

What Freedom of Speech on Abortion in the Case-Law of the European Court of Human Rights?

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INTRODUCTION

The litigation on the freedom of speech on abortion appeared in Europe in the 1970s, at the same time abortion was decriminalised in Western Europe and later legalized. The liberalisation of abortion in certain Western European countries,¹ along with the resistance to this legal phenomenon in other countries,² has provoked reactions that at times were very strong on the part of Europeans. Those who express themselves in favour of or against abortion, at work, as simple individuals, or as activists, have often found themselves sanctioned or inadequately protected by the responsible authorities of their country. Believing that their fundamental right to freedom of expression and opinion has been violated, they have addressed the European Commission on Human Rights, known since 1998 as the European Court of Human Rights (hereafter “the ECHR” or “the Court”). Since 1977³ and until the present day, eleven cases have been judged by the ECHR⁴.

Consequently, more than forty years after its liberalisation in Europe, abortion remains a much discussed societal issue. Those “for” and “against” continue to act by various means to change not only the

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¹ In 1967 in the United Kingdom, in 1974 in Austria and in Germany, in 1978 in Norway and in 1978 in Italy.

² Such as Ireland and Portugal.

³ Date of introduction of the first case on the matter.

⁴ Cases in which the plaintiffs were against abortion include: *X. v. United Kingdom*, App. No. 8010/77, Eur. Comm’n. H.R. & Rep. (1979), <http://hudoc.echr.coe.int/eng?i=001-73958>; *Plattform “Ärzte für das Leben” v. Austria*, App. No. 10126/82, Eur. Ct. H.R. (1985), <http://hudoc.echr.coe.int/eng?i=001-57558>; *D.F. v. Autriche*, App. No. 21940/93, Eur. Comm’n. H.R. & Rep. (1994), <http://hudoc.echr.coe.int/eng?i=001-1928>; *Van Den Dungen v. Holland*, App. No. 22838/93, Eur. Comm’n. H.R. & Rep. (1995), <http://hudoc.echr.coe.int/eng?i=001-2059>; *Bowman v. United Kingdom*, App. No. 141/1996/760/961, Eur. Ct. H.R. (1998); *Annen v. Germany*, App. Nos. 2373/07 and 2396/07, Eur. Ct. H.R. (2010), <http://hudoc.echr.coe.int/eng?i=001-98315>; *Hoffer and Annen v. Germany*, App. Nos. 397/07 and 2322/07, Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/eng?i=001-102804>; *Annen v. Germany*, App. No. 3690/10, Eur. Ct. H.R. (2015), <http://hudoc.echr.coe.int/eng?i=001-158880>; Cases in which the plaintiffs were for abortion include: *Rommelfanger v. Federal Republic of Germany*, App. No. 12242/86, Eur. Comm’n. H.R. & Rep. (1989), <http://hudoc.echr.coe.int/eng?i=001-1010>; *Dublin Well Woman v. Ireland*, App. Nos. 14234/88 and 14235/88, Eur. Ct. H.R. (1992), <http://hudoc.echr.coe.int/eng?i=001-57789>; *Women on Waves v. Portugal*, App. No. 31276/05, Eur. Ct. H.R. (2009), <http://hudoc.echr.coe.int/eng?i=001-91113>.

legislation, but also the attitudes of the public, of medical professionals, and of politicians on the matter. Nevertheless, they are often prevented, dissuaded, sanctioned, or do not know the limits to their freedom of expression on the matter. Furthermore, if one follows the news, one will notice that those who are against this practice find themselves in this situation.⁵

Therefore, the question is whether the speeches on abortion are protected by the European Convention on Human Rights (hereafter “the Convention”) and if they are equally protected.

Analyzing the eleven cases judged by the Strasbourg courts allows for the conclusion that the Convention protects the speeches on abortion. Nevertheless, those speeches are unequally protected by it.

I. THE EUROPEAN CONVENTION ON HUMAN RIGHTS PROTECTS SPEECHES ON ABORTION

The Convention protects the substance and the form of all ideas and information, as long as it does not have the potential of directly inciting violence. Because abortion is identified by the Court as a subject of public interest, it has received the benefit of being highly protected by the Court, equivalent to political speech. Hence, wherever there is a restriction by national authorities on freedom of expression regarding abortion, the national authority must establish, in a convincing manner, a justification for such a restriction. States have broader powers to limit the exercise of freedom of expression, if it concerns the protection of a fundamental right or a moral or ethical issue, the right to life of the unborn, and the state is more restricted if it targets the protection of the rights of others, the doctors’ personal rights.

A. The Convention Protects the Substance and the Form of All Ideas and Information

The right to freedom of expression includes the right to opinion and the right to information, without any unjustified interference on the part of public authorities.

In principle, all ideas and information are protected by the Convention:

Freedom of expression is applicable not only to ‘information’ or ‘ideas’ that are favourably received or

⁵ *Cases of Intolerance or Discrimination of Christians in Europe*, INTOLERANCE AGAINST CHRISTIANS, <http://www.intoleranceagainstchristians.eu/cases.html> (last visited Feb. 28, 2017).

regarded as inoffensive or as a matter of indifference, but also to those that are of an offensive, shocking or disturbing nature to the State or any section of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.'⁶

The Convention "basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him."⁷

The Convention does not protect speeches that are "capable of [directly] inciting violence"⁸ and those which encourage the rejection of the principles of democracy.⁹ The Court stated that speeches that represent a danger to society do not deserve to be protected: "It is only by a careful examination of the context in which the offending expressions appear that one can draw a meaningful distinction between shocking and offensive expression which is protected by Article 10 and that which forfeits its right to tolerance in a democratic society."¹⁰

The Convention not only protects the substance of the expressed ideas and information, but also the form in which they are expressed,¹¹ even if it is excessive.¹² Once it has been determined the exaggeration or the provocation¹³ does not imply an animosity or an intention to harm the reputation of a third party, it falls under the protection of the Convention.

B. The Debate on Abortion is a Subject of "General Interest" and It Benefits from the Highest Protection

As the Court has stated on various occasions, the speeches on abortion arise from the "public interest,"¹⁴ and hence they have the benefit of being highly protected by the Convention.¹⁵ This protection is equivalent to the protection bestowed on political speech by the

⁶ *Handyside v. United Kingdom*, App. No. 5493/72, 1 Eur. H.R. Rep. 737, § 49 (Dec. 7, 1976).

⁷ *Leander v. Sweden*, Eur. Ct. H.R. 9248/81 § 74 (Mar. 26, 1987).

⁸ *Tatár and Fáber v. Hungary*, Eur. Ct. H.R. 40721/08 § 56 (July 24, 2012).

⁹ *Alexeyev v. Russia*, Eur. Ct. H.R. 4916/07, 25924/08, and 14599/09 § 80 (Apr. 11, 2011).

¹⁰ *Id.* at § 56.

¹¹ *Oberschlick v. Austria (No. 2)*, Eur. Ct. H.R. 20834/92 (July 1, 1997); *Radio France and others v. France*, Eur. Ct. H.R. 53984/00 (Mar. 30, 2004).

¹² *Oberschlick v. Austria*, *supra* note 11 at § 38; *De Haas and Gijssels v. Belgium*, Eur. Ct. H.R. 19983/92 (Feb. 24, 1997).

¹³ *Pedersen and Baadsgard v. Denmark*, Eur. Ct. H.R. 49017/99 (Dec. 17, 2004).

¹⁴ *D.F. v. Austria*, *supra* note 4; *Annen v. Germany*, *supra* note 4.

¹⁵ *Hoffer and Annen v. Germany*, App Nos. 397/07 and 2322/07, *supra* note 4 at § 44.

Convention.¹⁶ This aspect has an influence on the possibility for the State to limit the exercise of this right: “it is recalled that there is little scope under Article 10 § 2 for restrictions on debates on questions of public interest.”¹⁷ The more the right to speech is protected by the Convention, the weaker the discretion for the State to limit the exercise of the freedom of expression will be. The discretion of the State will be even weaker if it does not entail the protection of morals,¹⁸ but instead the protection of the rights of others, such as the personal rights of others.

C. *The Restrictions to Freedom of Expression*

Freedom of expression is not an absolute right. The relationship between freedoms and responsibilities,¹⁹ as well as the search for the common good of society and the respect for its common values, allows the State to limit retrospectively²⁰ or subsequently²¹ the exercise of the freedom of expression, submitting it to certain formalities, conditions, restrictions, or sanctions. The reasons for which this freedom can be limited are enumerated in Article 10 § 2 of the Convention.²² Nevertheless, the necessity of each restriction should be established in a convincing manner by national authorities.²³

Generally, the speech against abortion is limited in order to protect the rights of others, often the personal rights of doctors who practise it. In rare cases, speech against is limited in public education

¹⁶ *Axel Springer AG v. Germany* (No. 2), Eur. Ct. H.R. 48311/10 §54 (July 10, 2014).

¹⁷ *Wingrove v. United Kingdom*, Eur. Ct. H.R. 17419/90 § 58 (Nov. 25, 1996); *Animal Defenders International v. United Kingdom*, Eur. Ct. H.R. 48876/08 § 102 (Apr. 22, 2013).

¹⁸ *Otto-Preminger-Institut v. Austria*, Eur. Ct. H.R. 13470/87 (Sept. 20, 1994) (Asking such moral questions, the States benefit from a large margin of appreciation); see also *Kokkinakis v. Greece*, Eur. Ct. H.R. 14307/88 (May 25, 1993); *I.A. v. Turkey*, Eur. Ct. H.R. 42571/98 (Sept. 13, 2005); *Aydin v. Turkey*, Eur. Ct. H.R. 23178/94 (Sept. 25, 1997).

¹⁹ *Id.* at § 49 (stating that “[f]rom another standpoint, whoever exercises his freedom of expression undertakes ‘duties and responsibilities’ the scope of which depends on his situation and the technical means he uses.”).

²⁰ *Handyside v. United Kingdom*, *supra* note 6 at § 43.

²¹ *Dalban v. Romania*, 1999-VI Eur. Ct. H.R. 221 at § 40 (Sept. 28, 1999).

²² European Convention on Human Rights art. 10 § 2, Nov. 4, 1950. “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

²³ *Handyside v. United Kingdom*, *supra* note 6 (stating that “a range of exceptions that always require a strict interpretation, and the need for the restraint must be established convincingly”); *Boldea v. Romania*, App. No.19997/02, Eur. Ct. H.R. para. 45 (2007), <http://hudoc.echr.coe.int/eng?i=001-79497>; *Otto-Preminger-Institut v. Austria*, *supra* note 18; *Wingrove v. United Kingdom*, *supra* note 17.

by the rights of parents to educate their children according to their own convictions. In these cases, the discretion of the State is restricted, because the reason for it does not touch on a sensitive moral or ethical issue.

On the other hand, the speech in favour of abortion collides principally with the right to life of the unborn child, the right to life being one of the “basic values of the democratic societies making up the Council of Europe”²⁴ and “an inalienable attribute of human beings” which “forms the supreme value in the hierarchy of human rights.”²⁵ Sometimes, this speech conflicts with the need to protect the life of the unborn and the physical and moral integrity of the woman.²⁶ In these cases, as it is a question of a fundamental right and/or a moral issue, the discretion of the State is broader to limit the exercise of freedom of expression.

II. THE SPEECHES ON ABORTION ARE UNEQUALLY PROTECTED

The chronological study of the eleven cases regarding freedom of expression on abortion reveals that the Strasbourg courts were addressed by applicants who expressed their opinions for or against abortion at their work place,²⁷ as ordinary individuals,²⁸ or as activists.²⁹ The courts have established the applicable principles on the matter and have developed a manner in which they have approached those cases. This body of case law, along with the way in which the courts approached those cases, leads to the conclusion that the protection of the speech on abortion is imbalanced. This inequality is determined, on one hand, by the profile of the person expressing their opinion on the matter (employer, employee, ordinary individual, or activist), and on the other hand, by the content of the speech (for or against abortion). Four stages of the development of the case law have to be examined in chronological order to arrive at this conclusion.

In the first stage, the former Commission has established that, when speech on abortion is expressed at work, the employer being a

²⁴ *McCann and others v. United Kingdom*, Eur. Ct. H.R. 18984/91 § 147 (Sept. 27, 1995).

²⁵ *Streletz, Kessler and Krenz v. Germany*, 2001-II Eur. Ct. H.R. 409 § 92-94 (Mar. 22, 2001).

²⁶ *Tysiack v. Poland*, 2007-I Eur. Ct. H.R., 219 §107 (Mar. 20, 2007).

²⁷ *X. v. United Kingdom*, *supra* note 4; *Rommelfanger v. Federal Republic of Germany*, *supra* note 4; *Pichon and Sajous v. France*, Eur. Ct. H.R. 49853/99 (July 10, 2001).

²⁸ *D.F. v. Austria*, *supra* note 4; *Van Den Dungen v. The Netherlands*, *supra* note 4; *Annen v. Germany*, *supra* note 4; *Hoffer and Annen v. Germany*, *supra* note 4; *Annen v. Germany*, *supra* note 4.

²⁹ *Plattform “Ärzte für das Leben” v. Austria*, *supra* note 4; *Open Door and Dublin Well Woman v. Ireland*, *supra* note 4; *Women on Waves and Others v. Portugal*, *supra* note 4.

Church or a public school, whether it is for or against this practice, the right to freedom of expression of the Church-employer and the right of parents to educate their children according to their religious or philosophical convictions prevails over the right to freedom of expression of the employee.³⁰

In the second stage, the same Commission has stated that when individuals express their opinions against abortion in terms that are shocking and offensive, their right to freedom of expression is guaranteed, as long as they do not undermine the personality rights of doctors.³¹

Thereafter, in the third stage, the Court has ruled that when activists express their opinions on abortion, either in favour or against the issue, be it during a political debate or during a pre-election period, they benefit from a heightened protection.³² The Court has also ruled that activists in favour of abortion have the right to choose the most effective means by which to communicate their message, even if other means exist, as long as it involves a symbolic act of legislative significance.³³ Furthermore, it has established the right not to be prevented from expressing one's opinion in the public sphere, open by its very nature. When deciding cases regarding the freedom of expression, the Court has reaffirmed the protection of expression if the speech is made by minority groups.³⁴ In that way, it should be observed that when judging cases in favour of abortion, the Court has been careful to develop the case law towards a greater protection of freedom of expression by those in favour of abortion.³⁵ Regarding the activists who were against abortion, the former Commission has established that the speeches on abortion can also be expressed through peaceful protest and the State has to take all necessary measures to ensure that the protest takes place in a peaceful manner.³⁶

On the other hand, in the fourth stage, it should be noted that activists who were against abortion have partially benefitted from the same liberal principles developed by the Court in previous cases

³⁰ *Rommelfanger v. Federal Republic of Germany*, *supra* note 4; *X. v. United Kingdom*, *supra* note 4.

³¹ *D.F. v. Austria*, *supra* note 4; *Van Den Dungen v. Netherlands*, *supra* note 4.

³² *Bowman v. the United Kingdom*, *supra* note 4 at § 42; *Women on Waves and others v. Portugal*, *supra* note 4 at §§ 37, 39.

³³ *Women on Waves and others v. Portugal*, *supra* note 4 at §§ 38-42.

³⁴ *Baczowski and others v. Poland*, Eur. Ct. H.R. 1543/06 (May 3, 2007) (quoting *Steel and Morris v. United Kingdom*, Eur. Ct. H.R. 68416/01 § 89 (Feb. 16, 2005)); *Akdas v. Turkey*, Eur. Ct. H.R. 41056/04 § 81 (Feb. 16, 2010); *Chassagnou and others v. France*, Eur. Ct. H.R. 25088/94, 2833/95, and 2844/95 § 112 (Apr. 29, 1999).

³⁵ *Open Door and Dublin Well Woman v. Ireland*, *supra* note 4; *Women on Waves and others v. Portugal*, *supra* note 4.

³⁶ *Plattform "Ärzte für das Leben" v. Austria*, *supra* note 4 at §§ 5, 6, 32.

regarding the speech in favour of abortion. Unfortunately, the Court has continued to apply the case law of the former Commission in these cases, taking the view that their speech can be expressed in terms that are shocking and offensive, as long as it does not undermine the personality rights of doctors.³⁷ It has also decided that their speech can take place in the vicinity of a clinic, as long as it does not seriously disturb medical practitioners at work.³⁸ Furthermore, the Court has judged that the speech against abortion cannot be detached from the historical and social context.³⁹ Thus, the comparison of abortion to the Holocaust in Germany was considered a “very serious violation of the personality rights of doctors.”⁴⁰ Furthermore, the Court ruled it to be justified in order to create awareness of the fact that what is legal is not always moral.⁴¹

Comparing the approaches adopted by the Court to decide cases for and against abortion, it is obvious that they are not the same. Until the November 26th 2015 judgment in *Annen* case, the Court afforded more protection to the speech in favour of abortion, whereas it afforded less protection to the speech against abortion. Will this judgment in favour of the speech against abortion be a change of trend or just an exception to the Court’s approach regarding the speech against abortion? The answer is in the Court’s future judgments on the matter.

A. The Protection of the Speech on Abortion in Regard to the Person Who is Expressing It

1. The Speeches on Abortion Held at Work

a. The Right of Parents to Educate Their Children Prevails Over the Freedom of Expression of a Teacher on Abortion

*X v. United Kingdom*⁴² was the first relevant case judged by the former Commission on Human Rights. It concerns a Math and English teacher in a public secondary school who was terminated for, *inter alia*, wearing placards bearing religious, anti-abortion slogans on his clothes and suitcase. The former Commission concluded in this case that

³⁷ *Annen v. Germany*, App. Nos. 2373/07 and 2396/07, *supra* note 4; *Hoffer and Annen v. Germany*, *supra* note 4.

³⁸ *Annen v. Germany*, App. Nos. 2373/07 and 2396/07, *supra* note 4.

³⁹ *Hoffer and Annen v. Germany*, *supra* note 4 at § 48.

⁴⁰ *Id.* at § 47.

⁴¹ *Annen v. Germany*, *supra* note 4 at § 63.

⁴² *X v. United Kingdom*, *supra* note 4.

Article 10 of the Convention had not been violated, taking the view that because this was a secular school and that parents had a right for their religious and philosophical convictions to be respected, the ban imposed on a teacher for displaying his religious and moral convictions at school was justified⁴³. The former Commission also judged that such a sanction was justified where the teacher's convictions became offensive to his female colleagues or had the effect of disturbing the children⁴⁴.

b. The Freedom of Opinion and Expression on Abortion of the Church-Employer Prevails Over the Freedom of Expression of its Employee on Abortion

In the case of *Rommelfanger v. Federal Republic of Germany*,⁴⁵ the former Commission concluded that the freedom of expression of the applicant had not been violated. The case concerned an assistant doctor, employed by a Catholic hospital, who was terminated with notice for having expressed his opinion in favour of abortion in the press. He had accepted, by his employment contract, a duty of loyalty towards the Church, which limited his right to freedom of expression to a certain extent without depriving him of the protection afforded by Article 10⁴⁶. The former Commission, taking in account that that the right of the Church to impose its views on employees was not unlimited and that the courts have jurisdiction to insure that no excessive loyalty can be demanded from the applicant, held that "the obligation to abstain from making declarations on abortion that are against the position of the Church on the matter have not been perceived as an excessive demand because of the capital importance of this problem for the Church."⁴⁷

It is justified to give priority to the right to freedom of expression of the Church-employer, or of the organisations founded on values indispensable for the accomplishment of their functions, or to the right of parents to educate their children over the freedom of expression of the employee. Firstly, because the restriction on the right to freedom of expression of employees was founded on the protection of other fundamental rights, which according to the Convention, *a priori*, deserve an equal protection.⁴⁸ Secondly, because the particular

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Rommelfanger v. Federal Republic of Germany*, *supra* note 4.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Von Hannover v. Germany*, 2012-1 Eur. Ct. H.R., 399 § 106-7 (Feb. 7, 2012).

circumstances of the cases called for it. In the *X* case, it was notably the need of students in a secular school to receive an education according to their parents' convictions,⁴⁹ and in the *Rommelfanger* case, it was the respect of the principle of autonomy of the Church and of the fact that the employee had accepted freely in his employment contract to limit his freedom of expression to a certain extent.⁵⁰

In this way, the right to freedom of expression on abortion by the Church-employer, or by an organisation founded on specific ethics is better protected than that of the employee.

2. The Speeches on Abortion Held by Individuals

a. The Speech on Abortion Can Be Expressed in Terms That Are Shocking and Offensive, as Long as It Does Not Severely Undermine the Personal Rights of Doctors

On a second occasion, the former Commission judged two cases in which individuals expressed themselves in different manners against the practice of abortion by doctors.⁵¹ Their intention was not only to attract the attention of the public and of politicians to the harmfulness of abortion for the woman and the unborn child, but also to convince doctors to renounce this practice and to convince women to abstain from aborting. Their goal was not to harm the reputation of doctors, as the national courts assessed. However, the courts in Strasbourg, confirming their sanctions, did not give priority to their right to freedom of expression, but rather to the personality rights of doctors.⁵²

Therefore, in the case of *D.F. v. Austria*,⁵³ an applicant had reacted to an article published by a gynaecologist on the medical instruction of the pill RU486 by sending circular letters to all doctors and ordinary citizens in his region. In this letter, he called the doctor in question a "supporter of murder" and a "fighter for the death pill."⁵⁴ He was convicted of defamation and was fined 4800 AS. Judging the case, the Commission concluded that Article 10 had not been violated. Recognising abortion a matter of general interest deserving protection,

⁴⁹*X. v. United Kingdom*, *supra* note 4.

⁵⁰*Rommelfanger v. Federal Republic of Germany*, *supra* note 4.

⁵¹By distributing letters and leaflets, by carrying posters and signs, by making conversation with the passers-by and the clients of a clinic, by exposing enlarged photos with aborted foetuses, and by publishing on a website.

⁵²*D.F. v. Austria*, *supra* note 4; *Van Den Dungen v. Netherlands*, *supra* note 4.

⁵³*D.F. v. Austria*, *supra* note 4.

⁵⁴*Id.*

the Commission gave greater weight to the degrading nature of the statements, to the degradation of the doctor in the eyes of readers of the letter, the words used, and the means as to how the information was distributed by the applicant.⁵⁵ It took the view that the interest of the applicant to criticise the doctor, the pill RU486, and the use of this pill did not prevail over the rights of the third party to have its reputation protected.⁵⁶

In the case of *Van Den Dungen v. Netherlands*,⁵⁷ the applicant lead discussions, distributed pamphlets, and displayed enlarged photographs of aborted fetuses in front of an abortion clinic. At the request of the foundation society which administrated the clinic, the national courts delivered an injunction against the applicant, barring him from a 250-meter radius of the clinic for a period of six months.⁵⁸ Analysing the case under Article 10 of the Convention, taking into account that the aim of the applicant was rather to dissuade women from having an abortion than to express his beliefs, the Commission concluded that this Article had not been violated.⁵⁹ It examined the interference with the right of the applicant in light of all the facts of the case, and considered that the reasoning followed by the national authorities was “pertinent and sufficient.”⁶⁰ The Court observed that the duration of the interference was limited and restricted to a very precise area and that the purpose of the measure was not to deny the applicant’s right to freedom of expression, but only to restrain this right for the protection of others.⁶¹

According to the Convention, the speech on abortion can be expressed in shocking, striking, or disconcerting terms,⁶² as long as it does not directly incite violence and it does not imply animosity or an intention to harm the reputation of a third party. Nevertheless, calling a doctor a “supporter of murder” and a “fighter for the death pill,”⁶³ as well as organising discussions, distributing pamphlets, and displaying enlarged photos of aborted fetuses in front of a clinic was considered offensive towards the respective doctors by the former Commission and was believed to undermine their personality rights.⁶⁴

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Van Den Dungen v. Netherlands*, *supra* note 4.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Hoffer and Annen v. Germany*, *supra* note 4 at § 45.

⁶³ *D.F. v. Austria*, *supra* note 4.

⁶⁴ *Id.*; *Van Den Dungen v. Netherlands*, *supra* note 4.

Protecting the reputation of doctors is commendable. Nevertheless, giving priority to a right not to be offended is very dangerous for a democratic society. It enables a mechanism for censoring every opinion that can be labelled contradictory to certain criteria, and ultimately rendering a fundamental right “theoretical and illusory.”⁶⁵

3. The Speeches on Abortion Held by Activists

Further, the Court judged two cases concerning activists who were not in favour of abortion⁶⁶ and two others concerning activists in favour of this practice.⁶⁷ In three of these cases the Court found a violation of the Convention. It took the view that the speech opposing abortion expressed by an activist in the context of a political debate or during a pre-electoral period benefits from an enhanced protection.⁶⁸ The same applies if the speech is made by minority groups.⁶⁹ Similarly, the Court affirmed the same principle regarding the speech in favour of abortion held by activist associations which contested the existing legislation.⁷⁰ In the two cases concerning the speech in favour of abortion, the Court established very liberal principles regarding the freedom of expression; notably, the almost absolute right to choose the most effective means of expression and the right not to be prevented from expressing oneself in a place that is by its nature an open public space.⁷¹ In a case concerning the anti-abortion speech held by activist associations, the Court established principles concerning the freedom of peaceful protest and positive obligations of the State on this matter, principles that are still valid.⁷²

a. The Speeches on Abortion Expressed in the Context of a Political Debate or During a Pre-Electoral Period Benefit From a Heightened Protection

⁶⁵ *Airey v. Ireland*, Eur. Ct. H.R. 6289/73 (Oct. 9, 1979); *Scoppola v. Italy* (No.2), Eur. Ct. H.R. 10249/03 (Sept. 9, 2009).

⁶⁶ *Plattform “Ärzte für das Leben” v. Austria*, *supra* note 4; *Bowman v. the United Kingdom*, *supra* note 4.

⁶⁷ *Open Door and Dublin Well Woman v. Ireland*, *supra* note 4; *Women on Waves and others v. Portugal*, *supra* note 4; *Plattform “Ärzte für das Leben” v. Austria*, *supra* note 4; *Bowman v. the United Kingdom*, *supra* note 4.

⁶⁸ *Bowman v. the United Kingdom*, *supra* note 4; *Women on Waves and others v. Portugal*, *supra* note 4.

⁶⁹ *Baczowski and others v. Poland*, *supra* note 34 at § 64; *Akdas v. Turkey* *supra* note 34; *Chassagnou and others v. France*, *supra* note 34.

⁷⁰ *Women on Waves and others v. Portugal*, *supra* note 34 at § 39.

⁷¹ *Id.* at §§ 38, 40.

⁷² *Plattform “Ärzte für das Leben” v. Austria*, *supra* note 4 at §§ 5, 6, 9, 32.

In the case of *Bowman v. the United Kingdom*,⁷³ the Court found a violation of Article 10 of the Convention, censoring the decision of the internal courts. The case concerned the criminal conviction of an activist, who was against abortion and stem cell research, for distributing pamphlets in a pre-electoral period that outlined the stance of the candidates on abortion.⁷⁴ The Grand Chamber of the Court established that a provision of the electoral law prevented the applicant, in an absolute manner, from publishing certain information, subjecting her to a criminal sanction.⁷⁵ To arrive at this conclusion, the Court took into account the following factors: the importance of political debate, particularly in a pre-electoral period due to the interdependence of freedom of expression and free elections; the nature of the sanction, including the feeble amount fixed by the costs; the duration of the restriction that was applied four to six weeks prior to the election; the importance of the timing for the effective transmission of the message in the pre-electoral period, the Court appreciating that even if the plaintiff could campaign at another moment, she would not have achieved the objectives she intended by publishing the pamphlets because during this critical period the voters' minds were focused on choosing a representative; the plaintiff's inability to access other effective means of communication; and the absolute nature of the legal barrier.⁷⁶

On this occasion, the Court established that if the speech on abortion, be it for or against the practice, takes place in the context of a political debate, especially during a (pre)electoral period, it is strongly protected.⁷⁷

b. The Speech in Favour of Abortion Can Be Expressed Even if the Information and Ideas Expressed are of an Offending, Shocking, or Disturbing Nature to the State or Any Sector of the Population and its Absolute Prohibition Cannot Be Justified Under the Convention

In the case of *Open Door and Dublin Well Woman v. Ireland*,⁷⁸ the Court concluded, by 15 votes to 8, that Article 10 of the Convention had been violated. In this case, the Supreme Court of Ireland had prohibited

⁷³ *Bowman v. the United Kingdom*, *supra* note 4.

⁷⁴ *Id.* at §§ 10-5.

⁷⁵ *Id.* at § 47.

⁷⁶ *Id.* at §§ 41-7.

⁷⁷ *Id.* at § 42; *Hoffer and Annen v. Germany*, *supra* note 4 at § 45; *Women on Waves and others v. Portugal*, *supra* note 4 at § 39.

⁷⁸ *Open Door and Dublin Well Woman v. Ireland*, *supra* note 4.

the applicants from supplying pregnant women with consultation services and specific information regarding the organisation of trips abroad to foreign clinics to obtain an abortion⁷⁹. In examining the case, the Strasbourg Court admitted that the ban imposed on the applicants had a legitimate aim, namely the protection of morality, including the right to life of the unborn child as protected by Irish constitutional law.⁸⁰ At the same time, it rejected the other aims invoked by the authorities, i.e. the defence of order, the protection of the rights of others (of the unborn child and its father), and the prevention of crime.

Further, it stated that "that freedom of expression is also applicable to "information" or "ideas" that offend, shock or disturb the State or any sector of the population."⁸¹ Furthermore, taking into account Irish law and the attitude of the authorities; the nature, understanding, effectiveness, and consequences of the ban; the means of distribution; the target audience; and the existence of information available to the public, it considered this prohibition to be disproportionate. While the issue arose from an area that touched on moral values, the Court diminished significantly the broad discretion that the State benefits from. Regarding Irish law and the attitude of the authorities, the Court noted that Irish law did not criminally sanction a pregnant woman for going abroad to avail of an abortion and that the authorities had tolerated or continued to tolerate the litigious activities. Regarding the injunction, the Court believed that it hindered the freedom to receive and communicate information on lawful services abroad, that it was drafted in a very broad and disproportionate manner, and that it was of an absolute nature because it did not take into account the age of the female, her health status and the reasons for soliciting the information.⁸² Regarding the efficiency of the sanction, the Court believed that the injunction was not efficient enough to safeguard the right to life of the unborn and that it created a risk for the health of the women; notably for poor or under-educated women, as in the absence of proper advice, they would look for an abortion at a more advanced stage of the pregnancy and they would not request post-abortion care.⁸³ In relation to this information, the Court observed that the organisations are confined to explaining the available solutions, the decision remaining in the hands of the mother. It judged that there was no link between the provision of information and the destruction of the

⁷⁹ *Id.* at § 20.

⁸⁰ *Id.* at §§ 60, 63.

⁸¹ *Id.* at § 71.

⁸² *Id.* at §§ 73-5.

⁸³ *Id.* at §§ 76, 77.

life of the unborn. The Court also noted that this information was not disseminated to the general public and that it already existed in Ireland in magazines, in phonebooks, and through people having contacts in Great Britain.⁸⁴

The Court's solution in this case was surprising. All the more so since it had conducted, without precedent, an in-depth analysis of the case. It did so by placing the sanction imposed on the applicant in the general context in Ireland, by going as far as to judge the concrete efficiency of the sanction on defending the right to life of the unborn, and the necessity of this information for the health of women. On one hand, it noted that the sanction did not involve a ban, but merely a limit on the communication of information, because Ireland had tolerated the circulation of such information in its jurisdiction.⁸⁵ It also noted that Ireland had limited neither the debate on abortion in general, nor the possibility of women to go abroad to have an abortion.⁸⁶ On the other hand, it deemed the sanction to be absolute, broad, disproportionate, incapable of protecting the right to life of the unborn, and dangerous for the health of women, without any evidence whatsoever to support this view.⁸⁷ Furthermore, in examining the proportionality of the sanction, if the Court had properly explored the question of the ban incurred by the applicants, it did not afford any weight to the constitutional right of the unborn, which is of utmost importance and is also protected by the Convention, which justified such a limitation on the exercise of freedom of expression. It came to the conclusion, again without any supporting evidence whatsoever, that the applicants, by dispensing the information, did not encourage abortion, hence their declared aim was precisely to provide pregnant women with information on the possibilities of aborting abroad and of organising their trip with this objective in mind.⁸⁸

c. Every Person Has the Right to Choose the Most Effective Means of Communicating His or Her Message, Particularly if it Involves a Symbolic Activity of Legal Challenge

In the case of *Women on Waves and others v. Portugal*, where the applicants challenged the legislation outlawing abortion in Portugal,

⁸⁴ *Id.* at § 76.

⁸⁵ *Id.* at § 72.

⁸⁶ *Id.* at § 73.

⁸⁷ *Id.* at §§ 73-6.

⁸⁸ *Id.* at § 75.

the Court concluded that Article 10 had been violated.⁸⁹ A Dutch organisation and two Portuguese organisations aimed to “promote the debate on reproductive rights,”⁹⁰ notably to lobby in favour of the decriminalisation of abortion in Portugal. The first applicant had chartered a ship to sail from Amsterdam to the Portuguese port of Figueira da Foz and organised on board, over the course of two days, meetings, seminars, and practical workshops on the topics of preventing sexually transmitted diseases, family planning, on the decriminalisation of abortion, and the abortive pill RU486, which was outlawed at the time in Portugal by the Penal Code. As the ship approached Portuguese waters, the Secretary of State for the Sea gave a ministerial order banning it from entering.⁹¹ To arrive at the conclusion of a violation of the Convention rights of the applicants, the Court established a true right to choose the most effective means to communicate ones’ message, believing that the applicants, owing to the prohibition, were not in a position to communicate their ideas and information in the means that they deemed most effective: “[the interested parties] must be in a position to be able to choose, without any unreasonable interference by the authorities, the mode of communication that they deem the most efficient to reach as many people as possible.”⁹² Observing that they could have come ashore to assert their opposition to the law, the Court ruled that when ideas are shocking, disturbing, bringing into question the established order or involve a symbolic activity of legal challenge, the way of communication can be of such an importance that its restriction can essentially affect the substance of ideas and information in question:⁹³ “rightfully so, it is when ideas that are offending, shocking and challenge the established order that the right to freedom of expression is most precious.”⁹⁴ Furthermore, the Court decided that a “measure as radical as that inevitably will have a chilling effect not only as regards applicants, but also as regards other people who hope to communicate information and ideas which challenge the established order.”⁹⁵

In the same case, the Court established the State’s duty not to prevent individuals from expressing their opinion on abortion in a place “that is by its nature an open public space.”⁹⁶

⁸⁹ *Women on Waves and others v. Portugal*, *supra* note 4 at § 44.

⁹⁰ *Id.* at § 7.

⁹¹ *Id.* at § 8.

⁹² *Id.* at § 38.

⁹³ *Id.* at § 39.

⁹⁴ *Id.* at § 42.

⁹⁵ *Id.* at § 43.

⁹⁶ *Id.* at § 40.

Then, considering the reprehensible act that the authorities sought to prevent, namely the illegal distribution of the pill RU486, the Court held that nothing proved that this was the intention of the applicant.⁹⁷ It also judged that the authorities had at their disposal other means of reaching their desired goals, the seizing of pills for example, that were less detrimental to the freedom of expression of the applicants than resorting to the prohibition.⁹⁸ The Court reiterated that a prohibition has a dissuasive effect not only as regards the applicants, but also as regards other people who hope to challenge the established order.⁹⁹

d. The Speeches on Abortion Expressed by Activists and Minority Groups Benefit from a Heightened Protection

Thereafter, the case law of the Court consolidated the protection of activist speech. This allows us to affirm that if the expression of opinions or convictions on abortion takes the form of activist speech, it benefits from a reinforced degree of protection.¹⁰⁰ The same applies if the speech is made by an organisation: “when an NGO draws the public attention on matters of public interest, it is exercising a public watchdog role of similar importance to that of the press.”¹⁰¹

On numerous occasions, the Court has also affirmed that unpopular opinions or the opinions of minority groups benefit from enhanced protection, as they are the most often “stigmatised.”¹⁰² It also established that the exercise of a right guaranteed by the Convention to a minority group cannot be subject to the acceptance of the majority.¹⁰³ In a democratic society, minority speech and ideas must be tolerated.¹⁰⁴

⁹⁷ *Id.* at § 41.

⁹⁸ *Id.* at § 43.

⁹⁹ *Id.*

¹⁰⁰ *Renaud v. France*, Eur. Ct. H.R. 13290/07 (Feb 25, 2010).

¹⁰¹ *Vides Aizsardzibas Klubs v. Latvia*, Eur. Ct. H.R. 57829/00 § 42 (May 27, 2004); *Animal Defenders International v. The United Kingdom*, Eur. Ct. H.R. 48876/08 § 103 (Apr. 22, 2013).

¹⁰² *Baczowski and others v. Poland*, Eur. Ct. H.R. 1543/06 (May 3, 2007) (quoting *Steel and Morris v. United Kingdom*, Eur. Ct. H.R. 68416/01 (Feb. 16, 2005)). [I]n a democratic society even small and informal campaign groups (...) must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.

See also; *Vides Aizsardzibas Klubs v. Latvia*, Eur. Ct. H.R. 57829/00 (May 27, 2004) “Such participation of an association being essential to a democratic society, the Court considers that it is similar to the role of the press in that it is defined by its constant jurisprudence”. “In order to carry out its task effectively, an association must communicate facts of public interest, assess these facts and contribute to the transparency the activities of public authorities.”

¹⁰³ *Akdas v. Turkey*, *supra* note 34 at § 81; *Chassagnou and others v. France*, *supra* note 34.

¹⁰⁴ *Chassagnou and others v. France*, *supra* note 34.

Therefore, as speech against abortion is a minority speech and is sometimes considered relatively unpopular, it must be tolerated, and in principle, must benefit from more protection than the speech in favour of abortion.

e. The Speeches on Abortion Can be Expressed Through Peaceful Protest and the State Must Take All Measures Necessary so that the Protest Can be Carried Out in a Peaceful Manner

As an extension of the freedom of expression there is the freedom of peaceful assembly pursuant to Article 11 of the Convention.

Article 11 of the Convention also protects “the free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places,”¹⁰⁵ as well as “protests that may offend or dissatisfy those opposed to the ideas or claims that they are seeking to promote.”¹⁰⁶

The restriction of freedom of assembly can be justified only if “the organisers and participants have violent intentions or otherwise reject the principles of a “democratic society,”¹⁰⁷ or if there is an “increased likelihood of violence,” “a clear threat or imminent danger of violence,”¹⁰⁸ or if the applicant perpetrates at this occasion “a reprehensible act.”¹⁰⁹ “The circumstances of “the particular place and time (...) unequivocally change the meaning of a certain display” to the point that they amount to “the apology of war crimes, crimes against humanity or genocide.”¹¹⁰

The simple “eventuality of tensions and heated exchanges between opposing groups during a protest” does not justify a ban, because such a society “would be faced with being deprived of taking account of differing points of views.”¹¹¹ The same, neither

¹⁰⁵ *Tatár and Fáber v. Hungary*, supra note 8 at § 41.

¹⁰⁶ *Id.* at § 37; *Alexeyev v. Russia*, supra note 9.

¹⁰⁷ *Tatár and Fáber v. Hungary*, supra note 8 at § 37; *Alexeyev v. Russia*, supra note 8 at § 80 (“any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy and often even endanger it.”).

¹⁰⁸ *Id.* at § 44.

¹⁰⁹ *Ezelin v. France*, App. No. 11800/85, Eur. Ct. H.R. para. 53 (1991), <http://hudoc.echr.coe.int/eng?i=001-57675>; *Women on Waves v. Portugal*, supra note 4, at § 41.

¹¹⁰ *Tatár and Fáber v. Hungary*, supra note 8 at § 58.

¹¹¹ *Id.*

“uneasiness,”¹¹² nor “the dictates of public feeling,”¹¹³ or “‘ill feelings or even outrage’ of another are enough to justify the banning of a symbol” in the absence of intimidation.¹¹⁴

In the case *Plattform Ärzte für das Leben v. Austria*,¹¹⁵ concerning two protests organised by a doctors’ organisation that was opposed to abortion, the Court established that “the right to freedom of peaceful assembly is guaranteed to everyone who has the intention of organising a peaceful demonstration.”¹¹⁶

In the same case, the Court ruled that the Convention obliges signatory States to take reasonable and appropriate measures in order to ensure a certain protection so that the protest can be carried out in a peaceful manner. These measures cannot prevent counter-protests, but the right to counter-protest cannot be exercised to the point of paralysing the exercise of the right to protest.¹¹⁷

4. The Speech Against Abortion Held by Activist Individuals

It should be noted that the liberal principles developed by the Court in cases regarding the speech in favour of abortion were applied only partially in the cases concerning activists who expressed their opinions against abortion. These involve cases introduced by Mr. Klaus Günter Annen, either alone or with Ms. Collene Hoffer.¹¹⁸

¹¹² *Vajnai v. Hungary*, Eur. Ct. H.R. 33629/06 § 57 (Oct. 8, 2010) (stating that “the display of a symbol which was ubiquitous during the [communist] regime[s] may create uneasiness among past victims and their relatives, who may rightly find such displays disrespectful.” However, “such sentiments, however understandable, cannot alone set the limits of freedom of expression” because “otherwise (...) freedom of speech and opinion is subjected to the heckler’s veto.”).

¹¹³ *Id.* (stating that “a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society”).

¹¹⁴ *Tatár and Fáber v. Hungary*, *supra* note 8 (“even assuming that some demonstrators may have considered the flag as offensive, shocking, or even “fascist”. . . its mere display was not capable of disturbing public order or hampering the exercise of the demonstrators’ right to assemble as it was neither intimidating, nor capable of inciting to violence by instilling a deep-seated and irrational hatred against identifiable persons.”).

¹¹⁵ *Plattform “Ärzte für das Leben” v. Austria*, *supra* note 4.

¹¹⁶ *Id.* at § 5.

¹¹⁷ *Id.* at § 32 (“A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.”).

¹¹⁸ *Annen v. Germany*, App. Nos. 2373/07 and 2396/07, *supra* note 4; *Hoffer and Annen v. Germany*, *supra* note 4; *Annen v. Germany*, App. No. 3690/10, *supra* note 4.

Mr. Klaus Günter Annen introduced four cases to the Court because he was punished on several occasions for expressing his opinion against abortion. In the first three cases the Court did not find a violation of the Convention.¹¹⁹ In the first two cases,¹²⁰ the applicant had distributed a leaflet near a clinic in which he stated that a doctor, Dr. K., practised illegal abortions. He also indicated the name and professional address of the doctor. He was ordered by the national courts to no longer distribute this information, either in vocal or written form.¹²¹

One year later, he protested and approached passersby and potential customers of the clinic, carrying a poster on which one side stated "abortion kills unborn children" and on the other "'You shall not kill' also applies to doctors." He was handed an injunction by the tribunals to no longer address passers-by or customers within a certain perimeter of the doctor's clinic and to not point out that the doctor practised abortions. Analysing the sanctions, the motives invoked by the authorities, the content of the applicant's statements, and how the national courts weighed up various rights, the Court declared the case inadmissible.¹²² It held that the interference with the applicant's right to freedom of expression was relatively limited because he had not been subject to criminal sanctions and had not been ordered to revoke his statements. He was prohibited from repeating certain statements regarding the professional activities of the doctor, and was ordered to no longer approach passers-by in the vicinity of the clinic.¹²³ Addressing the motives invoked by the authorities, the Court observed, concerning the first injunction, that the national courts had judged that the statement of the applicant suggested that the activities of the doctor were illegal and that it publicly named and shamed the doctor for no reason. Regarding the second injunction, the Court observed that the courts, referring to the naming and shaming of the doctor, had ruled that by approaching passers-by and potential clients to inform them on the practice of abortion by the doctor, the applicant had seriously interfered with the doctor's exercise of his legal professional activities, which served a public health interest.¹²⁴

With respect to the content of the statement of the applicant, regarding the first injunction, the Court held that affirming that the

¹¹⁹ *Annen v. Germany*, App. Nos. 2373/07 and 2396/07, *supra* note 4; *Hoffer and Annen v. Germany*, *supra* note 4.

¹²⁰ *Annen v. Germany*, App. Nos. 2373/07 and 2396/07, *supra* note 4.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

doctor practiced abortions was correct from a legal point of view, but not from the point of view of an ordinary person.¹²⁵ With regard to the second injunction, the Court found that the applicant's statement, that the doctor practised abortions, was accurate.¹²⁶ Nevertheless, it agreed with the national tribunal giving more weight to the context of the statement, namely that it took place in the vicinity of the clinic, hence perturbing the professional activity of the doctor.¹²⁷

The Court held furthermore that the national courts had correctly weighed the different rights in question, privileging the rights of the doctor, taking into account that he had not taken part in the debate started by the applicant, and that he had given the applicant no reason to single him out.¹²⁸ Finally, the Court observed that the applicant had not been prevented from criticising the general practice of abortion in Germany, or from criticising this practice of the doctor in general.¹²⁹

On another occasion,¹³⁰ accompanied by Ms. Collene Hoffer, he handed out a four-page leaflet to passers-by outside a medical clinic, in which he mentioned, *inter alia*, Dr. F. "specialist in murdering unborn children."¹³¹ On the last page of the leaflet he stated: "Yesterday: Holocaust, today: Babycast."¹³² They were convicted of defamation and ordered to pay daily fines that amounted 150 and 100 euros respectively.¹³³ Examining the case, the Court considered that the criminal sanction inflicted on the applicants was relatively modest.¹³⁴ In affirming, along with the internal courts, that this concerned a subject of public interest having a political goal, making use of exaggeration and controversial criticism, the Court stated that the comparison between the practice of abortion and the mass homicide committed during the Holocaust gravely damaged the personal rights of the doctors and that the applicants could have expressed their criticism in a manner that was less detrimental to the reputation of the doctor.¹³⁵

A few years later,¹³⁶ Mr. Klaus Günter Annen put leaflets against abortion in the letter boxes of people living in the surrounding

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Hoffer and Annen v. Germany*, *supra* note 4.

¹³¹ *Id.* at § 7.

¹³² *Id.* at § 8.

¹³³ *Id.* at § 22.

¹³⁴ *Id.* at § 49.

¹³⁵ *Id.* at §§ 46-8.

¹³⁶ *Annen v. Germany*, App. No. 3690/10, *supra* note 4.

areas of clinics managed by two doctors, Dr. M. and R. The leaflet stated that the two doctors practiced illegal abortions which were allowed by the law,¹³⁷ compared the practice of abortion to the Holocaust,¹³⁸ and stated on the last page its website www.babycaust.de. This website contained, *inter alia*, a list of “abortion doctors” and their professional addresses. He was handed an injunction from publishing this list on his website. On the 26th of November, 2015, judging the case, the Court concluded there was a violation of the applicant’s right to freedom of expression.¹³⁹ Regarding the ban to distribute leaflets, the Court considered that the applicant had the right to choose the most effective means for his campaign and that the reference to Holocaust alone was a means to raise awareness that what is legal is not necessarily moral.¹⁴⁰ As to the ban of mentioning the names and professional addresses of the “abortion doctors” on his website, the Fifth Section sanctioned the absence of proofs and the reasoning in support of the tribunals conclusion.¹⁴¹ Thus, the Court proposed concrete standards for the individual and contextual assessment of such cases by the national courts.

a. Speech on Abortion Can Be Expressed in Terms That Are Shocking and Offensive, As Long As It Does Not Severely Infringe the Personal Rights of Doctors and Does Not Interfere In A Serious Manner With Their Professional Activity

Until 2015, in all these cases, the Court has confirmed the sanctions made by national courts.¹⁴² By adopting this approach, the Court has affirmed the case law of the former Commission on the subject, recalling that the speech against abortion can be expressed in terms that are shocking and offensive, as long as it does not infringe the personal rights of doctors.¹⁴³ It also decided that this speech can take

¹³⁷ On the first page of the leaflet, the plaintiff claimed that “In their day clinics doctors M./R. [complete address] practise illegal abortions,” followed, in very small lettering by “who are nevertheless allowed by the German legislator and who are not subject to criminal sanction. The statement of the council protects the doctor and the mother from criminal sanction, but not from sanction before God.”

¹³⁸ On the last page of the leaflet the following text appeared : “The murder of human beings at Auschwitz was illegal, but the national-socialist State, morally degraded, allowed the murder of innocent people and it was not subject to criminal sanction.”

¹³⁹ *Annen v. Germany*, App. No. 3690/10, *supra* note 4 at §§ 65, 74.

¹⁴⁰ *Id.* at §§ 62-3.

¹⁴¹ *Id.* at §§ 70-3.

¹⁴² *D.F. v. Austria*, *supra* note 4; *Van Den Dungen v. Netherlands*, *supra* note 4; *Annen v. Germany*, App. Nos. 2373/07 et 2396/07, *supra* note 4; *Hoffer and Annen v. Germany*, *supra* note 4.

¹⁴³ *D.F. v. Austria*, *supra* note 4; *Van Den Dungen v. Netherlands*, *supra* note 4.

place in the vicinity of a clinic, as long as it does not disturb, in a serious manner, doctors during their professional activity.¹⁴⁴

Nevertheless, according to the constant Strasbourg case law on the matter, the speech, including the one on abortion, can be expressed as long as it is not capable of directly inciting violence, and as long as it does not imply animosity or an intention to harm the reputation of a third party.¹⁴⁵ Nevertheless, carrying a poster which states on one side, “abortion kills unborn children” and on the other, ““You shall not kill” also applies to doctors,”¹⁴⁶ claiming on a leaflet that Doctor F. is a “specialist in murdering unborn children” and stating on the same leaflet “Yesterday: Holocaust, today: Babycast”¹⁴⁷ were considered to be offensive to the respective doctors by the Court.

This interpretation of the Convention was undermined in 2015, with the adoption of the judgment in the fourth *Annen*¹⁴⁸ case. In this case, the Court recalled that “the attack to the personal reputation should attain a certain degree of seriousness and it should be made in a way to cause damages to the personal enjoyment of the right to private life.”¹⁴⁹ It further stated that there should be a link between the applicant’s speech and the damage suffered by the doctors.¹⁵⁰

b. The Speeches on Abortion Cannot Be Detached From Their Historical and Social Contexts the Reference to Holocaust is Justified to Raise Awareness That What is Legal Is Not Necessarily Moral

Regarding the comparison of abortion with Holocaust, in the case *Hoffer and Annen v. Germany*, the Court stated that it could not be detached from the German historical and social context in which it had been employed.¹⁵¹ The Court also ruled that the use of this comparison is “a very serious violation of the personality rights of the doctor.”¹⁵²

This view of the Court was very questionable. Some years beforehand, in 2004, in a case against Austria, the Court considered that the expression “old crypto-Nazi” used to criticise a person, was a valid value judgment from the point of view of the Convention.¹⁵³

¹⁴⁴ *Annen v. Germany*, App. Nos. 2373/07 and 2396/07, *supra* note 4.

¹⁴⁵ *Tatár and Fáber v. Hungary*, *supra* note 8.

¹⁴⁶ *Annen v. Germany*, App. Nos. 2373/07 and 2396/07, *supra* note 4.

¹⁴⁷ *Hoffer and Annen v. Germany*, *supra* note 4.

¹⁴⁸ *Annen v. Germany*, App. No. 3690/10, *supra* note 4.

¹⁴⁹ *Id.* at § 54.

¹⁵⁰ *Id.* at § 62.

¹⁵¹ *Hoffer and Annen v. Germany*, *supra* note 4.

¹⁵² *Id.* at § 47.

¹⁵³ *Scharsach and News Verlagsgesellschaft mbH v. Austria*, Eur. Ct. H.R. 39394/98 § 41 (Nov. 13, 2004).

Later, in 2015, in the fourth case of Mr. Annen, the Court stated that the reference to Holocaust “is a way of creating awareness of the more general fact that law may diverge from morality.”¹⁵⁴

Indeed, the comparison of abortion to the Holocaust was not without meaning for the applicants in the case of *Hoffer and Annen v. Germany* or for Mr. Klaus Günter Annen.¹⁵⁵ They had no intention to damage the reputation of the doctors or to trivialise or instrumentalize the Holocaust. They called for the respect of human rights,¹⁵⁶ namely for the respect for the life of unborn children which, in the present state of the case law of the Court, does not exclude the unborn child from its protection. The applicants used the striking image of the Holocaust because for Germans it refers to a tragic event in their history, where innocent human beings were massacred. The purpose was to immediately and effectively raise public awareness on the high number of innocent human beings who are suppressed every day by the practice of abortion so that another Holocaust does not take place. It also cannot be forgotten that the Holocaust began with the collaboration of the medical profession.¹⁵⁷

In order to draw a lesson from history, a comparison needs to be made. If one is denied the possibility of comparing, then one is denied a significant and necessary lesson from which one could learn an objective evil. To compare is not to deny the uniqueness of the Holocaust. The comparison that the applicants have made with the Holocaust in order to illustrate their ideas should be regarded from their point of view, that abortion is murder. This comparison is not disconnected with the Holocaust, or incongruous, or disrespectful to the victims, as was the case in PETA.¹⁵⁸ In the latter case, the suffering of human beings during the Holocaust was compared with the suffering of animals in the abattoir. However, there is a very big difference between a human being and an animal.

Which other strong and effective image could they have used to convey the essence of their message and convince the German public that abortion is a mass crime against innocent human beings? With what other image could they have effectively expressed their message? Moreover, the applicants were not the only ones to use this comparison.

¹⁵⁴ *Annen v. Germany*, App. No. 3690/10, *supra* note 4 at § 63.

¹⁵⁵ *Id.*

¹⁵⁶ *A contrario Peta Deutschland v. Germany*, Eur. Ct. H.R. 43481/09 § 7 and 15 (Nov. 8, 2012) (agreeing opinions of Judges Zupancic and Spielmann).

¹⁵⁷ ROBERT JAY LIFTON, *THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE*. (3rd ed. 1989).

¹⁵⁸ People for the Ethical Treatment of Animals (PETA), <http://www.peta.org/> (last visited Mar. 16, 2017); *PETA Deutschland v. Germany*, Eur. Ct. H.R. 43481/09 (Nov. 8, 2012).

Public advertising campaigns against abortion in Poland,¹⁵⁹ posted at the crossroads of the city centre, enormous posters of about 200 square meters, displaying the face of Hitler and aborted fetuses with the message: “Abortion in Poland: Introduced by Hitler the 9th of March 1943.” They recalled the decree on “the interruption of pregnancy for working mothers from the East and Poland” as a “measure for the security of the German people” because “the birth rate among working women from the East and from Poland was a biological weapon against the German people.”¹⁶⁰ John-Paul II, during a trip to Poland in June 1991, compared “the graveyards of abortion” to those of the extermination camps.¹⁶¹ Other examples can be mentioned: internet sites like *Survivors of the Abortion Holocaust*,¹⁶² the documentary *180*,¹⁶³ several books on this subject,¹⁶⁴ like *The Abortion Holocaust: Today's Final Solution*¹⁶⁵ by William Brennan; *The Holocaust Analogy to Abortion* from the book *The Facts of Life* by Brian Clowes; *Holocaust: New and Old* by Elasa Dorgin; *Rachel Weeping: The Case Against Abortion* by James Tunstead Burtchaell, etc.

Opposing this comparison and preventing its circulation in the public space is in fact a means of promoting the opposing view of that of the applicants on abortion, which brings us back to using the Holocaust as a tool.

c. Any Censorship of the Speech on Abortion by the Tribunals Should Be Made After An Individual and Contextual Assessment of the Case, in Reference to the Situation at the Moment of the Publication

In the last case *Annen*, adopted in 2015, the Court established procedural obligations deriving from Article 10 of the Convention¹⁶⁶. Noting that the tribunals did not thoroughly assess the case, the Fifth Section indicated, for example, the tribunals failed to consider factors

¹⁵⁹ *Poland: A portrait of Hitler at the service of an anti-abortion campaign*, RIPOUBLIK (Mar. 4, 2010), <https://ripoublik.wordpress.com/2010/03/04/pologne-un-portrait-de-hitler-au-service-dune-campagne-anti-avortement/>.

¹⁶⁰ *Id.*

¹⁶¹ The cemetery of the children before their birth (John Paul II - Trip to Poland - 1991), <http://notredamedesneiges.over-blog.com/article-13984914.html> (last visited Mar. 16, 2017).

¹⁶² *Who are the survivors?*, SURVIVORS OF THE ABORTION HOLOCAUST, <http://www.survivors.la/who-are-the-survivors/> (last visited Mar. 16, 2017).

¹⁶³ *Living Waters, "180" Movie*, YOUTUBE (Sept. 21, 2011), https://www.youtube.com/watch?feature=player_embedded&v=7y2KsU_dhwI.

¹⁶⁴ Adam Cassandra, *Abortion Activists in India Resist Efforts to Stop Genocide*, HUMAN LIFE INT'L (Aug. 12, 2011), <http://www.hli.org/2011/08/abortion-activists-in-india-resist-efforts-to-stop-gendercide/294/?task=view>.

¹⁶⁵ WILLIAM BRENNAN, *ABORTION HOLOCAUST: TODAY'S FINAL SOLUTION* (Jul. 1983).

¹⁶⁶ *Annen v. Germany*, App. No. 3690/10, *supra* note 4 at, §§ 70-3.

which should be taken into account for an individual and contextual review of a case: the geographical impact of the leaflets, their content, the general context of the case, the specific layout of the webpage, the necessity to protect sensitive data and the doctors' previous behavior (if they had already mentioned on the internet that they practiced abortions), the impact of the speech on the third parties, and if it is likely to incite aggression or violence against the doctors.¹⁶⁷

B. Protection of speech on abortion according to its content

1. The speech against abortion is better protected by the Convention

If one examines the approach employed by the Court until 2015 to settle cases in favour of abortion with those against abortion, one will find that they are not the same despite the fact that, at the core, there have not been substantial differences between these cases to justify this difference in approach.¹⁶⁸ This difference in approach fails to present not only the will of the Court to not develop its case law in accordance with protecting the speech against abortion, but also its refusal to reaffirm its own precedent established in cases regarding the speech in favour of abortion. The most obvious examples are the cases *D.F.* and *Van Den Dungen*, the speech against abortion, compared with the case *Open Door*, the speech in favour of abortion; and the first three *Annen* cases. The speech against abortion, compared with the cases *Open Door* and *Women on Waves*, speech in favour of abortion.

Nevertheless, the *Annen* judgment of November 26th, 2015 partially attenuates this trend. The Court is starting to apply to the speech against abortion certain principles already established in cases in favour of this practice, showing itself more protective of this speech.

a. The cases of *D.F.* and *Van Den Dungen* compared to the *Open Door* case

The *Open Door* case was decided by the Court in 1992, and the cases *D.F.* and *Van Den Dungen* were decided in 1994 and 1995 respectively. The first case concerned activists, organisations, and women who were pro-choice; and the other two cases concerned two individual activists who were against abortion. In the *Open Door* case,

¹⁶⁷ *Id.*

¹⁶⁸ See *supra* note 4.

arriving at a conclusion that the Convention had been violated, the plenary session of the Court gave an in-depth analysis of the sanction imposed on the applicants, taking into account Irish law and the attitude of the authorities, the nature, the extent, the effectiveness and the consequences of the ban, the means of dissemination, the intended audience, and the existence of information in the public sphere¹⁶⁹. It was the first time that the Court went into such detail in a case concerning the speech on abortion. However, two years later, the former Commission settled the case *D.F.* in two brief paragraphs, limiting itself to stating that the speech of D.F. was of a stigmatizing nature and that the words used and the means of communication, a circular letter, did not prevail over the personality rights of the doctor¹⁷⁰. The same went for the case *Van Den Dungen*, which was condensed into one paragraph by the former Commission, three years after *Open Door*, considering that the sanction was limited in time and space and it did not deprive the applicant of expressing himself by other means.¹⁷¹

b. The first three *Annen* cases compared to *Open Door* and *Women on Waves*

The applicants in the first three *Annen* cases, who were anti-abortion, were subject to the same arbitrariness of the Court in the cases *D.F.* and *Van Den Dungen*, unlike the cases *Open Door* and *Women on Waves*, where the applicants were pro-abortion. The case *Women on Waves* was decided in 2009 and the three *Annen* cases in 2010 and 2011 respectively. As there were no substantial differences between these cases, there was nothing to justify the different approaches taken in their judgment.

Like the applicants in the cases *Open Door* and *Women on Waves*, Mr. *Annen* and Ms. *Hoffer* were also activists. They wanted to change the legislation on abortion in Germany to convince doctors to renounce this practice and women to give up aborting their babies. Their speech was a minority one in German society. However, they did not benefit from the same heightened protection of their right to freedom of expression like the activists who were pro-abortion in the cases *Open Door* and *Women on Waves*.

They employed the means of communication that they considered most effective to convey their message: distributing leaflets,

¹⁶⁹ *Open Door and Dublin Well Woman v. Ireland*, *supra* note 4 at §§ 72-9.

¹⁷⁰ *D.F. v. Austria*, *supra* note 4.

¹⁷¹ *Van Den Dungen v. Holland*, *supra* note 4.

protesting and having discussions with passers-by outside the clinic, dropping anti-abortion pamphlets in letter boxes, and creating an internet site. Mr. Annen used a different means of expressing himself each time. Nevertheless, he was sanctioned on every occasion. Therefore, it was not until 2015, after his first three cases, he did not benefit from the “right to choose the most effective means of conveying his message” like the applicants had in *Women on Waves*. Furthermore, the repeated sanctions imposed on the applicant, while he changed each time the way of expressing himself, had nothing but an extremely dissuasive effect on his right to freedom of expression and the rights of others who wished to express their opinions against abortion in the future. However, the Court ignored this aspect in the case of Mr.

Annen, failing to indicate that “a measure so radical inevitably has a chilling effect not only on the applicants, but also on other persons hoping to communicate information and ideas that go against the established order,”¹⁷² like it did in the *Women on Waves* case.

In the three cases, Annen too employed terms that some individuals may consider shocking or offensive, “abortion kills unborn children,” “You shall not kill’ also applies to doctors,” “specialist in murdering unborn children,” “Yesterday: Holocaust, today: Babycast,” “abortion doctors”, but in his case, the Court did not affirm that “when ideas are presented that are striking, shocking and contest the established order, freedom of expression is the most precious thing,” like in the case *Women on Waves*, where it was stated that the “right to freedom of expression is also valid where the ideas or information conveyed are of a offending, shocking or disturbing nature to the State or any sector of the population.”¹⁷³ A similar stance was taken in *Open Door*.

In the *Annen* cases, the Court ruled that the sanction was justified because the applicants’ wording undermined the personal rights of doctors. In the cases *Open Door* and *Women on Waves*, it judged that the sanctions incurred by the applicants to ensure the protection of the right to life of the unborn, a constitutional right in Ireland, was not justified and disproportionate, while the value protected by the Member State was of primordial importance in the aforementioned cases.¹⁷⁴

¹⁷² *Women on Waves and others v. Portugal*, *supra* note 4 at § 43.

¹⁷³ *Open Door and Dublin Well Woman v. Ireland*, *supra* note 4 at § 71.

¹⁷⁴ *Open Door and Dublin Well Woman v. Ireland*, *supra* note 4 at § 80; *Women on Waves and others v. Portugal*, *supra* note 4 at § 44; *Annen v. Germany*, App Nos. 2373/07 and 2396/07, *supra* note 4; *Hoffer and Annen v. Germany*, *supra* note 4 at § 49.

Mr. Annen made his speech in a place that was by its nature a public place, expressing himself and manifesting in a peaceful manner.

However, in his case the Court did not recall that “the freedom to express ones’ opinions during the course of a peaceful assembly is of such an importance that it cannot be made subject to any limitation insofar as the interested party does not commit himself, in this occasion, a reprehensible act” as it affirmed in the case *Women on Waves*.¹⁷⁵ He also did not seriously disturb “the professional activity of doctors.”¹⁷⁶

There is nothing in the facts presented by the Court to suggest this.

Altogether, the three *Annen* cases did not benefit from a thorough analysis on the part of the Court, like it had done in the *Open Door* case, taking into account Irish law and the attitude of the authorities, the nature, extent, effectiveness and consequences of the prohibition, the means of dissemination, the intended audience, and the existence of information in the public sphere. In the *Annen* cases, the Court limited itself to stating that the applicant did not incur a criminal sanction, while he was prohibited from repeating certain statements concerning doctors and approaching passers-by, the reasons given by the internal national courts were sufficient, and that he had other means of expressing his view against abortion. The same approach was taken in the case *Hoffer and Annen*, in which the Court ruled in three paragraphs that the applicants cannot, in their speech, compare abortion to the Holocaust, because this seriously violated the personal rights of the doctor, all the more so since the speech could not be detached from the historical and social context in Germany.¹⁷⁷ According to the Court, they should have expressed their criticism in a manner that was less damaging to the reputation of the doctor.¹⁷⁸

c. The *Annen v. Germany* Judgment of 26th November, 2015

It is to be noted that with this judgment the Court changed its approach applying to the speech against abortion the principles that it established in the cases favorable to abortion. Thus, it recognized to the applicant the right to choose the most effective means for his campaign, namely the distribution of leaflets near a clinic and indicating the name and the professional address of the doctors. The Court judged that the wording used by the applicant, “abortion doctors,” “illegal abortions,” including the reference to Holocaust to raise awareness that what is

¹⁷⁵ *Women on Waves and others v. Portugal*, *supra* note 4 at § 40.

¹⁷⁶ *Annen v. Germany*, App. Nos. 2373/07 and 2396/07, *supra* note 4.

¹⁷⁷ *Hoffer and Annen v. Germany*, *supra* note 4.

¹⁷⁸ *Id.* at §§ 46, 49.

legal is not necessarily moral, is a legitimate means for the efficiency of his campaign, which contributed to a highly controversial debate of public interest. Regarding the personal rights of doctors, the Fifth Section held that any damage caused to the doctors should be proved and must be caused by the applicant's speech. Finally, it imposed procedural obligations under Article 10 of the Convention to the tribunals, obliging them to thoroughly assess each such case. Thus, the Court indicated concretely and non-exhaustively the factors that should be taken into consideration when examining a case individually and contextually.

CONCLUSION

Having regarded to the above considerations, the Convention, which has been interpreted by the former Commission and by the ECHR, protects the speech on abortion. However, this protection is unbalanced and it varies depending on the person expressing the opinion and the content of his or her speech. In principle, these speeches are more protected if they are held by activists, by a NGO, by a minority group which wishes to attract the attention of the public, and decision-makers on a subject of general interest, especially if they want to change the mentalities and the established order. The Convention protects all ideas that are offending or shocking and all symbolic activity of challenging of the legal order by establishing the right to choose the most effective means by which to convey a message. It condemns anything that might have a chilling effect on these speeches. However, the establishment and application of these principles in cases in which the applicants were in favour of abortion; and inversely, their ignorance or their partial application in the cases where the applicants were against this practice, illustrates how certain judges use the Convention to promote a certain speech on abortion, the one that criticises the existing societal values, respect for the life of every human being and for the health of the woman, so that they can be replaced by other values. In any event, once these principles are established, the European Court should apply them in the same manner in the cases against abortion as in those in favour of this practice. Otherwise, its reputation and justice will be diminished.