

# NOMOS

Le attualità nel diritto

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**G. ROLLNERT LIERN, *The neurorights and freedom of thought*, Madrid, Editorial Dykinson, 2024, pp. 188\*\***

Commenting on a work by Göran Rollnert is always a pleasure, given the accuracy, clarity, and consistency with which he develops his publications. I am not sure that I would have been drawn to a title like the present had it not been for the author in question. This is due to a certain apprehension about these topics and their implications — fear of not understanding them and of delving into what escapes me as an individual (now vulnerable). However, I am always tempted to learn and, above all, to approach the subject from a constitutional perspective. Constitutionalism arose precisely to protect individuals and, in the post-World War II era, democratic constitutionalism will have an unmistakable core: the dignity of the human being.

In truth, I do not consider personal rights to be an innovative concept, even though I frequently voice my opposition to their proliferation. At their core, these rights are always about dignity in its purest essence, particularly when addressing the protection of neuro-rights. It is therefore no surprise that Rollnert's work draws my interest. Yet, as research progresses—now at an accelerated pace—it becomes clear that jurists cannot ignore the potential effects of these advancements on individuals or, even more so, on specific groups that may be particularly vulnerable to these groundbreaking techniques.

As I have already stated, the author consistently demonstrates rigor in his studies, and by facing the novelty of this topic in our legal framework, he begins by referring to international legal sources. Moreover, he also identifies constitutions that have proactively addressed this emerging concern. Thus, he begins by highlighting “the relevance of the subject matter on both international and national agendas, specifically, neuro-rights and freedom of thought—a title aimed to condense in a concise and simple manner the complex issue of the legal protection of the mind in the face of the exponential development of neurotechnologies” (p. 16). I find it hard to adopt (and at times even to accept the necessity of) so many new terms coined to describe newer rights, as they do not seem as new to me as the concept of the individual itself. The author himself acknowledges that cognitive freedom (addressed on pp. 20-24) shares significant common grounds with the classic

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freedom of thought, which constructs the foundation of all liberties. I would even argue that the bibliography employed by the author leads to distinctions that are meaningful when discussing specific cases or judicial decisions, yet, in my view, it is impractical to

separate aspects that cannot coexist simultaneously in reality. This is particularly evident in the interplay between the positive and negative dimensions of rights, especially regarding public freedoms.

I. I believe our Constitution comprehensively addresses these issues, particularly in Article 16.2, which establishes that no one may be compelled to testify about their innermost feelings (of any kind), without yet referring to Article 10, which I will address later. A different matter arises with the application of new brain treatment techniques, whether their use is therapeutic and restorative or, conversely, illicit. However, this is not new, as history already reveals periods marked by the use of both physical and psychological torture.

I understand the concern of international organizations and the need for them to address the new risks to which the dignity and integrity of individuals may be subjected by those who have such highly incisive means at their disposal. However, the globalized world encompasses a wide range of political backgrounds, some of which are likely already misusing these risks unlawfully. In this regard, states governed by the Rule of Law (in my opinion, unwisely) are increasingly drawing distinctions between so many new situations, often moving away from fundamental legal principles. Along these lines, I am not convinced that hyper-regulation, aimed at keeping pace with the fast and intricate advancements of increasingly complex and refined technologies, necessarily affords better protection for our rights. Nor do I believe it ensures that our legal world can fully integrate innovations arising from pure microengineering—developments that jurists often cannot keep up with in real time, even if trying to understand them.

II. The author himself, when presenting the current state of doctrinal perspectives, notes that his foundational sources acknowledge that, no matter how far their reasoning may diverge, the core issue remains freedom—a principle that compels its respect or risks its violation. As he states: “The essence of the right, therefore, would be the freedom to make decisions, and from this perspective of decision-making, it is closely linked to identity as the self-perception of the decision-making agent. Individual free cannot exist if the individual lacks self-awareness due to an alteration of the mental substrate of their personality. Consequently, interventions that could undermine one’s sense of self *would also affect* their free will, impairing their freedom to make decisions, which may no longer be autonomous, as they could not be clearly attributable to the neuronally intervened individual” (p. 23). In my own words, and if I have understood it correctly, this represents a direct and fundamental attack on the freedom of thought that is inherent to the human dignity. It is reassuring to see that my own doubts are reflected in the key documents cited on pp. 28 and following (UNESCO 2021 and OECD), which question whether the introduction of new terminologies truly contributes to legal guarantees or if we are, in essence, dealing more with new techniques than with new rights. It is noteworthy that one

of the most prominent authors (Ienca) attempts to classify the faculties inherent to freedom of thought into five categories of rights, though he himself doubts whether they truly constitute rights (p. 37).

I find it appropriate that the documents addressing this issue include references—even in their titles—to ethics, which, in my view, lies at the heart of the concerns raised by these novel techniques. Conversely, it is striking that this ethical perspective disappears when the author introduces the latest developments from the European Union (EU) standpoint, which emphasizes the effects of these advancements on humanitarian law.

III. Moreover, in this modern pursuit of new terms and (in my opinion) so-called rights, several observations stand out alongside the (appropriate) notion of ethics I previously mentioned: (1) Some authors are reviving the classical concept of "free will," which, not without reason, has been taught to us for decades as an essential property of the human being. (2) I believe there is a need for a deeper examination of the relationship between neuroscience—when it directly impacts humans—and artificial intelligence (AI), which, while capable of extraordinary development, remains fundamentally detached from spiritual values. (3) Finally, I cannot overlook the fact that the Constitutional Court, perhaps by inventing a "right to data," has, from time to time, contributed to discussions about rights. This concept also appears in the recent documents cited by the author, even though, as with AI (which relies on data as its foundation), such discussions may not necessarily—or often—fall within the realm of emerging neuro-rights. Data, by its very nature, is external and unrelated to thought and consciousness, which are only externalized voluntarily.

Lastly, it is noteworthy, as Rollnert points out, that in responding to the survey conducted by the United Nations (UN) among experts, one of them (Bublitz)—who is the most insistent on the significance of cognitive liberty—is silent on this occasion, instead organizing his thoughts around the concept of freedom of thought (pp. 53-57). This is unsurprising to me, as the referenced author appears to question the new frameworks, given that thought is inherently free—an essential, fundamental, and foundational liberty, as I have argued many times.

While cognitive abilities may or may not be present, I question whether the dignity of the individual can be exercised by choosing alternative modes of cognition, which, in any case, is a profoundly personal element.

IV. My impression when I read these novel insights into the American cases is that perhaps the sole translation into Spanish does not allow us to make a proper distinction between the elements that the authors of reference use. This is because their origin, or that of its use, could not have been the same as ours, whose juridical formation spans many centuries.

Of course, chemical substances have evolved, and, above all, invasive technologies have advanced in the field of healthcare and many other less lawful and protective areas. However, the perception of the human being and its intrinsic need for protection, has not changed, except perhaps within certain groups, particularly among the vast majority of youth. This shift aligns with the transition from traditional beliefs, and it appears that

massive secularization has not been replaced by ethical and moral values, at least not in the same proportion or intensity. The alarming consequence is that a society that has abandoned such values may ultimately be governed by those who dismiss or deem ethics obsolete.

Furthermore, it is not only technologies that offer extraordinary possibilities for intervention. From psychiatric medication to the activities of invasive groups, akin to sects, the risks today are immense. While it may seem exaggerated, it should not be overlooked the potential effects of mobile devices and their capabilities in influencing the free will of those who, from a young age, have made them their primary source of thought. This extends beyond mere religious secularization, encompassing the great institution that upheld culture and popular sentiment for centuries: the family.

V. Rollnert offers us an exhaustive and well-structured synthesis of the doctrinal debate that is being conducted in other legal systems and into which we are gradually integrating ourselves. This contribution is very helpful to the reader, as it introduces us to a topic that, *velis nolis*, we must consider in light of reality and the necessary regulation of new and not always perceptible risks.

However, I can't help thinking that the specialists engaged in this debate approach it from their own perspectives and writings, primarily international ones. To me, the way they complicate not only the terminology but also the content of each concept—immediately elevating them to the status of rights—feels unnecessary. This approach reframes freedom of thought and the dignity of the human being in a way that, in my view, does not facilitate but rather hinders their regulation and protection.

The key is to focus on what truly matters: protecting the human being and its conscience. If this is the case, why do we need to make such detailed distinctions for every technique or new term? The legal protection remains the same, as does the subject to whom it is directed. For example, emphasizing the centrality of cognitive freedom is, as I have stated, a mistake, since dignity is universal, irrespective of intellectual and/or cognitive capacity.

We are fortunate to have a Constitution that, unfortunately, is not well understood in all its aspects. On several occasions, I have pointed out the inconsistency of inventing new rights while paying little attention to Article 10.1, which, although not included in the highly protected first section of fundamental rights, provides a core of reflection that we have not adequately explored.

It is interesting how much focus the second paragraph has received from legal scholars, while the first paragraph has been mostly ignored. In my view, the first paragraph is enough to avoid many unnecessary debates that expand terminologies and concepts. When looked at carefully, it could act as a central point to deeply connect personal rights and strengthen their different dimensions with a clear and practical idea. The author himself acknowledges the concerns of its framers, who warned that “they should not be regarded as independent normative principles” (p. 90). Of course, the fact that society is so fragmented today does not mean that the human being can also be *cut into pieces* without losing their essence.

VI. The third part of the work is devoted to analyzing the question of the Spanish State, logically starting with the Digital Rights Framework adopted by the Government on July 14, 2021. I must express my satisfaction here as the author begins to delve into Spanish legal doctrine, which demonstrates a degree of caution aligned with the perspective I have been emphasizing in this reflection: before introducing many innovations, we shall reflect on our legal framework (pp. 105 ff.). I am pleased to see that the relative completeness of our rights and the possibilities they offer in addressing new realities are being acknowledged.

Although, as the author is a specialist in ideological freedom, it is understandable that he dedicates more attention to it (perhaps excessively, as ideology alone does not fully encompass our inner forum), the author does accept my broader view of freedom of thought. This is especially relevant today, as the traditional religious and ideological notions have been significantly expanded by numerous new ways of thinking and living, which further enrich these domains without requiring us to move beyond the study of freedom of thought.

After presenting many doctrinal developments, as Rollnert introduces to us, pages 90 and following provide an excellent summary of the constitutional content of the issue at hand and its adaptation to new technologies, insofar as they may affect the inner forum and its undeniable constitutional protection.

*Freedom of thought would thus be freedom of the mind, with all that it entails: protection of all brain activity that generates the human mind, not only reflective and conscious activity but also other interconnected mental states such as feelings, emotions, perceptions, and memories. In other words, paraphrasing Constitutional Court Decision 230/1994, freedom of thought protects the autonomous control over one's intellectual faculties and consciousness, as well as the individual's free disposition over their deeply personal psychic space. This control and free disposition logically include the voluntary decision to externalize one's thoughts and, in principle, the freedom to consent or not to third-party access to one's own mind (p. 99).*

These considerations remind me of the importance the author places on the State's neutrality, a principle that I also personally emphasize, particularly in the context of freedom of education—an area where some Spanish regions fail to set an example. The author also addresses this issue by referencing the doctrine of the European Court of Human Rights (ECHR) on page 114. It is logical for legal doctrine to differentiate in various ways between the internal and external dimensions of this freedom. As I have always maintained, and as I learned from my mentor, it is the externalization of thought that transforms freedom of thought into various public freedoms: the freedom to express thought (as the Italians refer to what we call freedom of expression), religious freedom, or, as mentioned earlier, freedom of education.

Undoubtedly, Article 20.1(a) of the Spanish Constitution offers a broad understanding of the ways in which thought can be freely expressed. Moreover, the doctrinal debate about the intensity of thought and its varying treatment can also, in my opinion, be clarified by the distinction I have consistently upheld between intimacy *stricto sensu*, and private life (privacy or *privacit *), a distinction on which I have placed considerable emphasis.

VII. I cannot help but point out something notable that I mentioned in footnote 5. It is not until page 131 of the work under discussion that the word "*soul*" appears, used as a synonym for "*psyche*." However, I would go further without departing from the definition provided by the Royal Spanish Academy (RAE): "Soul (from the Latin *anima*): A spiritual and immortal substance, capable of understanding, willing, and feeling, which gives form to the human body and, together with it, constitutes the essence of man."

I appreciate the concise way in which Rollnert labels the first of his conclusions: "*Reading the brain and writing into it.*" These are interesting distinctions drawn from the authors who inspire him, to whom I would respond that the first may be legitimate, but not the second. His second concluding idea focuses on the insufficiency of international human rights laws in this area. This is unsurprising to me, as something only accessible to highly specialized researchers is unlikely to be incorporated into international regulations beyond what they already establish.

Among so many ambiguities, the author recognizes the debate between those who propose new measures and those, like myself, who believe this is not a matter to divide and develop into so many new forms that fail to change the essence of the human being or the protection of their integrity (pp. 137 ff.).

*Bublitz indeed rejects the originalist interpretation of the Universal Declaration of Human Rights, which leads proponents of neuro-rights to claim that "there are no provisions in the human rights document to address the new risks created by technological innovations" because "when the Universal Declaration of Human Rights was adopted in 1948, the future challenges of neurotechnology and artificial intelligence were hardly imaginable."*

*He points out, however, that while the drafters of the Universal Declaration did not foresee the neurosciences, they did express concern about "external forces influencing the human person 'through psychological pressure, economic pressure, or all possible means of propaganda and social pressure,'" which includes "technological access to the person" (p. 142).*

I share the author's conclusion after the significant effort made to present this issue and to do so with striking recency, covering developments up to the year 2023, as he states.

*From a legal perspective, a broad and extensive conception of thought as the essence of the right aligns with the protective purpose of a fundamental right that seeks to safeguard the inner forum of the person as an interior domain immune and inviolable to external intrusions. This includes the "intimate sanctuary of beliefs" and "space of intellectual self-determination" referenced by the Constitutional Court. In this sense, the statement that freedom of thought is, in essence, freedom of the mind must be interpreted as meaning that, regardless of the concept of thought adopted, there can be no free thought without guaranteeing the autonomy of its cognitive foundation—the brain function from which all mental states of the person arise.*

VIII. If anything, and certainly not as a criticism, as I fully understand his attraction to ideological freedom—having dedicated his doctoral thesis to it, which I had the honor of guiding—I would point out that the broad scope of the concept of thought, mind, or however one chooses to define it, goes far beyond the ideological. I find it very valuable that he reviews the effects of freedom of thought within our own legal system (particularly in criminal law), although I still believe that, in addition to referencing the act *Ley Organica*

3/2018, of December 5, on the Protection of Personal Data, if he had also taken into account the older act *Ley Organica* 1/1982, of May 5, on the Civil Protection of the Right to Honor, Personal and Family Privacy, and Self-Image, it would have provided a stronger foundation for his own argument. The author himself (on p. 156) cites the Constitutional Court in support of the perspective I advocate:

*This appears to be the view of the Constitutional Court, which has stated that "Article 18.4 of the Spanish Constitution not only 'establishes an autonomous fundamental right to control the flow of information concerning each individual' (Constitutional Court Judgment 11/1998, of January 13, Legal Ground 5; 96/2012, Legal Ground 6, and 151/2014, of September 25, Legal Ground 7), but also, as indicated in its final clause, 'to guarantee [...] the full exercise of their rights,' an instrumental right aimed at protecting other fundamental rights, that is, 'a mechanism to safeguard the rights to privacy and honor and the full enjoyment of other citizens' rights' (Constitutional Court Judgment 292/2000, of September 30, Legal Ground 5)."*

I conclude by sincerely congratulating the author on his effort and achievements. And perhaps, taking advantage of the trust and professional regard we share—which is profound and genuine—I wish to respond to his magnificent work with the words of the renowned Calderón de la Barca:

“To the King, one must give their wealth and life, but honor is the patrimony of the soul, and the soul belongs only to God.”

Remedio Sánchez Ferriz