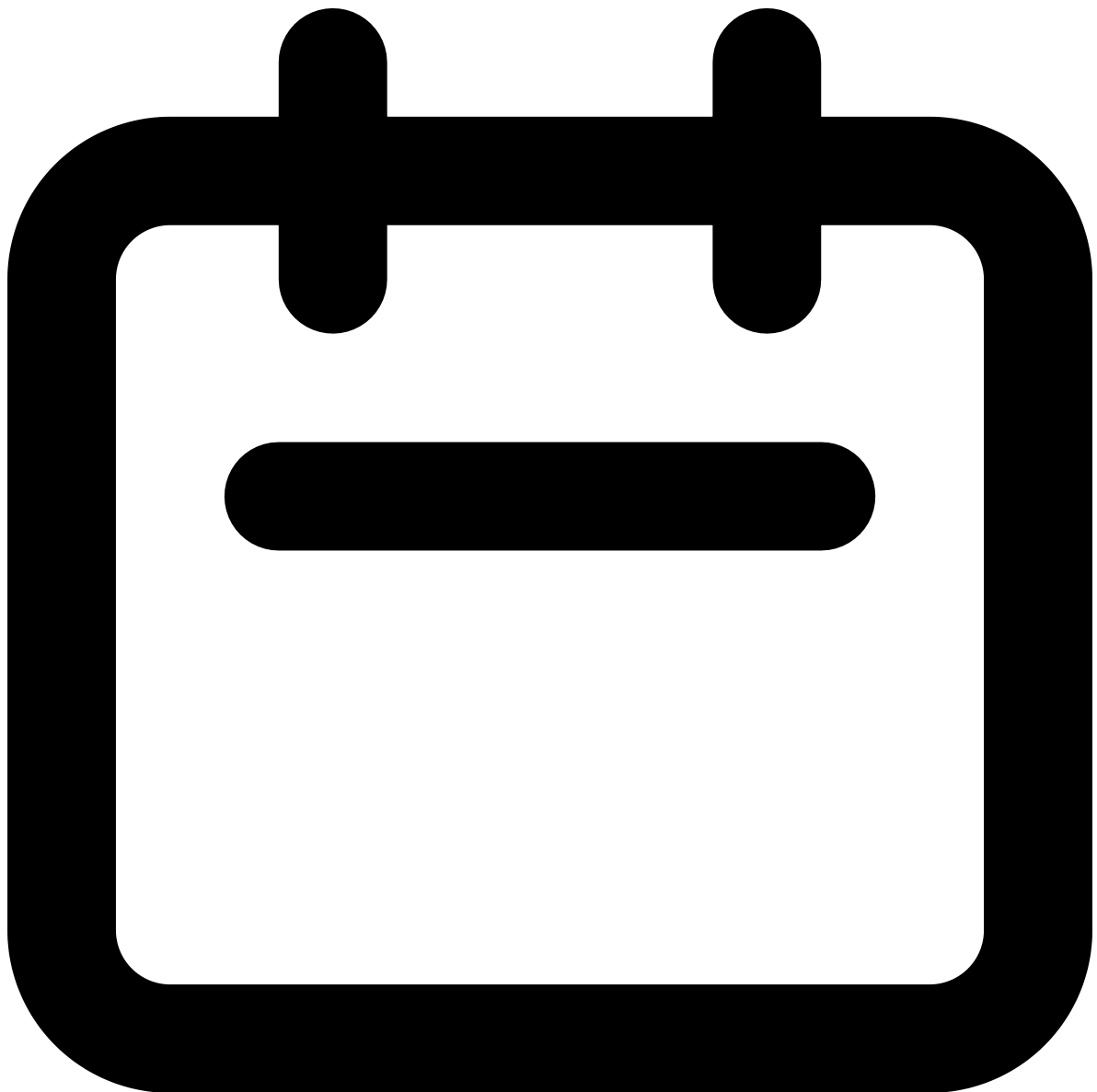


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**Backwards steps on the enjoyment of rights – a matter of state intervention or of interference?
Retrogressive measures before the European Court of Human Rights.**



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Two aspects in particular warrant attention in the recently decided case of [Diaconeasa v. Romania](#): First, the continuing longstanding untenable attitude of some actors/authorities towards unpaid care work; second, the European Court of Human Rights' (ECtHR, the Court) approach to retrogressive measures on entitlements to benefits and State support.

In this post, after summarising the facts, I will discuss these two aspects of the case in particular. Building on the latter aspect, I will explore the implications and the broader potential of the judicial approach chosen in the present case to assess the compliance of retrogressive measures with the European Convention on Human Rights (ECHR).

Facts & Judgment

Diaconeasa v. Romania is about the withdrawal of the provision of a State-funded personal assistant to a physically disabled individual, which essentially deprived her of her right to autonomy (see [Jivan v. Romania](#), para. 49). The authorities' withdrawal decision was based on a social enquiry report by the responsible Directorate of Social Welfare, and completely disregarded other evidence, including multiple expert evaluations of the individual's situation.

As attested by multiple medical, social and neurological assessments, following a stroke, the applicant had been unable to move, talk or take proper care of her basic needs. Furthermore, the applicant suffered from complete memory loss, was disoriented in space and time and needed a great deal of care. Initially, the Commission for the Protection of Adults with Disabilities (hereafter: the Commission) issued a certificate (for one year at a time) acknowledging her severe disability necessitating a (State-funded) personal assistant. Two years on, the same Commission, following its annual evaluation, noted that the applicant received help from her two daughters (who, it recommended, should continue doing so). It concluded that she had a severe disability not necessitating a personal assistant. It did so without stating any reasons for this change in its assessment – the new certificate being valid for two years.

The applicant lodged an objection with the County Court, and a judicial tug-of-war began. While the County Court cancelled the new certificate, the Court of Appeal ruled that it was valid (observing that the applicant needed only partial assistance for her daily home activities). Following the issuance of another certificate by the Commission two years later, again stating that there was no need for a personal assistant, and another objection lodged by the applicant, the Court of Appeal held that this new – and this time permanent – certificate was valid, despite there being no change whatsoever in the applicant's physical condition. It is worth noting that this final decision was based on another social enquiry report mentioning the fact that the applicant's daughters were taking care of her and helped with money, food, hygiene and going outside. The Court of Appeal did not consider the various expert assessments that consistently indicated the applicant's need for assistance.

The ECtHR found that no thorough assessment of the severity of the applicant's disability had been undertaken by the Court of Appeal and the Commission, nor had alternative practical arrangements been considered. It found that no fair balance had been struck between the competing interests at stake, as required by Article 8 (para. 64). Thus, the provision had been violated.

Commentary

Unpaid care work as a criterion for granting access to State benefits

In assessing the applicant's support and care needs, the Romanian authorities relied heavily on the unpaid care work provided by the applicant's daughters – to the extent that the daughters sacrificed their own private and family life to support their mother (para. 44). In its submission, the Romanian Government explicitly underlined that the applicant had a support network (para. 46), and argued that, therefore, the applicant lived with 'assisted independence' (para. 43). The ECtHR recognised and critiqued this: "[T]he Court cannot accept that support spontaneously given by family members could replace adequate disability benefits, as the Government seem to suggest" (para 61). It is also worth highlighting the Court's reference to the [Convention on the Rights of Persons with Disabilities](#) (CRPD; to which Romania is a party), more specifically the rights of persons with disabilities to live independently and be included in the community and to ensure their personal mobility (para. 57; CRPD arts. 19, 20).

Unpaid care work, which [reinforces gender inequality](#), is fundamentally unrecognised and [invisible](#): It is mostly undervalued or ignored in market or economic analyses, in public policy and in society more broadly, devaluing the worth attached to people who have cause to draw on support and to the support itself (which is overwhelmingly provided by [women](#)). It is governments' political choice whether to relieve the burden of unpaid care work by investing in appropriate infrastructure and public services. While government policies can redistribute unpaid care work more fairly – that is, across more shoulders and not reinforcing existing inequalities – change is happening frustratingly slowly. In its judgment, the Court flagged, albeit too briefly, the core of these concerns.

The withdrawal of previously granted State support as an interference with the applicant's right to respect for private life

While the ECtHR's delineation of States parties' positive and negative obligations is not always clear-cut or explicit (see [Wibye](#)), in the present case, the Court seems to frame the retrogressive measure taken by the Romanian authorities primarily as interference with the applicant's right to respect for her private life. Hence, even though this case is about access to public benefits, that is, positive obligations of the State, the withdrawal of what had previously been granted is considered by the Court as an interference with her existing entitlement – all while acknowledging the positive dimension inherent in this negative obligation of the State: the adoption of measures and the allocation of resources to guarantee respect for private life (para. 47). While a certain margin of appreciation is granted to the State here, it is certainly not a wide one. The Court seems to acknowledge that the applicant had a legitimate expectation to the continuation of State support, given that neither the state of her health and condition nor the domestic criteria for assessing the severity of her disability had changed. This approach of the Court is in line with what [Dixon and Landau](#) call 'using social rights defensively': as shields to protect existing entitlements (rather than as swords giving rise to positive obligations and creating new entitlements).

Retrogressive measures in international human rights law with regard to economic, social and cultural rights

I would like to discuss the ECtHR's approach outlined above through the lens of the [assessment framework](#) developed by the UN Committee on Economic, Social and Cultural Rights (similarly, see also the review criteria set out by the [UN Committee on the Rights of the Child](#)).

The overarching principle of progressive realisation in relation to economic, social and cultural rights ([International Covenant on Economic, Social and Cultural Rights](#) (ICESCR) art. 2(1)) essentially describes the State [obligation](#) to move as expeditiously and effectively as possible towards the full realisation of rights. Progressive realisation thus goes beyond achieving the minimum essential levels of a right. The flipside of the principle means that any backwards steps would constitute a prima facie violation of the progressive realisation principle enshrined in the ICESCR. Yet, the UN Committee has acknowledged that, in the face of severe resource constraints, retrogression might at times be justifiable. Against the backdrop of the principle of progressive realisation, it [set out](#) the following requirements for assessing backwards steps taken by States, establishing its doctrine of non-retrogression: Measures must be temporary, necessary, proportionate, non-discriminatory, consider in particular the needs of the disadvantaged, and guarantee the minimum essential levels of rights enjoyment. Overall, the non-retrogression doctrine introduces more robust scrutiny than the proportionality standard that is generally invoked in relation to limitations of rights (ICESCR art. 4).

Turning back to the ECtHR, in *Diaconeasa v. Romania*, the Court assesses whether there was a fair balance struck between the competing interests and undertakes a proportionality review (see also the comparator case of [McDonald v. United Kingdom](#), which the Court similarly approached from the standpoint of an interference with the right to issue, given that it concerned the refusal of a benefit which had been previously provided). While the ECtHR's scrutiny of infringements of States' positive obligations [tends to be less intense](#) than that of negative obligations (e.g., [no less restrictive means testing](#)), the standard of review for retrogressive measures – even if they concern the provision of public services and the allocation of resources – is more in line with that applied in relation to negative obligations. Overall, however, this intensity of review doesn't go as far as the stringent framework of review developed by the UN Committee in the context of retrogressive measures.

[Wibye](#) and [Stoyanova](#) (also [here](#)) have proposed that the reason for the intensity of review chosen by the ECtHR may be that whenever States can choose between different means to achieve the legitimate aim pursued, but have omitted doing so (typically relating to positive obligations), they are accorded a wide margin of appreciation (see also para. 48 in the present judgment), whereas when there is only a single fulfilment option for the State (as is typical where negative obligations are concerned, giving rise to a least restrictive measure test), it is granted a narrow margin of appreciation only. This distinction helps, to some extent, to explain the nuances in standards of review and principles invoked when adjudicating cases. Retrogression cases may fall between these two categories, but it seems that in most cases they are more likely to fall into the second category (single fulfilment option). In the present case, no alternatives to the provision of a personal assistant were considered by the authorities and courts, and it appears that the only avenue to remedy the infringement of the right in question was to continue to provide the applicant with a personal assistant. As a result, the respondent State was granted less autonomy – in line with the schema sketched out above.

What are the implications of a judicial approach that construes retrogressive measures as an interference with a primarily negative right? The underlying idea behind framing retrogressive measures in this way could be that the Court considers that once a certain right or standard has been achieved, there should not be any rollback – as provided for in the progressive realisation principle with regard to economic, social and cultural rights. Should this nevertheless be the case, a more stringent review will be undertaken, and a narrower margin of appreciation will be granted to States.

Perhaps as an interesting parallel, it is worth noting that political theorists, most prominently [Pogge](#), have framed the duties of wealthy States towards poorer nations as negative duties of restitution for harm rather than as positive duties to provide aid.

Broader considerations and concluding remarks

What are the implications of this stance on, and framing of, retrogressive measures for the role of the State in human rights law more broadly? International human rights law calls for an intervening State that consistently moves towards the full realisation of rights (positive obligations) and that, at the same time, does not arbitrarily interfere with people's enjoyment of their rights (negative obligations). These different demands on the State create a certain tension. The crux of the matter is thus to find the right balance between intervention and non-interference in determining what role the State ought to play in giving effect to human rights. From an economic and social rights standpoint, it may seem that too much leeway – or in the ECtHR's terminology, too wide a margin of appreciation – has at times been granted to States in this sphere. It is an encouraging signal that, when it comes to retrogressive measures in the provision of social security and social assistance, the ECtHR is willing to scrutinise more stringently decisions taken by the State.

In the present case, the ECtHR held that the wide margin of appreciation that States generally have in relation to positive obligations with significant resource implications does not apply to cases where there is a backtracking compared to the level of rights fulfilment already achieved. Interestingly, it framed the issue at stake not as a matter with significant budgetary implications for the State, but as a matter of law: "The issue at stake in the present case is not a choice between basic care or additional, more expensive care – which, being a matter of allocation of limited State resources, falls within the State's margin of appreciation [...] – but rather about ensuring the applicant the appropriate level of care and dignity, as provided for by law and its interpretation in the light of its aims and principles [...]" (para. 63). Rightly, the Court assesses retrogressive measures more intensively, granting a narrow margin of appreciation only. This is a welcome move. Because what we need in human rights is progress, not setbacks – and human rights budgeting rather than excuses referring back to resource constraints.*

*[*Exceptions may apply, for example in the face of severe crises if important human rights infrastructures, such as the maintenance of the social security system, are jeopardised.]*

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