

[42] European Court on Human Rights/Council of Europe, *Guide on Article 9 of the European Convention on Human Rights*, 30 April 2022, par. 14. Cf. Also Harris et al. 2018, p. 571.
[43] EComHR 23 March 1993, 19459/92 (*F.P./Germany*). See also ECommHR 15 December 1983, 10358/83 (*C./UK*), at 147.
[44] Those sanctions did however fall within the scope the freedom of expression pursuant to Article 10 ECHR.
[45] EComHR 11 October 1991, 16311/90, 16312/90 and 16313/90 (*Hazar and Açik/Turkey*).
[46] ECtHR 8 July 2008, 9103/04 (*Georgian Labour Party/Georgia*), § 120.
[47] Cf. *Yong-Joo Kang v. Republic of Korea*, CCPR/C/78/D/878/1999, HRC, 16 July 2003.
[48] ECtHR (GC) 26 April 2016, 62649/10 (*İzzettin Doğan and others v. Turkey*), § 68 (emphasis added).

inconsistent and loosely reasoned.[49] Given the limited number of cases on freedom of thought so far, we cannot be sure whether the considerations in *Salonen v. Finland* are to be seen as either the leading approach, or rather as an exceptional inconsistency, mentioned in only one single decision of the Commission dated back to 1997. What is clear, is that the Court's general consideration – that the right to freedom of thought, conscience *and* religion covers only views that meet a certain threshold – has been reiterated in a variety of recent cases.[50] To some extent, this consideration echoes the position of the EComHR in *F.P. v. Germany*, that Article 9 ECHR is essentially destined to protect religions or theories on philosophical or ideological universal values. Furthermore, it aligns with the generally accepted claim that for a *conviction* to be protected by Article 9 ECHR, it must concern a weighty and substantial aspect of human life and behaviour; it must attain a certain level of cogency, seriousness, cohesion and importance.[51] A non-religious critical opinion on vaccination, for example, does not constitute a conviction or belief in the meaning of Article 9 ECHR.[52] By reiterating its general principles and explicitly referring to "conscience" *and* "thoughts", the Court seems to have extrapolated this general criterion to thoughts now as well.

This is, however, exactly one of the reasons why Bublitz challenges a narrower understanding of "thought", as it would leave little scope for thought independent from conscience.[53] Whether this would be problematic is open to discussion. Malcolm Evans, for example, distinguishes between patterns of "thought and conscience" on the one hand, and "religion or belief" on the other. He sees little reason to make a further distinction between thought and conscience.[54] Likewise, Carolyn Evans considers Article 9(1) ECHR to distinguish between two complex and similar ideas. On the one hand "religion or belief" and on the other "thought and conscience", the latter encompassing political, philosophical, ethical, and intellectual positions in human affairs.[55] Meanwhile, she accepts that 'the words thought and conscience are – perhaps even to a greater extent than religion and belief – vague and difficult to convincingly define.'[56]

Bublitz also points at the text of Article 18 ICCPR, which would speak, in similar terms as Article 9 ECHR, against a narrow understanding of freedom of thought *as* a right to freedom of conscience, which

[49] B. Rainey, P. McCormick & C. Ovey, *The European Convention on Human Rights*, NY: OUP 2021, p. 461. Also C.K. Roberts, *Reconceptualising the Place of the Forum Internum and Forum Externum in Article 9 of the European Convention on Human Rights*, Bristol 2020 (electronic version), p. 31.
[50] ECtHR (GC) 1 July 2014, 43835/11 (*S.A.S./France*), § 55; ECtHR 8 June 2021, 48329/19 (A*ncient Baltic religious association Romuva/Lithuania*), § 125; ECtHR 9 November 2021, 9476/19 (*De Wilde/the Netherlands*), § 51.
[51] ECtHR 29 April 2002, 2346/02 (*Pretty/UK*), § 82; Vermeulen & Roosmalen 2018, p. 741-742.
[52] ECtHR (GC) 8 April 2021, 47621/13 and 5 others, (*Vavřička and Others/Czech Republic*), § 335.
[53] Bublitz 2021, p. 59.
[54] M.D. Evans, *Religious liberty and international law in Europe*, Cambridge: CUP 1997, p. 289.
[55] C. Evans, *Freedom of Religion Under the European Convention on Human Rights*, NY: OUP 2001, p. 52, 66.
[56] Idem, p. 52.

would only cover important beliefs. The reason is that the text lists "belief" as a non-exhaustive example.[57] Article 18 ICCPR reads as follows:

> 'Everyone shall have the right to freedom of thought, conscience and religion. This right shall *include* freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.'[58]

Whether the word "include" here refers to either *religion* and *belief*, or, rather, to the *freedom to have or adopt* and *to manifest* religion and belief, may not be entirely clear.[59] But if we assume it pertains to "belief", the text could also provide an argument in favour of a more narrow understanding of the right to freedom of thought – not *as* but *akin* to the right to freedom of conscience: the freedom of thought and conscience denotes only those views that meet a certain threshold, including beliefs as well as other significant personal or collective convictions that are not protected by "conscience" but do qualify as a "thought", such as political opinions.

Altogether, the case-law on Article 9 ECHR does not reveal a clear definition of protected thoughts. The Commission in *Salonen v. Finland* may have suggested a wide understanding. Meanwhile, the general principles of the Court hint at a somewhat restricted interpretation. Accordingly, when discussing the law as it is, we better not put too much emphasis on *Salonen v. Finland*, assuming that the scope of freedom of thought is broad. Rather, we could just accept that under Article 9 ECHR the scope of freedom of thought is as-yet unclear. It could be wide, as seems suggested in *Salonen*; it could be narrow or moderate, as seems to follow form *F.P. v. Germany* and the Court's general principles. Accepting this unclarity may open the way towards a proactive debate on what the scope of freedom of thought ought to be, without appealing to arguable authoritative decisions or judgements that appear unable to draw compelling conclusions.

Scope and mental privacy

As mentioned above, understanding the right to freedom of thought as covering mental privacy presupposes a wide scope of the right, comprising a right not to reveal any unexpressed mental state – be that either a political opinion, trivial memory, or everyday emotion. After considering two central legal arguments that are often submitted for a broad understanding of "thought" – paragraph 1 of the General Comment No. 22

[57] Bublitz 2021, p. 59.
[58] Emphasis added.
[59] Cf. *Guide on Article 9 of the European Convention on Human Rights*, 30 April 2022, par. 27.

and *Salonen v. Finland* – it seems that such a wide scope of the right is at least debatable. What would this mean to the question of whether mental privacy is or ought to be covered by the right to freedom of thought? As the scope of the right is arguably somewhat limited, or at least still unclear, it is at best premature to presuppose that mental privacy *is* completely covered by the right to freedom of thought; being a "core attribute" of the right.[60] This poses the question of whether mental privacy *should* be protected as part of the right to freedom of thought. The next sections delve into this question, focussing on the absolute nature of the right to freedom of thought and on its relation to the right to privacy and the right to freedom of opinion and expression.

4. Mental Privacy: Absolute or Qualified Protection?

In their seminal article on the right to privacy, Warren and Brandeis observed that 'the common law secures to each individual the right of determining, originally, to what extent his thoughts, sentiments, and emotions shall be communicated to others.'[61] This legal protection, they argued, is merely an instance of the general right to be let alone; the right to privacy, which could be invoked to protect against 'invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes and sounds.'[62] Over a century later, the UN Special Rapporteur on the Right to Privacy (Article 17 ICCPR) warned 'that constantly developing technologies pose important challenges for the protection of privacy: these technologies may reveal the most intimate behaviour, wishes, preferences and indeed the very thoughts of individuals in ways that previously were not possible.'[63]

These considerations indicate that a right not to reveal thoughts, emotions, sentiments, preferences, wishes, or any other unexpressed mental state – a right to mental privacy – is covered by the general right to privacy. As the Special Rapporteur on Freedom of Religion or Belief highlights, in the United States, 'courts recognise that an individual right to privacy encompasses mental privacy'.[64] Likewise, in Europe, it has been argued that the right to respect for private life pursuant to Article 8 ECHR also covers the protection of mental privacy.[65]

At the same time, the Special Rapporteur on Freedom of Religion or Belief has emphasised that mental privacy is a core attribute of the right to freedom of thought. This raises foundational questions. Typically, the right to privacy is a *qualified* right. It allows for certain exceptions. Think, for example, of

[60] As the UN Report 2021 suggests at par. 26.
[61] S.D. Warren & L.D. Brandeis, 'The Right to Privacy', *Harvard Law Review*, 1890, Vol. 4, at 198.
[62] Warren & Brandeis 1890, at 205-206.
[63] *Report of the Special Rapporteur on the right to privacy*, 15 October 2018, A/HRC/37/62.
[64] UN Report 2021, par. 26. See Long Beach City Employees Assn. v. City of Long Beach (1986); Stanley v. Georgia (1969).
[65] Ligthart et al. 2021.

the taking and examination of DNA for purposes of immigration or criminal justice.[66] By contrast, the internal dimension of the right to freedom of thought, guaranteed by Article 18(1) ICCPR and 9(1) ECHR, is an *absolute* right. Infringements cannot be justified.[67] If the protection of mental privacy would be covered by both the right to privacy and the right to freedom of thought, a criterion will be needed to determine which interferences with mental privacy justify the absolute protection by the right to freedom of thought, over and above the qualified protection of the right to privacy.[68]

A similar issue has arisen regarding the absolute prohibition of torture, inhuman and degrading treatment, which protects a person's bodily and mental integrity. This protection is also covered by other rights, such as by the qualified right to respect for private life pursuant to Article 8 ECHR. In order to define boundaries between different levels of legal protection in this regard, scholars and courts have identified relevant factors to determine of whether an intervention comes within the scope of the absolute protection or not. For example, to elicit absolute protection from Article 3 ECHR in addition to Article 8 ECHR, a treatment must attain a "minimum level of severity".[69] Whereas Article 3 ECHR is absolute, the assessment of the minimum level is relative. It depends on all circumstances of an individual case, including the nature and context of a treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some cases, the sex, age, and health of the victim.[70] Further relevant factors could be the purpose for which a treatment has been inflicted, together with the intention and motivation of it.[71]

If mental privacy is covered by both the right to freedom of thought and the right to privacy, a similar theory should be developed to distinguish between absolute and qualified legal protection. Possibly, one relevant factor could relate to the *type of the mental content* at stake. The significance of the personal interests in not revealing certain types of mental content may be a convincing reason to guarantee their secrecy in an absolute way.[72] Perhaps, speaking in the language of the ECtHR, one might think about mental content that attains a certain level of cogency, seriousness, cohesion, and/or importance.[73] For example, one could imagine that the significance of the interest in not revealing one's religious and philosophical

[66] P.M. Taylor, *A Commentary on the International Covenant on Civil and Political Right*, NY: CUP 2021, at 478-479; K. de Vries, 'Right to Respect for Private and Family Life', in Van Dijk et al. 2018, at 672-675.
[67] General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18) CCPR/C/21/Rev.1/Add.4, par. 3; Vermeulen & Roosmalen 2018, p. 738.
[68] Ligthart et al. 2022, at 8-9.
[69] Harris et al. 2018, at 238-239, 268, 519-522. Cf. Taylor 2021, at 189-190, 480-481.
[70] ECtHR (GC) 26 October 2000, 30210/96 (*Kudła/Poland*), § 91. See also K. Addo & N. Grief, 'Does Article 3 of the European convention on Human Rights Enshrine Absolute Rights?' *European Journal of International Law* 1998, 9 p. 51-524.
[71] ECtHR (GC) 1 June 2010, 22978/05 (*Gäfgen/Germany*), § 88; ECtHR 19 February 2015, 75450/12 (*M.S./Croatia (No. 2)*), § 95; ECtHR 24 July 2014, 28761/11(*Al Nashiri/Poland*), § 508; ECtHR 27 November 2003, 65436/01 (*Hénaf/France*), § 47-60.
[72] On a potential legal approach to sensitive and less sensitive mental content, see also section 5.
[73] Cf. ECtHR *İzzettin Doğan and others v. Turkey*, § 68

convictions could justify absolute protection by the right to freedom of thought, over and above the qualified protection from the right to privacy.[74] The significance of the personal interest in not being coerced to reveal one's political opinions may be another example.[75] At the same time, obligations to reveal less significant personal mental states should sometimes be permissible. Think, for example, of the legal duty of witnesses to disclose what they know about a criminal offence at trial,[76] or the obligation in divorce cases to reveal facts or feelings that one would rather keep to oneself. Furthermore, Bublitz mentions the example of terrorists and ticking bomb scenarios, where pressing state interests to retrieve a person's knowledge or intentions are easily conceivable.[77]

However, whereas the type of the mental content seems indeed a relevant factor in the jurisprudence of the ECtHR to determine the applicability of the right to freedom of thought, conscience, and religion,[78] it appears not decisive for attributing absolute protection to the privacy of different kinds of personal views: even the privacy of one's religious convictions is not guaranteed in an absolute way. For example, in the case of *Dimitras and others/Greece*, the applicants complained under Article 9 ECHR about the procedure of taking an oath as a witness in criminal proceedings. Witnesses who wished to make a solemn declaration had to reveal that they were not an Orthodox Christian. Sometimes, this requirement involved the disclosure of being Jewish or atheistic. The Court considered that the right to *manifest* religious convictions also comprises a negative aspect: a right not to be obliged to *reveal* one's religious denomination or convictions, and not to be compelled to adopt conduct from which it could be inferred that one has – or does not have – such convictions.[79] Requiring a witness to disclose her religious adherence before an investigative judge infringes this negative freedom under Article 9(1) ECHR.[80] After an examination of Article 9(2) ECHR, the Court concluded that the infringement was not justified in principle nor proportionate to the interests pursued. Article 9 ECHR had been violated.[81] In another case, the Court reiterated that there will be an infringement of the negative aspect of the qualified freedom to *manifest* religion or belief 'when the State

[74] Provided that the freedom not to reveal one's religion and non-religious convictions is enshrined in the internal, absolute part of Article 9(1) ECHR; Vermeulen & Roosmalen 2018, p. 738-739; ECtHR 2 February 2010, 21924/05 (*Sinan Işik/Turkey*), § 42.
[75] Cf. ECtHR 8 July 2008, 9103/04 (*Georgian Labour Party/Georgia*), § 120.
[76] ECtHR 23 October 2018, 26892/12 (*Wanner/Germany*); Bublitz 2021, p. 77.
[77] Bublitz 2014, p. 23. Also Ienca & Andorno 2017, p. 16. In fact, in such scenario's, even the legitimate disclosure of certain 'significant' types of mental content might be conceivable in some cases.
[78] ECtHR *İzzettin Doğan and others v. Turkey*, § 68
[79] ECtHR 3 June 2010, 42837/06, 3237/07, 3269/07, 35793/07 and 6099/08 (*Dimitras and others/Greece*), § 78.
[80] Idem, § 80. Also ECtHR 20 June 2020, 52484/18 (*Stavropoulos and others/Greece*), § 44; ECtHR 2 February 2010, 21924/05 (*Sinan Işik/Turkey*), § 41; ECtHR 15 June 2010, 7710/02 (*Grzelak/Poland*), § 87.
[81] *Dimitras and others/Greece*, § 88. Also ECtHR 21 February 2008, 19516/06 (*Alexandridis/Greece*), § 38. Cf. ECtHR 17 February 2011, 12884/03 (*Wasmuth/Germany*), § 51-54.

brings about a situation in which individuals are obliged – directly or indirectly – to reveal that they are non-believers.'[82]

Even though the (non-)religious convictions in these examples did attain a certain level of cogency, seriousness, cohesion, and importance, so as to elicit protection from Article 9 ECHR, the obligation to disclose those views did not trigger absolute protection. Apparently, even the secrecy of one's religious adherence is not in principle protected within the absolute *form internum*. As such, the type of the mental content seems no compelling criterion to attribute either absolute or qualified protection to the privacy of different kinds of mental states – at least not under the ECHR. Meanwhile, these examples do suggest an alternative approach towards the issue of absolute vs. qualified protection of mental privacy.

As it appears from case-law of the ECtHR, the right not to disclose one's convictions and religion under Article 9 ECHR, is not an absolute right relating to the *forum internum*, as is often assumed in the literature,[83] but a qualified right that derives from the right to manifest one's religion and belief within the *forum externum*. What would a similar approach – where the privacy of personal views is part of the right to manifest those views – mean with respect to the privacy of our thoughts? Whereas Article 9(1) ECHR guarantees the right to manifest religion and belief, it does not cover the manifestation of thoughts. Yet thoughts can be "manifested" through actions, primarily via speech and expression, covered by the freedom of expression pursuant to Article 10 ECHR.[84] To some extent, Article 10 ECHR also guarantees the negative aspect of the freedom of expression: the right not to be compelled to express oneself.[85] That is, a right not to express or impart all kind of information, including everyday thoughts, opinions, emotions, ideas, and simple facts. Likewise, the General Comment on Article 19 ICCPR highlights that the '[f]reedom to express one's opinion necessarily includes freedom not to express one's opinion'.[86]

Within this approach, the right not to reveal one's inner thoughts and all other kinds of unexpressed mental states, will be covered by the *forum externum* protection under the right to freedom of expression, alongside the right to privacy.[87] Infringements of this right can sometimes be justified,[88] similar to the protection of mental privacy through the general right to privacy and to the way the ECtHR approaches the privacy of (non-)religious convictions under Article 9 ECHR. Protecting mental privacy in a qualified way

[82] ECtHR *Grzelak/Poland*, § 87.
[83] E.g. Vermeulen & Roosmalen 2018, p. 738.
[84] Evans 1997; Bublitz 2014, p. 2. Cf. L.G. Loucaides, 'The Right to Freedom of Thought as Protected by the European Convention on Human Rights', *Cyprus Human Rights Law Review* 2012, 1(1), p. 84-85.
[85] Harris et al. 2018, p. 595; J.D. Jackson & S.J. Summers, *The Internationalization of Criminal Evidence*, NY: CUP 2012, p. 249, 268; D. Bychawska-Siniarska, *Protecting the right to freedom of expression under the European Convention on Human Rights*, Strasbourg: Council of Europe 2017, p. 13 and 18.
[86] General comment No. 34, CCPR/C/GC/34, at 10.
[87] Ligthart 2020; Ligthart 2022.
[88] The freedom not to express opinions under Article 19 ICCPR is, however, absolute.

also receives support from the literature.[89] For example, both Bublitz and McCarthy-Jones have suggested to reconsider the absolute nature of the right to freedom of thought, as obligations to reveal certain personal mental states should sometimes be permissible, such as for the prevention, detection, and prosecuting of crime.[90]

But should the privacy of our thoughts always we susceptible to certain limitations? Or could it be that particular circumstances do elicit absolute privacy protection within the *forum internum*? Perhaps, one could possibly think of the *means* that are used to reveal a person's mental states as a relevant factor for distinguishing between absolute (*forum internum*) and qualified (*forum externum*) protection of mental privacy. In the literature on non-consensual thought-*modulation*, there is a debate on the ethical and legal significance of whether a mental influence operates either directly or indirectly,[91] which may be significant to determine which influences violate the right to freedom of thought.[92] For example, Bublitz discusses the relevance of the distinction between *direct* and *indirect* means of thought-modulation: direct interventions target mental states without psychological mediation, primarily in neurobiological ways, such as through medication and neurotechnological brain stimulation. By contrast, indirect interventions aim to alter mental states via perception, often involving informational input such as attending a lecture, reading a book, or observing an advertisement. This distinction between direct and indirect interventions relates to the degree of control people have over a thought-modulating intervention. Whereas people have most control over consciously perceived indirect interventions, they have almost no control over direct brain interventions.[93] This should be normatively significant, as interferences with the *freedom* of thought should *undermine* or *bypass control* over one's thoughts and thinking. As Bublitz writes: 'This is a necessary, but not a sufficient condition, and it forms part of a test of infringement: *Does an intervention respect the other as a free and self-controlled thinker; or does it undermine or bypass control?* The latter infringes freedom of thought, the former may not.'[94]

Whereas these considerations could indeed be valuable for the determination of infringements and violations of the right to freedom of thought in cases of thought-*modulation*, it is as-yet unclear whether they would be equally relevant to differentiate between permissible and impermissible means that aim at *disclosing* thoughts, conscience, or religion. But it may well be arguable that revealing a person's

[89] E.g. Ienca & Andorno 2017, p. 16.
[90] Bublitz 2014; Bublitz 2021; McCarthy-Jones 2019. See, e.g., ECtHR *Wanner/Germany*.
[91] T. Douglas, 'Neural and Environmental Modulation of Motivation: What's the Moral Difference?', in D. Birks & T. Douglas (eds.) *Treatment for Crime*. NY: OUP 2018; N. Levy, 'Cognitive Enhancement, in Neurointerventions and the Law', in N.A. Vincent, T. Nadelhoffer & A. McCay (eds), *Neurointerventions and the law*, NY: OUP 2020.
[92] Bublitz 2021; UN Report 2021, par. 28-36.
[93] J.C. Bublitz, 'Why means matter: legally relevant differences between direct and indirect interventions into other minds', in: Vincent, Nadelhoffer and McCay 2020.
[94] Bublitz 2021, p. 82.

unexpressed personal views through means that completely bypass the person's self-control – not involving any form of expression or manifestation whatsoever – cannot reasonably be said to infringe the qualified right to freedom of *expression* or *manifestation* of thoughts, within the *forum externum*. Instead, invading peoples' mental lives by retrieving their inner thoughts in this way, is typically an issue related to the *forum internum*, which receives absolute protection by the right to freedom of thought.[95]

However, in most if not all cases, the disclosure of personal mental states shall involve at least some kind of expression or other forms of self-control – be that either through speech, body language, or (Internet) behaviour. One of the very few cases where this might be different, concerns the identification of mental states through measuring brain activity with neurotechnology, such as EEG and fMRI. But even in those cases, it is questionable whether the subject's self-control in not having her unexpressed mental states being revealed can be thought to be completely bypassed. In many cases, brain-reading techniques require participation from the subject. For example, she must press a yes-or-no-button to answer certain questions or observe presented stimuli that elicit brain activity. Moreover, she must not distort or manipulate the test by moving her head or recalling, for example, emotional memories. As a consequence, the acquisition of brain data that allow the drawing of inferences about mental content, will often involve at least some level of self-control by the subject.[96] Even in cases where pressure or coercion is employed to enforce cooperation with a brain scan, like in a criminal justice context, the subject will still retain the power to decide whether or not to disclose, express, or manifest certain mental content through the neurotechnological measurements.[97] Meanwhile, someday, scientific developments might possibly reach a point where brain-reading devices, such as brain-computer-interfaces, could record brain activity and identify a person's wishes, feelings, or preferences, without the person even noticing. When such devices will disclose the identified mental content to the outside world,[98] for example, to the company of the device, it might be conceivable that the absolute *forum internum* protection kicks in (that is, if the revealed mental content qualifies either as a thought, conviction, or religion in the meaning of Article 18 ICCPR and 9 ECHR, or as an opinion in the sense of Article 19 ICCPR).

[95] Cf. Bublitz 2014, p. 8, 23.
[96] Ligthart 2022, p. 55; Bublitz 2014, p. 23.
[97] Similar to, e.g., obligatory witness testimonies, though distinctive from, e.g., the disclosure of personal information through mandatory blood testing for DNA analysis, which can also be realized without any cooperation of the subject, completely bypassing one's will to cooperate.
[98] Without valid consent of the user.

5. Mental Privacy as Part of the Right to Freedom of Opinion and Expression?

As discussed in the previous section, to some extent, the right to freedom of expression comprises a right to mental privacy. Regarding the ECHR, Harris and collaborators write:

> 'Albeit sparse in the case law, Article 10 guarantees to some extent the negative aspect of freedom of expression, namely the right not to be compelled to express oneself. One notable example is the right to remain silent.'[99]

Whereas the scope of the right to freedom of thought is as-yet unclear, it is arguably accepted that the scope of the right to freedom of expression is 'extremely broad'.[100] It covers opinions, ideas, emotions, facts, value statements, and other information of almost any content. Moreover, it not only protects the *substance* of information, but also a diverse variety of *forms and means* by which information is being expressed, transmitted, or received. These range from speech to poetry and painting over radio and film to disrupting foxhunting by blowing a hunting horn.[101]

In view of this broad scope, the right to freedom of "non-expression" is perfectly able to guarantee a right not to disclose, through any means, one's unexpressed mental content; a right to mental privacy. In addition, in most cases, the freedom of expression allows for the balancing of competing private and public interests, such as the person's autonomy in (not) disclosing her mental content and the public interest in preventing and prosecuting crime or in protecting the rights and freedoms of others. Apart from the person's autonomy, other interests can be taken into account as well. Interestingly, under the ECHR, the ECtHR has acknowledged a "chilling-effect-principle" as a relevant factor of special regard in the balancing of interests, particularly in cases on the freedom of expression.[102] According to Fathaigh, the chilling-effect-principle 'seems to be based on the idea that certain interferences with freedom of expression must be considered not only in the light of the individual applicant, but also [in view of the] the broader effect this interference has on freedom of expression generally.'[103] Arai-Takahashi explains that even when restricting

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[99] Harris et al. 2018, p. 595. See also Bychawska-Siniarska 2017, p. 13 and 18; Jackson & Summers 2012, p. 249, 268.
[100] Rainey, McCormick & Ovey 2021, p. 488.
[101] ECtHR (GC) 15 December 2005, 73797/01 (*Kyprianou/Cyprus*) (speech); ECtHR (GC) 8 July 1999,. 23168/94 (*Karataş/Turkey*) (poetry); ECtHR 24 May 1988, 10737/84 (*Müller and others/Switzerland*) (painting); ECtHR 28 March 1990, 10890/84 (*Groppera Radio AG and Others/Switzerland*) (radio); ECtHR 20 September 1994, 13470/87 (*Otto-Preminger-Institut/Austria*) (film); ECtHR 25 November 1999, 25594/94 (*Hashman and Harrup/UK*) (blowing a hunting horn).
[102] Harris et al. 2018, p. 621; R.Ó. Fathaigh, 'Article 10 and the chilling effect principle', *E.H.R.L.R.* 2013, 3, p. 304-313; T. Baumbach, 'Chilling Effect as a European Court of Human Rights' Concept in Media Law Cases', *Bergen Journal of Criminal Law and Criminal Justice* 2018, 6(1), p. 92-114.
[103] Fathaigh 2013, p. 312.

measures are to be considered as the least burdensome, their very necessity should be called into question if they have a deterrent impact on the freedom of expression.[104] As Baumbach holds, the term "chilling effect" in Strasbourg case-law is a legal concept that 'indicates that something striking is at stake'. It is a relevant factor reserved to special circumstances, not referred to randomly.[105]

Retrieving peoples' inner thoughts, emotions, and intentions without valid and expressed informed consent, may well entail such special circumstances that require the inclusion of the chilling-effect-principle when balancing the competing interests at stake. After all, the non-consensual acquisition of personal mental states could deter other people from thinking what they want to think and from wishing not to express those thoughts – especially if such practices occur on a large scale.[106] Therefore, presumably, the chilling-effect-principle is an important factor for determining the permissibility of practices that reveal mental content in light of the freedom of expression.

In general, the possibility of balancing competing interests is desirable for the protection of mental privacy.[107] Presumably, other factors will be relevant too. The test of a fair balance has been conceived a flexible and open-ended weighing exercise. It allows the balancing of all relevant interests and arguments at stake.[108] The precise interests to be balanced and the weight that should be attached to those interests shall depend on all relevant circumstances of each individual case. Altogether, at least in theory, the freedom of expression appears well equipped to offer adequate and fine-grained legal protection to the secrecy of our mental states.[109]

Meanwhile, apart from the freedom of expression, mental privacy is also covered by the right to privacy. As case-law on, for example, DNA, GPS, and CCTV have shown,[110] the right to privacy is perfectly able to adapt to technological developments, which could also include techniques that allow the disclosure of mental states.[111] So, what would be the benefit, then, of developing an additional approach on mental privacy under the right to freedom of non-expression?[112]

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[104] Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerp – Oxford – NY: Intersentia 2002, p. 134.
[105] Baumbach 2018, p. 111.
[106] A.L. Roskies, 'Mind Reading, Lie Detection, and Privacy', in J. Clausen & N. Levy (eds.), *Handbook of Neuroethics*, Dordrecht: Springer 2015, p. 686-687; C.J. Kraft & J. Giordano, 'Integrating Brain Science and Law: Neuroscientific Evidence and Legal Perspectives on Protecting Individual Liberties', *Frontiers in Neuroscience* 2017, 11, Article 621, p. 3; A. Lavazza, 'Freedom of Thought and Mental Integrity: The Moral Requirements for Any Neural Prosthesis', *Frontiers in Neuroscience* 2018, 12(82), p. 4.
[107] Ienca & Andorno 2017, p. 16; Bublitz 2014, p. 23; McCarthy-Jones 2019, p. 7, 12-13; Jackson & Summers 2012, p. 273-276.
[108] J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Leiden: Martinus Nijhoff Publishers 2009, p. 76.
[109] Ligthart 2022, p. 256-257.
[110] Harris et al. 2018, p. Taylor 2021, p. 476-479
[111] Ligthart 2022, Ch. 4.
[112] Ligthart 2022, Sect. 8.3.3.

In some cases, the protection offered by the right to privacy and the freedom of expression are closely connected.[113] For example, under the ECHR, in cases concerning the prisoners' right to correspondence, the right to privacy pursuant to Article 8 ECHR sometimes absorbs a prisoner's complaint about the freedom of expression guaranteed by Article 10 ECHR.[114] In such cases, the Commission has considered Article 8 ECHR as a *lex specialis*. No separate issues arise under Article 10 ECHR.[115] At the same time, referring to these cases, Van Rijn highlights the distinctive aims of both provisions:

> 'in Article 8, the main point is the protection of the private character of the means of communication referred to, while in Article 10 its character as a means of expressing an opinion and of providing and receiving information is at issue.'[116]

Perhaps, this distinction could sometimes result in different levels of legal protection afforded by either the right to privacy or the freedom of expression. The balancing of interests under the right to privacy inextricably links closely to considerations of personal data and privacy sensitivity.[117] By contrast, the freedom non-expression is not primarily concerned with the *sensitivity* of the expressed mental content. Rather, in more general terms, it protects the personal interest of not giving opinions, disclosing ideas or furnishing all kind of information just because you don't want to express your mental content. Just because you don't wish to give other people access to the intimate spheres of your mental life.[118]

Yielding and using sensitive mental states, for example, relating to sexual proclivities or mental health, is likely to enjoy considerable protection under the right to privacy. The sensitivity of the obtained information puts weight to the balancing of interests, in favour of the person whose mental states have been revealed. At the same time, when less sensitive information is at stake, such as the intention to buy new shoes, this will be normatively relevant too, potentially tipping the balance in favour of the competing public interests that apply in the individual case, such as crime control, the economic well-being of the country, or the protection of the rights and freedoms of others. For this reason, the right to privacy is unlikely to offer strong protection against the non-consensual acquisition of everyday thoughts, frivolous idea, or trivial feelings.[119] Still, people may have good reasons not to disclose such mental content. Unlike the right

[113] A. van Rijn, 'Freedom of Expression', in P. van Dijk et al. 2018, p. 780. Cf. P. O'Callaghan & B. Shiner, 'The Right to Freedom of Thought in the European Convention of Human Rights', *European Journal of Comparative Law and Governance* 2021, 8(2–3), p. 30.
[114] E.g. ECtHR 20 June 1988, 11368/85 (*Schönenberger/Durmaz*), § 31; ECtHR 25 March 1983, 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 (*Silver and others/UK*), § 107.
[115] EComHR 4 May 1989, 9511/81 (*McCallum/UK*), § 63.
[116] Van Rijn 2018, p. 781.
[117] See e.g. Harris et al. 2018, p. 538-540; Taylor 2021, p. 478.
[118] Cf. Goering et al. 2021.
[119] Ligthart 2022, Ch. 4.

to privacy, the right to freedom of non-expression is not intrinsically linked to privacy and sensitivity of personal data. It aims to protect 'expression' as a means of imparting information. Perhaps, this could justify a diverging 'fair balance', putting less weight to the triviality of the mental content at stake.

As yet, case-law and legal scholarship on the freedom of non-expression are scarce.[120] This lack of a well-defined doctrine entails uncertainties about the extent to which the right protects mental privacy. But this could also be an advantage. The precise scope of the freedom of non-expression and the permissible limitations are yet to be defined. The intricacies of novel technologies that may threaten mental privacy can be taken into account as of the outset of specifying this right, together with the case-law and literature on nearby human rights, such as the right to privacy and freedom of thought.[121]

6. Concluding remarks

The right to freedom of thought is evolving. This raises novel theoretical questions about the right's scope, absolute nature, and relation to other rights. Part of these questions is whether the right to freedom of thought covers a right to mental privacy. As the scope of a right to mental privacy – understood as a right not to reveal any unexpressed mental state – is typically broad, it is as-yet premature to presuppose that mental privacy is a "core attribute" of the right to freedom of thought, of which the scope is arguably somewhat restricted, though at least still unclear. Moreover, it is questionable whether a right to mental privacy should be covered by the *absolute* protection of the right to freedom of thought within the *forum internum*. Typically, privacy rights are relative, begging for a balancing of private and public interests. This is also clearly illustrated by the case-law of the ECtHR, where even the freedom not to disclose ones religious adherence is not protected as an absolute but rather as qualified right. Against the background of these considerations, this chapter suggests exploring the possibility of protecting mental privacy not as part of the right to the freedom of thought, but, rather, through the broad and qualified right to freedom of expression, in addition to the right to privacy.

[120] Some examples: ECtHR 23 October 2018, 26892/12 (*Wanner/Germany*); EComHR 7 April 1994, 20871/92 (*Strohal/Austria*); EComHR 13 October 1992, 16002/90 (*K./Austria*).
[121] Ligthart 2022, Sect. 8.3.3.