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***Abortion and Freedom of Expression***

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"Freedom of expression is also applicable to "information" or "ideas" that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society"."

I would like to introduce my contribution with this famous quote of the European Court of Human Rights (ECHR) in its case *Handyside vs. The United Kingdom* of 1976 which really founded the position of the Court on the question of freedom of expression, it truly linked the question of freedom of expression to the question of democracy.

Obviously, we could not speak of, or carry out prevention, if there were no freedom of speech, if it were not possible to talk about and expose all the aspects of a question and in particular, of the question of abortion.

My contribution will primarily address the case law of the ECHR due to its importance in Europe. Indeed, over the past years, the importance of the Court has increased, its decisions are followed and little by little, the Courts of all countries have a tendency to follow the position of the ECtHR.

## The evolution of abortion through the European Convention of Human Rights and the case law of the ECHR

In 1950, when the European Convention of Human Rights was opened for signature most of the European States prohibited abortion and today, in 2017, a very large majority authorises it.
What I propose is to see how the Court integrated this change of the States without changing the text of the Convention.

## My opinion on the case law of the Court concerning freedom of expression on abortion

The Court has overall been faithful to irs principles. Indeed, the speech on abortion objectively enjoys a high degree of protection.
Had I held this conference two years ago I might have been slightly more reserved on the application of freedom of expression because the Court showed itself more liberal when a pro-abortion view was concerned than when an anti-abortion view was concerned. The *Annen* case of 2015 departs from its own precedent and allows to say that the speech on abortion is now free whether you are for or against it.

The Court, when confronted to questions on freedom of expression in relation to abortion –a dozen cases in its case law– is going to proceed in stages, first by wondering whether the State, in preventing a citizen or an association to express itself has provided for this prohibition by the law –generally the examination of this condition is no problem– then, it will examine whether the purpose of this law is legitimate –there too generally, the Court is very open. The difficulty of this restriction rests on the necessity in a democratic society to condemn a speech. It is under this term that the Court will sometimes recognise the applicants their freedom of expression or sometimes deny it to them.

## The question of promoting your idea when you are going against the law

### *Woman on waves vs. Portugal*, 3 May 2009

Portugal prohibited abortion and the association *Woman on Waves* wanted to promote it with large means. To do so, they chartered a ship to approach the Portuguese coasts and offer “sexual health” services – counselling, abortion and contraception – while letting the ship anchor in territorial waters so that it wasn't in Portuguese territory. Portugal took measures to prohibit the boat from anchoring and the association brought a claim before the ECHR who ruled that the choice of the means is eminently important and that the association should be able to expose its point of view and provide consultations before the Portuguese people even if Portugal prohibits abortion. Thus, freedom of expression also applies to ideas that shock or disturb the State.

***Van Den Dugen vs. Holland*, 22 February 1995**

I am going to compare the case I just mentioned, *Women on Waves* with the *Van Den Dugen* case. The facts here also concern the means of broadcasting one's opinions. The Court was very liberal in its approach concerning the ship on the coast but, in contrast, concerning pro-life activists who circulate leaflets by clinics to try and talk about abortion, the Court showed itself less indulgent. Indeed, it considered it was legitimate for the State to restrain an activist who came to give out lealflets and tried to convince a woman not to abort, from being less than 250 m away from the clinic for 6 months. It is thus difficult, in these conditions, to convince a woman on the parking lot if you have to stay at least 250 m away from the clinic. The Court in these two cases, hasn't been completely fair.

**The moral judgment; defamation**

Up until 2015 the Court has been quite uncompromising. It authorised a value judgement on a doctor that practiced abortion but when the activists called one of a Nazi or a criminal comparable to a Nazi the Court did not recognise freedom of expression and considered that the question was one of defamation. In 2015 in the *Annen* case, the Court judged that, if one gives a circumstantial opinion and that correctly compares the acts of the doctor and the fact that he is killing a human being, it is part of the public debate and interest. Thus a condemnation is a bit heavy. This shift in the case law is important because before, it considered that a pro-life activist was not allowed to call a doctor a Nazi when in other cases it had allowed journalists to call politicians Nazis because it was part of the public interest. It was, according to it, an acceptable value judgement.

We can see in this a fruitful dialogue between the Strasbourg judges and those of the Supreme Court of the United States. In both cases, it allowed people against abortion to be able to touch pregnant women wishing to undergo an abortion. In the year 2000 *Hill v. Colorado* case, the Court confirmed a limit of 8 feet (2.5 m) of authorised minimal distance, to address a person coming to a clinic – you can still be heard when you are 2.5 m away. In 2014, the Supreme Court of the United States went further in the *Mc Cullen v. Coakley* case, and prohibited a buffer zone law that the State had fixed at 35 feet (~10m).

The Court said that that was too much, because 35 feet away prevents the person from creating a relationship. There is a right for the person to remain alone, not to have to hear a point of view with which she disagrees, but it must still be possible for pro-life activists to be able to be heard from them. To keep them at a distance of more than 10 m is not acceptable. The ECtHR in its *Annen* case of 2015 follows this direction, this is good news and seems fair to me.

**On freedom of expression in the workplace**

Professor Schouppe has previously mentioned the case of *Rommelfanger vs. The Federal Republic of Germany* of the 6th of September 1989. In these cases, the Court is balanced. We have two cases on each side that allow for a comparison.
On the one side, there was a pro-life activist, a professor who in a secular public school had images, stickers or pins with enlarged pictures of aborted babies on him. He had been dismissed by the school. The Court considered that this was acceptable because the public school must be neutral and respect the convictions of everyone. In that case, we were dealing with "proselytism" and something offensive.

On the other side, in a Catholic school, a teacher who publicly and repeatedly explained to be in favour of abortion, in contradiction with the doctrine proposed by the school. His contract was not renewed and the Court validated the decision and considered that it was legitimate.

All of this illustrates the persistence of the debate. To this day, in 2017, abortion remains a debated question that disturbs and is situated on the edge of several themes that agitate civil society such as the question of feminism, morals, religion, family, life. Everyone can be concerned by abortion. In the light of the importance and the numbers given previously by Dr Puppinck in his introduction, it is essential that there be a strong freedom of expression guaranteed concerning this subject. We must not let ourselves be intimidated, this freedom is strong despite some laws that are, for example in France, very restrictive. I would also like to mention the crime of obstruction to abortion that was carried by the previous legislature that practically prohibited from trying to convince women on the internet not to undergo an abortion. I have good hope that the decision of partial censorship of the Constitutional Council will nip this law in the bud because the permitted censorship is important. It is hard to prove that when one voluntarily visits a pro-life website, one endures pressures.

Freedom of expression is also the freedom of women who underwent an abortion to be able to talk about it, they are the incident victims of the laws and debates between the pros and the cons. To convince you, if necessary, I invite you to look on YouTube or on blogs at the many testimonies that exist of young women who resorted to abortion and who regretted it. The texts are very sincere and touching, and these are not girls of Paris' Right Bank. These young women were in an illusion because an ambient discourse, very favourable to abortion, deluded them. Once they resorted to abortion, many of them felt regrets and suffered from it. The expression of this regret is also a part of the freedom of expression on abortion that the Court guaranties as well as most of countries.