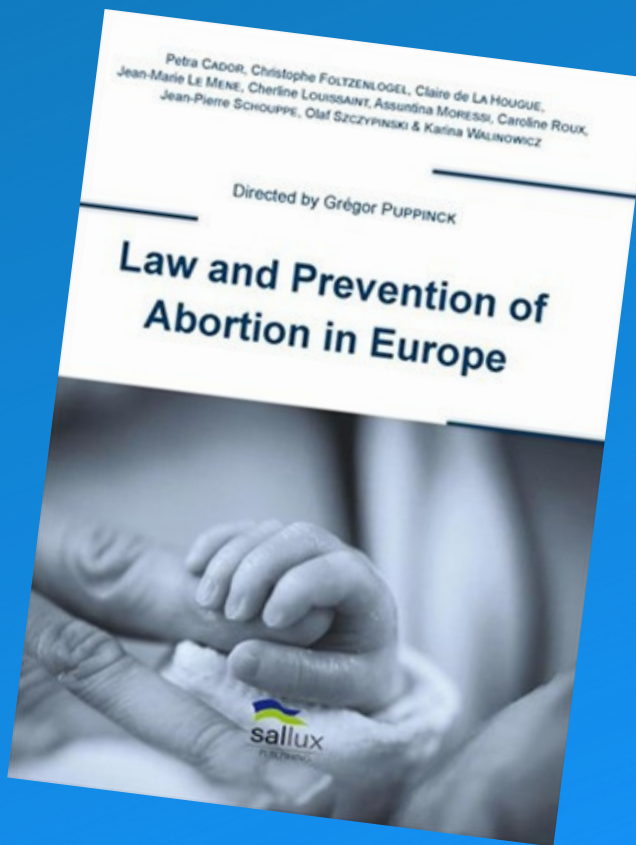
EUROPEAN CENTRE FOR LAW AND JUSTICE

Freedom of Expression and Demonstration on Abortion

Grégor Puppinck



This article is a revised extract from the book "Law and Prevention of Abortion in Europe" published in 2018 in English.

You can order this book in paper version from the publisher or directly from the ECLJ by writing to us at secretariat@eclj.org

Freedom of Expression and Demonstration on Abortion

Grégor Puppinck

Table of Content

Abortion is a controversial topic. Hence, it is not surprising that even today freedom of expression regarding abortion is restricted: it is either forbidden to promote abortion or to attempt to dissuade medical staff and women from resorting to abortion.

For a long time, the restriction of the promotion of abortion was the order of the day. Margaret Sanger, the American founder of Planned Parenthood, was imprisoned in 1917 in the US for distributing diaphragm. On July 31, 1920, a French law designed to encourage the repopulation of France was adopted. It banned abortion and the sale and advertisement of contraceptives. Under this law, neo-Malthusian publications were withdrawn from sale and birth control activists, like Etienne Humbert, were given short-term prison sentences. In 1975, the Veil law maintained the prohibition of incitement to abortion by means of advertisement, but authorised the dissemination of information on abortion. Similarly, after the law of 18 January 1991 had authorised the advertisement of condoms[1] in the wake of the spread of AIDS, Law 2001-588 of July 2001 on voluntary termination of pregnancy and contraception decriminalised incitement to abortion.

Currently in France, it is rather the dissuasion of medical staff and women from practising abortion that is prohibited. As evidenced by several indices, anti-abortion speech or activities are increasingly met with criminal provisions intended to curb them. That is to say, "incitement not to abort" is punishable by criminal sanctions under the offence of obstruction of abortion established by the Neiertz law of 1993,[2] and extended thereafter. Anti-abortion activists have been convicted on several occasions. One of them, Dr. Xavier Dor, was even imprisoned[3] in 1998. More recently, a high school teacher was dismissed from the national education service for showing a class of first year high school students a film that was explicitly against abortion.[4] In Cuba, dissident physician, Óscar Elías Biscet, spent 11 years in prison for denouncing abortion and neonatal infanticide. In contrast, other countries have travelled the reverse path: in Russia, where abortion was widely permitted during the communist era, advertising abortion was banned in November 2013. Most former communist European countries have taken a similar step.

Organisations in favour of abortion fight politically and publicly to promote the "right to abortion" once they consider that it is insufficiently recognised or threatened. This was the case during the last decade in Portugal, Ireland, Poland, Hungary or Spain. The measures employed are sometimes spectacular. For example in Portugal, a ship offering abortion services was chartered to defy the ban on this practice. But more often, abortion advocacy organisations deal directly with political and judicial institutions. They are behind most of the judgements of the European Court of Human Rights (hereinafter the "European Court") that overrule restrictive laws (against Poland, Ireland and Portugal).
On the contrary, anti-abortion groups appear to have a much larger and youthful membership base, but very little access to the media and political authorities. Admittedly, anti-abortion speech is very

[1] the author would like to thank Andrea Popescu and Christophe Foltzenlogel for their contribution to this study.
Law on provisions regarding public health and national insurance.
[2] Loi n° 93-121 du 27 janvier 1993.
[3] Caroline Fourest, "Xavier 'dort' enfin en prison !", *ProChoix* n°2, January 1998.
[4] "Le professeur d'histoire anti-IVG révoqué "pour faute lourde"" Le Point, 5 April 2011. The film was "*No need to argue."*

marginalised in France despite its relative dynamism. More and more demonstrations are organised every year in major European cities; the turnout is sometimes massive. In Bratislava (Slovakia), a "*Walk for Life"* brought together 70,000 people in September 2013.[5] 7,000 people participated in a protest in Zagreb, Croatia on May 21 2016.[6] "*40 days for life",* an international movement*,* is spreading. It is a peaceful 40-day presence marked by prayer and fasting outside abortion clinics with the aim of creating awareness. This movement claims that between 2007 and 2015, they had 700,000 participants in 36 countries, that through their campaign, 11,796 children were "saved", 133 people resigned from their jobs at abortion clinics and 73 abortion clinics were closed.[7] The "pro-life" movement is seeking to reach the conscience of people. Their proximity to abortion centres is a necessary condition for the effectiveness of their campaign. Other "pro-life" organisations install mobile ultrasound equipment near abortion centres and advise women going into these clinics to see what they have in the womb before the abortion. Anti-abortion campaigns are also carried out on the Internet through the creation of several sites that offer alternative information. They aim to help pregnant women to "choose life" by informing them about the assistance available as well as the alternatives to abortion. These sites also offer 24h-hour crisis telephone services open to women in distress. This activism is almost always done voluntarily.

But beyond the simple description of these schools of thought, beyond the presentation of the public speech these movements elaborate on abortion, and the fact that it is meant to either defend or fight this practice, it is interesting to understand, given the current positive law, the status of freedom of expression concerning abortion – considering the many questions the courts are confronted with in this area. Thus, considering that abortion was legalised in 1975 and that subsequent reforms made this act a real right and not an act merely tolerated, can an anti-abortion speech still be made and, if so, what are the limits the law imposes on such a speech? Moreover, do these limits also apply to acts against abortion, such as demonstrations outside abortion centres? Finally, what impact does the case-law of the European Court have on this issue?

Since 1993, the government and the French legislator have taken steps to fight pro-life speech and activism. The resurgence of anti-abortion militancy led the government to strengthen its measures, firstly by extending the criminalisation of the offence of obstruction, and secondly by initiating communication and information campaigns as well as campaigns promoting abortion.[8] The aim of the government is to compete with anti-abortion discourse in the public domain and to prohibit such discourse from reaching people who practise abortion, those considering abortion as well as their relatives (I). This national policy is an exception in Europe; most European countries have not adopted a specific legislation to restrict freedom of expression on abortion. The system of the European Convention on Human Rights made its ruling on about ten cases of interference in the exercise of freedom of expression or demonstration for or against abortion. A recent judgement provided useful information on guaranteeing these rights and their limits (II).

---

[5] Stefan Danisovsky, "Slovaquie : succès pour la première marche nationale pour la vie", *L'Homme Nouveau*, 23 September 2013.

[6] Le Figaro/AFP, « Croatie: 7000 manifestants défilent contre l'avortement », 21 May 2016.

[7] https://40daysforlife.com/results/

[8] See the government campaign in "IVG : mon corps, mon choix, mon droit" [Abortion: my body, my choice, my right"] and on the website www.ivg.gouv.fr

I. The Offence of Obstruction to Abortion

"No. 2014-873 of August 4, 2014, the government developed more severe means of criminal sanction. The enactment of the law, including the implementation of a "zero tolerance"[9] policy against anti-abortion activists, was driven by the government's desire to facilitate access to abortion.

A. The Extension of the Crime of Obstruction of Abortion

The offence of obstruction was established by Law No 93-121 of 27 January 1993 to counter the actions of and punish anti-abortion activists who were seeking to prevent the practice of abortion by physically entering clinics and tie themselves up in the operating room. These dramatic measures by "anti-abortion commandos" enjoyed wide media coverage. Following numerous convictions, these types of protests were gradually reduced to small peaceful gatherings, far from clinics and family planning centres. This offence was then extended by Act No. 2001-588 of 4 July 2001 and by Act No. 2014-873 of 4 August 2014 to ensure a real equality between women and men. Thus, it extended the offence of obstruction of abortion to obstructing "access to information" on abortion.

Article L 2223-2 of the French Public Health Code currently states that:

> It is punishable by two years' imprisonment and a fine of 30,000 euros to prevent or to try to prevent the practice of or access to information on the termination of a pregnancy or the acts initially provided for by Articles L. 2212-3 à L. 2212-8:
>
> - either by obstructing in any way whatsoever access to the institutions mentioned in Article L. 2212-2, the free movement of persons within those institutions or the conditions of work of the medical and non-medical employees;
>
> - either with moral or psychological pressure, threats or any other act of intimidation against medical or non-medical employees of these institutions, women who come for voluntary interruption of pregnancy or for information about it or their relatives.[10]

Institutions covered by this offence are those in which abortions are performed by a doctor or a midwife, namely public or private health institutions and family planning or family education centres. "Women's rights advocacy" organisations, which often also run family planning or family education centres, have, under Article L2223-1 of the French Public Health Code, the ability to prosecute perpetrators of the offence of obstruction.

B. A possible broad interpretation

The Criminal Chamber of the Court of Cassation[11] ruled, in the judgement of 1 September 2015, that entering the premises of the French movement for family planning *(Mouvement français pour le planning familial)* to pray and offer a medal of the Virgin Mary and baby slippers to a woman in

[9] Communiqué of Najat Vallaud-Belkacem, *Tolérance Zéro pour l'entrave à l'IVG*, 27 September 2013.
[10] Free translation from French.
[11] N° 14-87.441, 3136, JurisData : 2015-019467.

the waiting room constituted psychological pressure and moral violence within the meaning of criminal law, and that the 10,000 euros fine imposed on the culprit for the offence of obstruction was justified. Considering that the events in question occurred in 2012 (before the new wording of 2014), the defendant, in his defence, argued firstly that the woman had not come for abortion or even asked for it, but came for advice and, secondly, that the place of the incident was not one of those mentioned by the bill of indictment, i.e. a place where abortion can be practised.[12] The Court of Cassation ruled that the right to receive "advice" is protected as a pre-abortion act. Regarding the location of the incident, the Court noted that the family planning clinic practised therapeutic abortion by administering *"emergency contraceptive pills"* i.e. the morning-after pill. The fact that this activity of the family planning centre did not comply with the provisions of Articles L. 162-1 and the subsequent articles of the Public Health Code in force did not preclude the fact there was an offence of obstruction to voluntary interruption of pregnancy.[13] The Court, thus, made a broad interpretation of the offence of obstruction, and gave the culprit a heavy sentence. As J. Robert H. notes *"In effect, high schools should also enter the provisions of Article L. 2212-2 since they also distribute these products; it is clear that the interpretation of this text is very artificial."*[14] It should also apply to pharmacies and medical offices. The offence covers not only acts committed within the institutions, but also those committed close by that may obstruct access to them. Protests in public space, close to institutions that practise abortion were regularly forbidden in France by prefectural orders. These prohibitions have been systematically validated by courts[15] which consider that the manifestations could disturb public order, particularly in view of *"previous agitations sparked by similar gatherings, which led to the conviction of their leader or of some of the members for the offence of obstructing abortion, assault, or demonstrating without authorisation.*"[16]

The wording of Article L 2223-2 of the Public Health Code can be broadly interpreted, not only regarding its application in space, but also pertaining to acts that constitute it, since it also punishes the pursuit of "moral or psychological pressure" on the entourage of a woman who comes to seek information about abortion in an attempt to prevent her from having abortion or from getting information about abortion or about pre-abortion acts. Just attempting to help and convince a woman or one of her relatives not to have an abortion can constitute the offence. What about the parents of a young pregnant girl? Do they still have the right to try to convince their daughter not to abort without being charged with the offence of obstruction? The legislator had already withdrawn their right to object to an abortion performed on their underage daughter, and even object to her access to information on abortion. As a result, many girls are left to carry the burden of abortion alone.

How can this offence be interpreted when the government has announced plans to fight pro-life movements and has accused them of "misinforming" women? This can undermine freedom of

---

[12] Jacques-Henri ROBERT, " J'vous ai apporté des chaussons", *Droit pénal* n° 10, Octobre 2015, comm. 125. sous Cass. Crim. 1er sept. 2015, n° 14-87.441, F-D : JurisData n° 2015-019467 ["j'vous ai apporté des chaussons" (literally here "I brought you baby socks", is a reference to a French song entitled "J'vous ai apporté des bonbons" (I brought you sweets)].

[13]Cass. Crim. 5 mai 1997, n° 96-81.462 : JurisData n° 1997-002448 ; Bull. crim. 1997, n° 158 ; Rev. sc. crim. 1998, p. 117, obs. J.-P. Delmas-Saint-Hilaire.

[14] Jacques-Henri ROBERT, "J'vous ai apporté des chaussons", *Droit pénal* n° 10, Octobre 2015, precited. (Free translation).

[15] Even though edicted with no respect for the inter parts proceedings (prescribed by art. 8 of the decree of 28 Nov. 1983

[16] Conseil d'Etat, *Association S.O.S. Tout petits,* 25 June 2003 , N° 223444.

expression. Any information likely to be received by a pregnant woman or her relatives and construed as intended to dissuade her from aborting may constitute the offence of obstruction. Will it still be possible to inform women about the negative effects of abortion? Can a pharmacist still inform a client about the risks related to chemical abortion by virtue of his duty to advise? A pharmacist was recently dismissed for informing clients of these risks.[17] Is a doctor faced with a woman considering abortion still entitled to freedom of speech? To what extent can his duty to advise constitute a warning, a call to responsibility or a sensitisation to the value of human life without being sanctioned by criminal law?

Such a broad interpretation of the offence of obstruction may rely on the Report on Access to Abortion in territories[18] written by the High Council for Equality between Women and Men (*Haut Conseil à l'égalité entre les femmes et les hommes*) at the request of the Government for the revision of 2014. It states that "*the large number of anti-abortion groups on the internet hinder access to reliable and quality information.*"[19] According to the report, anti-abortion websites aim *"to indirectly obstruct the right to abortion by providing information which, behind its apparent neutrality, systematically seeks to discourage women from exercising their right to abortion".* [20] According to the High Council, *"A deliberately truncated information on a website or a speech clearly against the freedom of all women to terminate a pregnancy issued during a phone call after consulting the said site, is a form of psychological pressure, which could constitute a psychological interference"*[21] within the meaning of the law. Moreover, even the use by health workers of *"terms like "recidivist", "abortion of convenience" or "failed contraception" – which is understood as the woman's failure to master contraception – make the woman feel guilty and does not make abortion a legitimate act of their sexual and reproductive lives".* These *"archaic and moralistic representations are a form of restriction on abortion"*.[22] The semantic battle is a reality. The report concluded by recommending that government should *"consider extending the material element [of the offence of obstruction] to the dissemination of false information and ambiguous discourse on abortion through a website or phone call"*.[23] It also envisages the possibility for public authorities to *"adopt a 'naming and shaming' approach* against pro-life websites, including the creation of a *"black list"*.[24]

In 1994, a year after the Neiertz Act, the US Congress also passed a law against obstructing abortion i.e. the Federal Freedom of Access to Clinic Entrances Act.[25] But this law was couched in more restrictive terms than the French legislation, as only violent actions were likely to be

[17] Appeal for assistance – Jacqueline F., pharmacist dismissed for misconduct because she was not administering the after-morning pill. http://www.objectiondelaconscience.org/appel-laide-jacqueline-f-pharmacienne

[18] HCEfh, Rapport relatif à l'accès à l'IVG Volet 1 : *Information sur l'avortement sur Internet*, Rapport n°2013-0912-HCE-008 as an anticipated answer before the committal of the Minister for the Rights of women, Mrs Najat Vallaud-Belkacem. (Free translation from French)

[19] HCEfh, Rapport relatif à l'accès à l'IVG Volet 2 : *Accès à l'IVG dans les territoires*, Rapport n°2013-1104-SAN-009 publié le 7 novembre 2013, p. 31. (Free translation from French)

[20] (Free translation from French) HCEfh, Rapport relatif à l'accès à l'IVG Volet 1, p. 22.

[21] HCEfh, Rapport relatif à l'accès à l'IVG Volet 1, p. 24.

[22] *Rapport relatif à l'accès à l'IVG dans les territoires*, Volet 2, p. 60.

[23] *Rapport relatif à l'accès à l'IVG* Volet 1, p. 25.

[24] *Ib.*

[25] FACE Act, 18 U. S. C. §248(a)(1).

sanctioned. The Act subjects to both criminal and civil penalties anyone who "*by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services*".

Future litigations will outline the limits of the offence of obstruction. However, as of now, the body of case law of the European Court of Human Rights provides enough significant lessons regarding this subject.

II. The protection of Freedom of Expression and Demonstration on Abortion in Europe

For over thirty years, the European Court of Human Rights and the former Commission have dealt with about ten cases[26] involving the restriction of freedom of expression or demonstrations on abortion – cases in which this freedom was exercised either in favour of or against abortion.
It appears from this case law that discourse on abortion enjoys a high degree of protection, even when it is extreme.

A. Freedom of expression on abortion

1. Questioning the legislation on abortion is not an abuse of rights

Although abortion is a sensitive subject, it is not forbidden to discuss it. It is permissible to criticise its legality as well as its prohibition once the criticism does not fall within the scope of Article 17 of the Convention, which allows the exclusion from the protection of freedom of expression *"any speech that is contrary to the wording and spirit of the Convention and which contributes to the destruction of the rights and freedoms under the Convention and which contributes to undermining the rights and freedoms provided for by the Convention.*"[27] These include incitement to ethnic, racial[28] and religious discrimination.[29] Not protecting a speech *"likely to* [directly] *encourage*

[26] Cases in which the applicants were in favour of abortion: *Rommelfanger v. Federal Rebublic of Germany*, n° 12242/86, decision of the Commission of 6 September 1989 ; *Open Door and Dublin Well Woman v. Irlande*, n° 14234/88; 14235/88, arrêt du 29 October 1992 ; *Women on Waves et autres v. Portugal*, n° 31276/05, judgement of 3 February 2009 ; Cases in which the applicants were against abortion: *Plattform arzte fur das leben v. Austria*, n° 10126/82, decision of the Commission of 17 October 1985 ; *D.F. v. Austria*, n° 21940/93, decision of the Commission of 2 September 1994 ; *Van Den Dungen v. the Netherlands*, n° 22838/93, decision of the Commission of 22 Febraury 1995 ; *Bowman v. the United Kingdom*, n° 141/1996/760/961, judgement of 19 February 1998 ; *Pichon and Sajous v. France*, n° 49853/99, decision of 2 October 2001 ; *Annen v. Germany*, n° 2373/07 and 2396/07, decision of 30 March 2010 ; *Hoffer and Annen v. Germany*, n°s 397/07 et 2322/07, judgment of 13 January 2011 ; *Annen v. Germany*, n° 3690/10, judgement of 26 November 2015.
[27] *Kuhnen v. Allemagne*, n° 12194/86, decision of the Commission of 12 May 1988.
[28] *Glimmerveen and Hagenbeek v. Pays Bas*, nos 8348/78 8406/78, decision of the Commission of 11 October 1979 ; *Garaudy v. France*, decision of 24 June 2003.
[29] *Kuhnen v. Germany.*

violence"[30] and even those that are harmful to society[31] or democracy[32] *"should not be tolerated in a democratic society.*"[33]
Abortion in itself is not protected from criticism, whether for or against. Speech in favour of abortion is considered as freedom of expression even if abortion is prohibited under the criminal law of the country in question. Thus, the Court condemned the ban in Ireland on providing information concerning abortion services abroad[34] while abortion was prohibited in the country. The Court also guaranteed the right to freedom of expression in favour of abortion by ruling against Portugal although at the time of the judgement abortion was punishable in the country.[35] Even in countries where national legislation prevents access to abortion as a right, anti-abortion speech is not excluded from the scope of application of the Convention.

2. Freedom of expression on abortion is highly protected

The right to freedom of expression not only includes freedom to receive information, but also freedom to give information and ideas. Freedom of expression constitutes *"one of the essential foundations of such a [democratic] society, one of the basic conditions for its progress and for the development of every man."*[36] *"Democracy thrives on freedom of expression."*[37] Freedom of expression *"basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him."*[38]

The European Court applies the established general principles concerning freedom of expression to abortion.[39] It consistently considers that speech on abortion is of *"public interest"*.[40] In the *Annen v. Germany* judgement of 26 November 2015, the Court found that the anti-abortion campaign conducted by the applicant *"contribute[d]to a highly controversial debate of public interest"* and stressed that *"there can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake"*.[41] As a matter of public interest, speech on abortion enjoys the same high level of protection[42] as political speech,[43]

---

[30] *Faber v. Hungary*, n°40721/08, judgement of 24 July 2012, § 56.
[31] *Faber v. Hungary*, n°40721/08, judgement of 24 July 2012, 2012, § 54.
[32] *Faber v. Hungary*, n°40721*Alexeiev v. Russie*, nos 4916/07, 25924/08 et 14599/09, judgement of 11 April 2011, § 80 ;/08, judgement of 24 July2012, § 54.
[33] *Alexeiev v. Russia*, n° 4916/07, 25924/08 et 14599/09, arrêt du 11 avril 2011, § 80.
[34] *Open Door and Dublin Well Woman v. Irland*, n° 14234/88; 14235/88, 29 October 1992.
[35] *Women on Waves and others v. Portugal,* n° 31276/05, 3 February 2009.
[36] *Handyside v. the United Kingdom,* 7 December. 1976, § 49.
[37] *United communist party and others v. Turkey,* 30 January 1998, § 57.
[38] *Leander* v. *Suède*, n° 9248/81, judgement of 26 March 1987, § 74.
[39] See among others *Hertel v. Suisse*, 25 August 1998, § 46, *Recueil* 1998-VI, *Steel and Morris v. United Kingdom*, n° 68416/01, § 87, *Mouvement raëlien suisse v. Suisse,* II, [GC], n° 16354/06, § 48, et *Animal Defenders International v. United Kingdom* [GC], n° 48876/08, § 100.
[40] *D.F. v. Austria*, n° 21940/93, decision of the Commission of 2 September 1994 ; *Annen v. Germany*, n° 2373/07 and 2396/07, dec. 30 March 2010.
[41] § 62: "*The Court also points out that the applicant's campaign contributed to a highly controversial debate of public interest. There can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake (see A, B and C v. Ireland [GC], no. 25579/05, § 233)."*
[42] *Hoffer and Annen v. Germany*, n°s 397/07 et 2322/07, 13 January 2011, § 44.
[43] *Axel Springer AG v. Germany* (n° 2), n° 48311/10, 10 July 2014, § 54.

as *"there is little scope under Article 10 para. 2 of the Convention (art. 10-2) for restrictions on political speech or on debate of questions of public interest*.[44] Hence, the ability of authorities to limit the exercise of freedom of expression in this area, under the margin of appreciation, is very low. Public authorities must have "*compelling reasons*"[45] to do so.

The fact that abortion is a sensitive subject is not a legitimate reason to restrict freedom of expression. On the contrary, the Court is convinced that *"Freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"*.[46] In the case of *Women on Waves and Others v. Portugal* in which a boat intended to promote abortion was prohibited from entering the Portuguese waters, the Court emphasised that *"it is exactly when ideas that offend, shock and challenge the established order are being presented that freedom of expression is the most valuable"*.[47]

Freedom of expression allows "recourse to a degree of exaggeration, or even provocation."[48] The European Court seeks to ensure not only the right to express one's opinion, but also the right to choose and employ effective means to this end: "Article 10 (art. 10) protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed"[49] even if it is extreme[50] or provocative.[51] In the aforementioned case of *Women on Waves and Others v. Portugal*, the Court held that individuals "should be able to choose, without unreasonable interference from the authorities, the manner they deem most effective to reach as many people as possible".[52] Thus, anyone is free to express his opinion on abortion by any means the person considers effective, be it through a protest, by distributing leaflets or through a website, even though there are other means.[53] In the case of *Bowman v. United Kingdom*[54] concerning the prohibition of the distribution of pro-life pamphlets during pre-election period, the Court found a violation of Article 10 of the Convention and therefore recalled the importance of freedom of political debate and the free flow of opinions and information of all kinds, especially during pre-election period. The Court stressed that people should not be deprived of "access to any other effective channels of communication".[55] The Convention also extended its protection to the expression of thought on the Internet.[56]

Freedom of expression being closely connected to freedom of assembly, the European Court has, on several occasions, protected the right to demonstrate in public, either in favour of or against

---

[44] *Wingrove v. the United Kingdom,* judgement of 25 November 1996, § 58 ; *Animal Defenders International v. the United Kingdom*, n° 48876/08, [GC], judgement of 22 April 2013, § 102.
[45] Free translation: *Brasilier v. France*, 11 April 2006, § 41.
[46] *Handyside v. the United Kingdom*, n° 5493/72, Judgement of 7 December 1976, § 49.
[47] Free translation from *Women on Waves and others v. Portugal*, n° 31276/05, judgement of 3 Feb. 2009, § 42 *in fine*
[48] *ECRH, Steel and Morris,* § 90.
[49] *Oberschlick v. Austria* (n° 2), n° 20834/92, 1 July 1997, *§ 57.* See also *Radio France and Others v. France*, n° 53984/00, judgement of 30 March 2004.
[50] *Oberschlick v. Austria* (n° 2), n° 20834/92, judgement of 1 July 1997, § 38 ; *De Haes and Gijsels v. Belgium*, n° 19983/92, judgement of 24 February 1997.
[51] *Pedersen and Baadsgard v. Denmark*, n° 49017/99, judgement of 17 December 2004.
[52] (Free translation) *Women on Waves and v. Portugal*, n° 31276/05, judgement of 3 Febr2009, § 38 *in fine*.
[53] *Women on Waves and Others v. Portugal*, § 38.
[54] *Bowman v. the United Kingdom*, n° 141/1996/760/961, n° 141/1996/760/961 judgement of 19 February 1998.
[55] *Bowman v. the United Kingdom*, § 46.
[56] *Yildrim* v. *Turkey*, nº 3111/10, judgement of 18 December 2012, § 54.

abortion. The Court recalled the State's obligation not to inhibit the expression of thought on abortion in an *"open public space"*[57], since, in its opinion, any *"attack on freedom of expression may undermine the exercise of this freedom".*[58] Freedom of expression is therefore extended by freedom of assembly. In the case of *Women on Waves and Others v. Portugal*[59], the Court underscored the fact that *"freedom to express opinions in a peaceful assembly is of such importance that it cannot be subjected to any limitation provided the concerned party does not commit a punishable offence in doing so".*[60]

In the case of *Plattform Ärzte für das Leben v. Austria*[61], in which the government was challenged for failing to protect religious pro-life demonstrators who were confronted with fierce counter-demonstrations, the Court held in the same direction that *"the right to freedom of peaceful assembly is guaranteed to everyone who has the intention of organising a peaceful demonstration".*[62] The Court stressed that it is important not *"to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community".*[63] The State's obligation towards associations or groups is not limited to not hindering their freedom of expression but includes *"positive measures to be taken"*[64] to protect their demonstrations. The Court also noted that *"in a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate".* (§ 32)

Finally, it must be noted that every woman has the right to seek and receive information about pregnancy and abortion. Moreover, public authorities have the duty to inform women of the risks associated with abortion. Thus, in the case of *Csoma v. Roumanie*,[65] the Court found that *"by not involving* [the applicant] *in the choice of medical treatment and by not informing her properly of the risks involved in the medical procedure",* the rights of a woman who became barren following an abortion had been violated.

Nevertheless, the conventional guarantee of the right to freedom of expression has limits because "*whoever exercises his freedom of expression undertakes "duties and responsibilities" the scope of which depends on his situation and the technical means he uses".*[66] The grounds on which this freedom may be restricted are enumerated in Article 10 § 2 of the Convention. National authorities must give convincing reasons to justify the need for any form of restriction.[67] The European Court has set a precedent by ruling on the merits of several restrictions on freedom of expression on this subject.

---

[57] (Free Translation) *Women on Waves and Others v. Portugal*, n° 31276/05, judgement of 3 February 2009, § 40.
[58] (Free translation) *Renaud v. France*, n° 13290/07, 25 February 2010, § 42.
[59] n° 31276/05, judgement of 3 February 2009.
[60] *Ezelin v. France*, n° 11800/85, judgement of 26 April 1991, § 53 ; *Women on Waves and Others v. Portugal*, n° 31276/05, judgement of 3 February 2009, § 41.
[61] *Plattform arzte fur das leben v. Austria*, n° 10126/82, decision of the Commission of 17 October 1985.
[62] *Plattform arzte fur das leben v.. Austria*, n° 10126/82, decision of the Commission of 17 October1985, § 5.
[63] *Plattform arzte fur das leben v. Austria*, n° 10126/82, judgement of 21 June 1988, § 32.
[64] *Plattform arzte fur das leben v. Austria*, n° 10126/82, decision of the Commission of 17 October 1985, § 9.
[65] *Csoma c. Romania*, n° 8759/05, hotararea din 15 January 2013, § 68.
[66] *Handyside, § 49.*
[67] *Handyside* v. *the United Kingdom* n° 5493/72, judgement of 7 December 1976, § 49 : "*subject to exceptions which should, however, be construed strictly, and the need for any restrictions must be established convincingly*; *Boldea c. Roumanie*, n° 19997/02, judgement of 15 February 2007, § 45 ; *Wingrove v. the United Kingdom,* nº 17419/90, judgment of 25 November 1996.

B. The Limits of Freedom of Expression on Abortion

With the exception of cases affecting the reputation of abortion doctors, the Court often condemned restrictions on freedom of expression on abortion.

1. Protecting Morals, Order and Health

The mere fact that abortion is prohibited in a country is not reason enough to restrict freedom of expression. In the case of *Open Door and Dublin Well Woman v. Ireland*[68] the Court found that the Irish authorities had infringed upon the freedom of expression of two organisations whose purpose was to inform women about abortion and assist those who wished to obtain abortion abroad. While acknowledging that this ban pursued the legitimate aim of protecting morals,[69] order and health, the Court held that the disputed ban disproportionately restricted freedom to receive or convey information about lawful services abroad. In addition, the Court found that this information was useful, especially for the health of poor, uneducated women because without proper guidance, these women would request an abortion at a more advanced stage of pregnancy and not seek post abortion care. The Court gave a similar ruling in the case of *Women on Waves and Others v. Portugal.*

2. Preserving the Reputation of Individuals Practising Abortion

The need to preserve the reputation and rights of others justifies certain restrictions on freedom of expression on abortion. These restrictions could be in the form of convictions for insult or defamation.[70] Indeed, the right to reputation is "*a right which is protected by Article 8 of the Convention as part of the right to respect for private life".*[71] *A person's reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her "private life".*[72] Assertions devoid of sufficient factual basis cannot be justified by public debate because nonfactual assertions exceed the limits of acceptable criticism within the meaning of article 10.[73] However, for an attack on a person to be considered as detrimental to the right to private life guaranteed by Article 8 of the Convention,[74] it should reach a certain level of seriousness and violate the person's enjoyment of the right to private life.

Activists sometimes name persons or institutions practising abortion in order to put pressure on them. Similarly, those in favour of abortion violently criticise persons or institutions opposed to

---

[68] *Open Door and Dublin Well Woman v. Irland*, n° 14234/88; 14235/88, judgement of 29 October 1992.
[69] *Open Door and Dublin Well Woman v. Irland*, n° 14234/88; 14235/88, 29 octobre 1992, §§ 60 and 63.
[70] *Constantinescu v. Romania*, 27 June 2000, §73 and 74; *McVicar v. The United Kingdom*, 7 May 2002.
[71] *Radio-France, precited., § 31. -Chauvy and Others, precited, § 70.*
[72] *Pfeifer v. Austria, 15 November. 2007, § 35.*
[73] *Petrina v. Romania, 14 Oct. 2008.*
[74] *A. v. Norway*, no. 28070/06, § 64, 9 April2009; *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012 and *Delfi AS*, cited above, § 137.

abortion and expose them publicly,[75] following the *"naming and shaming"* approach.

Until the *Annen* judgement of 2015, the Court accepted, in all the cases brought before it, the conviction of activists who named abortion doctors. In the case of *D. F. v. Austria,*[76] the former Commission, acknowledging that the debate on the RU 486 abortion pill was a topic of general interest, considered the conviction of the applicant for defamation justified. The applicant, in response to an article in favour of the RU 486 issued by a doctor in the local press, disseminated a circular letter in the same region referring to that doctor as a *"supporter of homicide"* and *"an advocate for the pill of death."* The Commission, consequently, considered that the applicant's interest in criticising the pill, especially what the doctor said about the pill, does not prevail over the doctor's interest in the protection of his reputation.

In three other cases filed by Mr. Klaus Günter Annen[77], the Court accepted his civil conviction particularly for naming an abortion doctor in his leaflet and accusing him of performing "unlawful abortions". This accusation was based on the fact that, in principle, abortion was forbidden in Germany, but that anyone who performed it was not subject to criminal liabilities if certain conditions were respected. He was also charged with distributing near an abortion clinic leaflets that said "*abortion kills unborn infants"* and *"Thou shall not kill also applies to physicians*."

The Court admitted that this leafleting could disrupt the doctor's work. It also found that the interference with the applicant's right to freedom of expression was relatively modest because he was not subject to criminal sanctions and was not ordered to retract his claims: he was ordered to refrain from making certain statements regarding the doctor's professional activities in question and from speaking to passers-by in the vicinity of the doctor's medical office. Finally, the Court observed that he was not prevented from criticising the practice of abortion in general. In another case[78], this same applicant was convicted of defamation together with another activist for distributing to passers-by in front of a medical centre a pamphlet describing a named doctor as *'Killing specialist' for unborn infants* and affirming "*then: Holocaust, today: Babycaust ; Whoever remains silent becomes guilty too!".* The Court considered that the pamphlets had a political aim, which they were allowed to pursue even by use of exaggerated and polemic criticism. However, it found that comparing the physician's activity with "Holocaust" was to the extreme, especially within the German setting (§49) and that it amounted to *"a very serious violation of the physician's personality's rights".*[79]

[75] See for example "*Top 27 European Anti-choice Personalities" punished but the European Parliamentary Forum on Population and Development*."
[76] *D.F. v. Austria*, n° 21940/93, decision of the Commission of 2 September1994.
[77] *Annen v. Germany*, n° 2373/07 and 2396/07, déc. 30 mars 2010 ; *Hoffer and Annen v. Germany*, n°s 397/07 and 2322/07, judgement of 13 January 2011.
[78] *Hoffer and Annen v. Germany*, n°s 397/07 and 2322/07, 13 January 2011.
[79] *Hoffer and Annen v. Germany*, n°s 397/07 and 2322/07, judgement of 13 January 2011, § 47 *in fine*.

Some years later[80] Klaus Günter Annen was again convicted for distributing pamphlets in the immediate vicinity of the clinic run by two physicians, whose names were mentioned, and asserting, once again, that they performed unlawful abortions although it was not allowed. On the first page of the pamphlet, the applicant claimed that *"In the day clinic Dr M./Dr R. [full names and address] unlawful abortions are performed"* followed by an explanation set in smaller letters: *"which are, however, allowed by the German legislator and are not subject to criminal liability. The attestation of counselling protects the "doctor" and the mother from criminal responsibility, but not from their responsibility before God".* The following text appeared on the back of the leaflet: *"The murder of human beings in Auschwitz was unlawful, but the morally degraded NS-State allowed the murder of innocent people and did not make it subject to criminal liability."* The leaflets compared the legal framework of abortion to Holocaust and made reference to a website[81] containing the names and address list of "*abortion doctors"* and a request to pray for them. After this campaign, the two doctors closed their clinic and changed their professional activity.

In this case, the German courts again sentenced Mr. Annen for the same reasons, considering that the attack had created a massive "pillory effect" on registered doctors, which was further aggravated by the reference to the Holocaust. He was ordered to stop distributing the leaflets in the vicinity of their clinic and to remove their names from the list on his website.

Yet, this conviction was again brought before the European Court which ruled this time, in a judgement delivered on 26 November 2015 that the conviction violated the freedom of expression of the applicant. The Court first held that the factual content of the leaflets on the illegality of abortion were accurate and precise enough. It took into account the fact that disseminating leaflets mentioning the full names of the doctors and their professional address in the immediate vicinity of the day clinic enhanced the effectiveness of his campaign (§ 62).[82] As to the reference to the Holocaust, the Strasbourg Court held that this reference in itself was not enough to damage the reputation of the physicians. While recognising the specific context of German history, the Court found this comparison acceptable because the applicant did not – at least explicitly – equate abortion with the Holocaust, neither did he compare the doctors in question and their professional activities to the Nazi regime. The Court held that the reference to the Holocaust was to create awareness of the more general fact that, as in the Nazi era, the *"law may diverge from morality"* (§ 63). This is because the killing of human beings in Auschwitz had been *unlawful, but allowed, and had not been subject to criminal liability under the Nazi regime* (§ 63). This moral aim was not objectionable. Consequently, the Court held that the prohibition of the distribution of leaflets was not justified.

Regarding the order to remove the names of the two doctors from his website, the Court first recalled the importance of the Internet in the dissemination of information and the exercise of freedom expression.[83] It also noted the increased risk of infringement of the exercise of rights and freedoms through this medium.[84] The Court then observed that the local courts did not assess the

[80] *Annen v. Germany*, n° 3690/10.
[81] www.babycaust.de
[82] In another case of prohibition of leafleting against abortion, the Court had already stressed the importance of access to "effective means of communication". *Bowman v. United Kingdom.*
[83] *Times Newspaper Ltd v. United Kingdom* (nos 1 and 2), n°3002/03 and 23676/03? §27, 10 March 2009.
[84] *Editorial Board of* Pravoye Delo *and Shtekel v. Ukraine*, no. 33014/05, § 63.

specific content of the applicant's internet site, but simply applied its conclusions on the leaflet to this site. Consequently, the Court held that the local courts did not respect the procedural principles embodied in Article 10 of the Convention (§73).

Eventually, the European Court took into account a later judgement on the facts of the case made by the Federal Constitutional Court on November 8th, 2010, concerning almost similar facts in a case also involving Mr. Annen. By this judgement, the highest German court condemned the injunction issued to Mr. Annen to refrain from distribution his leaflets near a clinic, describing it as an attack on freedom of expression.

It must be noted that concerning this same ruling, two of the seven European Court judges gave a dissident opinion. Having acknowledged that the abortion debate was legitimate and deserved a high degree of protection, and recognised as perfectly legitimate the distribution of leaflets and the running of an anti-abortion website, they considered, as opposed to the majority, that associating the names of doctors with Nazi crimes exceeded the limits of the protection of freedom of expression.

More generally, it is worth noting that when abortion is legal and performed in the workplace of the doctor concerned, it is difficult to admit that publicly revealing that a doctor performs abortion could be detrimental to his reputation. This publication may only be deemed prejudicial if the practice of legal abortion in itself is considered a shameful activity. In other words, judging in the case that resulted in the Annen judgement of 26 November 2015 that the reputation of physicians was affected by the publication of their work would have implied recognising exactly what the applicant wanted to denounce: the injustice and immorality of abortions, even one that is legal. If abortion were true freedom, physicians should be proud to practise it.

3. Protecting Women Considering Abortion

How can the rights of women going into abortion clinics be reconciled with the rights of persons who wait near these clinics to express opposition, and target these women with their message?

In the *Annen* judgement of 26 November 2015, the Court clearly recognised and guaranteed the right to distribute leaflets in the immediate vicinity of the abortion clinic. Meanwhile, in an earlier case, *Van Den Dungen v. Netherlands*[85] of 1995, the former Commission found, in contrast, that a six-month ban on pro-life demonstrators from approaching within 250 meters of an abortion centre was legitimate to protect the rights of the clinic, its staff and visitors. The Commission then ruled that the interference had not intended to deprive the demonstrators of the opportunity to speak, but was proportionate, as it was limited in time and space. For the same reasons, the Court found no violation of the right to freedom of movement of the applicant guaranteed by Article 2 of the Fourth Additional Protocol.
Thus, the *Annen judgement* of 2015 clearly distinguished itself from this earlier case law.

The case law of the Supreme Court of the United States, like the European Court, has also changed considerably and protects freedom of expression more. On 28 June 2000 in the case of *Hill v. Colorado* (530 US 703 (2000), the Supreme Court ruled, by 6 votes against 3, that any law which

[85] *Van Den Dungen v. the Netherlands*, n° 22838/93, the decision of the Commission du 22 février 1995.

prohibits protestors from approaching within eight feet (2.50 meters) of anyone within a radius of 100 feet (30 meters) of abortion clinics was consistent with the Constitution. This law was aimed at not only limiting the ability to protest, but also the ability "to educate, to distribute writings or to advise" people about abortion. The majority in the Court Supreme held that the right of individuals not to be forced to receive a message that they may not want to hear – the right "*to be let alone"* – justifies the restriction on freedom of expression, especially considering the fact that these people are particularly vulnerable both physically and emotionally. Three of the nine judges were strongly opposed to this approach; they eventually won their case. The Supreme Court changed its approach in the *McCullen v. Coakley* (573 US, 2014) judgement of 26 June 2014, concerning a Massachusetts law which prohibited anyone from parking within an area ("buffer zone") of 35 feet (10 meters) from the entrance of abortion clinics, except the employees of these centres.

In that case, the Supreme Court unanimously ruled that the Massachusetts law violated the 1st Amendment to the Constitution which guaranteed freedom of expression. The nine judges ruled that the establishment of this zone disproportionately violated freedom of expression. It took into account the fact that anti-abortion activists were not just protesters, but they also encouraged women to talk about their situation, helped them materially and informed them about available assistance and alternatives to abortion. The applicant in this case wanted to campaign as a "street adviser" rather than a protester. The Court held that such a "buffer zone" was a direct obstacle to this means of expression. It also held that it would have been possible to ensure free access to establishments as well as guarantee public order through less radical measures such as adopting legislation similar to the Federal Freedom of Access to Clinic Entrances Act 1994[86] which prohibits only violent acts.

4. Respect of the Employer's Rights

The State is not obliged to permit freedom of expression in a private space or the like. Thus, in a long-standing case of *X. v. the United Kingdom,*[87] the former Commission held that a public high school could dismiss a teacher for attaching to his bag a sticker reflecting his evangelical beliefs and his opposition to abortion. In fact, the former Commission, noting that some of the stickers were considered offensive and distracted the children, held as justified his dismissal having regard to the respect due to the secular nature of the school, the right to belief of the parents, and the respect for the female employees.
Similarly, in the case of *Rommelfanger v. Federal Republic of Germany,*[88] the former Commission found no violation of the freedom of expression of a physician dismissed by a Catholic hospital for speaking in favour of abortion. The former Commission took the view that "*The requirement to refrain from making statements on abortion in conflict with the church's views was not seen as an unreasonable demand because of the crucial importance of this issue for the church."*[89]

Thus, it seems an employee can be required, within the professional setting, to refrain from expressing radical ideas, once this expression directly opposes the position held by the employer

[86] FACE Act), 18 U. S. C. §248(a)(1).
[87] *X. v. United Kingdom* n° 8010/77, decision of the Commission of 1st March 1979.
[88] *Rommelfanger v. Federal Republic of Germany*, n° 12242/86, decision of the Commission of 6 Sept1989.
[89] *Rommelfanger v. Federal Republic of Germany*.

and is likely to jeopardise its legitimate interest.

*

At the end of this study, four observations can be made, and can be food for thought for further studies.

First of all, one must assess the persistence of the public debate around abortion: while the Veil law was supposed to end the arguments, one must admit that such a debate has never ceased and that the time passed since the legalisation of abortion seems not to have reduced the intensity of the controversies. Indeed, the fact in itself that legislator had, several times, to restrict the freedom of speech and of manifestation in these cases shows, if needed, the strong and long-lasting opposition created by such an act in the population. That the legislator adopted such clauses also shows the existence of a ratio of power between opposite speech. Indeed, while large organisations, such as the Family Planning, are supported by the authorities and have access to the media, the people and associations who fight against abortion have limited resources and access to the media. Their actions are often reduced to small manifestations or gatherings, like the "40 Days for Life" movement.

Secondly, the persistence of the public debate is not really what one could call a surprise. To start with, on a personal grounds, abortion is, for a lot of women, the cause of intimate sufferings. On collective and social grounds, it is the focusing point of a fundamental conflict between two radically contradictory conceptions of nature, of dignity and of human freedom. These conceptions being also widely determined by religious and philosophical adherences. Abortion is thus a particularly sensitive spot of cultural tensions, which makes it a typically political subject, even though it falls within a multitude of personal tragedies.

Therefore, it was an illusion to think that a law (the Veil law), could put an end to the controversies and that the awkwardness started with this law would fade away over time. The will to normalise abortion collided with (and still does) an absolute impediment, namely the impossible refusing of the moral problem caused by abortion and the suffering induced by it. The consecration of abortion as a right or a basic freedom didn't change anything to this fact and it was too much for the law to expect it to change the perceptions on abortion.

Likewise, the attempts to control language, as a way to "normalise" abortion by way of using words aiming at erasing what it at stake with abortion, have been largely illusory. In this regard, whereas the proper use of words, without censorship nor self-censorship, is a basic ingredient to freedom of thought and freedom of speech, abortion has become the battlefield of a semantic battle in which the aim is the representation, and hence the awareness, of reality. Indeed, in a context where the use of words such as "infant" and "mother" in the context of abortion, has become unbearable for a high number of people, the result of conception (the *nascitarus*) is more often referred to as embryo, foetus or even cluster of cells. Likewise, abortion is designed by the acronym "IVG" (Voluntary interruption of Pregnancy), or is even described as a "reproductive health care". And yet, even if the control on language can affect the majority's understanding of reality, it is helpless as regards technical and scientific progress, which allow a better understanding of prenatal life. Would it be the reason why there are more and more conscientious objectors among doctors. It is what happened to

Dr Nathanson who stopped practising abortions after having seen its effects via ultrasound. He is the one who directed the famous documentary *The Silent Scream* (1984) filming an abortion process via ultrasound.

Thirdly, while Western States have made freedom of speech and manifestation basic principals in law, it is not innocent to note that some people would consider restrictions to these liberties to be unbearable censorship and that the exact same people contributed to adopt, in the specific case of abortion, lawful measures aiming at suppressing this liberty of speech. Article L 2223-2 of the French Public Health Code is a striking example of this, as a broad interpretation of it (meant as such by the High Council for Equality) could lead to criminalisation of any speech opposed to abortion. Another example is given by the National Education, which, while giving out, in the schools' premises, abortion medicines, firmly forbids its teachers to show a movie showing the same pupils filmed images of an abortion. Those who would do that would be fired. Yet by what intellectual trick could something that you are not allowed to show have the moral quality of basic law?[90] Is the violence of these images to be reproached to those who show it or to abortion itself? Do they not reveal also a hidden part of social violence, the cost of our "sexual liberty"?

Fourth and lastly, despite the faults inherent to it, European law is, currently, a warranty for freedom of speech and manifestation as regards abortion. Through case laws, which, step by step and case after case, narrowed and become more coherent, the European Court has reached a balanced solution, between refusing to sacrifice freedom of speech and manifestation of people who are against abortion and allowing the States to accept such a practice. Hence this liberty is protected not only when the message is not addressed to a specific person and made available in the press or on the internet, but also when it aims a particular person as a means to encourage him or her to renounce his or her abortion project, as long as, once must admit, that message contains no wrong or insulting information. As for the manifestations near abortion centres, restrictions may be enforced to usual conditions to be able to ensure normal working conditions for these centres. One of the reasons of this nuanced case law is probably to be found in the European judges' convictions, (or at least for some of them, just like the American Supreme Court) that the opponents to abortion, while trying to convince women not to resort to it, do not necessarily want to jeopardise these women, and have a higher goal: that is of sparing them a traumatic experience and sparing the life of their infant.

In any case, despite the restrictions that positive law bring to the freedom of speech and manifestation, there is another restriction, maybe less visible but probably more harmful: the personal one, that society imposes on women who resorted to abortion and their relatives and that forbids them to express their sufferings and potential regrets. How many women live with this suffering inherently kept for themselves? How many depressed moods are due to an abortion? This suffering, today reduced to being expressed anonymously, on many internet chatting rooms, also has to be taken into account.

[90] Assemblée nationale, Resolution of 26 November 2014 reasserting the basic right to abortion in France and in Europe