Submission to Secretariat of the Human Rights Council Advisory Committee on the matter on Neurotechnology and Human Rights

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Dear Esteemed Members of the Advisory Committee

We send this submission after having the pleasure of meeting with the Rapporteur of the Drafting Group who requested a short overview of the main findings and observations emerging from a significant collaborative project on the right to freedom of thought which we have coordinated. We thank you for allowing us to participate in this important work.

Introduction

We submit these observations having just completed our edited *Cambridge Handbook for the Right to Freedom of Thought* to be published later this year. This Handbook is the first attempt to map out how the right to freedom of thought finds expression in positive law, how it is protected, and applied across the globe. It contains chapters written by legal experts in the selected jurisdictions, grouped by region, as well as context-setting chapters by leading scholars in the field.

At present there is no authority on what, precisely, is meant by the 'right to freedom of thought'. There is no consensus on what the right protects, or how it can be used. There is little clarity on what exactly 'thought' means in this context, or what 'freedom' means. To begin developing the right, or for the right to achieve significant legal effect, it is necessary first to determine how thought is protected, how it is defined, and how the right can be given practical effect in different countries, against the background of different legal systems and relevant cultural traditions.

As such this submission provides a summary of some of the findings that have emerged from our book which demonstrate that the right to freedom of thought possesses certain attributes, that it can be applied in practice, but also that it is in urgent need of further development. As such our analysis is that it is appropriate to apply the right in the context of neurotechnology, that the right offers absolute protection for the *forum internum* (widely construed), and, most critically, it imposes positive obligations upon states to safeguard, protect and promote the right, which we think translates into, *inter alia*, the need for a **strict regulatory approach** to all neurotechnology.

The Handbook's main findings applicable to the work of the Advisory Committee

1. Freedom of Thought, like dignity, is a right, a value and an ideal.
2. People have long assumed that 'the thought of man is not triable'[1] and yet history tells us that many men and women have indeed been put on trial, sentenced, killed and persecuted for their (assumed) thoughts alone.[2] It is important to recognise that although

[1] Chief Justice Bryan in 1477 cited in 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

[2] For example, consider the crimes of sedition, heresy and treason still in use in some parts of the world. Also recall the persecution of women during the European witch trials and the Spanish

neurotechnology is a new context for human rights to adjust to, it has the potential to replicate many of the same types of injustices, inequalities, discrimination, violence and abuse that human rights have long sought to address. Human rights must therefore remain central to all deliberations about how to regulate neurotechnology.

3. We do not believe that there is any benefit, necessity or basis for introducing a separate body of rights referred to as 'neurorights' or a new bundle of rights under the label of 'cognitive liberty'. Neurotechnology is a new frontier for human rights but there is enough in the right to freedom of thought to offer robust protection and immediately apply standards of protection. Moreover, it is important to bear in mind that there are both political and legal risks in introducing new rights when existing rights can offer adequate protection. These risks were part of the political debate in Chile when that country was contemplating introducing new neurorights to its Constitution. It was ultimately determined that the soundest course of action was to rely on an existing right (the right to mental or 'psychic' integrity).[3]
4. To rely primarily upon ethical guidelines and soft regulation would be a gift to the burgeoning unregulated neurotech market and would amount to a serious omission in the context of the protection of human rights. In our view, human rights, especially the right to freedom of thought, must inform a strict regulatory approach to neurotechnology.
5. The right to Freedom of Thought is underexplored and neglected. Out of the 18 legal systems discussed in the Handbook, only 6 list it as a distinct *domestic* right in (written) positive law;[4] only in 1 system has the right been developed by courts;[5] other legal systems, such as England and Wales, India and the United States, understand it more so as a value or underlying principle of the politico-legal order; the remaining legal systems either do not make reference to the right or when they do (in court decisions) it is inextricably linked to *forum externum*, typically used as a synonym for Freedom of Expression. In other jurisdictions, like Chile, the right is associated with the constitutional right to mental integrity, this right covering much of the same ground.
6. Yet, notwithstanding the above, the right to Freedom of Thought is not without utility. It at least prohibits (1) compelling someone to have a particular thought and the indoctrination of ideas;[6] (2) forbidding people from having particular thoughts and punishing them for their thoughts;[7] (3) compelling someone to confess the existence of a particular thought;[8] (4) 'unduly intrusive or inappropriate investigation of one's thoughts';[9] (5) 'impermissible manipulation of one's thoughts'.[10]
7. Although, there is no universally agreed understanding of the right there are some common normative features. Some jurisdictions have articulated the scope and application of the right more clearly than others. For example, the Colombian Constitutional Court has deduced these 4 aspects: (1) the positive dimension ('right to develop one's thoughts autonomously and to freely adopt and live by any ideology, philosophy or cosmovision';

Inquisition. For some more discussion see Bethany Shiner, 'The right to Freedom of Thought in England and Wales'

[3] Eduardo A. Chia & Flavio Quezada, 'The right to Freedom of Thought in Chile'

[4] Satoshi Yokodaido, 'The right to Freedom of Thought in Japan', Emine Ozge Yildirim, 'The right to Freedom of Thought in Türkiye', Victoria Miyandazi, Miracle Mudeyi & Harrison Otieno Okoth 'The right to Freedom of Thought in Kenya', Christopher Phiri 'The right to Freedom of Thought in Zambia', Neel Raamandarsingh Purmah, 'The right to Freedom of Thought in Mauritius' and Dwight Newman, 'The right to Freedom of Thought in Canada'.

[5] Diego González & Sebastián Rubiano-Groot, 'The right to Freedom of Thought in Colombia'

[6] Japan

[7] Japan, Canada

[8] Japan

[9] Canada

[10] Canada

(2) the negative dimension (that 'the State and third parties should not access or discover a person's thoughts without their consent, nor should they coerce them to think in a certain way, nor can they interfere with an individual's cognitive processes.'; (3) the 'right not to reveal one's thoughts' and (4) the right 'not to be sanctioned or harassed for the expression of thoughts and moral convictions'.[11] Further, there is a broad understanding of thought which is not limited to the 'content' of the thoughts, e.g. in Japan it is a distinct right, not linked to freedom of religion, belief, expression or opinion as in other legal systems and it safeguards an individual's 'inner freedom' protecting 'a person's world vision or life view'.[12]

8. The right has been drawn upon to protect mental privacy,[13] personal identity,[14] mental integrity. [15] The right is often interpreted alongside the right to dignity. This is especially the case in those legal systems that understand the right as an underlying value or principle of the politico-legal order.
9. The right to Freedom of Thought is, by its very nature, inextricably related to other rights and, in some jurisdictions more than related, but is co-dependent upon other rights or only exists when a series of rights are joined together.[16]
10. The interpretation of the right is often informed by context including history, cultural make-up, pluralism, and power structures. For example, in England and Wales it emerges as a direct response to absolute monarchical power and a history of religious persecution which was not only about religious belief but about the power and authority of the state at a time when the Crown and Church were fused together.[17] Another example of this is how in the American Convention on Human Rights, freedom of thought sits in article 13 with freedom of expression and access to information. Article 13(3) refers to state control of the media. The explanation for this formulation can be found in the recent history of dictatorships engaging in gross and widespread human rights violations and covered up through the killings of political dissenters, journalists and the use of state propaganda.[18] Contrast this with Article 9 of the European Convention on Human Rights which protects the right to freedom of thought, conscience and religion. Europe was plagued for hundreds of years by bloody civil and regional religious wars and freedom of conscience and the ability to act upon it was a dearly won right that took centuries to emerge.
11. Looking at neurotechnology through the lens of freedom of thought might help us understand the real issues at stake as well as the appropriate standards of protection. To use a non-neurotechnology example, facial recognition technology has long been recognised as a posing serious privacy concerns but depending on how the data collected is used and what that data is combined with, it could engage the right to freedom of thought as well (e.g. using facial recognition technology to track, record and analyse a person's subtle behaviours and facial expression to deduce their inner state and make decisions, such as public order or security-related decisions, based on that).
12. There have been some cases looking at the permissibility of using brain readings, specifically Brain Electrical Oscillation Profiling, in criminal proceedings in India, for example. One important point to make here is that the police had begun to use these technologies across the country to secure prosecutions. There were no prohibitions against the use of such. This serves as a reminder that clear prohibitions must be put in

[11] Colombia
[12] Japan
[13] Kelly Amal Dhru, 'The right to Freedom of Thought in India'
[14] Nora Hertz, 'The right to Freedom of Thought in Germany'
[15] Chile
[16] India
[17] England and Wales
[18] Cláudio de Oliveira Santos Colnago & Bethany Shiner, 'The Right to Freedom of Thought under the American Convention on Human Rights'

place. The Supreme Court in *Selvi* held that, '…we must recognize that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences…'.[19]

13. There is an urgency in developing greater authority and clarity on how the standards inherent in the right must be applied in practice by states through their regulatory requirements which must be backed up by monitoring and enforcement agencies. We would liken this approach to medical regulatory standards or other examples of human rights-informed regulation (like the European AI Act 2024).

Concluding Recommendations

We cannot stress enough the urgent need for the UN to adopt a clear position on the human rights standards applicable to neurotechnology and to announce this position as quickly as possible. Whether that should take the form of a General Comment, a Declaration or Guidelines will be for the advisory committee to determine knowing and understanding the inner workings and limits of the various bodies within the UN. However, Article 18 and 19 ICCPR's relevance to this emerging and potent field is clear.

We also recommend that the advisory committee draw on medical regulatory rules which ban certain forms of scientific research and strictly regulate the testing and development of some medicines, which can never be released into an open and unregulated commercial market, as an analogy for neurotechnology.

We appreciate you taking the time to read and consider these comments and welcome any further requests for assistance or support in your important endeavour.

Yours sincerely

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[19] *Smt. Selvi & Another v. State of Karnataka*, 7 SCC 263 (2010), para 82.