II. GRAND CHAMBER OF THE EUROPEAN COURT OF HUMAN RIGHTS, *A, B & C V IRELAND*, DECISION OF 17 DECEMBER 2010

A. Introduction

The use of 'European consensus' as a decision-making mechanism of the European Court of Human Rights has been condemned and praised in almost equal measure.[1] On the one hand, some scholars argue that the way in which so-called 'consensus' is identified is generally unsound and lacking in rigour.[2] It is also claimed that European consensus is overly subjective in its nature[3] and, in any case, that it undermines the principle that the Convention has an autonomous meaning determined by the Court and separate to what member States do or interpret it as meaning.[4] On the other hand there are scholars who, while often concerned with the sub-optimal methodology adopted in identifying and using European consensus in the decisions of the Court, recognise the method's potential to increase the legitimacy of the Court and its function as a mechanism for the progressive liberalisation of the European public order.[5]

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[1] See, e.g, G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP, 2009) 120-131; G Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 15 EJIL 279; JL Murray, 'Consensus: concordance, or hegemony of majority' in *Dialogues between Judges* (Council of Europe, 2008); E Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 JILP 843; A McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 MLR 671; JA Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004) 11 CJEL 113; F de Londras, 'International Human Rights Law and Constitutional Rights: In Favour of Synergy' (2009) 9 IR Constitutionalism 307; K Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12 GLJ 1730; P Martens, 'Perplexity of the National Judge Faced with the Vagaries of European Consensus' in *Dialogues between Judges* (Council of Europe, 2008); L Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 23 Cornell ILJ 133; C McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 4 OJLS 499; M Delmas-Marty, 'A 'Reasoned' Conception of the Reason of State' in M Delmas-Marty (ed), *The European Convention for the Protection of Human Rights. International Protection versus National Restrictions* (Kluwer, 1992).

[2] Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002), 192-3; P Mahoney, 'The Comparative Method in Judgments of the European Court of Human Rights: Reference Back to National Law' in G Canviet et al (eds), *Comparative Law Before the Courts* (BIICL, 2004), 149.

[3] P Martens, 'Perplexity of the National Judge Faced with the Vagaries of European Consensus' in *Dialogues between Judges* (Council of Europe, 2008), 79.

[4] Letsas 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (n 1) 304; Benvenisti (n 1) 851.

[5] See eg K Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' [2011] PL 534; Helfer (n 1).

This reflects the fact that, generally speaking, European consensus has been applied in order to establish an expanded scope of protection for the Convention in areas not expressly mentioned within it or contemplated at the time of its drafting, on the basis that there is an identifiable trend (although, in strict linguistic terms, not an actual 'consensus') among other European States to protect the alleged right.[6]

Although respondent States had occasionally attempted to justify their derogation from the European consensus or trend on the basis of an internal consensus—understood as a generally held moral value or judgement within the State in question—those attempts had been unsuccessful prior to the important decision of the Grand Chamber in *A, B & C v Ireland*.[7] In that case, the Court found that Ireland's extremely restrictive stance on the availability of abortion was justifiable and compatible with the Convention on the basis of an alleged internal consensus (in favour of a very restrictive abortion regime in Ireland) that trumped the European consensus (evidencing a much more liberalised abortion regime).[8]

In this article, we argue that the proposition that an internal consensus could 'trump' European consensus is troubling from a constitutionalist perspective. The European Court of Human Rights is at the heart of the constitutionalising process in the continent of Europe, laying down minimum standards for rights protections in 47 countries and, indeed, in the European Union as an autonomous institution.[9] To allow the alleged values of a particular State to be exempted from the general minimum standard and, potentially, to usher in a reduction of that minimum standard as a consequence thereof, is clearly out of step with the development of a European public order. Not only that, but it raises questions about the legitimacy and coherence of the rights-based harmonising project to which the Convention is core, and the role of the

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[6] Dzehtsiarou, *ibid*, 541-8.

[7] *A, B and C v Ireland*, Application No 25579/05, Judgment of 16 December 2010.

[8] We are not concerned here with the impact of *A, B & C v Ireland* on Ireland's abortion regime *per se*. On this see B Daly, 'Access to Abortion Services: The Impact of the European Convention on Human Rights in Ireland' (2011) 30 Med L. 267; B Daly, '"Braxton Hick's" or the Birth of a New Era? Tracing the Development of Ireland's Abortion Laws in Respect of European Court of Human Rights Jurisprudence' (2011) 18 EJ Health L 375.

[9] The Lisbon Treaty and Protocol 14 to the ECHR provided the legal basis for the European Union to become a party to the European Convention on Human Rights, the final negotiations for which are underway. See, eg, M Kuijer, 'The Accession of the European Union to the ECHR: A Gift for the ECHR's 60th Anniversary or an Unwelcome Intruder at the Party?' (2011) 3 *Amsterdam Law Forum* 17; X Groussot, T Lock & L Pech, 'EU Accession to the European Convention on Human Rights: A Legal Assessment of the Draft Accession Agreement of 14th October 2011' *European Issues No. 218* (Fondation Robert Schuman, 2011); T Lock, 'EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg', (2010) 35 ELRev 777.

European Court of Human Rights within it.[10] We begin with an outline of the concept of 'trumping internal consensus' and a summary of its application in *A, B & C v Ireland* before proceeding to our core objections to its use by the Strasbourg Court.

B. Trumping Internal Consensus

European consensus is not entirely what it says on the tin. Rather than describing a literal 'consensus' position on a particular question between all of the member States to the Convention, 'European consensus' as deployed by the Strasbourg Court might be more accurately described as an identifiable trend or commonality among at least some members of the Council of Europe in relation to the matter at hand.[11] Once identified, European consensus is usually deployed to determine whether the Convention can be said to provide certain protection within the banner of Convention rights, where such protection is not expressly mentioned in the Convention itself (e.g. LGBT rights being given protection under the banner of Article 8 in spite of their unenumerated status[12]). Usually the question of European consensus arises only in situations where it is not clear whether or not the Convention protects individuals in the way that is claimed and, as a corollary, whether the State action impugned violates the Convention for failing to vindicate the right in question.[13] Moreover, the Court has tended not to apply European consensus if the Contracting States had commenced drafting a new Protocol to deal with the matter under consideration.[14] In the cases where European consensus has been deployed to date the Court has reached one of three conclusions: i) that there is a lack of European consensus, usually meaning that the impugned law is Convention-compatible[15] unless manifestly

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[10] See further F de Londras, 'The European Court of Human Rights, Dual Functionality, and the Future of the Court after Interlaken' *UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 45/2011* <http://ssrn.com/abstract=1773430>

[11] Dzehtsiarou (n 5) 541-8.

[12] For an overview see B Verschraegen, 'The right to Private Life and Family Life, The Right to Marry and to Found a Family, and the Prohibition of Discrimination' in Katharina Boele-Woelki and Angelika Fuchs (eds), *Legal Recognition of Same-Sex Couples in Europe* (Intersentia, 2003).

[13] See, for example *Lautsi v Italy*, Application No 30814/06, Judgment of 18 March 2011; *Christine Goodwin v the United Kingdom*, Application No 28957/95, Judgment of 11 July 2002. For detailed discussion see Dzehtsiarou (n 5) 546-8.

[14] A Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 HRLR 57, 69; *Öcalan v Turkey*, Application No 46221/99, Judgment of 12 May 2005.

[15] See for example, *Lautsi* (n 13) [70]; *Dickson v United Kingdom*, Application No 44362/04, Judgment of 4 December 2007 [78]; *Sheffield and Horsham v United Kingdom*, Application No 22985/93, Judgment of 30 July

unreasonable, disproportionate or unnecessary in a democratic society; ii) that there is an identifiable European consensus of which the impugned law is part and, therefore, that the law is Convention-compatible;[16] or iii) that there is an identifiable European consensus with which the impugned law is incompatible, usually meaning that it is Convention-incompatible. Our concern is with the third of these scenarios.

Where a European consensus is identified and a respondent State's law falls outside of it without reasonable justification, the Court normally finds a violation of the Convention.[17] Whether or not divergence from the European consensus is justified is, of course the core question in such situations. The Court has identified the particular historical and social context extant in a respondent State as a justification for divergence, although the longer the divergence persists the more strongly it has to be justified, and in fact no case has yet been found to reach the threshold for justification under this ground.[18] Divergence from European consensus can also be justified on the basis of an incompatible international trend to which the impugned State action might be said to aligned, although that is rare indeed.[19] Finally—and of key concern in this article—divergence from the European consensus might be justified on the basis of an internal consensus that 'trumps' that found at a regional level. Internal consensus can be defined as a widespread (although not unanimous) attitude to a legal issue that is held by the majority of people within the respondent State. In net terms the internal consensus claim is twofold: first that in fact an internal consensus exists and can be verified; and second that the internal consensus is sufficient to justify divergence from (i.e. to trump) the identified European consensus and, as a result, that there is no incompatibility with the Convention.

1998 [55]. In such cases a wide margin of appreciation is usually identified: *Evans v United Kingdom*, Application No 6339/05, Judgment of 10 April 2007 [77].

[16] *Stoll v Switzerland*, Application No 69698/01, Judgment of 10 December 2007 [155].

[17] See, eg, *Ünal Tekeli v Turkey*, Application No 48616/99, Judgment of 16 November 2004; *Tănase v Moldova*, Application No 7/08, Judgment of 27 April 2010; *DH and Others v the Czech Republic*, Application No 57325/00, Judgment of 13 November 2007; *Micallef v Malta*, Application No 17056/06, Judgment of 15 October 2009.

[18] *Republican Party of Russia v Russia*, Application No 12976/07, Judgment of 12 April 2011, [127-130]; *Tănase v Moldova* (n 17) para [172].

[19] In *Goodwin v the United Kingdom* the European Court of Human Rights stated that lack of European consensus could not justify allowing the respondent State a wide margin of appreciation in relation to transsexuals' rights, because of 'the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals': *Christine Goodwin* (n 13) [85]. In this case the continuing international trend was not deployed to trump the existing consensus but rather was used to overcome the lack of such consensus. However, the reasoning behind this argument is similar to trumping consensus, namely a solution supported by European consensus or lack thereof is disregarded under the justification of another trend—this time, an international one.

It is rare for States to try to argue for trumping internal consensus, and in fact no such argument had succeeded prior to *A, B & C*. The internal consensus argument was deployed by the British Government in *Tyrer v the United Kingdom.*[20] *Tyrer* concerned the long-standing practice of sentencing people to 'birching' in criminal trials in the Isle of Man.[21] Tyrer—a juvenile who had been subjected to this punishment—claimed that it contravened Article 3 of the Convention, which protects against torture, inhuman and degrading treatment or punishment. The UK claimed, *inter alia*, that corporal punishment 'did not outrage public opinion in the Island'[22] and ought to be saved from Convention incompatibility on that basis. The Court disagreed, holding:

> …even assuming that local public opinion can have an incidence on the interpretation of the concept of 'degrading punishment' appearing in Article 3, the Court does not regard it as established that judicial corporal punishment is not considered degrading by those members of the Manx population who favour its retention: it might well be that one of the reasons why they view the penalty as an effective deterrent is precisely the element of degradation which it involves. As regards their belief that judicial corporal punishment deters criminals, it must be pointed out that a punishment does not lose its degrading character just because it is believed to be, or actually is, an effective deterrent or aid to crime control. Above all, as the Court must emphasise, it is never permissible to have recourse to punishments which are contrary to Article 3...whatever their deterrent effect may be.[23]

Although the Court in *Tyrer* did not entirely rule out the prospect that an internal consensus might be relevant in analysing whether a particular State action contravenes the Convention, it clearly rejected any such argument in this case. This was based on both the nature of the right in question as an absolute right *and* on the European consensus as regards corporal punishment. In the latter connection, the Court held that it 'cannot but be influenced by the developments and

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[20] *Tyrer v the United Kingdom*, Application No 5856/72, Judgment of 25 April 1978.
[21] Birching was a statutorily regulated form of corporal punishment conducted by police officers (Summary Jurisdiction Act 1960, section 10). Regulation of this punishment was so precise that the size and weight of the cane to be used was specified in the Directive of the Lieutenant-Governor of 30 May 1960.
[22] *Tyrer* (n 20) [31].
[23] *Ibid*.

commonly accepted standards in the penal policy of the member States of the Council of Europe in this field'.[24] Thus, even if the internal consensus existed, which the Court doubted, it seems that it was not an internal *trumping* consensus. Similar claims arose in the case of *Dudgeon v the United Kingdom*.[25] Dudgeon claimed that the continuation in force of 'the abominable crime of buggery' as prohibited by sections 61 and 62 of the Offences against the Person Act 1861 was a violation of the Convention. The UK argued that continued criminalisation of male homosexual sex in Northern Ireland did not contravene the Convention based on what it claimed was 'the strength of feeling in Northern Ireland against the proposed change, and in particular the strength of the view that it would be seriously damaging to the moral fabric of Northern Irish society' to decriminalise such acts.[26] The UK further argued that Northern Ireland was a particularly conservative society that placed greater emphasis than most Convention States on religion, even as applied to heterosexual conduct.[27] The thrust of this argument was that even if the European consensus was for the decriminalisation of consensual homosexual sex between men, Northern Ireland contained an internal trumping consensus that ought to save the law in that jurisdiction from incompatibility. Although the Court accepted that these claims were relevant to the matter at bar, it did not agree that there existed any internal trumping consensus. Instead, the Court held that the Convention was violated, finding:

> As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States.[28]

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[24] *Ibid*.
[25] *Dudgeon v the United Kingdom*, Application No 7525/76, Judgment of 23 September 1981.
[26] *Ibid* [46].
[27] *Ibid* [56].
[28] *Ibid* [60].

Neither *Tyrer* nor *Dudgeon* categorically ruled out the possibility that an internal trumping consensus could exist, but in neither case was the claim successful. This is significant, not least because in *Dudgeon* at least what was in question was a matter of significant moral debate and disagreement. *Dudgeon* was decided in 1981 when homosexual sex was unlawful in many countries and only one country in the world—Norway—had a law protecting people from discrimination on the basis of sexual orientation (and that itself was introduced in 1981).[29] This suggests that even in an area of moral sensitivity an alleged internal trumping consensus required hefty supporting materials in order to succeed. The same proved not, however, to be the case in *A, B & C v Ireland*.[30]

C. *Trumping Consensus in* A, B & C v Ireland

A, B & C v Ireland concerned the extremely restrictive abortion regime in place in Ireland and claims of its incompatibility with the Convention. Although abortion is permitted under the Irish Constitution where the life of the mother is at risk[31] (including from suicide[32]), no legislation has ever been introduced regulating the mechanism by which medical professionals can determine whether or not a woman's life is endangered and certify that an abortion is constitutionally permissible.[33] Furthermore, serious risk to the life (as opposed to the health) of the mother is the only situation in which an abortion can be legally acquired in Ireland, although travel to another jurisdiction in order to procure an abortion is permitted and information relating to abortion is freely available.[34] The claimants in *A, B & C* challenged this abortion regime, claiming firstly that it violated the Convention because there was no clear and safe way of determining whether someone was entitled to an abortion within the existing constitutional limits, and secondly because it was claimed that the restrictiveness of the regime itself violated the Convention partially because it was out of step with the prevailing position across the Council of Europe

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[29] In 1981 Paragraph 349(a) of the Norwegian Penal Code was amended to prohibit discrimination on the basis of sexual orientation in the provision of goods and services and in access to public gatherings.
[30] *A, B & C* (n 7).
[31] Art 40.3.3, *Bunreacht ne hÉireann* (Constitution of Ireland).
[32] *Attorney General v X* [1992] 1 IR 1 (Supreme Court of Ireland, 5 March 1992).
[33] See generally J Schweppe (ed), *The Unborn Child, Article 40.3.3° and Abortion in Ireland: 25 Years of Protection? (Liffey Press, 2008).*
[34] Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995.

States. In relation to the former, the Court reiterated its earlier case law[35] that where abortion is legally permitted there must be a mechanism to acquire it and found a violation on that basis.

In relation to the latter claim, the European Court of Human Rights confirmed its long-standing position that abortion was an area in relation to which member States enjoyed a significant margin of appreciation,[36] but then proceeded to State that 'the question remains whether this wide margin of appreciation is narrowed by the existence of a relevant consensus'.[37] In other words, was the extreme restriction of abortion in Ireland to cases where the pregnancy and the woman's life were incompatible acceptable under the Convention, or did it require that abortion would be more broadly available including especially where the pregnancy endangered the *health* of the woman? The Court confirmed that there was a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than that permitted under Irish law,[38] but held that this consensus did not decisively narrow the State's margin of appreciation.[39] This was because the limited availability of abortion in Ireland was said to be based on the 'profound moral views'[40] of the Irish people, which constituted a trumping internal consensus. In this respect, internal consensus and European consensus were applied as competing variables determining the scope of the margin of appreciation afforded to the respondent State.

This conclusion was based on the argument proposed by the Irish government that the results of three constitutional referenda on abortion,[41] together with public demands for guarantees about abortion in the Maastricht[42] and Lisbon[43] referenda,[44] evidenced an internal

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[35] *Tysiąc v Poland,* Application No 5410/03, Judgment of 20 March 2007.
[36] *A, B. and C.* (n 7) [185].
[37] *Ibid* [233]-[234].
[38] *Ibid* [235].
[39] *Ibid* [236].
[40] *Ibid* [126].
[41] Abortion referenda were held in 1983 (introducing the 8th Amendment to the Constitution (protecting the life of the unborn with equal protection to the life of the mother)), 1992 (introducing the 13th Amendment to the Constitution (allowing for freedom to travel for the purposes of abortion) and 14th Amendment to the Constitution (allowing for the provision of information relating to abortion), but rejecting a proposed amendment to preclude abortion where the life of the mother was endangered by the risk of suicide), and in 2002 (rejecting a proposal to preclude abortion where the life of the mother is endangered by suicide). For a comprehensive outline see, e.g., G Hogan & G Whyte, *Kelly: The Irish Constitution* (4th edn, Tottel, 2003).
[42] Concerns about abortion becoming more available in Ireland through EU intervention resulted in Protocol 17 of the Maastricht Treaty, which provides '[n]othing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Art 40.3.3 of the Constitution of Ireland'.

consensus of a profound nature. As discussed further below, the methodology applied in reaching this decision is questionable, but notwithstanding that the Court concluded that 'the impugned restrictions in the present case 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'.[45] Although there was a European consensus inasmuch as Ireland is one of only a few member States to restrict abortion to situations where the life, as opposed to the health, of the mother is at risk,[46] the Court found that—as previously held in *Vo v France*[47]—there is no legal or scientific consensus in Europe as to when life begins.[48] This seems to have been perceived as a factor to weaken the probative nature of the European consensus, further highlighting the vulnerability of the European consensus to being trumped by internal consense. The Court stated:

> [T]he question of when the right to life begins came within the States' margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life, so that it was impossible to answer the question whether the unborn was a person to be protected for the purposes of Article 2. Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected, the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother. It follows that, even if it appears from the national laws referred to that most Contracting Parties may in their legislation have resolved those conflicting rights and interests in favour of greater legal access to abortion, this consensus

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[43] In advance of the second referendum on the Lisbon Treaty the European Council (Heads of Government) adopted a Decision including, in Section A, a guarantee that '[n]othing in the Treaty of Lisbon attributing legal status to the Charter of Fundamental Rights of the European Union, or in the provisions of that Treaty in the area of Freedom, Security and Justice affects in any way the scope and applicability of the protection of the right to life in Art 40.3.1, 40.3.2 and 40.3.3…[of] the Constitution of Ireland'.

[44] Changes to the founding treaties of the European Union that alter the 'essential scope or objectives' of the European Union can only be ratified by Ireland is approved by constitutional referendum: *Crotty v An Taoiseach* [1987] IR 713 (Supreme Court of Ireland, 9 April 1987).

[45] *A, B. and C.* (n 7) [226].

[46] Andorra, Malta and San Marino prohibit abortion in all circumstances.

[47] *Vo v France*, Application No 53924/00, Judgment of 8 July 2004.

[48] *A, B. and C.* (n 7) [237]

> cannot be a decisive factor in the Court's examination of whether the impugned prohibition on abortion in Ireland for health and well-being reasons struck a fair balance between the conflicting rights and interests, notwithstanding an evolutive interpretation of the Convention.[49]

Here the Court is dancing around—although never precisely pinning down—the relationship between degree of abortion availability and views on the moment that life begins. A more precise analysis is found in the concurrence by Irish *ad hoc* judge, Judge Finlay-Geoghegan. She makes the connection inasmuch as she sees it between *Vo* and the decision in *A, B & C* more clear by holding that the European consensus was not one as to when life began and did not therefore go to the core public policy concern underpinning the Irish position. In other words, the two consensuses (European v internal) were, in her view, related to two different questions (how available abortion is (European) v when life begins (Irish)). As a result, it did not operate to narrow Ireland's margin of appreciation.[50] Both this concurrence and the decision of the majority arguably conflate questions about when life begins (a question that fundamentally goes to whether abortion should be permitted at all and, if so, how far into pregnancy) and circumstances in which abortion should be permitted for reasons connected to maternal welfare (where life is at risk only, or where life *or* health is at risk).[51] Indeed, much the same point was made in the dissenting judgment.[52]

The application of a trumping internal consensus was criticised by Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi dissenting, who wrote:

> [I]t is the first time that the Court has disregarded the existence of a European consensus on the basis of 'profound moral views'. Even assuming that these profound moral views are still well embedded in the conscience of the majority of Irish people, to consider that

[49] *Ibid* [237].
[50] *Ibid*, Concurring Opinion of Judge Finlay-Geoghegan,[6].
[51] We are not concerned here with the outcome as it relates to the Court's jurisprudence on abortion *per se*. On that see, e.g. S McGuinness, 'A, B and C Leads to D (For Delegation!)' (2011) 19 Med Law Rev 476.
[52] *A, B. and C.* (n 7) Dissenting Judgment, [2].

> this can override the European consensus, which tends in a completely different direction, is a real and dangerous new departure in the Court's case-law.[53]

The danger of this departure is, we contend, largely bound up in the potential risk that it poses to the continuing development of a rights-based, constitutionalist public order throughout the European continent should the notion of trumping internal consensus not be left to perish on the rock of *A, B & C*.

D. Trumping Consensus and Frustrated Constitutionalism

Although internal consensus has only been allowed to 'trump' European consensus in the Strasbourg jurisprudence on one occasion, the phenomenon raises serious concerns. These concerns are deeply linked to the constitutionalist mission and identity of the Court. Even though the European Court of Human Rights is a not a supreme court for Europe, or even a constitutional court in the traditional sense, it does have an important constitutionalist function and identity.[54] This is reflected in the fact that, at its heart, the Court's function is to ensure compliance with, and the development of, the Convention in a manner that contributes to the cultivation (together with the Court of Justice of the European Union) of an *ordre publique* for the continent in which basic minimum rights-based constitutionalist requirements are elaborated and safeguarded through domestic implementation and regional supervision.[55] In order to succeed in its constitutionalist mission the Court needs the same resources as other constitutionalist courts, including legitimacy.[56] Dzehtsiarou has previously argued that the

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[53] *Ibid*, Dissenting Judgment, [9].

[54] S Hennette-Vauchez, 'Reformatory Rationales Mismatch the Plural Paths of Legitimacy of ECHR Law' in Jonas Christoffersen & Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (OUP, 2011); L Wildhaber, 'Rethinking the European Court of Human Rights' in Jonas Christoffersen & Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (OUP, 2011); L Wildhaber, 'A Constitutional Future for the ECHR' (2002) 5 HRLJ 161. Some argue the Court is in fact a constitutional court. See especially A Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP, 2008); A Stone Sweet, On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court' (2009) 80 *Revue Trimestrielle des Droits de l'Homme* 923.

[55] L Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 EJIL 125; de Londras (n 10).

[56] See, J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale L.J. 1346; A Kavanagh, 'Participation and Judicial Review: a Reply to Jeremy Waldron' (2003) 22 L.& Phil. 451; S Freeman, 'Constitutional Democracy and the Legitimacy of Judicial Review' (1990) 9 L.& Phil. 327; T Poole, 'Legitimacy,

concept and methodology of European consensus is itself a legitimacy-enhancing measure, enhancing its standing in the eyes of the member States, *provided* it is transparently and accurately constructed and consistently deployed.[57] Furthermore, the impact that a judgment or series of judgments has on the lived experiences of those residing within the *espace juridique*[58] of the Convention has implications for the extent to which the people covered by the Convention consider it and its court to be legitimate. Across each of these legitimacy planes (i.e. member States and protected individuals) trumping internal consensus has potentially troublesome and delegitimising effects. Together, these effects undermine the constitutionalist impact and capacity of the Court.

In *A, B & C* trumping internal consensus allowed for the continuation of the *status quo* in Ireland, as desired by the Irish government itself. It is to be expected that this would in fact always be the result where a trumping internal consensus is found. In that respect it is likely that the respondent State in question would consider the use of trumping internal consensus to be a legitimising factor for that particular judgment, taking into account the supposedly unique and deeply engrained national sentiment in favour of the position as it stands. Indeed, failure to take what is considered to be 'proper' account of the sentiment and tradition within a member State has, on occasion, been the basis for sharp criticism and allegations of illegitimacy levied against decisions emanating from Strasbourg in the past.[59] Among the other member States, however, trumping internal consensus potentially undermines the legitimacy and effectiveness of the Court and the Convention more broadly.

First of all it may act to 'fudge' the question of what a particular provision of the Convention requires of states and of whether (and, if so, under what circumstances) a State can

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Rights and Judicial Review' (2005) 25 OJLS 697; Wo Sadurski, 'Law's Legitimacy and "Democracy-Plus"' (2006) 26 OJLS 377; A Føllesdal, 'The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights' (2009) 40 *Journal of Social Philosophy* 595.

[57] Dzehtsiarou (n 5).

[58] This phrase was used in *Banković v Belgium,* Application No 52207/99, Decision of 12 December 2001 to describe the geographical space within which the Convention operates (subject to some strictly exceptional extraterritorial application).

[59] A clear example of such criticism is the reaction of the UK Parliament to the judgments of the European Court of Human Rights in the cases *Hirst v the United Kingdom (No. 2)*, Application No 74025/01, Judgment of 6 October 2005 and *Greens v the United Kingdom*, Application No 60041/08, Judgment of 24 November 2010 in which the Court found prisoners' voting ban incompatible with the Convention. As is well known, the law has not been changed in response to these decisions, with members of the parliament in Westminster alleging that the apparent disconnection between this decision and the desires of the people of the United Kingdom delegitimsed the decision and the Court itself. See generally the Backbench Parliamentary Debates, 'Prisoners' right to vote', *The Hansard*, 10 February 2011, Column 498-586.

provide a level of protection lower than that apparently required but still remain within the bounds of the Convention. In other words, States may wonder what exactly it is that the Convention requires of them and whether they can themselves construct a compelling enough case for an internal consensus that would allow for them to 'trump' the general European position. Furthermore, a State that currently forms part of the European consensus as identified by the Court may in fact have in place a certain legal or regulatory regime precisely because it considered that to be required in order to be Convention compliant, even if it was not particularly desired. In other words, there may be situations where the Convention has had precisely the exogenous force on domestic legal and regulatory systems that was desired (i.e. it has resulted in domestic legal change 'upwards' even without a judgment against the State), but the identification of a trumping internal consensus in one State may either foster resentment in other States *or* result in other States recalibrating laws 'downwards' on the basis of a self-declared trumping internal consensus. That is arguably more likely to happen in relation to matters of particular moral and social controversy—such as abortion—where campaigners on a particular side of the debate might argue that in fact the Convention does not require as liberal a legal regime as exists and in fact that further restricting individual freedoms would be permissible based on the case in which a trumping internal consensus was established.

Second, the notion that European consensus might be subordinate to internal consensus within any particular State might bolster broader arguments that the Convention ought to be subordinate to decisions taken at the national level. This would likely undermine the effectiveness and harmonising capacity of judgments emanating from the Strasbourg Court. At its core, an argument of trumping internal consensus is one that makes the nature and content of an international legal obligation subject to public sentiment and public acceptance of obligations within the contracting party, notwithstanding the fact that individuals are not full subjects of international law. This adds to the counterintuitive nature of the proposition that commonly accepted minimal human rights standards would be subordinate to public sentiment within a respondent State.

Thus, trumping internal consensus has important implications for the harmonisation mission of the Convention and, by corollary, the Court itself. Indeed, the dissenting judges in *A, B & C v Ireland* recognised as much themselves when they held:

> According to the Convention case-law, in situations where the Court finds that a consensus exists among European States on a matter touching upon a human right, it usually concludes that that consensus decisively narrows the margin of appreciation which might otherwise exist if no such consensus were demonstrated. This approach is commensurate with the "harmonising" role of the Convention's case-law: indeed, one of the paramount functions of the case-law is to gradually create a harmonious application of human rights protection, cutting across the national boundaries of the Contracting States and allowing the individuals within their jurisdiction to enjoy, without discrimination, equal protection regardless of their place of residence….Even assuming that these profound moral views are still well embedded in the conscience of the majority of Irish people, to consider that this can override the European consensus, which tends in a completely different direction, is a real and dangerous new departure in the Court's case-law.[60]

At a more basic level, trumping internal consensus as applied in *A, B & C v Ireland* raises serious methodological concerns. The occasional incoherence and incomplete reasoning in decisions of the Court have often been remarked upon.[61] Indeed, some decision-making mechanisms or principles of the Court, including the margin of appreciation and European consensus, have been especially singled out for criticism.[62] Even those who argue that European consensus has an important legitimising role to play in the canon of the Convention have accepted that it is methodologically problematic.[63] However, at least with European consensus the laws and policies of a number of States are identified and taken into account with some degree of transparency; where an internal consensus is identified the methodological concerns raised are arguably more acute. Unlike with comparative political and legal analysis—which is essentially

[60] *A, B. and C.* (n 7), dissenting opinion [5]-[9].
[61] See, eg, D Jenkins, 'There and Back Again: The Strange Journey of Special Advocates and Comparative Law Methodology' (2010) 42 *Columbia HRLR* 279.
[62] For criticism of European consensus see above n. 1. Criticisms of the margin of appreciation include H Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence (Martinus Nijhoff, 1996), 152. Lord Lester, 'Universality Versus Subsidiarity: A Reply' [1998] EHRLR 73; O Gross and F Ní Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23 HRQ 625; P Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 AJIL 38.
[63] Arai-Takahashi (n 2) 192-3; Mahoney (n 2) 149.

the method used for European consensus—internal consensus tends to be identified through a crude analysis of sentiment. This was certainly the case in *A, B & C v Ireland*.

The trumping internal consensus in *A, B & C* was—as mentioned above—based on an allegedly profound moral value of the Irish people. This was established by reference to the outcomes of three hotly disputed constitutional referenda and demands made in the somewhat notoriously fraught context of EU-treaty referenda. The Court accepted that the net result in these referenda could be read as communicating accurately the position of the Irish people, i.e. that they were happy with the abortion regime as it stands in Ireland. However, a closer mining of the materials relied upon by the Court tells a somewhat more complex story. In 1983, the 8th Amendment to the Constitution (protecting the right to life of the unborn with equal regard to the right to life of the mother) was passed by a 'yes' vote of 66.45 per cent (66.9 per cent of the valid poll). Inasmuch as it concerned the availability of abortion in Ireland, the referendum in 1993 saw 62.27 per cent of voters who turned out (and 65.35 per cent of the valid poll) reject a proposal to restrict abortion to a greater degree than that determined by the Supreme Court in *Attorney General v X* (in which the risk of suicide was found to permit of abortion under the terms of the Constitution).[64] The People had been asked to amend the Constitution to make it clear that a risk to the life of the mother emanating from the possibility of suicide would not be sufficient to make abortion constitutionally permissible; they were *not* asked whether they wanted to make abortion *more* liberal. Thus, the 'no' vote in that referendum was a simple refusal to further restrict abortion in Ireland. The same was true in the 2002 constitutional referendum, when 50.15 per cent of the people who voted (a mere 42.89 per cent turnout) refused once more to restrict abortion further(equating to 50.42 per cent of the valid poll).[65] Rather than standing for the proposition that the Irish people have a deeply held or profound moral position that supports the *status quo*, as claimed by the Court, these referenda simply stand for the proposition that the Irish people have not been willing to support the amendments to the Constitution *as presented to them* in these referenda. The European Court of Human Rights also suggested that the demands for guarantees from the EU in relation to abortion in the Maastricht and Lisbon referenda reinforced the profound moral position advocated by the Irish government,

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[64] *Attorney General v X* (n 32).

[65] Full statistics for all Irish referenda including turnout and breakdown are available in Department of Environment, Community and Local Government, *Referendum Results 1937-2012* (available at http://www.environ.ie/en/LocalGovernment/Voting/Referenda/PublicationsDocuments/FileDownLoad,1894,en.pdf).

however the most that could be said about these guarantees is that sufficient concern was expressed or perceived in these campaigns that the EU might force a change to Irish abortion law (in contrast to a domestically initiated change) as to make the government believe such guarantees were required.

It is perhaps too much to expect an international court—or perhaps even any court—to be able to take into full account the socio-political context that gives real meaning to referendum results, but if that is the case then perhaps the best course of action for the Court is not to read any meaning into these resulted at all outside of their role in determining the current legal position. Otherwise, as was the case in *A, B & C v Ireland*, the Court will pronounce a moral position that is suspect (at best) to the people of the country in question and who are alleged to hold this position.

If the European Court of Human Rights continues to allow internal consensus to trump European consensus it runs the risk of encountering unanticipated consequences within the respondent States themselves. This is fundamentally because, at least as deployed in *A, B & C v Ireland*, trumping internal consensus acts as a fudge allowing the Court to escape laying down the exact parameters of Convention rights in contentious areas. Rather than clearly stating that the Convention does or does not recognise a right to access abortion where a woman's health is in danger, the Court held that Ireland could determine the scope of its own abortion regime but that once such a decision had been taken appropriate systems for accessing the services had be put in place. Absent those systems there was a violation of the Convention. Rather than set down a clear minimum standard of rights protection, which is the core function of the Court and Convention, the Court thereby placed abortion firmly within the domestic sphere and left apparently complete discretion to the State. The immediate reaction in Ireland was for pro-choice campaigners to call for legislation regulating abortion in line with the limited constitutional exemption [66]and for pro-life campaigners to call for a new referendum to further restrict the availability of abortion.[67] The Strasbourg Court's decision left both options open; without a constitutional change the decision does seem to require regulatory action, but it does not preclude closing abortion off even further, perhaps even introducing an absolute ban on abortion

[66] F de Londras, 'Ireland Still in Denial About Abortion', *The Guardian* (London, 17 December 2010), 36.
[67] W Binchy, 'Referendum to Protect Unborn Now Necessary', *The Irish Times*, (Dublin. 12 December 2010).

in Ireland, which (as it would have to be done by referendum[68]) could subsequently be represented as evidence of an internal consensus based on profound moral values. Any attempt to row back on the trumping internal consensus approach taken in *A, B & C* would be difficult to justify in such circumstances as—unlike in cases of evolutive jurisprudence using European consensus—the 'consensus' deemed most potent in the area of abortion now seems to be an internal, rather than an external, one.

E. Conclusions

The objections outlined above are fundamentally concerned with the danger that trumping constitutionalism would in fact represent a mechanism by which the role of the Court and the Convention in European constitutionalisation would be undermined. Understood as a process of building up a European *ordre publique* comprising the Convention, the Treaties Founding the European Union and the *acquis* emerging from both, the emerging constitutionalist principles and laws are heavily influenced by the rights-based principles that emerge from the Strasbourg Court. This influence has always been considerable, not only inasmuch as the member States have generally tended to respond positively to the majority of the judgments handed down against them, but also because other States have tended to follow suit in at least some circumstances notwithstanding the fact that judgments are strictly binding only on those States against whom they are handed down.[69] Furthermore, since the parallelism between Community/Union and Convention law in respect of rights was identified in the *Bosphorus* case,[70] an alignment between the EU and the decisions of the Court has been discernible. Indeed, that alignment will become very much concretised when the European Union accedes to the Convention, making the Convention and its principles binding on the Union and, by extension, on all of the member States of the Union when applying or implementing EU law. There is an

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[68] The Irish Constitution can only be amended by referendum of the people: Art 46, *Bunreacht na hÉireann* (Constitution of Ireland).
[69] Art 46, European Convention on Human Rights.
[70] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, Application No 45036/98, Judgment of 30 June 2005.
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odd paradox in the emergence of what seems to be a counter-constitutionalist notion of trumping internal consensus in *A, B & C v Ireland* just as we stand on the brink of taking such a significant step in constitutionalising the two European legal orders.

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