

Submission to the UN Special Rapporteur on Freedom of Religion or Belief

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This submission aims to provide information and inputs to the United Nations Special Rapporteur on Freedom of Religion or Belief, Dr. Ahmed Shaheed, regarding the thematic report to be presented at the 76th session of the UN General Assembly on Respecting, Protecting and Fulfilling the Right to Freedom of Thought.

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FREEDOM OF THOUGHT AND THE EXTENT OF ITS PROTECTION IN BRAZIL

***"freedom of conscience and belief is inviolable,
assuring free exercise of religious beliefs and
guaranteeing, as set forth in law, protection of places of
worship and their rites"***
(Federal Constitution, Article 5.6)

Freedom of thought is not expressly protected as a fundamental right by the Brazilian Constitution, which is the main source for the basic rights in the country. However, it is encompassed by the right to freedom of conscience, protected under article 5.6 (with additional protections under article 5.7-8) of the Constitution. This fundamental right is protected in conjunction with freedom of belief, highlighting the intimate connection between these two aspects of the inner life of all human beings. Its scope and extent of protection is also defined by Brazil being signatory to international instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights, which protect "freedom of thought" in articles 18 and 13, respectively.² However, despite the successful incorporation of international human rights treaties into domestic law, decisions from supranational courts tend to be overlooked in Brazil, not being part of the country's legal culture to follow the case-law of such bodies.³

Freedom of conscience (and thought) is the individual's ability to formulate judgments and ideas about himself and about the external environment that surrounds him. Therefore, public authorities cannot interfere in this intimate sphere, being prevented from imposing philosophical concepts and doctrines on citizens.⁴ Furthermore, freedom of conscience embraces the broad faculty to self-determine one's ethical, existential, intellectual, and even

² SARLET, Ingo Wolfgang; MARINONI, Luiz Guilherme; MITIDIERO, Daniel. *Curso de Direito Constitucional*. 6. ed. São Paulo: Saraiva, 2017, p. 512-523.

³ PINTO, Thiago Alves; ALVES, Rodrigo Vitorino Souza. *Investigations on the Use of Limitations to Freedom of Religion or Belief in Brazil. Religion & Human Rights*, [S.L.], v. 15, n. 1-2, 23 abr. 2020. Brill. <http://dx.doi.org/10.1163/18710328-bja10004>.

⁴ MENDES, Gilmar Ferreira; BRANCO, Paulo Gustavo Gonet. *Curso de Direito Constitucional*. São Paulo: Saraiva, 2011, p. 352-353.

mythical standards, which is closely associated with the right to have or not to have a religion.⁵ In addition to this negative aspect, freedom of conscience requires from state to provide for the necessary means to the development of an autonomous human personality. Consequently, if the Constitution protects freedom of conscience, it will also allow each person to live according to their conscience, even in situations in which their beliefs and convictions contravene general norms (conscientious objection).⁶

The idea of freedom of thought is connected to several fundamental rights, such as freedom of religion or belief, opinion, privacy, and expression (“manifestation of thought” as in articles 5.4 and 220 of the Constitution), all ensured under articles 17, 18, and 19 of the ICCPR. As for the connection between freedom of thought and religion, freedom of thought encompasses a vast range of situations that are further reaching and not limited to religious scenarios.⁷ Moreover, freedom of thought can be understood as the right to externalize, by all means, one's understanding of science, religion, art, or any other matter⁸. Ultimately, it is logical to assume that both rights are undeniably attached but cannot be outlined as one and the same.

In this sense, while safeguarding the right to conscientious objection, the Constitution establishes that “no one shall be deprived of any rights because of religious beliefs or philosophical or political convictions” (article 5.8), therefore expressly determining that this objection is not limited to religious matters, reaching all kinds convictions.

That being said, it is key to notice the nature of freedom of thought. It is a right that protects the *forum internum* of individuals, the pure liberty of conscience and belief, an absolute freedom in accordance to the 1949 Supreme Court ruling [STF. MS 1114].⁹ The manifestation of thought, however, is related to the *forum externum*, concerning the expression of opinions and ideas. The former cannot be restricted if not associated with the latter, since it remains under the person's exclusive internal dimension, out of the reach from the legal system.

⁵ WEINGARTNER NETO, Jayme. *Liberdade religiosa na jurisprudência do STF*. In: SARMENTO, Daniel; SARLET, Ingo Wolfgang (coord.). *Direitos fundamentais no Supremo Tribunal Federal: Balanço e Crítica*. Rio de Janeiro: Lumen Juris, 2011, p. 481-494.

⁶ MENDES. Op. cit.

⁷ SARLET, Op. cit.

⁸ DA SILVA, José Afonso, *Curso de Direito Constitucional Positivo*, 37ª edição revista, São Paulo, Malheiros Editores, 2014.

⁹ PINTO; ALVES, Op. cit.

Right holders are assured to not suffer interventions or coercion while professing one's convictions and that the State will follow a neutral approach to fully provide for such freedom, as it is one of the foundations of the rule of law.¹⁰

Additionally, the Constitution does not expressly provide for freedom of expression as a general genus encompassing several specific varieties of manifestation, however, the protection of “free manifestation of one's thought” arises with such scope since it can materialize through social communication, intellectual or artistic performance, as well as open demonstrations of religious preferences.¹¹ This is the scope of freedom of thought that can be regulated and limited.

National Courts have held the understanding that the externalization of one's opinion must comply with other fundamental rights and guarantees, specially to avoid hate speech and discrimination.

In a case involving freedom of expression and thought, the Federal Court of the First Region permitted the circulation of a book that had previously been prohibited on grounds that it disseminated discriminatory ideas against Afro-Brazilian religions, allowing its circulation on the basis that freedom of thought and expression prevailed.¹² Members of Afro-Brazilian religions criticized the demonization of their deities and rituals by neo-Pentecostal pastors in the media, raising the issue of limits of freedom of speech and expression. [Interlocutory Appeal 2005.01.00.069605-8]¹³

In 2015, weighing freedom of expression against verbal assault (“injuria”), the Brazilian Supreme Court, mentioning ACHR's article 13.2, established that freedom of expression cannot include within its scope of protection manifestations based on insults and offenses of a criminal nature. [STF. ARE 891.647]

In 2014, when analyzing the legality of street manifestations in favor of cannabis legalization, the Court understood that citizens right to criticize and protest is safeguarded by

¹⁰ SARLET, Op. cit.

¹¹ SARLET. Op. cit.

¹² ALVES, Rodrigo Vitorino Souza. Brazil, In: Encyclopedia of Law and Religion, General Editor Gerhard Robbers. Consulted online on 04 June 2021 <http://dx.doi.org/10.1163/2405-9749_elr_COM_00000015> First published online: 2015

¹³ ALVES. Op. cit.

the freedom to express one's thoughts, and those actions cannot be mistaken as an incitement to crimes, even if the ideas defended are not broadly accepted. [STF. ADPF 187]

Also worth mentioning, the “Ellwanger case”, ruled in 2002, recognized freedom of expression as a limited constitutional guarantee, arguing that freedom of expressing opinion cannot shelter immoral content that implies criminal illicitness (holocaust denial) and must be exercised observing the limits defined in the Constitution. [STF. HC 82.424]

Freedom to express one’s thought was interpreted and applied by the Supreme Court in accordance with the American Convention on Human Rights, article 13.2. Regardless of its solid connection with the idea of human dignity, the external manifestation of thoughts and opinions is limited and susceptible to restrictions.¹⁴ In the aforementioned cases, the Court concluded that externalizing discriminatory and offensive convictions is not protected by the right to express one's thought and that manifestations claiming for public policy changes represent the pure right to manifest one's thoughts.

Similarly, the Inter-American Commission on Human Rights, when analyzing the case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile, understood that: “Subsequent liability is regulated in Article 13(2) of the Convention and is only admissible in a restricted way, when necessary to ensure respect for the rights or reputation of others. This restriction of the possibility of establishing subsequent liability is set out as a “guarantee of freedom of thought, so that certain people, groups, ideas or mediums of expression are not excluded, a priori, from public debate”. This type of restriction was not used in the instant case, but the cinematographic work was censored before it was exhibited”¹⁵.

¹⁴ Ibid

¹⁵ See https://www.corteidh.or.cr/docs/casos/articulos/seriec_73_ing.pdf

RECENT DEVELOPMENTS

Bill 2630/2020¹⁶, known as “Law Against Fake News”, aims to regulate digital freedom, responsibility, and transparency. Although some issues might be raised, such as the lack of clarity that increases the vigilance and possibilities of penalty for digital and defamation crimes exposing even more activists and citizens to danger in a delicate political context in Brazil, it is an opportunity for providing expressive advances in protection of a large number of rights, since this bill would be sustained by democratic and constitutional principles. Despite the divergences on different points of view, the proposed legislation would make internet users responsible for their acts, words, and merchandising on the internet, including digital platforms and social media. Consequently, it might be good not only for Brazilian consumer rights but also for freedom of thought and democracy in general. The positive aspect of this resource would depend both on a good legislative technique to enable the law and its appropriate use.

Additionally, Law 13709/2018¹⁷, or the Brazilian General Data Protection Law, regulates the use of data and prohibits harmful and inappropriate use of privileged information concerning the population. It involves guaranteeing freedom of thought on the grounds of democratic and constitutional values in line with article 3 of the law in question. It is known that freedom of thought can be severely damaged when social, economic, and political actors hold the power to control the information citizens. Besides possible manipulation of databases for trade purposes, persecutions, retaliations, and punishments for political and ideological reasons are among the potential violations of this fundamental right, especially during moments of social and political disestablishment.

¹⁶ BRASIL. *Projeto de lei nº 2.630, de 2020*. Autoria: Senador Alessandro Vieira (CIDADANIA/SE). Disponível em: <<https://legis.senado.leg.br/sdleg-getter/documento?dm=8110634&ts=1612303001672&disposition=inline>>. Acesso em: 1º jun. 2021.

¹⁷ BRASIL. Lei nº 13.079, de 14 de agosto de 2018. *Lei Geral de Proteção de Dados Pessoais (LGPD)*. Disponível em: <http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/113709.htm>. Acesso em: 1º jun. 2021.

CONTEMPORARY CHALLENGES TO FREEDOM OF THOUGHT: HUMAN RIGHTS AND NEW TECHNOLOGIES

Technology has an important role in our society, having the capability to intervene in the world.¹⁸ Freedom of thought and information is directly affected by misinformation, fake news, and massive data collection. In order to expand power to all dimensions of society and consequently expand their profit, companies look for public-private partnerships to extract and collect data from citizens to improve the quality of their services.

Most data collection is intended to predict the future to help market certainty, therefore algorithmic policy is conservative to maintain the predicted order. Control works through absolute transparency, or the supervision of everyone by everyone.¹⁹ It is possible to conclude that freedom itself is in contradiction with absolute transparency. Therefore, society suffers a significant change through the enhancement of social control in use by the online market.

M. Horkheimer and T. Adorno affirmed that: “The reduction of thought to a mathematical apparatus condemns the world to be its own measure”.²⁰ Misinformation and disinformation are a way to dominate individuals, often strengthening hate speech and intolerance, both responsible for creating bubbles between users who share identical ideas and setting them apart from others. Data is incapable of perceiving common sense or ethical moral imperatives. This perspective is reached only by a rational human being integrated into certain social and collective contexts.

These technological phenomena particularly negatively affect freedom of thought and mental autonomy, since algorithms and misuse of technology might interfere in the way people learn, think, and perceive the world. Misinformation is the consequence of an individualistic society, threatening freedom of thought, democracy and the development of a collective social being. Something that is perceived as our online freedom of expression in fact

¹⁸ ZUBOFF, Shoshana. *A era do capitalismo de vigilância: a luta por um futuro humano na nova fronteira do poder*. Rio de Janeiro: Intrínseca, 2021.

¹⁹ HAN, Byung-Chul. *The transparency society*, translated by Erik Butler. California: Stanford University Press, 2015, p. 47.

²⁰ ADORNO, T. W.; HORKHEIMER, M. *Dialectic of enlightenment: philosophical fragments*, translated by Edmund Jephcott. California: Leland Stanford Junior University, 2002, p. 20.

produces an environment where it is not possible to notice how individual choices are being guided.

For example, according to the report “21st-Century Readers: Developing Literacy Skills in a Digital World”, developed by the Organization for Economic Cooperation and Development (OECD), 67% of 15-year-old students in Brazil cannot differentiate facts from opinions when reading texts.²¹ OECD claims that digital technologies are responsible for greater dissemination of information, with a variety of formats that do not always fit in with traditional models. The organization suggests that the enormous flow of information that characterizes the digital age requires readers to be able to distinguish between fact and opinion. Readers must learn strategies for detecting biased information and malicious content. Thus, in addition to legal instruments, promoting public policies on education and digital literacy is essential to protect freedom of thought. Digital and media literacy must urgently be advanced in Brazil and many other countries, to preserve human rights and the democratic order and to combat misinformation and disinformation

Another interesting and complex application of freedom of thought in the context of new technologies is a **broader protection of the brain and mind, including the right to mental integrity, mental privacy, and the protection against interventions into the mind and brain.**²²

²¹ See "21st-Century Readers: Developing Literacy Skills in a Digital World", available at https://www.oecd-ilibrary.org/education/21st-century-readers_a83d84cb-en;jsessionid=73wTanft-x7_V3Ih2msID2hq.ip-10-240-5-96.

²² BUBLITZ, Jan Christoph. *Freedom of Thought in the Age of Neuroscience*. Archiv für Rechts- Und Sozialphilosophie 100 (1):1-25 (2014). LIGTHART, Sjors; DOUGLAS, Thomas; BUBLITZ, Christoph; KOOIJMANS, Tijs; MEYNEN, Gerben. *Forensic Brain-Reading and Mental Privacy in European Human Rights Law: Foundations and Challenges*. Neuroethics: 1-13. 2020.