Original Manuscript

NQHR

Netherlands Quarterly of Human Rights
1–21
© The Author(s) 2023
Article reuse guidelines:
sagepub.com/journals-permissions
DOI: 10.1177/09240519231211823
journals.sagepub.com/home/nqh
Sage

Protecting the mental realm: What does human rights law bring to the table?

Timo Istace
Universiteit Antwerpen, Antwerpen, Belgium

Abstract
The protection of the mind through human rights law has been receiving increasing attention in recent years. Concerned by rapid developments in neurotechnology, some scholars have suggested the introduction of so-called 'neurorights': that is, human rights that specifically aim to protect people's minds against unwanted intrusion by neurotechnology. However, a cautious approach is advisable. Before robust claims about the need for neurorights can be made, it first needs to be examined what protection is currently offered within the existing human rights framework. Adequate safeguards to counter existing and upcoming threats to people's minds may already be available through an analysis of the current spectrum of human rights and fundamental freedoms. In this article, the role that the existing human rights framework could play in protecting people's minds will be examined. To that aim, first the need to protect people's mental sphere will be discussed. Subsequently, the existing human rights and fundamental freedoms will be assessed on their merits in providing adequate protection.

Keywords
mind, mental autonomy, mental privacy, right to freedom of thought, right to private life

1. INTRODUCTION

A person's mental sphere was long deemed inviolable, and therefore not in need of substantial protection. The body was considered to be vulnerable to harm inflicted by others, whereas the mind was regarded as an impregnable fortress over which the individual had full control. However, this premise is hotly contested. Rapid developments in neurotechnology indicate that we are

Corresponding author:
Timo Istace, Faculty of Law, Universiteit Antwerpen, Venusstraat 23, Antwerpen, 2000, Belgium.
Email: timo.istace@uantwerpen.be

Creative Commons Non Commercial CC BY-NC: This article is distributed under the terms of the Creative Commons Attribution-NonCommercial 4.0 License (https://creativecommons.org/licenses/by-nc/4.0/) which permits non-commercial use, reproduction and distribution of the work without further permission provided the original work is attributed as specified on the SAGE and Open Access page (https://us.sagepub.com/en-us/nam/open-access-at-sage).

increasingly capable of interfering with people's mind through technological means.[1] Anticipating the challenges raised by these developments, neuroscientists and philosophers have started reflecting on the moral consequences when the mind is no longer under the full control of the individual. Following in their path, legal scholars have recently begun to look into how the law ought to contribute to the protection of people's mind. Human rights law gradually gained a central place in this field of research.

Before examining what legal protection for the mind exists within human rights law, some essential questions must be addressed: What is it that needs to be protected, against what, why, and for whom? The exact parameters of what should be protected comes down to how one defines 'the mind'. Without committing to a specific theory within the mind-body debate, 'the mind' in this article refers to mental states, such as emotions, thoughts, imagination, intentions, perception, and decision-making.[2] The purpose of this article is thus to examine whether these inner mental states are (sufficiently) protected by human rights law.

In this examination, the most important question to consider is why we would need legal safeguards to protect the mind. Intrusions into the mind raise two major risks.[3] First, the possibility that third parties could access people's mental processes and content constitutes a threat to mental privacy. Mental privacy is the privacy one enjoys in relation to their mental states.[4] Nagel underlines the fundamental importance of mental privacy for individuals and societies by stating that 'civilisation would be impossible if we could read each other's mind'.[5] If a person's mental privacy was violated, their ability to think freely and authentically might also be implicated since individuals may then be subjected to conformity pressures and self-censorship.[6] Mental privacy is therefore essential for social interaction and for the construction of an autonomous self that is able to flourish.[7] A second risk that arises when the mind proves to be accessible is that mental processes and states might be altered. As will be discussed in more detail below, emotions, thoughts, intentions, and beliefs could be influenced in various ways (such as, education, indoctrination, or medication). These interferences might constitute a threat to someone's mental autonomy, that is, 'the specific ability to control one's own mental functions, like attention, episodic memory, planning, concept formation, rational deliberation, or decision making',[8] and so on. Where individuals are vulnerable to the manipulation of their mental capacities and activity, their mental autonomy is at risk. This

1 Rafael Yuste, Jared Genser, and Stephanie Herrmann, 'It's Time for Neuro-Rights; New Human Rights for the Age of Neurotechnology' (2021) 18 Horizons 155.

2 Stephan Rainey and others, 'Brain Recording, Mind-Reading, and Neurotechnology: Ethical Issues from Consumer Devices to Brain-Based Speech Decoding' (2020) 26 Sci Eng Ethics 2295.

3 These two major risks constitute broad categories, which are entangled with other specific ethical and legal challenges. For instance, a risk that arises when mental privacy would be violated is the risk of discrimination on the basis of information obtained on one's mental sphere.

4 Sarah Richmond, 'Brain imaging and the transparency scenario' in Sarah Richmond, Reese Geraint and Sarah Edwards (eds), *I know what you're thinking. Brian imaging and Mental Privacy* (OUP 2012).

5 Thomas Nagel, 'Concealment and exposure' (1998) 27 Philos. Public Aff 3, 4.

6 Simon McCarthy-Jones, 'The Autonomous Mind: The Right to Freedom of Thought in the Twenty-First Century' (2019) 2 Front Art Intel; Andrea Lavazza, 'Freedom of Thought and Mental Integrity: The Moral Requirements for Any Neural Prosthesis' 2018 12 Front Neurosci.

7 Christian Halliburton, 'How Privacy Killed Katz: A Tale of Cognitive Freedom and the Property of Personhood as Fourth Amendment Norm' (2009) 42 Acron Law Review 803, 803.

8 Thomas Metzinger, 'The myth of cognitive agency: Subpersonal thinking as a cyclically recurring loss of mental autonomy' (2013) 4 Front Psychol 1, 2.

may impact a variety of fundamental interests, such as one's personal identity, authenticity, agency, and self.[9] Both mental privacy and mental autonomy are moral values that emanate from human dignity – as will be elaborated upon further. Therefore, they do not only constitute the most important rationale for reflecting on the human rights protection of the mind, but also fundamental interests that require legal protection in order to preserve and enhance human dignity.

It is important to underline that neurotechnologies are definitely not the only means to access and influence a person's mind. Medications to treat mental illness have the ability and the explicit purpose to interfere with cognitive or affective processes in order to alter the patient's mental states. Furthermore, visual, auditive, or olfactory stimuli are used in marketing contexts to affect people's mental states.[10] Similarly, subliminal stimuli can be deployed to alter people's thoughts, beliefs, or intentions with the goal of, for example, influencing their political views.[11] Moreover, the mind can just as well be manipulated without the use of external tools, for instance, by resorting to rhetoric or indoctrination. Hence, although neurotechnologies are unquestionably the most modern and spectacular means for interfering with the mind, they are only one amongst many means that challenge the presumption of inaccessibility of the mind. This article aims to take a general approach and examine the existing protection against interference with people's mental sphere regardless of which means are used, shifting away from a focus on neurotechnological interference. In today's digital age, for instance, it could be argued that certain forms of (digital) marketing require a higher level of scrutiny in terms of human rights protection, since they might currently be considered more threatening than neurotechnological devices in terms of undermining the freedom one has over one's mental states. Similarly, 'nudging' as a policy tool used by governments to influence citizens' decision-making is an issue which raises some ethical concerns.[12] In short, people's mental spheres face a variety of threats, and thus a general framework of mind-protection is desirable.

To the question of whose mental sphere needs protection, the answer is short: every individual benefits from, and is in need of, this kind of protection. Focussing on more vulnerable groups of people, such as people suffering from mental health issues, or young children, is a legitimate aim. However, before addressing the consideration that the mental vulnerability of certain individuals or groups might need specific attention, it should first be more generally ascertained what challenges are raised by, and what protection is offered against interferences with people's minds.

2. THE MIND WITHIN THE HUMAN RIGHTS FRAMEWORK

Within human rights law, there is no explicit right to 'mental autonomy' or 'mental privacy' that protects the privacy and autonomy interests at the level of the mental sphere. At the time of the drafting of the main human rights instruments, the establishment of an elaborate legal protection

9 Elisabeth Hildt, 'Electrodes in the brain: Some anthropological and ethical aspects of deep brain stimulation' (2006)5 *IRIE* 33–39; Frederic Gilbert, John NM Viaña and Christian Ineichen, 'Deflating the "DBS causes personality changes" bubble' (2021) 14 Neuroethics.

10 Aradhna Krishna, Luca Cian and Tatiana Sokolova, 'The power of sensory marketing in advertising' (2016) 10 Curr Opin in Psychol. 142.

11 Ran R Hassin and others, 'Subliminal exposure to national flags affects political thought and behavior' (2007) 104 Proc Natl Acad Sci USA 19757.

12 Paul Kuyer and Bert Gordijn, 'Nudge in perspective: A systemic literature review on the ethical issues with nudging' (2023) 32 Ration Soc 191.

for people's inner spheres was not considered a priority as the concept that the mind was something that could be interfered with was almost unheard of.[13] As the inviolability of the mind lost its self-evidence, it is worthwhile exploring whether mental autonomy and mental privacy might, apart from being an implicit presumption underpinning the legal order,[14] be protected by existing rights. At first glance, human dignity, the right to freedom of thought and opinion, and the right to private life (including the right to privacy, the right to [mental] integrity, and the right to personal autonomy and identity) might offer protection to (certain aspects of) the mind. The scope and meaning of these rights will be examined in order to assess to what extent they do so. As these legal provisions are themselves very general, a thorough examination of the case law by human rights courts is essential in order to establish how they apply in different contexts.

Two important preliminary remarks are in place. First, this analysis will focus on the 'negative dimension' of mental autonomy and privacy. It will examine whether the existing human rights protect against unwanted intrusions into the mind by third parties. The 'positive dimension', which is captured in the concept of 'mental self-determination' as described by Bublitz,[15] entailing the freedom of individuals to have their minds interfered with by whatever means they choose, will not be addressed here. Second, this analysis will examine the law as it is, and not the law as it ought to be. The goal of this article lies in studying the existing frameworks, which is a necessary first step in defining the shortcomings that may need to be remedied.

2.1. Human Dignity

Within human rights law, human dignity is a rather peculiar legal concept. First laid down in Article 1 of the Universal Declaration on Human Rights (UDHR), human dignity as a concept has become omnipresent in international and regional human rights instruments and in human rights discourse.[16] Within the context of the European Union (EU), human dignity is considered a general principle of EU law,[17] and 'constitutes the real basis of fundamental rights'.[18] Moreover, Article 1 of the European Charter of Fundamental Rights (CFR) explicitly stipulates a right to human dignity - and the entire fist chapter is devoted to its protection. While the European Convention on Human Rights (ECHR) makes no explicit reference to human dignity, the case law of the European Court of Human Rights (ECtHR) asserts that 'the very essence of the Convention is respect for human dignity and human freedom'.[19] In addition, international and regional instruments relating to bioethics and biomedicine, such as the Oviedo Convention,[20] attribute a central position

13 UN General Assembly (Third Committee), *Report Third session, Meeting 127* (1948), A/C.3/SR.127:395; As quoted by Hammer, L. *The International Human Right to Freedom of Conscience* (Dartmouth: Ashgate, 2001):34.

14 Jan-Christoph Bublitz, 'My Mind is Mine!? Cognitive Liberty as a Legal Concept' in Elisabeth Hildt and Andreas Franke *Cognitive Enhancement* (Springer 2013); Wrye Sententia, 'Neuroethical Considerations: Cognitive Liberty and Converging Technologies for Improving Human Cognition' (2004) 1013 Ann NY Acad Sci 221.

15 Jan-Christoph Bublitz, 'The Nascent Right to Psychological Integrity and Mental Self-Determination' in Andreas von Arnauld, Kerstin von der Decken and Mart Susi (eds), The Cambridge Handbook of New Human Rights (CUP 2020).

16 See, for example, Articles 10 International Covenant on Civil and Political Rights (ICCPR), and 1 International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as their respective preambles.

17 Case C-377/98 *Netherlands v European Parliament and Council* [2001] ECLI:EU:C:2001:523.

18 'Explanations Relating to the Charter of Fundamental Rights' (2007) 2007/C303/02.

19 *Pretty v. the UK* App no 2346/02 (ECtHR 29 April 2002), para 65.

20 Convention of 4 April 1997 on the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine.

to human dignity, as developments in biomedical science and technology are considered potential threats to human dignity.[21]

Despite its central role within the human rights framework, there is no consensus on a definition, nor on the normative value of human dignity. Addis aptly points out that 'its popularity seems inversely related to its clarity'.[22] Nonetheless, McCrudden identifies three elements that constitute the minimal core of human dignity as a notion within human rights law.[23] First, human dignity refers to the unalienable intrinsic worth of every human being, solely on the basis of being human. It recognises that there is more to human existence than its biological or genetic dimension.[24] Second, human dignity requires every individual's intrinsic worth to be acknowledged and respected by others. In that way, the innate value of people determines minimal standards for the treatment of the individual. Third, human dignity obliges the State to ensure the establishment of minimal conditions that guarantee that the intrinsic worth of every human being is respected. In addition, Andorno attributes a collective dimension to human dignity, referring to the inherent value of humanity as a whole.[25] The integrity and identity of all humanity is worthy of protection against technological or cultural developments that would impact the core of what it means to be human. Yet, despite the identification of a set of core elements, McCrudden recognises that these core elements remain an 'empty shell' since they are context-specific, and their outcome thus heavily depends on the issue at stake and the cultural, political, social, and judicial context. Moreover, in most cases, specific human rights (for example, the right to integrity, or the right to [private] life) will be decisive in addressing violations of fundamental interests, whereas human dignity is rather used as a supporting element.[26]

The uncertain added value of human dignity due to its vague substantive content is enhanced by its unclear normative status. Human dignity is often invoked as a foundational principle that merely underpins or legitimises the existence of a catalogue of universal, inalienable human rights, without contributing anything to its meaning or interpretation.[27] In other instances, it is considered as a principle that grounds concrete human rights,[28] and that is operationalised through providing a minimum standard of human rights protection.[29] In line with this second understanding, human dignity constitutes an interpretative principle that also guides the development of new rights - and the broadening of existing ones - in the light of social or technological changes.[30]

---

21 Partly Dissenting Opinion of Judge Marcus-Helmons to *Cyprus v. Turkey* App no 25781/94 (ECtHR 10 May 2001).

22 Adeno Addis, 'Dignity, Integrity, and the Concept of a Person' (2019) 13 ICL Journal 323, 323.

23 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 Eur J Int Law 655.

24 Roberto Andorno,'Human Dignity, Life Sciences Technologies and the Renewed Imperative to Preserve Human Freedom' in Marcello Ienca and others (eds), *Information Technology, Life sciences and Human Rights* (CUP 2022).

25 Roberto Andorno, 'Human Dignity and Human Rights' in Henk AMJ ten Have, and Michèle Jean (eds), *The UNESCO Universal Declaration on Bioethics and Human Rights: Background, principles and application* (Unesco Publishing 2009).

26 Roger Brownsword, 'Human Dignity from a Legal Perspective' in Marcus Düwell and others, *Cambridge Handbook on Human Dignity* (CUP 2014).

27 ibid.

28 Roberto Andorno, 'Human Dignity and Human Rights' (n25). For instance, Floridi argues that personal information is a constitutive element of an individual's being, which makes human dignity foundational to the right to privacy. Luciano Floridi, 'On Human Dignity as a Foundation for the Right to Privacy' (2016) 29 Philos Technol 307.

29 This idea is reflected in the first title of the CFR, which aims at protecting human dignity, by safeguarding the right to life, the right to integrity, and the prohibition of torture and slavery.

30 For instance, in Article 28 of the UNESCO Universal Declaration on Bioethics and Human Rights, it is explicitly stated that human dignity is a principle that should guide the interpretation of the provisions in the Declaration.

Although the opaque meaning and normative status of human dignity renders the value of human dignity in protecting the mind rather limited, two ways can be identified in which it contributes to a mind-protection framework. First, human dignity as a general principle legitimises the need to reflect on, and to effectively implement, a framework to protect the mind. When the mind, as an essential feature that underpins fundamental capacities such as autonomy, agency, and identity, is open to unsolicited intrusion, the inherent value of a person faces serious threats. It is thus important to protect the mind against intrusions that access or alter mental states against one's will. Human dignity demands the protection of mental privacy and autonomy. Moreover, as these mental capacities might be necessary features that ought to be protected to preserve humanity, human dignity in its collective dimension also calls for the protection of people's mental realms. Second, minimal requirements emanating from the duty to respect every individual's inherent worth, and the worth of the human species, might guide the establishment of minimal standards for protecting the mind, and facilitate the interpretation of human rights in this context. In particular, values such as autonomy and integrity, which are strongly intertwined with the classic understanding of human dignity,[31] might offer some guidance. However, it remains to be seen whether human dignity as an interpretative tool adds anything substantial to the interpretation of human rights.[32]

2.2. The Right to Freedom of Thought

After its adoption in Article 18 of the UDHR, the right to freedom of thought has subsequently been enshrined in Article 18 of the International Covenant on Civil and Political Rights (ICCPR), Article 9 of the ECHR and Article 10 of the CFR. All these provisions protect freedom of thought, alongside the freedom of conscience and religion. Extensive doctrinal analyses exist regarding the latter two, which make these the most prominent and elaborated human rights safeguards that offer protection to people's *forum internum* – an individual's inner sphere of thoughts and convictions. They prohibit, for instance, the mandatory participation of children in religious or moral education.[33] Notwithstanding their importance due to their explicit consideration of people's mental states, only limited attention will be devoted to these freedoms in this analysis since the range of mental states that resort under their scope (that is, religious, moral and philosophical beliefs) are limited. The focus will be on the freedom of thought, which is more general in nature and can be considered as the origin of the other two freedoms.

The vast amount of literature that exists on the freedom of consciousness and religion stands in stark contrast with the freedom of thought, whose attention in legal scholarship is somewhat limited – albeit emerging – in comparison.[34] Similarly, regulatory guidance by the relevant human rights bodies is lacking, and case law is virtually non-existent. Due to the lack of practical

31 Marcio R Staffen and Mher Arshakyan, 'The Legal Development of the Notion of Human Dignity in the Constitutional Jurisprudence' (2016) 12 Rev Bras Direito 108.

32 Antoine Buyse, 'The Role of Human Dignity in ECHR Case-Law' (*ECHR Blog,* 21 October 2016) < https://www.echrblog.com/2016/10/the-role-of-human-dignity-in-echr-case.html > accessed 13 February 2023.

33 *Leirvág et al. v. Norway* CCPR/C/82/D/1155/2003 (UN Human Rights Committee 23 November 2004), para 14.2.

34 Only recently a comprehensive book dealing with the freedom of thought was published, see Jonathan Blitz and Jan-Christoph Bublitz (eds.). *The Law and Ethics of Freedom of Thought,* vol. 1 (Palgrave Macmillan 2021). See also: McCarthy-Jones, 'The Autonomous Mind' (n6); Susie Alegre 'Rethinking Freedom of Thought for the 21st Century' (2017) 3 EHRLR 221; Sjors Ligthart and others, 'Rethinking the Right to Freedom of Thought: A multidisciplinary Analysis' (2022) 22 Hum Rights Law Rev 1.

operationalisation of the freedom of thought in court proceedings, Bublitz attributes a metaphysical - rather than a practical - nature to the right to freedom of thought.[35] Nonetheless, it is labelled 'a sacred and inviolable right [and the] basis and origin of all other rights' in the preparatory works to the UDHR.[36] Similarly, the case law of the ECtHR 'emphasised the primary importance'[37] of the right to freedom of thought and deems it 'one of the foundations of a democratic society'.[38] There is thus a striking discrepancy between the sparse attention that the freedom of thought receives in legal practice, and the fundamental importance that it is attributed.

Despite its underdevelopment, Vermeulen distinguishes three core aspects to the absolute[39] right to freedom of thought:[40] the right not to reveal one's thoughts; the right not to have one's thoughts manipulated; and the right not to be penalised for one's thoughts.[41] Generally a fourth element is added, which is the positive obligation of States to create an enabling environment for free thought, and thus to proactively provide protection against violations of the *forum internum* by governmental actors, as well as private parties such as commercial corporations.[42] Collectively, these elements hold that the right to freedom of thought guarantees that 'one cannot be subjected to treatment intended to change the process of thinking ('brainwashing'), that any form of compulsion to express thoughts or to change an opinion […] is prohibited, and that no sanction may be imposed on the holding of a view'.[43]

This indicates that the right to freedom of thought undisputedly implies the protection of some part of one's mental states. The recent report of the UN Special Rapporteur on freedom of religion or belief explicitly links the freedom of thought to the protection of mental privacy and mental autonomy.[44] Yet despite this, specific principles for its application still remain largely absent. Greater attention is especially needed regarding what constitutes an 'illegitimate' intervention into the mind. As Nowak states, 'the delineation between (impermissible) interference with freedom of thought and conscience and the (permissible) influencing to which we are exposed

35 Jan-Christoph Bublitz 'Freedom of Thought in the Age of Neuroscience' (2014) 100 Arch fur Rechts- und Sozialphilosophie 1.

36 International Law Commission, 'Summary record of the 60th meeting' (1948) UN Doc E/CN.4/SR.60.

37 *Mockutė v. Lithouania,* App no 66490/09 (ECtHR 27 February 2018), para 119.

38 COE, 'Guide to Article 9: Freedom of Thought, Conscience and Religion' (last updated 31 August 2022) accessed on accessed 13 February 2023.

39 It is important to underline the dual structure of the right to freedom of thought, conscious and belief. The protection granted by this right consists of an internal dimension that covers thoughts, and religious or conscientious beliefs which have not been expressed (*forum internum*), and an external dimension that includes externalised expressions (*forum externum*) of religion and conscientious beliefs (thus excluding 'thoughts'). The latter may be subjected to limitations, whereas the protection of the *forum internum* is absolute. This could be explained by the consideration that the externalisation of thought is protected under the freedom of expression (for example, Articles 19 ICCPR, and 10 ECHR); see Consideration 3 of CCPR, 'General Comment 22: The right to freedom of thought, conscience and religion' (1993) U.N. Doc. HRI/GEN/1/Rev.1 at 35; Malcolm D Evans, *Religious liberty and international Law in Europe* (CUP 1997).

40 Legal doctrine on the right to freedom of thought under the UN framework and the ECHR framework are strikingly similar to the extent that Article 9 ECHR appears to be identical to Article 18 UDHR and Article 19 ICCPR; Patrick O'Callaghan and Bethany Shiner 'The Right to Freedom of Thought in the European Convention on Human Rights' (2021) 8 Eur J Comp. Law Gov 112.

41 Ben Vermeulen, 'Freedom of thought, conscience and religion (article 9)' in Pieter van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006).

42 Mari Stenlund and Pamela Slotte, 'Forum Internum Revisited: Considering the Absolute Core of Freedom of Belief and Opinion in Terms of Negative Liberty: Authenticity and Capability' (2018) 18 Hum Rights Rev 425.

43 Vermeulen, 'Freedom of thought, conscience and religion (article 9)' (n41), 752.

44 UN Special Rapporteur on freedom of religion or belief, 'Interim report' (2021), A/76/380.

daily by the media, private advertising or State propaganda is not easily made'.[45] The establishment of criteria for assessing what constitutes an 'illegitimate interference' is of paramount importance considering the absolute character of the freedom of thought and the fact that, as a result, there is no stage where a more detailed balancing of interest must be conducted in order to assess the (il)legitimacy of interferences.[46]

In addition, the question remains as to what constitutes a 'thought' and thus is protected against being revealed under coercion, and against undue manipulation.[47] The preparatory works of the human rights instruments do not provide much information in that regard.[48] One could be tempted to state that the concept of 'thought' covers a very wide range of mental states. In the General Comment on Article 18 of the ICCPR, for instance, it is stated that the freedom of thought is 'far-reaching and profound; it encompasses freedom of thought on all matters'.[49] Legal specialists also conclude that the scope of freedom of thought captures about every kind of 'thought' one can conceive of,[50] and – together with the closely related freedom of opinion – 'protects all aspects of our inner lives, whether profound or trivial including emotional states and political opinions'.[51] In an exceptional judgement, the ECtHR considered that the name parents intend to give to their child, is a thought falling under the scope of Article 9 ECHR due to the 'comprehensiveness of the concept of thought'.[52] This suggests that the freedom of thought also covers more trivial thoughts. However, this seems to stand out against other principles that are more durably established in case law. These principles favour a more restrictive approach, as they imply that the freedom of thought only 'denotes views that attain a certain level of cogency, seriousness, cohesion and importance'.[53] 'Thoughts' only fall under the scope of Article 9 of the ECHR when they relate to a 'weighty and substantial aspect of human life and behaviour' and are considered worthy of protection in European democratic society.[54] The preparatory works regarding Article 18 of the

45 Manfred Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary* (N.P. Engel Publisher 2005) 412.

46 Alegre, 'Rethinking Freedom of Thought' (n34), 221.

47 In Articles 18 of the UDHR and 18(2) of the ICCPR, the freedom to change one's 'belief' is protected, whereas in other human rights instruments, there is mentioning of 'thoughts'. Bublitz refers to this as the 'thought-belief discrepancy'. Bublitz argues, convincingly, that within the context of the *forum internum,* the notions of 'thought' and 'belief' should be interpreted similarly, and broadly. 'Thoughts', in that sense, are 'beliefs on all matters'. In this interpretation, the consistency of the human rights protection offered within the UN, EU, and Council of Europe (CoE) frameworks is safeguarded. Jan-Christoph Bublitz, 'Freedom of Thought as an International Human Right: Elements of a Theory of a Living Right' in Jonathan Blitz and Jan-Christoph Bublitz (eds), *The Law and Ethics of Freedom of Thought,* vol. 1 (Palgrave Macmillan 2021).

48 Loukis G Loucaides, 'The Right to Freedom of Thought as Protected by the European Convention on Human Rights' (2012) 1 Cyprus Hum Rights Law Rev 79; Sjors Ligthart, 'Freedom of Thought in Europe: Do Advances in 'Brain-Reading' Technology Call for Revision?' (2020) 7 JLB.

49 CCPR, 'General Comment 22' (n39), 1.

50 Martin Scheinin, 'Freedom of Thought, Conscience and Religion' (2000) 54 Stud Theol 5; Bahia Tahzib *Freedom of Religion or Belief. Ensuring Effective International Legal Protection* (Martinus Nijhoff Publishers 2005); O'Callaghan and Shiner, 'The Right to Freedom of Thought' (n40); Karl J Partch, 'Freedom of Conscience and Expression, and Political Freedoms' in Louis Henkin (ed), *The International Bill of Rights. The Covenant on Civil and Political Rights* (Columbia University Press 1981).

51 Susie Alegre, 'Regulating around Freedom in the '*Forum Internum*'' (2021) 21 ERA Forum 593.

52 *Salonen v. Finland* App no 27868/95 (ECtHR 2 July 1997).

53 *Campbell & Cosans v. The UK* App nos 7511/76 and 7743/76 (ECtHR 25 February 1982), para 36; *Bayatyan v. Armenia* App no 23459/03 (ECtHR 7 July 2011), para 110.

54 ibid., para 36; Jim Murdoch, *Freedom of Thought, Conscience and Religion. A Guide to the Implementation of Article 9 of the European Convention on Human Rights. Human Rights Handbooks no. 9* (Council of Europe 2007).

UDHR similarly suggest a more narrow interpretation.[55] As repeatedly echoed in the legal doctrine, only religious, philosophical, scientific, and political thoughts appear eligible for protection,[56] which means that so-called more 'trivial' mental states would fall out of the scope. Contrary to Alegre, Bublitz, for instance, asserts that emotions do not fall within the scope of the freedom of thought since there is no indication that it entails freedom of emotion.[57] Overall, it is rather unlikely that the freedom of thought would be violated when simple thoughts such as the memory of what one ate for breakfast, or the fact that one is not looking forward to an upcoming school reunion, are revealed against one's will.

By way of conclusion, it is hard to argue with the view of McCarthy-Jones that 'the right to freedom of thought, which is supposed to guard citizens' mental autonomy in the face of such threats, is so under-developed as to be not fit for the purpose'.[58] The precise value of the freedom of thought in protecting mental states remains unclear due to the paucity of case law on the scope, the meaning and potential violations of its internal aspect. Moreover, the case law on the freedom of thought consistently deals with interferences with the *forum externum* that might indirectly interfere with the *forum internum* in so far as it concerns the coercion of someone to adopt certain thoughts or beliefs in a way that is publicly observable (for example, in the form of behaviour). How this indirect mental manipulation impacts the *forum internum,* however, is mostly disregarded.

2.3. Right to Freedom of Opinion

Closely related to the right to freedom of thought is the right to freedom of opinion, enshrined in Articles 19 of the UDHR, 19(1) of the ICCPR, 10 of the ECHR, and 11 of the CFR. The freedom of opinion not only protects the freedom of expression of opinions, but also the freedom to hold opinions without interference, as well as to change and develop opinions after new information is gained and processed. This freedom 'requires States parties to refrain from any interference with freedom of opinion (by indoctrination, "brainwashing", influencing the conscious or subconscious mind with psychoactive drugs or other means of manipulation) and to prevent private parties from doing so'.[59]

Thus, similar to freedom of thought, the core aim of freedom of opinion appears to be safeguarding the privacy and autonomy of cognitive processes. Both rights, in their internal dimension, show a remarkable resemblance.[60] Consequently, similar interpretative hurdles arise. First, there is a lack of engagement in case law with the internal side of the freedom of opinion, as the focus tends to fall upon the freedom of expression of opinion. Second, the differentiation between impermissible interferences with the freedom of opinion and permissible interferences, such as marketing or education, is essential - but has not yet received proper reflection. Third, the scope of this freedom has not been

55 Ligthart, 'Freedom of Thought in Europe' (n48).

56 Jim Murdoch, *Freedom of Thought, Conscience and Religion* (n54); Bernadette Rainey, Elisabeth Wicks, and Clare Ovey (eds.), *The European Convention on Human Rights* (7th edn, OUP 2017); Sjors Ligthart and others, 'Forensic Brain-Reading and Mental Privacy in European Human Rights Law: Foundations and Challenges' (2021) 14 Neuroethics 191.

57 Bublitz, 'Freedom of Thought as an International Human Rights: Elements of a Theory of a Living Right' (n47).

58 Simon McCarthy-Jones, 'Freedom of Thought: Who, What, and Why?' in Jonathan Blitz and Jan-Christoph Bublitz (eds), *The Law and Ethics of Freedom of Thought,* vol. 1 (Palgrave Macmillan 2021) 42.

59 Nowak, *U.N. Covenant on Civil and Political Rights* (n45), 442.

60 COE, Preparatory work on Article 9 of the European Convention on Human Rights' (1956) DH (56)14.

clearly defined. The general comment to Article 19 of the ICCPR states that 'all forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature'.[61] Here again, despite the fact that in principle *all forms of opinion* are said to be protected, the right to hold opinions seemingly applies only to opinions on issues that have some level of personal bearing.

2.4. Right to (Mental) Integrity

The right to integrity constitutes an autonomous right in international and regional human rights law. This right is typically considered to entail a right to bodily integrity, as well as a right to mental integrity. Most case law and doctrinal analyses focus on the right to bodily integrity. This right might protect the mind whenever the methods that are used to interfere with people's minds also interfere with their bodily integrity. For instance, conversion therapies that incorporate physical punishments to 'change non-heteronormative sexual orientations and non-cisnormative gender identities'[62] interfere with an individual's bodily integrity. In the same way, unsolicited neurotechnological interventions that impact one's mind by manipulating neural activity by using electrical currents could violate one's physical integrity.[63]

However, in cases where one's bodily integrity is not violated, does the right to mental integrity apply to the unsolicited alteration of mental states? The most explicit formulation of a right to mental integrity appears in Article 3 of the CFR. Very generally, its protection entails a negative right that protects individuals from interference with their physical and mental sphere, as well as a positive right that entails self-determination in relation to the body and the mind. Notwithstanding its fundamental importance,[64] clear definitions, delineations of its scope, or principles that could guide interpretation are lacking. Explanatory reports or the preparatory works regarding Article 3 of the CFR offer no guidance,[65] nor does the case law of the Court of Justice of the European Union (CJEU).

To remedy this lack of guidance, it is necessary to look at other human rights instruments. Since the right to integrity under Article 3 of the CFR is based on the principles of the Oviedo Convention,[66] the latter may function as an interpretative tool to the right of mental integrity in the biomedical context.[67] One of its fundamental aims is the protection of physical and mental

61 CCPR, 'General Comment No. 34 to Article 19 International Covenant on Civil and Political Rights' (2011) DOC CCPR/C/GC/34, 2.

62 HRC, 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' (2020) A/HRC/44/53, 2.

63 Jesper Ryberg, *Neurointerventions, Crime, and Punishment: Ethical Considerations* (OUP 2019); This is in line with Marshall's observation where she links the protection of the inner sphere to the protection of its 'biological substrate', that is, the brain as the biological space for thought production; Jill Marshall, 'An Overview of the Development of the Right to Personal Identity at the European Court of Human Rights' in Jill Marshall (ed.), *Personal Identity and the European Court of Human Rights* (Routledge 2022).

64 Reflected by the fact that the right to integrity is also a general principle of EU law; Case C-377/98 *Netherlands v European Parliament and Council* [2001]. ECLI:EU:C:2001:523.

65 Jackie Jones, 'Human Dignity in the EU Charter of Fundamental Rights and its Interpretation before the European Court of Justice' (2012) 33 Liverp Law Rev 281.

66 'Explanations Relating to the Charter of Fundamental Rights' (2007) 2007/C303/02.

67 Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *Commentary on the EU Treaties and the Charter of Fundamental Rights* (OUP 2019).

integrity.[68] Following Lwoff, this implies that this Convention 'requires that individuals are protected in their ability to exercise control over what happens to them, including with regard to their body, and mental state, as well as their physical and mental data'.[69] Interpreted in such an extensive way, the Oviedo Convention requires a strong, binding protection of the *forum internum.* Nonetheless, this interpretation appears aspirational rather than established in practice.

By contrast, the ECtHR does give some substance to the right to mental integrity.[70] The ECtHR considers the protection of mental, psychological, or moral integrity an essential aspect of the right to private life enshrined in Article 8 ECHR.[71] Moreover, severe infringements upon one's mental integrity which amount to torture or degrading or inhumane treatment are also prohibited under Article 3 of the ECHR.[72] These two provisions thus, in their own way, prohibit treatment that violates one's (mental) integrity, and require States to adopt measures to avoid violations of individuals' mental integrity within private relations.[73] As for the concrete meaning of the right to mental integrity, different aspects can be distinguished within the case law of the ECtHR. First, the right to mental integrity is interpreted in such a way as to include a right to mental health, and access to appropriate psychological treatment for those who need it. The ECtHR considers that 'mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity and that the preservation of mental stability is in that context an indispensable precondition'.[74] Second, this right also entails a right to be free from mental or psychological harm in the broad sense.[75] It prohibits treatment of a person that results in mental suffering, anxiety, humiliation, and indignity.[76] The ECtHR has consistently held that, in the context of individuals in police custody for instance, maltreatment where the person concerned was subjected to assault, insults, and sleep deprivation, amounted to a violation of their mental integrity.[77] Psychological

68 Article 1 and Article 5 Oviedo Convention; Roberto Andorno, 'The Oviedo Convention: A European Legal Framework at the Intersection of Human Rights and Health Law' (2005) 2 JIBL 133.

69 Laurence Lwoff, 'New Technologies, New Challenges for Human Rights? The Work of the Council of Europe' (2020) 27 Eur J Health Law 335, 341.

70 Following the principles established by Article 52(3) CFR, Article 3 CFR should be read alongside the right to personal integrity as incorporated in the ECHR framework.

71 *X and Y v. The Netherlands* App no 8978/80 (ECtHR 26 March 1985), para 22; *Tysiac v. Poland* App no 5410/03 (ECtHR 20 March 2007); *Dordevic v. Croatia* App no 41526/10 (ECtHR 24 July 2012). The right to mental integrity, in the case law of the ECtHR, is mostly referred to as the right to psychological or moral integrity. For instance, mental integrity: *Jalloh v Germany* App no 54810/00 (ECtHR July 2006); *Dordevic v. Croatia*; psychological integrity: *Botta v. Italy* App no 21439/93, (ECtHR 24 February 1998); *Tysiac v. Poland*; *Soderman v. Sweden* App no 5786/08 (ECtHR 12 November 2013); moral integrity: *Bensaid v. The United Kingdom* App no 44599/98 (ECtHR 6 February 2001); *Wainwright v The United Kingdom A*pp no 12350/04 (ECtHR 26 September 2006); These notions, however, are seemingly used as synonyms within the ECHR framework; Bublitz 'The Nascent Right to Psychological Integrity and Mental Self-Determination' (n15).

72 *Jalloh v Germany* (n71); *Dordevic v. Croatia* (n71).

73 *Tysiac v. Poland* (n71), para 144; *Y v. Slovenia* App no 41107/10 (ECtHR 28 May 2015).

74 *Bensaid v. The United Kingdom* (n71), para 47.

75 Jan-Christoph Bublitz 'The Nascent Right to Psychological Integrity and Mental Self-Determination' (n15).

76 Marcello Ienca and Roberto Andorno, 'Towards New Human Rights in the Age of Neuroscience and Neurotechnology' (2017) 13 Life Sci Soc Policy 1.

77 *Selmouni v. France* App no 25803/94 (ECtHR 28 July 1999), paras 89–99; *Akkoc v. Turkey* App nos 22947/93 and 22948/93 (ECtHR 10 October 2000), para 116.

harm is interpreted in a very broad way as it does not require harm to mental capacities.[78] For instance, the right to psychological integrity has also been successfully invoked in cases where harm is caused to one's personal reputation.[79]

The right to mental integrity can also be found in other human rights instruments. It features in the UN Convention on the Rights of the Child,[80] where this right is also considered a right to mental health and a prohibition of psychological harm and abuse.[81] Furthermore, a similar protection is embedded in Article 7 of the ICCPR – which resembles the protection offered by Article 3 of the ECHR[82] – and Article 9(1) of the ICCPR that holds a right to security which entails the 'freedom from injury to the body and the mind, or bodily and mental integrity'.[83] In addition, the International Committee on Bioethics (ICB) of United Nations Educational, Scientific and Cultural Organization (UNESCO) observes that Article 1 of the UDHR implies the protection of the mind against arbitrary alteration and manipulation. The ICB states that 'the integrity of the body, and the brain/mind as part of the body, should be recognized, respected and protected from arbitrary alteration, modification or manipulation, which violates it and causes harm to the subject (who becomes an object)'.[84] As this assertion is to be appreciated in a context of neurotechnological manipulation of the mind, it rather concerns an indirect protection of the mind through the protection of bodily integrity. Lastly, the Convention on the Rights of Persons with Disabilities (CRPD) mentions the protection of mental integrity in its Article 17. In the case of *X v. Tanzania*, the United Nations Committee on the Rights of Persons with Disabilities (UNCRPD) observes that the right to integrity of a person 'is linked to the idea of human dignity and that each person's physical and mental space ought to be protected. It includes the prohibition of physical and mental torture, inhuman and degrading treatment and punishment, as well as a wide range of less grave forms of interference with a person's body and mind'.[85] Although the case concerned treatment that caused mental harm amounting to torture or inhumane and degrading treatment, the Committee deemed it necessary to also acknowledge that 'a wide range of less grave forms of interference with a person's body and mind' falls within the scope of the right to integrity. This is an interesting piece of case law that requires further elaboration, considering that, apart from this example, the right to integrity in Article 17 of the UNCRPD mainly aims to ensure that adequate informed consent is obtained from those with a disability.[86]

In conclusion, the right to mental integrity has not been attributed an important role so far, and, as a result, its scope and meaning remain ill defined.[87] The core attributes that can be identified – that

78 Sümeyye E Biber and Marianna Capasso 'The Right to Mental Integrity in the Age of Artificial Intelligence: Cognitive Human Enhancement Technologies' in Bart Custers and Eduard Fosch-Villaronga (eds.) *Law and Artificial Intelligence* (T.M.C. Asser Press 2022).

79 *Pfeiffer v. Austria* App no 12556/03(ECtHR 15 November 2007), para 35.

80 UN Convention of the Rights of the Child (1989) Resolution 44/25.

81 Lisa Grans, 'Honour-Related Violence and Children's Right to Physical and Psychological Integrity' (2017) 23 Nord J Hum Rights 146.

82 CCPR, '*General Comment No. 20 on Article 7'* (1992) U.N. Doc. HRI/GEN/1/Rev.1 at 30.

83 CCPR, '*General Comment No. 35 on Article 9*' (2014) U.N. Doc. CCPR/C/GC/35.

84 IBC, 'Report of the IBC on ethical issues of neurotechnology' (2021) SHS/BIO/IBC-28/2021/3 Rev., 11.

85 *X v. Tanzania* App no 22/2014 (UN Committee on the Rights of Persons with Disabilities 31 August 2017), para 8.7.

86 Mary Keys, 'Article 17 [Protecting the Integrity of the Person]' in Valentina Della Fina, Rachelle Cera and Guiseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities. A Commentary* (Springer 2017).

87 Bublitz, 'My Mind is Mine!?' (n14).

is, a right to mental health, and a right to be free form psychological harm – do not directly contribute to the protection of mental privacy or mental autonomy. It can be argued that the mere fact that an interference in one's mental life without consent constitutes infliction of mental harm, without requiring any resulting psychological distress or anxiety. In that sense, the right to mental integrity might protect mental autonomy, and as such be a valuable link in a general mind-protection framework. Nevertheless, it remains unclear how interests should be balanced and what factors would be important when establishing what constitutes undue interference with one's mental sphere. Further development of the right to mental integrity is needed in order to establish what role it could play in protecting mental autonomy.

2.5. Right to Respect for Private Life

Marshall states that the right to private life prohibits illegitimate interference by the government or other private parties into one's private space, 'be that in their head or in their home'.[88] This suggests that the right to private life grants protection to unsolicited interferences with one's mental sphere. Since the scope of the freedom of thought is ambiguous, it might be that those mental states that do not fall under its absolute protection still lie within the scope of the right to private life, as this right might afford a 'broad and holistic protection, including of thoughts, as part of the right to identity and autonomy'.[89]

The right to private life – also often referred to as the right to privacy[90] – is a well-established fundamental right within the human rights framework, as it is enshrined in Articles 12 of the UDHR, 17 of the ICCPR, 8 of the ECHR, and 7 of the CFR.[91] A basal articulation of this right can be found in the classic definition by Warren and Brandeis who described the right to privacy as 'the right to be let alone'.[92] This traditional conceptualisation of the right to private life has been greatly elaborated in doctrine. The ECtHR broadened the scope of this right from guaranteeing the protection of an individual's most private inner sphere against unwanted intrusion, to protecting a private sphere that extends to the social environment needed for the development and fulfilment of one's personality and relations with others.[93] Because of this extensive conceptualisation by the ECtHR, this paragraph will focus on the right to private life under the ECHR. The extensive

88 Jill Marshall, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009), 3.

89 Sabine Michalowski, 'Critical Reflections on the Need for a Right to Mental Self-Determination' in Andreas von Arnauld, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook of New Human Rights* (CUP 2020) 407.

90 To avoid terminological confusion, it is important to stress that the right to private life and the right to privacy are often used interchangeably. While Article 17 ICCPR, for instance, holds the right to privacy, and Article 8 ECHR protects the right to private life, they mean the same thing. Nonetheless, in this article, the distinction is made between the right to privacy as synonymous with the right to private life, and the right to privacy *sensu stricto* which essentially aims at enforcing people's ability to exercise control over their personal information and prohibit the illegitimate collection, storage, processing, and disclosure of that information by government institutions or private parties. The latter is a component of the former, alongside the right to integrity, autonomy, and identity.

91 These legal provisions also include the protection of a right to respect for family life, home and correspondence. In this article, given the fact that this analysis aims at examining the protection of people's private mind, the focus naturally falls upon the private life aspect.

92 Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 15 *Harv Law Rev* 193.

93 *Niemietz v. Germany* App no 13710/88 (ECtHR 16 December 1992), para 29.

case law of the ECtHR on the right to private life allows for the right to be divided into three categories of protected goods pertaining to individuals:

1. their physical, psychological, or moral integrity;
2. their privacy; and
3. their autonomy and identity.[94]

These three dimensions represent strongly intertwined personality rights that overlap to such a degree that it is difficult to isolate them. Nonetheless, as a systematic analysis benefits from breaking down this right into its subcomponents, it is suitable to follow the threefold division. Since the right to (mental) integrity has already been analysed above, the right to private life will here be examined in its dimensions of privacy and autonomy and identity.

2.5.1. Privacy

Elaborating on the right to privacy as 'a right to be let alone', the notion of informational privacy was further developed, and became central in today's data-driven society. This notion of informational privacy aligns closely with the privacy aspect of the right to private life, and especially with its data protection pillar. Informational privacy can be defined as 'the ability to control the collection, use and disclosure of one's personal information'.[95] Within the informational privacy approach, mental privacy is 'the ability to determine ourselves when, how and to what extent information about our thoughts is communicated to others'.[96] Several legal experts claim that the general right to privacy entails such a right to mental privacy.[97] It is important to establish to what extent this is the case. The need therefore arises in contexts where information on people's thoughts, emotions or intentions are collected by making use of, for instance, (online) behaviour reading techniques or neurotechnological brain reading. Considering these (neuro-)technological developments, the means of surveillance of people's mental life appear to be exponentially expanding, which makes it considerably harder to ensure and regulate the privacy of our private life.[98]

The right to privacy entails the freedom from unwanted collection, storage, use, and disclosure of information.[99] This is in part operationalised by the right to data protection, a right that is recognised as an essential pillar of the right to private life as enshrined in Articles 8 of the ECHR[100] and 17 of the ICCPR.[101] Within the EU framework, the right to data protection is considered a fully autonomous

94 COE, 'Guide on Article 8 - Right to Respect for Private and Family Life, Home and Correspondence' (Last updated 31 August 2021) accessed 13 February 2023.

95 Roger JR Levesque, *Adolescence, Privacy, and the Law: A Developmental Science Perspective* (Oxford Scholarship Online 2016), 96.

96 For this analysis, it is more accurate to speak of 'information about our mental states', as this analysis investigates investigating whether the current right to privacy applies to mental information of all sorts.

97 Ligthart and others, 'Rethinking the Right to Freedom of Thought' (n34).

98 Sarah Trotter, 'Narratives of absence. On the Construction and Limits of the Category of Personal Identity in European Human Rights Law' in Jill Marshall (ed). *Personal Identity and the European Court of Human Rights* (Routledge, 2022).

99 Nicole A Moreham, 'The Right to Respect for Private Life in The European Convention on Human Rights: A Re-examination' (2008) 1 EHRLR 42.

100 *S. & Marper v. UK* App nos 30562/04, 30566/04 (ECtHR 4 December 2008), para 103; COE, 'Guide on Article 8' (n94); COE, 'Guide to the Case-Law of the of the European Court of Human Rights: Data protection' (Last updated 31 August 2022) accessed 13 February 2023.

101 Nowak, *U.N. Covenant on Civil and Political Rights* (n45).

fundamental right laid down in Article 8 of the CFR.[102] In the case law of the ECtHR, the right to privacy and the right to data protection overlap to such an extent that the applicable principles are largely identical.[103] In the same way, the CJEU consistently mentions Articles 7 and 8 of the CFR in the same breath. Moreover, the meaning, scope, and conditions for the limitation of Article 7 of the CFR as well as Article 8 of the CFR are to be interpreted in accordance with Article 8 of the ECHR considering their corresponding nature.[104] However, the scope of Article 8 of the CFR seems determined by secondary EU law,[105] such as the General Data Protection Regulation (GDPR).[106]

The right to privacy (including data protection) is applicable insofar the information collected, stored, used, or disclosed[107] constitutes personal data - that is, data that contains unique information about an individual that enables their identification.[108] In addition, Articles 8 of the ECHR and 7 of the CFR are applicable whenever the collection, storage, use or disclosure of the data affects a personal interest.[109] The ECtHR assesses whether, taking into account all contextual elements, the information concerned touches upon private interests, and could pose harm to their private life. This criterium is taken very broadly.[110] The information does not have to be considered sensitive,[111] and might even be publicly available,[112] to impact one's private life. It is important to consider that the context and the possible use of the information is relevant for assessing whether data fall within

102 Even two decades after it was established, debate is ongoing about almost every aspect of the autonomous fundamental right to data protection. For a debate on the question as to whether it can be considered a fully-fledged autonomous right, and what its relation is with the right to privacy, see, for example, Bart van der Sloot, 'Legal Fundamentalism: Is Data Protection Really a Fundamental Right?' in Ronald Leenes and others (eds.), *Data Protection and Privacy: (In)visibilities and Infrastructures* (Springer 2017); Juliane Kokkot and Christoph Sobotta, 'The Distinction between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR' (2013) 3 Int Data Priv Law 222; Gloria Gonzalez Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (Springer 2014).

103 Nevertheless, Convention 108 (*Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* [1981]) lays down more specific guidelines on how the right to data protection needs to be constituted when data is processed. This regulation has been updated in 2018, and relabelled Convention 108+.

104 Case C-400/10 PPU *J. McB. v. L.E.* [2010], ECLI:EU:C:2010:582, para 53; Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR v. Land Hessen* [2010], ECLI:EU:C:2010:662, para 52; Article 52(3) CFR.

105 Steve Peers and others (eds), *The EU Charter of Fundamental Right: A Commentary* (Hart Publishing 2019).

106 EU Regulation 2016/679 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. OJ L 119/1. For an excellent analysis of Article 8 CFR, its relation to the GDPR, and the conditions for limitations, see Plixavra Vogiatzoglou and Peggy Valcke, 'Two Decades of Article 8 CFR: A Critical Exploration of the Fundamental Right to Data Protection in EU law' in Eleni Kosta, Ronald Leenes and Irene Kamara (eds), *Research Handbook on EU Data Protection* (Edward Elgar 2022).

107 Within the EU framework, the strong data protection mechanism only applies when personal data is processed, that is, any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction; Article 4(2) GDPR.

108 *S. & Marper v. UK* (n100), para 72; *Aycaguer v. France* App no 8806/12 (ECtHR 22 June 2017), para 33; Article 2(a) Convention 108+; Article 4(1) GDPR.

109 This is not the case within the GDPR, which means that the right to data protection ex Article 8 CFR can be considered broader and only requires the data subject to be identifiable.

110 *Amann v. Switzerland* App no 27798/95 (ECtHR 16 February 2000), paras 65, 80; *Rotaru v Romania* App no 28341/95 (ECtHR 4 May 2000), para 46.

111 *M.N. a.o. v. San Marino* App no 28005/12 (ECtHR 7 July 2015).

112 *Rotaru v Romania* (n110), para 43; *Cemalettin Canli v. Turkey* App no 22427/04 (ECtHR 18 February 2009), para 33.

the scope of Article 8 of the ECHR.[113] Some information might seem trivial, but may greatly impact private interests in specific situations, such as forensic contexts. Notwithstanding the broad interpretation of 'private life', not all interferences with personal information are interferences with the right to private life. Trivial data, that has no impact on one's private life, will not be protected under Article 8 of the ECHR.

What does the demarcation of the scope of the right to privacy and the right to data protection mean for data on people's mental states? A first observation is that the case law of the ECtHR on a person's privacy interests is always related to information that is present in their *forum externum.* The ECtHR has issued judgements in cases where State authorities – or private third parties – interfered with people's information concerning bank accounts and transactions,[114] medical data,[115] or their images and photographs.[116] The collection and use of (biometric) information without consent, for instance, can be seen as extremely personal and belonging to the core of one's being, yet, it is not part of one's mental sphere. There is seemingly no case law in which the right to private life played a decisive role in protecting individual's thoughts, emotions, or intentions solely in its inner dimension, without any practical implications in the outside world. Some case law, however, seems to suggest that there might be a role to play for the right to private life in this regard. For example, the ECtHR considered that 'information about personal religious and philosophical conviction concerns some of the most intimate aspects of private life' that falls not only within the scope of Article 9 of the ECHR, but also of Article 8 of the ECHR.[117] In this case, it concerned parents who were obliged to provide school authorities with information about the religious beliefs of their children in order to be eligible for an exemption from participating in religious activities. These religious beliefs, which belong to the *forum internum*, are considered to fall within the scope of the right to privacy.

Mental data on its own, or together with other kinds of information, would in many cases constitute personal information since it would enable the identification of the data subject. However, this data might not always impact the subject's private life. When a person's intention to vote in an upcoming election, or their sexual preference is deduced from their (online) behaviour, this information will fall within the scope of Article 8 ECHR, as it concerns a sensitive and personal matter. But does the same go for the intention to visit the zoo tomorrow, or the emotions one feels when watching a documentary? Such information might turn out not to fall within the scope of the right to privacy as this do not seem to affect any important private interests.[118]

Subsequently, an interference with the right to privacy and data protection does not necessarily equal a violation. The right to privacy is violated only when the interference occurs in a way that fails to meet the established conditions of legality, legitimacy, and proportionality, as laid down in Articles 8(2) of the ECHR and 52(1) of the CFR, and General Comment 16 to the ICCPR.[119] The ECtHR takes many different elements into account in

113 *S. & Marper v. UK* (n100), para 67; *G.S.B. v. Switzerland* App no 28601/11 (ECtHR 22 December 2015), para 93.

114 *M.N. a.o. v. San Marino* (n111).

115 *L.H. v. Latvia* App no 52019/07 (ECtHR 29 April 2014).

116 *Von Hannover v. Germany* App nos 40660/08 and 60641/08 (ECtHR 7 February 2012).

117 *Folgerø v Norway* App no 15472/02 (ECtHR 29 June 2007), para 98.

118 Keeping in mind that there are contexts imaginable where this might constitute important private information, for example, in forensic contexts where the whereabouts of the data subject might be of key importance.

119 Although the wording of the conditions differ to some extent, these conditions are interpreted very similarly, especially in the light of constant judicial dialogue between the CJEU and ECtHR which strive for an harmonious interpretation; *Handbook on European Data Protection Law 2018* (Publication Office of the EU 2018).

the balancing of interests. Important elements are, amongst others, the nature of the data, the safeguards in place, and the expectancy of privacy.[120] Hence, although mental information that is not externalised will in many cases constitute very personal information for which one might expect a high level of privacy, the question as to whether an interference with the right to private life is proportionate and necessary will ultimately depend on the seriousness of the infringement.[121]

By way of conclusion, there appears to be valuable potential in the right to privacy in protecting people's inner sphere as it prohibits the collection, storage or disclosure of personal information when this would compromise fundamental interests of an individual. Yet, it is unclear just how the right to privacy *sensu strictu*, as conceptualised today, applies to unexpressed mental states, including data on unexpressed mental states. While it protects against the collection, storage, and disclosure of information of some importance, it does not *per definition* cover all sorts of data on people's mental states. Moreover, in some instances an interference with the right to privacy might be justified. One may wonder if this is desirable as, for instance, the information on one's emotional reaction to certain commercial advertisements might not be highly personal or sensitive, whereas its collection by companies might nevertheless give rise to serious moral concerns. This prompts the question as to whether mental information requires a special status under the right to privacy and therefore receive absolute protection to ensure robust safeguards for mental privacy. Or are there instances where an interference with mental information is justified and the existing safeguards provided by the derogable right to privacy, combined with the absolute freedom of thought, are sufficient? These are important questions that need to be addressed when reflecting on how the mind should be protected by human rights law.

2.5.2. Autonomy & personal identity

The right to autonomy and identity has gained a position at the core of the right to private life, to that extent that the right to private life ultimately protects the right to 'develop one's identity, and to live one's life in the manner of one's choosing'.[122] Altering one's mental states by interfering with their mental processes might violate mental autonomy as it might erode the ability to exert control over one's own mental functions. This in turn is likely to undermine one's personal identity, autonomy, agency, authenticity, and self. It seems plausible that the right to private life, in its dimension of the right to personal autonomy and identity, provides a remedy for the threats posed to mental autonomy.[123]

The right to personal autonomy plays a central role in human rights law, as it is closely related to the fundamental notions of human dignity and personal freedom.[124] The case law of the ECtHR

120 Peers and others (eds), *The EU Charter of Fundamental Right: A Commentary* (n105).

121 *S. & Marper v. UK* (n100), para 86.

122 Moreham, 'The Right to Respect for Private Life' (n99), 46.

123 In a recent rapport, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment asserted, while addressing the risks of neurotechnology, that the right to personal autonomy could also be developed within the prohibition of torture, as he states that 'profound disruption of one's mental identity, capacity or autonomy' should be a covered by the prohibition of torture; UN Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punisment, 'Report' (2020) UN Doc. A/HRC/43/49, para 32.

124 Nelleke R Koffeman, *(The Right to) Personal Autonomy in the Case Law of the European Court of Human Rights.* (Report for Staatscommissie Grondwet 2010) < https://hdl.handle.net/1887/15890 > accessed 13 February 2023.

attributes two different statuses to the right to personal autonomy. On the one hand, it is considered a general principle that underlies all Convention rights.[125] On the other hand, the right to personal autonomy seems to have evolved into an autonomous right, emerging from the broader concepts of human dignity and personal freedom.[126] The concept of personal autonomy nonetheless remains elusive as it is difficult to delineate the interests covered by this right. Generally, this right aims to establish the required social conditions that allow individuals to live as autonomous beings according to their beliefs and values.[127] It ensures the freedom to personal development and the right to establish relationships with other human beings and the outside world.[128] The right to personal autonomy and the basic principles of its application have been developed predominantly in case law relating to procreation,[129] sexual life,[130] and end of life.[131] This conceptualisation, however, does not concern the autonomy of peoples' minds. It rather concerns the autonomy of people to live by their inner experienced selves, their values, beliefs, and feelings, and to present themselves in this way to the outside world. Referring to the examples given above, the right to autonomy in relation to, for instance, sexual life does not directly address the thoughts, feelings, intentions, and beliefs – that is, the inner life – that underpin people's sexual preferences, but rather the right to develop and express those feelings, beliefs, intentions, and thoughts by living their preferred sexual life.

A similar analysis is required about the right to personal identity.[132] The ECtHR asserts that this right entails the right for individuals to establish and develop details of their identity according to their own wishes, and allows them to live and manifest this identity.[133] The case law[134] in this regard mainly concerns the right to sexual identity,[135] gender identity,[136] and ethnic and cultural identity.[137] More trivial issues are also protected by the right to personal identity, such as the choice to wear a beard.[138] Nowak observes, in the context of the ICCPR, that 'identity includes, in addition to one's name, one's appearance, clothing, hair and beard style, one's gender, genetic code, feelings and thoughts, one's specific past, as well as confession to a belief or some other conviction'.[139] Marshall observed that 'some of the Court's [ECtHR's] jurisprudence is compatible with a view

125 *Pretty v. UK* (n19), para 61.
126 *Evans v. UK* App no 6339/05(ECtHR 10 April 2007), para 71.
127 Bart Kamphorst, 'The Primacy of Human Autonomy: Understanding Agent Rights through the Human Rights Framework' (2012) CEUR Workshop Proceedings 19.
128 *Niemietz v. Germany* (n93), para 29; *Pretty v. UK* (n19), para 61.
129 *Evans v. UK* (n126).
130 *Dudgeon v. UK* App no 7525/76 (ECtHR 22 October 1981); *Smith and Grady v. UK* App Nos 33985/96 and 33886/96 (ECtHR 27 September 1999).
131 *Pretty v. UK* (n19).
132 For a case law overview, see, for example, Rainey, Wicks and Ovey 'The European Convention on Human Rights' (n56).
133 Marshall, 'An Overview of the Development of the Right to Personal Identity' (n63).
134 Other forms of identity are also protected within the ECHR framework, but under different provisions. For example, Article 9 of the ECHR can be said to protect religious identity, whereas Article 11 could be considered to contribute to various forms of collective identity.
135 *Dudgeon v.* UK (n130).
136 *Goodwin v. UK* App no 28957/95 (ECtHR 11 July 2002); *Van Kück v. Germany* App no 35968/97 (ECtHR 12 June 2003).
137 *Ciubotaru v. Moldova* App no 27138/04(ECtHR 27 April 2010)*; Winterstein a.o. v. France* App no 27013/07 (ECtHR 17 October 2013).
138 *Biržietis v. Lithuania* App no 49304/09 (ECtHR 14 June 2016).
139 Nowak, *U.N. Covenant on Civil and Political Rights* (n45), 386.

of identity that reflects the importance of building and retaining an ability and capacity that is each person's domain, to enable them to think reflectively without interference, to be in control of their own faculties, to decide their own plan of life'.[140] Such an approach indicates that the right to personal identity might address concerns around personal identity interests that come with unsolicited influencing, altering, or manipulation of one's mind. However, when addressed in jurisprudence and legal doctrine, the right to identity, like the right to personal autonomy, mainly touches upon the manifestation of identity in, and its recognition and acceptance by the outside world. In this way, it does not directly concern the identity as lived and experienced in the *forum internum* of a person. Rather, it is the freedom to live and express oneself according to one's identity.

In conclusion, the right to personal autonomy and identity aims to guarantee that individuals can make decisions according to their inner beliefs and values, so that they can construct their personal identities in relation to their social environment. Although interfering with one's mental processes – by, for example, indoctrination or neurotechnological interventions – seems to fundamentally hinder the establishment of a private sphere where a person is free to make decisions, this right predominantly deals with the development and expression of identity and personal beliefs within the public sphere and their recognition by third parties, without explicitly considering possible repercussions on the *forum internum*.

3. CONCLUSION: THE PROTECTION OF THE MIND AS A LEGAL GOOD WITHIN HUMAN RIGHTS LAW?

The analysis allows for some conclusions on how current international and regional human rights instruments protect people's mental sphere against illegitimate intrusions that might compromise an individual's mental privacy and autonomy.

First, it is apparent that the human rights protection of people's mental sphere is not governed by a coherent right – such as the right to bodily integrity, that is devoted to the protection of people's physical sphere – or a consistent set of principles.

Second, however, the mind is still provided with a piecemeal protection against unsolicited manipulation and interference. Mental autonomy and privacy are to some degree covered by the human rights framework. As a grounding principle, the notion of human dignity demands for the protection of mental privacy and autonomy, and thus legitimises and grounds the establishment of a human rights framework that protects people's mental sphere. Furthermore, most importantly, the right to freedom of thought explicitly aims to protect a part of people's mental life. Nonetheless, this right is underdeveloped as, despite its long history, little to no attention has yet been paid to this absolute right in case law and legal doctrine. Consequently, the scope of the existing protection is opaque or, at best, very narrow. For its part, the right to private life, which aims to protect the most personal aspects of a person's life, entails several privacy and autonomy safeguards which might apply to a person's mind. More clarification is however needed in order to establish how the right to privacy, and the right to mental integrity exactly, protect one's inner sphere. This is a general observation that applies to all rights granting some form of protection to the *forum internum.* When applied in practice, the courts balance these rights in the context of a confrontation between certain internal beliefs, thoughts, or convictions, and the external world. The focus therefore lies on external behaviours rather than on what effect these have on the mental autonomy or

140 Marshall 'An Overview of the Development of the Right to Personal Identity' (n63) 11, 14.

mental privacy of the people concerned. There is a paucity of human rights case law directly addressing internal mental states as such, which results in a lack of substantial theorising on the protection of the mind. As a result, human rights law currently seems unfit for the purpose of effectively addressing issues such as online behaviour reading, or aggressive marketing practices by commercial corporations.

Legal experts and ethicists should weigh in on this issue in order to map out what a mind-protection framework should look like. So far, policy-makers and courts largely restrict themselves to emphasising that the sovereignty over one's thoughts, beliefs, decision-making, and personality-constituting features is a necessary and fundamental interest of every individual. In a next step, these claims should be substantiated by the establishment of an elaborate legal framework that facilitates and guarantees this sovereignty in a way that fits the current societal context. The fact that human rights courts did not have the opportunity yet to address violations of mental privacy or autonomy, does not take away from the observation that today's cultural and technological context requires the development of a general mind-protection framework. Such framework would offer guidance to courts when they would have to examine intrusions into one's mental sphere, and it would allow policy makers to rely on a clear framework when they consider regulating certain domains of public life, such as marketing practices or commercial neurotechnologies. As a first step in building a human rights framework to protect the mind, it is indispensable to reflect on the role that an evolutive interpretation of existing rights could play.[141] As stated, the right to freedom of thought holds potential to prohibit revealing or manipulating mental states against one's will. Determining the limits and content of this right, taking into account the living instrument doctrine, is of primordial importance as it constitutes the backbone of a mind-protection framework. It is crucial to establish whether the right to freedom of thought has a narrow or broad scope, whether its absolute character should be maintained as is, and what actions unduly interfere with this freedom. In addition, it should be clarified how the derogable protection provided by the right to private life can complement the absolute protection the right to freedom of thought offers to mental privacy and autonomy. The answers to these questions will contribute to the shaping of a mind-protection framework, which might have significant impact on, amongst others, established practices of forced psychiatric treatment, and the regulation of digital algorithms and neurotechnology. Consequently, notwithstanding the value of looking into the possibility of introducing new (neuro-specific) human rights to protect the mind, it must first be examined to examine what protection the current human rights frameworks might have to offer if they were to be interpreted in the light of the current scientific and societal context.

Finally, it is important to highlight that general principles are needed when it comes to protecting the mind through human rights law. In the context of neurotechnology, international and regional human rights institutions have put the issue of protecting the mental sphere high on the agenda.[142] They are looking into ways in which human rights should address the challenges neurotechnology poses for the privacy and autonomy of the human mind. These initiatives are to be welcomed. Nevertheless, it is important to also look beyond the context of neurotechnology, and reflect on

141 As been done by, for example, Alegre, 'Rethinking Freedom of Thought' (n34), 221; Ligthart and others, 'Rethinking the Right to Freedom of Thought' (n34).

142 See, for example, UN Human Rights Council, 'Resolution 51/03 on Neurotechnology and Human Rights' (6 October 2022) UN Doc. A/HRC/RES/51/3; Committee on Bioethics, 'Common Human Rights Challenges Raised by Different Applications of Neurotechnologies in the Biomedical Field' (2021).

what types of mental interference are unacceptable. Why would clear safeguards be created only tackling neurotechnological intrusion into the mind, and not intrusions by, for example, unacceptable forms of education or marketing? In today's society, the need for principles to assess whether certain online algorithms unduly manipulate the mental processes of individuals appears more pressing than legal mechanisms to specifically address neurotechnological manipulation of mental processes. The debate on the normative relevance of different ways to interfere with the mind needs to be explicitly addressed, and included into the neurorights debate.[143] Are there reasons to treat challenges posed by neurotechnology to mental privacy and autonomy in a different manner to similar challenges that originate from other means to interfere with the mind? From a pragmatic point of view, it might be justified to tackle different challenges separately, considering the specific contexts they arise in. From a moral perspective, however, it is indispensable to examine all ways to interfere with the mind, and provide legal – human rights – protection where needed.

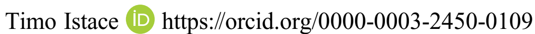
Declaration of Conflicting Interests

The author declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author disclosed receipt of the following financial support for the research, authorship, and/or publication of this article: This work was supported by the Fonds Wetenschappelijk Onderzoek, (grant number 45218).

ORCID iD


Timo Istace https://orcid.org/0000-0003-2450-0109

143 Jan-Christoph Bublitz, 'Why Means Matter. Legally Relevant Differences Between Direct and Indirect Interventions into Other Minds' in Nicole A. Vincent and others (eds.), *Neurointerventions and the Law (New York: OUP, 2020):49–88;* Neil Levy, *Neuroethics. Challenges for the 21st century* (CUP 2007); Farah Focquaert and Maartje Schermer, 'Moral Enhancement: Do Means Matter Morally?' (2015) 8 Neuroethics 139.