

FREEDOM OF THOUGHT:
LEGAL PROTECTION FROM MANIPULATION

Abstract

The freedom of thought is stipulated as a fundamental human right in main international human rights instruments at universal and regional levels. Freedom of thought is also guaranteed at the national level in constitutions of many states. It might seem that the legal regulation of freedom of thought is more declarative by its very nature: *prima facie*, it cannot be limited or violated in practice. Thus, one might assume that it does not need any legal protection. In this paper, we argue that the rapid scientific and technological evolution urge the necessity of rethinking the legal content of the freedom of thought and elaborating mechanisms at national and international levels for its effective protection. In particular, we discuss the lawfulness of manipulation as means of influencing the freedom of thought in the age of high technologies and argue that the large-scale intensive manipulation by using special big data processing tools (including artificial intelligence) with the aim to shape the information receivers' decision-making process in order to reach a certain outcome motivated by self-interest should be viewed as unlawful interference into the freedom of thought under International Human Rights Law, consequently creating positive obligations for states.

Keywords: freedom of thought, manipulation, ethics, human rights, national and international regulations.

Introduction

“Cogito, ergo sum” (I think, therefore I am): these words were the centre of Rene Descartes's philosophy and the cornerstone element of Western rationalism. In this context, thinking should be understood not just as the *ability* of a human being to think, but actually also as the *readiness to exercise this ability* via questioning, doubting, reasoning, choosing, via free will, as well as the *ecosystem, which allows a person to freely exercise this ability*. Indeed, is there anything more vital to *Homo sapiens* than thinking, and is there

anything more important for personal autonomy and individual self-determination than the *freedom* of thought? Thus, freedom of thought can also be regarded as a form of expression of human dignity. This leads to the question: what is *freedom of thought*? Is it merely a metaphysical category, moral, philosophical term, a supreme value or can it be classified as a legal concept? Is freedom of thought axiomatic, and is its application absolute in practice? Does freedom of thought require legal protection? What does the freedom of thought in legal instruments, such as universal and regional international human rights

treaties, or constitutions of different states, mean? Is it envisaged in legal documents as a proclamation that should never be forgotten, or does it have a practical meaning? Is it possible to limit the freedom of thought and how?

One might recall the Orwellian 1984 and the oppression of freedom of thought through the so-called Thought Police that was created to punish thought-crime. The 1984, often referred as science-fictional drama, in our opinion, is in fact exaggerated description of real repressive societies as was, for instance, Stalin's totalitarian regime, with only *elements* of science fiction. But is totalitarianism capable of restricting the *freedom of thought per se* or just it's *manifestation* by restricting the freedom of expression? *"Don't you see that the whole aim of Newspeak is to narrow the range of thought? In the end, we shall make thought-crime literally impossible, because there will be no words in which to express it. ...Every year fewer and fewer words, and the range of consciousness always a little smaller. Even now, of course, there's no reason or excuse for committing thought-crime. It's merely a question of self-discipline, reality-control. But in the end, there won't be any need even for that..."* (Orwell, 1949, p. 67). Thus, in the "Orwellian" scenario freedom of thought could be limited either by self-discipline or by "rubbing" the means of expression of thought. Both these mechanisms described in 1984 are in essence examples of hard power. The first one requires the will of the "thinker" for self-discipline assumedly under the fear to be punished by the Thought Police. But this mechanism hasn't proven to be successful. The collective character of the 1984 - Winston - is the best proof of its inefficiency, which called the necessity for a new oppressive mechanism aimed at limiting the possibility to exercise freedom of thought by re-

stricting access to information and means of expressing information against the will of the potential "thinker". Thoughts concerning the 1984 raise the question of whether hard power, i.e. oppression, is the only feasible tool for restricting the freedom of thought? A mechanism that Orwell did not discuss in the 1984 is soft power in the form of targeted information control policy and large-scale manipulations using new technologies and artificial intelligence (AI) under the aegis of freedom of information and freedom of expression in the atmosphere of love and solidarity.

In the first section of this paper, we analyze the regulation of the freedom of thought as envisaged in universal and regional human rights instruments, *inter alia*, by drawing a comparison between the wordings and revealing the legal content of the right to freedom of thought and its protection under International Law. The second section is devoted to the analysis of the right to the freedom of thought at the national level as stipulated in state constitutions of randomly selected countries from the European, American and African human rights systems. Here we show that at the national level there is no uniform approach towards regulation of the freedom of thought and that belonging of the given state to a certain system of human rights protection does not significantly influence the content of the constitutional level regulation of the freedom of thought. In section three of the current paper, we focus specifically on large-scale manipulation as a means of influencing the freedom of thought in the age of rapid scientific and technological evolution. This thesis calls for the necessity to rethink and revise the legal mechanisms of protection of the right to freedom of thought at international and national levels in the light of risks posed by widely used new technologies and al-

gorithmic tools in the data processing. Some of such legal mechanisms and relevant recommendations are discussed in section four of the paper.

Freedom of Thought in International Human Rights Treaties

The *Universal Declaration of Human Rights (UDHR)*¹ in its article 18 states: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance”. While article 29 envisages grounds for possible limitation of rights as “determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”.

As we can see from the UDHR provisions:

- a) Freedom of thought is referred to as a right, thus, implying state obligation to protect it.
- b) Freedom of thought is regulated in the same clause with conscience and religion. The clause further opens the legal content of freedom of religion, leaving the freedom of thought without interpretation.
- c) The wording of article 29 represents a generic regulation referring to all rights stipulated in the UDHR. However, its analysis leads to the conclusion that it cannot be applicable to the right to freedom of thought. Logically by no means can limitation of the freedom of thought *per se* be necessary to secure due recognition and respect for the

rights and freedoms of others or for the purpose of just requirements of morality, public order and the general welfare in a democratic society. This is the most reasonable interpretation of the applicability of the UDHR article 29 deriving from common sense. UDHR is not binding for states in and of itself, but it has been largely argued that it is legally enforceable as a reflection of customary international law or general principles of law (Shaw M.N., 2014, p.204). This argument, however, seems as applicable to the rights and freedoms reflected in UDHR as the minimum that states should be obliged to ensure, rather than being applicable to the limitations clause.

The *International Covenant on Civil and Political Rights (ICCPR)*² generally follows the UDHR approach when envisaging the right to freedom of thought in its article 18, regulating this right together with freedom of conscience and religion with further detalization only of the right to freedom of conscience and religion. This raises the question of whether the mentioned provision puts an equation between thought and conscience or whether it views thought as a wider concept. According to General Comment N 22 the “right to freedom of thought, conscience and religion... is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others”.³ From the word-

¹ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

² International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976.

³ UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993, CCPR/C/21/Rev.1/Add.4, at: <https://www.refworld.org/docid/453883fb22.html>.

ing of the General Comment N 22, it could be concluded that the freedom of thought as envisaged in article 18 should be interpreted as including but not limited to personal beliefs or religious thought. At the same time, ICCPR establishes the permissible grounds for limitations in article 18 itself with a very precise wording applicable only to the limitation of the freedom to *manifest religion or beliefs*. While ICCPR article 4, clause 2 declares *inter alia* article 18 as non-derogable.

At the regional level, the *European Convention of Human Rights (ECHR)*⁴ regulates freedom of thought in article 9 akin to analogical provision of ICCPR. However, the analysis of the relevant literature, as well as the case-law of the European Court of Human Rights (ECtHR) leads us to the conclusion that concept of freedom of thought in the meaning of ECHR is different from that of article 18 of ICCPR. While treating freedom of thought, conscience and religion as representing one of the foundations of a “democratic society” in the meaning of the ECHR,⁵ it implies from the relevant analysis that the freedom of thought is viewed as a narrow concept embracing only the religious aspects of thought and moral convictions (White, Ovey, & Jacobs, 2010, pp. 402-424)⁶. As to limitations, unlike the ICCPR article 4 on derogations, article 15 clause 1 of ECHR does not include the provision on freedom of thought, conscience and religion in the list of non-derogable rights, at the same time envisaging that derogations should be allowed only “to the extent strictly required by

the exigencies of the situation, provided that such measures are not inconsistent with [states’] other obligations under international law”. This approach, in our opinion, might as well be conditioned by the narrower interpretation of the freedoms enshrined in ECHR Article 9. In any case, the absence of case-law interpretations on freedom of thought, in our opinion, should not be considered as leaving room for its limitation by states but rather as a sign that the natural freedom is taken as granted and not requiring any specific regulation or interpretation.

The *African Charter on Human and Peoples Rights (ACHPR)*⁷ guarantees the freedom of conscience, the profession and free practice of religion, freedom of information and freedom of speech, freedoms of association, freedom of assembly (articles 8-11) and other freedoms, remaining silent on the freedom of thought. Does this mean that the guarantee of the freedom of thought is perceived as meaningless? In the discussion of the legal content of the right to freedom of thought, opinions have been expressed that freedom of thought should be understood as a declarative norm rather than having a practical meaning. Under such interpretation, the freedom of thought at best would be constituting freedom implying no obligation of the state rather than a right with corresponding obligations. The ACHPR, however, regulates the thought neither as a right nor even as freedom.

Unlike the ACHPR the *American Convention on Human Rights (ACHR)*⁸ stipulates the protection of the right to the freedom of thought and does so with an “Orwellian approach” in its

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Rome, 4.XI.1950, CoE.

⁵ *Kokkinakis v Greece*, 25 May 1993, App. 14307/88.

⁶ Also see in general: Guide on Article 9 of the European Convention on Human Rights: Freedom of thought, conscience and religion Council of Europe/ European Court of Human Rights (2019) at: https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf

⁷ Organization of African Unity (OAU), African Charter on Human and Peoples’ Rights (“Banjul Charter”), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁸ Organization of American States (OAS), *American Convention on Human Rights*, “Pact of San Jose”, Costa Rica, 22 November 1969.

article 13 titled “Freedom of thought and expression”, thus, directly linking the protection of the freedom of thought to the freedom of expression.

Article 13 clauses 1 and 2 state:

“1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers [...]

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a) respect for the rights or reputations of others; or b) the protection of national security, public order, or public health or morals”.

As we can see, the first sentence of article 13, clause 1 guarantees the right to the freedom of thought, implying state obligation for its protection. Then the second sentence may seem to narrow down the protection to the freedoms of expression and information. In our opinion, however, this would be just the *prima facie* determination of the scope of the freedom: because it does not limit the freedom of thought and expression only to freedom to seek, receive, and impart information and ideas but rather *includes* the latter freedoms into the legal content of the freedom of thought and expression. The ACHR article 13 clause 4 does not allow any prior limitations to the freedom, except public entertainments by law for the sole purpose of regulating access to them for the moral protection of childhood and adolescence, “any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds...” as stipulated in article 13 clause 5 of ACHR, and “in time of war, public danger, or another emer-

gency that threatens the independence or security of a State Party [... and only...], provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, colour, sex, language, religion, or social origin” as envisaged in ACHR article 27.

Freedom of Thought in Constitutions

The analysis of randomly selected constitutions of different states shows that there is no uniform approach towards regulation of the freedom of thought at the national level. It also seems that belonging to the given state to a certain system of human rights protection does not significantly influence the constitutional level regulation of the freedom of thought. Thus, for instance, in the constitutions of Bulgaria (article 37), Estonia (article 40), Latvia (article 99), Malawi (article 33), Namibia (article 21), Rwanda (article 37), Slovakia (article 24) the freedom of thought is regulated in the same provision with the freedoms of conscience, religion, faith or belief. In article 54 of the Cuban Constitution, the freedom of thought is regulated in line with freedom of conscience and freedom of expression. The Constitution of Morocco regulates the freedom of thought in the same clause with the freedom of opinion and expression (article 25). In article 30 of the Constitution of Niger the freedom of thought, opinion, expression, conscience, religion and worship are regulated together. The Constitution of Chile guarantees the freedom of conscience, expression of belief and the manifestation of religion (article 19), and there is no mentioning of the freedom of thought. The German Constitution envisages *inter alia* the freedom of faith and conscience in its article 4, free-

dom of expression, arts and sciences in article 5 with no mentioning of the freedom of thought. In the constitutions of Greece, Peru, Poland, Portugal, Belarus, Cameroon, Tanzania, a similar approach is undertaken, and the freedom of thought is absent from regulations. Freedom of thought is not specifically regulated also in the Constitution of the USA, however, in several instances, the freedom was acknowledged to get absolute protection by virtue of the First Amendment to the US Constitution.⁹ The wording of the relevant provisions of the constitutions of Latvia (article 99), Malawi (article 33), Niger (article 30), South Africa (article 15) explicitly envisage the freedom of thought as a right, in constitutions of some other states, it is stipulated as freedom however clearly implying the corresponding obligation of the state to guarantee it.¹⁰ Different approaches are undertaken by states also with regard to restriction and derogation clauses. Thus, for instance, in Bulgaria (articles 37 and 57) and Estonia (articles 40 and 130), the constitutions provide no possibility for derogation or restriction of the freedom of thought. The constitutions of Malawi (article 44) and Namibia (article 21) envisage general grounds for reasonable restrictions of rights and freedoms by law, which are in consistence with international human

rights standards. A similar approach is undertaken in the Constitution of the Russian Federation, also providing the possibility of restricting the relevant freedoms in emergency situations (article 55, clause 3 and article 56). The Constitution of Cuba envisages in article 54 as a limitation clause that “conscientious objection may not be invoked with the intention of evading compliance with the law or impeding another from the exercise of their rights”.

In the given context, it is interesting to analyze also the evolution of the legal regulation of the right to freedom of thought in the Constitution of the Republic of Armenia (RoA). Freedom of thought has been envisaged by all three editions of the RoA Constitution: namely article 23 in the 1995 edition, article 26 in the 2005 edition, and article 41 in the 2015 edition. The RoA Constitution of the 1995 edition stipulated: “everyone is entitled to freedom of thought, conscience, and religion.” The freedom of thought was stated as non-derogable and not subject to any restrictions, while the freedom to exercise religion and beliefs could be restricted by law on the grounds prescribed in the Constitution. This provision was amended in 2005, and then new wording envisaged: “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to change religion or belief, and freedom — either individually or in community with others — to manifest them in preaching, church ceremonies and other rites of worship. The manifestation of this right may be limited only by law, where it is necessary to protect the public safety, health, morals or the rights and freedoms of others.” *Prima facie* it might seem unclear from the wording of the RoA Constitution of 2005 edition whether the provided grounds for limitation are applicable only to the conscience and religious freedom, or

⁹ For example, US Supreme Court Justice Black in his concurring opinion in *Wieman v. Updegraff* decision of 15 December 1952 stated: “Framers rested our First Amendment on the premise that the slightest suppression of thought, speech, press, or public assembly is still more dangerous” (p.194), and in *dicta* of the decision *Lawrence vs Texas* of 26 June 2003 the US Supreme Court mentioned that “liberty presumes an autonomy of self that *includes freedom of thought*, belief, expression, and certain intimate conduct” (para.1).

¹⁰ This is the case, for instance, in article 54 of the Constitution of Cuba, article 25 of the Constitution of Morocco, article 37 of the Constitution of Rwanda, article 24 of the Constitution of Slovakia, article 29 of the Constitution of the Russian Federation, article 33 of the Constitution of the Republic of Belarus, articles 14 and 40 of the Constitution of Estonia.

to the freedom of thought as well. However, the keyword of the restriction clause, in our opinion, is the word “manifestation”. In other words, the limitation clause provides grounds only for limiting *the manifestation* of the right rather than the right itself. According to the authoritative doctrinal interpretation of the given constitutional provision thought is described as a natural characteristic of human beings, the basis for their spiritual life and spiritual freedom, which cannot be subject to legal regulation as such simply because the thought *per se* cannot be limited (Harutyunyan & Vagharshyan, 2010, pp. 297-298). Thus, these commentaries also lead us to the conclusion that the mentioned limitations clause cannot be interpreted as applicable to the freedom of thought. The latest amendments to the RoA Constitution were adopted in 2015, also altering the wording of the provision on the right to freedom of thought, conscience and religion. Article 41 of the RoA Constitution stipulates:

“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to change religion or belief and, either alone or in community with others and in public or in private, the freedom to manifest them in preaching, church ceremonies, other rites of worship or in other forms. 2. The expression of freedom of thought, conscience and religion may be restricted only by law for the purpose of state security, protecting public order, health and morals or the basic rights and freedoms of others”.

It is difficult to judge what the legal content of article 41 clause 2 is: i.e. does the term “expression of” apply to the freedom of thought and conscience or is it linked only to the freedom of religion? It could be assumed that the freedom of thought is envisaged as potentially subject to restriction by law for certain listed purposes. This,

however, seems to be an unreasonable interpretation first and foremost because such interpretation would be viewed as conflicting with the RoA international legal obligations in the framework of article 5 clause 3 and article 81 of the RoA Constitution. Thus, despite the vagueness of the wording we are inclined to apply to article 41 the same interpretation as in case of the wording of article 26 in the 2005 edition of the Constitution.

Restriction of the Freedom of Thought

Hobbes (as cited in Lemetti, 2012, p. 174) describing the natural freedom of thought in his *Leviathan* wrote: “internal faith is in its own nature invisible and, consequently, exempted from all human jurisdiction.

Through centuries the thought has been perceived as an element of the inner world of the “thinker”, the intangible product of the mental process in the brain of a person known only to that person until the moment of its expression in one way or another, and, thus, reasonably not subject to any regulation or limitation by state (Bublitz, 2014, pp.1-3). Such perception of thought served basis for leaving the freedom without regulation in the basic laws of some states. Such perception might also be the reason for limited doctrinal analysis on the right to freedom of thought. The rapid evolution of science and technology, which is already merging with once science fiction, make us rethink the uselessness of the right to the freedom of thought and the necessity to open a discussion on its legal content, hypothetic grounds for and lawfulness of its limitation, as well as the evolution of the law on the protection of the freedom of thought.

There might be different hypothetic scenar-

ios of intervention into the freedom of thought – all interesting subject for discussion, however, in the current paper, we would like to focus on manipulation as means of influencing the freedom of thought in the age of high technologies.

Manipulation in and of itself is not a new phenomenon: it has always been used in order to influence the decision-making process at all levels. It is said that our reality is subjective, our expectations often shape the reality: we see what we expect to see. Manipulation in our understanding is the process of misleading the information receiver by information control or selective processing, and by this also determining the behaviour of the information receiver, in order to make the latter form a certain opinion or idea, make a certain decision or act in a certain way, and constituting direct intervention into the area of freedom of thought. Manipulation becomes easier if manipulator possesses comprehensive information about the preferences, personal character, expectations, his/her belonging to a certain group based on certain parameters, and about the environment of the information receiver. Regardless of whether the aim or cause of the manipulator is good or bad manipulation is always unethical. One of the most illustrative fictional examples of manipulation could be considered that of Dorian Grey by Lord Henry in Oscar Wilde's *The Picture of Dorian Grey*. "There is no such thing as a good influence. All influence is immoral - immoral from the scientific point of view. Because to influence a person is to give him one's own soul. He does not think his natural thoughts or burn with his natural passions. His virtues are not real to him. His sins, if there are such things as sins, are borrowed. He becomes an echo of someone else's music, an actor of a part that has not been written for him" (Wilde, 2011, p. 28).

We may witness or experience manipulation in our everyday life in the workplace, when doing shopping, making (facilitating) choices about the government structure or participating in elections. Manipulations are always intentional and manipulators also often acknowledge the unethical nature of their attempt to interfere with the freedom of thought of a third person, and yet it has always been and remains present in our lives. So it would be naïve to assume that one day, because of its unethical nature, manipulations would stop taking place. But what has made current-day manipulation significantly different from that of Wilde's age is the information and communication technologies and utilization of AI for collecting and processing data, tracking and predicting individual and collective behaviour, which makes psychological manipulation easier and less obvious (hidden), the expected outcome more precisely predictable, the outcome more targeted and large-scale, capable even of affecting public relations and government structures. So if in case of single instances of manipulation, i.e. intervention into the freedom of thought domain of one person by another person, the state should not reasonably be expected to have an obligation to protect the freedom of thought of the person being influenced, in our opinion, the opposite assumption should be true when dealing with certain cases of large-scale manipulation conducted by using new technologies. In casual interpersonal manipulation both: the information receiver and the manipulator are in horizontal and symmetric relations. Both have equal opportunities in seeking and receiving information, choosing what information to impart, what to believe in, and what to ignore, with whom to interact, etc. New information technologies and almost limitless possibilities of AI put manipulator into a better position, transform the

nature of manipulator-information receiver relations into vertical and asymmetric. This, in our opinion, calls the necessity for the state intervention to protect the “weak” side from possible intervention into the freedom of thought. While any manipulation in and of itself is immoral, we argue that **large-scale intensive manipulation (interference into the freedom of thought domain) by using special big data processing tools (including AI) with the aim to shape the information receivers’ decision-making process in order to reach a certain (approximately pre-calculated) outcome motivated by self-interest is not just immoral but also unlawful.**

Big data is a term used to describe large and inter-connected data with high volume and a wide variety of information, as well as high speed of collecting and processing (McGregor, Calderón, & Tonelli, 2013, p. 1). Data mining and pooling tools allow to aggregate and combine the large quantity of information from many different sources and collected by different, in one way or another, interconnected agencies, the so-called data warehouses, to then integrate and analyse it, categorize the useful information and identify individual and collective characteristics and features, as well as trace behavioural trends, while these patterns, in their turn can be either focused or not, either applied on a wide-scale population or targeted at a certain group depending on the aim of data analysis (Kulhari, 2018, pp. 26-27; McGregor, Calderón, & Tonelli, 2013, p.1). It has been widely discussed that data mining, pooling and its subsequent (automated or human) processing often fairly raise questions in the context of posing risks to person’s privacy (Fienberg, 2006, pp. 143-154; Pavolotsky, 2013,

pp. 217-225).¹¹ One of the approaches to address the issue of privacy is accepting the consequences of the rapidly developing world and adapting to the new situation. As the co-founder of Sun Microsystems Scott McNealy famously said yet in 1999 to a group of reporters: “You have zero privacy anyway... Get over it” (Sprenger, 1999). Later argued that these words were taken out of the context, however, in essence, this approach not just has fairgrounds, but it has become even more topical with the development of the new information technologies. The opposite approach, i.e. attempt to regulate the use of new technologies and balance it with the right to privacy, has also been considered. One suggested solution has been the “privacy by design” concept aimed at ensuring privacy protection *ex-ante* and included in the design of the new technology. This concept got pioneered by Ann Cavoukian, formerly Ontario’s Information and Privacy Commissioner, who also elaborated seven principles of privacy by design: proactive and preventative, privacy as the default setting, privacy embedded into the design, full functionality – positive-sum, end-to-end security – full lifecycle protection, visibility and transparency, user-centric approach (Birnhack, Toch, & Hadar, 2014, pp. 55-114). Another very striking example of the balanced protection approach has been the adoption of General Data Protection Regulation (GDPR) implemented in May 2018 and applicable to the territory of all European Union (EU) member states.¹² After the GDPR adoption,

¹¹ See also Data mining, dog sniffs and the fourth amendment, Harvard Law Review Association, HLR Vol. 128, No.2 (December 2014), pp. 697-698.

¹² European Union (2018). *General Data Protection Regulation*, 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, at: <https://eurlex.europa.eu/eli/reg/2016/679/oj>.

many states also outside the EU have taken steps to improve respective legislation on data protection. This movement is reaching even the USA (Serrato, Cwalina, Rudawski, Coughlin, & Fardele, 2018).

With massive discussions still ongoing states can choose between the “zero privacy” approach and regulation of the field to protect privacy, *inter alia*, in accordance with international human rights standards. The situation is different with balancing the application of new information technologies and mental autonomy. Discussions on the necessity to view the application of automated data processing techniques *inter alia* in the light of freedom of thought, and the “challenges to cognitive sovereignty” have started to take place recently with a focus on such aspects as possible future AI application, for instance, equipment capable of reading the mind of a person through the interface (McCarthy-Jones, 2019; Gilbert, 2019) or manipulation strategies used by social media (Băncău-Burcea, 2017). The legal regulation of the first scenario would be necessary but more pre-emptive and proactive in nature, and the second scenario, in our opinion, remains in the domain of social media ethics. In the meantime, “Big Techs” like Facebook and Google already today have very significant power exerted from the bottom up, via the advanced technologies, the so-called surveillance capitalism, which “allows them to divide and conquer us in ways that the oligarchs of the past could only dream about” (Foroohar, 2019). “Domination!” was the proclamation with which, as reported, Mark Zuckerberg used to end meetings in the early years of Facebook (Kuchler, 2019). Indeed, recently we have often been hearing that social media is influencing the results of elections, such as Cambridge Analytica scandal (Confessore, 2018), or that it served as

the main tool for generating government structure changes, like Arab Spring dubbed as “Revolution 2.0” (Hochwald, 2013, pp. 21-27).

These trends reasonably give rise to the legal discussions concerning the protection of the freedom of thought. Interestingly, unlike the Orwellian approach to possible limitation of the freedom of thought through restricting the freedom of expression, nowadays a shift took place often arguing the lawfulness of factual limitation of the freedom of thought by the necessity to ensure the freedom of expression. This argument, however, does not seem to be well-grounded. In our opinion, the protection of the freedom of thought does not need to be realised by imposing unbalanced or unlawful restrictions to the freedom of expression, but rather imposing only reasonable, necessary and proportional limitations. A number of organizational and legislative measures at national and international levels could be undertaken by the state and businesses in order to ensure full and effective protection of the right to freedom of thought.

What could and should be done to Protect Freedom of Thought: Summing up

The absolute nature of the right to freedom of thought in International Human Rights Law (IHRL) and the states’ obligation to ensure and protect it against violations call for the necessity of specific measures at international and national levels to address the risks in the context of widespread utilization of new technologies and algorithmic processes.

At the universal level, the ICCPR regulations ensure full protection of the freedom of thought, while the regional level protection seems to have room for improvement and updated interpretation.

The necessity of enhancing the freedom of thought protection has already been emphasized by the Council of Europe (CoE) member states. Thus, acknowledging that machine learning technologies and tools can be used to predict choices, influence thoughts and subject people to manipulation, CoE has called on member states to address the risk in February 2019. As a result, a Declaration on manipulative capabilities of algorithmic processes (Declaration)¹³ was adopted along with further draft recommendations of the Committee of Ministers (Draft Recommendations) to member-states addressing the impacts of algorithms on human rights¹⁴. The Declaration, as reflected in its paragraph 9, encourages member states to address the risks to human rights by, *inter alia*, “initiating, within appropriate institutional frameworks, open-ended, informed and inclusive public debates with a view to providing guidance on where to draw the line between forms of permissible persuasion and unacceptable manipulation. The latter may take the form of influence that is subliminal, exploits existing vulnerabilities or cognitive biases, and/or encroaches on the independence and authenticity of individual decision-making; [as well as] taking appropriate and proportionate measures to ensure that effective legal guarantees are in place against such forms of illegitimate interference”. The Declaration also stresses the need to put in place a stronger regulatory body or to take other measures for oversight and monitoring with spe-

cial emphasis on political and electoral processes, research and raising awareness campaign, etc. The Draft Recommendations, in their turn, stipulate details of the suggested cope of the obligation of the states and responsibilities of the businesses with respect to rights and freedoms in the context of advanced algorithmic systems.

Additional measures at European level, in our opinion, should include: broader interpretation of ECHR article 9 in the framework of ECtHR case-law to define “thought” as including all aspects of thought not limited to a religious context. As it was first acknowledged in Tyrer case, ECHR is a “living instrument”, and its interpretation should be adopted to the current-day conditions.¹⁵ Such approach also referred as the principle of effectiveness, is dictated by the necessity to give the rights and freedoms of the ECHR “fullest weight and effect consistent with the language used and with the rest of the text and in such a way that every part of it can be given meaning” (Merrills, J. as cited in White, Ovey, & Jacobs, 2010, p. 73). It seems to be the right time to give meaning to the word “thought” in article 9 via case-law. Such developments could, certainly, be facilitated by the evolution of CoE soft law.

As the ACHPR does not specifically regulate the freedom of thought, regional initiatives could be launched aimed at analysing and assessing the data on the use of specific technologies or algorithmic processes with capacities to influence decision-making. The results of such analysis could then serve as the basis for drafting legal regulations ensuring full and effective protection of the freedom of thought.

As to the ACHR, it might be interpreted as having relevant guarantees for ensuring full pro-

¹³ Declaration by the Committee of Ministers on the manipulative capabilities of algorithmic processes (Adopted by the on 13 February 2019) Decl. (13/02/2019)1.

¹⁴ Committee of experts on human rights dimensions of automated data processing and different forms of artificial intelligence (MSI-AUT), Addressing the impacts of Algorithms on Human Rights Draft Recommendation of the Committee of Ministers to member States on the human rights impacts of algorithmic systems (status – draft, 2018).

¹⁵ Tyrer vs United Kingdom, ECtHR (App.5856/72) 25 April 1978, para. 31.

tection of the freedom of thought embedded in article 13. Thus, the wording of the third paragraph of the ACHR article 13 could be interpreted broadly as a relevant tool for protecting the freedom of thought. According to the mentioned clause “indirect methods or means of restriction, including abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions”. This regulation is, *prima facie*, aimed at ensuring full exercise of the right to information rather than the freedom of thought as such: dealing with the freedom of thought from the Orwellian perspective. However, taking into account that the development of ACHR takes place through its interpretation, which in its turn shall keep pace with the current developments, it could as well be argued that the prohibition of “equipment used in the dissemination of information or any other means tending to impede the communication and circulation of ideas and opinions” should be broadly interpreted as applicable to and relevant for imposing restrictions, *inter alia*, on targeting technologies and software which are technically capable of selectively suiting people on the basis of data-driven profiling and by this indirectly impeding the circulation of ideas and opinions.

At the national level, states could also undertake certain measures aimed at protection of the right to the freedom of thought. Thus, state constitutions represent the highest legal act by which the freedom of thought could be guaranteed. If the constitution of a given state is silent on the right to freedom of thought, it should be interpreted as acknowledging that right by the force of IHRL as a customary norm or a general principle of law constituting the core of human

dignity. States, where freedom of thought is guaranteed by the constitution should carefully choose the wording making sure that it leaves no room for misinterpretation of the scope of protection of the right to the freedom of thought in consistence with their international legal obligations.

States should, in our opinion, also take additional efforts to enhance their national legislation with mechanisms aimed at full and effective protection of the freedom of thought. One such measure could be envisaging legal *responsibility (liability) for large-scale intensive manipulation (interference into the freedom of thought domain) by using special big data processing tools (including AI) aimed at shaping the information receivers' decision-making process and by that resulting in a certain (approximately pre-calculated) outcome and motivated by any form of self-interest*. The described situation imposes positive obligations on the state to protect people from possible violations against freedom of thought. This approach seems to be necessary, reasonable, proportionate and consistent to the international human rights standards. And imposing liability for the already realized conduct would ensure no unnecessary interference with the freedom of expression.

Other preventive legislative measures at the state level could include: envisaging legislative requirement for the technology companies to embed the freedom of thought guarantees into the design of a technology or an algorithmic system similar to “privacy by design” concept. This could be done by default disclosure of all third parties with whom the information provided by a person may be shared, all purposes of processing the data and receiving the periodic informed consent of the platform user, or by means of informing him/her of the origins of the advertisement,

video or any similar materials and indicating the parameters that served as a basis (reasons) for showing the given content to the given platform user, the patterns identified, including the latter's belonging to a certain category of users based on the relevant parameters – labelled as a *targeted advertisement* in every such case.

In our opinion states should also proceed with stipulating restrictions or prohibition on the dissemination of targeting advertisement (content) concerning political and electoral processes, as well as the adoption of do-not-track laws, fake news laws, and establishing independent oversight and monitoring mechanisms as complementary measures.

Acknowledging the significant role of fake news in facilitating large-scale manipulation (*inter alia* with the use of automated data processing tools) a number of states have already taken action against online manipulation via fake news. Such actions include elaborating state strategies and action plans, launching media literacy campaigns, setting up government task forces, signing public-private agreements, setting online reporting portals and fact-checking sites, adopting special legislation (Funke & Flamini, 2019). One of the toughest regulations on online manipulation is the “Protection from Online Falsehoods and Manipulation Act” (POFMA), passed in May 2019 by the Parliament of Singapore (Wong, 2019). Singapore has invoked POFMA for the first time against Facebook (Palma, 2019). POFMA and similar laws are treated with caution for the risks to the freedom of expression. Indeed special care shall be taken by states to ensure that any action aimed against spreading online misinformation does not constitute a violation of the freedom of expression and is in consistence with international human rights standards. At the same time, it should be acknowledged

that the freedom of expression is not an absolute right and states have a certain margin of appreciation in lawfully limiting it, including via legislation (this approach is reflected, *inter alia*, in the ICCPR article 19 clause 2, ECHR article 10 clause 2, ACHR article 13 clause 2). By contrast, as analysed *supra*, the freedom of thought, encompassing all matters, is an absolute right to which no limitations and from which no derogations should be allowed. States have positive obligations to secure this right and protect it from violations not only by state agents but also by private persons or entities (White, Ovey, & Jacobs, 2010, pp. 99-102). In other words, the necessity to ensure the right to freedom of thought, in our opinion, could serve a legitimate ground for imposing restrictions on the right to freedom of expression given certain conditions are fulfilled.

The practice of do-not-track bills has already been adopted in the USA. Thus, as a mechanism to ensure privacy and data protection Assembly of California has passed a bill, the so-called Do Not Track Bill (AB 370), on amending California Online Privacy Protection Act.¹⁶ The main purpose of the Act is to provide the Internet users with the opportunity to opt out of online tracking schemes (McGregor, Calderón, & Tonelli, 2013, pp. 3-4). In May 2019 a similar piece of legislation to enact a national do-not-track system and to limit the targeted advertisements was introduced to the Senate (currently pending) by privacy and freedom of choice pioneer Senator Josh Hawley.¹⁷ These kinds of initiatives not on-

¹⁶ State of California Assembly (2013). *An act to amend Section 22575 of the Business and Professions Code, relating to consumers*, available at: https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB370.

¹⁷ Hawley, J. (2019). *A Bill to protect the privacy of internet users through the establishment of a national Do Not Track system, and for other purposes* (S.

ly enhance privacy protection but also serve as supplementary tools for ensuring the right to freedom of thought. Moreover, in the protection of freedom of thought Senator Hawley has also suggested passing a bill “to prohibit social media companies from using practices that exploit human psychology or brain psychology to substantially impede freedom of choice, to require social media companies to take measures to mitigate the risks of the Internet addiction and psychological exploitation, and for other purposes”.¹⁸ Despite the almost no chances for the draft to be approved, Josh Hawley’s action is one more signal drawing attention to the necessity of thinking of special mechanisms or regulations aimed at enhancing the protection of the freedom of thought.

In addition to the above-mentioned measures, in our opinion, action should also be launched to make businesses and state agencies responsible for data processing via specific algorithmic systems to elaborate and adopt business ethics rules specifically addressing the mechanisms that are used to ensure the freedom of thought. An example of such mechanism could be, for instance, providing every user with a right to access an interactive online chart with the entire massive of depersonalized, categorized databases and datasets with identification only of that given user. And last but not least, states should ensure that the civil society is well aware of the legal content of the right to the freedom of thought in the context of new technologies, as well as familiarized with the means for its pro-

tection against violations by the state or private companies.

It should be acknowledged and ensured that the freedom of thought remains the right of every person. “Think for yourself and let others enjoy the privilege of doing so too.” Voltaire (Essay on Tolerance).

Conclusion

Freedom of thought is recognized as a fundamental human right in a number of international and regional human rights instruments. At the same time at the national level, there is no uniform approach towards regulation of the right to freedom of thought. Thus, in constitutions of some of the randomly selected states, the regulation of the freedom of thought is directly linked to the freedoms of conscience, religion, faith or belief, or to the freedom of expression, in other states the freedom of thought is at all absent from constitutional regulations. Similarly in some states, where the freedom of thought is guaranteed under the basic law, the relevant constitutional provision explicitly envisages the freedom of thought as a right, in other states the freedom of thought is stipulated as freedom however clearly implying the corresponding state obligation to effectively ensure it. Some of the analyzed state constitutions provide no possibility for derogations or restriction of the freedom of thought, and others envisage generic grounds for reasonable restriction of all rights and freedoms in general (including the right to the freedom of thought) by law provided that such restrictions are in consistence with international human rights standards.

While the right to freedom of thought is undoubtedly perceived as an absolute right to which no restrictions are possible in practice, the

1578), available at: <https://www.congress.gov/bill/116th-congress/senatebill/1578/text>.

¹⁸ Hawley, J. (2019). *Draft Bill “Social Media Addiction Reduction Technology Act” (SMART)*, LYN19429, (para.1), available at: <https://www.hawley.senate.gov/sites/default/files/2019-07/Social-Media-AddictionReduction-Technology-Act.pdf/>.

rapid technological and scientific development, in our opinion, calls for the necessity of evolution of the law on the protection of freedom of thought, *inter alia* by revealing the legal content of the right to the freedom of thought in the present-day realities, as well as determining the scope of positive obligations of the state to ensure its full and effective protection. This argument becomes specifically topical in the context of using machine learning technologies and tools for large-scale data processing aimed at reaching a certain outcome motivated by self-interest, i.e. large-scale manipulation facilitated by the use of new technologies (including AI). We conclude that while any manipulation in and of itself is immoral, the large-scale intensive manipulation (interference into the freedom of thought domain) by using special big data processing tools with the aim to shape the information receivers' decision-making process in order to reach a pre-calculated outcome and motivated by self-interest should also be interpreted as unlawful under IHRL and, consequently, reflected in national legislation. Such approach should be advanced by developing the interpretation of the right to freedom of thought regulations of relevant international treaties addressing the risks posed by technological development, as well as by ensuring states undertake appropriate measures to fulfil their positive obligation in protecting the absolute right to freedom of thought.

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