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THE MARGIN OF APPRECIATION IN *A, B AND C V IRELAND*: A DISPROPORTIONATE RESPONSE TO THE VIOLATION OF WOMEN'S REPRODUCTIVE FREEDOM

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Abstract: In the case of *A, B & C v Ireland* the European Court of Human Rights found that there had been an interference with the applicants' right to private life. However, "owing to the acute sensitivity of the moral and ethical issues raised by abortion" Ireland was afforded a wide margin of appreciation and was not found to have breached the Convention. This paper argues that the Court's application of the margin of appreciation doctrine was disproportionate. Firstly, the existence of 'consensus' throughout Europe on permitting abortions where a woman's health and wellbeing are at risk should have contracted the power of discretion afforded to national authorities. Secondly, the blanket deference is problematic as a matter of equality. The sensitivity of the abortion question is not a sufficient justification for judicial restraint. In light of the discriminatory nature of the policies in dispute, as well as the presence of an established principle that operates to narrow state discretion (consensus), European supervision should not have been restrained. Rather, it should have been heightened.

A. INTRODUCTION

In Ireland, abortion is almost completely illegal. Constitutional protection for unborn life limits the availability of abortion to circumstances where there is a direct threat to the life of a pregnant woman.[1] The termination of pregnancy in any other circumstance is a criminal offence,[2] and thus most women who seek a safe and legal abortion must leave the country. In 2005, three Irish women who had previously travelled to the UK for abortions challenged these restrictions before the European Court of Human Rights (hereafter "the Court"), asserting that Ireland had breached Articles 2, 3, 8 and 14 of the European Convention on Human Rights (hereafter "the Convention") on the right to life, the right to be free from inhuman treatment, the right to privacy and the right to non-discrimination respectively. Their application was heard before the Grand Chamber of 17 judges on December 9, 2009. The third applicant, C, was successful in her claim that her rights under article 8 of the Convention, including her right to physical integrity, were violated by the lack of an

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[1] Article 40.3.3, Bunreacht na hÉireann (Constitution of Ireland) as interpreted in *Attorney General v X* [1992] IESC 1, [1992] 1 IR 1 (Supreme Court of Ireland, 5 March 1992), The Protection of Life during Pregnancy Act 2013 (2013 Act).

[2] ibid. Prior to the 2013 Act, the Offences against the Person Act 1861, ss 58-59 stated that the penalty for procuring an abortion was life servitude.

accessible procedure through which she could have established her qualification for a lawful abortion.[3] This ruling led to the adoption of the "The Protection of Life during Pregnancy Act 2013" – the first piece of legislation in Ireland to define the circumstances and processes within which abortion can be legally performed. While this certainly represents a welcome step forward for those seeking to liberalise abortion laws in Ireland, the situation for most women who seek access to abortions has in no way changed.

This includes applicants A and B, whose right to an abortion when their health and wellbeing are at risk was denied by the European Court. Though the Court found that there had been an interference with the applicants' right to private life, "owing to the acute sensitivity of the moral and ethical issues raised by abortion"[4] Ireland was afforded a wide margin of appreciation and was not found to have breached the Convention. This paper takes the position that such judicial deference is an unsound response to the violation of women's reproductive freedom and a particularly problematic answer to emerge from an international human rights court. In the context of abortion rights, the practice of international and regional human rights bodies is central to protection and indeed to reform. As the case of C illuminates, where the applicant had to turn to the Court to find a means of accessing her pre-existing rights under domestic law, women and advocates rely on the international framework as the last available forum to circumvent resistant governments and political inertia in their home states. Yet, the case of *ABC* is indicative of how far the Court is willing to go in this regard. The majority decision to dismiss the claims of A and B rests decidedly with a wide application of the margin of appreciation, and this paper will conclusively demonstrate that this application of the margin was disproportionate.

The critique is based on two distinct points. Firstly, the Court's application of the margin of appreciation in *ABC* is flawed as a matter of legal method. In its attempt to disengage itself from the abortion question, the Court disregards well-established methodology of Strasbourg jurisprudence that should have served to strengthen the Court's power of review. In particular, the existence of 'consensus' throughout Europe on permitting abortions where a woman's health and wellbeing are at risk, should have contracted the power of discretion afforded to national authorities. Secondly, the blanket deference in *ABC* is problematic as a matter of equality. The regulation of abortion results in a gendered hierarchy of state protection for human rights, and legal policies that prescribe unequal treatment demand strict scrutiny. This is particularly true in the ECtHR context, as the Court

[3] *A, B and C v Ireland* [2010] ECHR 2032, (*ABC*).
[4] ibid, para 233.

has in the past proclaimed gender equality as one of the key underlying principles of the Convention system.[5] It will be argued that wide-ranging deference on policies that raise questions of equality cannot be reconciled with this goal.

Part B of this paper will provide an overview of the judicial approach in *ABC* and will offer a background on the operation of the margin of appreciation doctrine in ECHR jurisprudence. Part C consists of the first critique as to why the margin of appreciation in *ABC* is disproportionate. It illustrates that in affording Ireland a wide margin of appreciation, the Court disregards the long established Strasbourg methodology of 'consensus.' It makes clear that the novelty of the Court's approach is indicative of a judicial desire to defer to the national position on abortion. In Part D, the paper demonstrates the implications of abortion policy on gender equality. It then analyses how the Court's application of the margin of appreciation in *ABC* reproduces this inequality by devaluing women's rights, dismissing the gendered impact of abortion policies and by endorsing a discriminatory policy of requiring women to go abroad to access human rights. In Part E, it concludes that the Court's approach in *ABC* amounts to a reduction of its own institutional competence, as well as its mandate to uphold equality and to protect the rights of women.

B. BACKGROUND

The three applicants in *ABC* complained to the European Court that the restrictions on the availability of abortion in Ireland forced them to leave the country to access their reproductive freedom – a process which was expensive, dangerous, and traumatic. The first applicant, A, was a recovering alcoholic with four children in the care of the state. At risk of post-natal depression (which she had suffered after each of her four prior pregnancies) and of the view that a fifth child may impede her progress in becoming sober and reuniting with her family, she travelled to the UK in secret to obtain an abortion. The second applicant, B, was young, poor and felt that she could not care for a child on her own. She also travelled to the UK in secret. The third applicant, C, who was in remission from cancer, struggled to obtain information from medical practitioners as to the impact of her pregnancy on her health and life. Having researched the risks herself, she decided to travel to the UK for an abortion. Upon return to Ireland, she suffered prolonged bleeding and infection as consequences of an incomplete abortion, but experienced difficulty in accessing satisfactory medical care. The

[5] For explicit reference see, among other authorities, *Sahin . Turkey*, App no 44774/98 (ECtHR, 10 November 2005), para 115; *Dahlab v Switzerland*, App no 42393/98 (ECtHR, 15 February 2001); *Abdulaziz v UK*, App nos 9214/80 9473/81 9474/81 (ECtHR, 28 May 1985), para 78; *Petrovic v Austria*, App no 20458/92, ECHR1998-II 3.

applicants argued that Irish abortion law subjected them to degrading treatment and risked their health. The third applicant also contended that her life had been placed at risk. Specifically, the applicants submitted that Ireland's abortion prohibition violated their human rights under Articles 2 (Right to Life), 3 (Prohibition of Inhuman and Degrading Treatment), 8 (Right to Respect for Family and Private Life) and 14 (Prohibition of Discrimination) of the European Convention.

In its 2010 judgement, the Grand Chamber determined that there was no violation of Article 2, as there existed no legal impediment to the applicants' travelling abroad for an abortion. Although the third applicant had suffered post-abortion complications, the Court felt that there was no evidence of any relevant risk to her life.[6] Regarding Article 3, the Court took the view that travelling abroad for an abortion was both psychologically and physically arduous for each of the applicants, and financially burdensome for the first applicant.[7] However, in the Court's opinion, this did not reach the minimum level of severity required to fall within the scope of Article 3.[8]

The heart of the Grand Chamber's judgment addressed the violations of privacy and family life under Article 8. The Court found in favour of the third applicant,[9] reiterating its previous position that, where abortion is legally permitted, the state has a positive obligation to ensure that it is accessible.[10] The Court was adamant that Article 8 could not be interpreted as conferring a right to an abortion,[11] but with respect to applicants A and B it accepted that the Irish prohibition on abortion for reasons of maternal welfare came within the scope of the applicants' right to respect for their private lives under Article 8(1).[12] However, it was judged that the prohibition amounted to an interference with that right, which was in accordance with the law, and pursued the legitimate aim of the protection of morals. Here the Court accepted the normative premise of abortion restrictions in Ireland as being "the profound moral views" of the Irish people, which demanded strong protection for pre-natal life.[13] Yet, as required by Article 8(2), the proportionality of this interference had to be reviewed. To assess whether the prohibition on abortion was necessary in a democratic society, the Court considered whether Irish law

[6] *ABC* (n 3), paras 158 - 159.
[7] ibid, para 163.
[8] ibid, para 165.
[9] ibid, para 163.
[10] See *Tysiac v Poland*, App no 5410/03 (ECtHR 20 March 2007).
[11] *ABC* (n 3), para 214.
[12] ibid, paras 214, 216.
[13] ibid, para 227.

> "struck a fair balance between, on the one hand, the first and second applicants' right to respect for their private lives under Article 8 and, on the other, the profound moral values of the Irish people as to the nature of life, and consequently as to the need to protect the life of the unborn."[14]

Significantly, in determining whether this balance was met, the Court afforded the Irish government a wide margin of appreciation. The Court reasoned that the Irish government's "direct and continuous contact with the vital forces of their country" enabled them to ascertain the content and requirements of national morals and the necessity of the restrictions.[15] The claims of applicants A and B were dismissed. It was observed that the prohibition on abortion for the protection of a woman's health and wellbeing came within Ireland's margin of appreciation and, accordingly, Ireland's abortion restrictions did not violate the Convention.

Given that the decision not to recognise the claims of applicants A and B centres upon the majority's use of the margin of appreciation, it is useful at this point to consider the origins and operation of the doctrine under the Convention system. Defined as the line at which "international supervision should give way to a State Party's discretion in enacting or enforcing its laws",[16] the margin of appreciation operates to reduce the level of scrutiny the Court applies to laws that interfere with an individual's rights. This typically occurs when the Court is dealing with matters "of general policy, on which opinions within a democratic society may reasonably differ".[17] In such circumstances, the role of the domestic policy-maker is given weight and, accordingly, the Member State may be considered "better suited to settle the dispute".[18]

The doctrine was initially developed to address fear amongst Member States that European human rights policies could weaken national security.[19] The Court awarded states a measure of discretion in assessing the proportionality of Article 15 emergency measures, and their compatibility with the Convention.[20] This deferential approach gradually evolved

[14] ibid, para 230.
[15] ibid, para 232.
[16] Howard Charles Yorrow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence (Martinus Nijhoff, 1996), 13.
[17] *Greens and MT v United Kingdom*, Appl nos 60041/08 and 60054/08 (ECtHR 23 November 2010), para 113.
[18] Dean Spielmann, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2012) CELS Working Papers Series, 1. See also *ABC* (n 3), paras 232, 237.
[19] Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 NYU Journal of International Law 843, 846.
[20] See *Greece v United Kingdom*, 1958-1959, YB Eur Conv On HR 174; *Lawless v Ireland (No 3)*, App no 332/57 (ECtHR 1 July 1961).

beyond security considerations and was applied to deal with issues such as language policies in education,[21] the allocation of natural resources,[22] and the imposition of free speech limitations to protect public morals.[23] Benvenisti notes that this extension reflected a new philosophy within the Court: a philosophy grounded in notions of subsidiarity and democracy.[24] That is, the Court recognised that primary responsibility for protecting human rights lies with Member States and that, in order for them to guarantee such protection, national authorities must consider local needs and conditions.

In modern jurisprudence the doctrine receives its greatest expression in determining the scope of the "personal freedoms"[25] of the Convention (Articles 8-11), whereby states are expressly allowed to limit rights if "necessary in a democratic society, in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[26] The Court has recognised that there exists a great diversity of values throughout the Member States of the Council of Europe, and that this pluralism must be respected.[27] By deferring to the national authorities, the margin is seen as embracing cultural diversity and incorporating societal differences into the Convention scheme of rights.[28] Thus, where a case raises sensitive or moral issues, the Court is more likely to afford a wide margin of appreciation and find that there has been no breach of the Convention. As emphasised in *X, Y and Z v the United Kingdom*, this approach will be taken where there is no consensus among the Member States of the Council of Europe, "either as to the relative importance of the interest at stake or as to the best means of protecting it."[29]

The extent to which the margin of appreciation reduces the intensity of the European Court's review of rights violations can lead to concern. Letsas argues that the margin of appreciation can be deployed by the Court to avoid substantive human rights review

[21] *Belgian Linguistic Case*, Application nos 1474/62; 1677/62; 1691/62 (ECtHR 23 July 1968) 307.
[22] *James v United Kingdom* (1986) 8 EHRR 123, 46.
[23] *Handyside v United Kingdom* (1979–80) 1 EHRR 737.
[24] Benvenisti (n 19), 846.
[25] Yorrow (n 16) 25.
[26] See European Convention of Human Rights, Articles 8-11.
[27] See Paul Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?' (1998) 19 HUM RTS LJ 1, 2, 4.
[28] Aron Ostrobvsky, 'What's So Funny About Peace, Love, and Understanding? How the Margins of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals' (2005) 1 Hanse Law Review 10. See also James Sweeney, 'Divergence and Diversity in Post-Communist European Human Rights Cases' (2005) Connecticut JIL 21.
[29] *X, Y and Z v the United Kingdom*, App no 21830/93 (ECtHR 22 April 1997) 44. See also *Frette v France*, App no. 36515/97 (ECtHR 26 February 2002) 41.

altogether.[30] Where the Court waives its power of review completely, it is no longer just a margin that is afforded to public authorities, but substantive interpretive control.[31] The danger here is that, if applied in this way, the margin of appreciation can relegate rights adjudication to domestic relativism. Immune from external review, states can become free to adopt policies that may prescribe a lower level of human rights protection than the Convention would otherwise impose.

This danger is realised in *ABC*. The margin of appreciation is invoked under the guise of protecting moral diversity on the sensitive question of abortion. Yet despite being championed as a means of ensuring respect for ethical diversity, the margin in *ABC* operates as a strategy of evasion for the majority. Though the Court found that there had been a violation of the applicants' right to a private life, it proceeded to afford a wide margin of appreciation to Ireland, practically deferring to Ireland's position. Significantly, this approach is disproportionate on the basis of the Court's own principles regarding the margin of appreciation. Furthermore, it is unsound as a response from the European Court to the violation of reproductive freedom – an issue that is inextricably linked to gender equality. These arguments will be presented in turn.

C. THE DISPROPORTIONATE MARGIN OF APPRECIATION IN *ABC*

The Court's application of the margin of appreciation was disproportionate on two main grounds. Firstly, the width of the margin should have been contracted in accordance with the long-standing methodology of European consensus. Additionally, the impetus behind the Court's dubious legal reasoning is to avoid losing recourse to the margin of appreciation and to maintain its deferential approach on the subject of abortion. Secondly, blanket deference to the status quo is unjustified in abortion cases as, in this case, state regulation on abortion perpetuates inequality. Furthermore, though the Grand Chamber rigorously attempts to disengage itself from the conflict, its strategy of restraint serves to reinforce a gendered system of inequality.

1. A Departure from Long Standing Methodology of the European Court

The Court deemed that a measure of deference was appropriate in *ABC*, owing to "the acute sensitivity of the moral issues raised by the question of abortion."[32] The Court conceded

[30] George Letsas, 'Two Concepts of the Margin of Appreciation', (2006) 4 Oxford Journal of Legal Studies 705, 706.
[31] Spielmann (n 18) 4.
[32] *ABC* (n 3), para 233.

however that, with respect to well-known principles of the Court's jurisprudence, the margin of appreciation is narrower in cases where either an important facet of an individual's identity is at stake, or a consensus among the Council of Europe Member States exists.[33] The first of these contracting mechanisms reflects the fact that, where state policy impacts on an individual's identity, the state may be infringing a person's most intimate, inalienable rights. This paper will first analyse the Court's decision to overlook the relevance of European consensus on providing abortion access to women whose health and wellbeing is at risk. It will then go on to examine the Court's failure to address the impact of abortion restrictions on an individual's identity, in section D.

The existence of "consensus", as used by the Court, refers to the identification of a minimum standard or discernible trend among Council of Europe members on a matter "touching upon a human right."[34] Specifically, the Court looks to the law and practice of European states for a common trend, where a matter or interest is not enumerated in the Convention, or is perceived as being beyond the contemplation of the drafters.[35] Where consensus is established, the Court will generally find that the interest in question is within the scope of the Convention's protection. It is generally used as a basis for the evolution of Convention norms and aids the Court in its goal of ensuring the harmonious enforcement of human rights protection throughout Europe.[36] Accordingly, the existence of a European consensus decisively narrows a state's margin of appreciation in deciding whether or not to protect a certain freedom. In other words, where a respondent state is shown to be out of step with European consensus, the Court will normally find a breach in rights protection.

In *ABC*, the Court went to surprising lengths to avoid such an outcome. The Court confirmed that there was a consensus amongst the majority of European states towards more liberal abortion policies than those that existed in Ireland.[37] For example, it was conceded that the vast majority of the 47 Council of Europe Member States recognise a woman's right to choose to terminate her pregnancy. Specifically, 35 countries permit abortion without restriction as to reason. Five countries limit the availability of abortion to circumstances

[33] ibid, para 232.
[34] *ABC* (n 3), Joint partly Dissenting Opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni, and Poalelungi, para 2.
[35] See generally, Kanstantsin Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' (2011) PL 534.
[36] Spielmann (n 18) 15. See also *ABC* Dissent (n 34) paras 5-6.
[37] *ABC* (n 3), para 235.

where it is necessary for the protection of maternal health and wellbeing.[38] A more restrictive regime than Ireland's exists in just three states, in that it does not explicitly permit abortion on *any* grounds, even where the woman's life is at risk.[39] Thus, the first applicant was entitled to a lawful abortion in 40 of the 47 states, and the second applicant could have obtained an abortion legally in 35 states. This demonstrated that in balancing the health and wellbeing of the mother with the rights of the foetus, the European majority view definitively gave precedence to the former. In short, a European standard exists to afford more value to the health and wellbeing of the mother over the interests of the foetus.

However, the Court held that this consensus towards liberalising abortion laws to encompass protection for a woman's health and wellbeing, did *not* narrow Ireland's margin of appreciation.[40] Instead, the Court held that the task of weighing the mother's rights with the rights of the foetus could not be separated from the question of when life begins – a question on which there was no consensus in Europe, and on which states enjoyed a wide margin (as ruled in *Vo v France).*[41] Accordingly, the Court decided that the margin afforded in respect of the protection of unborn life "necessarily translate[d]" into the margin that states have in balancing the rights of the mother and the unborn.[42]

2. A Margin and Consensus that "do not toe the line"[43]

There are two main problems with this assessment. Firstly, as the dissenting judges pointed out, the majority was wrong to conflate the issues of protection for maternal health and the protection for unborn life.[44] The margin that was afforded in *Vo* concerned the question of whether or not to protect unborn life. That is, the Court held that a margin of appreciation should be allowed to each state to determine whether a foetus has a right to life. Ireland thus had a margin in its determination that the protection of pre-natal life was a vital interest of the country. Yet, Ireland was not deprived of its initial choice to protect the unborn by being required to balance this interest with the competing interests of the rights of the mother.[45] Judge Finlay Geoghegan also recognised that the transfer of the margin on the protection of

[38] Poland, Spain, Portugal, Cyprus, Finland. Centre for Reproductive Rights, *The World's Abortion Laws 2011*, (2011), <http://worldabortionlaws.com/index.html> accessed 8 August 2014.
[39] These states are Andorra, Maltam and San Marino.
[40] *ABC* (n 3), para 236.
[41] *Vo v France*, App no 53924/00 (ECtHR 8 July 2004 as highlighted in *ABC* (n 3), para 237.
[42] ibid.
[43] Paolo Ronchi, 'A, B and C v Ireland: Europe's Roe v Wade Still Has to Wait' (2011) Oxford Student Legal Research Paper Series Paper number 14/2011, 4.
[44] *ABC* Dissent (n 34), para 2.
[45] See also: Sanjivi Krishnan, 'What's the Consensus? The Grand Chamber's Decision on Abortion in A, B and C v Ireland' (2011) 16(1) UHRLR. 2, 4.

unborn life to the margin that states have in balancing the rights of the mother and the unborn was erroneous. The judge noted that, for "the consensus to be relevant, [it] should be a consensus on the balance to be struck between the potentially competing interests of the rights of woman and the unborn."[46] It follows that the Court's reasoning was somewhat circular, in that the majority believed that Ireland's margin of appreciation could not be narrowed by consensus, because of the fact that Ireland already had a margin. As I have highlighted earlier though, the margin of appreciation afforded concerned a different issue.

It is interesting to note that, in *Ireland v UK*,[47] the Court could arguably be said to have conflated the margin of appreciation on the question of whether a threat to the life of the nation existed, with the margin on the question of whether the measures used to address this threat were "strictly required by the exigencies" of the situation.[48] However, in recent times the Court has cast off its reticence in scrutinising the proportionality of derogation measures, as evidenced by the Court's decision in *A & Ors.*[49] In other words, the margin that is afforded to states in deciding that there is a need to protect the life of their nation no longer translates into a margin on whether the resulting derogations are proportionate. In this vein, the margin afforded to Ireland in protecting pre-natal life should not have been reassigned to the question of whether a fair balance had been struck between the rights of the mother and those of the unborn.

The second problem is the motivation behind the first. That is, the Court's justification for affording Ireland a wide margin to the state was premised on the "profound moral views" of the Irish people.[50] As De Londras and Dzehtsiarou describe, the Court ruled that the "internal moral consensus" in Ireland "trumped" European consensus.[51] Thus, the Court justified Ireland's failure to protect the applicants' rights in accordance with European standards, based on the fact that the dominant ideology in Ireland did not agree with the value

[46] *ABC* (n 3), Concurring Opinion of Judge Finlay Geoghegan, para 8.
[47] *Ireland v UK*, App no 5310/71 (18 January 1978).
[48] See Oren Gross & Fionnoula Ní hAoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Court on Human Rights' (2001) 23(III) Human Rights Quarterly B.
[49] *A & Ors v UK*, App no 3455/05 (19 February 2009); see also *Dudgeon v UK*, App no 7525/76 (22 October 1981), para 52 "It is for the national authorities to make the initial assessment of the pressing social need; accordingly, a margin of appreciation is left to them. However, their decision remains subject to review by the Court."
[50] *ABC* (n 3), para 241.
[51] Fiona De Londras & Kanstantsin Dzehtsiarou, 'Grand Chamber of the European Court of Human Rights, A, B and C v Ireland, Decision of 17 December 2010' (2013) 62 ICLQ 2.

of these rights.[52] This reasoning represents "a real and dangerous new departure in the Court's case-law."[53] It departs not only from precedent, but also from the harmonising role of the Court.[54] Strictly speaking, by enabling one country to deviate from the European standard of rights protection on the basis of relative values, the Court compromises its role in maintaining "minimum standards for rights protection."[55] Yet before we consider the consequences of this deviation, it is worth underlining the novelty in this approach.

The dissenting opinion in *ABC* emphasised that this case marks the first time that European consensus was discounted on the basis of moral beliefs.[56] For example, in *Lautsi & Ors v Italy*,[57] which is further discussed elsewhere in this Journal,[58] the presence of religious symbols (crucifixes) in state-run primary schools was challenged as infringing both the requirement of secularism, and the rights of pupils and their parents to entertain different religious beliefs.[59] The Italian Government sought to rely on Italy's "internal consensus", claiming that the presence of crucifixes in schools was a "national particularity" rooted in the nation's Catholic values. However, the Court was clear that its deference to Italy was not based on Italy's internal consensus, but rather on the *absence* of European consensus on the issue, i.e. the lack of European standards on the presence of religious symbols in State schools.[60] As Arai-Takahashi emphasises, *ABC* stands alone as a case in which cultural justifications were considered "sufficiently potent to dilute the *solidly established methodology* of European consensus."[61]

This begs the question: why was the majority in *ABC* willing to depart so significantly from the Court's own authority? Why, when the Court's own principles should have guided it towards upholding a minimum standard of protection for reproductive freedom, did it choose not to? It appears that the Court is "too ready to abandon the notion of consensus where the

[52] It worth noting that the actual existence of an internal consensus on abortion in Ireland is questionable, and is rigorously contested by many commentators (see, to that effect, De Londras and Dzehtsiarou (n 51), 7). However, it must be conceded that the process of fact finding 'is not normally within the province of the European Court' (*Klaas v Germany*, App no 15473/89 (6 September 1978), para 29). In other words, it is not clear what resources the Court has at its disposal that would allow it to definitively discern the lack of a moral consensus in Ireland.
[53] *ABC* Dissent (n 34), para 2.
[54] De Londras and Dzehtsiarou (n 51) 5; Ronchi (n 43) 6-7.
[55] De Londras and Dzehtsiarou (n 51), 1.
[56] *ABC* Dissent (n 34), paras 4-5.
[57] *Lautsi & Ors v Italy*, Application no. 30814/06 (ECtHR 18 March 2011).
[58] See Eugenio Velasco Ibarra's contribution to this issue.
[59] ibid, paras 68-70.
[60] ibid, para 68. Additionally, the internal consensus argument was dismissed in *Tyrer v UK*, App No 5856/72 [(25 April 1978) and *Dudgeon v UK* (n 49).
[61] Yuraka Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR (Intersentia 2001) 27.

issue is too political to be decided by Strasbourg."[62] The disproportionate application of the margin speaks to a judicial desire to avoid a confrontation on an issue that is controversial and sensitive. The Court was determined to avoid contracting Ireland's discretion on abortion policy. These functional concerns in the use of the margin in *ABC* are compounded by the resulting issues raised in respect of gender equality.

D. DEFERENCE AND EQUALITY

Abortion restrictions perpetuate a standard of state protection for human rights that is unequal and gendered. Blanket deference, where the Court gives the ultimate power of assessment to the national authorities, can thereby "open a door of approval"[63] for states which adopt discriminatory abortion laws. Gender equality has been long marked out as one of the fundamental principles of human rights law.[64] The European Court of Human Rights itself has long asserted that the "advancement of the equality of the sexes" is an important goal of the Member States of the Council of Europe.[65] Furthermore, the Court has reiterated that gender equality is one of the "key principles underlying the Convention."[66] Yet there is a stark divergence between such aspirations and the deference shown in *ABC*. In this section, the key link between abortion policies and gender equality will be established. This will underpin my critique of the Court's application of the margin of appreciation in *ABC*, and illustrate how the Court's judgment risks reproducing inequality.

The legal regulation of abortion prescribes the extent to which a pregnant woman's rights can be abridged. The pregnant woman's right to bodily integrity is invariably qualified, as both the state and medical practitioners assume significant control (at times even full control) over her pregnancy. As Rosemey Nisoff outlines, once a woman is pregnant, her rights are shared with the foetus she is supporting, with the state, and with her medical practitioners.[67] Her autonomy is thus reduced, especially where the regulatory framework qualifies abortion, as doctors and legislators become the primary decision makers of whether she can terminate her pregnancy, and in turn deprive her of the opportunity to pursue any

[62] Paolo Ronchi, 'Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in Lautsi v Italy' (2011) 13(3) Ecc LJ 287.
[63] Yorrow (n 16) 193.
[64] Ivana Radacic, 'Gender Equality Jurisprudence of the European Court of Human Rights' (2008) 19(4) EJIL 841.
[65] *Abdulaziz v UK* (n 5), 78.
[66] See *Schuler-Zgraggen v Switzerland*, App no 14518/89 (ECtHR 24 June 1993; *Burghartz v Switzerland*, Application no. 16213/90 (22 February 1994); *Van Raalte v The Netherlands*, App no 20060/92 (21 February 1997); *Sahin v Turkey* (n 5) para 115; *Abdulaziz* (n 5) 78; *Petrovic v Austria*, ECHR 1998-II 3.
[67] See Rosemary Nossiff, 'Gendered Citizenship: Women, Equality, and Abortion Policy' (2007) 29(1) New Political Science 61, 62.

other personally, rather than collectively, valued choices. The Irish example further illustrates that a woman's attempts to access her reproductive rights may be criminalised.

This inequality in the treatment of pregnant women is compounded by the fact that unintended pregnancy disproportionately affects low-income women and minorities[68] – those who already often find themselves victims of social and economic inequities. Abortion is often sought by women in circumstances of poverty, coercion and violence.[69] This is evidenced by the circumstances of the applicants in *ABC* and further highlighted, as the report of the Committee on the Elimination of Discrimination Against Women (CEDAW) shows, by the particular oppression caused by Ireland's abortion laws to asylum seekers and women with limited financial resources.[70] In addition, discrimination is perpetuated on socio-economic grounds when abortion laws force women to travel long distances to access reproductive health services.[71]

Crucially, the policies that qualify a woman's rights once she is pregnant represent a standard of state protection that rests solely on sex-specific grounds. That is, the rights of pregnant women and girls are selectively devalued on the basis of their reproductive capacities. Adult men possessing full legal capacity are not subjected to criminal sanctions for medical procedures that may be necessary for the preservation of any aspect of their health and the state does not refute their autonomy over their health decisions. The healthcare rights of pregnant women and girls are thus afforded a level of protection that is depreciated and gendered. Restrictive abortion polices thereby represent an evident barrier to women's ability to obtain the same level of protection that is afforded to men.

In *ABC*, the Court did not conceal the fact that the respondent state suppresses women's rights through abortion regulation. The balancing exercise that is deployed between a woman's rights and the rights of the foetus overtly recognises that states operate legal policies which curtail a woman's rights. Indeed, Convention protection of human rights is not unlimited, and the balancing of competing rights and freedoms is central to the Court's

[68] 'Abortion' (*Guttmacher Institute 2012*) <http://www.guttmacher.org/sections/abortion.php>, last accessed August 15 2013.
[69] Katy Yanda, 'Reproductive Health and Human Rights' (2003) MSPH, Columbia University, 278.
[70] See also, Report of the Committee on the Elimination of Discrimination Against Women on its Twenty-First Session, U.N. GAOR, 54th Sess., Supp. No. 38, Pt. II, ¶ 180, U.N. Doc. A/ 54/38/Rev.1 (1999) (concluding observations on Ireland).
[71] See Risa Kaufman, 'Securing Poor Women's Equality by Eliminating Reproductive-Based Discrimination', (2001) 24 Harvard Women's LJ 190. This was recognised in the seminal Canadian case of *R v Morgentaler*, [1988] 1 SCR 30, where the Court recognized that restrictive abortion laws law discriminated against disadvantaged women—such as poor, young, and rural women—many of whom were unable to access abortion services.

function.[72] Yet the Court's approach to abortion policies fails to address the discriminatory nature of this abridgment of women's rights and there is no mention at all of the inequality created by restrictive abortion laws in the judgment. Rather, the Court responds to the violation of the rights of applicants A and B with a sweeping deference to the status quo. In this way, the Court's application of the margin of appreciation in *ABC* serves to reinforce the structural, and gendered, inequality of abortion restrictions in Ireland. Three examples of the Court's approach in *ABC* attest to this and serve to significantly undermine the Court's endorsement of the principle of gender equality.

Firstly, the Court's policy of deference results in the Court reproducing an unequal standard of rights protection. The Court fails to appreciate the significance of reproductive freedom to women's identity and autonomy and therefore devalues the applicants' Article 8 rights. Secondly, the Court overlooks the gendered nature of the unequal protection of women's rights by treating abortion as an isolated issue of domestic morality. Thirdly, in determining whether the restrictions imposed on women's rights are "necessary in a democratic society", the Court endorses a discriminatory state policy that requires women to travel abroad to access their rights. In short, the Court fails to scrutinise the gendered nature of the abortion restrictions and thus sanctions a gendered hierarchy of rights protection.

1. The Unequal Protection of Rights

a) The devaluation of the applicants' Article 8 rights

The majority in *ABC* echoed the Court's previous jurisprudence, such that the regulation of pregnancy came within the sphere of "private life" as protected by Article 8 of the European Convention. The Court proceeded to outline that Article 8's protection included !the right to personal autonomy and personal development" (which are viewed as aspects of an individual's "physical and social identity"[73]) as well as the right to "physical and psychological integrity".[74] As Ronchi highlights, this rhetoric bears a striking resemblance to the reasoning of Blackmun J in the seminal US abortion case, *Roe v Wade.*[75] However, while *Roe* guaranteed abortion rights to women in the US, *ABC* declared that "Article 8 could not be interpreted as conferring a right to an abortion."[76] Though the judiciary at both sides of the Atlantic agreed that abortion restrictions impacted upon women's rights, the conclusions

[72] Arai-Takahashi (n 61) 6.
[73] See *Tysiac* (n 10), para 107; *Pretty v UK* (2002) 35 EHRR 1, para 61.
[74] *ABC* (n 3), para 212.
[75] See Ronchi (n 44) 4, commenting on Blackmun J's decision in *Roe v Wade*, paras 152–53.
[76] *ABC* (n 3), para 214.

reached in the respective courts diverged significantly. The European Court's use of the margin of appreciation facilitated this finding.

As mentioned above, the majority in *ABC* stated that where a "particularly important facet of an individual existence or identity is at stake"[77] the margin of appreciation afforded to a state will be narrowed, yet the Court in *ABC* was not inclined to restrict national discretion on abortion. Thus, in order to ensure that Ireland's latitude of deference on the abortion question is not curtailed, the Grand Chamber curtails the breadth of the applicants' Article 8 rights and in particular the protection of their "physical and social identity". The Court does this in two ways.

First, the Court attempts to divert attention away from the fact that abortion restrictions are a matter of human rights. By merging the margin of appreciation that Ireland had on the question of when life begins with the margin of appreciation on abortion, the Court shifts the attention away from the impairment caused to the applicants' Article 8 rights.[78] Instead, the meta-legal question of "when does life begin" becomes the pivot around which the Court's assessment revolves. In this way, the Court avoids having to determine if the primacy afforded to the protection of foetal life over the rights of the mother breaches Convention standards, as there exists no Convention standard on the question of when life begins. The applicants' claims to bodily integrity, autonomy and identity are thus subsumed by a discourse on the beginning of life[79] and are afforded scant review in the majority opinion.

Secondly, in treating abortion as, primarily, an issue of domestic morality, the critical importance of reproductive control to a woman's identity is overlooked. This is crucial as policies that encroach upon an individual's identity demand strict scrutiny under the Convention. Beyond the biological event that substantially defines one's physical identity, pregnancy holds implications for every aspect of a woman's social identity – her relationships, her self-understanding, her education, her career, her economic status, and, more broadly, her ability to live the life she chooses.[80] It should be recognised also that the impact on identity is not abstract or individualistic. The decision to have an abortion is a "concrete decision about intimate relations and family composition"[81] and the pregnant woman's relational identity is deeply implicated in the reproductive decision. However, the

[77] ibid, para 232.
[78] See also *ABC* Dissent (n 34), para 7.
[79] See *ABC* (n 3), paras 236-237.
[80] See also Joshua Cohen, *Public and Private in Social Life*, (Croom Helm, 1983) 160.
[81] Carol Sanger 'About Abortion: The Complications of the category' (2012) 54 Ariz L Rev 849, 859.

Court in *ABC* does not discuss the consequences for the women on whom unwanted pregnancy is imposed. Instead, the Court defers to the state priority of the protection of domestic values. As Alison Jaggar underlines, it is both counterfactual and biased to treat abortion as a "self contained issue of morality"[82]. Rather, abortion must be examined from the point of view of women's real life experiences and the impact of pregnancy on their identity. Yet the Court in *ABC* fails to acknowledge the significance of reproductive freedom to women's identity and thus prevents the recognition of the applicants' Article 8 rights.

Though the Court fails to adequately engage with Article 8 rights in *ABC*, it can be observed that it has previously found in favour of applicants who have sought to protect their abortion rights under the right to private life. Crucially however, these have been existing rights and the Court has never expanded beyond the level of reproductive freedom afforded by national authorities. As mentioned above, the Court found in favour of the third applicant in *ABC*,[83] but was adamant that applicant C did not seek a right to an abortion beyond what had already been provided for under domestic law[84] (albeit that this right was unclear and ambiguous). In *Tysiac v Poland*, a Polish woman sought an abortion as her pregnancy threatened to eradicate her sight but she was refused despite the fact that Polish law allows for terminations where pregnancy endangers maternal health. The Court found a breach of the Convention Article 8 on the basis that Poland had failed to safeguard the applicant's ability to determine her qualification for a therapeutic abortion. Yet the Court purposely distanced itself from the substantive claim of a violation of the applicant's reproductive freedom. As Nicollette Prialxu argues, the Court did not make clear that the deprivation of a lawful abortion was unjust.[85] The Court will uphold Article 8 claims only when they encroach on procedural aspects of the right rather than on the crux of self-determination or autonomy in reproductive decisions.[86] Moreover, in *Tysiac*, the Court relied on the fact that, on paper, Poland provided for abortion in limited circumstances to conclude that there was no need to examine the broader significance of the case or if any alleged "right to have an abortion" had been infringed.[87]

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[82] Alison Jaggar, 'Abortion Rights and Gender Justice Worldwide: an Essay in Political Philosophy' in Michael Tooley and others (eds), *Abortion: Three Perspectives*, (OUP 2009) 130.
[83] *ABC* (n 3) para 163..
[84] *ABC* (n 3), para 230.
[85] Nicolette Prialxu, 'Testing the Margin of Appreciation: Therapeutic Abortion, Reproductive 'Rights' and the Intriguing case of Tysiac v Poland' (2009) 15(4) European Journal of Health Law 361.
[86] See also Elizabeth Wicks, 'A,B,C v Ireland: Abortion Law under the European Convention on Human Rights' (2011) 11(3) HRLR 556.
[87] *Tysiac* (n 10) para 104.

Furthermore, in a set of particularly disturbing facts in *P and S v Poland*,[88] the state was found to have violated the right to private life of a 14-year-old victim of rape, owing to the exceptional difficulties she encountered in accessing an abortion, which she was entitled to under Polish law. Yet it must be emphasised that, while the Court upheld the applicant's Article 8 rights, it did not liberalise Poland's abortion laws. In fact, the Court reiterated a deferential approach such that the "examination of national legal solutions was of particular importance for [its] assessment" of the applicant's complaint and then confined this assessment to the positive obligations that the state was already under.[89]

b) The failure to engage Article 3

All three applicants in *ABC* challenged Ireland's restrictive abortion regime under Article 3, namely on the ground that the impact of the restrictions on abortion and of travelling for an abortion abroad amounted to inhuman or degrading treatment.[90] The Court regarded this complaint as "manifestly ill-founded"[91] and quickly dispatched the evidence before it. While the majority did recognise that women endure "significant psychological burdens" in being required to leave their home country to seek medical treatment prohibited there, they ruled that this did not reach the threshold of Article 3.[92]

This dismissal was an unsound outcome. It can be argued that the Court's refusal to recognise the Article 3 violations in the context of abortion is motivated by the absolute nature of the right in question and the limited opportunity of invoking the margin of appreciation in this regard. The Court has defined "degrading treatment" as that which is said to "arouse in its victims feelings of fear, anguish and inferiority, capable of humiliating and debasing them."[93] In the case of *ABC*, substantial evidence was provided to demonstrate that the severity of Irish law and the resulting and pervasive stigma of abortion were an affront to women's dignity.[94] Irish women who seek abortions are given three choices by the state:

(i) they must overcome the trauma, taboo and financial difficulties of travelling abroad to do something which is illegal in their own country;

(ii) they must seek unsafe back-street abortions for which they may be imprisoned; or

[88] *P and S v Poland* App no 57375/08 (ECtHR 30 October 2012).
[89] ibid paras 97-98.
[90] *ABC* (n 3), para 160.
[91] *ABC* (n 3), para 165.
[92] *ABC* (n 3), paras 239-241.
[93] *Ireland v UK* (n 47), para 167.
[94] *ABC* (n 3), submission from Doctors for Choice, paras 120-131.

(iii) they must maintain their pregnancies – even where this places their health and wellbeing at risk.

Debasing feelings of fear, anguish and inferiority are consistent outcomes for each course of action.

Restrictive abortion laws further impact on dignity, as they perpetuate a pervasive stigma. This in turn threatens respect for the equal worth of all individuals.[95] The principal mechanism by which stigmatisation violates dignity is the corrosion of individual self-respect and self-worth.[96] It also includes a loss in social hierarchy and is multidimensional, so that it has socio-political effects. The stigma created by restrictive abortion laws induces a "chilling" climate of fear and shame that impacts on both those who seek abortion services and those who carry out the procedure.[97] Women may be penalised for seeking access to necessary healthcare, which can cause deep humiliation, fear and even violence. Thus, the need to seek illegal health services and the intense stigmatisation of both the abortion procedure and the women who seek such procedures can have deleterious effects on women's mental health. In addition, as the United Nations Special Rapporteur concluded in 2011, restrictive abortion laws produce a chilling effect, which may prevent healthcare workers from seeking training and information on abortion.[98] Healthcare workers who choose to perform abortions under these circumstances may accordingly be uninformed and untrained on appropriate abortion procedure and post-abortion care, reducing the quality and availability of legal abortions. Furthermore, the criminalisation of abortion creates a vicious cycle; as the United Nations Special Rapporteur investigated "...the stigma resulting from procuring an illegal abortion perpetuates the notion that abortion is an immoral practice, which then reinforces the continued criminalization of the practice." [99]

Even for women who can afford to travel and who can navigate the logistics of obtaining an abortion abroad, the emotional burdens involved are profound.[100] In *ABC*, all

[95] Sandra Fredman, *Discrimination Law* (OUP 2011), 27.
[96] Paul Quinn, 'Self respect—A "Rawlsian Primary Good" unprotected by the European Convention on Human Rights and its lack of a coherent approach to stigmatization?' (2013) 14 International Journal of Discrimination and the Law 19, 21.
[97] Human Rights Watch, 'A State of Isolation' (2013) Submission to the Irish Human Rights Commission <www.hrw.org/print/reports/2010/01/28/state-isolation>, 24.
[98] Special Rapporteur of the Human Rights Council on Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Interim Report* 11 35 (2011), transmitted by Note of the Secretary-General, U.N. Doc. A/66/254 (3 Aug. 2011) (Anand Grover), <http://www.acpd.ca/wp-content/uploads/2012/08/SR-Right-to-Health-Criminalization-of-SRHR-2011.pdf> accessed 9 August 2014.
[99] ibid.
[100] See for example Irish Family Planning Association, 'Psychological, Physical and Financial Costs of Abortion' <http://www.ifpa.ie/node/506> accessed 27 August 2013, in which one women outlined the degrading impact of having to travel abroad for an abortion: "Having to lie to everyone, the lies and the shame

applicants described the stigma and fear they felt in going abroad to do something that was a criminal offence in their own country. This was compounded upon return in seeking post-abortion care.

Additionally, the Court's jurisprudence has demonstrated that Article 3 may be breached by reason of the failure to provide appropriate medical treatment (see *Ilhan v Turkey).*[101] As Judge Lopez Guerra points out in his concurring judgment, the majority in *ABC* does not make reference to the degree of gravity of the real or perceived dangers to the applicants' health or wellbeing in their individual cases.[102] There may well be cases where the risk to the health of a pregnant woman, as opposed to her life, is such that travelling overseas may not be an option. While the health dangers of the applicants in *ABC* were not such as to impede travel outright, significant evidence was submitted to the Court of the ill-treatment that may be suffered due to Irish law. For example, Doctors for Choice highlighted how women in Ireland face inevitable delays in abortions abroad, de facto exclusion from early non-invasive medical abortion, and are regularly left to seek 'backstreet' and illegal abortions.[103] Vital post-abortion medical care and counselling in Ireland are only arbitrarily available, as Irish doctors receive no training in post-abortion care. Furthermore, the Doctors for Choice group outlined how the stigma and fear imposed by the Irish abortion regime discourages women from seeking care. [104]

International human rights standards would support this assessment, i.e. that a failure to provide necessary healthcare in the context of abortion may reach the level of ill-treatment under Article 3. In *KL v Peru*,[105] a young woman sought an abortion where she had been told that the foetus she was carrying had developed a severe abnormality that was likely to be fatal. She was refused an abortion under Peruvian law and she subsequently gave birth to a visibly deformed child who died after 4 days. The experience caused her to suffer severe depression. The UN Human Rights Committee ruled that in refusing an abortion and causing her foreseeable severe mental suffering, Peru had violated Article 7 of the ICCPR (prohibition on inhuman and degrading treatment.) Sanjivi Krishnan argues that this implies

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make you feel like you're doing something really wrong, like a drug dealer. The travel part is so difficult. I don't think people know this…It is still so traumatic even if you can afford it.".

[101] *Ilhan v Turkey* App no 22277/93 (27 June 2000).

[102] *ABC* (n 3), Concurring Opinion, Judge Lopez Guerra, paras 4-5.

[103] *ABC* (n 3), Doctors for Choice para 120.

[104] ibid.

[105] *KL v Peru*, Communication 1153/2003; views adopted on October 24, 2005.

that Article 7 itself includes state responsibility to provide access to abortion where a woman's health is put at risk.[106]

In *ABC*, substantial evidence was espoused to demonstrate that Ireland has failed in its positive obligations to protect women from degrading treatment. Yet crucially, from the Court's point of view, a determination that Article 3 applied would be legally and symbolically a "nuclear option". In other words, if an Article 3 violation had been recognised, the Court would not have been able to use the margin of appreciation and no room would exist for national deference.[107]

It is significant that the reluctance to engage Article 3 is also evident in the case of *Tysiac v Poland*. As noted earlier, in *Tysiac* the applicant was forced to continue with a pregnancy knowing she would be blind by the end of it. Yet this could not be understood as creating "feelings of fear, anguish and inferiority capable of humiliating and debasing" for a young woman who already had 4 young children to care for.[108] Though in *P and S v Poland*, the Court found a violation of Article 3, this was not due to the state's regulation on abortion, but to issues surrounding how the authorities had treated the applicant and her family.[109] *RR v Poland*[110] is the only other reproductive freedom case where the Court found a violation of Article 3. There, a woman was deliberately refused genetic tests during her pregnancy by pro-life doctors until the time limit for an abortion had passed. The Court agreed that the woman had suffered degrading treatment, having been forced to endure "weeks of painful uncertainty concerning the health of the foetus, her own and her family's future and the prospect of raising a child suffering from an incurable ailment."[111] While this insightful reasoning is to be welcomed, it is relevant that genetic testing was not prohibited in Poland and that the doctors were acting on their own beliefs. The ruling of the European Court thus did not require a liberalisation of Polish abortion law per se. Yet in *ABC*, a finding of degrading treatment would certainly have imposed significant obligations on the Irish state to expand access to abortion within its borders. The Court's reticence to probe this acute sensitivity however proves unrelenting in *ABC*, where recourse to the margin of appreciation prevents the Court

[106] Sanjivi Krishnan, 'What's the consensus: The Grand Chamber's decision on abortion in A, B and C v Ireland' (2012) 22 EHRLR 2; see also Christina Zampas and Jaime M Gher, 'Abortion as a Human Right' (2008) 8 HRLR 249, 270.
[107] For the non-applicability of the doctrine to Article 3 see Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights* (Martinus Nijhoff Publishers, 1998), 86.
[108] *Tysiac* (n 10), para 66.
[109] *P and S v Poland* (n 88), paras 157-169.
[110] *RR v Poland*, App no 27617/04 (26 May 2011).
[111] ibid.

from recognising the inhuman and degrading treatment experienced by women who are denied access to an abortion.

2. The Dismissal of Gender

By focusing purely on abortion as a matter of morality, the Court disregards the discriminatory impact of abortion. As Blanca Rodriguez-Ruiz demonstrates, the gender dimension of abortion restrictions is eclipsed by *metalegal* and *metaphysica*l arguments.[112] As noted earlier, regardless of a person's stance on abortion, it cannot be contested that abortion restrictions result in a different level of state protection for women; a differentiation that is justified on the basis of a biological trait. Yet what this means for women's rights or access to equality is subsumed in arguments based on biology, morality and politics.[113] The misplaced emphasis on the question of when life begins enables the Court to overlook the discriminatory nature of Ireland's abortion policies. As Shapiro outlines, the legitimacy of abortion policy should not be determined by considerations as imponderable as the beginning of life, but by whether a domestic policy places a disproportionate burden on an active citizen's rights.[114] In *ABC* however, the Court fails to adequately scrutinise the impact of Ireland's abortion policy on women's lives. Nonetheless, it is not sufficient for a human rights court to accept the inequities women endure as an unfortunate incident of domestic regulation. The Court's goal of gender equality becomes meaningless if it does not protect against a gendered system of rights protection within contracting states. However, in *ABC* the Court not only ignored the impact of abortion policies on women's rights, but it went as far as to endorse a policy of sending women abroad to access their human rights.

3. Overt Endorsement of Discrimination – Sending Women Abroad to Access Human Rights

Though the Court was adamant that the Irish Government was to benefit from a wide power of appreciation, it was necessary to examine whether the interference with the applicants' rights was "necessary in a democratic society". This involved an assessment of whether denying women access to abortion – even where maternal health and wellbeing are under

[112] Blanca Rodriguez-Ruiz, 'Gender in constitutional discourses on abortion: Looking at Spain from a comparative perspective', (UCC Law Conference *Reforming Abortion Law: A Comparative Perspective*, Cork, March 2013) <http://www.ucc.ie/en/lawsite/eventsandnews/video/> accessed 9 August 2014.
[113] ibid.
[114] Ian Shapiro, *The State of Democratic Theory* (Princeton University Press 2009) 70-73, commenting on *Planned Parenthood v Casey* 505 US 833 (1992).

threat – is proportionate to the aim of protecting Irish morals.[115] As I have explained above, the Court conflated the margin that was to be applied to this balancing act with that which Ireland possessed in determining whether to protect unborn life. This misplaced margin of appreciation resulted in the Court condoning the Irish solution of sending women abroad to access their human rights.

The Court reasoned that the prohibition on abortion for health and wellbeing reasons did not exceed the margin of appreciation, on the basis that the Thirteenth Amendment to the Irish Constitution removes any legal impediment to adult women travelling abroad for an abortion.[116] The "option"[117] of travelling to another state to access their reproductive autonomy was judged to satisfy Convention requirements. This article contends that the inclusion of the availability of travel as part of the calculation of proportionality is unjustifiable for two reasons. Firstly, it absolves Ireland from its binding responsibility under the Convention to protect the rights and freedoms of all persons within its jurisdiction.[118] Secondly, requiring women to go abroad to have their rights respected results in severe inequalities.

It is contrary to the Convention's most explicit aim, that of "securing the universal and effective recognition and observance of rights",[119] to absolve a state of their human rights responsibilities on the basis that that state does not stop people from travelling to other countries, where their rights will be ultimately recognised. As noted by the Centre for Reproductive Rights, it is a well-known principle of international human rights law that a state's fulfilment of its human rights obligations is judged on the basis of that state's performance alone.[120] Yet in *ABC*, the Court elevates this long-standing British 'solution' to an Irish problem to the satisfaction of human rights.

It is imperative that the Court avoid endorsing such policies. There exists no impediment in Ireland to men obtaining any medical intervention to protect their health and quality of life. Yet if a woman requires an abortion in order to protect her health and wellbeing, she will not be secured this protection in her state. Instead, the state's response is that she must risk her health further, and get on a boat or a plane to access the medical care

[115] *ABC* (n 3), para 229.
[116] ibid, para 239.
[117] ibid.
[118] Article 1 of the European Convention on Human Rights reads that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms … of this Convention."
[119] Preamble, European Convention on Human Rights.
[120] 'Centre for Reproductive Rights Fact Sheet' (Centre For Reproductive Rights 2013) <http://reproductiverights.org/en/resources/publications/fact-sheets> accessed 17 August 2013.

she needs. The judgment suggests that it is within a state's margin of appreciation to treat its citizens unequally on a moral basis. This is compounded by the fact that travelling overseas may not be an option for many, a consideration wholly absent from the Court's opinion. For unemployed women or women earning low wages, the freedom to travel is illusory. In 2013, Human Rights Watch identified the cost of an early medical abortion in the UK at £535 (€670) and £800 (€1000) for an abortion preformed in late gestation.[121] These sums are not inclusive of other costs that are likely to be incurred, such as travel and accommodation, childcare, loss of income and the costs of a travelling companion. Human Rights Watch outline that the total cost of an abortion could exceed an individual's monthly salary.[122] For many women, this barrier will be insurmountable.[123]

Additionally, for refugee women in Ireland, the constitutional freedom to travel does not exist. Lacking the time and money to obtain passports, they must apply to the Department of Justice for travel documents to leave the country. The Department has no policy to address these situations and therefore decides on an ad hoc basis. Secondly, the cost of obtaining an abortion abroad is likely to be out of reach, as asylum seekers do not have the right to work in Ireland. Instead they are in receipt of "direct provision" from the Irish Government, which amounts to €19.10 a week.[124] An additional cost may be incurred, as it is necessary for all non-EU nationals in Ireland to apply and pay for visas to enter the UK, or Schengen visas to enter into a European Union (EU) country. The position of women under 18 is equally difficult. In 2007, a 17-year-old girl in the care of the state and carrying a foetus with a fatal abnormality was forced to initiate proceedings in the High Court in order to claim her right to travel for an abortion.[125] In light of the tangible barriers to travel, it would seem inappropriate to suggest that an 'option' of travel can negate a breach of the Convention.

Sheelagh McGuinness highlights that the Grand Chamber has since followed the *ABC* approach of including the availability of cross-border treatment in its assessment of proportionality.[126] In *SH & Ors v Austria*[127] the Court opined that Austria provided adequate respect for the applicants' right to privacy as the State did not prohibit people from travelling

[121] Human Rights Watch (n 97), 24.
[122] ibid.
[123] For example, the minimum wage in Ireland is €8.65 an hour and a gross average monthly salary amounts to circa €1245. Once taxes and charges are imposed, the medical and travel costs of obtaining an abortion may therefore well exceed an individual's monthly pay.
[124] Irish Reception and Integration Agency, 'Direct Provision FAQs' <http://www.ria.gov.ie/en/RIA/Pages/Direct_Provision_FAQs> accessed 9 August 2014.
[125] *A & B v Eastern Health Board & C* [1997] IEHC 176, [1998] 1 IR 464.
[126] Sheelagh McGuinness, 'Health, Human Rights And The Regulation Of Reproductive Technologies In SH and Others v Austria' (2013) Medical Law Review 146, 155.
[127] *SH & Ors v Austria*, App no 57813/00 (ECtHR 3 November 2011).

abroad to avail of assisted procreation techniques that are proscribed in Austria. However, it was also relevant that, upon return, Austrian law would respect the wishes of the parents regarding paternity and maternity.[128] This 'tolerance' – a principle that has been marked out as critical to the assessment of whether a restriction on a right is "necessary in a democratic society"[129] – cannot be said to be present in *ABC*. As detailed, Irish women who travel abroad for abortions face an unrelenting stigma upon return. Additionally, the availability of post-abortion care is limited.

E. CONCLUSION

Marie Dembour has remarked: "[w]hen it comes to illustrating the way in which human rights law at Strasburg fails to address women's predicament in a male-dominant society, abortion is an excellent case in point."[130] *A, B & C v Ireland* is the case that validates her condemnation of the European Court of Human Rights. Demarcated as unequal citizens, the women in *ABC* turned to the judicial process to vindicate their rights and seek equal protection. Some argue that the Court is not there to perform miracles on behalf of reluctant legislatures.[131] This claim may be particularly applicable to an international court which oversees a system of rights protection dependent on the subsidiary protection of contracting states. Crucially, however, in *ABC* the European Court represented an institution that was both legitimate and institutionally competent to address the violation of women's reproductive freedom. In the first instance, it has been shown the Court had the competence to define the minimum standard of protection for women's reproductive freedom owing to the presence of European consensus. Secondly, by the Court's own admission, the principle of gender equality underpins both the European Convention and human rights. The Court was thus mandated to scrutinise the regulations that afford an unequal standard of protection to women's rights and that place access to equality beyond the reach of many women. However, through its reliance on the margin of appreciation, the majority in *ABC* bypasses the violations and inequality before it. In doing so, the Court shrinks from its obligations as an international human rights adjudicator. That is, by departing from its established methodology and acquiescing to the position of the national authorities, the Court eludes its

[128] ibid, para 40.
[129] See *Dudgeon v UK* (n 49), para 53.
[130] Marie Dembour, *Who Believes in Human Rights?: Reflections on the European Convention* (CUP 2006) 206.
[131] Conor Gearty, 'The European Court of Human Rights and the Protection of Civil Liberties: an Overview' (1993) 52 Cambridge Law Journal 113.

role in determining the minimum standards of the Convention, and fails to safeguard against a gendered hierarchy of rights protection.

This article has shown that the application of the margin of appreciation in the majority decision of *A, B & C v Ireland* is disproportionate on two main grounds. Firstly, although there exists clear consensus throughout the Council of Europe regarding situations where the rights of the mother should outweigh those of the foetus (i.e. risk to health, wellbeing), the Court deemed this inapplicable. Instead, the Court endorses Irish exceptionalism on abortion as an "internal consensus" that can prevail upon European standards. Secondly, the Court's reliance on the margin of appreciation to defer to the national authorities results in the Court backtracking on foundational principles of its human rights jurisprudence. This paper outlined that abortion cases demand a heightened standard of judicial scrutiny in order to accord equal value to women's lives and their rights. By contrast, the European Court defers to the status quo, fails to address the feelings of debasement, as well as the discrimination caused by Ireland's abortion regime and, thus, ultimately devalues women's rights. While the Court attempts to portray the margin as a means of respecting domestic morals and cultural values, this disguise is thinly veiled. The margin of appreciation is applied as a tool of evasion, yet these judicial politics amount to a disproportionate response to the violation of women's reproductive freedom in *ABC*.