A Distinct Right to Freedom of Thought in South America: The Jurisprudence of the Inter-American Court of Human Rights, Neurotechnology and the application of Bioethics principles

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Abstract

The right to freedom of thought is guaranteed by Article 13 of the American Convention on Human Rights, yet current jurisprudence interprets the right as a mere dimension of freedom of expression, also protected by Article 13. Contemporary neurotechnology research presents the possibility for human thoughts to be tracked, recorded, analysed and predicted. This applies pressure upon the Inter-American Court of Human Rights' current understanding of the right to freedom of thought. Firstly, this paper will examine how Article 13 has been interpreted by the Inter-American Court of Human Rights at different stages of its jurisprudence. Secondly, by considering both technological advances and the other rights guaranteed by the Convention, this paper argues for an evolution in the interpretation of Article 13 whereby the right to freedom of thought is understood as a distinct right, separate from freedom of expression. Finally, this paper proposes that the positive duty to secure Convention rights requires States to enact preventative legislation and regulations. Existing bioethics principles should be drawn upon to inform human rights compliant laws and regulations that require the architectural design of technologies to limit the potential to infringe upon freedom of thought.

Keywords: Freedom of Thought – Freedom of Expression – Inter-American Court of Human Rights – Bioethics principles – Neurotechnology

1. Introduction

The right to freedom of thought is explicitly contained within Article 13 of the American Convention on Human Rights (the "Convention"), yet it is not explicitly recognised as having any value beyond its role in fuelling expression. In contrast to what may be implied by a literal interpretation of the Convention's text - which could be understood to contain three different rights: freedom of thought, freedom of expression and a right to information, the Court's reasoning has found that the Convention provides a single right[1] with two distinct dimensions, an individual and a collective one, known as the "double dimension doctrine"[2] that must be satisfied at the same time. Furthermore, unlike Article 9 of the European Convention on Human Rights (ECHR) which is characterised by an absolute protection of the *forum internum,* Article 13 case law has made no attempt to delineate the inner realm of thought from external manifestations. As such, it is unclear whether the same level of protection would apply to internal thoughts as to expression.

Thought is protected alongside expression with the right to freedom of conscience and religion are contained within Article 12 unlike Article 9 ECHR which protects thought, conscience and religion with freedom of expression contained separately in Article 10 ECHR. The unity of

[1] E. L. O. Trujillo, 'La libertad de pensamiento y de expresión vista desde la Corte Interamericana de Derechos Humanos', *Latinoamérica. Revista de estudios Latinoamericanos,* 53 (2011) 133-145.
[2] Even though the Court does not use the term "double dimension doctrine", the reference to a double dimension is frequent in its case law and in the Commission's opinions, as it will be explained.

freedom of thought and expression forms a "logical sequence".[3] The deep relationship between thought and expression is clear because thought protects the essential ability to express oneself and is inherent to every human being. The interdependence of thought and expression is well exemplified in this passage from Bury:

> "A man can never be hindered from thinking whatever he chooses so long as he conceals what he thinks. The working of his mind is limited only by the bounds of his experience and the power of his imagination. But this natural liberty of private thinking is of little value. It is unsatisfactory and even painful to the thinker himself, if he is not permitted to communicate his thoughts to others, and it is obviously of no value to his neighbours…Thus freedom of thought, in any valuable sense, includes freedom of speech".[4]

However, as certain technological developments are beginning to illustrate, the mind is no longer the impenetrable fortress protecting our inner lives. Neurotechnology, for example, has paved the way for brain-reading, which some authors have already speculated about the legal implications of its application in criminal law or performed without the subject's consent.[5] Neuroimaging can detect a person's automatic mental reaction to stimuli such as images[6] and

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[3] Remark by UK delegate during the drafting of the Universal Declaration of Human Rights, A/C.3/SR.179 (2) and similar views during drafting of the CCPR, e.g., E/CN.4/SR.164 at 10 (Lebanon) as cited in J. C. Bublitz (forthcoming).
[4] J. B. Bury, *A history of freedom of thought* (Henry Holt and Co: Cambridge, 1913) Kindle edition.
[5] S. Ligthart et al "Forensic Brain-Reading and Mental Privacy in European Human Rights Law: Foundations and Challenges" (e-pub ahead of print) *Neuroethics* (2020). Retrieved 27 November 2020 https://link.springer.com/article/10.1007%2Fs12152-020-09438-4.
[6] *Ibid.*

functional-MRIs can determine whether someone is telling the truth[7] as well as a person's intentions.[8]

Even though this paper argues that there is scope for a further evolution of the interpretation of Article 13 to better protect freedom of thought in the face of scientific and technological developments, it must be stressed that the Court has never distinguished "thought" from "expression" within the meaning of Article 13 of the Convention. However, the extent to which thought may be considered a distinct right has not yet been tested. To date, they have not been treated as autonomous rights but as interconnected. This appears to be a coherent position in the light of the various documents that have given shape to the Inter-American System. Article IV of the American Declaration of the Rights and Duties of Man, for example, states that "Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever". Other important documents, including the Declaration of Chapultepec and the Declaration of Principles on Freedom of Expression, consider the necessity of protecting expression itself, thereby providing implicit protection to the thought that logically comes before it.

Yet, like the European Court of Human Rights, the Court regards the Convention, and other human rights treaties, as "living instruments whose interpretation must consider the changes over time and present-day conditions."[9] As such, the time will come when the Article 13 has to be applied to new circumstances. Rather than dismiss the application of Article 13 to facts

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[7] M. J. Farah et al, 'Functional MRI-based lie detection: Scientific and societal challenges' *Nature Reviews Neuroscience* 15 (2014) 123–131.
[8] S. J. Gilbert and H. Fung 'Decoding intentions of self and others from fMRI activity patterns' *NeuroImage* 172 (2018) 278-290
[9] *Right to Information on Consular Assistance within the Framework of the Guarantees of Legal Due Process*, Advisory Opinion OC-16/99, Inter-American Court of Human Rights, 1 October 1999, Series A No 16, at [114].

that do not immediately relate to expression, the Court must be prepared to isolate thought from expression in order to consider the essential role thought has as an elementary precondition to the exercise of many other rights. Thought in itself demands positive protection which requires States to consider how to protect the right through legislation and regulation of the technologies that enter the *forum internum*. That may be through effective data protection and privacy laws or regulatory standards of certain products. We argue in this paper that bioethics principles act as a suitable guide for the consideration of legal rules to protect the right. The protection of the right to freedom of thought, deriving from the overarching principles of dignity, autonomy and liberty, needs specific and distinct attention through an evolutionary approach to interpreting Article 13 and through the positive protection of the right within each State Party to the Convention.

This article will do the following: first it will set out the scope of Article 13 as understood by a series of cases from the Inter-American Court of Human Rights. Following the conclusion that thought is currently not specifically recognised or protected within that jurisprudence, we then argue why it is necessary that it is understood as a distinct right using neurotechnology as an illustration of circumstances in which the freedom of thought may be violated. Next, in line with the positive duty to realise Convention rights, we consider bioethics principles as a guide for the development of preventative national frameworks.

2. The Inter-American Human Rights System

The Inter-American system for the protection of human rights is an evolving enterprise that dates back to 1948 when the Organization of American States (OAS), which oversees the

human rights system, approved its Charter which governs the alliance between the American States during the 9th International Conference of American States in Bogotá, Colombia. Although, human rights treaties such as the American Declaration of Rights and Duties of Man approved at the 1948 Bogotá conference, the Convention signed in 1969 and coming into full force in 1978, is the dominant human rights treaty. Its provisions seek to provide an exemplar for democratic legal systems founded on the rule of law and human rights although at the time of its inception, the region was plagued by dictatorships engaging in gross and widespread human rights abuses including forced disappearances, extrajudicial killings and torture.[10] Despite this, the Convention put together an ever-evolving system for the protection of Human Rights which includes other human rights treaties and numerous amendments promulgated by the OAS.[11]

The 1948 Charter created the Inter-American Commission of Human Rights (the "Commission") to "promote the observance and protection of human rights",[12] setting the ground for a future American Convention on Human Rights, but only come into effect in 1960, when its Statute was approved, and its first members elected. It was only when the Convention came into the force 20-years later, that the Inter-American Court of Human Rights (the "Court") could be established as the sole judicial organ and the final arbitrator of human rights. The Convention established clear attributions for the Commission and the Court, as the two human rights authorities, and details the procedures that each body is to apply in response to human rights complaints. In short, the Commission is the first port-of-call for individuals and

[10] J. M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge: Cambridge University Press, 2012, 2nd Edition) 6.
[11] *Ibid*, 2-3.
[12] Inter-American Court of Human Rights. *History*. Retrieved 15 July 2020. http://www.corteidh.or.cr/historia.cfm?lang=en.

States (although State's can also petition the Court directly as well[13]) which then filters out claims either by determining their inadmissibility or by settling the disagreement between the parties outside of judicial arbitration. The Commission can submit a contentious case to the Court which will then determine whether the State is responsible for the alleged violation. The Commission must also provide reports, recommendations and advisory services for the purpose of promoting and defending human rights in the region.[14] However, it is the Court's judgments which hold the greatest legal authority and are legally binding upon States which is why this paper focuses on the Court, not the Commission.[15] The Court interprets the Convention so "as to give full effect to the system of human rights protection".[16] To secure the "greatest degree of protection"[17] to individuals the Court interprets the Convention rights in a dynamic and evolving way[18] according to the "present-day conditions".[19]

The Inter-American System is not limited to the Court's rulings but includes the important work by the Commission and the work of the Special Rapporteur for Freedom of Expression, created in 1998. In 2000, the Commission adopted the Declaration of Principles on Freedom of Expression to guide the activities of the Special Rapporteur. Together, the Court, Commission and Special Rapporteur determine the interpretation of Article 13, although this paper focuses primarily on the Court's Article 13 case law. As will be seen later, the interpretation construed by the Court over the years is that the Convention guarantees a

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[13] American Convention, Article 61.
[14] American Convention, Article 41.
[15] American Convention, Article 68(1).
[16] *Reports of the Inter-American Commission on Human Rights,* Advisory Opinion OC-15/97, IACtHR Series A No 15 (14 November 1997) at [29] as cited in Pasqualucci *supra* note 10, p. 12.
[17] *Case of Benjamin et al. v. Trinidad and Tobago* (Preliminary Objections), IACtHR Series C No. 81 (1 September 2001) at [70].
[18] F. Piovesan, *Direitos humanos e o direito constitucional internacional* (São Paulo: Saraiva, 2011, 12th edition) 323.
[19] *Right to Information on Consular Assistance Within the Framework of the Guarantees of Legal Due Process* supra not 9, at [114] as cited in Pasqualucci *supra* note 10, p. 13.

freedom to express oneself in a double dimension, individually and collectively, which indirectly protects people's thoughts. As this paper will argue, the interpretation of the right to freedom of thought must evolve to be understood as an distinct right under the Convention to effectively protect it.

3. The Inter-American Court of Human Rights' interpretation of Article 13

Article 13, entitled Freedom of Thought and Expression provides that:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
    a. respect for the rights or reputations of others; or
    b. the protection of national security, public order, or public health or morals
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainment may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offenses punishable by law.

It is important to appreciate the specific context in which the Convention and its interpretation exists. Article 13 explicitly conjoins several rights which are separated out in other treaties such as the European Convention on Human Rights (ECHR). The association between thought, expression and information has been understood as amounting to a key defence of democracy which has struggled to emerge in the region in the post-independence era. The suppression of information during periods of military dictatorship, which commonly involved the persecution of journalists, has created a historical backdrop to how Article 13 has been understood, as will be seen by the facts in the cases discussed in the next section. Indeed, Article 29(c) on interpreting the Convention emphasises that the provisions within the Convention shall not be interpreted as "precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government". Here we see the aims of the Convention as being the securing of individual rights as well as collective political rights, specifically democratic governance.

The Court's jurisprudence on Article 13 of the Convention can be divided in to two specific stages: before and after the creation of the Office of the Special Rapporteur on Freedom of Expression by the Commission in 1998. After the creation of the Office of the Special Rapporteur, freedom of thought and expression received more attention from the Commission, motivated by the Rapporteur's work, and by the Court through its decisions. The Special Rapporteur has promoted the protection of freedom of expression which in turn has helped

develop clarification on its scope and application under the Convention and the American Declaration on the Rights and Duties of Man. Furthermore, its annual reports analyze the overall situation for the protection of freedom of expression and identifies specific trends affecting the development of the right in the Americas. [20]

As observed by Bertoni,[21] before the Office of the Special Rapporteur was created, there were few cases related to freedom of thought and expression which can be explained by the fact the Commission did not refer contentious cases to the Court until 1986.[22] As such, the Court's Article 13 jurisprudence consisted solely of its Advisory Opinion OC-5/85 on the "Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism", issued on November 13, 1985 ("AO5")[23] which was non-binding but became a handbook for studying the contents of the freedom of thought and expression under the Inter-American System,[24] partly because there was a dearth of other decisions and partly because of the robust and rigorous nature of the Court's arguments in that original opinion.

In this section, we will discuss the reasoning in a selection of relevant cases within each stage in a chronological order to reflect the Court's evolution over the years. This will set the context for a third stage in the "evolutive interpretation" of Article 13.[25]

3.1 Stage one: Advisory Opinion 5

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[20] C. Grossman, "Challenges to freedom of expression within the Inter-American system: a jurisprudential analysis" *Human Rights Quarterly* 34 (2012) 361-403
[21] E. A. Bertoni, "Jurisprudencia interamericana sobre libertad de expresión: avances y desafíos". In: M. P. Ávila Ordoñez et al (eds) *Libertad de expresión: debates, alcances y nueva agenda.* (Quito: UNESCO, 2011) 349.
[22] Pasqualucci *supra* note 10, p. 6.
[23] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* Advisory Opinion OC-5/85, IACtHR, 13 November 1985, Series A No 5
[24] Bertoni, *supra* note 21, p. 350.
[25] *Right to Information on Consular Assistance Within the Framework of the Guarantees of Legal Due Process, supra* note 9 at [114].

One of the most important Article 13 decisions is the 1985 Advisory Opinion 5 (AO5). This Opinion was issued to clarify whether, under Article 13, a State's requirement for compulsory membership of journalists and reporters with an association as a condition for the exercise of the journalist profession (i.e., compulsory licensing), could be a legitimate limitation to freedom of thought and expression. Its robust reasoning established basic concepts that are still used by the Court. Such reasoning includes the essential relationship the rights to freedom of thought, expression and information have with a healthy democratic regime; the dual dimension (both individual and collective) of the right; and, the criteria to determine whether the "subsequent imposition of liabilities"[26] enforced by law on the basis of unlawful expression comply with the Convention.

A single right is implied when the AO5 states that Article 13 provides individuals the "freedom of express their own thoughts".[27] In other words, the Court conflates thought with expression considering thought as a precondition, which it obviously is, for expression but not acknowledging that thought has an essential value, in and of itself, beyond and not determined by its expression.

On the relationship between Article 13 and democracy, the Court stated that "freedom of expression is a cornerstone upon which the very existence of a democratic society rests".[28] The Court understands that only a well-informed society is able to adequately hold power to

[26] Article 13(2) refers to "subsequent imposition of liability" which refers to legal consequences flowing from the abusive exercise of freedom of expression. These consequences may be of civil or criminal nature, depending on the applicable law. Examples of "subsequent liabilities" would be a criminal conviction due to crimes against honour, or civil damages granted against the person who exercised the expression.
[27] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, supra* note 23 at [30].
[28] *Ibid,* at [70].

account. Thus, "a society that is not well informed is not a society that is truly free".[29] The AO5 explicitly states that the Court's interpretation of Article 13, as a provision that "bear[s] a critical relationship to the preservation and functioning of democratic institutions", must be guided by "the just demands of democracy".[30]

When emphasising the importance of the Court's interpretation on the inherent link between freedom of thought, expression and information with democracy, it is important to understand the Latin American context of countries transitioning from dictatorships that systematically suppressed expression in a varied number of ways, from censorship to physical threats, to democratic regimes. Even as democracies, journalists and human rights defenders have continued to be intimidated, threatened and killed, and protest and dissent is (sometimes violently) repressed.[31] Grossman explains that:

> "In a democracy, however, criticism free from fear of punishment - especially when directed at authority - reaffirms egalitarian principles and ensures that public officials carry out their duties with transparency and responsibility. Conversely, the threat or imposition of penal sanctions suffocates democracy and responds to an authoritarian logic that is incompatible with democratic tenets". [32]

Another legacy of the AO5, is the Court's now classic understanding that Article 13 provides a double dimension of the rights to freedom of thought and expression, as both an individual and a collective one. In the individual dimension, the AO5 made clear that the right to freedom

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[29] *Ibid.*
[30] *Ibid* at [44].
[31] OAS 'Annual Report of the Special Rapporteur for Freedom of Expression' (2019) OEA/Ser.L/V/II.Doc.5
[32] C. Grossman, "Freedom of expression in the Inter-American system for the protection of human rights". *ILSA Journal of International & Comparative Law*, 7 (2001) 619-647.

of expression and the dissemination of ideas and information are "indivisible concepts".[33] The right to speak or write "cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible". As such, there is a corresponding right to receive information and this reciprocation between the individual and collective dimension functions as "a means for the interchange of ideas and information among human beings and for mass communication" since there is a collective interest to receive different information and opinions.

The dual aspect of Article 13 requires that the two dimensions "must be guaranteed simultaneously"[34] and is premised on the understanding that Article 13 not only provides "the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds. Hence, when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to "receive" information and ideas."[35]

The AO5 also established that even though there are lawful limitations to freedom of thought and expression, any such limitations must be analysed carefully to assess their compliance with the strict boundaries of subsections 2 to 5 of Article 13. According to Mazzuoli,[36] this was one of the most important parts of the Opinion, since upon this basis the Court has determined that for the imposition of subsequent liabilities to be correctly established by national law, it is necessary to observe a set of conditions. These conditions include: a) the reasons for liability must have been established prior to the facts, b) the law must use strict and clear definitions, c)

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[33] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, supra* note 23 at [31].
[34] *Ibid* at [33].
[35] *Ibid* at [30].
[36] V. de Oliveira Mazzuoli, *Direitos Humanos na Jurisprudência Internacional* (São Paulo: Método, 2019) 738.

the purposes sought must be legitimate and d) the reasons for liability must be necessary to secure such purposes. As stated in AO5:

> "The 'necessity' and, hence, the legality of restrictions imposed under Article 13(2) on freedom of expression, depend upon a showing that the restrictions are required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts the right protected must be selected. (…) That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it".[37]

Hence, there is a strong presumption against prior censorship, which can only be applied on the strict limits of Article 13(4), which include for the moral protection of childhood and adolescence, on the basis that "there is a danger in creating "filters" to decide what individuals can hear, see, or read".[38]

3.2 Stage two: Cases following the establishment of the Office of the Special Rapporteur for Freedom of Expression

From 2001, three years after the creation of the Special Rapporteur, the Court initiated a sequence of judgments in which the question of Article 13's scope was pertinent. Building on the solid foundations of AO5, the Court was able to address specific issues relevant to the protection of the rights contained in Article 13 such as censorship, political speech protection,

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[37] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism supra* note 23 at [46].
[38] Grossman, *supra* note 32, p. 634.

freedom of information, and the proportionality of the liability imposed against journalists or book authors.

In succession, a series of cases followed the AO5 reasoning on the purpose and scope of Article 13. The double dimension doctrine was applied in each case in which it was unanimously found that there had been an Article 13 violation. *Ivcher-Bronstein v. Peru* considered the State's attempt to control the media through the indirect removal of the President of a TV channel which has exposed torture and corruption by members of the Peruvian Army contrary to Article 13;[39] *Olmedo-Bustos v. Chile* related to the judicially ordered prior censorship of the movie *The Last Temptation of Christ* as a breach of the right to freedom of expression;[40] and, *Herrera Ulloa v. Costa Rica* assessed whether the criminal defamation conviction of a journalist who has published damming reports about a public official amounted to a violation.[41] These judgments reaffirmed the AO5 double dimension doctrine finding that every person "not only has the right and the freedom to express their own thoughts, but also the right and freedom to seek, receive and impart information and ideas of all kinds";[42] meaning "that no one be arbitrarily limited or impeded in expressing his own thoughts"[43] and that "awareness of other people's opinions and information is as important as the right to impart their own".[44] Furthermore, protection applies to opinions "that offend, are unwelcome or expose the State or any sector of the population".[45]

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[39] *Ivcher-Bronstein v. Peru* (Merits, Reparations and Costs) Inter-American Court of Human Rights, 6 February 2001, Series C No 74
[40] *Olmedo Bustos v. Chile* (Merits, Reparations, and Costs) Inter-American Court of Human Rights, 5 September 2001, Series C No 73
[41] *Herrera-Ulloa v. Costa Rica* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights, 2 July 2004, Series C No 107
[42] *Ivcher-Bronstein v. Peru, supra* note 39 at [64].
[43] *Olmedo Bustos v. Chile, supra* note 40 at [64]; *Herrera-Ulloa v. Costa Rica*, *supra* note 41 [108], both citing "AO5" *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism supra* note 23 at [31]
[44] *Herrera-Ulloa v. Costa Rica*, *supra* note 41 at [110].
[45] *Ivcher-Bronstein v. Peru*, *supra* note 39 at [152].

The Court began to expand upon the AO5's emphasis upon the symbiotic relationship between expression and democracy. In *Herrera-Ulloa*, the Court strengthened the AO5's emphasis on democracy and Article 13 emphasising that "the essential role played by freedom of expression in the consolidation and dynamics of a democratic society. Without effective freedom of expression, exercised in all its forms, democracy is enervated, pluralism and tolerance start to deteriorate, the mechanisms for control and complaint by the individual become ineffectual and, above all, a fertile ground is created for authoritarian systems to take root in society."[46] In *Canese v. Paraguay*, in the context of an election campaign, the Court stressed the connection between speech and democracy to promote debate and aid the public in forming an opinion about candidates. Article 13 is therefore instrumental in the electorate exercising its political rights.

Furthermore, as per *Palamara Iribarne v. Chile,* the State has a duty not to restrict the dissemination of ideas, enabling the dissemination of publications "by any appropriate means to make [an individual's] ideas and opinions reach the maximum number of people and, in turn, allowing these people to receive this information".[47] In line with these cases, State persecution of journalists and TV professionals because of the opinions and information published and disseminated,[48] or government attempts to influence the media[49] are clear violations of Article 13. Such abuses of power violate the freedom of expression of the media

[46] *Herrera-Ulloa v. Costa Rica*, *supra* note 41 at [116].
[47] *Palamara Iribarne v. Chile* (Merits, Reparations, and Costs) Inter-American Court of Human Rights, November 2005, Series C No 135 at [73].
[48] *Ríos et al v. Venezuela* (Preliminary Objections, Merits, Reparations, and Costs) Inter-American Court of Human Rights, 28 January 2009, Series C No 194; *Perozo et al v. Venezuela* (Preliminary Objections, Merits, Reparations, and Costs) Inter-American Court of Human Rights, 28 January 2009, Series C No 195.
[49] *Granier et al v. Venezuela* (Preliminary Objections, Merits, Reparations, and Costs) Inter-American Court of Human Rights, 28 June 2015, Series C No 29.

outlets and its workers, but also the social dimension of the right as it aims to silence government critics and suppress unfavourable information. The right therefore has a broad scope in protecting an individual when speaking[50] as well as an individual who wishes to widely disseminate information using various means of communication (books, films, newspapers etc).

In 2006 the Court significantly developed its jurisprudence on freedom of expression when it ruled in *Claude-Reyes v. Chile*[51] that the right to freedom of information as expressly provided for in Article 13 should be understood as including the double dimension, like the right to freedom of thought and expression, that must be guaranteed simultaneously by the State. The effect of this ground-breaking case is that the individual has the right to receive public information and the State has a positive obligation to provide it to the individual who can then circulate it so that the wider population also has access to it.[52] This is deemed as necessary to combat corruption[53] and, in the context of forced disappearances, is central to the right to know the truth.[54]

In *Kimel v. Argentina,*[55] from 2008, which involved the publication of a book about a judge and the author's criminal conviction that derived from it, the Court reiterated that freedom of thought and expression is not an absolute right:

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[50] *López Álvarez v Honduras* (Merits, Reparations and Costs), Inter-American Court of Human Rights, 1 February 2006, Series C No 141 at [164].
[51] *Claude-Reyes v. Chile* (Merits, Reparations and Costs), Inter-American Court of Human Rights, 19 September 2006, Series C No 151.
[52] *Ibid* at [77].
[53] *Ibid* at [81].
[54] *Gomes Lund et. al. v. Brazil* (Preliminary Objections, Merits, Reparations, and Costs), Inter-American Court of Human Rights, 24 November 2010, Series C No 219.
[55] *Kimel v. Argentina* (Merits, Reparations and Costs) Inter-American Court of Human Rights, 2 May 2008, Series C No 177.

> "Notwithstanding, freedom of thought and expression is not an absolute right. Article 13(2) of the Convention, which prohibits prior censorship, provides for the possibility of placing restrictions on freedom of thought and expression by imposing subsequent liability for abuse of this right. These restrictions in no way should restrict, beyond what is strictly necessary, the full exercise of freedom of thought and expression or become either a direct or indirect mechanism of prior censorship".[56]

However, the interpretation of a permissible direct or indirect restriction to freedom of thought and expression should be strict and literal, as a broader interpretation could lead to the direct erosion of the right.[57] Thus, a disproportionate criminal conviction may be considered an illegitimate way for restricting freedom of thought and expression.[58] Furthermore, the Court will take account of the impact certain restrictions on the exercise of expression may have for human dignity.[59]

Another relevant case is *I.V. v Bolivia*, from 2016, that involved a sterilization procedure performed in a non-emergency situation and without the informed consent of the victim which resulted in the permanent loss of her capacity of having children. The Court stated that the principle of autonomy "prohibits any State action that attempts to 'instrumentalize' individuals" in a way that could limit their "choices about their own life, body and full development of their personality".[60] The Court also stated that "private life" is a concept

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[56] *Ibid*, at [54].
[57] *Canese v. Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights, 31 August 2004, Series C No 111.
[58] *Ibid*; *Herrera-Ulloa v. Costa Rica supra* note 41*; Kimel v. Argentina supra* note 55; *Tristán Donoso v. Panama* (Preliminary Objection, Merits, Reparations, and Costs) Inter-American Court of Human Rights, 27 January 2009, Series C No 193.
[59] *López-Álvarez v. Honduras supra* note 50.
[60] *I.V. v. Bolivia* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights, 30 November 2016, Series C No 329 at [150].

broader than "privacy", since "it encompasses a series of factors related to the dignity of the individual, including, for example, the ability to develop one's own personality and aspirations, determine one's own identify, and define one's own personal relations".[61] The Court also recognized the "existence of a connection between physical and mental integrity and personal autonomy and the liberty to take decisions regarding one's own body and health", which would demand States to "ensure and respect decisions and choices that have been made freely and responsibly."[62]

The Court's case law identifies some special attributes to Article 13, including: 1) the double dimension (individual and collective), 2) that freedom of thought and freedom of expression are considered the same right, 3) which not an absolute right, 4) the indivisibility between the expression and its dissemination, 5) protection of the means necessary to disseminate ideas, 6) illegitimacy of direct or indirect restrictions, 7) applicability to private relations, 8) the right to State-held information. The consequence for freedom of thought is that "thought" itself (understood as the internal thinking of individuals or the *forum internum*) has not yet been considered worthy of protection under the Convention. The text of the Convention, however, leaves margin for future developments. As of now, there have been relatively few Article 13 cases before the Court, no doubt a reflection of the Commission's role in encouraging settlements, in comparison to the European Court of Human Right's Article 9 and 10 judgments.

Furthermore, as we have emphasized, the cases before the Court are reflective of specific context of the region, which partly accounts for the difference between the American

[61] *Ibid* at [152].
[62] *Ibid* at [155].

Convention and its interpretation and the ECHR and its interpretation.[63] Indeed, as O'Callaghan and Shiner point out, the European Court of Human Rights has not yet had a case before it to test the scope, limit and application of the right to freedom of thought contained in Article 9 ECHR and nor has the Inter-American Court.[64] As such, the Court's case law is contained to the specific case facts that it has considered so far. This may account for why thought has been considered as a mere dimension of expression rather than as a right offering a specific protection to human thought beyond the expression and the feeding of thoughts with information. The Court has adapted its understanding of how the Convention rights ought to be protected and the scope of the rights themselves according to the context. It is submitted, that with the oncoming technological changes, it will have to do so again.

4. Technological changes and its impact on thought and expression: the example of neurotechnology

Humans are constantly conditioned by social experiences and the kinds of medium we are exposed to. Thus, the meaning of a right is determined by the cultural surroundings of an individual or a society. The current understanding of what could be 'freedom of thought' is dramatically conditioned by the acts that come right after we think – therefore, 'expression' or 'speech' are activities to which we are familiar with, differently than references to 'thought'. Before Gutemberg's invention of the printing press the idea of 'free speech' could be understood as applied only to a literally spoken manifestation, not to the written one. Its

[63] T. Buergenthal, "The American and European Conventions on Human Rights: Similarities and Differences" *The American University Law Review* 30 (1980) 155-166

[64] P. O'Callaghan and B. Shiner "The Right to Freedom of Thought in the European Convention on Human Rights" *European Journal of Comparative Law and Governance* (forthcoming).

development to a broader freedom of expression was something determined by technological change.[65]

The current period of technological development, the Fourth Industrial Revolution,[66] demands a change of interpretation to protect thought itself, unattached from speech. As stated by Pedra,[67] changes in interpretation occur as a way of preserving the meaning of the text itself, seeking to achieve harmony with the society to which it was designed for. Such norms cannot be considered as "written in stone", since they are in a constant process of interaction with reality.

Recent developments in neuroscience have made it possible to decode thoughts – from determining which object the individual sees (neuroimaging) to determining what he or she hears.[68] Bublitz catalogues a number of situations in which freedom of thought would be at risk, from the use of neuroimaging technologies to mind and brain interventions (both invasive and noninvasive) and neuromarketing.[69] The possibility of thought crimes or negative sanctions due to thoughts, which once belonged to science fiction, is becoming real as brain-computer interfaces make it possible to affect the real-world without obviously committing an action.[70] Brain-computer interface products are entering the marketplace which offer

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[65] V. Mayer-Schönberger and K. Cukier, *Big Data*: *a revolution that will transform how we live, work and think*. (Boston: Eamon Dolan, 2013) 176.
[66] K. Schwab, *The Fourth Industrial Revolution* (2017, Penguin)
[67] A. Sant'Ana Pedra, *Mutação Constitucional: interpretação evolutiva da Constituição na democracia constitucional* (Rio de Janeiro: Lumen Juris, 2014).
[68] J. C. Bublitz, "Freedom of thought in the age of neuroscience" *Archiv für Rechts- und Sozialphilosophie* (100)(1) (2014) 1–25; S. McCarthy-Jones, "The Autonomous Mind: The Right to Freedom of Thought in the Twenty-First Century" *Frontiers in Artificial Intelligence* 2(19) (2019). Retrieved 27 November 2020 https://doi.org/10.3389/frai.2019.00019; S. Alegre, "Rethinking Freedom of Thought for the 21st Century", *European Human Rights Law Review* 3 (2017) 221- 233.
[69] Bublitz, *supra* note 68, 7-14.
[70] K. Thompson "Committing Crimes with BCIs: How Brain-Computer Interface Users can Satisfy *Actus Reus* and be Criminally Responsible" *Neuroethics* (2019); A. McCay, "Neurobionic revenge porn and the criminal

consumers direct insights into their brain to help increase productivity by measuring the brain's electrical signals which are analysed using advanced signal processing algorithms. Other cognitive states can also be detected by such products.[71] Neuralink is another brain-machine interface platform converting thought into data.[72]

The convergence between technology and biology will progressively allow more and more data to flow from the human body to intelligent machines, which will facilitate an unprecedented knowledge of one's mind, information that will be held either by the government or by corporations. As pointed by Schwab, the Fourth Industrial Revolution implies a deep fusion between humanity and technology, which is allowing us to learn in an exponential way about our thoughts and emotions.[73] Therefore, amongst the most important issues that will require attention from legal scholars are related to this fusion between biology and technology known as "biotech".[74] Thus, if machines that can convert thoughts into data are proliferating, their ability to predict thought and understand unspoken expressions may be harmful for an individual's freedoms.[75]

This calls for a reflection over the scope of the legal and constitutional protection to be given to freedom of thought – that has always been understood by the Court as a freedom to express

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law: Brain-computer interfaces and intimate image abuse" in N. Vincent, T. Nadelhoffer and A. McCay (eds) *Neuro-interventions and the Law: Regulating Human Mental Capacity* (New York: Oxford University Press, 2019)

[71] 'Neurable: Focus on What Matters Most', 23 April 2021. Retrieved 30 April 2021 https://www.youtube.com/watch?v=Rae6NzMWTRo&t=119s

[72] E. Musk and Neuralink, "An integrated brain-machine interface platform with thousands of channels" *Journal of Medical Internet Research* 21(10) (2019) e16194.

[73] Schwab, *supra* note 66.

[74] As of 2016, there were circa 1 trillion sensors online and about more than half of Internet traffic was generated by domestic devices. The technological community also expects that by 2025 the first implantable cellphone will be available on the market, see *ibid*, p. 92.

[75] Alegre, *supra* note 68, p. 226.

one's thinking, as conditioned by the available technology.[76] As technology develops, it becomes clearer that the insights gained from neurotechnology will have a transformative effect on the law by shining new light on a right that was taken for granted, but which now needs the development of a basic framework for its protection.[77]

5. The Right to Freedom of Thought

Having examined scientific developments that may influence the scope of the right to freedom of thought, we now turn to the specific argument that we think arises from the impending technological challenges which is that the right to freedom of thought must be understood as a separate and distinct right.

5.1 Freedom of Thought as a distinct right

As seen discussed, the Court's jurisprudence indicates that Article 13 guarantees thoughts and expression symbiotically although the right has two different dimensions, an individual and a collective or social one. This paper argues that due to current technology developments described in the previous section, the right to freedom of thought should be understood as being distinct from the right to freedom of expression. Such an evolution would retain the double dimension element whilst also acknowledging that effective protection for the right to freedom of thought necessarily requires the Court to understand the specific application of these technologies to the internal realm. As such, the Court may need to grapple with the question of

[76] McCarthy-Jones, *supra* note 68, p. 5.
[77] J. Greene and J. Cohen, "For the Law, Neuroscience Changes Nothing and Everything" *Philosophical Transactions of the Royal Society of London* B, 359, (2004) 1775-17785.

whether the right protects the *forum internum* as well as the *forum externum*. Such an evolution is permitted and necessary if the Convention's aim in protecting human rights in a responsive manner is to be met.

In terms of permissibility, to give effective protection to the Convention rights, the Court adopts a dynamic approach to interpretation. The Article 29(b) ***pro homine*** principle, whereby domestic laws must be interpreted in the manner most advantageous to the human being, ensures that the dignity of the individual is of primary concern when interpreting the Convention rights "so that its guarantees are truly practical and effective."[78] Additionally, Article 29(c) proclaims that no provision of the Convention shall be interpreted as "precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government". This means that protection can extend to rights that are not textually guaranteed if they are recognized by the Court. Such an enumeration of rights that protect thought relays back to the need for the Convention to be interpreted as one complete harmonic document.

Regarding the necessity for the specific recognition of freedom of thought, although other Convention rights recognise the importance of protecting humanity's ability to think freely by indirectly protecting the right, thought as a fundamental human characteristic necessary for the exercise of other rights needs direct and effective protection. Here we can reflect upon the fact that Article 13 is valued not as an isolated right but as an Article which interconnects, secures or enhances the democratic aims of the Convention as well as the effective enjoyment of other

[78] *Vargas Areco v. Paraguay* (Merits, Reparations, and Costs), Inter-American Court of Human Rights, 26 September 2006, Series C No 155 at [85] as cited in Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights supra* note 10, p. 12.

Convention rights. This special feature of Article 13 was expressed in the concurring opinion of Judge Sergio Garcia Ramirez in *Herrera Ulloa*:

> "Other rights suffer, weaken or disappear when freedom of expression is eroded. The protection of life and liberty, preservation of integrity of person, respect for property, and access to the courts: all these owe much to freedom of expression manifesting itself as criticism or a power to denounce, which is an individual and collective imperative. Authoritarianism tends to wield its power against freedom of expression as a means to forestall revelation of the truth, to silence differences, to dissuade or frustrate voices of protest and, in the end, to negate the pluralism that is one of the distinctive features of a democratic society. Hence, society's "democratic senses" must be constantly alert so as to prevent and combat any violation of freedom of expression which might bring with it, sooner or later, other forms of oppression". [79]

This was the approach taken in *López Lone et al. v. Honduras* where, in the context of the aftermath of a *coup d'état*, the Court recognized the existing relationship between political rights, freedom of expression, the right of assembly and freedom of association that together, make democracy possible.[80] Indeed, during the drafting of the Universal Declaration of Human Rights, it was said that the "principle of freedom of thought" is spread across the right to freedom of thought, opinion formation (or access to information), freedom of expression and assemblies.[81] The point being that the right to freedom of thought is both explicitly protected

[79] Concurring opinion of Judge Sergio Garcia Ramirez, *Herrera Ulloa supra* note 41 at [5]
[80] *López Lone et al. v. Honduras* (Preliminary Objection, Merits, Reparations and Costs), Inter-American Court of Human Rights, 5 October 2015, Series C No 302.
[81] A/C.3/SR. 127 (403) as cited in Bublitz (forthcoming).

alongside other rights which implicitly rely on thought as well as offer supplementary protection to thought in specific circumstances or forms.

One pertinent interconnected right worth mentioning is the protection of mental integrity under Article 5 ("right to humane treatment") which states: "every person has the right to have his physical, mental, and moral integrity respected". This right has been primarily understood as an absolute prohibition on all forms of torture and cruel, inhuman or degrading punishment or treatment.[82] It is a central right for the protection of prisoners, along with Article 7 ("right to personal liberty"). Often the context of the ill-treatment bears upon the severity of the breach whether that be the institutionalised use of corporal punishment[83] or the ill-treatment of civilians in arbitrary detention.[84] The Court has described that the "violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation."[85] The case law has not distinguished between mental or moral integrity and has not expounded on the right except in circumstances of "mental suffering".[86]

In its Advisory Opinion 23/17, the Court declared that the violation of mental integrity could assume "various connotations of degree and ranges from torture to other types of ill-

[82] *Lori Berenson-Mejía v. Peru* (Merits, Reparations and Costs), Inter-American Court of Human Rights, 25 November 2004. Series C No 119, at [100].
[83] *Caesar v. Trinidad and Tobago* (Merits, Reparations and Costs) Inter-American Court of Human Rights, 11 March 2005, Series C No 123, at [73].
[84] *Tibi v Ecuador* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights, 7 September 2004, Series C No 114.
[85] *Loayza Tamayo v. Perú* (Merits) Inter-American Court of Human Rights, 17 September 1997. Series C No 33, at [57].
[86] *Lysias Fleury et al. v. Haiti* (Merits and Reparations) Inter-American Court of Human Rights, 23 November 2011, Series C No 236, at [72].

treatment or cruel, inhuman or degrading treatment", and that the effects could vary in "intensity according to endogenous and exogenous factors (such as duration of the treatment, age, sex, health, context and vulnerability) that must be examined in each specific situation".[87] As such, Article 5 provides protection in specific circumstances related to mental anguish which in future may not be limited to the context of institutional punishment or detention. The specific contours of the right to mental integrity remain elusive under the American Convention as well as under Article 8 ECHR and Article 3 of the European Charter on Fundamental Rights.[88] Such a right could relate to freedom of thought in the sense that it relates to mental health, mental ill-treatment (sleep deprivation and insult in the context of detention) and the manipulation of someone's thinking or decision-making. Bublitz has characterised the potentially very broad conception of mental integrity as relating to the "*preservation* of the intactness, unity or identify" of the mind.[89] In other words, any undue interferences on the formation of ways of thinking would be a violation of this right.

The right to privacy under Article 11 means "the right to private life includes a person's physical and mental integrity, and that the State also has the positive obligation to ensure this right to its citizens".[90] In *Artavia Murillo et al. v. Costa Rica*, the Court asserted that:

> "The protection of private life encompasses a series of factors associated with the dignity of the individual, including, for example, the ability to develop his or her own personality

[87] *The Environment and Human Rights* Advisory Opinion OC-23/17, Inter-American Court of Human Rights, 15 November 2017, Series A No 23 at [112].
[88] J. C. Bublitz, "The Nascent Right to Psychological Integrity and Mental Self-Determination" in A. von Arnauld, K. von der Decken and M. Susi (eds) *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (Cambridge: Cambridge University Press, 2020).
[89] *Ibid* (emphasis is original).
[90] *Artavia Murillo v. Costa Rica* (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, 28 November 2012, Series C No 257.

> and aspirations, to determine his or her own identity and to define his or her own personal relationships. The concept of private life encompasses aspects of physical and social identity, including the right to personal autonomy, personal development and the right to establish and develop relationships with other human beings and with the outside world".[91]

In *Fontevecchia v. Argentina*, the Court specified that States have a positive obligation to create a regulatory environment that preserves private life and inhibits unlawful interferences with it, either from the government of by private individuals:

> "The scope of privacy is characterized as being free and immune to invasions or abusive or arbitrary attacks by third parties or public authority and may include, among other dimensions, the freedom to make decisions related to various areas of a person's life, a peaceful personal space, the option of reserving certain aspects of private life, and control of the dissemination of personal information to the public."[92]

Therefore, privacy could be considered alongside the protection of mental integrity and freedom of thought, to the extent that the Convention forbids "arbitrary or abusive" interference with this right.[93] One must assume that interfering directly with people's thoughts could be abusive or arbitrary, if not demonstrated a compelling public interest to do so. Since article 13 is not absolute, the act of interfering with thought may be compatible with the Convention, whenever demonstrated that the interference is neither arbitrary nor abusive or justified as in

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[91] *Ibid,* at [143].
[92] *Fontevecchia v. Argentina* (Merits, Reparations, and Costs), Inter-American Court of Human Rights, 29 November 2011, Series C No 238, at [48].
[93] American Convention, Article 11(2).

the context of involuntary psychiatric treatment.[94] The Convention guarantees that member States must "refrain from interfering arbitrarily with individuals, their personal information and their communications, and on the other hand, should guarantee that other actors refrain from such abusive conduct as well."[95]

These supporting rights provide an indirect and partial protection to thought itself where some thoughts, in some circumstances, would be subject of protection while others would be in a grey zone of non-protection. This is one good reason for recognising freedom of thought as an distinct right with practice effect. The combination of technological changes with the provisions cited above provide support for a new interpretation of Article 13 as containing three distinct rights: thought, expression and information. The right must be secured by a shift in the current understanding of Article 13 which solely protects external expressions to include the *forum internum*. As we have already demonstrated, Article 13 establishes a positive obligation upon States, and Article 2 requires States to give legal effect to Convention rights through domestic legal and regulatory frameworks. The question now is how should such frameworks be composed? The next section proposes that guidance is taken from already existing Bioethics principles as a way to give effect to the right to freedom of thought.

5.2 Drawing on Bioethics Principles

[94] M. Stenlund and P. Slotte "*Forum Internum* Revisited: Considering the Absolute Core of Freedom of Belief and Opinion in Terms of Negative Liberty, Authenticity, and Capability", *Human Rights Review* 19(4) (2018) 425–446. On how the absolute nature of Article 9 ECHR might still accommodate involuntary psychiatric treatment see O'Callaghan and Shiner *supra* note 64.

[95] OAS, Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, 'Freedom of Expression and the Internet', (2013) OEA/Ser.L/V/II.CIDH/RELE/INF.11/13, 10.

It is certain that huge changes are on the horizon once brain-reading techniques have been mastered. Consequently, freedom of thought issues should become a center piece of the legal discussions within corporations and government. Article 2 of the Convention demands that States give domestic legal effect to Convention rights by drawing up new legislation, if necessary, and/or removing laws or practices which are incompatible with the Convention rights and obligations. In the fusion between biology and technology, bioethics principles can help understand the problems related to the application of technologies and can be used to guide legislation and regulation to protect freedom of thought.[96]

The original bioethics principles evolved from commonly accepted medical practices, that derive from biomedical ethics. The application of ethical principles may act as a good instrument for preventing the violation of legal rights. The bioethics approach builds on the simple idea that ethics should govern medical treatments and scientific research that deals with humanity. It did not start with a uniform list of principles, but with common standards regularly accepted by the medical community. The initial reference to bioethics principles come from the work of Tom Beauchamp and James Childress, who published in 1974 the book "Principles of biomedical ethics". As described by the authors:

> "We appreciated the need for an approach that recognized the value of ethical theory for practical judgments but that did not fetishize a single type of theory or promote a single principle over all others. We became convinced that several moral principles provide significant common ground relevant to judgments in the biomedical sciences, medicine,

[96] D. C. Fabriz, *Bioética e direitos fundamentais*. (Belo Horizonte: Mandamentos, 2003) 364.

and health care and that these principles could not be convincingly ranked a priori in a hierarchical order".[97]

Beauchamp and Childress proposed four main principles to guide medical treatment and research: a) respect for autonomy, b) non-maleficence, c) beneficence, and d) justice. The principle of autonomy demands the profound respect for the individualistic will and demands clear and free consent. Non-maleficence implies a duty of not causing harm to the individual, understood alongside beneficence, in the sense that research must focus on improving humanity as a whole. Justice represents the ideal of fair and universal distribution of the benefits of research.[98]

In 2005, the United Nations Education, Scientific and Cultural Organization (UNESCO) issued a Resolution to adopt the Universal Declaration on Bioethics and Human Rights which specifically address the relation between bioethics and "human dignity, human rights and fundamental freedoms".[99] The principles part of the Declaration ("UNESCO principles") contains 15 Articles that report to the four Beauchamp and Childress principles: a) human dignity and human rights, b) benefit and harm, c) autonomy and individual responsibility, d) consent and persons without capacity to consent, e) respect for human vulnerability and integrity, f) privacy and confidentiality, g) equality, justice and equity, h) non-discrimination and non-stigmatization, i) respect for cultural diversity and pluralism, j) solidarity and cooperation, k) social responsibility and health, l) sharing of benefits, m) protecting future

[97] T. Beauchamp and J. Childress, "Principles of Biomedical Ethics: Marking Its Fortieth Anniversary", *American Journal of Bioethics*, 19(11) (2019) 9-12.
[98] Fabriz, *supra* note 96, pp. 109-111.
[99] Article 3(1); R. Andorno, "Global bioethics at UNESCO: in defence of the Universal Declaration on Bioethics and Human Rights" *Journal of Medical Ethics* 33(3) (2007) 150-154.

generations, n) protection of the environment, the biosphere and biodiversity.[100] Good reasons can justify the adoption of the UNESCO principles, such as their compatibility with the broader principles proposed by Beauchamp and Childress and their elaboration through a multistakeholder methodology in a multinational context.

The subsidiary application of the Universal Declaration on Bioethics and Human Rights to the Inter-American System should be considered since Article 29(d) of the Convention proclaims that its text should not be interpreted in ways that would result in "excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and **other international acts of the same nature may have**" (emphasis added). Hence, the Universal Declaration on Bioethics and Human Rights can be qualified as an international act of the same nature as the American Declaration of the Rights and Duties of Man.[101] Therefore, the UNESCO principles, which specifically draw on notions such as human dignity and autonomy, should influence the development of the content of the freedom of thought as a separate and distinct right. Although critics of the UNESCO principles wondered why the application of human rights principles was necessary to develop global bioethical standards, it was deemed critical to understand that considering biomedicine deals with the right to life and physical (and mental) integrity "it is perfectly sound to have recourse to the umbrella of international human rights law to ensure their protection."[102] Furthermore, "the human rights framework provides a more useful

[100] Articles 3 to 17
[101] As Article 29(d) of the Convention refers to "other international acts of the same nature", which includes other international human rights treaties, there is no need for each one to be expressly adopted by the OAS in order to be applied by the Court. See Advisory Opinion OC-16/99 on *The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law*, *supra* note 9.
[102] Andorno *supra* note 99, p.153.

approach for analysing and responding to modern public health challenges than any framework thus far available within the biomedical tradition".[103]

There may be two instances in which such principles, as set out in the Universal Declaration on Bioethics and Human Rights, could be articulated to enhance and protect the right to freedom of thought as a distinct right: a human rights approach and a regulatory approach. Firstly, the principles can influence the Commission and the Court by influencing the scope of freedom of thought and its limitations. Even though this would be a proper way for the Court to issue a decision, it may not be the most effective way of protecting freedom of thought. Considering the nature of the possible threats for this right and the rapidity of technological developments, to wait for a case to be brought before the Commission or even the Court will take a long time as such may be an ineffective way of preventing violations. In the second instance, the principles should influence domestic regulatory frameworks that State Parties need to protect freedom of thought. According to Article 1(1) of the Convention, States are compelled to "respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms". Therefore, States play a broad role in fulfilling the rights provided by the Convention.

The most effective way of protecting the right would be to combine both approaches. The Commission could play a large role in pushing domestic legislation and regulation. As described on the previous sections, the creation of the Office of the Special Rapporteur for Freedom of Expression and its reports helped to focus the Court's attention on the right to freedom of expression cases. This led to the Court's decisions that have helped shape internal

[103] J. Mann "Health and human rights. Protecting human rights is essential for promoting health" *BMI* 312 (1996) 924-5 as cited in *ibid*, p. 153.

regulation to strengthen compliance with the Convention. The same strategy could be adopted for the right tom freedom of thought, such as special reports on the possible threat of certain technologies to the right to freedom of thought and the application of the UNESCO principles. Thus, a further step to strengthen the application of the right would be to ensure that the UNESCO principles shape the architectural design[104] of any technologies that can pose potential harm to this freedom. Instead of judges (both national and supranational) adjudicating the issues taken *ex post facto* (if the issues actually make it to the Commission or to the Court), the technology should already conform to ethical, technical and legal standards and protections which do not discourage development and innovation, but as a form of ensuring that people's thoughts are not manipulated or invaded.[105]

6. Conclusion

An evolutive approach to the interpretation of the Convention allows it to adapt to social and technological changes in a vibrant and dynamic society. While the origins of the right to freedom of thought lies within its deep connection with freedom of expression, this paper has argued that the right to freedom of thought can and should be interpreted as a separate and

[104] L. Lessig, *Code 2.0*. (New York: Basic Books, 2006) 124-125. On a further development of Lessig's theory, this paper understands Architecture as a true "force" or regulation, alongside with the market, law and social norms see C. de Oliveira Santos Colnago, *Liberdade de expressão na Internet: desafios regulatórios e parâmetros de interpretação* (Salvador: Juspodivm, 2019).

[105] An initiative worth mentioning is the Chilean congress' approval of a draft amendment to its constitution to protect so called 'NeuroRights' "to protect the integrity and mental indemnity in relation to the advancement of the neurotechnologies". If on one hand domestic laws are an important factor in enhancing the protection of rights, on the other hand its role should be more result-oriented than symbolic. This means that it would be better to create clear rules for preventing violations of existing rights than generating 'new rights', which would still need to be developed regarding its scope and reach. 'En histórica votación, aprueban proyecto del ley que regulará los neuroderechos en Chile' *La Tercera,* 2021, 13 April. Retrieved 30 April 2021www.latercera.com/que-pasa/noticia/en-historica-votacion-aprueban-proyecto-del-ley-que-regulara-los-neuroderechos-en-chile/4IAQJIVHM5F75GRLAR2GQ27V24/

distinct right. This article has been unable to specify the exact contours that the may have but it is hoped that the core argument is at least persuasive enough to encourage other scholars and legal practitioners to begin thinking about and testing out the scope and limit of the right in practice. The right has the potential to be a powerful tool against future brain-reading and thought-influencing technologies. Moreover, in considering the principles and parameters of such a right, this paper has argued that it is possible to develop a regulatory approach whereby freedom of thought can be applied and implemented in harmony with scientific and technologic developments. More specifically, we should give serious thought to embedding the bioethics principles in the architectural design of any technologies that have the potential to pose a threat to freedom of thought.[106]

[106] For the application of such a strategy on freedom of expression on the Internet see Colnago *supra* note 104.