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## **Can rights be ring-fenced in times of austerity? Equality, equity and judicial ‘trusteeship’ over the UK’s fairness agenda**

Jacinta Miller and Alice Diver  
School of Law/TJI  
Ulster University, Northern Ireland

### **Abstract**

The need for some form of ‘fairness agenda’ has been cited on several occasions in connection with the UK’s ongoing programmes of welfare reform.<sup>1</sup> That the state has an over-arching duty to preserve finite resources, whilst also promoting just and ‘equitable outcomes’ via its decision-making processes, has also been noted in a number of recent cases arising out of the introduction of ‘austerity measures.’<sup>2</sup> Whether equitable concepts are set to expand upon basic equality principles in cases involving adequate living standards remains to be seen. What does seem fairly clear is that budgetary limitations have the potential to impact significantly upon the lives of the most vulnerable members of society, particularly in respect of such particularly ‘fragile rights’ as housing or health care provision. This is especially so where such socio-economic rights have tended to require considerable levels of financial and political bolstering, in the absence of which they risk being forever framed as merely aspirational in nature, suitable only for some gently

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<sup>1</sup> See <http://www.theguardian.com/politics/2010/oct/06/david-cameron-fairness-people-deserve> (accessed 30.04.15); <http://www.telegraph.co.uk/news/politics/david-cameron/9000249/David-Cameron-my-vision-for-a-fair-Britain.html> (accessed 10.10.15)

<sup>2</sup> See for example *MA and others v The Secretary Of State For Work And Pensions* [2014] EWCA Civ 13; *R (D) v Worcestershire County Council* [2013] EWHC 2490 (Admin); *R (Hardy) v Sandwell Metropolitan Borough Council* [2015] EWHC 890 (Admin); *R (Rutherford) v SSWP* [2014] EWHC 1631 (Admin)

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progressive form of realization. Litigation in domestic courts remains key: as Harris argued, ‘non-justiciability may be revealed as the reason for there being no legally enforceable rights.’<sup>3</sup> Equally, the notion of a justiciable right to an adequate standard of living is perhaps still a little too ‘malleable,’ to be considered on a ‘justiciability-par’ with weightier civil or political rights.<sup>4</sup> This chapter will argue that a rights-template tied to the notion of ‘socio-economic equity’ (rather than equality) could frame domestic judges as the ‘trustees’ of public budgets, and of the socio-economic rights that such funds are meant to protect and promote. This could in turn potentially serve to challenge at least some of the increasingly profound ‘cycles of poverty that can only be broken through structural reforms.’<sup>5</sup> The role of domestic courts is a fundamental, and essentially fiduciary one: judges are best placed to keep reminding legislators and policy-makers of the need to identify (and avoid dipping below) clearly articulated rights standards which should in themselves be firmly grounded upon such key rights concepts as human dignity and ‘bodily integrity.’<sup>6</sup>

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<sup>3</sup> B V Harris ‘Judicial Review, Justiciability and the Prerogative of Mercy’ *Cambridge Law Journal* (2003) (62) 631 -660 p 633. Harris uses the terms ‘judicial review’ and ‘justiciability’ almost interchangeably when he argues that ‘the courts have struggled to determine whether the exercise of the prerogative of mercy is vulnerable to judicial review, that is, whether or not it is justiciable.’ (p 636)

<sup>4</sup> See M Finkelstein, ‘Judicial Self-Limitation’ *Harvard Law Review* (1924) (37) 338 -364 p 341. See also P Hunt ‘*Reclaiming Social Rights*’ (1996) Ashgate: Aldershot (p 66). Hunt acknowledges that both legal and non-legal processes are necessary to achieve fuller implementation of human rights; P Farmer ‘*Pathologies of Power: Health, Human Rights and the New War on the Poor*’ (2003) University of California Press: Berkeley, on the contribution of legal processes to the implementation of human rights generally and how alternative strategies for realisation are often needed.

<sup>5</sup> I Muvungi. ‘Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies’ *The International Journal of Transitional Justice* (2009) 3 163-182 p 163

<sup>6</sup> L Waldorf ‘Anticipating the Past: Transitional Justice and Socio-economic Wrongs’ *Social and Legal Studies* (2012) (21) 171 - 186, p 173. Waldorf analyses the difficulties and limitations associated with addressing socio-economic rights violations, albeit in respect of transitional justice: (‘Socio-economic factors were mostly relegated to..historical background, where they could be more easily ignored.’ p. 176 )

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## 1. Introduction

*'[n]either morality nor justice... requires considerable sacrifices of some persons for the sake of trifling gains to others, even if the ideal of equality may seem initially to point in that direction.'*<sup>7</sup>

In the absence of meaningful definitional standards, many socio-economic rights essentially become fictive: as Harris has observed, 'consistent with the rule of law, the determinative factor in judicial review should be whether an applicant has established enforceable legal rights.'<sup>8</sup> By the same token, to be meaningfully juridical, human rights must at least be 'subject to the scrutiny of a court of law or another judicial or quasi-judicial process.'<sup>9</sup> Whilst it is now generally accepted that most, if not all, socio-economic rights are essentially justiciable<sup>10</sup> (at least in the sense of having some chance of being successfully litigated at the level of domestic courts and tribunals) it can also be argued that many such rights still tend to become particularly 'flimsy' at particular points in their implementation and subsequent monitoring stages.<sup>11</sup> As Hoffman LJ observed,

'Human rights include the right to a minimum standard of living, without which many of the other rights would be a mockery. But they certainly do not include the right to a fair distribution of resources or fair treatment in economic terms – in other words, distributive justice. Of

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<sup>7</sup> E Rakowski *'Equal Justice'* (1993) Clarendon Press: London, p 2

<sup>8</sup> Harris *op cit* n 1 p 632.

<sup>9</sup> K Arambulo *'Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects'* (1999) Hart, Oxford, p 55. This is traditionally viewed in the context of individual litigation through domestic courts or via individual complaint mechanisms. See also M Sepulveda *'The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights'* *School of Human Rights Research Series 18* (2003) Intersentia, Antwerp, on how the work of quasi-judicial organisations (such as the UN Treaty monitoring bodies) can also be taken as evidence of justiciability.

<sup>10</sup> See further A Nolan 'Addressing Economic and Social Rights Violations by Non-state Actors through the Role of the State: A Comparison of Regional Approaches to the 'Obligation to Protect' *Human Rights Law Review* (2009) 9 (2) 225-255; See however P O'Connell 'The Death of Socio-economic Rights' *Modern Law Review* (2011) (74) 532-554 on how courts in Canada, India, and South Africa have moved away from protecting socio-economic rights in favour of tacitly endorsing the 'neo-liberal policy prescriptions' of legislators.

<sup>11</sup> See further J. Donnelly, 'The Relative Universality of Human Rights' *Human Rights Quarterly* 2(2007) 29 (2) 81; G. Itzcovich, 'One, None and One hundred Thousand Margins of Appreciations: The *Lautsi* Case' *Human Rights Law Review* (2013) 13(2) 287-308

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course distributive justice is a good thing but it is not a fundamental right.’<sup>12</sup>

Domestic enforcement can thus be quite ‘frustrating’<sup>13</sup> for rights advocates, not least when it comes to identifying some form of useful minimum standards or rights-thresholds. With entitlements to social security or welfare benefits having been recognized however as a juridical form of property right, national courts are clearly obliged to protect vulnerable ‘rights beneficiaries’ who may be at risk of suffering harm. While judges cannot force domestic decision-makers to act equitably, they can at least identify and, if needs must, condemn clear instances of inequity and degradation as they arise, or seem likely to occur. Repeatedly reminding those who hold the public purse-strings of their moral duty to actively protect basic levels of subsistence, might eventually enable some level of budget ‘ring-fencing,’ aimed specifically at preventing violations of human dignity. Where law-making boundaries clearly exist however between the judiciary and the executive, it may be argued that calls for judicial oversight run the risk of falling prey to ‘judicial self-limitation’ with some jurists’ desire for change perhaps being too easily stymied by some ‘fear of the consequences that might ensue if courts were to interfere in such matters.’<sup>14</sup>

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<sup>12</sup> *Matthews v Ministry of Defence* [2003] UKHL 4 per Hoffman LJ at para 26

<sup>13</sup> T Collingsworth ‘The Key Human Rights Challenge: Developing Enforcement Mechanisms’ *Harvard Human Rights Journal* (2002) 15 183, p185

<sup>14</sup> Finkelstein *op cit* n 4 p 341; see also J H Jackson ‘Status of Treaties in Domestic Legal Systems: A Policy Analysis’ *The American Journal of International Law* (1992) (86) 310; and J Jowell ‘Judicial Deference: Servility, Civility or Institutional Capacity’ (2003) *Public Law* 592 on how UK courts have adopted this approach (p 593)

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## 2. Judicial (over)deference or judges as ‘rights-trustees’?

*‘Providing that the court limits itself to an investigation of the legal issues raised, there is no constitutional impropriety in such review. To the contrary, it is precisely the proper role of the court.’<sup>15</sup>*

Factors which might also affect rights-enforcement at the level of domestic law and policy-making include socio-political resistance to international monitoring mechanisms, as occurred in the UK recently over the UN’s criticism of its ‘bedroom tax’ welfare reforms.<sup>16</sup> Similarly, if certain types of rights are found to exist only where they have firstly been clearly defined in enshrining domestic statutes, or judicially endorsed via case law, and underpinned by adequately earmarked state resources, then this clearly calls into question the nature of such ‘rights.’ Arguably, they may be better framed as state-sanctioned social privileges, especially given that access to such entitlements may be almost entirely dependent upon favourable social contexts: a legacy of political conflict or financial recession may easily serve to freeze or reverse progressive implementation or hinder intended impacts. Basic principles of non-discrimination and equality (of treatment, or of opportunity) may fall short where there is a need for fairness-led, equitable outcomes, not least in cases involving resource-dependent decision-making.<sup>17</sup> Again, the ideals and language of

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<sup>15</sup> C Finn ‘The Justiciability of Administrative Decisions: A Redundant Concept?’ *Fed L Rev* (2002) (30) 239 on the proper role of the courts, the need for judicial review, the abuse of political power as an ‘exercise in bad faith or for improper purposes with no possibility of legal remedy’ and how this ‘is contrary to the rule of law, and should not be countenanced without compelling reason.’ (available <http://www.austlii.edu.au/au/journals/FedLRev/2002/9.html> accessed 01.02.15)

<sup>16</sup> See for example R Rolnik ‘*The Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development: Report Of The Special Rapporteur On Adequate Housing As A Component Of The Right To An Adequate Standard Of Living, And On The Right To Non-Discrimination In This Context*’ (Distr. GENERAL A/HRC/10/7 4 February 2009); and <http://www.theguardian.com/society/2013/sep/11/bedroom-tax-should-be-axed-says-un-investigator> . (accessed 31.01.15) Responses were fairly predictable: See for example <http://www.theguardian.com/society/2014/feb/03/ministers-savage-un-report-abolition-bedroom-tax> (accessed 30.01.15)

<sup>17</sup> See further D Turk ‘*The Realization of Economic, Social and Cultural Rights: Final Report by the Special Rapporteur*’ (1992) UN Document E/CN.4/Sub.2/1992/16; M Craven ‘*The International*

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‘equity’ (e.g. ‘trusteeship’, fairness, justice, fiduciary obligations towards vulnerable beneficiaries) might prove useful in overcoming some of the difficulties that tend to attach to the implementation of such economically fragile rights. There seems to be increasing judicial reluctance however to comment upon the unfairness of certain resource allocations, highlight systemic welfare failings, or denounce the harshness of fiscal policies. Arguably, if judges were framed as the moral ‘trustees’ of the fragile, dignity-based rights of the vulnerable, then perhaps legislators might be encouraged to allocate sufficient resources to protect such fundamental rights.

Courts would not be usurping elected legislators in their role as budget administrators; rather they would be calling upon them to be mindful of their ‘fiduciary duty’ to equitably care-take scarce public funds, without harming those social beneficiaries most in need of protection. Arguably, such an approach might enable a useful measure of rights ‘ring-fencing’ on the basis that it must be possible to identify a point at which basic standards of human dignity have been allowed to fall below an acceptable rights-threshold. Ensuring that such situations are rectified as a matter of urgency, rather than political expediency, is a key task. Democratically mandated ‘austerity measures’ might otherwise remain forever problematic; decisions which appear overtly discriminatory might well be challenged in court, but ultimately deemed rights-compliant on the basis that they were made both lawfully and rationally, and are therefore entirely ‘justified’ in political or economic terms. This is especially so where the ‘greater good’ has traditionally tended to demand

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*Covenant on Economic, Social and Cultural Rights: A Perspective On Its Development* (1995) Clarendon Press: Oxford; M Cranston ‘*What are Human Rights?*’ (1973) Bodley Head: London; C Orwin and T Pangle ‘The Philosophical Foundations Of Human Rights’ in M Platter ‘*Human rights in our time – Essays in memory of Victor Baras*’ (1984) Westview Press, London; E Vierdag ‘The Nature Of The Rights Granted By The International Covenant on Economic, Social and Cultural Rights’ *Netherlands Yearbook of International Law* (1978) (9) 69

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preservation of scarce public funds by rationing allocations on the basis of most urgent need. Similarly, if domestic law and policy-makers have demonstrated sufficiently high levels of ‘due regard’ for the rights of those likely to be adversely affected (via, say, political debate or public consultation) then this too might ‘court-proof’ many controversial policy decisions which might otherwise have been framed as sorely testing the limits of rights compliance.<sup>18</sup>

Domestic courts dealing with such contentious issues as social security payments, health care or adequate housing, remain well placed however to make significant contributions to human rights jurisprudence, irrespective of whether these matters are viewed as value-based, moral dilemmas or as grounded in clear legal entitlements.<sup>19</sup>

As Farmer has observed,

‘...human rights discussions are excessively legal and theoretical in focus. They seek to define rights, mandate punishment by appropriate authorities for the violators, enforce international treaties, and so on.’<sup>20</sup>

Given that signatory states must view all individuals as ‘equal in human dignity’<sup>21</sup> some meaningfully workable degree of government accountability should arise where this basic rights principle has been side-lined.<sup>22</sup> Focusing on the presence or

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<sup>18</sup> See further A P Le Sueur ‘Justifying Judicial Caution: Jurisdiction, Justiciability and Policy’ in B Hadfield (ed) *Judicial Review: A Thematic Approach* (1995) Gill and Macmillan: Dublin, p 240

<sup>19</sup> See however Nolan A, O’Connell R, and Harvey C (eds.) *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (2013) Hart, London, on how elected legislators (and public administrations) ‘have the primary responsibility, and the greatest capacity, for giving effect to such rights.’ (p.1)

<sup>20</sup> Farmer *op cit* n 4, p19. Farmer also cites L Henkin *The International Bill of Rights* (1981) Columbia University Press; New York, on how remedies in international law are similarly limited. See also T Collingsworth ‘The Key Human Rights Challenge: Developing Enforcement Mechanisms’ *Harvard Human Rights Journal* (2002) (15) 183 who suggests that remedies must lie in domestic law.

<sup>21</sup> See the Preambles to the UDHR, the ICCPR and the ICESCR for example.

<sup>22</sup> See The UN General Assembly Resolution 60/147 ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ (16 December 2005) A/RES/60/147. Although no article within The ICESCR establishes such a right, General Comment No. 14 ‘The Right To The Highest Attainable Standard Of Health (Article 12)’ E/C.12/2000/4 para 59 states that

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absence of domestic legal remedies should allow for some discussion of ‘what it actually takes to enable people to be secure against the standard, predictable threats to their rights.’<sup>23</sup> Non-discrimination at least provides a useful starting point: as Freeman pointed out, basic principles of ‘natural justice’ might be invoked even where no other obvious norms or legal rules are evident.<sup>24</sup> The procedural or administrative aspects of a claim may allow for some useful level of judicial oversight even if the core grievances of a plaintiff cannot be litigated.<sup>25</sup> As Toebes argued in respect of the Netherlands, ‘justiciability does not always refer to rights as such but, rather to elements’<sup>26</sup> within those rights. Litigating significant aspects of the right to health care (rather than searching for some workably specific domestic definition of a right to health) can serve to create significant precedent.<sup>27</sup> As McLean has further stressed, ‘even where rights are not formally provided for in constitutions, where a remedy is provided it can reasonably be concluded that the right is taken to exist.’<sup>28</sup> On this point Toebes conceded however that

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‘any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels.’

<sup>23</sup> H Shue ‘*Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*’ (1996) Princeton University Press; Princeton, p160

<sup>24</sup> M D A Freeman *Lloyd’s Introduction to Jurisprudence* (2001) Sweet and Maxwell, London, p1379 on the principle of natural justice (as applied in cases such as *National Bank of Greece and Athens v Metliss* [1958] AC 509; see para 525, per Viscount Simonds)

<sup>25</sup> See also C McCrudden ‘A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights’ *Oxford Journal of Legal Studies* (2000) (4) 499 on how judges may ‘refer extensively to the decisions of foreign courts when interpreting human rights guarantees.’

<sup>26</sup> B Toebes ‘*The Right To Health As A Human Right In International Law*’ (1999) Intersentia Publishers, Oxford, p168

<sup>27</sup> See for example *Soobramoney v Minister of Health, KwaZulu-Natal* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997). See also D Bilchitz ‘Placing Basic Needs at the Center of Socio Economic Rights Jurisprudence’ *ESR Review* (2002) (4) 1 on how the approach may be administrative rather than substantive; See also *R v Cambridgeshire Health Authority ex p. B* [1995] 1 WLR 898 and *Rodgers v Swindon Primary Health Care Trust and the Secretary of State for Health* [2006] EWCA Civ 392 as examples of judicial reviews taken in relation to Health Authority decisions to not provide particular medicines. See further M A McTeer ‘A Role for Law in Matters of Morality’ *Mc Gill Law Journal* (1995) (40) 893; A C Elias- Jones and J Samanta ‘The Implications of the David Glass Case for Future Clinical Practice in the UK’ *Arch Dis Chil* (2005) (90) 822 p 823 argue that until a better system exists (based perhaps on medical ethics committees) the courts are likely to remain as the ‘arbiters of the child’s best interests’ in such contexts.

<sup>28</sup> S McLean ‘A UK Perspective in Health Care Restraints’ in A. den Exter and H. Hermans (eds) ‘*The Right to Health Care in Several European Countries: Expert meeting, held in Rotterdam, the*

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‘In spite of the fact that the Dutch courts are said to have paid considerable attention to economic and social rights, there are very few judgements in which the Dutch courts have granted direct effect to economic, social and cultural rights.’<sup>29</sup>

That said, as a basic starting point ‘the equality principle is a dominant and recurring theme of international human rights law.’<sup>30</sup> National equality laws have in turn essentially been ‘legitimated on the grounds that they further the liberal goals of State neutrality, individualism and the promotion of autonomy’.<sup>31</sup> The notions of equality of opportunity and equal treatment in theory should provide considerable scope for enabling a greater indivisibility of rights,<sup>32</sup> and creating an underpinning philosophy of allocating scarce resources in the most equitable way possible.<sup>33</sup> Historical and socio-political context clearly also matters: the South African Constitution for example admitted that a fresh focus on non-discrimination was unlikely to correct entrenched inequalities which had resulted from decades of unfair laws and policies. As its Preamble states, ‘the People of South Africa recognize the injustices of the past,’ whilst Article 1(a) underscores the importance of ‘human dignity, the achievement of equality and the advancement of human rights and freedoms.’<sup>34</sup> Legally embedding equality principles could prevent blatantly unlawful

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*Netherlands. April 27 –28 1998*’ (1999) Kluwer law International; The Hague, who suggests that a legal right truly exists only where an actual legal remedy is present (p 59)

<sup>29</sup> Toebes *op cit* n 26. Toebes differentiates between direct effect and the ‘internal effect’ of Treaties via domestic law.

<sup>30</sup> A Bayefsky ‘The Principle of Equality or Non-Discrimination in International Law’ *Human Rights Quarterly* (1990) (11) 1, p 2. See also C McCrudden (ed) ‘*Anti-Discrimination Law: The International Library of Essays in Law and Legal Theory, Second Series*’ (2003) Dartmouth Publishing Company; Aldershot p xiii on how the grounds of discrimination have expanded and how new concepts of equality have developed; S C Kolm ‘*Justice and Equity*’ (2002) MIT Press; Massachusetts, on how ‘justice, fairness, or equity’ can underpin global ‘codes’ of justice.

<sup>31</sup> S Fredman ‘Equality: A New Generation’ *Industrial Law Journal* (June, 2001) (30) 145 p 154

<sup>32</sup> Turk *op cit* n 17

<sup>33</sup> See for example the CESCR Committee’s ‘Concluding Observations of the Committee on Economic, Social and Cultural Rights: Algeria (28/12/1995) UN Document E/C.12/1995/17 which cited deep concern over ‘the fact that the philosophy of the Covenant, based on the principle of non-discrimination and on the idea of the universality of human rights, has not fully taken root.’ (at para 16)

<sup>34</sup> See The South African Constitution available at <http://www.constitutionalcourt.org.za/site/theconstitution/thetext.htm> (accessed 10.10.14)

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forms of discrimination, removing any ‘arbitrary, invidious or unjustified distinction or differentiation unwarranted by those made subject to them.’<sup>35</sup> Preventing indirect discrimination, especially as it relates to accessing or using essential services, also has clear ties to the promotion of human dignity and to poverty avoidance,<sup>36</sup> as Farmer’s work on ‘structural violence’<sup>37</sup> made very plain.<sup>38</sup> And yet, ‘equal treatment can perpetuate inequalities’<sup>39</sup> not least where decision-makers are free to cite an over-arching need to protect the ‘public good’<sup>40</sup> or promote a notion of higher ‘state necessity.’<sup>41</sup>

Ensuring a decent standard of living is not merely about achieving broad-brush social or economic equalities: if everyone is equally ill, impoverished, or living in a similar state of degrading squalor, then it can hardly be said that principles of equal treatment have served either to define (or ring-fence funds to protect) meaningful rights standards. The concept of ‘adequacy’ might be more clearly articulated via equitable principles of justice or fairness: these in turn could point perhaps to some discernible minimum rights thresholds of provision, which might then be used to embed positive state obligations, or at least to highlight (or prevent a repeat of) abject failings of law and policy. Where however rights are repeatedly defined as being

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<sup>35</sup> T McKean ‘*Equality and Discrimination under International law*’ (1983) Clarendon Press; Oxford p185

<sup>36</sup> See G Oppenheimer, R Bayer and J Colgrove ‘Health and Human Rights: Old wine in new bottles?’ *The Journal of Law Medicine and Ethics* (2002) (30) 522 on Villerme’s 19<sup>th</sup> century study on mortality and living conditions in France; Chadwick’s report on English sanitary conditions and Virchow’s study of the Prussian typhus epidemic.

<sup>37</sup> P Farmer ‘*Infections and Inequalities: The modern plagues*’ (2001) University of California Press; London; See also P Farmer ‘*Pathologies of Power: Health, Human Rights And The New War On The Poor*. (2003) University of California Press: Berkeley.

<sup>38</sup> See also however V Leary ‘The Right To Health In International Human Rights Law’ *Health And Human Rights* (1994) (1) 28 on how there may be no automatic link between resources and health status.

<sup>39</sup> Fredman *op cit* n 31 p 2

<sup>40</sup> B Lee ‘Judicial Review and Access to Health Care’ in T Buck (ed) ‘*Judicial Review And Social Welfare: Citizenship And Law Series*’ (1998) Pinter; London, p 40.

<sup>41</sup> See further A T Price -Smith ‘*The Health Of Nations: Infectious Disease, Environmental Change And Their Effects On National Security And Development*’ (2001) MIT Press: Massachusetts, p10

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dependent upon a state's 'maximum available resources' (or couched in the language of progressive aspiration) domestic jurists are perhaps left with few options. They must either frame inadequate domestic legal frameworks as being essentially compliant with human rights obligations, or quietly classify them as inevitable contraventions, justified on the basis that decision-makers (i.e. budget holders) must protect the 'greater good.' In other words, national laws or policies on funding allocations which engage socio-economic rights may be profoundly *unfair* in terms of individual impacts and compromises to human dignity, but will remain essentially justifiable on the basis that public funds must be directed towards other, higher-priority rights issues. Judges face a difficult task in attempting to overturn decisions arising from such reasoning. And yet it can be argued that,

'The greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions.'<sup>42</sup>

In doing so, domestic courts can surely look to the various 'ethical concept[s], grounded in principles of distributive justice.'<sup>43</sup> As Whitehead and Dahlgren argued, 'health inequality' is not completely removed from 'health inequity' given how both concepts have the potential to create 'systematic, socially produced (and therefore modifiable) and unfair' outcomes.<sup>44</sup> The two concepts can still however be differentiated: health inequalities may arise from justified instances of discrimination (for example, an unavoidable targeting of resources during times of disaster, war or

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<sup>42</sup> *A v Secretary of State for the Home Department* [2004] UKHL 56 per Lord Bingham of Cornhill at para 29

<sup>43</sup> P Braveman and S Gruskin 'Theory and Methods Defining Equity in Health' *Journal of Epidemiology and Community Health* (2003) (57) 254

<sup>44</sup> See M Whitehead and G Dahlgren '*Levelling Up (Part 1): A Discussion Paper on Concepts and Principles for tackling Social Inequities in Health*' (2006) WHO Collaborating Centre for Policy Research on Social Determinants of Health, University of Liverpool; M Whitehead and G Dahlgren '*Levelling Up (Part 2): A Discussion Paper on European Strategies for tackling Social Inequities in Health*' (2006) WHO Collaborating Centre for Policy Research on Social Determinants of Health, University of Liverpool

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political transition) while health inequities might be more easily challenged on the basis that unnecessarily harsh, unfair decisions have been made.<sup>45</sup> Domestic law and policy-makers seem however to prefer the more clearly defined parameters of equality principles on the basis that these

‘can be assessed with respect to specified measurable outcomes, whereas judging whether a process is equitable or not is more open to interpretation.’<sup>46</sup>

In respect of defining ‘health justice,’ two approaches to equitable fairness (direct and indirect) seem possible.<sup>47</sup> The direct approach could simply see ‘equity as an end in itself’ and perhaps involve a meaningful nod to distributive justice: an indirect approach could however be aimed instead at having ‘equity embedded within the concept of social justice’ which might encourage greater judicial scrutiny of the various underlying processes which permit (and at times seem to endorse) inequalities.<sup>48</sup> The idea of inherent human dignity remains relevant, despite its often subjective nature.<sup>49</sup> Used objectively however, human dignity can reveal underlying policy ‘attitudes to an individual or group...[and] social norms or expectations.’<sup>50</sup> As Feldman has further argued, a focus upon

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<sup>45</sup> Braveman and Gruskin *op cit* n 43 p256.

<sup>46</sup> *Ibid*

<sup>47</sup> F Peter ‘Health Equity and Social Justice: Harvard Center for Population and Development Studies Working Paper Series’ (January 2000) Volume 10 Number 2 (available at <http://www.hsph.harvard.edu/hcpds/wpweb/foundations/peter.html> accessed 28/02/14)

<sup>48</sup> *Ibid*

<sup>49</sup> D Feldman ‘Human Dignity as a Legal Value – Part I’ *Public Law* (1999) 682 p 685; see also D Feldman ‘Human Dignity as a Legal Value – Part II’ *Public law* (2000) 61. See further *Pretty v United Kingdom* (Application no. 2346/02) (2002) 35 EHHR 1. Both sides used arguments based upon human dignity - and indignity- in this case.

<sup>50</sup> *Ibid* p686

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“*the inherent dignity of the human person*” as a foundation for rights is different from conferring a right to dignity...on the other hand, one clearly has an interest in having one’s human dignity respected, and this may support more specific rights.’<sup>51</sup>

Arguably, a truly juridical, enshrined right to avoid indignity, underpinned by such key equitable principles as fairness, may make it more difficult for budget-holders to simply dismiss or explain incidents of poverty, squalor and avoidable ill-health as inevitable, austerity-led events.

### **3. Identifying baseline rights thresholds: equality or equity?**

*‘The “very simple tripartite typology of duties” ...was not supposed to become a new frozen abstraction to occupy the same rigid conceptual space previously held by “negative rights” and “positive rights”... The constructive point was: look at what it actually takes to enable people to be secure against the standard, predictable threats to their rights.’<sup>52</sup>*

The task of differentiating between rights-bearing legal issues and socio-political complaints over resource-allocations often falls to domestic judges; they must then decide whether the matter in question is one of fundamental principle (involving moral rights or legal notions of justice) or one of higher state policy, requiring utilitarian calculations on the use of finite resources, and the nature of the ‘public good’.<sup>53</sup> As Allan suggested,

‘when the modern welfare–regulatory state confers extensive discretionary powers on public agencies, enabling them to perform wide-ranging and perhaps loosely defined public functions, the clear cut distinction between law and administration, or law and public policy, dissolves.’<sup>54</sup>

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<sup>51</sup> *Ibid* p 689

<sup>52</sup> Shue *op cit* n 23 p 160.

<sup>53</sup> See Jowell *op cit* n 14 who suggests that this has been the approach developed by the courts within the UK (p 593)

<sup>54</sup> T R S Allan ‘Doctrine and Theory in Administrative Law: an Elusive Quest for the Limits of Jurisdiction’ *Public Law* (2003) 29 at p 433

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Although individuals cannot require (or reasonably expect) domestic courts to overturn allocations of scarce or finite resources, or to create social welfare entitlements where none have previously existed in national law, certain state actions on ‘distributive justice’ can at least be subject to some manner of judicial overview, not least in relation to preventing instances of overt bias or discrimination. As King has argued, judicial deference should not necessarily preclude judicial intervention, particularly where fundamental human rights protections are at stake.<sup>55</sup> In respect of the United Kingdom, domestic courts have, post-Human Rights Act, ‘gone much further in reviewing resource allocation decisions on human rights grounds than under administrative law.’<sup>56</sup> The question for human rights advocates is perhaps not *whether* domestic courts should discuss resource distribution but one of gauging *when* exactly judicial intervention or critique will actually be precluded by domestic law.<sup>57</sup> Arguably, court decisions on the use of scarce resources could be viewed either as examples of ‘discretionary allocative decision making’<sup>58</sup> (long regarded as an area where judges ought ‘not to trespass’<sup>59</sup>) or as providing useful guidance which may eventually translate into ‘allocative impact.’<sup>60</sup> If some ‘legitimate expectation’ or target-based duties are identified then judicial involvement seems entirely legitimate.<sup>61</sup> Where an inability to access resources directly impacts upon the ability

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<sup>55</sup> J A King ‘The Justiciability of Resource Allocation’ *Modern Law Review* (2007) 70 197 at p198

<sup>56</sup> *Ibid* p 222

<sup>57</sup> *Ibid*

<sup>58</sup> *Ibid* p198

<sup>59</sup> *Ibid* p 221 (citing *R (Douglas) v North Tyneside Metropolitan Borough Council and (2) Secretary of State for Education and Skills* [2003] EWCA Civ 1847, [2004] 1 WLR 2363, per Scott LJ on how judges are ‘not to trespass into the discretionary area of resource allocation. That is an area that is not justiciable.’ (at para 62)

<sup>60</sup> *Ibid* p109. King defines decisions of allocative impact as being ‘those in which the effect of the decision is to impose a financial burden upon public resources.’

<sup>61</sup> On distributive justice as ‘the appropriate distribution of goods’ see further Freeman *op cit* n 24; J Rawls, ‘*A Theory of Justice*’ (1971) Harvard University Press: Boston; See also R Nozick ‘*Anarchy, State and Utopia*’ (1974) Basic Books: New York who suggests that ‘economic goods arise already encumbered with rightful claims’; R Dworkin ‘What is Equality? Part 1: Equality of Resources’ *Philosophy and Public Affairs* (1981) (10) 185; R Dworkin ‘What is Equality? Part 2: Equality of

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to subsist,<sup>62</sup> domestic litigation becomes less about examining the remit of certain rights, and much more aligned with the less easily ignored concepts of welfare, charity and ‘powerlessness.’ As Frankovits has argued,

‘Policies and programs which rest primarily on a perception of need and powerlessness subtly reinforce the powerlessness of the recipients who are seen as being given justice rather than as receiving their rights. The recognition of entitlement is in itself an act of empowerment.’<sup>63</sup>

Where individual entitlements arise by virtue of innate humanity, they should have the potential to withstand changes of government and to address at least some of the problems associated with resource scarcity. Where there is a clear distinction between actual, available levels of resources and those which *should* be made available under principles of equality and non-discrimination,<sup>64</sup> it may be argued that some sort of ‘minimum rights threshold’ (rather than a domestically defined, economic austerity-led benchmarking) is needed. This could serve as a ‘practical minimal floor of well-being as a standard for distributive analysis.’<sup>65</sup> Alston’s view of the Millennium Development Goals as targets to be achieved (‘ceiling’) rather

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Welfare’ *Philosophy and Public Affairs* (1981) (10) 283 on equality being more about resources than welfare.

<sup>62</sup> See Shue *op cit* n 23 on the relationship between basic human rights and subsistence rights

<sup>63</sup> A Frankovits ‘Rejoinder: The Rights Way To Development: A National Human Rights NGO Speaks On Donor Aid’ *Food Policy* (1996) (21) 123 (citing M Dodson, Commissioner of the Aboriginal and Torres Strait Islander Social Justice Commission in the first report regarding the enjoyment and exercise of human rights by the Aboriginal and Torres Strait Islander peoples of Australia as required by section 46C of the Human Rights and Equal Opportunity Act 1986 Sydney, 1993.)

<sup>64</sup> See for example *R v Cambridgeshire Health Authority ex p. B* [1995] 1 WLR898; *Rodgers v Swindon Primary Health Care Trust and the Secretary of State for Health* [2006] EWCA Civ 392. See further G McKeever and F Ní Aoláin ‘Thinking Globally, Acting Locally: Enforcing Socio-Economic Rights in Northern Ireland’ *European Human Rights Law Review* (2004) (2) 158 on the rights ‘mainstreaming’ approach which looks beyond courts to such bodies as Human Rights or Equality Commissions.

<sup>65</sup> Arambulo *op cit* n 9 p 136. See also A Eide ‘Realisation of Economic, Social and Cultural Rights and the Minimum Threshold Approach’ *Human Rights Law Journal* (1989) (10) 35; R Black, S Morris and J Bryce ‘Where And Why Are 10 Million Children Dying Every Year’ *The Lancet* (2003) (361) 2226

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than basic levels below which standards should not fall ('floor')<sup>66</sup> seems particularly apt: domestic judgments perhaps represent the best opportunity for identifying – if not actually raising – those rights-benchmarks which have failed to ring-fence funds to enable meaningful standards of living, or embed a culture of human dignity rights.<sup>67</sup> As the World Health Organisation ('WHO') has made very plain: '[t]here is a health baseline below which no individual in any country should find themselves.'<sup>68</sup> A clear danger with having rights-vague minimum thresholds is that frequently 'the floor will become the ceiling.'<sup>69</sup> As Chapman has further argued, there is a clear need to focus upon the actual content of such rights, and to assess how these might be tied to core state obligations which might then be cited as underpinning, legal duties.<sup>70</sup> If domestic courts are unable to frame certain rights as fully juridical (on the basis of too-scarce resources for example) then they might at least be able to provide some useful level of guidance on where equitable baseline standards might be found to exist.

The notion of fairness ought not to be tied to resource allocations but to rights-impact: where state decisions have served to strip individuals of dignity, then either

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<sup>66</sup> P Alston 'Ships Passing In The Night: The Current State Of The Human Rights And Development Debate Seen Through The Lens Of The Millennium Development Goals' *Human Rights Quarterly* (2005) (27) 755

<sup>67</sup> See for example the Somalia famine, where although steady rises in mortality rates had been documented since 1987, it was not until 1992 that the situation reached crisis point and drew public attention. See L A Persson, A S Aden, M Ibrahim, M Omar and S Wall 'Letter: Famine in Somalia' *The Lancet* (1993) (341) 1478; A Flanagan 'Somalia's Death Toll Underlines Challenges of a Post-Cold War World' (1993) *JAMA* 268 on how in one town, over a two week period, 2 300 bodies were collected, with a death toll 40 times the crude mortality rate identified by the World Health Organisation as an emergency indicator.

<sup>68</sup> World Health Organisation 'Global Strategy for Health for All by the Year 2000' (1981) Geneva available <http://whqlibdoc.who.int/publications/9241800038.pdf> (accessed 10/02/15) p 30

<sup>69</sup> A Chapman and S Russel 'Core Obligations: Building A Framework For Economic, Social And Cultural Rights' (2002) Intersentia, Antwerp, p 9

<sup>70</sup> *Ibid*; See also Arambulo *op cit* n 9 who describes the minimum core content of a right as a universal concept, based on 'a theoretical legal perspective' but underpinned by a clear minimum threshold. This she suggests is a relative concept, even though it may still provide for a usefully practical approach.

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no clearly discernible rights baseline exists or it has been effectively disregarded by law and policy-makers. If ‘the extent of policy freedom inherent to progressive realisation’ affords domestic decision-makers considerable scope in relation to pleading a scarcity of resources,<sup>71</sup> then gauging whether a juridical human rights violation has occurred requires a fairly substantive analysis of state conduct. Failure to recognise that key decisions on resource allocations tend to impact most profoundly upon the vulnerable, can easily create structurally embedded forms of poverty, homelessness and chronic ill-health.<sup>72</sup> A ‘rescue approach’ to situations which have arisen directly from inequitable policy decisions does not seem particularly inappropriate,<sup>73</sup> especially if decision-makers are framed as the ‘trustees’ of scarce resources, tasked with safeguarding the basic rights of those who would be most affected by any down-shifting of baseline standards.<sup>74</sup> Difficulties in implementation remain likely, given how ‘inequalities combine, interact, and are reproduced through interlinked economic, political, and socio-cultural processes.’<sup>75</sup> There is therefore a need for states to more clearly identify and target the intended ‘beneficiaries’ of finite resources on the basis of equitable distributions rather than via blunt equality of treatment. As Le Franc *et al* have noted, making judgements upon the basis of equality of opportunity remains a complex process requiring a complex formula including:

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<sup>71</sup> Den Exter and Hermans *op cit* n 28 p4. See further A Sen ‘*Inequality Re-examined*’ (2003) Oxford University Press: Oxford p31

<sup>72</sup> *Ibid* p 32

<sup>73</sup> *Ibid* p 42

<sup>74</sup> J Roemer ‘Equality of Opportunity: A Progress Report’ *Social Choice and Welfare* (2002) 19 (2) 455 p 457. Roemer has further suggested that equality of opportunity differs from equality of outcome insofar as ‘equal opportunity policy must create a level playing field, after which each individual is on his own.’

<sup>75</sup> See ‘*World Bank World Development Report: Equity and Development*’ (2006) World Bank: OUP p 28 (available at [http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2005/09/20/000112742\\_20050920110826/Rendered/PDF/322040World0Development0Report02006.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2005/09/20/000112742_20050920110826/Rendered/PDF/322040World0Development0Report02006.pdf) accessed 17/03/14)

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‘... circumstances, which consist of the determinants that should not lead, other things equal, to differences in outcome; luck, which comprises the determinants that are seen as a fair source of inequality provided that they are even-handed, with respect to circumstances.’<sup>76</sup>

McCrudden has also stressed the importance of ‘preventing status harm,’<sup>77</sup> with its focus on actively requiring public authorities to be aware of the fundamental needs of those groups that clearly experience inequality and then actively work towards *remedying* shortcomings. Thus domestic equality laws and wider international law principles may amount to ‘an adjunct to the protection of particularly prized public goods’<sup>78</sup> focussing perhaps upon a fiduciary duty of just ‘distribution ... rather than on the characteristics of the recipient’.<sup>79</sup> As Farmer has further suggested in respect of the right to health, ‘any distinguishing characteristic, whether social or biological can serve as a pretext for discrimination and thus as a cause of suffering.’<sup>80</sup> Inequalities in the context of health rights have been documented in relation to issues of gender, race, religion, age and socio-economic status.<sup>81</sup> Although socio-economic status is not one of the traditional comparators within health law, its relevance has been flagged up via international law’s focus on the concept of vulnerable groups. As Braveman and Gruskin also point out, ‘social justice or fairness ... is an ethical

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<sup>76</sup> A Le Franc, N Pistoletti and A Trannoy ‘*Equality of Opportunity: Definitions And Testable Conditions, With An Application To Income In France*’ EUI Working Papers RSCAS 35 (2006) p 3 (available at [http://www.gsoep.de/documents/dokumentenarchiv/17/60141/papertrannoy\\_lefranc\\_pistoletti.pdf](http://www.gsoep.de/documents/dokumentenarchiv/17/60141/papertrannoy_lefranc_pistoletti.pdf) accessed 12.05.14 p3)

<sup>77</sup> McCrudden *op cit* n 25 p514

<sup>78</sup> *Ibid.* See also B Lee ‘Judicial Review and Access to Health Care’ in T. Buck (ed) *Judicial Review and Social Welfare: Citizenship and Law Series* (1998) Pinter: London p 40 on how health may be viewed as a ‘hybrid economic good,’ with both public and private benefit.

<sup>79</sup> *ibid* p 513. As such, ‘equals should be treated as equals, except where differences can be justified.’

<sup>80</sup> Farmer *op cit* n 4 p46

<sup>81</sup> See N Adler, T Boyce, M Chesney, S Cohen, S Folkman, R Kahn and L Syme ‘Socio Economic Status: The Challenge of the Gradient’ in J Mann, S Gruskin, M Grodin and G Annas ‘*Health and Human Rights: A Reader*’ (1999) Routledge; London, p 180. This is ‘a composite measure that typically incorporates economic status measured by income; social status measured by education and work status measured by occupation.’ See also V Navarro ‘Race or Class versus Race and Class: Mortality Differentials in the US’ *The Lancet* (1990) (356) 1238 on gauging health inequality via social status rather than by race or gender

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concept, grounded in principles of distributive justice.’<sup>82</sup> There are a number of extra difficulties attaching to the ‘operationalisation’ of a ‘health equity’ agenda (as opposed to a basic equality of opportunity rights template) in this context, especially where social disadvantage was a pre-existing or immutable factor. If health is regarded more as a ‘social advantage’ then a ‘right’ to health may be better defined or described in fairly ‘relative terms.’<sup>83</sup> Arguably, equitable notions could be used here to at least underscore the importance of such key concepts as human dignity. That said, relying on “the inherent dignity of the human person” as a foundation for embedding fragile rights is different from finding ‘a right to dignity...’<sup>84</sup> despite the fact ‘dignity is often linked to autonomy or the freedom of the individual.’<sup>85</sup> Where social inequalities are perhaps inevitable (on the basis of perpetually scarce resources, for example) then legally justifiable forms of discrimination may arise as unavoidable outcomes.

As Fabre has observed, issues of economic, social and cultural rights seem to represent a sort of crossroads for the concepts of democracy and distributive justice.<sup>86</sup> Particularly during times of economic crisis, it may well be the case that ‘people oppose constitutional social rights on the grounds that they give unacceptable powers of interference to the judiciary.’<sup>87</sup> And yet judicial enforcement remains central to the embedding of human rights as meaningful concepts in domestic law. As McKeever and Ní Aoláin have further argued, there are two main models of judicial enforcement in respect of economic, social and cultural rights: a minimum

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<sup>82</sup> P Braveman and S Gruskin ‘Theory and Methods: Defining Equity in Health’ *Journal of Epidemiology and Community Health* (2003) (57) 254

<sup>83</sup> *Ibid* p254

<sup>84</sup> Feldman *op cit* n 49 p 689

<sup>85</sup> Fredman *op cit* n 31 p 155

<sup>86</sup> C. Fabre ‘*Social Rights under the Constitution: Government and Decent Life*’ (2000) Oxford University Press: Oxford p2

<sup>87</sup> *ibid*

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level of enforcement related only to procedural aspects and the more substantive mode of enforcement reflecting a clearly ‘constitutionalised’ right.<sup>88</sup> The substantive enforcement model would seek to ‘define and enforce a set of social and economic rights protections’ whose ‘entrenchment can be achieved either by constitutional or legislative means.’<sup>89</sup> They also suggest a third model which would not be utterly dependent upon judicial enforcement however and which would look also to the ‘mainstreaming’ of human rights provisions, for example national Human Rights Commissions or the use of equality impact assessments. In this sense ‘mainstreaming means that equality is not just an add-on or after thought but is a factor taken into account in every decision and policy.’<sup>90</sup> However, because basic ‘procedural justice does not require any particular outcome,’<sup>91</sup> non-discrimination remains significant to the equality rights template; even in the wake of the *Thlimmenos v Greece* decision, there is little guidance on how to provide rights protection for those who are different in terms of requiring equity of outcome rather than equality of allocation, opportunity or treatment.<sup>92</sup> As *Burnip* confirmed, there is clearly a state obligation to actively ‘make provision to cater for the significant difference.’<sup>93</sup> Such a substantive approach to the issue of specific entitlements might require domestic jurists to at least consider questions of distributive justice.

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<sup>88</sup> *Op cit* n 64 p58. The minimum enforcement model protects those ‘due process rights’ associated with economic, social and cultural rights. This amounts to procedural review of how a decision has been taken. Principles of equality (as they relate to logic and rationality) provide a useful basis for such a review, but do not necessarily create much scope for overturning decisions that might have led to inequitable outcomes.

<sup>89</sup> Fredman *op cit* n 31 p 163

<sup>90</sup> *Ibid* p165

<sup>91</sup> See further C Barnard and B Hepple ‘Substantive Equality’ *Cambridge Law Journal* (2000) 59 562 on Fredman’s approach to substantive equality, which draws upon four major concepts: equality of results, equality of opportunity, equality as ‘auxiliary to human rights’ and equality based on a central value such as ‘dignity.’ (p 563)

<sup>92</sup> *Thlimmenos v Greece* (2001) 31 EHRR 44 established that indirect discrimination may occur via non-differential treatment: ‘the right not to be discriminated against ... is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.’ (para 44)

<sup>93</sup> *Burnip v Birmingham City Council and Anor* [2012] EWCA Civ 629 (15 May 2012) para 15

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#### 4. Conclusion

Where public funds are involved, certain rights issues may be seen as beyond the remit of domestic judiciaries. In times of economic austerity, this may create a sort of amnesty for ‘widespread ignorance of the ICESCR not only among judges but also among governments and the community.’<sup>94</sup> Given however the vast amount of legal and political discourse generated by the various human rights bodies and by domestic litigation, it is clear that ‘we will not be able to say in hindsight, “*if only we had known.*”’<sup>95</sup> If the task of protecting resource-dependent, fragile socio-economic rights is to be almost always left exclusively to elected politicians rather than shared with the courts, then this perhaps also challenges the concept of rights-indivisibility.<sup>96</sup> Similarly, where the most fundamental socio-economic rights are entirely dependent upon adequate resources being made available, it may be more appropriate to refer to them as mere parcels of privilege, easily prone to being set aside or to suffering open-ended implementation delays. As such, they may still be described as dishearteningly ‘opaque’<sup>97</sup> concepts in terms of their scope and content. That said, some measure of increased coherence is gradually emerging, especially where the various UN Committees have continued to stress their disquiet over the lack of embedding and meaningful monitoring at domestic level. The key to protecting such rights in domestic law, it seems, is via consistent, close scrutiny (judicial or otherwise) of relevant domestic laws, policies, customs and impacts.<sup>98</sup> Unfortunately, if domestic jurists seem at times to be ‘less than involved in the

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<sup>94</sup> The International Commission of Jurists ‘*Report Of The Expert’s Roundtable Concerning Issues To The Proposed Optional Protocol To The International Covenant Of Economic, Social And Cultural Rights*’ (September 26 –27, 2002) p 12 (available at <http://www.icj.org/IMG/pdf/doc-61.pdf> accessed 03.12.13)

<sup>95</sup> F M Abbott, ‘The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO’ *Journal of International Economic Law* (2002) 5(2) 469–505 p505

<sup>96</sup> R Spano ‘Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity’ *Human Rights Law Review* (2014) 1-16 p 2

<sup>97</sup> Arambulo *op cit* n 9 p55

<sup>98</sup> *Op cit* n 94

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pursuit of the attainment of economic, social and cultural rights'<sup>99</sup> then these rights are unlikely to crystallize into a legally enforceable kind of entitlement any time soon. As such, the concept of domestic non-justiciability can be used to both categorise and gauge the limitations of human rights law. Requiring domestic decision-makers to focus particularly upon such basic concepts as human dignity, fairness, and equitable outcomes, could yet provide a means of overcoming at least some of the barriers that tend to arise during times of financial austerity.<sup>100</sup> Policy reforms and budgetary decisions which result in profound human rights infringements should not simply be dismissed as an inevitable consequence of economic downturn. Domestic lawyers and elected legislators must seek to identify and promote clear baseline rights-thresholds, below which human dignity ceases to be evident, and human degradation perhaps becomes near-normative. Arguably, with public purse-strings being increasingly tightened on the basis of targeting finite resources at those most 'deserving' of help, it may be argued that human rights protections during times of austerity have much more in common with charitable dispositions than they do with automatic, inherent entitlements. Depressing though this thought may be, it does at least provide some basis for the argument that elected law-makers have been politically mandated to act as 'rights settlers.' This obliges them to not only clearly define socio-economic rights (by setting clearly articulated, dignity-based minimum standards and thresholds) but to allocate equitable levels of

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<sup>99</sup> *Ibid* p 11

<sup>100</sup> See further K Chetty 'The Public Finance Implications of Recent Socio-Economic Rights Judgments' 6 *Law Democracy and Dev.* 231 2002 p 24As Chetty has stressed however (in respect of South Africa), the 'public finance implications of socioeconomic rights' cannot simply be overlooked. There may be an 'immense magnitude of ...backlogs' to contend with, in addition to a significant 'inequity in socio-economic rights that must be realised with relatively limited resources in a transitional environment.'

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resources, which must then be ring-fenced as budget priorities.<sup>101</sup> The courts could in turn be framed as ‘trustees’ of the rights in question, and tasked with determining whether or not just and equitable resource allocations have been made. For them to do otherwise (through fear of overstepping their remit, or ‘puncturing’ margins of appreciation) is clearly a derogation of their responsibilities to protect the most vulnerable of ‘rights beneficiaries.’ The state’s continuing ‘fairness agenda’ of socio-economic rights austerity, seems set at times on almost mirroring traditional civil or political atrocities, in terms of embedding widespread hunger, poverty, homelessness, and degradingly inadequate health care provision. Domestic judges must not permit a traditional deference towards Parliament to enable and perpetuate socio-economic injustices: to do so is to tacitly endorse not only domestic level erosion of human rights law, but the gradual forfeiture of human dignity thresholds.

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<sup>101</sup> Such a strategy might encourage a re-direction of public funds towards poverty alleviation, away from other expenses. See for example: <http://www.theguardian.com/uk-news/2015/apr/09/tory-labour-renew-trident-threat-reality-nuclear-election> (accessed 01.05.15)

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