

**Submissions of Christian Legal Fellowship in Response to the Special Rapporteur's
Call for Input on Respecting, Protecting and Fulfilling the Right to
Freedom of Thought**

Christian Legal Fellowship (CLF) appreciates the opportunity to provide input for the Special Rapporteur's report to the 76th Session of the General Assembly.

By way of background, CLF is Canada's national association of over 700 lawyers, law students, and jurists, representing more than 40 Christian denominations. We are a non-governmental organization in Special Consultative Status with the United Nations' Economic and Social Council, with an established history of engaging matters of national and international public policy and law. Our members contribute to peer-reviewed, scholarly legal journals (both in Canada and internationally) on matters of human rights as well as moral, legal, and political philosophy and professional ethics. CLF also organizes the annual *Symposium on Religion, Law and Human Rights*, in which legal scholars present papers on human rights issues. Recent symposia have focused on Canada's underexamined constitutional protections, including freedom of thought. Selected papers from the symposia have been published in three volumes of the *Supreme Court Law Review* and correlated books, edited by CLF staff. Over the past 40 years, CLF has developed institutional expertise and insight concerning the importance of fundamental freedoms of religion and conscience, thought, belief, opinion and expression, peaceful assembly and association as well as equality rights.

Overview

CLF conceives of freedom of thought as a distinct and essential element of that human dignity which all human rights instruments aspire to promote. As such, freedom of thought is prior to and operative within each of the other rights and freedoms protected by such instruments. This freedom manifests not only internally and individually, but also externally, communally and institutionally. Each manifestation demands appropriate respect from state actors. While it is difficult to conceive of justifiable limitations on the internal, individualistic manifestations of freedom of thought, CLF recognises that certain aspects of the outward, communal and institutional manifestations may be inconvenienced by state actions. Even these limitations, however, could only be justified in such degrees as are necessary to preserve civil order within a society that prioritises human dignity, and therefore human rights, over expedient state action.

Like the ICCPR, the *Canadian Charter of Rights and Freedoms* specifically guarantees freedom of thought as a fundamental element of free and democratic society. However, freedom of thought remains underdeveloped as a discrete entitlement in Canadian constitutional and human rights jurisprudence. This underdevelopment, by which freedom of thought has been relegated to a "forgotten freedom" in our constitutional order, has not been without consequence.¹ CLF and others believe that

¹ See Dwight Newman, Derek Ross & Brian Bird, eds, *The Forgotten Fundamental Freedoms of the Charter* (Toronto: LexisNexis Canada, 2020). See also Brian Bird, Dwight Newman & Derek Ross, "The Charter's forgotten fundamental

inattention to this particular freedom has been detrimental to both the development and understanding of other fundamental freedoms expressly guaranteed by our constitution, including those of religion, expression, and association, which are more routinely litigated and presumed on that basis to be more soundly defined. Gratefully, awareness of these consequences is increasing within Canada's legal community and some, including CLF, are working to restore and develop freedom of thought and other similarly neglected protections in Canadian law through advocacy, public education, and scholarship.²

The Canadian experience suggests a proper understanding of the broad interests encompassed by freedom of thought are necessary to the meaningful exercise and protection of the other fundamental freedoms promoted by human rights instruments. Inattention to the various internal, external, individual, communal and institutional elements by which human thought is developed and transmitted—particularly among minorities—risks normalising state actions that hinder this freedom or even extinguish certain of its key aspects. Such hindrances are subtly becoming more common place in Canada in the form of mandatory attestations, religious/ideological tests, efforts to suppress and eradicate “incorrect” thinking and censorship of “harmful” or “misinformed” ideas.

Respecting, protecting and fulfilling the universal human right to freedom of thought requires states' recognition of human thought's basic and essential relationship to human dignity, as well as its broad scope of internal, external, individual, communal and institutional manifestations. True freedom of thought is realised only where minority individuals and communities are at liberty to independently hold, develop, test, change and transmit ideas, opinions and beliefs—even those which are critical of or contrary to those espoused by the majority or dominant classes and institutions of society—without fear of unjustified state interference or sanction.

The Scope and Content of Freedom of Thought

As an association of Christian legal professionals, CLF understands the right to freedom of thought not merely as the consequence of a legal settlement, to be revised according to the whims and predilections of state actors, but as the corollary of the inalienable dignity bestowed upon human beings as the image-bearers of God.

A full treatment of the content of freedom of thought is beyond the scope of this submission.³ Rather, our submission seeks only to emphasize that, rightly constructed, the right to freedom of thought encompasses not only a fundamental aspect of the human person's *forum internum*, as international jurisprudence has long recognised, but also certain external, communal and even institutional manifestations.

freedoms”, *Policy Options* (16 June 2020), online: <<https://policyoptions.irpp.org/magazines/june-2020/the-charters-forgotten-fundamental-freedoms/>>.

²See, for example, the video series produced jointly by Christian Legal Fellowship and the Forgotten Freedoms Project, online: <https://youtube.com/playlist?list=PLpH6Eoq7XKuBgUsfoAfmf_864EyU8R_Ro>.

³ However, we direct the Special Rapporteur to the work of professor of law, Dr. Dwight Newman, for one such treatment. Professor Newman's groundbreaking work in this area is an important contribution to both domestic and international understandings of this freedom's scope, the protections it entails and prospective legal tests by which violations of it might be analysed. See, for example, Dwight Newman, “Interpreting Freedom of Thought in the *Canadian Charter of Rights and Freedoms*” at 107-122 in Derek Ross, ed. *Canadian Pluralism and the Charter* (2019, LexisNexis: Toronto). See also Monica Fitzpatrick and Dwight Newman's “Freedoms of Thought, Belief and Opinion as Protected Inner Freedoms”, (2020) 98 S.C.L.R. (2d) 249-271.

CLF believes the breadth of this freedom is well-captured in the wording of the *Canadian Charter of Rights and Freedoms*, which guarantees the “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”. As noted by Professor Newman, this alternate collocation—away from conscience and religion—makes clear “the broader sense of freedom of thought.”⁴

The right to freedom of thought encompasses a scope of interests that is simultaneously broader and more basic to human dignity than perhaps any of the other conventional human rights’ headings. One’s freedom to hold, test, develop, change and transmit one’s ideas about the world in which one finds oneself is fundamental to the conscious experience of every human being. Thought is a process in which humans are always and already engaged; we are all thinking creatures. But it is also the fruit of that process; thought is the common possession of individuals and communities alike in the forms of language, culture, arts, science, religion and morals. These forms are inextricable from our inner thought lives, and yet they are inescapably external and communal in nature.

As stated by American legal scholar Kathleen A. Brady:

Knowledge is not possible without understanding, and understanding cannot grow unless individuals and communities are free to ponder, examine, entertain, develop, communicate, discuss and experiment with new and existing ideas.⁵

While certain key aspects of individual human thought are indeed confined to the *forum internum*, these elements of human thought necessarily draw from and develop within external, communal and institutional sources and settings.

The foregoing implies that any meaningful conception of the right to freedom of thought must encompass not only the inner world of each person, but also the external, communal and even institutional phenomena that are directed to informing these inner worlds. State interventions whose purpose or effect is to control or impede these phenomena necessarily encroach on freedom of thought—in addition to whatever other freedoms may be implicated.

This is not to say protecting freedom of thought requires adjudicators to strictly distinguish its external elements from other protected *forum externum* interests, such as the freedoms of expression, religion, association and equality rights; rather, it is to say that meaningful protection requires consideration of whether freedom of thought is implicated in the limitation of these other interests. After accounting for the degree of interference, state action that implicates multiple dimensions of human dignity, for example, thought, speech and religion, should be more difficult to justify than actions which implicate only one.

Recognising the external, communal and institutional dimensions of freedom of thought is also essential to preserving the dignity of minorities against intentional or inadvertent diminutions at the hands of state actors. As stated by CLF’s Executive Director Derek Ross in a recent article:

⁴ Newman, *supra* at note 1, p. 112.

⁵ Kathleen A. Brady, “Religious Group Autonomy: Further Reflections about What Is at Stake” (2006/2007) 22:1 J.L. & Religion 153, at 185.

While freedom of expression protects the *dissemination* of an idea, freedoms of thought, belief and opinion may be conceived as protecting the *content* and inner *development* of that idea from undue state suppression. These freedoms can allow individuals and groups to develop and explore unpopular and controversial ideas without fear of sanction, all of which are necessary for knowledge to grow and lead us closer to truth [.]⁶

Ross finds an exemplar of the nature and scope of protection implied by freedom of thought in the narrower concept of academic freedom, which is so familiar in the context of higher learning. Concerning the practical implications of such a right, he notes that freedom of thought

[...] may have particular application in protecting private education from state interference, as well as protecting students in public education from certain forms of ideological indoctrination. These freedoms can also operate to prevent government from allowing only one side of a debate to be heard, and international jurisprudence on ‘viewpoint discrimination’ may be particularly illuminating in the development of these rights.⁷

All other things being equal, when state actors aim—whether through propaganda, censorship, sanctions, or other inappropriate means—to *dictate* the scope of permissible thought or to *substitute* the state’s thought in place of citizens’, freedom of thought is violated. To the extent states succeed in such aims, their actions are effectively *dehumanising*.

Justifiable Limits on Freedom of Thought?

CLF agrees with the current international understanding of freedom of thought as an absolute right, at least so far as this freedom’s internal, individual elements are concerned. We recognise, however, that those external, communal and institutional aspects of human thought may be legitimately inconvenienced by the genuine necessities of civil order in some cases.

As with other protected freedoms, the starting point in delineating one individual or community’s freedom in civil society is the point at which exercise of that freedom unduly intrudes upon the freedoms of others. It is for this reason that those aspects of the right to freedom of thought which are *forum internum* are rightly conceived of as absolute: The mere content of one’s thoughts cannot, so long as one’s dignity as a thinking creature is to be honoured, be subject to state intervention, because the mere content and internal development of one’s thinking do not, *per se*, implicate the freedoms of others.

However, we believe the occasion will be very rare indeed, in which a state actor’s interference with the external aspects of an individual or community’s holding, developing, testing, changing or transmitting their ideas can truly be justified by the exigencies of civil order.

Freedom of thought is a necessary pre-condition for the pursuit of truth, an individual and collective endeavour central to a free and democratic society and essential for human flourishing. Protection for truth-seeking underpins and unites each Canada’s fundamental freedoms – religion, conscience, opinion, belief, expression, the press, media of communication, peaceful assembly, and association –

⁶ Derek B.M. Ross, “Truth-Seeking and the Unity of the Charter’s Fundamental Freedoms” in Dwight Newman, Derek Ross & Brian Bird, eds, *The Forgotten Fundamental Freedoms of the Charter* (Toronto: LexisNexis Canada, 2020) 63 at 91.

⁷ *Ibid.* at 92.

but freedom of thought fulfills a particularly important, animating function in this pursuit. If we are not free to *think* differently from the state’s “approved wisdom”, we can never correct false or harmful ideas (of which history provides many examples).⁸ It is for this reason, in addition to the dignity of all human beings, that the limits on state power implied by human rights are both necessary and good. Accordingly—and especially in the context of ideas—societies that prioritise human dignity and rights over expedient state action must approach government standards of truth and harm with skepticism, even when such standards purport to prevent “harm” and “disinformation” or advance the “public interest”.

For example, when state actors attempt to protect their citizens from the potential harms of “fake news”, “false religion” or “harmful speech”, through the establishment of internet censors, bans on proselytizing and other restrictions on expression, serious consideration must be given to the fallibility of government understandings and the impact such measures have on citizens’ ability to investigate and understand the world they live in.

Similarly, when governments make subscription to state religion or values or impose mandatory attestations to state-approved beliefs a condition of full and equal participation in public life, we must consider the extent to which such measures are truly necessary to the maintenance of civil order in a society that prioritises human dignity. While such measures may be effective in establishing uniformity of thought on key issues, they do so at the expense of the human dignity that manifests in one’s freedom to think for him or herself and, in many cases, truth itself.

The free development and exchange of ideas in society, including exposure to competing or offensive beliefs and opinions, entails some degree of risk; however, they do not threaten freedom of thought. To the contrary, such development and exchange in and between individuals, communities and institutions are essential to the fulfillment of freedom of thought. Whatever the risk of exposure to disinformation or “harmful” ideas may be, in nearly every case such risk will be less than that which results from the state’s attempts to administer and curate the thoughts of its people. History is witness to the magnification of abuse and error in totalising states who suppressed independent thought and made themselves arbiters of what is true and good and beautiful.

For these reasons, even the external, communal and institutional means by which we hold, develop, test and change their ideas opinions and beliefs must be subject only to such limits as can be demonstrably justified by the necessity of civil order. And only such civil order as is appropriate to a society that prioritises human dignity over government expediency.

Concluding Thoughts

CLF wishes to emphasise that freedom of thought bears particular importance for religious, cultural and other minorities who identify with ways of thinking that are distinct from those of the majority. State interference with minorities’ freedom of thought is likely to appear innocuous to governments and members of majority or dominant groups who take the content of their own beliefs to be self-evident or beyond question. However, government measures that hinder or silence the maintenance, development and transmission of minority ways of thinking may threaten to effect the involuntary dissolution of the communities who hold to them. Preventing such tragedies is at the heart of the human rights’ mandate.

⁸ *Ibid.*