

Dwight Newman, QC, DPhil (Oxon)
Professor of Law & Canada Research Chair in Indigenous Rights in Constitutional and International Law
College of Law, University of Saskatchewan
15 Campus Drive
Saskatoon, SK
CANADA S7N 5A6
dwight.newman@usask.ca

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SUBMISSION TO THE UN SPECIAL RAPPORTEUR ON FREEDOM OF RELIGION OR BELIEF: Submission in Response to Call on Report on Respecting, Protecting and Fulfilling the Right to Freedom of Thought

I make this submission as a legal scholar who has been working on freedom of thought the last several years, principally in the context of Canada's constitutional law, although with a broader comparative and international interest in the topic as well. I make these submissions in my capacity as an individual and not on behalf of any organization.

I have made available to the Special Rapporteur several recent publications of mine: (1) Dwight Newman, "Interpreting Freedom of Thought in the Canadian Charter of Rights and Freedoms" (2019) 91 Supreme Court Law Review (2d) 107-122; (2) Monica Fitzpatrick & Dwight Newman, "Freedoms of Thought, Opinion, and Belief as Protected Inner Freedoms" (2020) 98 Supreme Court Law Review (2d) 249-271; (3) Dwight Newman, "Freedom of Thought in Canada: The History of a Forgetting and the Potential of a Remembering" (2021) European Journal of Comparative Law and Governance, forthcoming, in advance publication at: <https://doi.org/10.1163/22134514-bja10017>. I also have work-in-progress on more comparative dimensions of freedom of thought that I can make available at a later date if it remains of interest.

I welcome the Special Rapporteur's interest in this often neglected topic that has increasing implications both in the context of more traditional problems of restraints on thought in certain types of political situations (even if increasingly in some countries where many would not traditionally have considered freedom of thought to be subject to threat) and in the context of evolving technologies that may expand risks to freedom of thought. The Special Rapporteur's work on this topic is immensely important. I will attempt to comment on several of the questions raised by the Special Rapporteur, noting though that much of my work on these issues is at the conceptual level more so than in identifying various specific practices on which I trust that the Special Rapporteur will receive excellent information from other stakeholders.

Regardless of how much jurisprudence there has or has not developed on freedom of thought in particular jurisdictions, there is significant guidance to be found on the interpretation of freedom of thought in the *travaux préparatoires* of the *Universal Declaration of Human Rights*, which I

discuss in some of my publications on freedom of thought. That material makes clear that the inclusion of freedom of thought was a carefully contemplated decision and that the wording of the freedoms in the *UDHR*—and, thus, in the *ICCPR* and other instruments that drew from the *UDHR*—is informed by conceptions in which thought is indeed a distinct freedom from closely related freedoms like belief and opinion. Thought conveys more of the sense of a process, whereas belief and opinion reflect certain established positions, even while, for example, the freedom of opinion does need to be understood to encompass protection for processes of opinion formation.

Freedom of thought and certain related freedoms may certainly be understood to have mutually supporting relationships, perhaps much as the Vienna Declaration on Human Rights makes clear that all rights are mutually interdependent even while there may be certain closer relationships present in this context. In my publications, I discuss the relevance of intersectional freedom violations, noting as follows:

[C]areful consideration of freedom of thought is important even when there are overlapping rights at issue. What could appear to be a trivial infringement of one freedom might actually be more appropriately recognized as a more substantial infringement in the context of an intersectionality of different freedoms. The concept of intersectionality, of course, is more familiar in the equality rights context, where a different equality rights violation is identified when focusing on some individuals as facing discrimination not so much based on one ground or another of discrimination but based on an intersecting set of grounds of discrimination. Analogously to that concept, someone may face a freedom infringement based on intersecting infringements of fundamental freedoms.¹

In my publications, I propose several arms for a freedom of thought test which have a correspondence to the sort of scope for freedom of thought contemplated by the Special Rapporteur. While I frame those arms as a potential test for Canadian constitutional law purposes, where freedom of thought has not received jurisprudential attention, they may offer perspectives or ideas pertinent to international discussion of the scope of freedom of thought.

While equality considerations make it very important to be aware, as the Special Rapporteur suggests, that “rights-holders may be at different stages of cognitive development or have varying levels of cognitive functions”, this consideration does not give reason to lessen the scope of the freedom. With many rights, some may employ or exercise them in different ways, and this gives reason only to ensure that the right – or, in this case, freedom – is understood capaciously enough to encompass the exercise of the right by those who may be situated differently in respect of various factors.

These realities of different ways in which differently situated individuals (including those from a variety of different backgrounds) might employ and exercise freedom of thought lead to some complexities on the relationship between the inner aspects of freedom of thought and the necessary external aspects of freedom of thought that permit the realization and fulfillment of the inner freedom of thought. It is challenging to make sweeping generalizations about these relationships

¹ Dwight Newman, “Interpreting Freedom of Thought in the Canadian Charter of Rights and Freedoms” (2019) 91 *Supreme Court Law Review* (2d) 107, at 121-22.

in the context of the variety of ways in which differently situated individuals might employ the freedom of thought. Notably, it is important to be attentive not only to the enumerated list of persons in vulnerable circumstances – important thought that list is – but also to others who might be specifically vulnerable in respect of freedom of thought. The last-enumerated group in the list, being those from minority religious or belief communities, will in some circumstances be vulnerable in more general terms. But on account of being minorities, they will invariably be vulnerable in the context of freedom of thought where majoritarian approaches to thinking and worldviews may well lead to state actions that infringe upon the freedom of thought of members of these communities. Indeed, the scope of these communities who may not be vulnerable in general but may be vulnerable in respect of freedom of thought specifically may need to be extended to encompass a wider set of groups than the term may initially appear to encompass.

Those who may be vulnerable to infringements of freedom of thought are very likely to include those who have differing worldviews from majoritarian society, even where those now being identified as vulnerable may be members of majorities in other ways or may have historically been more powerful. Thus, those who are members of certain religious groups may have minority worldviews that make them vulnerable to potential infringements on freedom of thought even where their views might have once been more prevalent and even while these same individuals may be members of differently construed majorities.

Cultural groups that might not initially be identified as members of “belief communities” might nonetheless think very differently about the world and thus be potentially vulnerable to infringements on freedom of thought. The same might be said of members of Indigenous peoples. Indeed, some recent scholarly work has pointed to how members of some religious communities and members of Indigenous peoples may have in common that they have differing worldviews that depart from the worldviews held by many persons within their larger societies, which places them in some analogous positions of vulnerability in relation to state policies that impact differentially on those with differing worldviews. The freedom of thought guarantee needs to be understood sensitively with respect to these considerations. The scope of the category of those considered vulnerable to freedom of thought infringements thus needs to be extended in some ways specifically pertinent to freedom of thought.

I have attempted in these comments to provide perspectives on the relationship of freedom of thought to other freedoms, noting that it is both distinct from other freedoms and interdependent upon them, which I suggest leads to the need to think of the potential for intersectional freedom infringements related to freedom of thought. I have also highlighted some equality-related considerations that lead to a possible need to enlarge the categories of those who may be considered vulnerable on freedom of thought issues. I hope these comments will be of some assistance to the Special Rapporteur’s work and very much appreciate the Special Rapporteur’s attention to these issues.

