# What is thought, or what should it be?: Reply to Bublitz

**What is Thought, or what Should it Be? – Reply to Bublitz**

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## 1. Introduction

Since the turn of the millennial, scholars are increasingly considering the normative implications of emerging neurotechnologies, especially in relation to the protection and preservation of personal interests and normative values such as mental privacy, mental integrity and cognitive liberty. As one of the first, Bublitz moved this debate towards the area of human rights – with a particular interest in the right to freedom of thought (RFoT).[1] As the RFoT is one of the few human rights that was explicitly adopted to protect certain personal interests in the inner mental realm, Bublitz has dedicated himself over the past decade to reviving this right so as to realize robust and effective protection of the human mind against unsolicited interference by others, especially through modern technology such as neuroimaging and brain stimulation. With success. Since recent years, both academic interest and policy-oriented attention for the RFoT is growing.[2] With that, discussions on the meaning, boundaries, and implications of the right are increasing, contributing to the revitalization of this once forgotten right. One area of debate concerns the question of how to define "thought" in this context, which in part determines the RFoT's scope.

In *What is Thought? Interpreting and Constructing Article 18 ICCPR in Light of the Vienna Convention* (this volume), Bublitz considers and rejects some of the proposed understandings of "thought", including the Moderate view that I defend in this volume and elsewhere.[3] Rather, for the interpretation of "thought", Bublitz defends what he calls the Robust-scope view. Meanwhile, in light of the RFoT's absolute nature, Bublitz ultimately suggests a "restrictive, narrow construction" of the right, by introducing a test of seriousness to determine whether interferences with "thought" infringe the RFoT.

The aim of this reply is to articulate common ground, clarify my argument, and identify ways forward for the interpretation and construction of the RFoT. Let me start with highlighting some shared views and agreements:

- The existing RFoT shows great promise for protecting against unsolicited mental interference. It should be one of the central rights in debates over human rights for the mind.
- The use of non-consensual neurotechnology, like neuroimaging and neurointenventions, has the potential to interfere with mental states some of which might be protected by the RFoT.

[1] With a focus on Article 18 ICCPR.

[2] Illustrated by *inter alia* this Volume and Volume I; P. O'Callaghan & B. Shiner, *The Cambridge Handbook of Freedom of Thought*, Cambridge University Press 2025; Draft report on impact, opportunities and challenges of neurotechnology with regard to the promotion and protection of all human rights (23 February 2024), A/HRC/AC/31/CRP.1; Special Rapporteur on Freedom of Religion or Belief, *Report on the Freedom of Thought*, 5 October 2021, A/76/380.

[3] S. Ligthart, *Coercive Brain-Reading in Criminal Justice: An Analysis of European Human Rights Law*, Cambridge: Cambridge University Press 2022.

- According to the "*de facto* state of law", freedom of thought "is restricted to important philosophical or similar beliefs".[4]
- Transforming the absolute RFoT into a living, practical and effective right, may "require a restrictive, narrow construction" of the right.[5]
- A narrow construction of the RFoT may be attained by developing a threshold for infringement.[6]

In what follows, I will first clarify two arguments for the Moderate view in reply to Bublitz' stimulating endeavour to refute this view. This part of the reply focuses on Bublitz's section *Interpreting "Freedom of Thought"*. Next, I will briefly return to some of the issues Bublitz and I agree upon in reply to the section *Constructing the Scope of Freedom of Thought*.

## 2. Interpreting "Thought": Clarifying the Moderate View

According to the Moderate view, the RFoT offers absolute protection not to just any thought, opinion, idea or other mental state, irrespective of its content. Rather, on this view, the right covers, primarily, thoughts that have a major impact on a person's way of living.[7] This interpretation is substantiated, mainly, by reference to (1) the reasons put forward in the *travaux préparatoires* of Article 18 UDHR to adopt a right to freedom of "thought" next to the right to freedom of "religion" and "conscience", and (2) the Grand Chamber of the ECtHR repeatedly stating that, as a general principle, in the meaning of Article 9 ECHR "the right to freedom of thought, conscience and religion denotes only those views that attain a certain level of cogency, seriousness, cohesion and importance."[8] I will consecutively consider both arguments below.

*Travaux préparatoires Article 18 UDHR*

The *travaux préparatoires* of Article 18 UDHR illustrate that earlier drafts of this provision only protected religion and conscience. The inclusion of freedom of "thought" was motivated because Article 18 UDHR should also protect the holding and development of philosophical, political, and scientific views and beliefs.[9] A similar idea was reflected during the drafting process of General Comment No. 22, on the interpretation of Article 18 ICCPR, where it was noted that "the concept of freedom of thought, conscience, religion and belief encompassed a whole range of personal and collective convictions in the political, economic, social, scientific and intellectual spheres. The meaning of freedom of thought encompassed all those aspects."[10]

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[4] Bublitz, this volume, p. 4.
[5] Idem, p. 17.
[6] See also S. Ligthart & N. van de Pol, 'Freedom of Thought: Absolute Protection of Mental Privacy and Mental Integrity?', in O'Callaghan & Shiner 2025.
[7] See also C.D. De Jong, *The Freedom of Thought, Conscience and Religion or belief in the United Nations (1946-1992)*, Antwerp – Groningen – Oxford: Intersentia – Hart 2000, p. 23-33; K.J. Partsch, 'Freedom of Conscience and Expression, and Political Freedoms', in L. Henkin (ed.), *The International Bill of Rights*, NY: Columbia University Press 1981, p. 213-214.
[8] ECtHR (GC) 26 April 2016, 62649/10 (*İzzettin Doğan and others v. Turkey*), § 68. See also ECtHR (GC) 1 July 2014, 43835/11 (*S.A.S./France*), § 55; ECtHR 8 June 2021, 48329/19 (A*ncient Baltic religious association Romuva/Lithuania*), § 125; ECtHR 9 November 2021, 9476/19 (*De Wilde/the Netherlands*), § 51.
[9] See Ligthart 2022, p. 115 et seq with further references.
[10] CCPR/C/SR.1162, par. 34.

When interpreting legal norms and determining the meaning of the wordings within those norms, it is a common practice in the law to consider the initial purpose of a norm and the reasons for adopting a particular formulation. This is also a method sometimes employed by the ECtHR when interpreting the rights and freedoms laid down in the ECHR.[11] Furthermore, Article 32 of the Vienna Convention on the Law of Treaties (VCLT) states that for the interpretation of treaties recourse may be had to the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 (a) leaves the meaning ambiguous or obscure, or (b) leads to a result which is manifestly absurd or unreasonable.[12] As Bublitz rightly points out, the concept of thought is "vague", "complex and not easily pinned down". Giving ordinary meaning to "thought" in the sense of Article 31(1) VCLT "is complicated".[13] Furthermore, Bublitz welcomes Article 32(b) VCLT to prevent understandings of the RFoT that appear too broad, such as the decision of the European Commission of Human Rights in the case of *Salonen/Finland*, where the Commission qualified a parents' wish to give their daughter a particular forename as a "thought" in the meaning of Article 9 ECHR.[14]

So, when interpreting "thought", the reasons put forward in the preparatory work to protect thought in addition to conscience and religion may be relevant. From the *travaux préparatoires* of the UDHR it is clear that the protection of political, scientific and philosophical views was a central motivation for adopting freedom of thought in Article 18 UDHR. The question is, as Bublitz rightly points out, what exactly does this mean for the interpretation of the right anno 2024? Arguing that it supports a somewhat limited understanding of "thought" would be unconvincing, Bublitz argues, as it "would presuppose that these aspects were meant to exhaust the right's ambit, a contention not supported by textual or historical evidence. To the contrary, the repeatedly invoked figure of the "inner man" appears broader." Also, Bublitz highlights that "negotiations of the UDHR, conducted under heavy political and time pressure, rarely descended into details; the Commission and delegates developed a frame with abstract fix points and left its filling to subsequent interpretation."[15]

There may, indeed, be different ways of interpreting the *travaux*,[16] and there is no compelling reason to assume that the examples of political, scientific and philosophical opinions and beliefs, which required protection by including "thought", was meant to be exhaustive. Still, they give some direction. Based on the preparatory work we can be sure that "thought" *at least* comprises thoughts that have a major impact on a person's way of living, such as personal and collective views on politics, philosophy, science and alike. From there, Bublitz may be right that the rest is open for (dynamic) interpretation and further development.

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[11] D.J. Harris et al., *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights,* NY: OUP 2023, p. 21. Though not often, as the travaux of the ECHR are not always helpful (sometimes they are rather brief) and the emphasis is, primarily, on a dynamic and teleological interpretation.

[12] Cf. O. Corten & P. Klein (eds.), The *Vienna Conventions on the Law of Treaties: A Commentary, Volume* I, Oxford: OUP 2011, p. 855: "In practice, these works are the only ones that can explain, although often imperfectly, the evolution of a treaty's provision. In addition, the material form they take lends by itself a certain weight to preparatory works. Like the text of a treaty, and as opposed to other means as, for instance, State practice and the circumstances existing at the time of the conclusion of a treaty, preparatory works are concrete (summaries, series of written proposals, etc.). Their tangible nature probably encourages the interpreter to consider them carefully."

[13] Bublitz, this volume, p. 7, 10.

[14] Bublitz, this volume, p. X.

[15] Idem, p. X

[16] Cf. Corten & Klein 2011, p. 857-859.

*Case law of the ECtHR*

One of the reasons for the present unclarity about the meaning of "thought", is that case law on the RFoT is very scarce. Most of the Article 9 ECHR / Article 18 ICCPR jurisprudence is about conscience and religion – and most cases are concerned with the external freedom to *manifest* religion or belief. However, in the absence of decisions and judgements substantively focusing on the internal freedom of thought, the case law under the ECHR does provide some general suggestions and directions for the interpretation of "thought" in the meaning of Article 9 ECHR. For example, in *F.P./Germany*, the EComHR considered that Article 9 ECHR "is essentially destined to protect religions or theories on philosophical or ideological universal values."[17] Furthermore, the applicants' complaint in *Hazar and Açik/Turkey*, arguing that their prison sentences for belonging to the Communist Party of Turkey violated their RFoT, was admissible under Article 9 ECHR.[18] And the ECtHR has indicated that "[a]n intention to vote for a specific party is essentially a thought confined to the *forum internum* of an individual",[19] which is protected by Article 9(1) ECHR.

Bublitz is right that these cases do not, substantively, concern the application of the internal RFoT. They may, indeed, not be conclusive for the interpretation of "thought". At best, they indicate that "thought" encompasses *at least* political thought and, perhaps, some other types of ideological or philosophical views. From there, again, the rest might be up for interpretation.

However, this room for interpretation seems to be narrowed by the ECtHR in more recent cases, where the Court, including the Grand Chamber, repeatedly states that, in general,

> "as guaranteed by Article 9 of the Convention, the right to freedom of thought, conscience and religion denotes only those views that attain a certain level of cogency, seriousness, cohesion and importance."[20]

Apparently, Article 9 ECHR does not protect just any thought, opinion, or idea.[21] To be protected by this provision, personal or collective views must meet a certain threshold. As Rainey, McCormick and Ovey write, although Article 9 ECHR extends to a wide range of religious and non-religious convictions and philosophies, the Court has confirmed that to be protected, thoughts, conscience and religion must attain a certain level of cogency, seriousness, cohesion and importance.[22]

Whereas, for example, political and philosophical ideas will likely qualify as such, less cogent, serious, coherent and/or important thoughts, such as which socks to wear, what fruit to buy, or one's

[17] EComHR 23 March 1993, 19459/92 (*F.P./Germany*). See also EComHR 15 December 1983, 10358/83 (*C./UK*), at 147.
[18] EComHR 11 October 1991, 16311/90, 16312/90 and 16313/90 (*Hazar and Açik/Turkey*). Ultimately, this case ended in a 'friendly settlement', so no substantive decision was provided on the merits of the case: EComHR 10 December 1992, 16311/90, 16312/90 and 16313/90 (*Hazar and Açik/Turkey*).
[19] ECtHR 11 January 2007, 55066/00 and 55638/00 (*Russian Conservative Party of Entrepreneurs and others/Russia*), § 76. Also: ECtHR 8 July 2008, 9103/04 (*Georgian Labour Party/Georgia*), § 120.
[20] ECtHR (GC) 26 April 2016, 62649/10 (*İzzettin Doğan and others v. Turkey*), § 68. See also ECtHR (GC) 1 July 2014, 43835/11 (*S.A.S./France*), § 55; ECtHR 8 June 2021, 48329/19 (A*ncient Baltic religious association Romuva/Lithuania*), § 125; ECtHR 9 November 2021, 9476/19 (*De Wilde/the Netherlands*), § 51; ECtHR 22 November 2022, 20921/21 (*Nikolaus ALM/Austria*), § 9.
[21] Unlike Article 10 ECHR, which has a very broad scope.
[22] B. Rainey, P. McCormick & C. Ovey, *The European Convention on Human Rights*, New York: OUP 2021, p. 462.

preference for tea over coffee, are in general unlikely to be covered.[23] Meanwhile, the ECtHR has hardly provided any guidance on how to understand and apply these threshold requirements of cogency, seriousness, cohesion, and importance,[24] neither has it applied them in cases concerning the protection of inner "thought". Hence, the precise implications of the Court's general consideration on the scope of Article 9 ECHR for the interpretation and application of the RFoT are still largely uncertain. Nonetheless, for receiving protection from Article 9 ECHR, it is clear that a thought must attain a certain level of cogency, seriousness, cohesion and importance.

Although Bublitz conceives this case law as the "strongest support" for the Moderate view, he finds it yet inconclusive and unpersuasive to substantiate this view.[25] The main reason is that "[t]hese decisions do not address the scope of the *internal* side of thought. (…) most, if not all, concern the *forum externum*. But the reasons for a narrow understanding of external manifestation of beliefs do not apply to the *forum internum* (…) Due to this structural difference, generalizations from the *internum* and the *externum* (…) are not readily possible."[26] Hence, Bublitz concludes, "the analysis of the case law of the ECtHR on which this [Moderate] view is premised overlooks the historical, legal, and perhaps philosophical differences between the *internum* and the *externum*".[27]

So, in short, Bublitz' point is that the threshold formulated by the ECtHR only applies to *forum externum* protection, not to the protection of internal, unexpressed thoughts. But this is very unlikely, for at least two reasons. First and foremost, the ECtHR clearly states that "*as guaranteed by Article 9 of the Convention*, the right to freedom of thought (…) denotes only those views that attain a certain level of cogency, seriousness, cohesion and importance." Similar to Article 18 ICCPR, Article 9 ECHR does not address external manifestations of thought, unlike manifestations of religion and conscience. The manifestation/expression of thought is typically protected by the right to freedom of expression.[28] Hence, referring to "thought" in the meaning of Article 9 ECHR *ipso facto* means inner thought. Therefore, the Court's general consideration that the RFoT *as guaranteed by Article 9 ECHR* only denotes views that attain a certain threshold, can hardly be taken to mean anything else than concerning the protection of inner thought, as this is the only type of thought Article 9 ECHR applies to.

Relatedly, the very first sentence of Article 9 ECHR – Everyone has the right to freedom of thought, conscience and religion – is generally taken to comprise *forum internum* protection.[29] This right is "largely exercised inside the individual's heart and mind" and receives absolute protection.[30] The *forum externum* protection is encompassed by the addition that "this right includes freedom (…) to manifest his religion or beliefs".[31] Hence, if the Court refers to "the right to freedom of thought, conscience and religion", as it does in the quotation above, than this at least covers *forum internum* protection. If the Court's consideration on cogency, seriousness, cohesion and importance would only have applied to the *forum extremum*, they would not have referred to the right to "freedom of thought, conscience and religion" but rather to the "freedom to manifest one's religion or beliefs". Most

[23] Which could depend on the precise context: Ligthart & Van de Pol 2024. Cf. Bublitz, this volume, p. 13.
[24] T. Wolff, 'Cogency, Seriousness, Cohesion and Importance', *Oxf. J. Law Relig.* 2023.
[25] Bublitz, this volume, p. 11-13.
[26] Idem, p. 12.
[27] Idem, p. 24.
[28] M.D. Evans, *Religious liberty and international law in Europe*, Cambridge: CUP 1997, p. 285.
[29] Harris et al. 2023, p. 578.
[30] D. Godien, *Short guide to the European Convention on Human rights*, Council of Europe Publishing 2005, p. 95.
[31] Harris et al. 2023, p. 578.

complaints of alleged violations of Article 9 ECHR the Court considers as concerning the *manifestation* of religion or belief, while explicitly articulating that Article 9 ECHR also protects, in absolute terms, the *inner* freedom to hold certain views and beliefs.[32] As such, it is unlikely that the ECtHR overlooks the difference between *forum internum* and *externum*.

In sum, it seems clear that the ECtHR's recurrent general consideration that the right to freedom of thought, conscience and religion as protected by Article 9 ECHR denotes only those views that attain a certain level of cogency, seriousness, cohesion and importance, (also) applies to Article 9's *forum internum* protection, including the RFoT. This is, however, not to say that the ECtHR's delineation of the RFoT's scope is most persuasive and free from critique. Indeed, there could be good reasons to construct *forum internum* protection broader compared to *forum externum* protection.[33,34] For example, Bublitz points out that "the protection of *external* manifestations of belief has remarkable legal ramifications, it privileges actions and exempts rightholders from general rules and duties. Actions that are prohibited become permissible when they manifest beliefs, with conscientious objection to military service as a vivid example concerning matters of life and death (…) Such privileges and exemptions, however, must be narrow to uphold the idea of equal treatment and prevent circumventions. (…) But the reasons for a narrow understanding of external manifestation of beliefs do not apply to the *forum internum* because unmanifested mental events generally lack the potential to adversely affect others (in legal relevant ways). This allows for a broader understanding of the *internum*".[35] Furthermore, the emergence of neurotechnologies that may be used in ways that threaten people's autonomy over a broad range of thoughts and other mental states, may, together with the accompanied desire to offer robust human rights protection against such use, be another reason to understand "thought" not too narrowly. Meanwhile, if the *absolute* RFoT is to be interpreted as pertaining to a broad range of thoughts and thinking as a mental action, like the Robust view maintains, a need arises to otherwise restrict the right's scope, given the evident practical problems an unrestricted absolute right to freedom of (all) thought would give rise to.[36]

### 3. Ways Forward for the RFoT: Towards a Threshold of Infringement

As Bublitz writes, because of practical wisdom, absolute human rights should be construed restrictively. However, according to Bublitz, the scope of the absolute RFoT should not be restricted through a narrow understanding of "thought". Rather, the degree of "seriousness of the interferences" should become the guiding principle.[37] Bublitz suggests a threshold for infringement, "requiring interferences of some intensity or gravity. Assessments of intensity might draw on a range of factors, among them the importance of the content of the thought as suggested by the Moderate view; special consideration should be given to the nature of the interference and the intrusiveness of the means by which thought is detected or affected."[38]

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[32] See, e.g., the official though non-binding *Guide on Article 9 of the European Convention on Human Rights*, 31 Augustus 2022, par. 27; Harris et al. 2023, p. 578-579.
[33] This is what I mean with *lex lata* vs. *lex ferenda*.
[34] Note that the *forum externum* protection of freedom of thought, i.e., the right to freedom of expression, is considered to be "extremely broad": Rainey, McCormick & Ovey 2021, p. 488.
[35] Bublitz, this volume, p. 12.
[36] Think for instance of the implications such a right would have for compulsory education laws, coercive medical treatment in prison and forensic psychiatry, or the obligation of witnesses to reveal certain thoughts like memories in court.
[37] Bublitz, this volume, p. 19.
[38] Idem, p. 18.

Developing such a threshold for infringement may indeed be a suitable approach for delimiting the RFoT's scope, while at the same time facilitating its revitalization by outlining clearer principles and conditions for its applicability.[39] Meanwhile, as Bublitz rightly points out, although this may shift focus from debates on delineating "thought", it raises the question of which "interferences" are to be considered "serious" enough to infringe the absolute RFoT.[40] This may be one of the central questions guiding RFoT scholarship in the coming years.

There are different ways to explore and examine this question, including the use of thought-experiments and ethical considerations and psychological or neuroscientific views on the intensity of different types of interference with thought. Furthermore, the law itself may also provide some helpful directions. For example, a similar issue has arisen regarding the prohibition of torture, inhuman and degrading treatment of Article 3 ECHR. This provision offers absolute protection to our bodily and mental integrity from grave interferences, in addition to the qualified protection of these notions offered by the right to respect for private life pursuant to Article 8 ECHR. To determine the applicability of the absolute prohibition of torture, inhuman and degrading treatment, over and above the qualified right to respect for private life, the ECtHR employs a general threshold: Article 3 ECHR only applies to treatment attaining 'the minimum level of severity'. Although the prohibition of ill-treatment is absolute, the severity threshold is typically relative.[41] It depends on all circumstances of the specific case, in particular the *characteristics of the treatment* (like its physical and mental effects and the manner and method of its execution), *characteristics of the victim* (like one's sex, age and state of health), and the *context* in which the treatment was imposed (such as in an atmosphere of heightened tension and emotions).[42]

Elsewhere, Van de Pol and I have explored the potential relevance of these factors for developing a threshold of infringement for the absolute RFoT in relation to the qualified rights to mental integrity and mental privacy.[43] We suggested that (1) the mental impact of an interference and the methods of inducing them, (2) the victim's vulnerability, and (3) the context of the interference may be relevant in this regard. These explorative suggestions merit further research and consideration, also in relation to the thought-provoking tentative test for interference with privacy of thoughts proposed by Bublitz in this volume. Such an endeavour would exceed the scope of this reply. Hopefully it inspires further discussions on the interpretation and application of the RFoT, also in relation to other human rights, including the right to privacy, mental integrity, and the freedom of expression.

[39] See also S. Ligthart, C. Bublitz, T. Douglas, L. Forsberg & G. Meynen, 'Rethinking the Right to Freedom of Thought: A Multidisciplinary Analysis', *Human Rights Law Review* 2022, 22(4), p. 1-14.
[40] Also: Ligthart & Van de Pol 2024.
[41] ECtHR 26 October 2000, 30210/96 (*Kudła v. Poland*), § 91.
[42] Council of Europe, *Guide on Article 3 ECHR,* 2022, p. 6-7; ECtHR 15 December 2016, 16483/12 (*Khlaifia and Others v. Italy*), § 160.
[43] Ligthart & Van de Pol 2024.