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When the European Court of Human Rights Decides Not to Decide

The Cautionary Tale of *A, B & C v. Ireland* and Referendum-Emergent Constitutional Provisions

FIONA DE LONDRAS*

Public international law takes a very clear position on domestic law: it is primarily a matter for states, and its provisions do not and cannot excuse non-compliance with international obligations. There is a whole host of ways in which tensions between domestic and international legal obligations emerge, particularly when compliance with international law requires changes to domestic law. In the European public space, these difficulties are manifest; from *Hirst (No. 2)*¹ in the United Kingdom to *Yukos*² in the Russian Federation, the European system of rights protection is currently grappling with the potentially dismembering fallout of these tensions. However, in addition to considering the ways in which the national legal system receives international law, we are, and should be, attentive to how international legal systems deal with national law. That is the focus of this chapter, in which I consider the reception of referendum-emergent constitutional provisions³ in European consensus (EuC) decision making. In particular, I am interested in whether a referendum-emergent constitutional provision that is at odds with a EuC ought to be treated as sufficiently weighty to preserve a margin of appreciation for the state and thus 'save' it from a violation of the Convention.

* Professor of Global Legal Studies, University of Birmingham. This chapter was written before the referendum on repeal of the Eighth Amendment was announced in Ireland. On 25 May 2018, a majority voted to repeal Article 40.3.3 and replace it with the Thirty-Sixth Amendment allowing for the regulation by law of termination of pregnancy.

¹ *Hirst v. the United Kingdom (No. 2)* (2006) 42 EHRR 41.

² *OAO Neftyanaya Kompaniya Yukos v. Russia* (Appl. no. 14902/04), 20 September 2011.

³ By this, I mean constitutional provisions in domestic law, which were endorsed and became part of the Constitution through a referendum.

This is hardly a simple matter. As we will see later, constitutions are often assumed to have a 'specialness' that is important to domestic governments and often to polities. Constitutions are especially weighty in domestic law, of course, but not so in international law, and it is perhaps to be expected that this will sometimes cause friction between the two. But when a constitutional provision has emerged from 'the People' through a referendum, resolving that friction might be particularly difficult. In such a case, the constitutional provision is as close to a direct reflection of the popular will as might be imagined in the context of a constitutional text. If it conflicts with international human rights law, then that conflict is not 'merely' between two legal instruments, but between one legal instrument concluded by states and one legal instrument that flows directly from the populace (at least to the extent that we might say any product of direct democracy does so). On a doctrinal level, the legal conundrum remains unchanged: a domestic law is in conflict with an international provision, and this conflict is to be resolved in the ordinary way. However, the socio-legal nature of the conflict is significantly different.

The referendum-emergent constitutional provision has a particular connection with the popular will and with popular sovereignty in the domestic polity. In principle, the international system is based on the consent of states, but in socio-political terms, states are collections of people, and the will of the people is hardly irrelevant. This is intensified in situations in which the domestic referendum-emergent constitutional position has been alleged, but has not yet been determined, to be incompatible with the international legal standard, that is, in cases in which the claimant seeks an evolution of the rights standard to recognise what she considers to be a violation. In such cases, how (if at all) should the international adjudicator account for the fact that the domestic provision emerges from a referendum? What weight, if any, should the apparent popular will carry in the analysis? In short, how should an international court decide?

This was precisely the challenge that faced the European Court of Human Rights (ECtHR) in *A, B & C v. Ireland*.⁴ This case, which is the only one so far in which a referendum-emergent constitutional provision was cast as a domestic consensus that trumped the EuC,⁵ involved

⁴ *A, B & C v. Ireland* [2011] 53 EHRR 13.

⁵ I have previously termed this 'trumping internal consensus': F. de Londras and K. Dzehtsiarou, 'Grand Chamber of the European Court of Human Rights, *A, B and C v Ireland*' (2013) 62(1) *International and Comparative Law Quarterly* 250.

abortion and, more particularly, whether women in Ireland had a right to access abortion in situations in which there was a risk to their health. Irish constitutional law recognises the foetus as a rights-bearer and restricts abortion to situations in which there is a real and substantial risk to the life, rather than the health, of the pregnant person.⁶ In spite of a EuC towards allowing abortion in a broader set of circumstances, the Court allowed Ireland a continued margin of appreciation owing to the ‘profound moral position’ of the Irish people said to be reflected in the constitutional provision (Article 40.3.3), which emerged from three referenda.

Taken in isolation from its socio-political context, *A, B & C v. Ireland* is a singular case. EuC does not necessarily determine the outcome of a dispute, but, here, we might reasonably have expected it to do so. There are at least three reasons. First, as outlined later, the EuC was substantial and weighty; it extended across the vast majority of the Council of Europe (CoE) states (A and B could have accessed abortion in thirty out of forty-seven Member States), and Ireland’s hyper-restrictive abortion law was clearly out of step. Second, abortion relates to the intimate sphere of personal decision making and privacy in respect of which states ordinarily have a very limited margin of appreciation,⁷ meaning that one would expect the EuC to have particularly persuasive force where a state attempts to maintain a position that deviates from the consensus in a manner that interferes with Article 8 rights. Third, the argument that the Irish government made against the claim of a violation was one that was essentially grounded on a claim of the specialness, not just of the constitutional provision, *but of its referendum-emergent nature in particular*.

As we will see later, the Government argued that Article 40.3.3 of the Irish Constitution reflects the profoundly held moral position of the Irish populace on a matter of deep contention and, as a result, ought to be considered determinative of the rights claim that was here being made under the Convention. This is hardly the first time that the Irish government has made this claim; in essence, it was the argument also made before the United Nations Human Rights Committee in recent cases

⁶ Article 40.3.3 *Bunreacht na hÉireann*; Protection of Life During Pregnancy Act 2013; *Attorney General v. X* [1991] 1 IR 1. See generally F. de Londras and M. Enright, *Repealing the 8th: Reform of Irish Abortion Law* (Bristol: Policy Press, 2018).

⁷ *Dudgeon v. the United Kingdom* [1981] 4 EHRR 149.

about the criminalisation of abortion in situations of fatal foetal abnormality.⁸ The Human Rights Committee has refused to accept that a state's will, even if reflected in a constitutional referendum, could determine questions of international human rights law or justify non-compliance therewith, and found that the Irish law on abortion violated the International Covenant on Civil and Political Rights (ICCPR), including the right to be free from torture and inhuman and degrading treatment.⁹ In contrast, the ECtHR in *A, B & C* found that the availability of abortion was a matter for states to determine for themselves and was one in relation to which there was a wide margin of appreciation, and that the referendum-emergent nature of the Irish constitutional provision added particular weight to the claim that Irish law did not violate the Convention.

The Court came to that conclusion, as I will show later, first by deploying EuC decision making, and then by consequently finding that the legal regulation of abortion in Ireland is compatible with the Convention, *notwithstanding* its deviation from the consensus. What the Court did not do, in any clear sense, is determine whether and to what extent abortion *per se* is properly a matter for analysis within the Convention. Instead, it subtly constructed abortion as a matter of exceptional policy difficulty and exempted it from the ordinary implications of a finding of EuC. It decided, in other words, not to decide on the key question here, which was whether access to abortion is a human rights matter under the European Convention on Human Rights (ECHR), and, if so, how women's right to access abortion can properly be protected within the Convention framework. It achieved this by constructing the referendum-emergent constitutional provision in Ireland as particular in its ability to justify divergence from the EuC. In this, the Court continued its unsatisfactory record of 'fudging' the question of abortion in its jurisprudence, neither clearly determining whether the foetus is a rights-bearer under the Convention nor whether women have Convention rights to access abortion,¹⁰ and engaging in a confounding manner with EuC as a mode of decision making.

Its decision not to make a clear decision on the human rights implications of abortion, in spite of the existence of a EuC, raises serious

⁸ *Mellet v. Ireland* UNHRC Decision CCPR/C/116/D/2324/2013, 9 June 2016.

⁹ *Ibid.*

¹⁰ On which, see generally D. Fenwick, 'Abortion jurisprudence at Strasbourg: Deferential, avoidant and normatively neutral?' (2014) 34(2) *Legal Studies* 214.

questions from the perspective of the Court's legitimacy. If (as outlined in Section 14.1) EuC is a mechanism of enhancing the legitimacy of the Court, then the successful deployment of that technique is surely reliant on some form of consistency and predictability. What *A, B & C v. Ireland* illustrates, however, is that EuC is not always robustly deployed, but rather can be sidestepped when the issue being considered raises particular policy difficulties for the Court. Rather than simply acknowledging that abortion is a matter on which the Court did not want to decide, the ECtHR instead seems to have corrupted the concept of EuC by allowing the argumentatively logical conclusion of its application to be avoided through what I will show is an inconsistent and illogical approach to referendum-emergent constitutional provisions.

Having first outlined the role of EuC in enhancing the legitimacy of the ECtHR (Section 14.1), I consider the decision in *A, B & C v. Ireland*, drawing particular attention to the Court's contortions *vis-à-vis* the EuC on access to abortion (Section 14.2). I argue that the Court's conclusion cannot be explained by either the specialness of constitutional provisions *per se* or of referendum-emergent constitutional provisions in particular, and is inconsistent with EuC decision making (Section 14.3). I conclude that the motivation for the Court's finding in *A, B & C* was a simple reluctance to make a decision about the human rights implications of laws that deny women agency in their reproductive lives, but that, in deciding not to decide, the Court corrupted EuC as a mode of reasoning, exposing its potential deployment in ways that lead to uncertainty and inconsistency (Section 14.4).

14.1 European Consensus

Legitimacy is a complex notion in the law of the ECHR, as it is related to its inputs, outputs, outcomes and societal perceptions.¹¹ In the context of the ECHR, there are multiple stakeholders, all of which have an interest in, and a perception of, the legitimacy of the Court. Perhaps the most obviously important stakeholders are the contracting parties – on which the system relies for its implementation and effectiveness – and the individuals whose rights are protected by the Convention and who can engage with the Court when their domestic legal systems have failed to adequately protect and, when appropriate, remedy violations of their rights.

¹¹ F. de Londras and K. Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (London: Palgrave MacMillan, 2018), chapter 1.

While, to some extent, both of these sets of stakeholders have a common interest – the effective operation of the ECHR and the broader CoE apparatus for its implementation and enforcement – they may have a different understanding of what this means. For the contracting party, it clearly means, among other things, respect for the principle of subsidiarity by the Court (which may be shorthand for respect for sovereignty);¹² for the individual, it means recognising, respecting and protecting her rights. The differences between these perspectives occasionally become manifest, perhaps most often when an applicant asks the Court to recognise her as bearing a right that has been violated in respect of a previously unsettled issue, and the state asks the Court to ‘respect’ its national position and to limit itself to what was clearly understood to be protected by the Convention. Here, of course, is where much of the tension relating to the evolution of the Convention is most evident, and here too is where EuC decision making attempts to mitigate these tensions.¹³

EuC decision making is one mechanism used by the Court to identify whether and when to take a further step in the evolution of the Convention.¹⁴ If some, many or all of the Member States of the CoE already consider that there is a right to X but the Convention law on this has not been settled, then that consensus (established or emerging) can help the Court to justify a finding that the right claimed is (a) protected by the Convention and (b) has been breached by the respondent state.

Of course, the national laws of the contracting parties do not *determine* the meaning of the Convention. It is an autonomous body of law, subject to autonomous interpretation.¹⁵ Thus, national laws simply act as interpretive aides for the Court when applying a EuC approach to assessing the reach of the Convention rights. The argument goes that by reaching for those interpretative aides from the national deposits of law, particularly within the CoE, the Court’s evolutive step might be

¹² See, for example, Protocol 15 to the Convention, which adds a mention of subsidiarity to the preamble of the ECHR.

¹³ See generally, K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: Cambridge University Press, 2015).

¹⁴ For example, Dzehtsiarou, *European Consensus*; de Londras and Dzehtsiarou, *Great Debates*, chapter 4; for a comprehensive and considered account of interpretation, including EuC, see G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007).

¹⁵ On the autonomy of the Convention, see, in particular, Letsas, *A Theory of Interpretation*, chapter 2.

substantiated and supported in a way that tends to ensure that it can maintain its legitimacy in the eyes of the contracting parties.¹⁶ In this way, EuC is effectively a persuasive mechanism and is not determinative *per se*.

EuC is more than simply a means of persuading a contracting party to accept the decision of the Court. It is also a mechanism of self-restraint on the part of the Court itself inasmuch as its absence may alert the Court to the possibility that an evolutive step desired by the applicant would take it 'too far too fast' and potentially undermine its legitimacy in the eyes of the contracting parties.¹⁷ EuC thus licences and restrains, persuades and substantiates. It is in these multiple ways that EuC might be said to assist in maintaining the Court's legitimacy.

Key to this legitimacy-enhancing nature of EuC is the Court's failure to discriminate between different kinds of law. When considering whether there is a consensus in favour of a particular desired rights-related outcome across the Member States of the CoE, the Court does not pay undue attention to either the form of the law or the quality of the process that led to it. A statutory instrument might be said to represent the domestic legal position just as well as an act of parliament or a constitutional provision. Of course, this is entirely understandable, particularly if EuC is a process for enhancing legitimacy: it is not the job of the ECtHR to determine the quality of the politico-legal process that led to a piece of domestic law when sketching a picture of the European status quo for the purposes of identifying a consensus.¹⁸ In that context, all that matters is that the law is valid as a matter of domestic legal analysis; the ins and outs of its making are a matter for the domestic system to address.

This suggests that when a EuC is identified that tends to support a particular outcome before the Court, the existence of a contrary law in the respondent state ought not to either determine the standard of rights protection under the Convention or act as a sufficient justification for departing from that standard of protection. If it did, then EuC would be a weak instrument indeed, both for the evolution of the Convention and for the legitimation of the Court. With this as our starting point, let us now turn to the curious events of *A, B & C v. Ireland*.

¹⁶ On this see generally Dzehtsiarou, *European Consensus*.

¹⁷ F. de Londras and K. Dzehtsiarou, 'Managing judicial innovation in the European Court of Human Rights' (2015) 15(3) *Human Rights Law Review* 523.

¹⁸ Although cf the use of procedural rationality when considering the compatibility of domestic laws with the Convention *per se*.

14.2 *A, B & C v. Ireland*

A, B & C concerns abortion law in Ireland. Long before Ireland regained its independence, abortion was criminalised under the Offences against the Person Act 1861.¹⁹ It remains criminalised today, albeit under a much later statute: the Protection of Life during Pregnancy Act 2013.²⁰ That later legislation was enacted as a direct result of *A, B & C* and outlines how women can access the very limited constitutional right to abortion in Ireland, which arises when the pregnant women's life is subject to a 'real and substantial risk' that can only be averted by bringing the pregnancy to an end, when the foetus is not considered to be viable and when the mechanism of terminating the pregnancy is thus abortion (rather than an early delivery through C-section or the like).²¹ At the time that the women who complained of a rights violation in *A, B & C* had attempted to access abortion care, however, that 2013 Act did not exist. Instead, Irish law was unclear, hyper-restrictive and extremely unwieldy.²² It comprised several elements, which are relevant to the outcome of the case.

The first was the Offences against the Person Act 1861, which made it a criminal offence, punishable by up to life in prison, to procure or provide abortion care.²³ The second was Article 40.3.3 of the Constitution as interpreted by the Supreme Court.²⁴ Article 40.3.3 provides in full:

The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

This subsection shall not limit freedom to travel between the State and another state.

This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.

¹⁹ s. 58, Offences against the Person Act 1861.

²⁰ s. 22, Protection of Life during Pregnancy Act 2013.

²¹ *X v. Attorney General* [1992] 1 IR 1.

²² See the outline of the law as it stood in F. de Londras and L. Graham, 'Impossible floodgates and unworkable analogies in the Irish abortion debate' (2013) 3(3) *Irish Journal of Legal Studies* 54.

²³ s. 53, Offences against the Person Act 1861.

²⁴ *Attorney General v. X* [1991] 1 IR 1.

The first clause of this provision was introduced by referendum in 1983, referendum being the only way to formally amend the Constitution of Ireland. It is the Eighth Amendment to the Irish Constitution and is commonly referred to by that title. The provision was subjected to an extremely restrictive interpretation by the Irish courts, so that its effect was that it precluded anything that might in any way be said to endanger foetal life by enabling access to abortion care, including the distribution of information about abortion or contact information for abortion clinics in the United Kingdom (excluding Northern Ireland, where abortion remains extremely restricted²⁵).²⁶ In the early 1990s, the Supreme Court confirmed that under Article 40.3.3, abortion was only available in Ireland when the pregnant woman's life was at 'real and substantial risk' (as had conventionally been understood) and that this risk included a risk of death through suicide (which was not as originally thought).

That case – *Attorney General v. X*²⁷ – exposed the detrimental impacts of the Eighth Amendment. It concerned a fourteen-year-old girl who had been raped and became pregnant, and who was suicidal. The Attorney General had sought and acquired an injunction from the High Court to prevent her parents from bringing her to the United Kingdom for an abortion. The Supreme Court, on appeal, made it clear that she was entitled to access abortion 'at home' in Ireland given the risk to her life; however, the prospect that a child who had been the victim of a crime could be enjoined from travelling for an abortion had struck a deep chord with the Irish people.

The case was followed in 1992 by a further referendum, which introduced the second and third clauses of Article 40.3.3 (on the rights to travel and information). A proposal to confirm that abortion could not be accessed when the risk to life was a risk of suicide did not succeed. A second attempt to reverse *X* by precluding abortion in cases of 'suicidal ideation' was also unsuccessful in 2002.²⁸ Thus, by the time that the events underpinning *A, B & C v. Ireland* had taken place, the constitutional position was that pregnant persons had a right to access abortion

²⁵ The Abortion Act 1967 was never extended to Northern Ireland. In that jurisdiction, the Offences against the Person Act 1861 remains in place and in force.

²⁶ For a comprehensive outline and analysis of the judicial interpretation of Article 40.3.3, see F. de Londras, 'Constitutionalizing fetal rights: A salutary tale from Ireland' (2015) 22 (2) *Michigan Journal of Gender and the Law* 243–89.

²⁷ See footnote 7.

²⁸ For an analysis and a comprehensive outline of the 1992 and 2002 referenda, see de Londras, 'Constitutionalizing fetal rights', see footnote 26.

when their life was at real and substantial risk, had a right to travel to access abortion in any circumstances and had a right to information relating to abortion. There was no legislative framework for determining when and if someone fell into the category in which they were entitled to access abortion, and medics faced the prospect of criminal charges and potential life imprisonment under the Offences against the Person Act 1861 if they provided abortion care outside of those limited but undefined situations.

The third relevant legal provision was related to the availability of information. As noted earlier, after the referendum in 1992, the Constitution provided for 'freedom to obtain or make available, in the State, *subject to such conditions as may be laid down by law*, information relating to services lawfully available in another state' (my emphasis). These conditions laid down by law were and remain extremely restrictive. They are found in the Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995, which provides that all information regarding abortion must be non-directive and makes it a criminal offence to make a referral for a patient for abortion services in another state.

Ireland, then, had one of the most restrictive abortion law regimes in the world when A, B and C all found themselves engaging with it. The three cases were all rather different. A and B both claimed that the failure to make abortion available in cases of a risk to health violated Article 8 of the Convention. A had four children already, all of whom were in foster care, she lived in poverty, was a recovering alcoholic, had suffered from depression in all of her previous pregnancies and was in the process of attempting to regain custody of her children, working with her social worker. B had been informed by two doctors that there was a substantial risk of ectopic pregnancy in her case, and she further did not want to continue with the pregnancy as she did not feel she could cope with a child on her own. Both A and B travelled to England for an abortion, both experiencing difficulty with meeting the cost of the flights and abortion care. C claimed that the lack of legislation to determine whether she was entitled to an abortion under the Constitution violated her Article 8 rights. She had been receiving chemotherapy for three years and, before her treatment, had been informed by her doctor that if she were to become pregnant it would be dangerous for the foetus if she continued treatment during the first trimester. Having gone into remission, she unintentionally became pregnant, but claimed that she could not access clear information about the impact of the pregnancy on her

health owing to ‘the chilling effect of the Irish legal framework’.²⁹ She travelled to England, where she accessed abortion care.

While the ECtHR did find a violation of C’s rights, holding that where abortion is legally available, there must be a framework through which it can be accessed³⁰ (which is what the 2013 Act now provides³¹), it found no violation in relation to A and B. The Government’s argument in these cases was very much focused on the fact that the prohibition on abortion in Ireland is constitutionally based, and thus, is ‘based on profound moral values deeply embedded in the fabric of society in Ireland [...] defined through equally intense debate’.³² By asking the Court to find that the Convention required abortion to be made available in cases of a risk to health, the government claimed that A and B were ‘asking the Court to [...] go against the recognised importance and fundamental role of the democratic process in each state and acceptance of a diversity of traditions and values’ in the contracting parties.³³

This was an especially important plank of the government’s argument, which was that the constitutional status quo reflected the will of the People. It argued that it was ‘entitled to adopt the view, *endorsed by the people*, that the protection of pre-natal life [...] was a legitimate goal’³⁴ and that ‘the opinion of the Irish people had been measured in referenda in 1983, 1992, and 2002’.³⁵ Given the lack, it was claimed, of any European consensus *on when life begins* (as opposed to the availability of abortion as a matter of law), the state’s ‘legitimate choice [...] that the unborn was deserving of protection’ should be respected,³⁶ particularly since this related to ‘ethical and moral issues [...] to be distinguished from scientific issues’.³⁷ Even bearing in mind the EuC that might be said to exist in respect of the availability of legal abortion, the government claimed, this ‘consensus [...] was irrelevant since it was based on legislation and not on the decisions of any constitutional court on the

²⁹ *A, B & C v. Ireland*, see footnote 5, para. 24.

³⁰ In this, the Court reiterated its previous position in *Tysiac v. Poland* (2007) 45 EHRR 42.

³¹ On the background to the introduction of the legislation, see C. O’Sullivan, J. Schweppe and E. Spain, ‘Article 40.3.3 and the Protection of Life during Pregnancy Bill 2013: The impetus for, and process of, legislative change’ (2013) 3 *Irish Journal of Legal Studies* 1.

³² *A, B & C v. Ireland*, see footnote 5, para. 180.

³³ *Ibid.*

³⁴ *Ibid.*, para. 182.

³⁵ *Ibid.*, para.183.

³⁶ *Ibid.*, para. 186.

³⁷ *Ibid.*, para. 188.

provisions of a constitution'.³⁸ Strangely, even if there were a relevant consensus, the Irish government argued that Convention rights 'were not dependent upon the assessment of the popular will at any given time'³⁹ and that 'sometimes rights might have to be protected against the popular will'.⁴⁰

The arguments of the Irish government were, then, both that the fact that the Irish legal position is enshrined in a Constitution is significant *and* that the fact that that position had emerged from referenda mattered. In the context of a contentious and contested moral and ethical question, constructed here as 'when does life begin?' (as opposed to 'should women have a right to access abortion care?'), Ireland's argument was that any existing consensus should be disregarded, even when such a consensus would ordinarily point towards Convention protection for the rights of the applicants.

The Court found that the prohibition on abortion in the cases of A and B interfered with their rights under Article 8, but it proceeded to find that limitation to have been a justified interference based on what was 'necessary in a democratic society'. The Court found that there was insufficient evidence to suggest that the constitutional status quo did not reflect the will of the People, that there is no consensus on when life begins and that the views of the Irish people reflected in the Constitution 'were based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum and which have not been demonstrated to have relevantly changed since then'.⁴¹

However, what about the consensus point? The Court held that, in principle, the 'acute sensitivity of the moral and ethical issues'⁴² arising in relation to abortion is such that a wide margin of appreciation is relevant, notwithstanding the fact that abortion is intimately connected with personhood and privacy so that it should, in principle, be an issue in relation to which states have a narrow margin of appreciation. The Court was satisfied that there is a consensus 'among a substantial majority' of the contracting parties towards a broader provision of abortion care and noted that A and B could have accessed abortion in thirty out of the

³⁸ Ibid, para.186.

³⁹ Ibid, para. 187.

⁴⁰ Ibid.

⁴¹ Ibid, para. 22.

⁴² Ibid, para. 233.

forty-seven Member States of the CoE.⁴³ However, because the Court could not find a consensus on when life begins (as per *Vo v. France*⁴⁴), and because there had been a 'lengthy, complex and sensitive debate in Ireland [...] as regards the content of its abortion laws'⁴⁵ which was reflected in the referenda, the result of which was a prohibition 'based [...] on the profound moral views of the Irish people as to the nature of life',⁴⁶ the EuC did not narrow the margin of appreciation conclusively.

In this case, then, referenda were important. The Court did not endorse the view that a consensus cannot 'override' a constitutional provision, argued in brief by the Irish government, but was influenced by the fact that Article 40.3.3 emanated from referenda in two ways. First, the fact that the provision was introduced following referenda was extremely significant in the Court's vital finding that it reflected a profound moral position held by the Irish people. Second, the Court considered the fact that abortion had been discussed in and was perhaps influential in the defeat of some other referenda (especially when it was considered that the ratification of changes to the EU treaties might have had an impact on the regulation of abortion care in Ireland) as reinforcing the apparent views of the people contained in the Constitution. The Court, in other words, placed particular weight on the referendum-emergent nature of the constitutional provision to override an existing and substantial EuC that abortion should be available in cases such as those presented by A and B. The implication here was that referendum-emergent constitutional provisions are somehow 'different'. It is to the robustness of this suggestion that I now turn.

14.3 Are Referendum-Emergent Constitutional Provisions Different?

As a matter of international law, constitutional provisions are no different than other domestic legal provisions. If compliance with a judgment of the ECtHR requires constitutional change, then the obligation to execute the judgment exists without regard to the (frequently challenging) nature of constitutional change when compared with legislative

⁴³ Ibid, para. 235.

⁴⁴ Appl. no. 53924/00, Eur Ct R., 8 July 2004.

⁴⁵ Ibid, para. 239.

⁴⁶ Ibid, para. 241.

repeal or amendment.⁴⁷ In international law, in many respects, constitutions are just the same as any other form of domestic law. However, in the context of EuC, domestic law is not usually pleaded in order to attempt to justify non-compliance with an international obligation (which it cannot do), but rather to make an argument about how that international obligation ought to be understood. In that context, there are at least some arguments that might suggest the super-weighting of constitutional law compared with other forms of domestic law, so that a constitutional provision contrary to the EuC might be able to ground a margin of appreciation that would otherwise be narrowed, if not absorbed, by the consensus.

In essence, all of these arguments can be boiled down to the claim that the constitution is *different* from other forms of domestic law, that is, to an argument of ‘constitutional exceptionalism’.⁴⁸ Of course, that claim is not unproblematic. The arguments outlined later take at face value a number of assumptions, arguments and approaches to the nature of constitutions and to what constitutions tell us about national identity that can be subjected to a whole range of often compelling critical disagreements, but might be taken ‘as is’ here for the purposes of the argument to come.

The legal status of a constitution in domestic law is perhaps the most obvious starting point. In most legal systems, the Constitution has a particular status in domestic law: it binds all the actors including the parliament and, where there is one, the monarch. It often, although not always, sets absolute limits on what laws and policies can be introduced, even empowering the courts to strike down legislation that is incompatible with it. It is, to put it briefly, the superior domestic law with which all other laws must comply. Even in the United Kingdom, where the ultimate constitutional principle might still be said to be parliamentary sovereignty, legislation that is deemed ‘constitutional’ is increasingly being recognised as entrenched, so that a particular and more challenging process for amending it must be undertaken than is the case with ‘ordinary’ legislation.⁴⁹ If the domestic legal system recognises the Constitution as being particularly weighty or as having a very particular normative force, why should the ECtHR not also recognise this, when

⁴⁷ Article 46, ECHR.

⁴⁸ C. Serkin and N. Tebbe, ‘Is the Constitution special?’ (2016) 101 *Cornell Law Review* 701.

⁴⁹ *Thoburn v. Sunderland CC* [2002] 4 All ER 156; *R (HS2 Action Alliance Ltd) v. Secretary of State for Transport* [2014] UKSC 3.

determining either the content of a EuC or the persuasiveness of an argument, grounded in domestic constitutional law, to justify divergence from such a consensus?

In many ways, this comes down to why it is that constitutional provisions are generally considered to be ‘special’. This is not, of course, simply or merely a matter of the formal normative status within the domestic hierarchy of laws. That hierarchy of laws in itself reflects something more important and more fundamental: the sense that there are some values, rules and provisions that are considered so important to the state that they ought to enjoy superiority in order to preserve them. This might be the protection of fundamental rights, the division of power between regions and the central state, the articulation of a fundamental national commitment or the articulation of the national identity in constitutional terms – what is contained within that, and why, is very much a product of each state’s individual constitutional tradition and story of statehood. However, in each case, it reflects something telling about the state itself: something thought to be so important to its constitutional identity that it should be protected from simple or ‘merely’ political override, often reflected in the fact that constitutional provisions are especially difficult to amend or, at the very least, require a special procedure for amendment. In some states, there are parts of the Constitution that cannot be amended at all – that are fully entrenched – so fundamental are they to the state’s constitutional identity and the national politico-legal structure. In others, constitutions can only be amended by super-majority vote or, in some cases, by two super-majority votes: one preceding an election and the other following one. In yet more states (such as Ireland), constitutional amendments can only be brought about by a referendum.⁵⁰

If it is the case that constitutions are ‘special’ because they reflect something fundamental about the identity and nature of the state then perhaps there is an argument that constitutional provisions *per se* ought to be given particular weight by the ECtHR. If that is so then one would argue that a state ought to be able to avoid a finding of non-compliance with the Convention even when their law fails to reach a minimum threshold of rights protection reflected in an established EuC. Instead, the specialness of the constitutional provision would underpin a claim to

⁵⁰ Article 46, *Bunreacht na hÉireann* 1937. On amendability of constitutions generally see R. Albert, X. Contiades and A. Fotiadou, *The Foundations and Traditions of Constitutional Amendment* (Oxford: Hart Bloomsbury, 2017).

exceptionalism from the European norm in a way that a mere legislative provision would not. Legislation might (ideally) be said to reflect the will of the People because of its production through a process of representative democracy, but it does not bear the specialness of a constitutional provision. It is 'mere' law, rather than a reflection of a facet of the constitutional identity and character of the state, and so it cannot be expected to carry a similar normative force in the face of an established EuC (which may itself, of course, reflect a mixture of constitutional and legislative provisions from other states). It goes without saying that any such argument undermines the normative force of the Convention and, potentially, the normative force of the whole project of international human rights law itself, but, taken on its own terms, there is nonetheless something compelling about it.

Thus, there are at least some arguments for saying that constitutional provisions should be treated differently in some way than other provisions of domestic law. Indeed, taken together, they form a claim of 'polythetic specialness', that is, of a 'combination of attributes [. . . that] combine to legitimize special interpretive arguments in a way that no feature can on its own'.⁵¹ If we assume that constitutions do have such a specialness, then that might be said to attend to them even if they differ across the CoE states in terms of their supremacy, entrenchment and so on, and that this difference is *significant* from the context of EuC decision making. This, of course, is the material point here: we are testing not only whether a constitutional provision ought to be considered weighty *per se*, but whether that weightiness ought to be said to be such as to override a EuC that exists across various legal instruments in other states. If so, a state may be able to avoid an obligation to change its constitution in order to be ECHR-compliant. That argument has never been accepted, however. Indeed, no argument that domestic law reflects or embodies deeply held national sentiment – about homosexuality⁵² or corporal punishment⁵³ or traditional values around family⁵⁴ – has ever been sufficient to convince the ECtHR that a consensus to the contrary ought not to be recognised in the articulation of a Convention-based standard of rights protection. Instead, the EuC – where it has been sought and

⁵¹ Serkin and Tebbe, 'Is the Constitution special?', 770.

⁵² *Dudgeon v. the United Kingdom* [1981] 4 EHRR 149; *Norris v. Ireland* (1989) 13 EHRR 186.

⁵³ *Tyrer v. the United Kingdom* (1980) 2 EHRR 1.

⁵⁴ *Karner v. Austria* (2003) 38 EHRR 528.

found – has prevailed to ground an evolutive interpretation of the Convention, and the respondent state has been required to execute the judgment, even when that meant constitutional change.⁵⁵ The one exception is *A, B & C v. Ireland*.

In reaching that decision, the Court was clearly influenced by the referendum-emergent nature of the constitutional provision and seemed to be particularly attracted to the argument that Article 40.3.3 was a particular expression of the ‘will of the people’. It is not unusual for the will of the people *per se* and the result of a referendum to be conflated, especially when Ireland is defending its approach to the regulation of abortion before international fora.⁵⁶ Of course, this is an overly simplistic claim in a number of important ways. First – and this is a rather obvious but nonetheless important point – the definition of ‘the People’ is limited by the rules relating to the franchise, as well as the practical impediments to vote. The franchise and ‘the People’ are not aligned, in Ireland or elsewhere, so that the rhetorical trope ought not to be allowed to be a substitute for empirical fact. The second difficulty with this conflation is that referenda allow for a determination of ‘the will of the People’ only inasmuch as the system for a referendum provides for this. In Ireland, there is no initiative process for a referendum; the holding, timing, content and funding of a referendum is pursuant to the gift of the government that commands a majority in the Oireachtas [Parliament]. It is the government that decides whether to hold a referendum and what to hold it on.

The will of the People may well be for abortion to be available with no restrictions whatsoever, without charge, to all pregnant persons who want to avail themselves of it, but there would be no way to tell that from the Constitution or, indeed, from the referenda that have already been held. At the time of *A, B & C v. Ireland* there had never been a

⁵⁵ See, for example, the constitutional amendments executed in Malta following *Demicoli v. Malta* (1992) 14 EHRR 47.

⁵⁶ It is the long-established practice of the Irish government to respond to criticism and challenges to its abortion law in international fora by arguing that the Constitution reflects the ‘will of the people’. See, for example, the arguments made to the United Nations Human Rights Committee in *Mellet v. Ireland* UNHRC Decision CCPR/C/116/D/2324/2013, 9 June 2016. Here, the arguments were unsuccessful, and Ireland was found to be in breach of the ICCPR. For an outline and critique, see F. de Londras, ‘Fatal foetal abnormality, the Irish Constitution, and *Mellet v Ireland*’ (2017) 24(4) *Medical Law Review* 591.

liberalizing referendum on abortion in Ireland.⁵⁷ The 1983 referendum constitutionalised foetal rights, and the 1992 and 2002 referenda attempted to further restrict the already hyper-restrictive system by ensuring that a suicidal woman could not access abortion unless some other risk to her life could be identified. It is true that in 1992 the rights to travel and access information were introduced, but these were not liberalising referenda *per se*; they had nothing to say about the popular will in respect of access to abortion as a matter of Irish law. Instead, they focused on enabling pregnant persons to access abortion ‘abroad’ should they wish to do so.

On the only occasion the People were asked to express a view on the substantive question of the content of abortion law in Ireland since 1983, they were asked to further restrict it, and they refused. If one can infer anything from that response – and it is not at all clear that one can – it is hardly that the constitutional status quo reflects the will of the People, but rather that it reflects something closer to the will of the People than the alternative, more restrictive version that was offered on that day. It is quite possible that this reading is no more feasible or convincing than the Court’s, which, in turn, should caution against assuming that a referendum represents the popular will in a manner that is any more profound or accurate than the content of a piece of legislation. In truth, the only thing the outcome of a referendum of this kind (where a specific constitutional wording is proposed to the People) indicates is that, on the day of the vote, that version of words was preferred (or not) over the alternative that was put to the electorate. The same thing could most likely be said about most constitutional referenda, so that placing any special weight, in rights-related adjudication, on the referendum-emergent nature of a provision can hardly be justified on this basis.

However, the Court appeared to place particular weight on the directly democratic nature of the referendum, noting that ‘[f]rom the lengthy, complex and sensitive debate in Ireland [. . .] as regards the content of its abortion laws, a choice has emerged’:⁵⁸ a choice that enjoys considerable weight, notwithstanding its clear implications for the human rights of pregnant people, mostly women, in Ireland. In many ways, this is

⁵⁷ This did not happen until 2018, when Article 40.3.3 was repealed by majority vote and before which this chapter was written. Once the referendum result is certified (when all legal challenges have been completed), the Irish parliament will consider and pass a new law allowing for the availability of lawful abortion in certain circumstances.

⁵⁸ para. 239.

curious; after all, the Court finds laws that have been passed following lengthy, complex and sensitive debates to violate the Convention all the time, notwithstanding the growing importance of procedural rationality in its decision making.⁵⁹ There is no reason in principle why referendum-emergent constitutional provisions ought to be saved that fate, even when they are being impugned in a context, as here, in which an evolutive interpretation of the Convention is sought. Although referenda are an exercise in direct democracy, their democratic character cannot be said to be necessarily *superior* to those laws that are passed by a legislative body as an exercise in representative democracy. I have already shown that referenda might well be just as refracted an expression of the popular will as legislation, as the populace is being asked simply to express a view on an autonomously generated proposition rather than to express 'freehand' their particular policy preference. Even in situations in which popular initiative can lead to a referendum, there is a process of refraction and rationalisation of the popular will at play that is analogous to that which takes place in the normal legislative process.

The fact that a legislative provision can be found to violate the Convention means that *in principle* international human rights law rejects the proposition that majoritarianism ought to determine rights. The same principle can be applied to referendum-emergent constitutional provisions. The democratic process may be 'direct' (subject to the earlier observations), but the capacity of international human rights law to protect against majoritarianism still ought to be harnessed in such cases. Indeed, one might argue that this is in many ways the essence of rights in the liberal democratic tradition. This makes it all the more remarkable for the Court in *A, B & C* to have pointed to a referendum-emergent constitutional provision in order to determine the core question of whether or not the Convention protects the right of pregnant persons to access abortion care.

Of course, one might argue that the evolution of the Convention standards by reference to EuC is itself a form of majoritarianism in rights protection. The distinction, however, is clear. EuC decision making is a technique that underpins the (primarily) evolutive interpretation of the Convention to protect rights. It is not determinative but rather aids the Court in its development of the Convention. It also requires neither a majority *per se* nor a literal consensus among the Member States, but

⁵⁹ See, for example, P. Popelier and C. van de Heyning, 'Subsidiarity post-Brighton: Procedural rationality as answer?' (2017) 30(1) *Leiden Journal of International Law* 5.

rather is used to identify a trend that, in turn, is applied to develop the Convention. Certainly, there will be times when the lack of a EuC might mean that the Court cannot be convinced that a desired evolutive leap ought to be undertaken, but that is clearly distinguishable from the outcome in *A, B & C*, which was to the effect that the decision of a majority of those who voted in a domestic constitutional referendum to actively deny women the right to access abortion care could determine the extent of the Irish state's obligations under the ECHR. This outcome is not consistent with the Court's general approach to either EuC or the protection of rights that relate to intimate personal decisions.

14.4 *A, B & C*, Referenda and Deciding Not to Decide

The Irish government has repeatedly argued in Strasbourg and elsewhere that the Constitution reflects the deeply held and profound moral position of the Irish people when it comes to abortion and that this is determinative of its obligation under international human rights law.⁶⁰ There is no other issue on which such an argument would get as much as a moment's positive attention in an international human rights forum. In making this argument, successive Irish governments have tried to export their own abdication of responsibility for the rights of pregnant persons to international tribunals. In Ireland, the political response to calls for abortion liberalisation has long been a metaphorical shrug that the Constitution limits what can be done, that it reflects the will of the People and that if that results in harm to pregnant people – involuntary detention to continue pregnancy,⁶¹ forced hydration when a woman goes

⁶⁰ This has largely been unsuccessful. As well as the decision in *Mellet v. Ireland* (see footnote 48), see Committee on Economic, Social and Cultural Rights, Concluding Observations on the Third Periodic Report of Ireland, E/C.12/IRL/CO/3, 8 July 2015, para. 30; Committee on the Elimination of Discrimination against Women, Concluding Comments: Ireland, CEDAW/C/IRL/CO/4–5, 22 July 2005, paras 38–39; Committee on the Rights of the Child, Concluding Observations on the Combined Third and Fourth Period Reports of Ireland, CRC/C/IRL/CO/3–4, 1 March 2016, paras 57–58; Committee against Torture, Concluding Observations of the Committee against Torture: Ireland, CAT/C/IRL/CO/1, 17 June 2011, para. 26.

⁶¹ This was the reported experience of a teenage girl who was considered not to be sufficiently suicidal to access an abortion under the Protection of Life during Pregnancy Act 2013 but who was subjected to involuntary detention under the Mental Health Act. She was subsequently released from detention pursuant to court order, the court finding that while she was distressed, she did not have a mental illness that required or justified the deprivation of liberty.

on a hunger strike in protest of her inability to access abortion,⁶² mental anguish at having to effectively smuggle a foetus with a fatal foetal abnormality ‘home’ for a funeral following a late-term abortion in Liverpool,⁶³ death from untreated septicaemia because no intervention would be provided until the pregnant woman was on the cusp of death⁶⁴ – then so be it.

Until the 2018 referendum on repeal of the Eighth Amendment, abortion was unquestionably the most contentious issue in the Irish political discourse. It is also clear that political opinion was significantly behind popular opinion, inasmuch as it could be gleaned from opinion polling and deliberative processes.⁶⁵ Those same politicians controlled the timing, nature, wording and occurrence of referenda. This was a circle that could not be squared. What is especially confounding about the decision of the ECtHR is that by allowing a referendum-emergent constitutional provision to override EuC, the Court failed to account for the decades-long political failure to assert and protect the rights of women in Ireland.

In the world of international human rights law, acknowledging that a lack of reproductive autonomy has rights-related implications is hardly contentious.⁶⁶ One can reach this conclusion without determining whether there is a ‘right to abortion’ *per se*. It is thus very clear that

⁶² This was the experience of ‘Ms Y’, on which, see M. Enright and F. de Londras, ‘Empty without and empty within: The unworkability of the Eighth Amendment after Savita Halappanavar and Miss Y’ (2014) 20(2) *Medico-Legal Journal of Ireland* 85.

⁶³ This is a widely reported experience whereby people access abortion care at the Liverpool Women’s Hospital, one of the few places in the United Kingdom that can offer such care to pregnant persons from Ireland who receive a late-term diagnosis of fatal foetal abnormality, as a result of which they decide to bring the pregnancy to an end. In these cases, the abortion usually comprises foeticide followed by the delivery of a stillborn baby, which many people choose to bring ‘home’ for a burial. Doing so often requires them to hide the corpse in a car and take the ferry back to Ireland.

⁶⁴ This was the experience of Savita Halappanavar, on which see Enright and de Londras, ‘Empty without and empty within’.

⁶⁵ For example, the Citizens Assembly (established as a deliberate forum for the discussion of *inter alia* the future of Irish abortion law) recommended an extremely liberal abortion law regime, which was followed by reports that many politicians considered that their primary task was to ‘water down’ those recommendations. See Citizens Assembly, Final Report on the Eighth Amendment to the Constitution (2017). Available at www.citizensassembly.ie/en/The-Eighth-Amendment-of-the-Constitution/Final-Report-on-the-Eighth-Amendment-of-the-Constitution/Final-Report-incl-Appendix-A-D.pdf.

⁶⁶ See, for example, UNCESCR, ‘General Comment No. 14: The Right to the Highest Attainable Standard of Health’ (11 August 2000) E/C.12/2000/4; Report of the Special Rapporteur on torture, inhuman or degrading treatment of punishment (2016) A/HRC/

reproductive autonomy, including access to abortion, is an area of profound human rights concern: one about which we might expect a human rights court to adjudicate, especially when domestic law utterly fails to accommodate the rights of women in its legal regulation of reproductive healthcare. However, the approach taken in *A, B & C v. Ireland* was such that these clear and unquestionable rights implications of hyper-restrictive abortion law regimes are to be left to the domestic sphere. Unlike other fields of governance, the Convention had nothing meaningful to say about abortion. The regulation and availability of abortion was, quite simply, for the national polity to decide.

Although in *A, B & C*, the Court tied that conclusion to the referendum-emergent nature of the Irish constitutional provision that underpins the legal prohibition on abortion in that jurisdiction, it was in reality simply continuing its pattern of treating abortion as a matter of procedure rather than of substantive rights,⁶⁷ and of allowing the lack of a consensus on the moral or legal status of the foetus⁶⁸ to determine the question of the protection of the rights of women, whose moral and legal status as rights-bearers is utterly uncontested. To do so in the face of a clear and persuasive EuC in favour of access to abortion, in at least some situations, beyond a risk to the life of the pregnant woman, is both inconsistent with EuC as an instrument that both licences (to evolve) and restrains (from evolving), and involves the illogical exceptionalisation of referendum-emergent constitutional provisions in a manner that does not withstand serious scrutiny.

Conclusion

It is perhaps easy to treat *A, B & C v. Ireland* as an idiosyncratic case within the ECtHR's jurisprudence. The topic in question (abortion) is one in respect of which there is no moral or ethical consensus, even if there is a legal consensus across the CoE Member States. Furthermore, the Irish context raised a particular challenge for the Court precisely because the constitutional prohibition on abortion was referendum emergent and, thus, posed a particularly striking contrast to a collection of judges sitting in Strasbourg, applying an international treaty, and with

31/57; UN CEDAW, 'General Recommendation No. 24: Article 12 of the Convention (Women and Health)' (1999) UN Doc A/54/38/Rev.1

⁶⁷ See *Tysiac v. Poland*, see footnote 30.

⁶⁸ *Vo v. France* (2005) 40 EHRR 12.

limited democratic or other connection to the polity that had approved that constitutional provision.

However, although the case of *A, B & C v. Ireland* does have some particular features, it nevertheless illustrates well the conundrums that arise when we consider the relationship between EuC and referendum-emergent constitutional provisions in domestic law. What would the implications be for the Court if it were to reach a conclusion that such a provision does violate the Convention, thus creating a serious execution quandary for the respondent state that must rely on those same voters to make good the incompatibility through a further referendum? And what if they decide not to; if they conclude that their decision on the protection of rights should not be overridden by that of seventeen judges in Strasbourg, who were in turn informed in their conclusions by the views of legislatures and electorates in other states through the application of a EuC approach? And what of the question of determining EuC itself: should legal provisions that were introduced by referendum carry more weight in the 'consensus calculus' or ought there to be a simple approach through which the Court refuses to attend to the provenance of a domestic legal rule in determining consensus?

Neither *A, B & C v. Ireland* nor this chapter offers answers to those questions, but what both do is to point to the importance of arriving at these answers in order to avoid the charge that, rather than guide the Court in its difficult and delicate task of evolving the Convention, EuC is in fact a mechanism of avoiding making decisions on difficult questions and deferring to the 'will of the People' in domestic states, whether that is directly expressed through referendum or obliquely through primary legislation.

PROOF