



# Social rights under article 2(1) of the Protocol on Ireland and Northern Ireland

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## ABSTRACT

The impact of Brexit upon the protection of social rights has received comparatively little attention, both in the public media and the academic literature. Social progress achieved on the island of Ireland since the conclusion of the Good Friday/Belfast Agreement can be seen as a product of that Agreement and Irish and British European Union (EU) membership – the former has generated the stability necessary for citizens to enjoy the opportunities and protection afforded by the latter. Brexit has put this social progress at risk and has already led to rights backsliding in social contexts. However, the mechanism created by the Protocol on Ireland and Northern Ireland to address diminutions of rights flowing from Brexit – article 2(1) – is not, we contend, suitable for preventing diminutions in social rights. We demonstrate in this article that the test for breach of article 2(1) focuses on specific breaches of individual rights and therefore does not cover situations in which regression in rights protection cannot be tied empirically to individual circumstances. The enjoyment of social rights on the island of Ireland is often facilitated by horizontally applicable EU law, and changes in levels of protection of social rights are often best observed at the population level over time. Using several case studies, we demonstrate how social rights backsliding on the island of Ireland that is attributable wholly or mainly to Brexit likely cannot be litigated through the application of article 2(1) of the Protocol, and we reflect upon the inadequacy of this situation.

**Keywords:** Good Friday Agreement; Ireland; Northern Ireland; Protocol; article 2(1); social rights; health; housing; education; children's rights.

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## INTRODUCTION

Politicians who advocated for Brexit almost unanimously proclaimed that the 1998 Good Friday Agreement/Belfast Agreement (henceforth the Agreement) was sacred ground. No politician wanted to suggest that the exit of the United Kingdom (UK) from the European Union (EU) should or could be allowed to damage the shared peace on the island of Ireland. Numerous declarations assured us that the Brexit process would preserve and protect the Agreement in its entirety.<sup>1</sup>

It is now clear that these assurances were given without full consideration for the true extent of Brexit's impact upon daily life on the island of Ireland, and especially in the border communities that were always going to be impacted the most. The problems caused for trade in food and medicines, for identity, and constitutional status, amongst other things, have all received a great deal of attention and continue to do so.<sup>2</sup> Other problems caused by Brexit, not resolved by the various international agreements between the UK and the EU that followed the UK's departure from the EU, have not received comparable attention. This article focuses on one such issue: the impact that Brexit continues to have upon the enjoyment of social rights on the island of Ireland, and on the role of the Protocol on Ireland and Northern Ireland (hereafter the Protocol)<sup>3</sup> in protecting those rights.

The Agreement led to the removal of infrastructure and checks at the border between Ireland and Northern Ireland. Since its creation, and despite both Ireland and the UK being in the EU single market from 1973, the border had served to 'cage' communities in Northern

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1 See, for example, Council of the European Union, Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, XT 21016/17 ADD 1 REV 2, Brussels, 22 May 2017; UK Government, Northern Ireland and Ireland: Position Paper (London 16 August 2017); UK Government Prime Minister's letter to Donald Tusk triggering article 50 (London 29 March 2017); UK Government, The United Kingdom's exit from and new partnership with the European Union, CM 9417, 2 February 2017; see also G Parker, 'Major and Blair warn Brexit could harm peace in Northern Ireland' *Financial Times* (London 9 June 2016).

2 For example: J Webber, 'Northern Irish farmers face supply chain risks over Brexit deal warn Lords' *Financial Times* (London 30 April 2024); P Inman, 'Brexit food trade barriers have cost UK households £7bn, report finds' *The Guardian* (London 24 May 2023); D Davidson, 'For Northern Ireland, Brexit borders are more about identity than markets' (*Global Council* 5 February 2021); A Kramer, 'Brexit, Northern Ireland, and Devolution' (*Centre on Constitutional Change* 1 October 2018).

3 The formal title for the Protocol is now the Windsor Framework. However, for readability, we refer to the Protocol.

Ireland in particular, especially disadvantaged ones,<sup>4</sup> and had a deeply negative impact upon the community through which it passed.<sup>5</sup> The achievement of the Agreement in making the border freely passable for individuals has not resolved the multitude of detriments that resulted from the political division of an island with complex social, economic, cultural and religious structures.<sup>6</sup> However, the Agreement was largely successful in ending the violence that had pervaded daily life in Northern Ireland. This relative stability has enabled a greater level of cross-border social cooperation to emerge, with some beneficial effects for social rights. EU law and policy contributed significantly to making this cooperation a reality, providing a framework to facilitate social cooperation<sup>7</sup> and practical resourcing.<sup>8</sup> Taken together, the Agreement and EU law may therefore be seen as beginning the process of healing the depleted social capital of the island of Ireland:<sup>9</sup> the

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- 4 L O'Dowd and C McCall, 'The significance of the cross-border dimension for promoting peace and reconciliation' IBIS Working Paper 55 (University College Dublin, Institute for British–Irish Studies 2006).
- 5 C Nash and B Reid, 'Border crossings: new approaches to the Irish border' (2010) 18(3) *Irish Studies Review* 265.
- 6 A Hall, 'Incomplete peace and social stagnation: shortcomings of the Good Friday Agreement' (2018) 4(2) *Open Library of Humanities* 1.
- 7 D Schiek, 'Legal frames for socio-economic cooperation on the island of Ireland: incrementalising approximation through using the "Protocol"?' (2021) 16 *Journal of Cross Border Studies in Ireland* 215.
- 8 For example, the *Peace IV* and *Peace Plus* programmes, funded by the European Regional Development Fund. See Regulation (EU) No 1299/2013 of the European Parliament and of the Council of 17 December 2013 on specific provisions for the support from the European Regional Development Fund to the European territorial cooperation goal OJ 2013 L 347/259; Regulation (EU) 2019/491 of the European Parliament and of the Council of 25 March 2019 in order to allow for the continuation of the territorial cooperation programmes PEACE IV (Ireland-United Kingdom) and United Kingdom-Ireland (Ireland-Northern Ireland-Scotland) in the context of the withdrawal of the United Kingdom from the Union OJ 2019 L 85I /1; Regulation (EU) 2021/1059 of the European Parliament and of the Council of 24 June 2021 on specific provisions for the European territorial cooperation goal (Interreg) supported by the European Regional Development Fund and external financing instruments OJ 2021 L 231/94.
- 9 There is some literature that discusses the accumulation or deterioration of social capital in Northern Ireland and the border region: D Morrow, 'Sustainability in a divided society: applying social capital theory to Northern Ireland' (2006) 2(1) *Shared Space* 63; C McCall and A Williamson, 'Fledgling social partnership in the Irish border region: European Union "community initiatives" and the voluntary sector' (2000) 28(3) *Policy and Politics* 397; A Campbell et al, 'Social capital as a mechanism for building a sustainable society in Northern Ireland' (2008) 45(1) *Community Development Journal* 22.

former by providing the stability for citizens to enjoy the opportunities or protections generated by the latter.<sup>10</sup>

Such social progress as has been achieved is put at risk by Brexit. Withdrawal from the EU means the withdrawal of the legal framework that has facilitated social opportunities and protections. This article considers whether these changes to a process of *social progress through collaboration* potentially violate the *social rights* enshrined in the Agreement, and covered by article 2(1) of the Protocol. The article proceeds in two parts. First, it will establish that social rights are part of the Agreement as an integral part of the peace-building process, and that article 2(1) should apply to the withdrawal of the structure provided by EU law for the enjoyment of those rights. Second, it will illustrate, using selected case studies, that the test for breach of article 2(1) was not designed with social rights backsliding in mind. The consequence is that, in practice, it may be tricky to rely on article 2(1) to protect against the various ways in which Brexit is compromising the enjoyment of social rights on the island of Ireland.

### **THE RELATIONSHIPS BETWEEN SOCIAL RIGHTS, THE AGREEMENT AND EU LAW**

Literature and jurisprudence suggest three important facets of social rights, each connecting to questions of their enforceability.<sup>11</sup> First, social rights are not superficial or secondary rights: they are concerned with the very foundations of human well-being, human capacity or flourishing,<sup>12</sup> equality of opportunity, and social

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10 'For Peace and Prosperity: The Economic and Social Benefits of the Belfast/Good Friday Agreement' (IBEC 2023).

11 For an early discussion see, for example, E W Vierdag, 'The legal nature of the rights granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 *Netherlands Yearbook of International Law* 69–105. This section of the article draws on T Hervey, *Brexit, Health and its Potential Impact on Article 2 of the Ireland/Northern Ireland Protocol* (Northern Ireland Human Rights Commission March 2022).

12 See, for example, P O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012); K Young, *Constituting Economic and Social Rights* (Oxford University Press 2012); A Sen, 'Why and how is health a human right' 372 (2008) *The Lancet* 2010.

justice.<sup>13</sup> Social rights connect with human dignity, and with full participation in society, including exercise of democratic rights. Human rights are ‘indivisible’ in that ‘civil and political’ rights are intertwined with ‘economic, social and cultural rights’: all must be protected within a democratic society.

Second, respect for social rights means both a minimal level of social protection and non-discriminatory access to social benefits. Minimal levels of rights protection are often contested in international and domestic human rights law. For example, the substantive content of a ‘right to health’ is typically understood as including both the social determinants of health and the right to healthcare: to access at least a minimum core of healthcare services, and the medicines, medical devices, equipment, consumables, and human blood, organs, tissues or cells associated with the relevant medical treatment, provided by reference to patient safety and dignity.<sup>14</sup> Healthcare systems and services are themselves social determinants of health.<sup>15</sup> But the right to health does not mean that a state has a duty to provide everyone with

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13 M Tushnet, ‘Civil rights and social rights: the future of the reconstruction amendments’ (1992) 25 *Loyola of Los Angeles Law Review* 1207; D Beetham, ‘What future for economic and social rights?’ in David Beetham (ed), *Politics and Human Rights* (Blackwell 1995); K Ewing, ‘Social rights and constitutional law’ [1999] *Public Law* 105; A Eide and A Rosas, ‘Economic, social and cultural rights: a universal challenge’ in A Eide, C Krause and A Rosas (eds), *Economic, Social and Cultural Rights* (Martinus Nijhoff 2001); T Hervey, ‘The right to health in European Union law’ in T Hervey and J Kenner, *Economic and Social Rights under the EU Charter of Fundamental Rights* (Hart 2003); T Hervey, ‘We don’t see a connection: the “right to health” in the EU Charter and European Social Charter’ in G de Búrca and B de Witte (eds), *Social Rights in Europe* (Oxford University Press 2005) 305–335; E Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Hart 2007); Sen (n 12 above); N Daniels, *Just Health: Meeting Health Needs Fairly* (Cambridge University Press 2008); D Borges, ‘Making sense of human rights in the context of European Union health-care policy: individualist and communitarian views’ (2011) 7 *International Journal of Law in Context* 335; Young (n 12 above); O’Connell (n 12 above); A Ely Yamin, *When Misfortune Becomes Injustice: Evolving Human Rights Struggles for Health and Social Equality* (Stanford University Press 2020); A Ely Yamin, ‘The right to health’ in J Dugard et al (eds), *Research Handbook on Economic, Social and Cultural Rights* (Edward Elgar 2021); O Ferraz, *Health as a Human Right: The Politics and Judicialisation of Health in Brazil* (Cambridge University Press 2021).

14 See, seminally, on the ‘minimum core’ approach, from an international human rights perspective, B Toebes, *The Right to Health as a Human Right in International Law* (Intersentia 1999); and B Toebes, ‘The right to health’ in A Eide, C Krause and A Rosas (eds), *Economic, Social and Cultural Rights* (Martinus Nijhoff 2001).

15 World Health Organization Commission on Social Determinants of Health, *Closing the Gap in a Generation: Health Equity through Action on the Social Determinants of Health* (WHO 2008) 26.

whatever health intervention they might need or desire: rather, it is more complex, related to the resources available to a state, and perhaps better expressed as a 'right to equitable access' to healthcare.<sup>16</sup> As such, to secure social rights, national social systems must be organised so that access is available on a non-discriminatory basis, without differentiating on 'forbidden grounds', such as race, gender, sexuality, age or disability. To continue with the 'right to health' example, non-discriminatory provision of healthcare services is a fundamental aspect of the right to health. This is reflected, for instance, in the Council of Europe's European Social Charter 1961 and Revised European Social Charter 1996 (ESC),<sup>17</sup> and the United Nations (UN) International Covenant on Economic Social and Cultural Rights (ICESCR).<sup>18</sup>

Third, social rights imply an obligation on all governments, irrespective of the level of development in their countries or the consequent resources available to them, to continually improve the social rights of their populations. It is recognised that all governments must engage in resource prioritisation, but this necessity should not prevent governments from neglecting to use the whole of their financial capacity for social rights protection: hence, a government's obligation is one of 'progressive realisation' undertaken 'to the maximum of its available resources'.<sup>19</sup> International and domestic human rights law recognises that different states have different capacities to protect social rights among their populations. However, having insufficient resources, or indeed, at least arguably, reference to a range of other

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16 Ferraz (n 13 above) 19, 143–146, 284.

17 1961, preamble, para 4: 'Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin.' See European Committee on Social Rights, Conclusions XVII-2 and 2005 Statement of Interpretation on Article 11, para 5.

18 1966, article 2(2): 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'; article 3: 'The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.'

19 See, for example, CESCR General Comment No 3, *The Nature of States Parties' Obligations* UN doc E/1991/23 (1990) para 9; C Sunstein, 'Social and economic rights: lessons from South Africa' (1999) 11 *Forum Constitutionnel* 123; L Chenwi, 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 46 *De Jure* 742; S Skogly, 'The requirement of using the "maximum of available resources" for human rights realisation: a question of quality as well as quantity?' (2012) 12(3) *Human Rights Law Review* 393–420.

(non-economic) contextual factors,<sup>20</sup> is not a lawful justification for a government failing to take active steps towards respecting, protecting and fulfilling social rights. The principle of progressive realisation is reflected, for instance, in the ESC<sup>21</sup> and the ICESCR.<sup>22</sup>

An important aspect of progressive realisation is the concept of non-retrogression. Non-retrogression has been described as follows by the UN:<sup>23</sup>

Non-retrogressive measures. States should not allow the existing protection of economic, social and cultural rights to deteriorate unless there are strong justifications for a retrogressive measure. For example, introducing school fees in secondary education which had formerly been free of charge would constitute a deliberate retrogressive measure. To justify it, a State would have to demonstrate that it adopted the measure only after carefully considering all the options, assessing the impact and fully using its maximum available resources.

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20 E Brems, 'Human rights: minimum and maximum perspectives' 9(3) *Human Rights Law Review* (2009) 349–372.

21 European Social Charter 1961, preamble, para 5: 'Being resolved to *make every effort* in common to *improve* the standard of living and to promote the social well being of both their urban and rural populations by means of appropriate institutions and action'; European Social Charter 1966, preamble, para 4: 'Considering that in the European Social Charter opened for signature in Turin on 18 October 1961 and the Protocols thereto, the member States of the Council of Europe agreed to secure to their populations the social rights specified therein in order to *improve* their standard of living and their social well-being' (emphasis added). See European Committee on Social Rights, 'Conclusions 2005 Lithuania' 336–338.

22 Article 2 ICESCR: '1. Each State Party to the present Covenant *undertakes to take steps*, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to *achieving progressively* the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'; article 12: '1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. *The steps to be taken* by the States Parties to the present Covenant to achieve the full realization of this right shall include ...'; article 16: '1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted *and the progress made* in achieving the observance of the rights recognized herein' (emphasis added).

23 Office of the UN High Commissioner for Human Rights, 'Frequently asked questions on economic, social and cultural rights' Fact Sheet 33 (nd) 16. See also the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights for the realisation of these human rights 1986; CESCR General Comment No 13, para 45; CESCR General Comment No 15, *The Right to Water* UN doc E/C12/2002/11 (2003), para 19; CESCR General Comment No 18, para 21.

Retrogressive measures resulting in a reduced or lower level of support for social rights, must thus be *justified* as necessary. Different possible standards for necessity include reasonableness, proportionality and 'least restrictive alternative' tests.<sup>24</sup> A necessity test might be satisfied, for example, where a change in policy puts provision of social rights on a better footing for the population as a whole (even if retrogressive for some groups), or achieves greater equity for vulnerable groups. To determine necessity, alternative approaches should be examined; the effects of apparently justified measures on acquired rights, especially on marginalised or vulnerable groups,<sup>25</sup> should be considered; and groups affected should participate in decision-making.<sup>26</sup>

Important sources of social rights, applicable to the UK and to Ireland, include the UN's ICESCR 1966; the Council of Europe's human rights instruments; and EU law. The UN ICESCR has been binding on the UK since 1976 and on Ireland since 1964.<sup>27</sup> Likewise, both the UK and Ireland are bound by the ESC.<sup>28</sup> Some provisions of the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR), which takes effect in the UK through the Human Rights Act 1998 and in Ireland through the European Convention on Human Rights Act 2003, are also relevant for social rights.<sup>29</sup> The European Union's Charter of Fundamental Rights and Freedoms 2000 (EU CFR) contains a range of social rights,<sup>30</sup> such as the right to social security and social assistance, including housing<sup>31</sup> and the right to health,<sup>32</sup> plus provisions on equality before the law<sup>33</sup> and non-discrimination.<sup>34</sup>

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24 Brems (n 20 above).

25 See, eg, S Liebenberg, *Socio-Economic Rights Adjudication under a Transformative Constitution* (Juta & Co 2010) 190; Chenwi (n 19 above).

26 CESCR, General Comment No 19, para 42.

27 Although the UN CESCR is not a source of justiciable rights in the UK or Ireland – a matter of concern for the UN CESCR, see, for example, UN CESCR, *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland*, 2016, paras 5 and 6; UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the third periodic report of Ireland*, 2015, para 7.

28 See Council of Europe, *Social Rights, Ireland*; Council of Europe, *Social Rights, United Kingdom*.

29 For example, the right to privacy and family life, article 8 ECHR.

30 Although note that the EU CFR contains both 'rights' and 'principles' in the social policy field, which generate different obligations and hence differ in their level of justiciability. See T Lock, 'Rights and principles in the EU Charter of Fundamental Rights' (2019) 56(5) *Common Market Law Review* 1201–1226.

31 EU CFR art 34.

32 *Ibid* art 35.

33 *Ibid* art 20.

34 *Ibid* art 21.

These provisions embody the minimal rights and non-retrogression principles approaches to social rights noted above.<sup>35</sup>

When entering into the Agreement, Ireland and the UK must be presumed to be intending to comply with their long-standing respective obligations to protect social rights under these international/EU law instruments. Equally, within the limits of their powers, the EU institutions are obliged to comply with human rights protected in the EU CFR in all their activities.<sup>36</sup> These obligations include, as a minimum, progressive realisation and non-retrogression. The introduction of retrogressive measures would constitute a breach of obligations in international and European human rights law. Such a breach is not justiciable in domestic courts on the basis of the treaty obligations in the UN ICESCR or the Council of Europe's ESC. But international obligations must be taken into account when interpreting provisions of domestic law, including those which are directly enforceable before the courts, especially where, as is often the case with human rights norms,<sup>37</sup> the language of that domestic law is ambiguous.<sup>38</sup> The text of the Agreement (agreed *inter alia* by the UK and Ireland) and of the Protocol (agreed by the EU and UK)<sup>39</sup> must therefore be construed with that presumption of compliance in mind.

The Agreement reflects the understanding of the indivisibility of rights, not only through the wording chosen for the text of the Agreement, but also through its choice to explicitly protect the right to equal participation in society. The first section of part 6 on rights,

35 See, eg, Case C-571/10 *Kamberaj* EU:C:2012:233; O Golyner, 'Article 34', and T Hervey and J McHale, 'Article 35' both in S Peers et al (eds), *Commentary on the European Union Charter of Fundamental Rights* 2nd edn (Hart 2021) 1553–1610.

36 Art 51(1) EU CFR; Cases C-8-10/15-P *Ledra Advertising and Others v Commission and ECB* EU:C:2016:701; see A Ward, 'Article 51' in Peers et al (n 35 above) 1553–1610.

37 All human rights norms are inherently contestable, in terms of the meanings and implications of legal textual embodiments of human rights principles, and especially their effects on the distribution of resources in society and on ethical implications, including dignity, equality of opportunity and justice.

38 See, for example, *Belhaj v Straw* [2017] UKSC 3, para 252, per Lord Sumption; *Assange v The Swedish Prosecutor 4* [2012] UKSC 22, para 122, per Lord Dyson at [122]; *R v Lyons* [2003] 1 AC 976, para 13, per Lord Bingham. On the interpretative presumption that UK domestic law is compatible with international obligations that are binding on the UK, see further, S Fatima, 'The domestic application of international law in British courts' in C A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press 2019).

39 Ireland is not a formal signatory to the Withdrawal Agreement, as the EU has exclusive competence to enter into agreements under art 50(2) of the Treaty on European Union (TEU), see Case C-621/18 *Wightman v Secretary of State for Exiting the EU*, EU:C:2018:999, para 53.

safeguards and equality of opportunity is entitled ‘Human Rights’. Rights listed in that section are preceded by the phrase ‘in particular’: they are not intended to be exhaustive.<sup>40</sup> The Northern Ireland Human Rights Commission is invited to suggest ‘additional rights’ for codification in UK law that ‘reflect the principles of mutual respect’. Nothing in the Agreement text explicitly excludes the possibility that it should protect social rights – rather, the Agreement text suggests that there are rights beyond the listed civil and political rights which are worthy of protection under the Agreement. Indeed, repeated use of the phrase ‘human rights’ indicates a desire to protect all rights. The preamble to the international agreement between the Government of the UK and the Government of Ireland, annexed to and part of the Agreement, explicitly ‘reaffirms’ a commitment to ‘the protection of civil, political, social, economic and cultural rights’.<sup>41</sup> Given the painstaking manner in which the Agreement was drafted, if the intention had been to exclude social rights from protection, a narrow way of defining the desired rights would have been found.

Moreover, the drafters made an explicit choice to protect the ability of everyone living in Northern Ireland to participate equally in social activity. This choice must, we argue, also imply the protection of specific social rights. Human rights are acknowledged to be an ingredient of community cohesion and common culture,<sup>42</sup> so it is difficult to accept that the Agreement drafters wished to recreate a more equal and respectful society without intending that the social rights of citizens should be protected. Indeed, it is more plausible that all rights are important to the building of a shared community in (Northern) Ireland founded upon a lasting peace, and that codification of social rights remains desirable, a position for which there is evidence across the political spectrum.<sup>43</sup>

The ambition of the drafters was to formally include economic and social rights alongside civil and political rights at the heart of the

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40 See, for example, *John McEvoy In the matter of an application by Martina Dillon, and Lynda McManus for judicial review; in the matter of an application by Brigid Hughes to apply for judicial review; in the matter of an application by Teresa Jordan for judicial review; in the matter of an application by Gemma Gilvary for judicial review; and in the matter of an application by Patrick Fitzsimons for judicial review; and in the matter of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023* [2024] NIKB 11, [540].

41 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, 1998, preamble, recital 5.

42 N O’Brien, ‘Equality and human rights: foundations of a common culture?’ (2008) 79(1) *Political Quarterly* 27–35.

43 A Renwick and C Kelly, ‘Perspectives on the Belfast/Good Friday Agreement: examining diverse views, 1998–2003’ (The Constitution Unit, University College London 2023).

Agreement.<sup>44</sup> This did not come to pass, but nevertheless the ambitions of the drafters for peace to be built upon social cooperation and social progress grounded in a respect for the social rights of all is reflected in the text, in the multiple references to social policy in the Agreement, and in the explicit protection given to equality of social participation.

Taking all of the above into account, it is therefore our contention that article 2(1) of the Protocol should be understood to cover not only rights explicitly included, but also the rights implicitly included in the Agreement, and that the correct interpretation of article 2(1) involves compliance with social rights obligations, including the obligations of securing minimal levels of protection; non-discrimination; and non-retrogression. The relationship between this general obligation of ‘non-retrogression’ and the ‘non-diminution’ rights of article 2 of the Protocol is as yet unclear, but we would argue that, as a minimum, ‘non-diminution’ must include ‘non-retrogression’ and may go further.<sup>45</sup>

### **APPLICABILITY OF PROTOCOL ARTICLE 2(1) TO SOCIAL RIGHTS DIMINUTION CASE STUDIES**

Article 2(1) of the Protocol reads as follows:

The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.

We argued above that the reference to ‘rights’ should be interpreted to include social rights. Using four case studies, we now consider how the legal test for a breach of the UK’s article 2(1) obligation might be applied to the possible diminution of social rights on the island of Ireland resulting from UK withdrawal from the EU.

The test set out by the Northern Ireland Court of Appeal in *SPUC Pro-Life Limited*,<sup>46</sup> reads as follows:

- (i) A right (or equality of opportunity protection) included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged

44 R O’Connell et al, ‘The Belfast Good Friday Agreement and transformative change: promise, power and solidarity’ (2024) 57 *Israel Law Review* 4–36.

45 For an argument to the effect that ‘non-diminution’ has a different meaning to ‘non-retrogression’, see C Murray, A O’Donoghue and B Warwick, *Discussion Paper on Brexit* (Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission 2018) 12.

46 *SPUC Pro-Life Limited v Secretary of State for Northern Ireland and Others* [2023] NICA 35, [54].

- (ii) That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020
- (iii) That Northern Ireland law was underpinned by EU law
- (iv) That underpinning has been removed, in whole or in part, following withdrawal from the EU
- (v) This has resulted in a diminution in enjoyment of this right, and
- (vi) This diminution would not have occurred had the UK remained in the EU.

In the context of social rights, the trickier elements of the *SPUC Pro-Life* test are points (iii) and (v).

SPUC had challenged the validity of UK regulations which gave Northern Ireland ministers the power to extend the grounds upon which abortion was permitted, particularly surrounding cases of foetal abnormality. SPUC argued that these regulations diminished the protections afforded by the Convention on the Rights of Persons with Disabilities (CRPD), which prohibits abortion on grounds of disability, and that this diminution was unlawful under article 2(1) of the Protocol.

The Court of Appeal explicitly rejected the SPUC's argument that the identified rights were underpinned by an international treaty that was recognised in EU law. Although the EU is a party to the CRPD, the Court held that any disability discrimination rights which might have existed in Northern Irish law could never be 'underpinned by EU law' because 'disability discrimination and the provision of abortion is not a matter within EU competence'.<sup>47</sup> The Court's view of EU competence appears to be a narrow one, focused on legislative competence to harmonise national law of the member states, although the Court is not explicit on this point.<sup>48</sup> If this narrow view of EU competence is accepted, where the EU has no power to adopt harmonising legislation on the topic of a specific (social) right, point (iii) of the *SPUC Pro-Life* test can never be satisfied. Such an interpretation would pose problems in the social field, where the EU has limited or no specific competence to harmonise certain areas of social policy through legislation.

This judgment can be viewed in different ways. One view is that it wrongly conceptualises 'EU law' only as legislation. EU law is wider,

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47 Ibid [58].

48 Ibid [58], [59], [68], [69], [71].

incorporating primary treaty law, including the EU CFR;<sup>49</sup> general principles of EU law, found in the CJEU's case law; and also certain international agreements;<sup>50</sup> and even – plausibly, as we explore below – various forms of soft law. Since the EU has become a party to the CRPD, it can be considered a part of EU law as an agreement concluded by the EU institutions. To dismiss out of hand the possibility that disability discrimination rights could be ‘underpinned by EU law’ is incorrect.

Another view is that the Court incorrectly focuses on specifically and directly worded legislative competences to *harmonise*. The EU has always been able, in the absence of such competences, to draw upon other related legislative and governance powers to achieve its policy objectives. Examples include legislatively mandated coordination of social security systems, legislatively mandated governance mechanisms such as the European Semester system, and the significant disbursement of EU funding.<sup>51</sup> Many of these permit the adoption of soft law, which the EU has used alongside legislation to greatly influence the development of the social policy area.<sup>52</sup> The effective

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49 In the context of a relocation of a destitute Eritrean asylum seeker from Belfast to Falkirk, Scotland, the Northern Ireland High Court implicitly accepted that the EU CFR is ‘EU law’ for the purposes of art 2(1), but found that equivalent protection was available under the ECHR, so no ‘diminution of rights’ could be said to have occurred: see *In the matter of an application by Aman Angesom for judicial review and in the matter of a decision by the Secretary of State for the Home Department, Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland intervening* [2023] NIKB 102. More recently, in the context of applications challenging various provisions of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, the Northern Ireland High Court has explicitly accepted that the EU CFR is ‘EU law’ for these purposes: see *John McEvoy* (n 40 above) [578]–[582], and has cast significant doubt on the approach taken in *Angesom* concerning where both the ECHR and EU CFR are sources of a relevant right, see [585]–[588].

50 A point made also by A Deb and C R G Murray, ‘Article 2 of the Ireland/Northern Ireland Protocol: a new frontier in human rights law?’ (2023) (6) *European Human Rights Law Review* 608.

51 For an overview, see T Hervey, *European Social Law and Policy* (Longman 1998). Some key legislation, and the ‘legal basis’ provisions granting the EU legislative competence on which each is based, includes Regulation 883/2004/EC on the coordination of social security systems OJ 2004 L166/1 (based on arts 48 and 352 TFEU); Regulation 2024/1263 on the European Semester system OJ 2024 L1263 (based on art 121(6) TFEU); Regulation 2021/241 establishing the Recovery and Resistance Facility OJ 2021 L57/17 (based on art 175(3) TFEU).

52 For example, see the literature on EU health law: K Purnhagen et al, ‘More competences than you knew? The web of health competence for European Union action in response to the Covid-19 outbreak’ (2020) 11 *European Journal of Risk Regulation* 297; T Hervey, ‘Telling stories about European Union health law: the emergence of a new field of law’ (2016) 15(3) *Comparative European Politics* 352.

use of soft law to promote integration is a particular characteristic of the EU's activity in the social policy field.<sup>53</sup> Soft law has in fact played an integral governance role in various EU policy areas and plays an important role in CJEU jurisprudence.<sup>54</sup> Consequently, it is neither the case that the EU 'has no competence' in social policy areas, nor that the tools provided by such competence are not part of 'EU law'. EU competence and law take many different forms, so it is incorrect to view 'underpinned by' as narrowly referring to specific and direct competences for command and control harmonising legislation, rather than to a broader conceptualisation of EU competence and governance tools.

The decision of the Court in *SPUC Pro-Life* is of course not the final word in the interpretation of article 2(1).<sup>55</sup> Further cases which might be taken have the potential to end up in the UK Supreme Court, which may take a different view again of how the phrase 'underpinned by EU law' should be interpreted. The decision of the Northern Ireland High Court in *SPUC Pro-Life* illustrates this potential. The High Court accepted that the CRPD could underpin rights in the Agreement by virtue of its status as an international agreement that has become incorporated into EU law through adoption by the EU institutions. However, the High Court then accepted the argument that international agreements can only become EU law to the extent that the EU possesses competence, and that, since the EU had no competence on abortion, the provisions of the CRPD that allegedly prohibited abortion on the grounds of foetal abnormality, argued to be a form of disability discrimination, could never become part of EU law and thus never underpin rights in the Agreement.

The High Court's detailed judgment demonstrates that it also considers competence to mean the power to adopt harmonising legislation. When considering whether there was other EU primary or secondary legislation upon which the SPUC could rely, the court stated that article 168(1) provides limited competence in health, but 'does not provide a standalone basis for EU harmonisation of Member State policies relating to health, including abortion provision, although

53 D and L Trubek, 'Hard and soft law in the construction of social Europe: the role of the open method of co-ordination' (2005) 11(3) *European Law Journal* 343–364.

54 O Stefan et al, 'EU soft law in the EU legal order: a literature review' (Law School Research Paper, Kings College London 2019).

55 See further on the potential of art 2(1), for example, C McCrudden, 'Human rights and equality' in C McCrudden (ed), *The Law and Practice of the Ireland/Northern Ireland Protocol* (Cambridge University Press 2022) 143–158; Deb and Murray (n 50 above). We note also the argument of Colton J in *John McEvoy* (n 40 above) [530]–[535], to the effect that a purposive approach to interpretation should be adopted in respect of the Protocol.

the EU does have a role in co-ordination and supplementation of such measures'.<sup>56</sup> Moreover, the Court also relies<sup>57</sup> on the fact that Council Decision 2010/48 authorising EU accession to the CRPD provides that the EU can accede to the CRPD only so far as its provisions 'affect common rules previously established' or if 'rules exist but are not affected'. This does mean that the CRPD can only become EU law to the extent of the EU's relevant competences, but the decision does not appear to specify that the competence must be a specific and direct harmonising competence. This, however, is how the High Court has interpreted the relevant sources. As we argued above, this is not the only interpretation possible. Indeed, a broader interpretation – which is open to the UK Supreme Court to make in future – of EU competence would better fit the realities of the powers provided by the Treaties and how the EU has used them in the social field. For example, the use of 'horizontal' legislation such as the Citizens' Rights Directive<sup>58</sup> and the Regulation on the mutual recognition of qualifications<sup>59</sup> has been hugely impactful in advancing the EU's social policy agenda, as we discuss in more detail below.

Despite the fact that courts are capable of adjudicating violations of social rights,<sup>60</sup> point (v) may also be difficult to satisfy with some social rights violations that arise from retrogressive policy choices because the impact of those violations is felt over time and at the population level. A 'diminution' in the enjoyment of the right must have 'resulted' from the withdrawal of EU law – both of these terms suggest a certain level of empirical proof is necessary before a breach of article 2(1) can be accepted. Such proof can sometimes be hard to supply in the case of a policy decision that does not specifically target any individual or group of individuals.

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56 *SPUC Pro-Life Ltd* [2022] NIQB 9, [120].

57 *Ibid* [109]–[111].

58 Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L158/77.

59 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications OJ 2005 L 255/22.

60 See, eg, J Dugard et al (eds), *Research Handbook on Economic, Social and Cultural Rights* (Edward Elgar 2021); A Nolan et al, 'The justiciability of social and economic rights: an updated appraisal' in M Kamminga (ed), *Challenges in International Human Rights Law* vol III (Routledge 2014); D Landau, 'The reality of social rights enforcement' (2012) 53(1) *Harvard International Law Journal* 189; O'Connell (n 12 above); Young (n 12 above); G de Búrca and B de Witte (eds), *Social Rights in Europe* (Oxford University Press 2005); T Hervey and J Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights* (Hart 2003); A Eide, C Krause and A Rosas (eds), *Economic, Social and Cultural Rights* (Martinus Nijhoff 2001).

The problems in satisfying points (iii) and (v) of the test in the context of social rights diminutions are illustrated in the case studies below. Point (iii) can be difficult to satisfy because the underpinning EU law is often horizontal or enabling legislation that creates conditions for the enjoyment of rights rather than providing a right directly, and point (v) can be difficult to satisfy because a diminution in enjoyment of social rights can often be hard to empirically identify or quantify, even if the situation in question is socially damaging.

### **Problems with proving underpinning of EU law – housing and children’s rights**

In April 2021, the UK Government decided to revive a policy that permits the deportation from Northern Ireland of non-British and non-Irish nationals who are sleeping rough and who do not accept limited assistance.<sup>61</sup> This is a retrogressive step in terms of the social right to housing. While the UK was an EU member state, even rough sleepers had certain rights of residence if they were EU nationals, and the UK courts found that deporting them while they benefited from those rights was unlawful.<sup>62</sup> Following the revival of the policy after the UK left the EU, EU-26 citizens who are sleeping rough and who do not have settled status<sup>63</sup> now face deportation. Rough sleeping EU-26 citizens in Northern Ireland face reduced opportunities to find accommodation, and moreover if deported they will lose the opportunity to travel across the border to Ireland, where they would be protected by their EU citizenship.

The Agreement sets out a right to freely choose one’s place of residence, reflecting a desire to rebuild trust and cooperation in a region in which internal migration is still characterised by sectarian

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61 This was first clarified in Home Office guidance on new post-Brexit immigration rules, and then in the Government’s strategy on rough sleeping: *Grounds for Refusal: Rough Sleeping in the UK* (Home Office 20 April 2021); *Ending Rough Sleeping for Good* (Department for Levelling Up, Housing and Communities 3 September 2022). The policy was fiercely criticised as ‘inhumane’ when first made public: C Da Silva, ‘UK policy to deport EU rough sleepers condemned as “inhumane”’ (*Euronews* 21 April 2021). Although the 2022 document does not mention Irish nationals or the Common Travel Area, the policy does not apply to Irish nationals, who have an unconditional right of residence in the UK under the Common Travel Area. The UK will maintain its policy of only deporting Irish nationals when a criminal court has recommended it, or if the Home Secretary considers that exceptional circumstances require deportation in the public interest: see *Written Answer to Parliamentary Question UIN HL14521*, tabled on 13 March 2019.

62 *The Queen on the Application of Gunars Gureckis and Others v Secretary of State for the Home Department* [2017] EWHC 3298 (Admin).

63 It is likely that homeless EU citizens will not have settled status, on account that applications could only be made online.

division.<sup>64</sup> Such a right must arguably be seen as an aspect of the broader right to housing, which represents more than a simple property right to a house.<sup>65</sup> A right to choose one's place of residence could also be linked to non-discrimination rights – the right to choose to live in a different community becomes meaningless if a person is prevented from exercising that right by discriminatory practices.<sup>66</sup>

To determine whether such social rights are 'underpinned by EU law', consider first a broad interpretation of the concept. The EU CFR contains rights to non-discrimination (article 21) and rights to housing assistance (article 34) which, as noted above, were part of Northern Irish law before 31 December 2020. Access to housing is covered in various pieces of EU legislation, including the Citizens' Rights Directive;<sup>67</sup> the Workers' Regulation;<sup>68</sup> the Long Term Residence Directive;<sup>69</sup> the Race Equality Directive;<sup>70</sup> and the Reception Conditions<sup>71</sup> and Returns Directive.<sup>72</sup> These provisions of legislation have been interpreted by the CJEU consistently with the right to housing assistance in article 34 EU CFR, even though that provision of the EU CFR is a social right and is part of the 'principles' section of the EU CFR.<sup>73</sup>

The Citizens' Rights Directive made it possible for EU nationals to be in Northern Ireland (indeed, to move to Northern Ireland from Ireland) even if they temporarily did not have a home. These rights of

64 I Shuttleworth, 'Residential mobility in divided societies: how individual religion and geographical context influenced housing moves in Northern Ireland 2001–2011' (2021) 27 *Population, Space and Place* e2387.

65 R Rolnik, 'Place, inhabitation and citizenship: the right to housing and the right to the city in the contemporary urban world' (2014) 14(3) *International Journal of Housing Policy* 293.

66 Evidence shows that Catholics experience inequalities with respect to social housing allocation: A Wallace, *Housing and Communities' Inequalities in Northern Ireland* (Centre for Housing Policy, University of York 2015).

67 Directive 2004/38/EC (n 58 above) art 24 (by implication), see Case C-310/08 *Ibrahim* ECLI:EU:C:2010:80; Case C-480/08 *Teixeira* ECLI:EU:C:2010:80.

68 Regulation 492/2011/EC on freedom of movement for workers within the Union OJ 2011 L 141/1.

69 Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents OJ 2004 L 16/44, art 11, see Case C-571/10 *Kamberaj* (n 35 above).

70 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ 2000 L 180/22, article 3(1)(h).

71 Directive 2013/33/EC laying down standards for the reception of applicants for international protection (recast) OJ L 180, 29.6.2013, 96, arts 2(g), 12, 18.

72 Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348, 24.12.2008, 98, art 26, see Case C-924/19 *FMS* ECLI:EU:C:2020:367.

73 See, in particular, Case C-571/10 *Kamberaj* (n 35 above). By contrast, see Case C-539/14 *Morcillo* ECLI:EU:C:2015:508.

residence afforded vulnerable individuals valuable protection and the time to search for accommodation suitable for their needs. The Citizens' Rights Directive is not a piece of housing legislation but is essential for facilitating the pursuit of housing and the eventual realisation of housing rights. A report on the scope of article 2(1) published by the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission<sup>74</sup> asserts that 'horizontal' EU law, such as the Citizens' Rights Directive,<sup>75</sup> should be considered to underpin the right to choose one's place of residence, which is an aspect of the right to housing.<sup>76</sup> If 'underpinning' were understood broadly, to mean 'facilitated by', then article 2(1) would apply, as a right to housing falls within the scope of EU law, and thus is 'underpinning law' that would have had to be taken into account when interpreting national law or policy such as the rough sleepers revised guidance, before the UK left the EU. This would be a generous approach to the concept of 'underpinning EU law'.

By contrast, the Court in *SPUC Pro-Life* seemed to suggest a narrower concept. According to the *SPUC Pro-Life* ruling, it seems that 'underpinning legislation' must *directly* relate to the policy area, or even *specific policy*, through which a particular right is protected. Although the Court did not directly address this matter, the Court questions the particular Agreement right being claimed and in the next sentence states that 'in addition, the fundamental question as to how abortion comes within the competence of the EU is not satisfactorily answered'.<sup>77</sup> Applied to the right to housing, the reasoning seems to be that, as there is no specific and direct harmonising EU competence on housing *per se*, there can be no 'underpinning EU law' in this instance. Housing is incidental, rather than central, to the examples of the legislation noted above, which concern human migration. If this narrower approach is taken, demonstrating that EU law underpins

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74 Equality Commission of Northern Ireland and Northern Ireland Human Rights Commission, *Working Paper: The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol* (Equality Commission of Northern Ireland and Northern Ireland Human Rights Commission December 2022).

75 Directive 2004/38/EC (n 58 above).

76 Similarly, the Northern Ireland High Court seemed to accept in principle that being deprived of access to social or economic benefits consequent upon remaining within the single market/customs union (that is, in Northern Ireland) could potentially be a 'diminution of rights' under art 2(1) of the Protocol, but found that no evidence had been adduced of his 'right to equality of opportunity in social activity' having been diminished because of his removal to Scotland, see *Angesom* (n 49 above) [110]–[112].

77 *SPUC Pro-Life* (NICA) (n 46 above) [71].

these kinds of social rights is tricky, since EU anti-discrimination law does not (yet)<sup>78</sup> fully cover social topics such as housing.<sup>79</sup>

The same difficulty arises with the protection of children's rights, a good example being the movement of children's social workers. Prior to Brexit, children in Northern Ireland who needed specialist care in Ireland, or who moved to Ireland for whatever reason, were commonly followed by their social worker. This practice provided essential stability to the child and was made possible by the fact that the EU Regulation on the mutual recognition of qualifications<sup>80</sup> was directly applicable in both Ireland and the UK, enabling a social worker to travel and practise between the two jurisdictions without hindrance. Following Brexit, qualifications obtained by a social worker in Northern Ireland are no longer automatically recognised in Ireland. Social workers who accompany vulnerable children from Northern Ireland to Ireland may now face significant delays in securing a right to practise professionally in Ireland, which would seriously weaken the care and support that is provided to those children,<sup>81</sup> an aspect of their social rights.

The right to equal opportunity in all social activity on grounds of class and disability should cover the situation described above since the health and disability status of young people in Northern Ireland is linked to socio-economic deprivation,<sup>82</sup> and nearly half of looked-after children are from the most deprived areas in Northern Ireland.<sup>83</sup> This means that structural issues in providing care to Northern Irish children will inherently have a heavier impact upon disadvantaged and disabled children. As discussed above, the EU CFR brought the right to non-discrimination into Northern Irish law before 31 December 2020. Article 24 EU CFR provides that 'children shall have the right to such protection and care as is necessary for their well-being'. Although the Convention on the Rights of the Child<sup>84</sup> has not been wholly incorporated into Northern Irish law, there are specific pieces

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78 See, eg, European Commission, Proposal for a Council Directive on implementing the principle of equal treatment outside the labour market, irrespective of age, disability, sexual orientation or religious belief, COM (2008) 426.

79 But see Council Directive 2000/43/EC (n 70 above) art 3(1)(h).

80 Directive 2005/36/EC (n 59 above).

81 S Graham, 'Warning of Brexit impact on vulnerable children requiring cross-border social work care' *Irish News* (Belfast 25 March 2021).

82 E McElroy et al, 'Exploring the effects of socio-economic inequalities on health and disability in Northern Irish adolescents: evidence from a nationally representative longitudinal study' (2023)14(1) *Longitudinal and Life Course Studies* 138.

83 *Children in Care in Northern Ireland 2021–22* (Northern Ireland Department of Health 2023).

84 Convention on the Rights of the Child, 1577 UNTS 3, entered into force 2 September 1990.

of legislation that refer to children's rights. For example the Children's Services Co-operation Act 2015 provides that children's well-being involves 'living in a society which respects their rights', and that determinations of well-being should be made with regard to any relevant provisions of the Convention on the Rights of the Child.

For article 2(1) to apply though, these rights must be 'underpinned by EU law'. Again, children's rights feature in several pieces of EU legislation,<sup>85</sup> but in this specific situation, there is no relevant specific EU law. Rather, it is horizontal EU law (the Directive on Mutual Recognition of Qualifications, reinforced by the free movement of services provisions of the Treaty on the Functioning of the EU (TFEU), and perhaps even by article 24 EU CFR, at least for interpretative purposes) that is crucial for facilitating the realisation of this particular aspect of children's rights. Taking a broad approach to the concept of 'underpinned by EU law', it could be argued that, even though the Regulation on mutual recognition of qualifications does not mention children's rights or rights at all, the practical effect of removal of this law directly undermines the protection of children's development rights on the island of Ireland. It certainly weakens society's respect for the rights of children as provided by the 2015 Act. However, in this situation the benefits of EU law are not conferred directly on the children whose rights might have been breached, but on the social workers who interact with the children to help realise those rights. Even if the broader interpretation of 'underpinning EU law' might be accepted for housing rights, as per the example above, it is unlikely that a court would accept the term 'underpinning' to cover a circumstance in which the Agreement rights and the relevant EU law give rights to different individuals.

### **Problems with proving both diminution and underpinning – education and health**

The above case studies examined situations in which it may be difficult to prove that an Agreement right is 'underpinned by EU law', but in which it is at least more straightforward to demonstrate that a right has been diminished. The following case studies illustrate situations in which it is difficult *both* to prove that the right has been diminished *and* to show that the relevant right is 'underpinned by EU law'. These types of situations tend to be those in which high-level policy changes prompted by Brexit are likely to lead to social damage, but in which it is difficult to prove an individual level rights violation. This may be

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85 For example, see Directive 2003/86/EC on the right to family reunification OJ L 251/12, Regulation 492/2011/EC (n 68 above) arts 4, 14; see R Lamont, 'Article 24' in S Peers, T Hervey, J Kenner and A Ward (eds), in Peers et al (n 35 above) 1553–1610.

the case for example because overlapping causal factors, distinct from Brexit, are also present in the effects of the policy changes. The first case study concerns the impact of Brexit upon third-level study, and the second concerns access to medicines and the impact on the health and social care system in Northern Ireland.

A series of negative consequences for the higher education sector in both Northern Ireland and Ireland will flow from Brexit.<sup>86</sup> One of the most pressing for Northern Ireland is the anticipated loss of government funding,<sup>87</sup> which Northern Irish universities point out will not only reduce places in the short term but will further increase pressure on universities in the long term when demographic changes (unrelated to Brexit) mean an increase in young people of university age.<sup>88</sup> When this is combined with additional cost-cutting measures, also not directly caused by Brexit *per se*, the result may be a significant drop in quality of education for students at Northern Irish universities.<sup>89</sup> The UK's decision not to continue its participation in the Erasmus+ programme is also another loss for Northern Irish universities. Although the Irish Government has committed to funding Erasmus+ experiences for students in Northern Irish universities, the impact of Erasmus+ went beyond student exchanges. Without the possibility to accept EU students on exchange or the ability to fund staff exchanges, Northern Irish universities are losing a powerful tool of educational diplomacy, which the replacement Turing scheme will not replicate and potentially may even undermine.<sup>90</sup> Brexit will also have a significant long-term impact upon Irish universities. The number of EU students applying for a university place in Ireland trebled after Brexit,<sup>91</sup> and this has led

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86 The sector has been vocal about the almost entirely negative impact of Brexit, see, for example: D Butler, 'How Brexit threatens Irish science's cross-border collaboration' (*Nature* 31 January 2019); C Gormley-Heenan, 'What's the likely impact of Brexit on higher education in Northern Ireland?' (*Political Studies Association Blog* 21 February 2019).

87 Government funding is projected to be cut by 10 per cent, see: R Meredith, 'Northern Ireland student numbers will reduce with funding cuts, universities say' (*BBC News* 12 June 2023).

88 'Education cuts will inflict long lasting damage to our economy says Queen's Vice Chancellor' (*Queen's University Belfast* 16 May 2023).

89 J Manley and S McGonagle, 'Students risk becoming Brexit's "collateral damage" as tuition fee hikes and reduction in university places are considered on back of Brussels funding cut' *Irish News* (Belfast 14 January 2022).

90 L Highman et al, 'Higher education and research: multiple negative effects and no new opportunities after Brexit' (2023) 18(2) *Contemporary Social Science* 216; O Fox and S Beech, 'International student mobility options following Brexit: an analysis of the genesis of Britain's Turing Scheme' (2024) 30 *Population, Space and Place* e2727.

91 K Donnelly, 'Applications from EU for places in Irish universities treble since Brexit' *Irish Independent* (Dublin 2 August 2022).

to warnings from Irish universities that they may have to cap places to preserve quality of education, unless their own government funding is increased.<sup>92</sup> The burdens created by Brexit for universities on both sides of the border will not help the underlying and ongoing concern to raise the currently low level of cross-border student mobility on the island of Ireland, an objective which is noted to be important for promoting higher levels of social cohesion.<sup>93</sup>

A reduced ability for third-level institutions across the island of Ireland to cater for the collective student population of the island will at least arguably result in a diminished ability for some students to enjoy a right to higher education.<sup>94</sup> A right to education is not explicitly included in the text of the Agreement, although – as we noted earlier – the list of protected human rights under the heading ‘Human Rights’ is qualified by the phrase ‘in particular’, indicating that the list in the Agreement is not exhaustive. A possible way of engaging the text of the Agreement is to argue for the applicability of the right to equal opportunity with a focus on social class. In a similar manner to the children’s rights case study above, the burden of reduced educational capacity will fall more heavily on socio-economically disadvantaged students – more socially advantaged students tend to benefit from experiences and preparation that will help them compete more effectively for a more limited number of places, and these students are also more likely to have resources at their disposal to allow them to pursue higher education away from the island of Ireland.

Even if it is accepted that the right in the Agreement to non-discrimination on grounds of social class is relevant to the reduced educational capacity of universities on the island of Ireland caused by Brexit, to be successful in an article 2(1) claim, one must still also demonstrate that this right was ‘underpinned by EU law’ and that it was diminished by the removal of EU law. As with the housing example above, numerous provisions on access to education are found across

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92 Ibid.

93 E Smyth and M Darmody, *Student Mobility in Ireland and Northern Ireland* (Economic and Social Research Institute 2023).

94 Scholars point out that the right to education includes a right to higher education and is not only a right to primary and secondary education: H Gilchrist, ‘Higher education as a human right’ (2018) 17 *Washington University Global Student Law Review* 645.

EU internal migration law, including in the case law of the CJEU.<sup>95</sup> But if a narrower approach to ‘underpinning EU law’ is adopted, these are insufficient. The Erasmus+ Regulation that established the programme for the period 2014–2020<sup>96</sup> notes in recital 7 that it is adopted pursuant to article 21 EU CFR, that the Erasmus+ programme should promote ‘inter alia equality between men and women and measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’, and that ‘there is a need to widen access for members of disadvantaged and vulnerable groups’. However, it is difficult to connect the specific withdrawal of this EU legislation with the reductions in soft power mentioned above, and then to the educational experience of any one particular student, making it extremely difficult to prove a specific diminution in rights in the article 2(1) sense. Conversely, it might theoretically be possible to quantify which students applied and missed out on the number of university places that would have been available if budget cuts were not made in Northern Ireland; however, it is impossible to point to one specific piece of EU law which underpins such a diminution of educational rights – the budget pressures facing the Northern Ireland Government have been caused by a combination of factors, only some of which stem from Brexit, and the demographic changes are unrelated. The key problem is that the test for breach of article 2(1) is geared towards the enjoyment of rights at an individual level. This is something that *SPUC Pro-Life* made clear – the Court needed to be convinced that the applicant’s particular enjoyment of rights was particularly diminished by the withdrawal of a specific piece of EU legislation. In practice, it would be virtually impossible to quantify *in individual terms* the impact which Brexit is having upon universities on the island of Ireland, and even more so to provide concrete evidence for the unequal nature of this impact on a particular rights-bearing individual.

Our final case study concerns the right to health. Supply of medicines to the whole of the UK has worsened since Brexit, with particular

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95 See, for example, Regulation 492/2011/EC (n 68 above) arts 7(2) and 10; Directive 2004/38/EC (n 58 above) art 24; Case 39/86 *Lair* EU:C:1988:322; Case C-184/99 *Grzelczyk* EU:C:2001:458; Case 209/03 *Bidar* EU:C:2005:169; Case C-147/03 *Commission v Austria* EU:C:2005:427; Case C-46/12 *LN* EU:C:2013:97; Case C-158/07 *Förster* EU:C:2008:630; Cases C-11&12/06 *Morgan and Bücher* EU:C:2007:626; Case C-73/08 *Bressol* EU:C:2010:181; Case C-542/09 *Commission v Netherlands* EU:C:2012:346; Cases C-523&585/11 *Prinz and Seeberger* EU:C:2013:524; Cases C-401-403/15 *Depesme* EU:C:2016:955.

96 Regulation 1288/2013/EU establishing ‘Erasmus+’: the Union programme for education, training, youth and sport [2013] OJ L 347/50.

challenges for supply to Northern Ireland.<sup>97</sup> Research by the Nuffield Trust<sup>98</sup> showed an alarming spike in notifications of supply shortages for Northern Ireland in 2021, at the end of some ‘grace periods’ for full implementation of the terms of the Withdrawal Agreement, because 80 per cent of medicines used in Northern Ireland arrive from Great Britain, yet Northern Ireland remains in the EU’s single market for regulatory matters for products including medicines. That immediate crisis was averted; and the Windsor Framework puts medicines supply on a steadier legal footing.<sup>99</sup> But the fundamental position remains: the EU does not automatically recognise the UK’s regulatory processes for authorisation of medicines. That means that, over time, the market in Northern Ireland will become more difficult to supply than that in Great Britain. It is unclear exactly how this will play out in terms of industry behaviour, but it is likely that there will be some medicines, or some specific delivery mechanisms for a medicinal product, or some patient groups, or specific medical conditions, for which there is no authorised medicine for Northern Ireland, whereas there is for Great Britain. Access to medicines is part of the right to health, and so the changes consequent upon the regulatory position for medicines in Northern Ireland are likely to result in a diminished ability for some patients to enjoy that right, or a different ability from the enjoyment of that right by patients in Great Britain. Different availability of products will mean that a different approach to patient treatment and care would have to be taken in Northern Ireland, in comparison to Great Britain. As with the right to education, the right to health is not explicitly included in the text of the Agreement, although, again as noted above, the list of protected human rights under the heading ‘Human Rights’ is qualified by the phrase ‘in particular’, indicating that the list in the agreement is not exhaustive. Could the diminished access to medicines, and consequent different approach to medical care in Northern Ireland, in comparison to Great Britain, be a discriminatory breach of the right to health, on the basis of nationality? Again, as with the right to education, it is difficult to see how one could prove an *individual* diminution of rights as a result of the kinds of systemic change, in industry behaviours and in actions of those operating in the

97 M Dayan et al, ‘Parallel, divergent or drifting? Regulating healthcare products in a post-Brexit UK’ (2023) 30(11) *Journal of European Public Policy* 2540–2572; H Yusufi, T Hervey, A Bloemink, A Cavanagh and H Shaw, ‘The NHS in Northern Ireland post Brexit: the legal position on product supply’ (2021) 29 *European Journal of Health Law* 165–193.

98 M Dayan et al, ‘Protocol politics mean hard times ahead for health in Northern Ireland’ (Nuffield Foundation 6 July 2022).

99 ‘Nuffield Trust response to Windsor Framework on Northern Ireland’ (Press Release 27 February 2023); M Dayan et al, *The Future for Health after Brexit Research Report* (Nuffield Trust 2024) 8.

health and social care system in Northern Ireland, flowing from the regulatory environment for medicines supply consequent upon Brexit.

In addition, although some of the regulatory environment for health and social care, and the product supply within it, was ‘underpinned by EU law’ when the UK was a member state of the EU,<sup>100</sup> not every aspect of the health and social care system was. Rather, health care provision is a shared responsibility between the EU and its member states, and indeed the TFEU explicitly states that ‘organisation and delivery of health services and medical care’ is a national competence. Although the licensing of medicines, so that they may access the market, is an EU competence, the decision as to whether a particular medicine is available within a national health system (sometimes known as ‘health technology assessment’) remains at national level. Even if, therefore, it could be shown that a right to health had been diminished, it would be tricky to show that a relevant right is ‘underpinned by EU law’.

## CONCLUSION

The EU has played, and continues to play, a significant role in facilitating the enjoyment of social rights. Social rights are found across the body of EU law,<sup>101</sup> most prominently in the EU CFR. The EU CFR has the same legal status as the EU Treaties.<sup>102</sup> It contains rights that address a wide range of social issues, including education, gender equality, children and elder protection, social security, housing and health.<sup>103</sup>

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100 See, for example, Directive 2001/83/EC on the Community code relating to medicinal products for human use OJ 2001 L 311/67; Regulation 726/2004/EC laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency OJ 2004 L 136/1; Regulation 141/2000/EC on orphan medicinal products OJ 2000 L 18/1; Regulation 1901/2006/EC on medicinal products for paediatric use OJ 2006 L 378/1; Regulation 1394/2007/EC on advanced therapy medicinal products OJ 2007 L 324/121.

101 A significant literature addresses the protection of social rights within EU law, see, for example: G Katrougalos, ‘The implementation of social rights in Europe’ (1996) 2 *Columbia Journal of European Law* 277; Hervey and Kenner (n 60 above); de Búrca and de Witte (n 60 above); S Coppola, ‘Social rights in the European Union: the possible added value of a Binding Charter of Fundamental Rights’ in G Di Federico (ed), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer 2011); K Lenaerts and P Foubert, ‘Social rights in the case-law of the European Court of Justice’ (2001) 28 *Legal Issues of Economic Integration* 267.

102 Art 6(1) TEU.

103 For detailed analysis of the significance of various social rights being included in the Charter, see the relevant chapters in Hervey and Kenner (n 60 above); and S Peers, ‘Article 4 – prohibition of torture and inhuman or degrading treatment or punishment’ in Peers et al (n 35 above).

In the Treaties, article 9 TFEU provides that EU law should promote high levels of protection in various social fields including education, employment, social exclusion and health. As these rights have evolved, from their early emergence in sectoral or horizontal legislation and case law to their codification in the EU CFR, the EU's ambition in, and contributions to, the social policy field has grown. The Commission recently adopted an Action Plan<sup>104</sup> to specify the supranational and national level actions that should take place to work towards the rights identified in the 2017 European Pillar of Social Rights. The Pillar<sup>105</sup> is a catalogue of social rights and policy aspirations which the Commission hopes will inspire a programme of action that will transform social outcomes in the EU. The Pillar is not binding in the same way that the EU CFR is, and its transformative potential has consequently been questioned by some.<sup>106</sup> Nevertheless, the Pillar provides a direct political mandate for legislation within the EU's fields of competence that will contribute to improving social outcomes, and others have shown that this purpose is already being realised.<sup>107</sup> The Pillar is now referred to in several pieces of EU legislation,<sup>108</sup> many of which are 'horizontal' in nature. This illustrates the point that the EU does not need to adopt specific, harmonising, social rights legislation to promote the enjoyment of social rights. Even if EU legislation, or even potentially soft law, is not directly connected to the Pillar, it can still create the conditions that are necessary for enjoying social rights, for example by securing freedom of movement, mutual recognition or non-discrimination. No one doubts the EU's competence to take such actions under the Pillar.

We contend that social rights are protected by the Agreement. Social rights are integral to peace-building on the island of Ireland, and to redressing the harms that flow from the geopolitical divisions that have beset the island, and its people(s). The wording of the Agreement indicates that the rights it encompasses must be understood inclusively,

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104 [The European Pillar of Social Rights Action Plan](#) (European Commission 2021).

105 [European Pillar of Social Rights](#) (European Commission, Secretariat-General 2017).

106 S Benedi Lahuerta and A Zbyszewska, 'EU equality law after a decade of austerity: on the Social Pillar and its transformative potential' (2018) 18(2–3) *International Journal of Discrimination and the Law* 163.

107 C Kilpatrick, 'The roaring 20s for social Europe: the European Pillar of Social Rights and burgeoning EU legislation' (2023) 29(2) *Transfer: European Review of Labour and Research* 203.

108 For example: Regulation 2021/1057 establishing the European Social Fund Plus, OJ L 231/21; Regulation 2019/1149 establishing a European Labour Authority, OJ L 186/21; Directive 2020/2184 on the quality of water intended for human consumption, OJ L 435/1; Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment, OJ L 198/13.

not narrowly. The implication is that the Agreement covers not only rights explicitly outlined therein, but also a range of other rights, including social rights.

EU law has contributed to social rights protection on the island of Ireland, in a range of ways, reflecting the various competences enjoyed by the EU: through harmonisation by legislation; mutual recognition of regulatory standards; coordination of national laws, policies and systems; governance via the European Semester system; and strategic deployment of EU resources. The Action Plan under the Pillar of Social Rights is another, recent, example. This role for EU law in the island of Ireland has been significantly diminished by Brexit.<sup>109</sup> The consequent individual loss of opportunity is harmful in itself, but the potential resulting depletion of social capital on the island is also concerning since it risks the erosion of trust and cooperation between stakeholders, which may lead to regression in areas of social policy. Evidence suggests that border change is linked to social and political trust,<sup>110</sup> and that damage to social capital in border regions erodes the possibility for cooperation.<sup>111</sup> To the extent that Brexit damages the social capital that has been painstakingly built on the island of Ireland following the Agreement, further negative policy development and loss of social rights protection will follow.

Article 2(1) of the Agreement was intended to protect people on the island of Ireland from a diminution of their rights under the Agreement consequent upon Brexit. However, as we have shown, especially if the approach adopted by *SPUC Pro-Life* is continued, in practice article 2(1) will be tricky to use to seek to reverse diminutions of social rights, flowing from loss of social opportunities or protections, previously provided or supported by EU law. This is for two main reasons: first, an unnecessarily narrow definition of ‘underpinning EU law’, based on an unrealistic notion of EU competence in the social field; second, the difficulty of adducing evidence to prove an individual diminution of a right in the context of the practicalities of social policy provision. It will be almost impossible to satisfy the *SPUC Pro-Life* test in situations where depletion of social capital, experienced on a collective basis (with the probable future diminution in collective and individual rights enjoyment), is occurring over time, in circumstances

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109 Some aspects of EU law, pertaining mainly to free movement of goods, remain applicable to Northern Ireland under the terms of the Windsor Framework.

110 S Abramson et al, ‘Historical border changes, state building, and contemporary trust in Europe’ (2022) 116(3) *American Political Science Review* 875.

111 F Lara-Valencia, ‘The “thickening” of the US–Mexico border: prospects for cross-border networking and cooperation’ (2011) 26(3) *Journal of Borderland Studies* 251.

where causal elements flowing from Brexit are accompanied by causal elements flowing from elsewhere.

This legal position is unsatisfactory because it creates a gap in rights protection which was intended to be avoided by the terms on which the UK left the EU: the Ireland/Northern Ireland Protocol annexed to the EU–UK Withdrawal Agreement. Under the *SPUC Pro-Life* approach, rights that are recognised by the Agreement are, in practice, not recognised as worthy of protection from Brexit-inspired rights backsliding by the Protocol. This position not only harms those who lose enjoyment of social rights, but also undermines the basis of the Agreement, namely the respect for all rights. Incidentally, it is also morally or politically unsatisfactory since Brexit was ‘sold’ to the electorate partly on the basis that it would create an opportunity for levelling up in relatively economically deprived areas of the UK such as Northern Ireland. The difficulty of challenging social rights backsliding achieves the opposite of that promise.

Moreover, the focus of the Protocol is on Northern Irish law, and therefore presumably on impacts felt in Northern Ireland, rather than those felt in the cross-border community, or in Ireland. The test in *SPUC Pro-Life* does not explicitly state that a diminution of rights can only be established if the harm is suffered by people in Northern Ireland. However, it is unclear to what extent a challenge by Irish rights holders harmed by Brexit would be successful. This is legally unsatisfactory since the Protocol was ostensibly created as an instrument to address cross-border issues as well as those experienced only in Northern Ireland. It is also morally and politically unsatisfactory since it abdicates responsibility for the external social impacts of Brexit.<sup>112</sup>

We do not know – and will probably never know – whether the drafters of the Protocol did not look sufficiently deeply at the possible consequences of Brexit for social rights; or thought that social rights were not relevant; or that the Protocol should not protect against diminutions of social rights; or simply found inclusion of social rights too difficult to negotiate in the time available. This inadequacy must raise the question of whether there is a need for other mechanisms that will offer protections for social rights in the face of loss of opportunity, equality and human dignity caused by Brexit.

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112 On the concept of external impacts of Brexit in the health field, see T Hervey et al, ‘Health “Brexternalities”: the Brexit effect on health and health care outside the United Kingdom’ (2021) 46(1) *Journal of Health Politics, Policy and Law* 177.