

## **Episode 5: Retrogression**

This episode focuses on retrogression. So far our discussion of obligations has primarily focused on the duty of states to advance economic and social rights enjoyment. However, the reality is that constant progress in the implementation of economic and social rights is far from inevitable. We frequently see measures like budget cuts and the elimination of policies and programmes that result in rollbacks in the enjoyment of economic and social rights.

There is a strong presumption against the permissibility of backward steps in economic and social rights achievement – or what the UN Committee on Economic, Social and Cultural Rights refers to as 'retrogression'. The prohibition on 'retrogressive measures' - that is, backward steps - in terms of the achievement of economic and social rights was first outlined by the Committee, in 1990 where it stated that '... any deliberately retrogressive measures ... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'.

It is important to note that the Committee made it clear that the prohibition is not absolute. There will be times when backward steps in economic and social rights achievement are unavoidable: for instance, in situations of natural disaster, conflict or economic emergency. International human rights law understands this and doesn't require governments to do more than they can.

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But what did the Committee mean when it said that retrogressive measures 'would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'? In practice, the Committee's statement suggests that the state will only be able to show that retrogressive measures are justified when factors beyond its control have led to a decrease in the available resources. In any case, a state can't justify retrogressive measures simply by referring to resource scarcity, fiscal discipline or savings: it needs to show why the measures at issue were necessary for the protection of the totality of rights in the Covenant.

The Committee has said a good deal about how it will treat state efforts to use resource constraints as a justification for retrogression. Where states try to argue this, the Committee will consider claims based on resource constraints on a country-by-country basis in the light of what they term 'objective criteria'. These criteria include country-specific contextual factors such as: the country's level of development; the severity of the alleged breach; the country's economic situation; the existence of other serious claims on the state's limited resources (for example, resulting from a recent natural disaster or from internal or international armed conflict). Other criteria include whether the government has sought to identify low-cost options; and whether the government has sought cooperation and assistance or rejected offers of resources from the international community without sufficient reason.

Given that many of the cuts made to economic and social rights-related programmes and services in recent years have been presented by governments as being required because of

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the impact of the financial and economic crises that originated in 2007-8, we need to pay special attention to what the Committee has said about retrogressive measures in times of financial and economic crisis. Not all fiscal austerity measures constitute impermissible retrogression. However, it is clear from the Committee's work that there has been a significant overlap between the austerity measures adopted by many states in the wake of the crises and human rights-violating backward steps in human rights achievement.

The Committee has directly addressed policy changes or adjustments in response to financial or economic crisis. In a 2012 letter to States Parties to the Covenant, the Committee said that any such adjustment must meet the following criteria: first, the policy must be a temporary measure covering only the period of the crisis. Second, the policy must be necessary and proportionate in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights. Third, the policy must not be discriminatory and must comprise all possible measures, including tax measures, to support social transfers and mitigate inequalities that can grow in times of crisis and to ensure that the rights of disadvantaged and marginalised individuals and groups are not disproportionately affected. Finally the policy must identify the minimum core content of rights, or a social protection floor, as developed by the International Labour Organization, and ensure the protection of this core content at all times. We will speak more about the minimum core obligation in episode 6.

These are the criteria that the Committee has applied to test the human rights compliance of post-economic crisis 'austerity measures' that have appeared in the State Reports that it

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has dealt with since the crises. In the case of Spain, the Committee referred to the criteria when expressing concern that, at a time when one in four minors was living below the poverty line, family benefit payments had been drastically cut or even abolished. In 2016 – when it looked at the UK's report – the Committee mentioned the criteria when expressing concern about the disproportionate, adverse impact that fiscal austerity measures introduced in 2010 were having on the enjoyment of Covenant rights by disadvantaged and marginalised individuals and groups. In both of these situations, the Committee clearly felt that the governments concerned had not done enough to prevent backward steps in economic and social rights realisation. The existence of a crisis did not serve to excuse the retrogression that had taken place.