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The London School of Economics and Political Science

**Political Trust and the Enforcement of Constitutional Social Rights**

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A thesis submitted to the Department of Law of the London School of Economics and Political  
Science for the degree of Doctor of Philosophy

London, September 2018

## DECLARATION

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I confirm that earlier versions or parts of some chapters (specifically the Introduction and Chapters 1, 2, 3, 4) are published in 'A Trust Network Model for Social Rights Fulfilment' (2018) 38(4) Oxford Journal of Legal Studies (forthcoming); and 'Political Trust as the Basis for a Social Rights Enforcement Framework' (2018) 44(1) Queen's Law Journal (forthcoming).

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## **ABSTRACT**

This thesis addresses the long-debated question of courts' proper role in enforcing constitutional social rights; and it does so from a new perspective – that of political trust. Its central argument is that the concept of political trust – as it has been conceptualised and theorised in the relevant social science literature – has normative potential for defining such a role for courts. Specifically, I argue that courts, in enforcing constitutional social rights, can, and should, use political trust as an adjudicative tool, employing it to develop a standard to which government, in its provision of social goods and services to the public, can and will be held. To make out this argument, I draw on both theoretical and empirical social science scholarship on trust and how it functions in contemporary societies. I suggest, based on that scholarship, that we can expect constitutional social rights adjudication by courts to be able to impact (and in the right circumstances, to foster) political trust. And following from this impact, in combination with the well-recognised value of political trust by social scientists as well as a host of other principled reasons, I make the claim that political trust can, and should, lie at the very centre of social rights enforcement by courts.

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## INTRODUCTION

Legal scholars and jurists have long engaged in a vibrant conversation around the proper role of courts in enforcing constitutional social rights. This conversation has come to pass in a series of two waves.<sup>1</sup> In its “first wave”, the conversation centred on justiciability – that is, whether constitutional social rights are enforceable by courts. That wave reached its peak during the late 1980s-early 1990s when the new democracies of the Global South and the former-Soviet Union sought to decide whether to include express (and enforceable) social rights provisions in their constitutions. In its “second wave” – the current wave – the conversation has a slightly different focus. That focus is not whether social rights are enforceable by courts, but, assuming they are, *how* courts should go about enforcing them.<sup>2</sup> Many new democracies, after intense debate, opted for the inclusion of express and enforceable social rights provisions.<sup>3</sup> In more established democracies, several courts have read social rights into their constitutions. And scholars, jurists and politicians (for the most part) have come to accept the justiciability of constitutional social rights. Thus, as a not-so-surprising consequence of this combination of circumstances, the last 20 years have witnessed a significant rise (or as some have called it, an “explosion”) in social rights litigation.<sup>4</sup> And courts require some guidance on how to deal with this explosion.

In this thesis, I join the above conversation and I seek to offer some guidance in this regard. I do so by introducing a new concept and a new vocabulary to the conversation – that of *political trust*. And I use this concept and this vocabulary to carve out a role for courts in enforcing constitutional social rights. By “political trust”, I mean, broadly speaking, the trust which the public holds in its government.<sup>5</sup> In steering the conversation towards the concept of political trust, I draw inspiration, at least in significant part, from a relatively new line of research

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<sup>1</sup> Richard Stacey, ‘Dynamic Regulatory Constitutionalism: Taking Legislation Seriously in the Judicial Enforcement of Economic and Social Rights’ (2017) 31 *Notre Dame Journal of Law, Ethics and Public Policy* 85, 85-86.

<sup>2</sup> David Landau, ‘The Reality of Social Rights Enforcement’ (2012) 53 *Harvard International Law Journal* 189, 196; Malcolm Langford, ‘The Justiciability of Social Rights: From Practice to Theory’ in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International Comparative Law* (Cambridge University Press 2008), 29; Marius Pieterse, ‘Coming to Terms with Judicial Enforcement of Socio-Economic Rights’ (2004) 20 *South African Journal on Human Rights* 383, 404-05; Anashri Pillay, ‘Economic and Social Rights Adjudication: Developing Principles of Judicial Restraint in South Africa and the United Kingdom’ [2013] *Public Law* 599, 599.

<sup>3</sup> In this regard, see the Toronto Initiative for Economic and Social Rights dataset which is available at <<http://www.tiesr.org/data.html>>. It documents the presence of various economic and social rights in 195 national constitutions across the globe, as well as the status of these rights as justiciable or aspirational. See also Courtney Jung, Ran Hirschl and Evan Rosevear, ‘Economic and Social Rights in National Constitutions’ (2014) 62 *American Journal of Comparative Law* 1043.

<sup>4</sup> Daniel M Brinks and Varun Gauri, ‘The Law’s Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights’ (2014) 12 *Perspectives on Politics* 375, 376. See also Octavio Luiz Motta Ferraz, ‘The Right to Health in the Courts of Brazil: Worsening Health Inequities?’ (2009) 11 *Health and Human Rights* 33.

<sup>5</sup> I use the term “government” not in the U.K. sense of “Government” as representing the executive branch of government. Instead, I use it to refer to both the executive and the legislature, or the elected branches of government. Accordingly, I use the terms “government” and “elected branches of government” interchangeably.

which focuses on the real-world effects of social rights adjudication by courts.<sup>6</sup> That research makes use of empirical data on the impact of social rights adjudication, and who benefits from it, to develop normative arguments vis-à-vis the proper role of courts in this area. Inspired by that research, this thesis is concerned, again in part, with the impact which social rights adjudication by courts, in its various shapes, can have (or at least can be expected to have) on political trust.

The central argument which I make in this thesis is that the concept of political trust has normative potential for defining the proper role of courts in enforcing constitutional social rights. Specifically, I argue that courts – in so enforcing – can, and should, use political trust as an adjudicative tool, employing it to develop a standard to which government, in its provision of social goods and services to the public, can and will be held. To make out this argument, I draw on both empirical and theoretical social science scholarship on trust and how it functions in contemporary societies. I suggest, based on that scholarship, that we can expect constitutional social rights adjudication by courts to be able to impact (and in the right circumstances, to foster) political trust. And following from this impact, in combination with the well-recognised value of political trust by social scientists as well as a host of other principled reasons, I make the claim that political trust can, and should, lie at the very centre of social rights enforcement by courts.

### **The Recognised Value of Political Trust**

A reader may reasonably ask: why introduce the concept of political trust? Dating back at least 50 years, social scientists have stressed the importance of public trust in government to well-functioning democracies. They have theorised about the consequences of political trust, arguing that it is tied to such valuable ends as social stability, economic welfare and effective governance.<sup>7</sup> This tie is explained as follows: when citizens have greater trust in government, they are more likely to regard government actions as legitimate and to cooperate with them, tolerating the political regime and voluntarily complying with laws and government demands. Such cooperation is critical because it allows the state to focus its limited resources for coercion

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<sup>6</sup> Brinks and Gauri (n 4); Ferraz (n 4); Octavio Luiz Motta Ferraz, 'Harming the Poor through Social Rights Litigation: Lessons from Brazil' (2011) 89 Texas Law Review 1643; César Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2011) 89 Texas Law Review 1669.

<sup>7</sup> Russell J Dalton, *Democratic Challenges, Democratic Choices: The Erosion of Political Support in Advanced Industrial Democracies* (OUP 2004); Pippa Norris, 'Conclusion: The Growth of Critical Citizens and Its Consequences' in Pippa Norris (ed), *Critical Citizens: Global Support for Democratic Government* (OUP 1999); Bo Rothstein, *Just Institutions Matter* (Cambridge University Press 1998). In addition to the instrumental value of political trust, it has also been argued that political trust is intrinsically valuable: Matthew Harding, 'Trust and Fiduciary Law' (2013) 33 OJLS 81; Colleen Murphy, *A Moral Theory of Political Reconciliation* (Cambridge University Press 2010).

on the relatively few disobedient.<sup>8</sup> As Russell Dalton has identified, ‘democracy functions with minimal coercive force because of the legitimacy of the system and the voluntary compliance of the public. Declining feelings of political trust and political support can undermine this relationship and thus the workings of democracy’.<sup>9</sup> Accordingly, as voluntary compliance with laws and government demands becomes the norm, cooperation translates into social stability.<sup>10</sup>

The link between political trust and public cooperation is well-supported by empirical research. For instance, Tom Tyler, in his work on trust, has consistently demonstrated that individuals’ trust in authority figures increases their cooperation with those figures. Specifically, based on data collected in a series of interviews, Tyler has convincingly shown that trust increases individuals’ willingness to accept authority decisions, their feelings of obligation to obey organisational rules and laws, and their performance evaluations of those in positions of authority.<sup>11</sup> These findings have been replicated across a range of contexts and groups, including legal authorities.<sup>12</sup> In a similar vein, Russell Dalton, using the 1995-98 World Values Survey, has shown a positive correlation between levels of political support (a concept closely tied to trust) and people’s willingness to obey the law.<sup>13</sup> Building on a categorisation developed by David Easton, Dalton divided political support into four categories: institutional support (support for the institutions of governance), authority support (support for those who control the institutions), support for democratic values, and community support (support for the nation or the political system in broad terms). Dalton found that all four categories correlated in a positive direction with willingness to obey the law, with institutional and community support having the strongest correlation. And as a final example, Sofie Marien and Marc Hooghe, in a similar study to that of Dalton but using the European Values Survey 1999-2001, obtained similar findings to those of Dalton.<sup>14</sup> They found that respondents with higher levels of political trust (specifically trust in political institutions) were significantly less likely to have permissive attitudes towards

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<sup>8</sup> Russell Hardin, ‘Trust in Government’ in Valerie Braithwaite and Margaret Levi (eds), *Trust and Governance* (Russell Sage Foundation 1998), 10.

<sup>9</sup> Dalton (n 7) 159. Some writers have described this benefit of trust as reduced “transaction costs” for governments: Dalton (n 7) 159; Eva-Maria Trüdinger and Uwe Bollow, ‘Evaluations of Welfare State Reforms in Germany: Political Trust Makes a (Big) Difference’ in Sonja Zmerli and Marc Hooghe (eds), *Political Trust: Why Context Matters* (ECPR Press 2011), 189.

<sup>10</sup> Dalton (n 7) 165.

<sup>11</sup> For a summary, see Tom R Tyler and Peter Degoey, ‘Trust in Organizational Authorities: The Influence of Motive Attributions on Willingness to Accept Decisions’ in Roderick M Kramer and Tom R Tyler (eds), *Trust in Organizations: Frontiers of Theory and Research* (Sage Publications 1996), 336.

<sup>12</sup> Tom R Tyler and Yuen J Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (Russell Sage Foundation 2002).

<sup>13</sup> Dalton (n 7) 165-66.

<sup>14</sup> Sofie Marien and Marc Hooghe, ‘Does Political Trust Matter? An Empirical Investigation into the Relation Between Political Trust and Support for Compliance’ (2011) 50 *European Journal of Political Research* 267.

law-breaking (the inverse of Dalton's willingness to obey the law)<sup>15</sup> than those with lower levels of trust. In fact, Marien and Hooghe found that this relationship held even when they controlled for variables such as the respondents' age, gender, level of education and religious practice.<sup>16</sup>

In addition to the recognised value of political trust generally, social scientists have taken note of its particular importance vis-à-vis social policy. Specifically, two inter-related points have been made on this front. First, political trust is of the utmost importance to *financing* the welfare state.<sup>17</sup> The social goods and services provided by the state in a social democracy depend on resources which citizens themselves provide. Citizens pay taxes to the state and, using the revenue collected from those taxes, the state administers social programmes. Thus, taxes paid by citizens are a prerequisite to state-provided social goods and services. In the apt words of Eric Uslaner, 'Taxes are the economic glue of social program[m]es, the source of government's ability to transfer resources – and, indeed, to function at all'.<sup>18</sup> For this reason, it has been argued that the 'future of the welfare state is likely to hinge on the ability for nation states to levy taxes ... on their populations'.<sup>19</sup> Given the above-described relationship between political trust and compliance with law, writers have argued that citizens' willingness to pay their taxes depends on their trust in government.<sup>20</sup> In other words, under this argument, citizens are less likely to pay their taxes if they do not trust their governments. Moreover, such tax non-compliance, it has been argued, creates a vicious, self-perpetuating circle: if citizens do not pay their taxes, governments cannot provide social goods and services to them, leading citizens to become even less trustful of government than before.<sup>21</sup> In this regard, Joseph S. Nye, Jr. has claimed, tying the concept of political trust to the notion of social stability, that '[s]uch a cumulative downward spiral could erode support for democracy as a form of governance'.<sup>22</sup>

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<sup>15</sup> Dalton used the same type of survey items but used those items to create what he calls a "willingness-to-obey-the-law index": Dalton (n 7) 166.

<sup>16</sup> For further empirical support, see Martin Lindstrom, 'Social Capital, Political Trust and Purchase of Illegal Liquor: A Population-Based Study in Southern Sweden' (2008) 86 *Health Policy* 266; Norris (n 7).

<sup>17</sup> Laurence E Lynn, Jr, 'How Do Trust and Confidence Affect the Governing of America?' in Sue Llewellyn, Stephen Brookes and Ann Mahon (eds), *Trust and Confidence in Government and Public Services* (Routledge 2013), 21; Joseph S Nye, Jr, 'Introduction: The Decline of Confidence in Government' in Joseph S Nye, Jr, Philip D Zelikow and David C King (eds), *Why People Don't Trust Government* (Harvard University Press 1997), 4; Bo Rothstein, Marcus Samanni and Jan Teorell, 'Explaining the Welfare State: Power Resources vs. the Quality of Government' (2012) 4 *European Political Science Review* 1, 10-11; Stefan Svallfors, 'Introduction' in Stefan Svallfors (ed), *The Political Sociology of the Welfare State: Institutions, Social Cleavages and Orientations* (Stanford University Press 2007).

<sup>18</sup> Eric M Uslaner, 'Tax Evasion, Trust, and the Strong Arm of the Law' in Nicolas Hayoz and Simon Hug (eds), *Tax Evasion, Trust and State Capacities* (Peter Lang 2007), 19.

<sup>19</sup> Nathalie Morel and Joakim Palme, 'Financing the Welfare State and the Politics of Taxation' in Brent Greve (ed), *The Routledge Handbook of the Welfare State* (Routledge 2013), 407.

<sup>20</sup> Norris (n 7) 264.

<sup>21</sup> Nye, Jr (n 17) 4; Eric M Uslaner, 'Corruption, the Inequality Trap and Trust in Government' in Sonja Zmerli and Marc Hooghe (eds), *Political Trust: Why Context Matters* (ECPR Press 2011), 141-42.

<sup>22</sup> Nye, Jr (n 17) 4.

This relationship between political trust and tax compliance also finds support in empirical research. John Scholz and Mark Lubell have shown a positive relationship between trust and tax compliance using a U.S. Internal Revenue Service survey which asked a sample of taxpayers in New York about tax compliance and civic values.<sup>23</sup> In an analysis of that survey data combined with in-person interviews, they found that trust in government significantly increased the likelihood of respondents' tax compliance. This relationship persisted even after they controlled for the influence of self-interested fear of getting caught and an internalised sense of duty. Based on their results, Scholz and Lubell concluded that 'trust in government ... significantly influence[s] tax compliance'.<sup>24</sup> Further, Steven Sheffrin and Robert Triest, in a study analysing the same survey data as Scholz and Lubell, found that respondents' attitudes towards government (including a belief that tax money is wasted by government) was the best predictor of underreporting income and overstating deductions.<sup>25</sup> Such attitudes were even a better predictor than the probability of detection and whether fellow citizens paid their fair share.<sup>26</sup>

Second, and relatedly, political trust is said to impact citizens' *attitudes* toward – and *support* for – social policies.<sup>27</sup> The idea here is that if citizens do not trust government, they will not support the policies their governments develop and implement. In this regard, several scholars have contended that trust functions as a cognitive heuristic which citizens rely upon when forming opinions about social policies.<sup>28</sup> Faced with the complex institutional arrangements of the welfare state and the uncertain consequences of social policies, citizens turn to trust: 'Other things equal, if people perceive the architect of policies as untrustworthy, they will reject its policies; if they consider it trustworthy, they will be more inclined to embrace them'.<sup>29</sup> And if citizens do not support governmental policies, they cannot possibly succeed. In particular, political trust is necessary to grant governments the flexibility they need to effectively carry out their policies. The more citizens trust their government, the more likely they are to

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<sup>23</sup> John T Scholz and Mark Lubell, 'Trust and Taxpaying: Testing the Heuristic Approach to Collective Action' (1998) 42 *American Journal of Political Science* 398. See also John T Scholz, 'Trust, Taxes, and Compliance' in Valerie Braithwaite and Margaret Levi (eds), *Trust and Governance* (Russell Sage Foundation 1998); John T Scholz and Neil Pinney, 'Duty, Fear, and Tax Compliance: The Heuristic Basis of Citizenship Behavior' (1995) 39 *American Journal of Political Science* 490. While tax compliance was self-reported in the study and thus not directly measured (a point which Scholz and Lubell acknowledge (402)), as Dalton (n 7) 169 and Uslaner, 'Tax Evasion, Trust' (n 18) 22 emphasise, it is difficult to objectively measure compliance with government regulations.

<sup>24</sup> Scholz and Lubell (n 23) 412.

<sup>25</sup> Steven M Sheffrin and Robert K Triest, 'Can Brute Deterrence Backfire? Perceptions and Attitudes in Taxpayer Compliance' in Joel Slemrod (ed), *Why People Pay Taxes* (University of Michigan Press 1992).

<sup>26</sup> For further empirical support, see Dalton (n 7) 158-59; Uslaner, 'Tax Evasion, Trust' (n 18).

<sup>27</sup> Jonas Edlund, 'Trust in the Capability of the Welfare State and General Welfare State Support: Sweden 1997-2002' (2006) 49 *Acta Sociologica* 395.

<sup>28</sup> Marc J Hetherington, *Why Trust Matters: Declining Political Trust and the Demise of American Liberalism* (Princeton University Press 2005); Thomas J Rudolph, 'Political Trust, Ideology, and Public Support for Tax Cuts' (2009) 73 *Public Opinion Quarterly* 144, 144-45; Trüdinger and Bollow (n 9) 191.

<sup>29</sup> Hetherington (n 28) 51.

grant it what Margaret Levi has called “contingent consent”.<sup>30</sup> Put concisely, they are more likely to support a governmental policy (or at least to tolerate it) even if they perceive the likely outcome of that policy to be unfavourable for them – that is, they are more likely to “contingently consent” to that policy.<sup>31</sup> For example, citizens who trust their government are more likely to agree to a tax increase in support of a policy or to a proposed reform thereof. For this reason, it has been suggested that aside from trust’s relevance as an influence on citizens’ provision of critical resources in the form of tax money, trust is also – as a heuristic linked to citizen support for social policies – in and of itself ‘a critical resource for government’.<sup>32</sup>

Once again, the claim that political trust impacts citizens’ attitudes toward/support for social policies is backed by empirics. Virginia Chanley and her colleagues have offered convincing evidence on this front.<sup>33</sup> Specifically, using U.S. survey data, their study examined the relationship between public trust in government and what they refer to as “policy mood” (a measure reflecting ‘the extent of public support for increased government spending and activity across a range of domestic policy areas, including education, health care, welfare, aid to cities, and the environment’).<sup>34</sup> They found a positive correlation: greater trust in government correlated with greater policy mood. Chanley and her colleagues concluded that their findings were ‘consistent with theoretical expectations concerning the importance of trust in government for public willingness to commit public resources for policy ends’.<sup>35</sup> A study conducted by Stefan Svallfors using Swedish survey data yielded similar findings to those of Chanley and her colleagues.<sup>36</sup> In fact, Sven Steinmo – in his work on welfare states – has persuasively argued that the difference in the size of the welfare state in Sweden as compared with that of the United States is attributable to a difference in political trust (rather than a difference in citizen want for government spending, as is usually presumed).<sup>37</sup> In interviews he conducted with citizens of Sweden, Britain and the United States, Steinmo found that the vast majority – including Americans – said that they would agree to an increase in their taxes if they ‘could be guaranteed

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<sup>30</sup> Margaret Levi, *Consent, Dissent and Patriotism* (Cambridge University Press 1997).

<sup>31</sup> Oscar W Gabriel and Eva-Maria Trüdinger, ‘Embellishing Welfare State Reforms? Political Trust and the Support for Welfare State Reforms in Germany’ (2011) 20 *German Politics* 273, 275.

<sup>32</sup> Trüdinger and Bollow (n 9) 189.

<sup>33</sup> Virginia A Chanley, Thomas J Rudolph and Wendy M Rahn, ‘The Origins and Consequences of Public Trust in Government’ (2000) 64 *Public Opinion Quarterly* 239.

<sup>34</sup> *ibid* 245.

<sup>35</sup> *ibid* 253.

<sup>36</sup> Stefan Svallfors, ‘Political Trust and Support for the Welfare State: Unpacking a Supposed Relationship’ in Bo Rothstein and Sven Steinmo (eds), *Restructuring the Welfare State: Political Institutions and Policy Change* (Palgrave MacMillan 2002).

<sup>37</sup> Sven Steinmo, *Taxation and Democracy: Swedish, British and American Approaches to Financing the Modern State* (Yale University Press 1993). See also Sven H Steinmo, ‘American Exceptionalism Reconsidered: Culture or Institutions?’ in Lawrence C Dodd and Calvin Jillson (eds), *The Dynamics of American Politics: Approaches and Interpretations* (Westview Press 1994).

that increased government spending would be efficiently and effectively used to address society's problems'.<sup>38</sup> He found, however, that American respondents were especially likely to follow up their response saying that they did 'not believe that revenue from higher taxes would be used efficiently or effectively and therefore they would not approve tax increases'.<sup>39</sup> Moreover, Eva-Maria Trüdinger and Uwe Bollow have demonstrated a positive relationship between political trust and support for welfare state reforms.<sup>40</sup> In their interviews with over 1,800 Germans, respondents were asked to report the level of trust they had in various political institutions/actors and to evaluate the direction of recent reforms on health care, pension and family policy. Trüdinger and Bollow 'found significant effects of political trust': the more respondents trusted government, the more likely they were to agree with the relevant reforms.<sup>41</sup>

The tax compliance and social policy support which follow from political trust are especially important today given present-day circumstances which make the public funding and delivery of social goods and services ever-more challenging. In 2001, Paul Pierson wrote that the welfare state in affluent democracies faces a context of "permanent austerity".<sup>42</sup> By this he meant that owing to a set of circumstances which have generated much fiscal stress for countries (including changes in the global economy, a slowdown in economic growth, aging populations and reduced fertility rates), it is increasingly difficult for governments to finance previously-made commitments to social goods and services. Contrary to then-popular beliefs, Pierson prophesied that given persistent citizen support for the welfare state, the consequence of these pressures would not be the entire dismantling of the welfare state, but rather, moderate cost-cutting efforts by governments. According to Pierson, 'neither the alternatives of standing pat or dismantling are likely to prove viable in most countries'.<sup>43</sup> Instead, it was Pierson's prophecy that 'we should expect strong pressures to move towards more centrist – and therefore more incremental – responses. Those seeking to generate significant cost reductions while moderni[s]ing particular aspects of social provision will generally hold the balance of political power'.<sup>44</sup>

Over the past 15 years, we have witnessed these sorts of cost-cutting efforts in affluent and developing democracies alike.<sup>45</sup> And the 2008 Global Financial Crisis has not helped

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<sup>38</sup> Steinmo, *Taxation and Democracy* (n 37) 199.

<sup>39</sup> *ibid* 199.

<sup>40</sup> Trüdinger and Bollow (n 9).

<sup>41</sup> *ibid*. For further empirical support, see Eun Young Nam and Myungsook Woo, 'Who is Willing to Pay More Taxes for Welfare? Focusing on the Effects of Diverse Types of Trust in South Korea and Taiwan' (2015) 44 *Development and Society* 319.

<sup>42</sup> Paul Pierson, 'Coping with Permanent Austerity: Welfare State Restructuring in Affluent Democracies' in Paul Pierson (ed), *The New Politics of the Welfare State* (OUP 2001).

<sup>43</sup> *ibid* 417.

<sup>44</sup> *ibid* 417.

<sup>45</sup> James Connelly, 'Conclusion: Remaining the Welfare State?' in James Connelly and Jack Hayward (eds), *The Withering of the Welfare State: Regression* (Palgrave Macmillan 2012); Staffan Kumlin, 'Overloaded or Undermined?

matters.<sup>46</sup> While the period immediately following the crisis saw most countries *increase* public spending (by introducing fiscal stimulus programmes), by 2010, that trend reversed itself and premature budget cuts – in the form of “austerity” measures – became widespread.<sup>47</sup> A review of austerity trends in 187 countries between 2010-20 found that by 2011, the majority of sampled countries (113 total) reduced their budgets, with an average reduction of 2.3 percent of GDP.<sup>48</sup> It was projected that this contraction in public spending would intensify at least into 2020. Moreover, such contraction is not limited to affluent democracies; on the contrary, public spending contraction has been, and is projected to be, most severe in developing democracies.<sup>49</sup>

Given the current state of events, it may be that now – more than ever – governments need their citizens to pay taxes and to support their social policies. If not, these two factors, coupled with the effects of the Global Financial Crisis and the circumstances which have given rise to “permanent austerity”, will seriously endanger governments’ ability to provide social goods and services. Accordingly, political trust may be imperative to the future of social welfare.

That said, having explained political trust’s value, a brief word of caution is warranted. Given its connection to public support for social policies, political trust also presents a sort of danger. That danger is that citizens will support *regressive* social policies. For example, in the earlier-described study conducted by Trüdinger and Bollow which found ‘significant effects of political trust’ on public support for policy reforms, the reforms in question had neither raised social benefits nor offered greater social protection.<sup>50</sup> On the contrary, they involved losses with costs frequently having been distributed unevenly. Consequently, political trust may have the effect of encouraging citizens to accept the erosion of social welfare (thereby making such erosion all the more likely). And for this reason, it may appear problematic to root courts’ enforcement of social rights in the concept of political trust (as I am proposing in this thesis).

However, I think that it is important to recognise that public support for regressive social policies is not necessarily a bad thing. Where a government faces difficult financial circumstances (such as those following the Global Financial Crisis), it may have no choice but to make cuts to social goods and services. And in such circumstances, I suggest, public support for regressive

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European Welfare States in the Face of Performance Dissatisfaction’ in Stefan Svallfors (ed), *The Political Sociology of the Welfare State: Institutions, Social Cleavages, and Orientations* (Stanford University Press 2007).

<sup>46</sup> Aoife Nolan, ‘Introduction’ in Aoife Nolan (ed), *Economic and Social Rights After the Global Financial Crisis* (Cambridge University Press 2014), 1-4.

<sup>47</sup> Isabel Ortiz et al, ‘The Decade of Adjustment: A Review of Austerity Trends 2010-2020 in 187 Countries’ (International Labour Organization, ESS Working Paper No 53, 2015) <<http://www.social-protection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=53192>> accessed 11 August 2017, 9. See also *ibid* 3.

<sup>48</sup> Ortiz et al (n 47) 2.

<sup>49</sup> *ibid* 53.

<sup>50</sup> Trüdinger and Bollow (n 9).

social policies is not a bad thing. Rather, it is important that citizens support these necessary policies. That said, because such support can be a bad thing (for example, where regressive policies are not absolutely necessary but instead reflect a government's biases or incompetence), we do need to introduce some degree of caution into our embrace of political trust in the social rights context. To start off, we do not want citizens to blindly trust government in introducing such regressive policies. However, as I will explain later in the thesis, my proposal that we root social rights enforcement in political trust would have courts ensure that governments, in exercising their control over social goods and services (including their introduction of any such regressive social policies), act in a *trustworthy* manner – that is, that they act in a manner which warrants citizens' trust in them.<sup>51</sup> As such, it guards against this sort of blind trust in government.

At the same time, we must also recognise that the protection of social rights does not – and should not – stop at the courts. The role of courts in social rights protection is necessarily constrained by their limited legitimacy and capacity in allocating public resources.<sup>52</sup> In light of such limitations, I use political trust in this thesis to carve out a defensible role for courts. But as I will elaborate in later chapters, social rights enforcement by courts is only one of many means by which social rights are protected (and ultimately realised) in contemporary social democracies. First of all, it is imperative that we acknowledge the distinction between the judiciary's role in enforcing constitutional social rights and the substance of those rights more broadly. As Sandra Fredman has stressed, 'the existence of a right does not mean that the court needs to make primary decisions about the allocation of resources'.<sup>53</sup> Human rights have several roles and functions beyond the courts, including 'an expressive and educational role, signalling the values a society stands for, regardless of the method for their enforcement' as well as a 'proactive function, guiding political and executive decision-making so that legislation, policy, and administration are formulated to meet human rights demands'.<sup>54</sup> Further, but relatedly, there is scope for social rights protection (and realisation) beyond that provided by national constitutions. For example, a state (assuming it is a signatory to the International Covenant on Economic, Social and Cultural Rights) has international obligations, including those pertaining to the use of retrogressive measures.<sup>55</sup> Importantly, the foregoing additional means by which social rights are protected (and realised) supplement the role which courts play in this area. And since

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<sup>51</sup> I elaborate upon this idea of "warranting" trust later in this Introduction as well as in Chapter 4.

<sup>52</sup> I elaborate upon such legitimacy and capacity limitations in Chapter 4. Further, Chapter 3 focuses on the many parties and relationships involved in social rights protection.

<sup>53</sup> Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008), 182. See also Matthias Klatt, 'Positive Rights: Who Decides? Judicial Review in Balance' (2015) 13 *International Journal of Constitutional Law* 354, 356.

<sup>54</sup> Fredman (n 53) 32-33.

<sup>55</sup> General Comment No 3.

these means will not centre on political trust, they can help to mitigate any dangers which the concept presents, including its potential, via public support for policies, to erode social welfare.

## Research Objectives and Method

Despite the recognised value of political trust – both generally and specifically to social policy – no legal scholar to date has used political trust as a basis for studying social rights adjudication by courts. That said, the concept of trust is not new to law. Prominent scholars in other legal fields, ranging from contracts and trusts to medical and fiduciary law, have long recognised the importance of trust to law and have used the concept to better understand and advance their respective fields.<sup>56</sup> For instance, and most recently, Matthew Harding has used the concept of trust in his study of fiduciary law. In that work, Harding has advanced the claim that legal scholars' frequent references to the concept 'suggests that trust may be an important organi[s]ing idea when thinking about what law is, what effect it has and what it ought to be doing'.<sup>57</sup>

Drawing inspiration from Harding (as well as the other scholars referenced above), this thesis aims to similarly use trust as an “organi[s]ing idea” for social rights law. More specifically, its principal objective is to define and develop a trust-based perspective for the adjudication of constitutional social rights by courts. Before elaborating on this perspective, I think that the term “constitutional social rights” requires some clarification. As Jeff King has helpfully catalogued, there are many different senses in which we may use the term “social rights”.<sup>58</sup> Not only are there both moral and legal senses to the term, but when social rights are used in their legal sense, they may have different sources, including international law, national legislation and national constitutions. In this thesis, my focus is the latter – that is, *constitutional* social rights. Thus, when I refer to “social rights” in this thesis, unless otherwise stated, I mean constitutional social rights. In particular, I am concerned mainly with a defined, but large, subset of constitutional social rights: rights to health, housing, education and social security.<sup>59</sup> Moreover, in referring to “constitutional” social rights, I do not mean only those rights set out expressly in a constitutional

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<sup>56</sup> Anthony J Bellia, Jr, 'Promises, Trust, and Contract Law' (2002) 47 American Journal of Jurisprudence 25; Margaret M Blair and Lynn A Stout, 'Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law' (2001) 149 University of Pennsylvania Law Review 1735; Roger Cotterrell, 'Trusting in Law: Legal and Moral Concepts of 'Trust' (1993) 46 Current Legal Problems 75; Frank B Cross, 'Law and Trust' (2005) 93 Georgetown Law Journal 1457; Mark A Hall, 'Law, Medicine, and Trust' (2002) 55 Stanford Law Review 463; Mark A Hall, 'The Importance of Trust for Ethics, Law, and Public Policy' (2005) 14 Cambridge Quarterly of Healthcare Ethics 156; Matthew Harding, 'Manifesting Trust' (2009) OJLS 245; Matthew Harding, 'Responding to Trust' (2011) 24 Ratio 75; Harding (n 7).

<sup>57</sup> Harding, 'Manifesting Trust' (n 56) 245.

<sup>58</sup> Jeff King, *Judging Social Rights* (Cambridge University Press 2012), 18-19.

<sup>59</sup> For a study with a similar focus, see *ibid.* In line with a well-established orthodoxy in the social rights literature, I am not concerned with labour rights (or what are often termed “economic” rights).

document.<sup>60</sup> In using the term, I also refer to social rights which have been read into general constitutional provisions (eg rights to life, human dignity or security of the person) by courts.<sup>61</sup> And finally, it is well-recognised that social rights give rise to a tripartite set of duties on government: to respect (a duty of non-interference), to protect (a duty to prevent interference or denial by third parties) and to fulfil (a duty to positively provide).<sup>62</sup> The latter duty is my primary concern in this thesis as it raises the greatest issues of public resource allocation, thereby making it the principal reason why social rights, and their enforcement by courts, are controversial. So, “social rights”, as used in this thesis, also refers specifically to *positive* social rights of this nature.

In the trust-based perspective defined and developed herein, trust serves two broad ends. First, it provides an overall *analytical lens* through which we can examine the adjudication of constitutional social rights by courts. Thus, such adjudication is analysed in this thesis in terms of the concept of political trust. Second, political trust serves as the *basis for a normative argument* about the proper role of courts in enforcing constitutional social rights. In particular, political trust is used to suggest how courts can, and should, go about enforcing social rights. As will be recalled from the outset of this Introduction, the latter is the thesis’s central argument.

This trust-based perspective applies slightly differently to those countries in which social rights have been constitutionalised as opposed to those countries in which that is not the case. In the former set of countries, the trust-based perspective represents what I will describe as an “actual” argument: it provides a means of analysing their courts’ adjudication of constitutional social rights and it offers a suggestion as to how their courts can, and should, enforce those rights. This is the case for South Africa, for example (a country which is discussed in greater detail in Chapter 5). In the latter set of countries (those in which social rights have not been constitutionalised), the trust-based perspective represents an argument with both actual and hypothetical components. As for the actual argument, despite the non-constitutionalised status of social rights, this perspective nonetheless provides a means of analysing their courts’ adjudication of social welfare matters. On the hypothetical side, the trust-based perspective offers a suggestion as to how these countries’ courts – if they were to constitutionalise these social rights (either via constitutional amendment or by courts reading them into general

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<sup>60</sup> For example, see sections 26, 27, 28 and 29 of the South African Constitution.

<sup>61</sup> For example, see the social rights which are protected under the right to dignity in Israel’s Basic Law: Human Dignity and Liberty (although the scope of such rights is contested): Aeyal Gross, ‘The Right to Health in Israel between Solidarity and Neoliberalism’ in Colleen M Flood and Aeyal Gross (eds), *The Right to Health at the Public/Private Divide* (Cambridge University Press 2014), 165.

<sup>62</sup> Henry Shue, *Basic Rights, Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1980), 52; Henry Shue, ‘The Interdependence of Duties’ in Philip Alston and Katarina Tomasevski (eds), *The Right to Food* (Martinus Nijhoff Publishers 1985), 86. See also David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (OUP 2007), 184; King (n 58) 35.

provisions) – could, and should, enforce them. This is the case for Canada, for instance (discussed in greater detail in Chapter 6). And because of this hypothetical argument, for the latter set of countries, the trust-based perspective, on top of contributing to the conversation around how courts should enforce constitutional social rights, also contributes, albeit indirectly, to the conversation around whether to constitutionalise social rights in the first place.

Furthermore, in advancing my normative argument, I am cognisant of the problems raised by proposing a uniform approach to social rights adjudication across jurisdictions with different socio-economic structures, constitutional cultures and political climates.<sup>63</sup> And owing to such differences, I recognise that my argument (which – consistent with the orthodoxy in the social rights literature – is presented at a rather general level) will apply slightly differently to each jurisdiction which falls within this thesis’s scope. That said, given political trust’s tie to social stability, economic welfare and effective governance (ends which are not, at least to my mind, jurisdiction-specific) as well as the reasons which I present in Chapter 4, I think that the concept of political trust (and thus, my normative argument) has some level of broad currency.

Also, to clarify, I submit in this thesis that political trust should be the dominant structuring principle for social rights enforcement by courts. This may seem an overly ambitious submission. However, given the breadth of political trust (as I conceptualise it in Chapters 1 and 2) – to encompass considerations of transparency, participation by citizens, equality, competence and fiduciary responsibility – granting political trust such a dominant role, I think, makes sense.

To define and develop this thesis’s trust-based perspective for social rights adjudication by courts, I necessarily adopt an interdisciplinary approach. As my discussion of the recognised value of political trust should have suggested, trust has been the subject of a voluminous and complicated body of academic scholarship in the social sciences, including in political science and theory, sociology, philosophy and psychology. In parallel to the work of the above-referenced scholars on trust and law, I draw on this social science scholarship on trust – and import and integrate it into the relevant legal literature on social rights adjudication by courts – in order to understand and define, in the social rights context, what trust is, how it functions and how it can be used to analyse and contribute to the study of such adjudication. Moreover, to illustrate the trust-based perspective in concrete terms, I draw on two specific examples: the prevention of mother-to-child transmission of HIV in South Africa during the late 1990s and early 2000s, and the reduction of wait times in Canada’s public health system during that same time period. These two examples serve as illustrations rather than case studies: as such, I use

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<sup>63</sup> Colm O’Cinneide, ‘The Problematic of Social Rights – Uniformity and Diversity in the Development of Social Rights Review’ in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014).

them for the modest purpose of illustrating my trust-based perspective. I have chosen these examples for a few reasons. First, both circumstances generated controversial court decisions: *Minister of Health v Treatment Action Campaign* in the Constitutional Court of South Africa (“*TAC*”),<sup>64</sup> and *Chaoulli v Quebec (Attorney General)* in the Supreme Court of Canada (“*Chaoulli?*”).<sup>65</sup> Second, because these decisions were controversial, they were the subject of much scholarly debate across disciplines, thereby making them ideal examples in order to illustrate the trust-based perspective which is defined and developed herein. Third, as I elaborate in Chapters 5 and 6, I have chosen these two examples because I think that they offer good counterbalances for one another. Whereas *TAC* involved a vulnerable group challenging a governmental decision which had a negative impact on that group, *Chaoulli* involved the reverse: a relatively less vulnerable group challenging a decision which had a positive impact on the most vulnerable segments of society. Consequently, the two cases depict two very different functions which courts can – and do – serve in social rights adjudication. Fourth, I have chosen these two examples because they enable me to illustrate contrasting positions which courts can adopt in terms of the promotion of government trustworthiness. In *TAC*, I will argue, the South African Constitutional Court did promote government trustworthiness (though, I will suggest, it did not go far enough). However, in *Chaoulli* the Canadian Supreme Court did not do so – in any respect. And lastly, I have chosen the jurisdictions of South Africa and Canada (as opposed to other less-researched jurisdictions like those in Latin America or elsewhere) for practical reasons. Those reasons are as follows: (i) my linguistic abilities – because I am an English speaker I have chosen jurisdictions whose case law is published in English; (ii) my familiarity with Canadian law – I am a Canadian-trained lawyer and so I have a background in its law; and (iii) my target audience – in this thesis, I seek to communicate principally with scholars and jurists working on these jurisdictions, as well as jurisdictions with related systems (eg the UK). And while I am aware of scholarly criticisms of the prevalent pattern in social rights scholarship to focus on certain jurisdictions (like South Africa), my choice of a South African example here is not despite – but rather, because of – this pattern.<sup>66</sup> Given the novelty of political trust, both as a concept and as a vocabulary for the social rights world, it makes sense, I think, to illustrate it (and the trust-based perspective on adjudication) with reference to a familiar case from a familiar jurisdiction.

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<sup>64</sup> [2002] ZACC 15, 2002 (5) SA 721.

<sup>65</sup> 2005 SCC 35, [2005] 1 SCR 791.

<sup>66</sup> Ran Hirschl, ‘From Comparative Constitutional Law to Comparative Constitutional Studies’ (2013) 11 *International Journal of Constitutional Law* 1, 8-9.

## Scope of the Thesis

In the interests of greater clarity, I will take a moment here to outline the scope of the thesis. Specifically, because political trust is frequently associated and confused with other, related concepts, I find it is helpful to identify in this section that which I am *not* addressing in the thesis.

### *Political Trust, not Social Trust*

In the political arena, the literature on trust has recognised four categories of relationships in which trust operates: the trust of citizens in their fellow citizens (what is often referred to as “social trust”); the trust of citizens in political elites (including both political/legal institutions and those who staff them) (what is often referred to as, and what I am calling, “political trust”); the horizontal trust among political elites; and the top-down vertical relationship where political elites form beliefs and expectations about the behavioural dispositions of citizens.<sup>67</sup> This thesis does not really address the category of social trust. It focuses predominantly on political trust and to some, but a much lesser extent, the latter two categories. While I acknowledge that social trust and political trust are related (as many writers on trust have argued), there are also significant differences between the two, including with respect to their foundations and their consequences.<sup>68</sup> Therefore, I leave the concept of social trust aside for the purpose of this thesis.

### *Political Trust, not Political Satisfaction*

Further, political trust in this thesis should be distinguished from what may be termed “political satisfaction”. There is a tendency (among laypeople and writers on trust alike) to conflate citizens’ trust in government with their satisfaction with the outcomes which the government produces. As I elaborate in Chapter 1, this conflation follows from what I suggest are erroneous definitions of trust. Some writers on trust define the concept in terms of outcome – that is, I trust you if I expect that you will produce an outcome which is favourable to me.<sup>69</sup> By this definition, if I am satisfied with the outcomes which you have produced in the past, I should expect you to produce outcomes which are favourable to me in the future and it necessarily follows from that expectation that I trust you. However, for reasons I describe in Chapter 1,

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<sup>67</sup> Claus Offe, ‘How Can We Trust Our Fellow Citizens?’ in Mark E Warren (ed), *Democracy and Trust* (Cambridge University Press 1999), 44.

<sup>68</sup> For a consideration of the difference between social trust and political trust, see Kenneth Newton, ‘Social and Political Trust in Established Democracies’ in Pippa Norris (ed), *Critical Citizens: Global Support for Democratic Government* (OUP 1999), 179.

<sup>69</sup> For a critique of this definition, see Oliver Williamson, ‘Calculativeness, Trust, and Economic Organization’ (1993) 36 *Journal of Law and Economics* 453.

such a definition of trust is problematic. Instead, trust is better defined in terms of *procedure* – that is, I trust you if I expect that you will follow a certain procedure in your interaction with me.

Accordingly, throughout this thesis, I maintain a sharp distinction between political trust and satisfaction. In the political context, this distinction is especially important as governing necessarily involves balancing competing demands and setting priorities, and frequently one demand is fulfilled at the expense of another. For this reason, we can expect governments to frequently produce outcomes which are unfavourable to one or more citizens, leaving those citizens dissatisfied with the outcome. Such dissatisfaction with the outcome does not necessarily mean that those citizens do not trust their government. Nor does it mean that the citizens who received a favourable outcome – and so, should be satisfied therewith – do trust government.

#### *“Warranted” Trust, not Blind Trust*

It has been argued that public trust in government is not always beneficial. As I elaborate in Chapter 4, some scholars have suggested that political trust may in fact be detrimental in some cases (ie where government is not trustworthy); in such cases, citizen *distrust* or scepticism is beneficial because it ‘keeps constituents alert, and therefore public officials responsive’.<sup>70</sup> I do not dispute this argument. However, I do draw a distinction between what Mark Warren has called “warranted” trust and blind trust.<sup>71</sup> I elaborate upon this distinction later in the thesis. That said, when I refer to the recognised value of political trust, I mean warranted trust.

#### *Theoretical Argument, not an Empirical Investigation*

Additionally, I want to say something about the nature of the argument which I advance in this thesis. Like most fields of study, the literature on trust is comprised of two principal categories. First, there is a body of theoretical work. Scholars across the social sciences have conceptualised what trust is, have theorised how we can expect trust to function and have made theoretically-grounded predictions on the consequences of increased and/or decreased trust. Second, scientists have conducted empirical investigations of trust. In an effort either to test untested

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<sup>70</sup> Karen S Cook, Russell Hardin and Margaret Levi, *Cooperation Without Trust?* (Russell Sage Foundation 2005), 165; Margaret Levi, ‘A State of Trust’ in Valerie Braithwaite and Margaret Levi (eds), *Trust and Governance* (Russell Sage Foundation 1998), 95-96.

<sup>71</sup> Mark E Warren, ‘Introduction’ in Mark E Warren (ed), *Democracy and Trust* (Cambridge University Press 1999), 4; Mark E Warren, ‘Democratic Theory and Trust’ in Mark E Warren (ed), *Democracy and Trust* (Cambridge University Press 1999). This parallels what I said earlier regarding the dangers of political trust. Relatedly, Onora O’Neill has suggested that what we need in public life is an ‘intelligent conception of trust’ – that is, trust which is “well placed”: Onora O’Neill, ‘Trust, Trustworthiness, and Accountability’ in Nicholas Morris and David Vines (eds), *Capital Failure: Rebuilding Trust in Financial Services* (OUP 2014), 178.

theoretical arguments or to understand more generally the social determinants and consequences of trust, they have examined the relationship between trust and a variety of variables.

This thesis falls into the former category. It does not offer an empirical investigation of trust. Rather, it advances a theoretical argument: specifically, a theoretical argument about the impact which we can expect social rights adjudication – in its various shapes – to be able to have on public trust in government. Of course, this argument is not derived from nothing. It is rooted in both the theoretical and empirical research on trust. Extrapolating from the arguments developed and the findings made in that research to the specific context of social rights law and adjudication, I develop herein my own theoretical argument about trust and how it can be expected to function in this area. And as I said earlier, I use this theoretical argument to develop a normative argument about the proper role of courts in enforcing constitutional social rights.

#### *Limitation to Social, Constitutional and Common Law Democracies*

Lastly, the scope of this thesis is limited in three further ways. First, since the focus herein is on positive social rights (specifically, the provision of social goods and services by the state to its citizens), the thesis is necessarily limited to countries which are social democracies (at least in some respect). Second, given the thesis's obvious focus on the enforcement of *constitutional* social rights – seeking to contribute to the conversation outlined at the outset regarding the proper role of courts in this specific area – it is also necessarily limited to constitutional democracies with a system of judicial review. And finally, as will become obvious in my discussion in Chapter 4 of the expected impact which social rights adjudication can have on public trust in government *via court judgments*, I am assuming a system of common law where courts write judgments which have precedential value. Thus, the scope of this thesis is also limited to jurisdictions which follow a common law tradition – at least with respect to the field of constitutional law.<sup>72</sup>

#### **Outline of Chapters**

The thesis proceeds in six chapters. Chapters 1 and 2 provide a necessary conceptual foundation for the thesis's central argument vis-à-vis constitutional social rights enforcement by courts. In Chapter 1, based on my reading of the trust literature, I conceptualise trust in the social rights context. I conceptualise it as a relational concept, meaning that trust may only arise in a relationship which contains certain elements (what I call a “trust relationship”), and I define trust

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<sup>72</sup> On this point, I recognise that the two jurisdictions which I have chosen for the purpose of my illustrations in Chapters 5 and 6 – South Africa and Canada – are hybrid or mixed legal systems. However, South Africa follows a common law tradition with respect to constitutional law; and Canada follows a common law tradition in all its provinces except for Quebec (but in Quebec, a common law tradition is followed with respect to public law).

in such a relationship as a set of three expectations held by the truster in the relationship about the trustee. Then, in Chapter 2, I apply this conceptualisation to the relationship between citizens and the elected branches of government with respect to social rights (what I call the “citizen-government relationship”): in doing so, I characterise that relationship as a trust relationship (and therefore, as a relationship in which trust may arise) and I explain precisely what it means to say that citizens “trust” their elected branches of government with respect to social rights.

In Chapter 3, following on from my characterisation of the citizen-government relationship as a trust relationship, I apply what may be described as the “network conception of trust” to that relationship. According to the network conception, trust arises in and depends on complex structures or networks of relationships. Applying this conception to the citizen-government relationship, I contend that in contemporary societies, the citizen-government relationship exists in a rich social context (which necessarily includes courts) and I suggest that trust in the citizen-government relationship depends on the other relationships in that context or network (including the relationship between citizens and courts arising out of social rights adjudication). From this suggestion, I arrive at the conclusion that we can expect social rights adjudication to be able to impact (including, in the right circumstances, to foster) political trust.

Chapter 4 brings it all together. Using the theoretical foundation laid in Chapters 1, 2 and 3 as building blocks, I advance the thesis’s central argument: that political trust has normative potential for defining the proper role of courts in enforcing constitutional social rights. I argue – based on that theoretical foundation in tandem with other principled reasons – that courts, in enforcing constitutional social rights, can, and should, use the concept of political trust as an adjudicative tool. I put forward the specific claim that courts should hold the elected branches of government to a standard of trustworthiness (a concept which follows from trust); and in doing so, I carve out a role for courts as what I call “mediators of government trustworthiness”.

The final two chapters (5 and 6) offer illustrations of this central argument, as well as the broader theoretical foundation from Chapters 1-3. Using the concrete examples of mother-to-child transmission of HIV in South Africa (litigated before the South African Constitutional Court in the *TAC* case) and the reduction of wait times in Canada’s public health care system (argued before the Canadian Supreme Court in *Chaoulli*), I briefly illustrate how the network conception of trust applies and then, focusing on my central argument, I assess whether in those cases the court mediated (and if not, how it could have mediated) government trustworthiness.

## CHAPTER 1

### Conceptualising Trust in the Social Rights Context

Before we can use the concept of political trust as an adjudicative tool for social rights enforcement (as I argue we can, and should, in Chapter 4), we must first do some work to understand what trust is. Developing an answer to that question is the goal of this chapter. Specifically, I offer herein a conceptualisation of trust in the social rights context. Writers on trust generally agree that trust is a context-specific concept.<sup>1</sup> Put simply, what trust means in one context may not necessarily hold in another. Accordingly, Russell Hardin has emphatically stressed that it is inaccurate and unhelpful to provide an all-encompassing or “true” definition of trust. He has warned: ‘No matter how enticing it may sometimes be, to engage in that debate is foolish’.<sup>2</sup> Hence, my goal in this chapter is a more modest one than that. Based on my reading of the literature on trust, I put forward ‘a workable notion’ of the concept of trust which I think is useable in the social rights context, including for the purpose of a social rights enforcement tool.<sup>3</sup> I do so in two principal stages. First, I conceptualise trust as relational, meaning that it may only arise in a relationship constituted by three elements – control, discretion/uncertainty and vulnerability. These three elements make up what I refer to as a “trust relationship”. Then, second, using these constituent elements of a trust relationship, I define trust in this context as a set of positive expectations held by the truster regarding the manner in which the trustee will exercise the control he maintains over a good or service which the truster either needs or wants.

#### Trust as a Relational Concept: Defining a “Trust Relationship”

Following the lead of several prominent writers on trust, I choose to conceptualise trust as relational. By this I mean that trust is a property of a social relationship.<sup>4</sup> That relationship is of a three-part form comprised of a trustee (A), a truster (B) and a good or service (X), where the

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<sup>1</sup> Bernard Barber, *The Logic and Limits of Trust* (Rutgers University Press 1983), 16-17; Karen S Cook and Russell Hardin, ‘Norms of Cooperativeness and Networks of Trust’ in Michael Hechter and Karl-Dieter Opp (eds), *Social Norms* (Russell Sage Foundation 2001), 331; Diego Gambetta, ‘Can We Trust Trust?’ in Diego Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (Basil Blackwell 1988), 219; Trudy Govier, *Social Trust and Human Communities* (McGill-Queen’s University Press 1997), 6; Richard Holton, ‘Deciding to Trust, Coming to Believe’ (1994) 72 *Australian Journal of Philosophy* 63, 67; Matthew Harding, ‘Manifesting Trust’ (2009) OJLS 245, 246; Karen Jones, ‘Trust as an Affective Attitude’ (1996) 107 *Ethics* 4, 5.

<sup>2</sup> Russell Hardin, ‘Conceptions and Explanations of Trust’ in Karen S Cook (ed), *Trust in Society* (Russell Sage Foundation 2001), 9.

<sup>3</sup> *ibid* 9.

<sup>4</sup> Cook and Hardin (n 1) 330-31.

relationship takes the form of ‘B trusts A with respect to X’.<sup>5</sup> This relational view of trust is to be distinguished from a competing view of the concept which instead considers trust a trait or a disposition of an individual actor.<sup>6</sup> In that view, the unit of analysis is the individual – that is, the truster (B). I elaborate further on this particular distinction in Chapter 3 of the thesis.

Based on my reading of the literature on trust, I suggest that three elements are essential for trust to arise in that relationship between A and B: (i) A must maintain *control* over a good or service (X); (ii) A must hold *discretion* in exercising his control over X, thus rendering B *uncertain* of how A will exercise said control; and (iii) B must need or want X, which coupled with A’s control and discretion over X, renders B *vulnerable* to A. These three relational elements constitute a “trust relationship”. To be perfectly clear, by “trust relationship” I do not mean a relationship in which trust exists (what may be distinguished as a “*trusting* relationship”). Rather, I mean a relationship in which it is possible for trust to arise. In other words, though trust may theoretically arise in a “trust relationship”, it may or may not, in actuality, exist therein.

In the social rights context, the identities of the trustee and the truster (A and B) as well as the definition of the good or service (X) depend on the relationship on which we are focusing and the specific sub-context with which we are dealing. In subsequent chapters, in my consideration and application of trust to specific relationships, I will be able to address more closely the identities of A and B, as well as the precise definition of X. However, I will make some general remarks here to provide some perspective for the discussion in this chapter.

The potential actors which A and B may represent include both individuals and institutions. Many notable scholars, including Rom Harré,<sup>7</sup> Guido Möllering,<sup>8</sup> Henry Farrell,<sup>9</sup> Jörg Sydow<sup>10</sup> and Bernard Barber<sup>11</sup> have forcefully argued that institutions can be, and frequently

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<sup>5</sup> Karen S Cook and Alexandra Gerbasi, ‘Trust’ in Peter Hedstrom and Peter S Bearman, *The Oxford Handbook of Analytical Sociology* (OUP 2009); Evan Fox-Decent, ‘The Fiduciary Nature of State Legal Authority’ (2005) 31 Queen’s Law Journal 259, 263, citing Annette Baier, ‘Trust and Antitrust’ (1985) 96 Ethics 231, 236-37; Evan Fox-Decent, *Sovereignty’s Promise: The State as Fiduciary* (OUP 2011), 105; Russell Hardin, ‘The Street-Level Epistemology of Trust’ (1993) 21 Politics and Society 505, 506; Holton (n 1) 66. Some authors have set up the three-part relationship slightly differently than I have as, for example, that between the trust actors (ie A and B) and *an action* (rather than a good or service underlying that action).

<sup>6</sup> Hardin, ‘Conceptions and Explanations’ (n 2). See also Cook and Gerbasi (n 5) 220.

<sup>7</sup> Rom Harré, ‘Trust and its Surrogates’ in Mark E Warren (ed), *Democracy and Trust* (Cambridge University Press 1999), 259-60.

<sup>8</sup> Guido Möllering, ‘Understanding Trust from the Perspective of Sociological Neoinstitutionalism: The Interplay of Institutions and Agency’ (Max Planck Institute for the Study of Societies, Discussion Paper 05/13, 2009) <[http://www.ssoar.info/ssoar/bitstream/handle/document/37397/ssoar-2005-moellering-Understanding\\_trust\\_from\\_the\\_perspective.pdf?sequence=1](http://www.ssoar.info/ssoar/bitstream/handle/document/37397/ssoar-2005-moellering-Understanding_trust_from_the_perspective.pdf?sequence=1)> accessed 11 August 2017, 15.

<sup>9</sup> Henry Farrell, ‘Institutions and Midlevel Explanations of Trust’ in Karen S Cook, Margaret Levi and Russell Hardin (eds), *Whom Can We Trust? How Groups, Networks, and Institutions Make Trust Possible* (Russell Sage Foundation 2009), 133.

<sup>10</sup> Jörg Sydow, ‘Understanding the Constitution of Interorganizational Trust’ in Christel Lane and Reinhard Bachmann (eds), *Trust Within and Between Organizations: Conceptual Issues and Empirical Applications* (OUP 1998), 43-44.

are, parties to trust-based relationships.<sup>12</sup> Institutions can and do occupy both A and B roles. As I explain later in this chapter, trust may be defined as a set of expectations regarding the manner in which the trustee (A) will exercise his control over X. Given this definition, there is no reason (at least to my mind) why an institution cannot be a trustee. Institutions can and do exercise control over goods and services through their personnel, the exercise of which is determined by the policies and procedures of that institution. Thus, based on such policies and procedures, a truster can develop such expectations about – and in turn, trust – an institution. On this point, Rom Harré has said that ‘the trust relation between a person and an institution is a species of the person-to-person relation ... Our beliefs about, as well as our affective and social relations to, the personnel account for standing in a trust relation to the institution they staff.’<sup>13</sup> By the same token, an institution should be able to be a truster in a trust relationship. Once again, the personnel who staff that institution may form expectations of other actors, including other institutions, and implement the institution’s policies and procedures on behalf of the institution based on those expectations. For example, Bernard Barber has stressed that ‘what holds for individual actors with regard to larger systems also holds between systems at the same level or different levels: with proper caution, it makes sense to talk of the various kinds of expectations and trust that supraindividual systems have of one another.’<sup>14</sup> Thus, A and B may represent both individuals (including individual citizens and residents, service providers, political officials and judges) and institutions (including not only the executive and legislative branches of government and the courts, but also, as I describe in Chapter 3, the media and special interest groups).

As for X, its definition really depends on both the relationship and the sub-context of social rights which is at issue. For example, in the relationship between citizens and the elected branches of government with respect to social rights (what I call the “citizen-government relationship” and which I describe in greater detail in Chapter 2), X may represent any one of the myriad of social goods and services which are the subject of social rights. Understandably the precise nature of those social goods and services depends on the specific social right with which we are dealing. For instance, those social goods and services will be very different in the right to health, on one hand, as compared with rights to education, housing or social security, on the other. Generally, though, X in the citizen-government relationship denotes physical goods, personnel, infrastructure, equipment and benefits or services. Therefore, in the right to health, just by way of example, those goods and services include pharmaceuticals (physical goods),

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<sup>11</sup> Barber (n 1) 18.

<sup>12</sup> cf Karen S Cook, Russell Hardin and Margaret Levi, *Cooperation Without Trust?* (Russell Sage Foundation 2005).

<sup>13</sup> Harré (n 7) 260.

<sup>14</sup> Barber (n 1) 18.

trained doctors, nurses and other health care providers (personnel), hospitals and clinics (infrastructure), machines and beds (equipment) and various medical procedures.

*(i) The Trustee's Control Over a Good or Service*

The first element of a trust relationship is that the trustee (A) maintains control over a good or service (X) (which the truster (B) needs or wants). Different circumstances may give rise to A's control over X. These include the cost of X (such that A but not B has the financial means to afford X), the scarcity of X (such that A but not B has access to X) and B giving control of X to A (such that B has given A the responsibility of taking care of X). Many writers on trust erroneously assume that A's control over X stems from the latter – B giving him control. Russell Hardin has criticised this assumption, identifying it as a slippage between “trusting” and “entrusting” (where the latter – B giving A control – is better encapsulated by the concept of “entrusting”).<sup>15</sup> I agree with Hardin's criticism here. As he has explained, ‘I can trust you to do something that I have not (even could not have) entrusted to you ... trusting and entrusting are not equivalent or even parallel, although we might use the two terms as though they were interchangeable, especially in contexts in which both might apply’.<sup>16</sup> Therefore, although A must maintain control over X, the source of A's control need not be a grant of control from B.

Two sets of distinctions are noteworthy here. First, the trustee may maintain either direct or indirect control over the good or service (X). *Direct* control refers to situations where the trustee controls the good or service itself. *Indirect* control, in contrast, covers those circumstances in which the trustee does not control the good or service itself, but controls some means of gaining access to the good or service at issue. For instance, in the citizen-government relationship, the elected branches may maintain indirect control by operating social funding programmes. Second, the control maintained by the trustee may be either exclusive or partial. This distinction relates to the availability of the good or service to the truster from a source other than the trustee. Whereas *exclusive* control denotes that the trustee is the truster's only possible source of obtaining the good or service, *partial* control means that the trustee is one of multiple sources. I elaborate upon this distinction and its importance under the vulnerability element.

*(ii) The Trustee's Discretion in Exercising Control and the Truster's Corresponding Uncertainty*

The trustee (A), in addition to maintaining control over the good or service (X), must also hold discretion in exercising that control. For the sake of simplicity, I may also refer to such discretion

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<sup>15</sup> Hardin, ‘Conceptions and Explanations’ (n 2) 17.

<sup>16</sup> *ibid* 17.

as discretion *over the good or service (X)*. Although writers on trust describe this element in slightly different ways, the substance is the same: A must not be so constrained by external factors that he no longer has free will in exercising his control. Diego Gambetta has said that trust necessitates that ‘agents have a degree of freedom to disappoint our expectations’ and that there ‘be the possibility of exit, betrayal, defection’.<sup>17</sup> For Roger Cotterrell, trust requires discretion to act ‘in unforeseen circumstances or in relation to new situations’.<sup>18</sup> And according to Matthew Harding, trust ‘recogni[s]es and responds to the freedom of individuals to make choices’.<sup>19</sup>

A’s discretion in exercising control over X creates corresponding uncertainty for B. Uncertainty reflects the inability of B to predict the outcome of her interaction with A.<sup>20</sup> Thus, B is uncertain whether she will obtain X from A. Discretion and uncertainty are directly related: more discretion afforded to A yields a wider range of possible courses of action for A in exercising his control over X which, in turn, yields a greater degree of uncertainty for B.

By imposing external constraints on A, we reduce A’s discretion and, in turn, reduce the degree of uncertainty for B: B is better able to predict the outcome of her interaction with A based on her knowledge that A is constrained by external factors. Trust based on this knowledge has been called “impersonal trust”<sup>21</sup> or “secondary trust”.<sup>22</sup> Where no constraints have been imposed on A, in trusting A, B must rely only on beliefs she holds about A’s person or character. These beliefs will stem from information which B possesses about A such as his past behaviours. Trust based on these types of beliefs has been called “personal trust”<sup>23</sup> or “primary trust”.<sup>24</sup>

The range of possible courses of action available to A may be referred to as the “sphere” of discretion.<sup>25</sup> This “sphere” understandably lies along a spectrum. At one end, A may have no external constraints imposed upon him and so, have absolute or unfettered discretion. At the other extreme, A may have so many external constraints imposed upon him so as to dictate the outcome of his interaction with B and leave him with no discretion. But the latter extreme (ie no discretion) is not trust. To repeat, for trust to arise, discretion and uncertainty (at least of some degree) must be present in the relationship. Uncertainty arises out of what Niklas Luhmann has

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<sup>17</sup> Gambetta (n 1) 218-19.

<sup>18</sup> Roger Cotterrell, ‘Trusting in Law: Legal and Moral Concepts of Trust’ (1993) 46 *Current Legal Problems* 75, 77-78.

<sup>19</sup> Harding (n 1) 246.

<sup>20</sup> Carol A Heimer, ‘Solving the Problem of Trust’ in Karen S Cook (ed), *Trust in Society* (Russell Sage Foundation 2001), 42.

<sup>21</sup> Philip Pettit, ‘Republican Theory and Political Trust’ in Valerie Braithwaite and Margaret Levi (eds), *Trust and Governance* (Russell Sage Foundation 1998), 298-99.

<sup>22</sup> Piotr Sztompka, *Trust: A Sociological Theory* (Cambridge University Press 1999), 87.

<sup>23</sup> Pettit (n 21) 296.

<sup>24</sup> Sztompka (n 22) 46-47.

<sup>25</sup> Matthew Harding, ‘Trust and Fiduciary Law’ (2013) 33 *OJLS* 81, 3.

called trust's 'problematic relationship with time'.<sup>26</sup> As he and other scholars have emphasised, to trust is to anticipate or hypothesise future events. However, the future cannot be accurately predicted. In Luhmann's words, 'the future contains far more possibilities than could ever be reali[s]ed in the present and hence be transferred into the past. The uncertainty which is bound to exist is simply a consequence of the very elementary fact that not all futures can become the present'.<sup>27</sup> Given this prospect for multiple futures, trust is our response (or our "solution", if you prefer) to uncertainty in the trust relationship. By trusting we anticipate 'an unknowable future'.<sup>28</sup> As Guido Möllering has put it, a key idea to the concept of trust is that it 'requires a leap of faith'.<sup>29</sup> In other words, we trust *in spite of* the uncertainty in the trust relationship.

If the trustee's exercise of control is so constrained by external factors to the point of eliminating his discretion and dictating outcome, trust has been removed from the equation. Without uncertainty in the relationship, there is no room left for trust: we no longer need to anticipate or hypothesise the future – we know it.<sup>30</sup> In the apt words of Helen Nissenbaum: 'Where people are guaranteed safety, where they are protected from harm via assurances ... trust is redundant; it is unnecessary. What we have is certainty, security, and safety – not trust'.<sup>31</sup> Those circumstances in which the outcome of A and B's interaction follows entirely from external constraints are more accurately encapsulated by the concept of *reliability*.<sup>32</sup> The truster may be able to predict said outcome not because he is trustworthy but because he is reliable.

Of course, as the "sphere" of discretion lies along a spectrum, circumstances can and will fall in between the two extremes of absolute/unfettered discretion and no discretion. The trustee may have some external constraints placed upon his exercise of control but nonetheless maintain some discretion in exercising that control. In such circumstances, the truster's ability to predict the outcome of her interaction with the trustee will be based on a mixture of the information she holds about the trustee and her knowledge of the external constraints which have been imposed upon him. Of note, this intermediate position between absolute/unfettered and no discretion is pivotal to my discussion in Chapter 4 of courts as "mediators of government trustworthiness".

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<sup>26</sup> Niklas Luhmann, *Trust and Power: Two Works* (Wiley 1979), 10.

<sup>27</sup> *ibid* 10.

<sup>28</sup> Jack Barbalet, 'A Characterization of Trust, and Its Consequences' (2009) 38 *Theory and Society* 367, 372.

<sup>29</sup> Möllering (n 8) 7.

<sup>30</sup> Helen Nissenbaum, 'Will Security Enhance Trust Online, or Supplant It?' in Roderick M Kramer and Karen S Cook (eds), *Trust and Distrust in Organizations* (Russell Sage Foundation 2004), 173; Sztompka (n 22) 23-33.

<sup>31</sup> Nissenbaum (n 30) 173.

<sup>32</sup> Cook, Hardin and Levi (n 12) 2-3.

*(iii) The Resulting Vulnerability of the Trustee*

Lastly, the good or service (X) is something which the trustee (B) either needs or wants. This fact, coupled with the other two elements, renders B vulnerable to the trustee (A). Since X is of necessity or value to B, its provision to B contributes to B's well-being. And because A has control and discretion over X, B is placed in a position of vulnerability: it is possible that A may act in a way which is in B's interests (so as to further her well-being) but since A is a free agent with discretion, he may also act to harm B's interests in their interaction.<sup>33</sup> As Annette Baier has stressed, 'Where one depends on another's good will, one is necessarily vulnerable to the limits of that good will. One leaves others an opportunity to harm one when one trusts'.<sup>34</sup> Put simply, A may provide B with X (a good or service which she needs or wants) but because A has discretion in exercising his control over X, it is also possible that A may not provide B with X.

The extent of B's vulnerability to A depends principally on two factors: the availability of X to B from sources other than A, and the personal attributes and life circumstances of B.<sup>35</sup> I use the term "principally" because I do not wish to suggest that these factors exhaustively determine the extent of B's vulnerability. We may certainly imagine other factors which may have some bearing on B's vulnerability. I focus here on these two because they enable me to elaborate upon the elements of control and discretion/uncertainty to which I have referred in defining a trust relationship and because they will be of relevance to the citizen-government relationship later.

First, B's vulnerability depends on whether or not she can obtain X from sources other than A. This factor is linked with the control element in the trust relationship and, more specifically, the distinction drawn there between exclusive and partial control.<sup>36</sup> If A is B's only source of X, A maintains exclusive control over X. This exclusive control, depending on the extent of A's discretion in exercising that control, opens B up to extreme vulnerability. B is at the mercy of A with respect to X. Should A refuse to provide B with X, B is denied X – a good or service which she needs or wants. But if B has the option of obtaining X from an alternative source, A's control over X is only partial and B's vulnerability is less. In that case, should A refuse to provide B with X, she may suffer harm (as a result of inconvenience, time or cost, for example) but she is not denied X. B has the option of turning to the alternative source of X.

It may be argued that what I am calling vulnerability is more accurately described as "dependence". This may be true. However, the work of scholars including Martha Albertson

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<sup>33</sup> Pettit (n 21) 208.

<sup>34</sup> Baier, 'Trust and Antitrust' (n 5) 235.

<sup>35</sup> *ibid* 240. See also Richard Emerson, 'Power-Dependence Relations' (1962) 27 *American Sociological Review* 31, 31-32.

<sup>36</sup> Claus Offe, 'How Can We Trust Our Fellow Citizens?' in Mark E Warren (ed), *Democracy and Trust* (Cambridge University Press 1999), 54.

Fineman, Susan Dodds and Margaret Urban Walker suggests that vulnerability and dependence are closely connected.<sup>37</sup> In fact, both Dodds and Walker have defined dependence as a form of vulnerability. Both of them have drawn a distinction between vulnerability in a general sense (ie as a result of our embodiment) and vulnerability to a specific person given a certain relationship. Dodds and Walker have identified the latter form of vulnerability as dependence. For Dodds, ‘Dependence is vulnerability that requires the support of a specific person (or people) ... In this way dependence can be contrasted with those vulnerabilities that do not involve immediate reliance on specific individuals’.<sup>38</sup> Similarly, Walker has distinguished between vulnerability in a general sense (what she has called “vulnerability-in-principle”) – which she has described as ‘susceptibility to injury’ or ‘being under threat of harm’ – and vulnerability to a particular actor (what she has called “dependence-in-fact”).<sup>39</sup> For Walker, in the case of dependence, the actor who ‘holds control of the vulnerability stands in a particular sort of relation to the one who has the vulnerability’.<sup>40</sup> In a trust relationship, the vulnerability to which the trustor is exposed is not of a general sort but rather is vulnerability to a specific actor – the trustee. Thus, although the trust literature uses the term vulnerability, I think that it is really dependence (as a form of vulnerability) in which we are most interested vis-à-vis trust. Nevertheless, to be consistent with the trust literature, I will continue to use the term vulnerability rather than dependence.

Second, the extent of B’s vulnerability to A depends on certain personal attributes and life circumstances of B. These attributes and circumstances are those which have some bearing on the extent to which B needs or wants X, such as B’s health, age, talents and socio-economic status.<sup>41</sup> In other words, these attributes and circumstances increase B’s stakes in the transaction between her and A.<sup>42</sup> For example, consider a scenario where A is a health administrative agency which determines coverage under a government-funded health insurance plan and X is a particular treatment (eg a chemotherapy drug). The value of X to B in this scenario heavily depends on B’s health. Assume three potential trusters: B1 (an individual who has been diagnosed today with a malignant tumour), B2 (an individual who has been diagnosed today with a benign tumour), and B3 (an individual who was diagnosed a year ago with a malignant tumour, who has not responded to any drugs and who has been advised by her oncologist that she will

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<sup>37</sup> Susan Dodds, ‘Dependence, Care, and Vulnerability’ in Catriona MacKenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (OUP 2013); Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law and Feminism* 1; Margaret Urban Walker, *Moral Understandings: A Feminist Study in Ethics* (OUP 2008).

<sup>38</sup> Dodds (n 37) 182-83.

<sup>39</sup> Walker (n 37) 90.

<sup>40</sup> *ibid* 90.

<sup>41</sup> Fox-Decent, ‘The Fiduciary Nature’ (n 5) 299.

<sup>42</sup> Frank B Cross, ‘Law and Trust’ (2005) 93 *Georgetown Law Journal* 1457, 1462.

likely not respond to X). Given their respective health statuses, the chemotherapy drug is of greater value to B1 and B3 than to B2. Let us further assume that B3 is persuaded by her doctor's advice and thus, X is of greater value to B1 than to B3. In this scenario, given the health statuses of the three trusters as well as the drug's value to each of them given the information from B3's doctor, B1 is most vulnerable to A followed by B3 and B2, in that particular order.

Since this factor is tied to the identity of B, as opposed to the relationship or X itself (which was the case for the previous factor), it has the potential to discriminate. By this I mean that one truster may be rendered more vulnerable to a trustee than another even though the two are parties to the same relationship with A involving the same good or service. Further, B's attributes and/or circumstances may also overlap (eg health or race with socio-economic status) to exacerbate B's vulnerability to A and further discriminate.<sup>43</sup> And further still, this second factor may interact with the first factor (the alternative availability of X) such that although two trusters may equally need or want X, they may unequally need or want X *from A*. For instance, consider a scenario where X is available from a source other than A but at a significant cost. Although X is technically available to B from an alternative source, in actuality, X is only available to B where B has the financial means to take advantage of that alternative source of X.

To demonstrate this interaction, let us return to the scenario of B1, B2 and B3 and the chemotherapy drug. Assume that in the scenario, a private insurance company offers plans which cover the chemotherapy drug for an annual charge. B1, B2 and B3 therefore have access to an alternative source of X (the private insurance company) but only where they are in a financial position to afford to pay the annual charge levied by those companies. One who is not in that financial position is more vulnerable to the health administrative agency and its coverage decision. Thus, if B1 is of a lower socio-economic status than B2 and B3, B1's socio-economic status interacts with the availability of X such that, aside from her differential health status as just discussed, she is more vulnerable to A than B2 and B3 because she is less able to afford what it costs to take advantage of the alternative source of X (the private insurance company).

## **Defining Trust**

To recap: where the three elements of control, discretion/uncertainty and vulnerability are present in a relationship, trust may arise therein. These elements do not guarantee trust but set the stage for it to be possible. But that does not tell us what trust is (which, as I said earlier, we need to answer before we can use political trust as a social rights enforcement tool for courts). In

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<sup>43</sup> Mark E Warren, 'Democratic Theory and Trust' in Mark E Warren (ed), *Democracy and Trust* (Cambridge University Press 1999), 335.

this part of the chapter, building on the three constituent elements of a trust relationship, I define trust as a set of positive expectations held by the truster (B) regarding the manner in which the trustee (A) will exercise the control he maintains over the good or service (X). This definition of trust will serve as a key theoretical building block for the remainder of the thesis.

### *Cognitive Versus Affective Trust*

To develop this definition of trust, and for the purpose of clarity, I will start with a common categorisation used in the trust literature. Trust is frequently divided into two categories: affective trust and cognitive trust.<sup>44</sup> On one hand, affective trust is emotional in nature.<sup>45</sup> It is a matter of our having ‘trustful affects, emotions or motivational structures’ towards another actor.<sup>46</sup> We can think of affective trust as “feeling” trust towards the trustee. Cognitive trust, on the other hand, is more conscious and reasoned than affective trust.<sup>47</sup> It is a matter of our beliefs (or, as I will elaborate shortly, our expectations) about how another will behave towards us.<sup>48</sup>

In most circumstances, trust will be a combination of these two categories.<sup>49</sup> That said, my focus in this thesis is on cognitive trust. This is so for at least two reasons. First, as writers on trust have recognised, affective trust usually arises in relationships of shared interests between the truster and the trustee which can merge into a shared identity.<sup>50</sup> For example, we see this kind of trust most frequently in parent-child or marital relationships. Cognitive trust, in contrast, arises more in relationships which occur at a distance and lack the affective convergence of interests and identities, such as trust in professionals, authorities, political officials and institutions.<sup>51</sup> Thus, given this thesis’s emphasis on political trust and the citizen-government relationship, it makes sense for it to focus on the latter. Second, cognitive trust is more contingent than affective trust on external circumstances.<sup>52</sup> Our beliefs and expectations of others are likely to change depending on those circumstances. To assert that B trusts A *cognitively* suggests that B expects A will do C in situation S; to assert that B trusts A *affectively* suggests that B’s emotional attitude towards A is trustful (regardless of the situation in which she finds

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<sup>44</sup> Lawrence C Becker, ‘Trust as Noncognitive Security about Motives’ (1996) 107 *Ethics* 43, 44-45. These components are not separated into watertight compartments; or as Becker has observed ‘a fuzzy boundary’ exists between them. However, it is worthwhile to maintain a distinction between them (44-45).

<sup>45</sup> Cross (n 42) 1459.

<sup>46</sup> Becker (n 44) 44.

<sup>47</sup> Cross (n 42) 1459.

<sup>48</sup> Becker (n 44) 44.

<sup>49</sup> Annette Baier, ‘Trust and Its Vulnerabilities’ in Annette Baier, *Moral Prejudices: Essays on Ethics* (Harvard University Press 1995), 132; Becker (n 44) 44-45.

<sup>50</sup> Warren (n 43) 330.

<sup>51</sup> *ibid* 330.

<sup>52</sup> Cross (n 42) 1468.

herself).<sup>53</sup> Accordingly, it should be possible to change B's cognitive trust in A by changing S (at least more so than affective trust which is less adaptable). Thus, owing to this thesis's concern with the impact which social rights adjudication can be expected to have on the public's trust in its government, it once again makes sense for it to focus on the category of cognitive trust.

### *Trust as a Set of Expectations*

Many writers have defined trust (at least cognitively speaking) in terms of the truster's expectations vis-à-vis the trustee's behaviour.<sup>54</sup> In this thesis, I do so as well. The expectations of which trust is comprised may be divided into three groups: (i) an expectation that the trustee will exercise good will towards the truster; (ii) an expectation that the trustee has the technical competence to fulfil his role – that is, to exercise his control over the good or service in a competent manner; and (iii) in certain relationships which are of a fiduciary nature, an expectation that the trustee will fulfil the fiduciary responsibility which he owes to the truster.

First is the truster's expectation that the trustee will exercise good will towards her.<sup>55</sup> This expectation is a very broad one; it has been characterised in different ways by different writers on trust. Karen Jones has focused on how the trustee will respond to his being trusted, describing it as an 'expectation that, when the need arises, the one trusted will be directly and favourably moved by the thought that you are counting on her'.<sup>56</sup> For John Dunn, it is an 'expectation of benign intentions in another free agent' thereby emphasising a lack of *ill will* on the part of the trustee (rather than the presence of good will).<sup>57</sup> Bernard Barber's account makes the expectation even broader, characterising it as an 'expectation of the persistence and fulfilment of the natural and the moral social orders' where those orders encompass an expectation that one will exercise good will towards another in the absence of reasons to the contrary.<sup>58</sup> I think the expectation of good will is probably best described as a combination of these various characterisations. It may be summed up as an expectation that the trustee will exercise good will towards the truster, in the absence of conduct from the truster giving the trustee reason to exercise ill will towards her.

The second expectation of which trust is comprised is an expectation held by the truster that the trustee has the technical competence (ie knowledge and skills) to fulfil his role and thus,

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<sup>53</sup> Becker (n 44) 44-45.

<sup>54</sup> Barbalet (n 28) 371-72; Barber (n 1) 15-21; Farrell (n 9) 128-29; Gambetta (n 1) 218-19; Niklas Luhmann, 'Familiarity, Confidence, Trust: Problems and Alternatives' in Diego Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (Basil Blackwell 1988), 97; Sztompka (n 22) 26.

<sup>55</sup> Barber (n 1) 9.

<sup>56</sup> Jones (n 1) 5-6.

<sup>57</sup> John Dunn, 'Trust and Political Agency' in Diego Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (Basil Blackwell 1988), 74.

<sup>58</sup> Barber (n 1) 9.

to exercise his control over the good or service.<sup>59</sup> This expectation necessarily supplements the good will expectation because as Jones has justifiably pointed out, ‘optimism about goodwill is not sufficient, for some people have very good wills but very little competence, and the incompetent deserve our trust almost as little as the malicious’.<sup>60</sup> The trustee’s competence may come from a number of sources, including expert knowledge, technical facility or daily routine performance.<sup>61</sup> Competence helps explain in part why trust involves a three-part relationship revolving around a particular good or service (X). Although we may expect that one has the competence to deal with one good or service, this expectation does not necessarily carry over to a different good or service. Where X changes, B’s expectations of A’s competence may change and, in turn, the extent to which B trusts A with respect to the new X may change. Trudy Govier has vividly made this point by stating ‘trust is often relative to particular contexts and ranges of action: we might trust someone in the role of snow-shoveller but not that of baby-sitter’.<sup>62</sup>

In addition to the expectations of good will and competence which apply universally, in certain relationships, trust is also comprised of a third expectation. It arises only in relationships which may be characterised as fiduciary in nature. This expectation stems from the work of Bernard Barber. According to Barber, because there are cases where the truster may not be able to comprehend the trustee’s technical competence, society instills a moral sense of fiduciary responsibility in those who possess special knowledge and skills (and accordingly wield power).<sup>63</sup> Such trustees include parents, government officials, professionals and institutions. As Barber has pointed out, we can only monitor technically competent performance from these individuals and institutions ‘insofar as it is based on shared knowledge and expertise’.<sup>64</sup> Where the trustee’s knowledge and expertise are not shared by the truster, something more is necessary. Fiduciary responsibility is that something more. Accordingly, trust by way of the fiduciary expectation is ‘a social mechanism that makes possible the effective and just use of the power that knowledge and position give and forestalls abuses of that power’.<sup>65</sup> The expectation is that the fiduciary will fulfil the responsibility which society has instilled in him. And that responsibility is, as Barber has summarised it, ‘to demonstrate a special concern for others’ interests above their own’.<sup>66</sup>

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<sup>59</sup> *ibid* 9.

<sup>60</sup> Jones (n 1) 6-7.

<sup>61</sup> Barber (n 1) 9.

<sup>62</sup> Govier (n 1) 6.

<sup>63</sup> Barber (n 1) 9.

<sup>64</sup> *ibid* 15.

<sup>65</sup> *ibid* 15.

<sup>66</sup> *ibid* 14.

As I will elaborate in the next chapter, there is considerable support for characterising political relationships like the citizen-government relationship as fiduciary in nature. And as such, trust in such relationships would be comprised of an expectation of fiduciary responsibility. Not only has Barber explicitly recognised the application of this expectation to political officials and institutions, but the recent work of public law scholars, including Evan Fox-Decent and Evan Criddle, advances the argument that relationships between the state (including state institutions such as the elected branches of government and the courts) and those subject to its/their power are properly characterised as fiduciary in nature.<sup>67</sup> If we accept this argument that the state, its institutions and those who staff them are fiduciaries to those subject to their power, the latter's trust in the former will consist of an expectation that these bodies and staff will fulfil their fiduciary responsibility to them – that is, they will put those trusters' interests above their own.

#### *A Behavioural Aspect to Trust?*

The definition of trust which I have set out – as a set of expectations held by the truster – may lead a reader to rightfully ask: but is trust not also a behaviour on the part of the truster? And the answer to this question would be yes. It is well-recognised in the trust literature that (affective trust aside) trust exists on two interconnected levels: one cognitive and the other behavioural.

Cognitive trust refers to an aspect of trust which is internal to the truster. As the term suggests, it occurs at the level of thoughts or beliefs held by the truster about the trustee and his behaviour. The definition of trust which I have set out in the previous section captures trust at a cognitive level. Behavioural trust, in contrast, is the outward manifestation of those thoughts or beliefs by the truster, in the form of actions. Behavioural trust signals to the trustee, as well as the world at large, that the truster trusts the trustee. Extrapolating from the definition of trust which I have set out, trust at the behavioural level may be defined as the truster's acting upon the expectations of good will, competence and fiduciary responsibility which she holds if/when she trusts the trustee at a cognitive level, thereby manifesting her trust in the trustee.<sup>68</sup>

Some writers on trust argue (or at least seem to suggest) that both levels – cognitive *and* behavioural – are necessary for there to be trust at all.<sup>69</sup> I disagree. While trust at the cognitive level may surely be manifested in behaviour (and that behaviour could be rightfully included within the concept of trust), in my view, the absence of such behaviour does not mean that trust

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<sup>67</sup> Fox-Decent, 'The Fiduciary Nature' (n 5); Fox-Decent, *Sovereignty's Promise* (n 5); Evan Fox-Decent and Evan J Criddle, 'The Fiduciary Constitution of Human Rights' (2009) 15 *Legal Theory* 301; Ethan J Leib, David L Ponet and Michael Serota, 'A Fiduciary Theory of Judging' (2013) 101 *California Law Review* 699; D Theodore Rave, 'Politicians as Fiduciaries' (2013) 126 *Harvard Law Review* 671.

<sup>68</sup> For a more fulsome consideration of trust at the behavioural level, see Harding, 'Manifesting Trust' (n 1).

<sup>69</sup> For a summary of this point, see Hardin, 'Conceptions and Explanations' (n 2) 9-12.

somehow ceases to exist. Why must I act on my expectations of good will, competence and fiduciary responsibility in order to “trust” you? I can see no reason why this must be the case.

On the contrary, defining trust as requiring both the cognitive and behavioural levels has problematic consequences. It may lead, and in actuality has led, many writers to the erroneous conclusion that trust represents a “choice” – that is, the truster chooses (at a cognitive level) to trust the trustee. This conclusion, however, as Russell Hardin has stressed, is incorrect: one does not choose to trust at a cognitive level, but rather one chooses to *act* on that trust. Hardin has explained: ‘I do not typically choose to trust and therefore act; rather, I do trust and therefore choose to act’.<sup>70</sup> Thus, it is the truster’s behaviour in response to her trust at a cognitive level (ie behavioural trust) which represents a choice. This error is not by itself devastating for the definition of trust. What is devastating in my view is the following: because the “choice” characterisation attaches to the behavioural level of trust (as I have just explained), and this definition requires both levels for trust to exist, writers have suggested that where the truster has no choice of behaviour, trust cannot exist.<sup>71</sup> In these writers’ view, trust necessitates that it be ‘possible for us to refrain from action. If it were only others who enjoyed freedom, while we had no alternative but to depend on them, then for us the problem of trust would not arise’.<sup>72</sup> In other words, “choice”, it has been suggested by these writers, is a requirement of trust.

This suggestion is problematic because it excludes from the ambit of trust, a number of relationships, including (and important for my purpose) political relationships like the citizen-government relationship. In general, such political relationships are characterised by little or no choice because citizens’ subjection to governmental power is inevitable. As Philip Pettit has said, ‘Wherever I choose to live, I will find myself subject to a government and in a position of vulnerability to government agents’.<sup>73</sup> Accordingly, citizens have very limited choices (limited to choices in voting for their elected officials and whether to remain in their country).<sup>74</sup> Now, in the context of social rights, wealthy (and potentially middle-class) citizens do have a choice which low-income citizens do not: they have the option to turn to the private market for social goods and services. As I will explain in greater detail later in this thesis, low-income citizens are at the mercy of politicians and bureaucrats for social goods and services. To define trust as requiring both cognitive and behavioural levels (and choice necessarily present at the behavioural level) suggests that whereas wealthy and middle-class citizens can trust their elected branches with

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<sup>70</sup> Hardin, ‘The Street-Level Epistemology’ (n 5) 516.

<sup>71</sup> Gambetta (n 1) 219; Sztompka (n 22) 25-29.

<sup>72</sup> Gambetta (n 1) 219.

<sup>73</sup> Pettit (n 21) 299-300.

<sup>74</sup> Luhmann, *Trust and Power* (n 26) 55.

respect to social rights, for low-income citizens, trust is not possible. In my view, this conclusion cannot be correct. Despite having no choice but to depend on the elected branches for social goods and services, low-income citizens may nonetheless trust them at a cognitive level.

For these reasons, I have chosen to define trust as a cognitive concept, separate from its behavioural manifestation. In this choice I am supported by notable writers on trust.<sup>75</sup> To be clear, this does not mean that trust does not have a behavioural aspect. A truster may act on her expectations of good will, competence and fiduciary responsibility and, in so doing, manifest her trust in the trustee. What it means is that, simply, such behaviour is not a requirement of trust.

#### *Trust's Focus on Procedure*

The three expectations which I have set out above regard the manner in which the trustee exercises his control over the good or service – in other words, the *procedure* by which that exercise of control takes place. But there is an additional expectation which the truster may hold: an expectation regarding the *outcome* of her interaction with the trustee. Put concisely, the truster may have an expectation about whether the trustee will, in the end, provide her with the good or service which she needs or wants. These two expectations are without doubt interconnected. It makes sense that if I expect you to exercise good will, act competently and fulfil your fiduciary responsibility to me, I should be more likely to expect (or perhaps more accurately “hope” for) a favourable outcome from our interaction (ie that you will provide me with the good or service at issue). The reverse should also be true: if I do not expect good will, competence and fulfilment of fiduciary responsibility, I should be less likely to expect a favourable outcome. However, despite the interconnection between these two expectations, it is imperative that we not conflate them so as to equate the latter – the expectation of a favourable outcome – with trust.

To explain why I think that this is so, consider what it means to say that a trustee has “abused” or “breached” a truster’s trust. Under the definition of trust which I have set out herein (ie trust as expectations of good will, competence and fiduciary responsibility), where the trustee acts contrary to these expectations (ie does not exercise good will, act with the requisite competence or fulfil his fiduciary responsibility), the trustee will have “abused” or “breached” the truster’s trust in him. In my view, this conclusion makes sense. Now, contrast that with a definition of trust as an expectation of a favourable outcome (whatever that outcome may be). That would mean that if the trustee acts contrary to that expectation by producing an unfavourable outcome (even though he exercised good will, acted competently and fulfilled his fiduciary responsibility to the truster), the trustee will have “abused” or “breached” the truster’s

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<sup>75</sup> Hardin, ‘Conceptions and Explanations’ (n 2) 9-12; Pettit (n 21) 310.

trust. Can this be correct? I do not think so. The truster may be dissatisfied with the outcome, yes, but it cannot be reasonably said that there has been an abuse or a breach of trust. It is for this reason, as will be recalled from the Introduction to this thesis, that I draw a distinction between political trust (focusing on procedure) and political satisfaction (focusing on outcome).

Moreover, this conclusion that trust focuses on procedure as opposed to outcome is supported by empirical research. From the Introduction, we know that the value of political trust is its tie to public cooperation, including the public's willingness to accept authority decisions, its feeling obligated to obey laws and its performance evaluations of those in positions of authority. This tie explains, in turn, why public trust in government is considered a means to the valuable ends of social stability, economic welfare and effective governance. However, and importantly, the work of scholars like Tom Tyler, Margaret Levi, John Hibbing and Elizabeth Theiss-Morse has shown that citizens' assessments of government legitimacy – and the cooperation which follows from such legitimacy – are much more influenced by citizens' judgments of the procedure by which government actors make decisions than by the outcome of their decision-making.<sup>76</sup> In fact, these scholars have concluded that procedure is the “central” or “dominant” consideration for citizens vis-à-vis legitimacy and cooperation.<sup>77</sup> To be clear, the outcome of the interaction between citizens and government actors is not irrelevant. Outcomes are very relevant, especially to citizens' satisfaction with government; but this body of research supports the conclusion that outcomes have minimal importance to citizens' assessments of government legitimacy and their cooperation with government actors.<sup>78</sup> And seeing as the principal basis for political trust's value to contemporary democracies is citizen cooperation with government actors, I suggest that it is better to conceptualise trust in terms of the three expectations which I

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<sup>76</sup> Stephen J Farnsworth, 'Congress and Citizen Discontent: Public Evaluations of the Membership of One's Own Representative' (2003) 1 *American Politics Research* 66; Amy Gangl, 'Procedural Justice Theory and Evaluations of the Lawmaking Process' (2003) 25 *Political Behavior* 119; John R Hibbing and Elizabeth Theiss-Morse, 'Process Preferences and American Politics: What the People Want Government to Be' (2001) 95 *American Political Science Review* 145; John R Hibbing and Elizabeth Theiss-Morse, *Stealth Democracy: Americans' Beliefs About How Government Should Work* (Cambridge University Press 2002); Margaret Levi, Audrey Sacks and Tom Tyler, 'Conceptualizing Legitimacy, Measuring Legitimizing Beliefs' (2009) 53 *American Behavioral Scientist* 354; Tom R Tyler, *Why People Obey the Law* (Yale University Press 1990); Tom R Tyler, Jonathan D Casper and Bonnie Fisher, 'Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures' (1989) 33 *American Journal of Political Science* 629; Tom R Tyler and Peter Degoey, 'Collective Restraint in Social Dilemmas; Procedural Justice and Social Identification Effects on Support for Authorities' (1995) 69 *Journal of Personality and Social Psychology* 482; Tom R Tyler and Peter Degoey, 'Trust in Organizational Authorities: The Influence of Motive Attributions on Willingness to Accept Decisions' in Roderick M Kramer and Tom R Tyler (eds), *Trust in Organizations: Frontiers of Theory and Research* (Sage Publications 1996).

<sup>77</sup> Farnsworth (n 76) 75; Gangl (n 76) 136; Hibbing and Theiss-Morse, *Stealth Democracy* (n 76) 65; Tyler and Degoey, 'Trust in Organizational Authorities' (n 76) 335, 347.

<sup>78</sup> Tyler, *Why People Cooperate* (n 76) 82-83.

have outlined above (which are procedural and whose connection with cooperation finds strong empirical support) rather than as an expectation of a favourable outcome.<sup>79</sup>

### **Chapter Summary**

The conceptualisation of trust which I have offered in this chapter forms the foundation for the subsequent analysis in this thesis. From it, two principal points may be taken. First, trust arises in a three-part relationship between a truster, a trustee and a good or service which the truster needs or wants. That relationship – referred to as a “trust relationship” – is constituted by three elements: control, discretion/uncertainty and vulnerability. Second, trust in a trust relationship may be defined as a set of positive expectations held by the truster regarding the manner in which the trustee will exercise the control he maintains over the good or service. Thus, trust is a cognitive (rather than behavioural) concept and focuses on procedure, specifically that by which the trustee exercises his control (rather than outcome). With this conceptualisation of trust made out, I now proceed in Chapter 2 to apply it specifically to the citizen-government relationship.

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<sup>79</sup> It must be pointed out that the procedural judgments which these scholars have found to be connected with citizens’ assessments of government legitimacy and their cooperation with government actors largely pertain to what I have described as government good will, competence and fulfilment of fiduciary responsibility to citizens, including as I conceptualise those three expectations in the specific context of social rights.

## CHAPTER 2

### The Citizen-Government Relationship

In Chapter 1, I laid the conceptual groundwork for understanding trust in the social rights context. In this chapter, I apply that groundwork specifically to the relationship between citizens and the elected branches of government with respect to social rights (what I will refer to from here forward as the “citizen-government relationship”). Paralleling the structure of Chapter 1, the application in this chapter proceeds in two principal stages. First, applying the three constituent elements of a trust relationship (control, discretion/uncertainty and vulnerability) to the citizen-government relationship, I characterise that relationship as a trust relationship. As such, I establish it as a relationship in which it is possible for trust to arise. Second, extrapolating from the definition of trust developed in Chapter 1 to the citizen-government relationship, I set out in this chapter what it means to say that citizens “trust” their elected branches with respect to social rights. Specifically, I define trust in the citizen-government relationship as a set of positive expectations held by citizens regarding the manner in which the elected branches will exercise the control they maintain over the social goods and services which citizens need.

#### Establishing the Parameters of the Citizen-Government Relationship

Before I get to this characterisation and definition, I shall first elaborate upon what I mean by the citizen-government relationship. In social democracies, there exists a relationship between citizens and the elected branches of government with respect to social welfare. Citizens pay taxes to the state and using the revenue collected from those taxes, the state provides citizens with a range of social goods and services by delivering a certain set of social programmes. Constitutional social rights afford citizens constitutional protection vis-à-vis such social goods and services (and establish corresponding obligations for the state to its citizens).<sup>1</sup> When I speak of the citizen-government relationship, I am generally assuming that that relationship exists in a system in which social rights are constitutionalised. Thus, the citizens in that relationship, under their constitution, possess the relevant rights to health, housing, education and social security.

As social rights scholars have consistently emphasised, both of the elected branches play an important role in protecting social rights.<sup>2</sup> The legislative branch contributes amendments to

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<sup>1</sup> Such rights may either guarantee citizens the social goods and services themselves or they may guarantee citizens “access” (or some equivalent) to those social goods and services.

<sup>2</sup> Cécile Fabre, *Social Rights Under the Constitution: Government and the Decent Life* (OUP 2003); Jeff King, *Judging Social Rights* (Cambridge University Press 2012); Patrick Macklem, ‘Social Rights in Canada’ in Daphne Barak-Erez and Aeyal M Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Hart Publishing 2007); Mark Tushnet, *Weak*

and promulgates the primary legislation which defines the parameters of state-delivered social programmes.<sup>3</sup> It also endorses the budget which allows the state to fund, and accordingly deliver, the programmes at issue. The executive – in which I include civil servants therein and the various administrative agencies relevant to the identified areas of social welfare – prepares the bulk of primary legislation which is introduced to the legislature, and then supplements, amplifies and implements that social welfare legislation through a broad range of administrative action.<sup>4</sup>

Two points of clarification on this relationship are warranted. First, when I say “citizens” I do not mean it in the sense of citizenship as legal status. Rather, I use the term to refer to those individuals who, under the relevant constitution, are afforded the protection of social rights. Thus, depending on the jurisdiction at issue, “citizens” – as I use the term here – may include residents and/or individuals of other legal status. That said, it is beyond the scope of this thesis to consider who, as a matter of international and constitutional law, should be afforded social rights protection. Second, I should explain why I have chosen to collapse the legislative and executive branches of government into one actor (what I have called the elected branches) and, in what follows, into one trust relationship (the citizen-government relationship). I have made this decision for a few reasons. The primary reason relates to what I seek to achieve in this thesis. One of my main objectives, as I indicated in the Introduction, is to analyse the impact which we can expect constitutional social rights adjudication to have on public trust in government. This analysis is built upon a distinction between, on one hand, the legislature and the executive (as elected bodies) and, on the other, the judiciary (as an unelected body). Although I do recognise that there is an important distinction to be drawn between the legislature and the executive, I do not want that distinction to overshadow the distinction between the elected branches *and the courts* which is far more central to my analysis. Further, and relatedly, in conducting this analysis, I strive to contribute to the current debate on the proper role of courts in enforcing constitutional social rights. The orthodoxy in that literature is to focus on the tripartite relationship between citizens, the elected branches and the courts. Because I situate my thesis in that literature, it makes sense to follow that orthodoxy – at least to some extent. Finally, from a purely practical perspective, most of the social science theoretical scholarship on political trust, upon which I am relying for my analysis herein, does not draw much of a distinction between the legislature and the executive. Rather, there is a tendency in that scholarship to speak of the relationship between citizens and their government at a more general level. Thus, I think

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*Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008); Katharine Young, *Constituting Economic and Social Rights* (OUP 2012).

<sup>3</sup> King (n 2) 41, 44.

<sup>4</sup> Lorne Sossin, ‘Boldly Going Where No Law Has Gone Before: Call Centres, Intake Scripts, Database Fields, and Discretionary Justice in Social Assistance’ (2004) 42 *Osgoode Hall Law Journal* 363, 364-65.

that it is best for me to maintain my analysis in this thesis at an equally general level, referring to the distinction between the legislature and the executive only where necessary.

### **The Citizen-Government Relationship: A Trust Relationship**

The citizen-government relationship encompasses all three elements of what I have called a trust relationship. In this part of the chapter, I explain how. But before proceeding to this analysis, let us quickly reconfigure the citizen-government relationship to fit the three-part form (ie the A-B-X relationship) that I outlined in Chapter 1. A and B (the trustee and the truster) represent the elected branches and citizens, respectively. The elected branches (A) include, as I have said, both the legislature and the executive. X represents any one of the myriad of social goods and services which I outlined in Chapter 1 as being the subject of social rights. To repeat, they include physical goods, personnel, infrastructure, equipment and benefits or services, and they relate to the rights of focus in this thesis: health, housing, education and social security.

#### *(i) The Elected Branches Maintain Control over Social Goods and Services*

The first element of a trust relationship – control – is quite manifest in the citizen-government relationship. In any social democracy, the elected branches maintain some degree of control over social goods and services which citizens need and/or want. Social rights are said to promise social goods and services which citizens need in order to lead a decent life.<sup>5</sup> Accordingly, I will proceed under the assumption that in the citizen-government relationship, the social goods and services at issue are *needed* by citizens. The elected branches' control over these social goods and services is exercised via the various legislative and administrative steps which I described earlier, including the preparation, development and promulgation of primary legislation, the preparation and approval of the budget, and subsequent administrative action. These legislative and administrative steps, taken together, are prerequisites to the state-delivered social programmes which grant citizens access to the social goods and services which they need. In concise terms, without such steps, these programmes would be neither created nor implemented and, in turn, citizens would not have access to such social goods and services – at least not from the state.

Granted, the nature of the elected branches' control is nuanced. For one thing, the source of that control is debatable. There is a good argument that the source of the elected branches' control is citizens' taxes. In this regard, Charles Reich argued long ago that owing to

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<sup>5</sup> Fabre (n 2) 7; King (n 2) 17.

citizens' obligation to pay taxes to the state, social rights should be seen as property rights.<sup>6</sup> For Reich, since social goods and services are supported by taxes, they are best viewed as 'substitutes for, rather than supplements to, other forms of wealth'.<sup>7</sup> The tax money which citizens pay to the state 'is no longer available for individual savings or insurance. The taxpayer is a participant in public insurance by compulsion, and his ability to care for his own needs independently is correspondingly reduced'.<sup>8</sup> If we accept Reich's argument, citizens are giving the elected branches control over these social goods and services, thereby *entrusting* them with the social goods and services which they need. However, as I said in Chapter 1, while such giving of control (or entrusting) is one source of control – and so, sufficient for this element of a trust relationship – it is not necessary. All that a trust relationship requires is that the elected branches, by whatever means, do exert control over those goods and services. This is indeed the case here.

For another thing, the two sets of distinctions which I outlined in Chapter 1 with respect to control do play out in the citizen-government relationship. First, the elected branches may maintain direct or indirect control over the social goods and services. In some countries and with some social rights matters, the elected branches maintain direct control over social goods and services: they produce physical goods, employ personnel, own equipment and infrastructure, or administer benefits and services directly to citizens. In other cases, the elected branches maintain indirect control by, for example, operating funding programmes and through regulation. Second, the elected branches' control may be exclusive or partial: the elected branches may be citizens' only possible means of obtaining social goods and services (exclusive control) or they may be one of multiple means (partial control). The Canadian public health system (which is described in further detail in Chapter 6 of this thesis) offers a fitting example of a government having exclusive control. Under the federal *Canada Health Act*, provinces are effectively required to provide their residents with a health care insurance plan which insures all "medically necessary" health care services. Several provinces, in complying with this requirement and providing plans, have chosen to legislatively prohibit residents and health care providers from privately contracting for services which are already covered by the public plan. The Supreme Court of Canada has described the effect of such legislation as generating what it refers to as 'a virtual monopoly for the public health scheme'.<sup>9</sup> Accordingly, such provinces may be said to have exclusive control over "medically necessary" care. However, this Canadian example represents,

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<sup>6</sup> Charles A Reich, 'The New Property' (1964) 73 *The Yale Law Journal* 733. See also John Allett, 'New Liberalism & the New Property Doctrine: Welfare Rights as Property Rights' (1987) 20 *Polity* 57.

<sup>7</sup> Reich (n 6) 737.

<sup>8</sup> *ibid* 737.

<sup>9</sup> *Chaoulli v Quebec* 2005 SCC 35, [2005] 1 SCR 791 [106].

for social goods and services more generally, the exception rather than the rule. In contemporary social democracies, providers of social goods and services rarely find themselves confined to a single, public system. In some cases, a provider will have the opportunity to offer her goods and services concurrently via both the public system and privately; in other cases, the provider may be compelled to choose one system or the other. Regardless of which applies, the opportunity for providers to offer their goods and services privately has important implications for citizens. It means the availability of a private market, the effect of which is that citizens are not (technically speaking) wholly dependent on the elected branches for the social goods and services which they need; they may have the option of obtaining them from a source alternative to the elected branches (ie a private provider). Where such a private market is available, the elected branches maintain partial control over the social goods and services. The relevance of such partial control will become evident shortly. That said, and like I explained regarding the source of the elected branches' control, neither of these two distinctions (direct/indirect and exclusive/partial) changes the critical fact that the elected branches do indeed maintain control over social goods and services – they merely alter the type of control which is maintained.

Thus, the first element of a trust relationship is duly satisfied in the citizen-government relationship: regardless of the nuanced nature of the elected branches' control, including that control's ultimate source as well as its precise type, the elected branches in social democracies do maintain some degree of control over social goods and services which citizens need.

*(ii) The Elected Branches Exercise Discretion and Citizens are Correspondingly Uncertain*

In any social democracy, the elected branches, on top of maintaining control over social goods and services, also hold discretion in exercising that control. Of course, this includes discretion with respect to those social goods and services which citizens need. I do not think that this point is especially controversial; however, in the interest of comprehensiveness and for the purpose of my subsequent analysis, I will elaborate briefly. Also note that, for the moment, I am leaving aside any constraints on the elected branches' discretion which may be imposed by courts. As we will see, such judicial constraints on government are the focus of my argument in Chapter 4.

In his highly influential book *Discretionary Justice*, Kenneth Culp Davis has defined “discretion” in politics as follows: ‘A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction’.<sup>10</sup>

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<sup>10</sup> Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge 1969), 4. For other – but similar – definitions of discretion, see Denis J Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press 1986), 21; Robert E Goodin, *Reasons for Welfare: The Political Theory of the Welfare State* (Princeton University Press 1988), 186; Jeffrey Jowell, ‘The Legal Control of Administrative Discretion’ (1973) 18 Public Law 178, 179.

The elected branches, in exercising their control over social goods and services, are indeed left free to make such a choice.<sup>11</sup> The precise nature of that choice, however, depends on the branch of government of which we are speaking. Robert Goodin, in his discussion of discretion in the welfare state, has pointed out that in any social democracy (or welfare state) there ‘must inevitably be legislative discretion in deciding which rules to adopt in the first place’ as well as ‘a certain amount of administrative discretion in bringing particular cases under general rules’.<sup>12</sup>

The legislature undoubtedly exercises much discretion.<sup>13</sup> Both in exercising its power of the purse and in promulgating primary legislation, the legislature is, to use Davis’s words, left ‘free to make a choice among possible courses of action or inaction’. Among other things, it can choose to approve (or not) the executive’s proposed budget and it can choose to promulgate (or not or propose amendments to) legislation put before it. While the legislature’s discretion can be restrained by constitutional limits, including express social rights language, given the vagueness with which social rights are often formulated, such restraint is likely to be minimal.<sup>14</sup>

The executive also has a wide margin of discretion.<sup>15</sup> Lorne Sossin has helpfully classified three levels of discretion which administrative decision-makers exercise.<sup>16</sup> The first is legal discretion. It refers to legislative grants of authority in which administrative decision-makers are given an express choice. Here, the legislature expressly delegates its discretion to administrative decision-makers because those decision-makers may be in a better position to make the decision at hand (although the legislature usually specifies an overall purpose). Second, administrative decision-makers exercise interpretive discretion. Unlike its legislative counterpart, interpretive discretion is not expressly delegated by the legislature but arises from vague or ambiguous language in the relevant social welfare statutes. As explained by Henriette Sinding Aasen and her colleagues, ‘Legislation pertaining to welfare is often formulated in general or vague terms and with broad object clauses, which leave room for a substantial degree of professional discretion in

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<sup>11</sup> Goodin (n 10) 12. See also King (n 2) 250-86 on legislative and administrative “flexibility”; Colm O’Cinneide, ‘Legal Accountability and Social Justice’ in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2013), 389.

<sup>12</sup> Goodin (n 10) 12.

<sup>13</sup> Xenophon Contiades and Alkmene Fotiadou, ‘Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation’ (2012) 10 *International Journal of Constitutional Law* 660, 667-68; *ibid* 12; King (n 2) 250-86.

<sup>14</sup> For example, Jeff King has stressed that social rights are inescapably vague, owing to the fact that they often impose qualified obligations on the state: King (n 2) 100-06. See also Anders Molander, *Discretion in the Welfare State: Social Rights and Professional Judgment* (Routledge 2016), 49.

<sup>15</sup> Robert E Goodin, ‘Welfare, Rights and Discretion’ (1986) 6 *OJLS* 232; Molander (n 14); Richard M Titmuss, ‘Welfare “Rights”, Law and Discretion’ (1971) 42 *The Political Quarterly* 113.

<sup>16</sup> Sossin (n 4).

the application of the law'.<sup>17</sup> Thus, administrative decision-makers are left with the discretion to interpret such general or vague statutory language. Finally, administrative decision-makers exercise discretion through what Sossin has called “administrative choices”.<sup>18</sup> These choices include how a citizen applies for benefits, which documents must be produced and verified, how decisions on eligibility are reached by decision-makers, the requisite training and qualifications of decision-makers and the extent of personal contact between decision-makers and applicants. At each level, decision-makers are, to use Davis’s definition again, given a ‘choice among possible courses of action or inaction’ – whether that choice be express, implicit or “administrative”.

The discretion exercised by both elected branches of government gives rise to inevitable uncertainty for citizens. This uncertainty too exists on multiple levels. Inescapably, whenever a political decision is made, there is the uncertainty that a citizen will not receive what she wants from the political process. Governing necessarily involves balancing competing demands and setting priorities, and frequently one demand is fulfilled by the elected branches at the expense of another.<sup>19</sup> Conor Gearty has called this form of uncertainty the ‘defect in politics’.<sup>20</sup> In social rights matters, there is a limited budget available to the elected branches in funding and/or delivering social goods and services to their citizens. Governments cannot fund and/or deliver every social good and service to every citizen.<sup>21</sup> Thus, as an inevitable consequence thereof, some citizens will be left unhappy or dissatisfied with the political process’s ultimate outcome.

However, and in my view more importantly, there is an additional type of uncertainty: that a citizen’s interests will be discounted, or worse, disregarded. In those cases where a citizen has not received what she wants from the political process, it does not necessarily follow that her interests have been discounted or disregarded: her interests may have been duly considered by the elected branches but, in making their political decisions (ie exercising their control dutifully which involves balancing competing demands and setting priorities), the elected branches may have decided that what the citizen wanted was not the “right” or “best” decision. Nevertheless, because the elected branches do have the discretion which I have just described, the reverse may be equally true: the citizen’s interests may have been indeed discounted or disregarded. First of all, the elected branches may discount or disregard a citizen’s interests in favour of their staff’s

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<sup>17</sup> Henriette Sinding Aasen et al, ‘Juridification and Social Citizenship: International Law, Democracy and Professional Discretion’ in Henriette Sinding Aasen et al (eds), *Juridification and Social Citizenship in the Welfare State* (Edward Elgar 2014), 296.

<sup>18</sup> Sossin (n 4) 364-65.

<sup>19</sup> Jane Mansbridge, ‘Social and Cultural Causes of Dissatisfaction with U.S. Government’ in Joseph S Nye Jr, Philip D Zelikow and David C King (eds), *Why People Don’t Trust Government* (Harvard University Press 1997), 134.

<sup>20</sup> Conor Gearty, ‘Against Judicial Enforcement’ in Conor Gearty and Virginia Mantouvalou (eds), *Debating Social Rights* (Hart Publishing 2010), 53-54.

<sup>21</sup> Mark E Warren, ‘Democratic Theory and Trust’ in Mark E Warren (ed), *Democracy and Trust* (Cambridge University Press 1999), 311.

own interests. As Margaret Levi has emphasised, both bureaucrats and politicians have their own interests when they make political decisions: for bureaucrats it is to maximise budgets and power, and for politicians it is to maximise votes.<sup>22</sup> When these actors' interests conflict with the interests of citizens (generally or a specific subset of citizens), there is the uncertainty that the elected branches' decisions will be made in a way which furthers these actors' interests rather than those of citizens.<sup>23</sup> Second, even if we assume good faith on the part of bureaucrats and politicians, these actors may nonetheless discount or disregard a citizen's interests because of simple neglect.<sup>24</sup> Owing to a lack of experience or to just basic ignorance on their part, bureaucrats and politicians may not be aware of or fully understand the plight of the citizen (or the group to which she belongs) and thus, fail to protect her interests – albeit unintentionally.

Of note, the threat of a citizen's interests being discounted or disregarded by the elected branches is pronounced especially for low-income citizens. This is so because their interests are not likely to align with either bureaucrats or politicians. Bureaucrats' interests in maximising budgets and power are likely to run contrary to the interests of low-income citizens in maximising social welfare entitlements; the less money spent on social welfare, the more money that remains in the budget (and which may be used elsewhere). Politicians' interests in maximising votes means that they will cater to the interests of those who have political influence and can re-elect them into power. Unfortunately, this politically powerful cohort of citizens is not likely to include those with low income. Several social rights scholars, including Sandra Fredman, Jeff King, Paul O'Connell and Kim Lane Scheppele have forcefully argued (supported by a body of empirical studies) that low-income citizens do not exert much political influence and thus, are a marginalised group.<sup>25</sup> This marginalisation of low-income citizens follows a circular pattern. To start off, it is a well-recognised point that governmental policy-making is heavily influenced by the wealthy through lobbying and interest groups.<sup>26</sup> As Colm O'Connell has suggested, the reality of the situation is 'that those in most need of state support are often those least able to access the political system and press for change'.<sup>27</sup> Following in large part

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<sup>22</sup> Margaret Levi, 'A State of Trust' in Valerie Braithwaite and Margaret Levi (eds), *Trust and Governance* (Russell Sage Foundation 1998), 95.

<sup>23</sup> Warren (n 21) 311-13.

<sup>24</sup> King (n 2) 166-67.

<sup>25</sup> Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008), 34; *ibid* 157-69; Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2013), 5; Kim Lane Scheppele, 'A Realpolitik Defense of Social Rights' (2004) 82 *Texas Law Review* 1921, 1926-27.

<sup>26</sup> King (n 2) 157; Virginia Mantouvalou, 'In Support of Legalisation' in Conor Gearty and Virginia Mantouvalou (eds), *Debating Social Rights* (Hart Publishing 2010), 116-17; Gearty (n 20) 75. For empirical support of this claim, see also DC Freeman, 'Note: The Poor and the Political Process: Equal Access to Lobbying' (1969) 6 *Harvard Journal on Legislation* 369, 370, cited in King (n 2) 157.

<sup>27</sup> O'Connell (n 11) 405.

from the wealthy's disproportionate political influence, those with low income tend to feel excluded from the political and democratic process and so, tend not to participate in it: they seldom register as voters and, when they do register, they are not organised voters generally.<sup>28</sup> Accordingly, political parties rarely target low-income voters and so, low-income citizens lack representation which would give them a political voice to influence governmental policy-making.<sup>29</sup> As a result, the interests of low-income citizens – on top of being discounted or disregarded intentionally in the pursuit of political ambition – are also likely to be neglected unintentionally due to a lack of representation.<sup>30</sup> Hence, and bringing us full circle, the wealthy (and middle class) are given even more political clout, leading low-income citizens to feel even more excluded and to their further marginalisation. On those rare occasions where a political party does target those with low income, it is often met with countervailing political forces from the wealthy lobbying and interest groups which prevent it from delivering on social programmes it may have promised.<sup>31</sup> As King has pointed out, a strong welfare state – which entails regulation of commerce and redistributive tax spending – is '*diametrically opposed* to the interests of the wealthy' and thus 'precisely the target of the well-resourced lobbying interests'.<sup>32</sup>

To make matters worse, in newer democracies such as those in the Global South and the former-Soviet Union, these various forms of uncertainty are exacerbated. On this point, David Landau has convincingly argued that such democracies frequently suffer from a lack of political party institutionalisation.<sup>33</sup> Whereas more developed democracies benefit from institutionalised party systems (with political parties having clear and enduring ideological platforms), newer democracies do not: their parties are plagued by confused platforms which change frequently. Because of this lack of political party institutionalisation, voters in newer democracies are less able to use party identification to assess the views of prospective politicians – and in turn, less able to predict how they will exercise control over social goods and services. As Landau has made clear, 'the party label is a necessary shortcut for voters: without it, they will often be unable to make an informed choice. And where the ideological meaning of a party label is malleable,

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<sup>28</sup> O'Connell (n 25) 5; Scheppele (n 25) 1926-27.

<sup>29</sup> O'Connell (n 25) 5.

<sup>30</sup> Moreover, as O'Connell has pointed out, 'the daily operation of the welfare state is often a complex and impenetrable process, and there is not much political capital to be gained by elected politicians and other opinion-formers probing deeply into how the system treats marginali[s]ed individuals and groups': (n 11) 404-05.

<sup>31</sup> Scheppele (n 25) 1926-27.

<sup>32</sup> King (n 2) 157.

<sup>33</sup> David Landau, 'Political Institutions and Judicial Role in Comparative Constitutional Law' (2010) 52 Harvard International Law Journal 319, 330.

voters will not get what they think they are getting even if they do try to rely on the party label'.<sup>34</sup> Hence, in newer democracies, an already uncertain process is rendered all-the-more uncertain.

We may thus fairly conclude that the citizen-government relationship satisfies the second element of a trust relationship: in social democracies, both the legislature and the executive hold discretion in exercising their control over those social goods and services which citizens need, and correspondingly, citizens are left uncertain of how said control will ultimately be exercised.

*(iii) Citizens are Vulnerable to the Elected Branches*

Lastly, in the citizen-government relationship, citizens are vulnerable to the elected branches (at least to some extent). Extrapolating from what I said in Chapter 1, citizens' vulnerability follows from the combined effect of two features of the citizen-government relationship: first, the control and discretion which the elected branches have over social goods and services (ie the first two elements of a trust relationship) and second, citizens' need for those social goods and services. Because citizens need the social goods and services, their provision to citizens contributes to citizens' well-being; and because the elected branches have control and discretion over those goods and services, the elected branches hold power over citizens. The elected branches, in exercising their control, may or may not choose to provide the social goods and services to citizens; and as a result, citizens may not be able to obtain those goods and services – at least not from the state. Accordingly, citizens are vulnerable to the elected branches.

Granted, citizens are not *equally* vulnerable to the elected branches. Just how vulnerable a specific citizen is to the elected branches depends on the two factors which I set out in Chapter 1. In the citizen-government relationship, the first factor (the availability of the good or service from an alternative source) usually, and predictably, translates into whether the social good or service is available from a provider on the private market. As I said earlier, in contemporary social democracies, it is rare for the elected branches to maintain exclusive control over social goods and services: there is often available to citizens (at least those who can afford it) a private market for those goods and services – ie the elected branches maintain partial control. Where a citizen can access a social good or service through the private market, her vulnerability to the elected branches is less. Second, a citizen's vulnerability depends on the personal attributes and life circumstances which I identified in Chapter 1: these include her health, her age, her talents and, of particular importance here, her socio-economic status. For example, a citizen in poor health is in greater need of public health care than one who is in good health and so, is more vulnerable to the elected branches. Similarly, a citizen with children has greater need for public

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<sup>34</sup> *ibid* 330.

education than one without children and so, once again, is more vulnerable. But also recall that this second factor may interact with the first. In the citizen-government relationship, this interaction is an especially significant one. Of particular note, citizens' socio-economic status interacts with the availability of social goods and services from private sources to generate an inequality of vulnerability across citizens. To repeat, where a citizen can access a social good or service through the private market, her vulnerability to the elected branches is less. In other words, the relevant providers on the private market mitigate citizens' vulnerability. However, only those citizens who have the financial means to turn to the private market (ie the wealthy and potentially the middle class) may benefit from this opportunity for mitigated vulnerability. Their money makes the private market a practical alternative should their government refuse to provide, or place restrictions on the provision of, social goods and services in the public system. In other words, the latter category of citizens is not wholly dependent on their government for the social goods and services which they need. For low-income citizens, however, the public system is likely their only means of access. They do not have the financial resources necessary to make the private market a practical alternative. Instead, low-income citizens are most likely at the mercy of politicians and bureaucrats for the social goods and services which they need.<sup>35</sup>

I leave aside for the moment the inequality of vulnerability which follows from these two factors and their interaction. While I fully acknowledge that this inequality can and does exist, the fact remains that all citizens are vulnerable to the elected branches, at least to some extent. If the social goods and services at issue are, generally speaking and on the whole, things which citizens need, and the elected branches have control and discretion over those goods and services, citizens are inevitably vulnerable. Regardless of whether there is a private market for a specific social good or service as well as whether a citizen has the financial means to take advantage of that market, the elected branches nonetheless maintain control over a social good or service which that citizen needs. The elected branches – whether the only source or one of many sources of that social good or service – still remains a source thereof. And therefore, the citizen is exposed to some degree of vulnerability to the elected branches. Accordingly, the citizen-government relationship also satisfies the third and final element of a trust relationship.

### **Defining Trust in the Citizen-Government Relationship**

Given the foregoing analysis, it is hopefully apparent that the citizen-government relationship may be accurately characterised as what I have called a trust relationship. As such, based on my

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<sup>35</sup> Claus Offe, 'How Can We Trust Our Fellow Citizens?' in Mark E Warren (ed), *Democracy and Trust* (Cambridge University Press 1999), 53.

discussion in Chapter 1, the citizen-government relationship is a relationship in which it is possible for trust to arise. If we accept this as true, it brings me to my next question: what precisely is trust in the citizen-government relationship? In other words, what does it mean to say that citizens “trust” their elected branches of government with respect to social rights? Employing the ‘workable notion’ of trust which I developed in Chapter 1 and applying it here, I define trust in the citizen-government relationship as follows: it is *a set of positive expectations held by citizens regarding the manner in which the elected branches will exercise the control they maintain over the social goods and services which citizens need*. And applying the three expectations set out in Chapter 1 to the citizen-government relationship, the expectations comprising this specific trust are the following: (i) that the elected branches will exercise good will toward citizens; (ii) that the elected branches will fulfil their fiduciary responsibility to citizens; and (iii) that the elected branches have the requisite competence to exercise the control they maintain over those goods and services.

Before getting into these three expectations, I would like to draw the reader’s attention to one point. As will become apparent very shortly, the definition of trust which I develop in this chapter (as arising in the citizen-government relationship) brings together a number of broad ideas in which legal scholars and political scientists have long been interested. Each of these ideas is the subject of a large and rich body of academic scholarship. Accordingly, it would be impossible in this thesis for me to offer any in-depth consideration of these ideas and their corresponding bodies of scholarship. However, I would like to stress that in developing this definition of trust, my objective is not to do so. Rather, my objective is a significantly more modest one: I seek simply to demonstrate how these ideas relate to the three expectations which comprise trust and through the concept of trust, to connect these ideas with one another.

#### *(i) The Expectation of Good Will*

The first constituent expectation of trust in the citizen-government relationship is good will: for citizens to trust their elected branches means that they expect the elected branches to show good will toward them in their exercise of control over social goods and services. To be more specific, I suggest that this expectation of good will translates into two inter-related sub-expectations.

The first sub-expectation is that those actors who staff the elected branches will exhibit good intentions toward citizens in exercising said control. To quote the apt words of John Dunn, trust in the political context necessarily includes an ‘expectation of benign intentions’ from

political actors.<sup>36</sup> To elaborate a bit upon what this means in the social rights context, I think that it is helpful to consider a typology of reasons outlined by Kent Roach and Geoff Budlender as to why governments fail to comply with constitutional standards vis-à-vis social rights matters.<sup>37</sup> Roach and Budlender (relying on a typology which was originally developed by Chris Hansen in another context) have set out three such reasons: inattentiveness, incompetence and intransigence on the part of government. Inattentiveness refers to those circumstances in which government actors make unintentional oversights or, as is more commonly the case, they fail to appreciate the nature of their constitutional obligations to citizens.<sup>38</sup> Incompetence captures those cases of government non-compliance which are due to incapacity or, in the words of Roach and Budlender, the product of ‘decades of neglect, inadequate budgets and inadequate training of public officials’.<sup>39</sup> I will address the issue of competence a bit later in the chapter. And finally, intransigence covers those situations in which government actors understand their constitutional obligations to citizens and have the capacity to meet them, yet they refuse to do so.<sup>40</sup> In my view, the first sub-expectation of good will (the expectation of good intentions) may be properly recharacterised as an expectation that the elected branches will not act – to use Roach and Budlender’s/Hansen’s term – ‘intransigently’ in exercising their control over social goods and services. Where the elected branches (or more accurately their staff) understand their obligations to citizens and are able to meet those obligations – however, they choose not to (as intransigence suggests) – the elected branches fail to exhibit good intentions toward citizens.<sup>41</sup>

The second sub-expectation which I suggest is encompassed by good will is that the elected branches, in exercising their control over social goods and services, will employ fair procedures. This sub-expectation follows from the first. As Joel Brockner has said, ‘The fairness

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<sup>36</sup> John Dunn, ‘Trust and Political Agency’ in Diego Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (Basil Blackwell 1988), 74, 89-90. Some scholars have also spoken of the “motives” of political actors: Tom R Tyler, ‘Trust and Law Abidingness: A Proactive Model of Social Regulation’ (2001) 81 *Boston University Law Review* 361.

<sup>37</sup> Kent Roach and Geoff Budlender, ‘Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?’ (2005) 5 *South African Law Journal* 325. Roach and Budlender’s typology was adapted from a typology set out in the following work: Chris Hansen, ‘Inattentive, Intransigent and Incompetent’ in Randall S Humm et al (eds), *Child, Parent and State* (Temple University Press 1994).

<sup>38</sup> Roach and Budlender (n 37) 346.

<sup>39</sup> *ibid* 349.

<sup>40</sup> Aoife Nolan, *Children’s Socio-Economic Rights, Democracy and the Courts* (Bloomsbury 2011), 210.

<sup>41</sup> It is noteworthy on this point that scholars (including those in social rights) have argued that good faith on the part of government should be assumed until (or unless) it is proven otherwise. For example, Jeff King has said: ‘The principle of inter-institutional collaboration . . . means accepting that the various institutions generally seek in good faith to do their own work and cooperate with other branches until it is shown to be otherwise. This is not naïve optimism. All *good* welfare states were built by legislatures, run by administrators, sustained by political consensus, and respected by the courts’: King (n 2) 310. See also John Braithwaite, ‘Institutionalizing Distrust, Enculturating Trust’ in Mark E Warren (ed), *Trust and Democracy* (Cambridge University Press 1999); Roach and Budlender (n 37). At the same time, some writers on trust are very pessimistic in this regard. John Dunn, for example, has said, ‘Politics is not on the whole good for the character; and it is unlikely that there really are sound reasons for viewing the intentions of most of those who have devoted decades to it with unreserved trust’: Dunn (n 36) 89-90.

of procedures says a lot about whether the party's [ie the trustee's] "heart is in the right place." Fair procedures signify that the party "means well," that is, the party appears to want to live up to its commitments'.<sup>42</sup> Thus, by implementing and following a set of fair procedures, the actors who staff the elected branches convey their good intentions toward citizens. Now, fair procedures is one of the broad ideas to which I referred earlier. And it is well beyond the scope of this chapter or this thesis to offer an exhaustive definition of "fair procedures" in social rights matters. Scholars across various disciplines have long debated the parameters of procedural fairness. That said, I do, however, wish to provide at least some elaboration of the notion here.

In particular, I would like to make two points of elaboration: one is relatively simple and the other is much more involved. First, because I have defined trust in the citizen-government relationship as a set of expectations *held by citizens* (and the expectation of good will is an expectation held by citizens), it seems amply reasonable that the "fairness" of said procedures would also be judged from the perspective of citizens. In other words, fairness is defined by what *citizens* would reasonably be expected to consider fair. Second, scholars, in debating the parameters of procedural fairness, have identified a lengthy list of elements which they say (often supported by empirical studies) contribute to people's assessments of procedural fairness.<sup>43</sup> Undoubtedly, these elements carry different weight depending on context.<sup>44</sup> Therefore, while it is beyond this thesis's scope to exhaustively define fair procedures in the social rights context (and thus, to consider every element of procedural fairness therein), in what follows I do wish to outline three such elements which I regard as carrying particular weight in this specific context.

The first such element is *transparency*: for citizens to perceive the process by which the elected branches exercise their control over social goods and services as fair, it must be transparent.<sup>45</sup> A transparent process enables citizens to see how the elected branches are exercising their control over social goods and services and to know whether, in that process, the actors who staff those branches are indeed exercising good will (not to mention acting in accordance with the other two constituent expectations of trust). Linking transparency directly to citizen trust, Karen Cook, Russell Hardin and Margaret Levi have noted that because '[p]ower is

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<sup>42</sup> Joel Brockner and Phyllis Siegel, 'Understanding the Interaction Between Procedural and Distributive Justice: The Role of Trust' in Roderick M Kramer and Tom R Tyler (eds), *Trust in Organizations: Frontiers of Theory and Research* (Sage Publications 1996), 407.

<sup>43</sup> Tom R Tyler, 'Social Justice: Outcome and Procedure' (2000) 35 *International Journal of Psychology* 117, 121.

<sup>44</sup> Gerald S Leventhal, 'What Should be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships' in Kenneth J Gergen, Martin S Greenberg and Richard H Willis, *Social Exchange: Advances in Theory and Research* (Plenus Press 1980), 39.

<sup>45</sup> Margaret Levi, Audrey Sacks and Tom Tyler, 'Conceptualizing Legitimacy, Measuring Legitimizing Beliefs' (2009) 53 *American Behavioral Scientist* 354, 360; Tom R Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' (2011) *Journal of Dispute Resolution* 1, 5. Tyler includes transparency under the overarching procedural fairness element of "neutrality".

often correlated with lack of transparency and secrecy', those in political power are more likely to be perceived as trustworthy if they employ 'a decisionmaking process that is transparent enough to those dependent on them to reveal that their actions are in the best interest of those over whom they have power'.<sup>46</sup> In the social rights context, such transparency is especially important because, as it has often been said, the 'welfare state presents itself to the public as an extraordinar[ily] complex, diversified and unintelligible institutional arrangement'.<sup>47</sup> A transparent process signals to citizens that the elected branches have nothing to hide in this complex arrangement. In essence, transparency offers citizens good reason to expect good will to be exercised by the elected branches (as well as, once again, the other two expectations of trust). This is because if the elected branches fail to meet citizens' expectations in this regard, their failure will be on display for everyone to see.<sup>48</sup> Moreover, and relatedly, if a citizen wishes to challenge a governmental decision in this regard, a transparent process equips that citizen with the information she needs to do so and, in turn, to hold the elected branches accountable.<sup>49</sup>

The second element of procedural fairness which is of considerable importance in the social rights context is *participation*: for citizens to judge the elected branches' process for exercising their control over social goods and services as fair, it must be participatory.<sup>50</sup> To use the concise words of Margaret Levi: 'If a group perceives that its voice is systematically ignored, it will not accept the policy-making process as fair'.<sup>51</sup> The relevance of participation to procedural fairness is owed, in large part, to the fact that participation renders the process more representative. Gerald Leventhal, in his influential work on procedural fairness in allocative procedures (which most processes of concern in social rights matters indeed are), has identified

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<sup>46</sup> Karen S Cook, Russell Hardin and Margaret Levi, *Cooperation Without Trust?* (Russell Sage Foundation 2005), 56-57. See also Offe (n 35) 54.

<sup>47</sup> Karl Hinrichs, 'Social Insurances and the Culture of Solidarity: The Moral Infrastructure of Interpersonal Redistributions – with Special Reference to the German Health Care System' (Centre for Social Policy Research, University of Bremen, 1997), cited in Eva-Maria Trüdinger and Uwe Bollow, 'Evaluations of Welfare State Reforms in Germany: Political Trust Makes a (Big) Difference' in Sonja Zmerli and Marc Hooghe (eds), *Political Trust: Why Context Matters* (ECPR Press 2011), 191. See also O'Connide (n 11) 404-05.

<sup>48</sup> In fact, Pierre Rosanvallon has suggested that transparency has 'replace[d] the exercise of responsibility as the end of politics. Instead of seeking to achieve political *objectives*, people seek certain physical and moral *qualities*. Disillusioned citizens want to eliminate anything that stands in the way of total transparency': Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (Cambridge University Press 2008), 258-59.

<sup>49</sup> Speaking to this point, Mark Warren has said: 'Trust thrives when institutions are structured so as to respond to communication'; for him, such a structure requires that there be available to citizens the 'institutional means for challenging authorities, institutions, and trusted individuals' and that citizens have 'access to information' (the latter of which demands that institutions be 'structured so as to provide the necessary transparency'): Warren (n 21) 338.

<sup>50</sup> Participation's significance to perceptions of fairness and, in turn, to trust is well-established in the procedural fairness literature: Leventhal (n 44); Margaret Levi, *Consent, Dissent and Patriotism* (Cambridge University Press 1997). But as with transparency, it has also been argued that increased participation undermines trust: John R Hibbing and Elizabeth Theiss-Morse, 'The Means is the End' in John R Hibbing and Elizabeth Theiss-Morse (eds), *What is it About Government that Americans Dislike?* (Cambridge University Press 2001), 246-47.

<sup>51</sup> Levi, *Consent, Dissent and Patriotism* (n 50) 23-24.

“representativeness” as a key criterion which such procedures must satisfy to be perceived as fair.<sup>52</sup> As Leventhal has explained, for a perceiver to judge an allocative process as fair, ‘all phases of the allocative process must reflect the basic concerns, values, and outlook of important subgroups in the population of individuals affected by the allocative process’.<sup>53</sup> This criterion of representativeness intertwines with the element of participation where the perceiver (the person determining the fairness of the procedure in question) is one of the individuals who are affected by the allocative process: in Leventhal’s words, his participation in that process makes it ‘fairer because it gives greater representation to a very important individual, namely, himself’.<sup>54</sup> In the social rights context, participation is especially important since, for the reasons I outlined earlier, it is highly questionable whether low-income citizens and their interests are truly represented via the political/democratic processes. Their participation makes such representation more likely.

The significance of participation to perceptions of procedural fairness is well-supported by empirical studies. For example, based on an extensive body of studies conducted by him as well as others, Tom Tyler has concluded that people feel more fairly treated if they are given opportunities ‘to participate in the resolution of their problems or conflicts by presenting their suggestions about what should be done’.<sup>55</sup> He has referred to such opportunities for participation as “process control or voice”. However, and of particular note, Tyler has found that such participation in the process need not amount to control over its outcome. Although people’s assessments of fairness are indeed enhanced when what they say shapes the outcome of a dispute, such control over outcome is not essential for a process to be judged as fair. People value the simple opportunity to share their views with decision-makers even if those views have little to no influence on the ultimate decisions made.<sup>56</sup> In fact, when it comes to political disputes, Tyler has found that not only do people not need control over outcomes, they do not want it: people expect political authorities to make those decisions for them.<sup>57</sup> But with that said, people *do* need to feel that their views were sincerely considered by decision-makers in making their decisions – ie that their “voice” was indeed heard by the relevant decision-makers.<sup>58</sup> To quote Tyler, for participation to lead to ‘the evaluation of procedures as fairer’, people ‘must trust that the authority sincerely considered their argument, even if they were then rejected’.<sup>59</sup>

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<sup>52</sup> Leventhal (n 44).

<sup>53</sup> *ibid* 43-44.

<sup>54</sup> *ibid* 44.

<sup>55</sup> Tyler (n 43) 121.

<sup>56</sup> *ibid* 121-22.

<sup>57</sup> *ibid* 121-22.

<sup>58</sup> *ibid* 122.

<sup>59</sup> *ibid* 122.

Accordingly, based on the foregoing research, I suggest that for citizens to perceive the process by which the elected branches exercise their control over social goods and services as fair, citizens must be able to participate in that process. If a governmental decision has particular impact on a specific group of citizens, procedural fairness requires that said group be able to express its views to the relevant government authority and that the latter, in turn, sincerely consider those views in the process of making its decision. The government authority need not allow those views to dictate its ultimate decision; however, it must sincerely consider them.

The final element of procedural fairness which I will point to as especially important in the social rights context is *respect for citizens' rights*: for citizens to perceive the process by which the elected branches exercise their control over social goods and services as fair, their rights must be respected in that process.<sup>60</sup> For Tyler, this element falls under a larger fairness element which he has called 'treatment with dignity and respect'.<sup>61</sup> Tyler has found that people judge a procedure as fairer when they are treated with dignity and respect in that procedure – and such treatment includes both 'common respect and courtesy' as well as 'respect for peoples' rights'.<sup>62</sup> In Tyler's words, 'People value having respect shown for their rights and for their status within society. They are very concerned that, in the process of dealing with authorities, their dignity as people and as members of society is recogni[s]ed and acknowledged'.<sup>63</sup>

Now, as Tyler has pointed out in his work, respect for citizens' rights encompasses both human rights as well as legal process rights (eg standing to bring a legal case).<sup>64</sup> And therefore, procedural fairness requires that the elected branches respect all of these rights in exercising their control over social goods and services. That said, I would like to stress one particular right here: citizens' (human) right to equality.<sup>65</sup> Why? As many scholars have emphasised, the right to equality is closely related to social rights.<sup>66</sup> And following from this relationship, we should – in

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<sup>60</sup> Levi, Sacks and Tyler (n 45) 460; Tyler (n 43) 122.

<sup>61</sup> Tyler (n 43) 122.

<sup>62</sup> Tyler (n 45) 6.

<sup>63</sup> Tyler (n 43) 122.

<sup>64</sup> Tyler (n 45) 6.

<sup>65</sup> I am assuming that the right to equality is, like social rights, constitutionally protected.

<sup>66</sup> Gwen Brodsky and Shelagh Day, 'Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty' (2002) 14 *Canadian Journal of Women and the Law* 184; Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 *South African Journal on Human Rights* 214; Fredman (n 25); Sandra Liebenberg, 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *South African Journal on Human Rights* 1; Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta Law 2010); Sandra Liebenberg and Beth Goldblatt, 'The Interrelationship Between Equality and Socio-Economic Rights Under South Africa's Transformative Constitution' (2007) 23 *South African Journal on Human Rights* 335; Murray Wesson, 'Equality and Social Rights: An Exploration in Light of the South African Constitution' [2007] *Public Law* 748; Murray Wesson, 'Discrimination Law and Social Rights: InterSections and Possibilities' (2007) 13 *Juridica International* 74; David Wiseman, 'The Past and Future of Constitutional Law and Social Justice: Majestic or Substantive Equality?' (2015) 71 *The Supreme Court Law Review* 563. However, these scholars have adopted different perspectives on the precise nature of the relationship between these sets of rights.

addressing the appropriate approach to enforcing social rights – also consider equality. Accordingly, this brings me to a question: if procedural fairness in the social rights context requires that the elected branches respect citizens’ rights – including, importantly, their right to equality – what does it mean for the elected branches to respect citizens’ right to equality?

Under a formal approach to equality, it means that the elected branches will, in exercising their control over social goods and services, treat all citizens alike. However, the equality literature makes very clear that the formal approach to equality suffers from several problems, including, of particular note, its failure to address deeply entrenched patterns of social disadvantage and its perverse capability of disallowing governmental measures aimed at actually promoting equality.<sup>67</sup> For that reason, I submit that respect for citizens’ right to equality cannot reasonably connote the protection of formal equality. Rather, in line with what is the overwhelmingly dominant view in the equality literature (as well as the position adopted by some national courts), I submit that equality in this regard denotes substantive equality.<sup>68</sup> And hence, for the elected branches to respect citizens’ right to equality in their exercise of control over social goods and services, they must exercise said control in furtherance of substantive equality.

Unlike formal equality (which focuses on differential treatment in law, seeking to eliminate such differential treatment), substantive equality’s focus is on ‘patterns of group-based disadvantage’ which give rise to structural inequality.<sup>69</sup> It recognises that ‘equality cannot be achieved by adopting a merely negative or “hands-off” approach’; and hence, it acknowledges the need for positive governmental measures which address that group’s disadvantaged position.<sup>70</sup> In view of that, substantive equality is said to ‘transcend[] formal equality at the point where it demands differential legal treatment in order to ameliorate and overcome inequalities’.<sup>71</sup> While there is much agreement in the equality literature in favour of a substantive (rather than formal) approach to equality, there is disagreement as to the overarching objectives of such an approach: that is, they agree that equality demands positive governmental measures but disagree over what is to be equalised in introducing such positive measures.<sup>72</sup> Sandra Fredman, in her influential work in the area, has argued that substantive equality ‘resists capture by a single

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<sup>67</sup> Fredman, ‘Redistribution and Recognition’ (n 66) 216; Wesson, ‘Equality and Social Rights’ (n 66) 751.

<sup>68</sup> As examples of cases supporting a substantive equality approach, see *R v Kapp*, [2008] 2 SCR 483 (Canada); *National Coalition for Gay and Lesbian Equality v Minister of Justice*, [1998] ZACC 15 (South Africa).

<sup>69</sup> Liebenberg and Goldblatt (n 66) 342-43.

<sup>70</sup> Brodsky and Day (n 66) 206; Wiseman (n 66) 564.

<sup>71</sup> Wiseman (n 66) 564.

<sup>72</sup> Two of the best-known objectives in this regard are equality of opportunity and equality of results: see Sandra Fredman, ‘Providing Equality: Substantive Equality and the Positive Duty to Provide’ (2005) 21 *South African Journal on Human Rights* 163, 167.

principle'.<sup>73</sup> According to her, substantive equality is, rather, a multi-dimensional concept.<sup>74</sup> And drawing on the strengths of various principles in the substantive equality discourse, Fredman has identified four objectives for the concept: (i) to promote respect for the equal dignity and worth of all (including to redress stigma, stereotyping, humiliation and violence); (ii) to accommodate, affirm and celebrate identity within a community; (iii) to break the cycle of disadvantage which is associated with out-group membership; and (iv) to facilitate full participation in society. For Fredman, these objectives – or dimensions – interact and have synergies with one another; and so, we can, and should, consider how the dimensions might be used to buttress one another.

I agree with Fredman's conceptualisation. It recognises the complexity of inequality, locating the right to equality, as Fredman has noted, in its 'social context, responsive to those who are disadvantaged, demeaned, excluded, or ignored'.<sup>75</sup> So, adopting this multi-dimensional conceptualisation for the purpose of conceptualising trust in the citizen-government relationship, I contend that for the elected branches to exercise their control over social goods and services in furtherance of substantive equality, they must strive to implement measures which achieve the four above-outlined objectives.<sup>76</sup> And given the procedural fairness requirement that citizens' rights (including the right to equality) be respected, the elected branches must so strive for the process by which they exercise their control over such goods and services to be judged as fair.<sup>77</sup>

To sum up, I have suggested that in the citizen-government relationship, the first expectation of trust – that of good will – translates into two inter-related sub-expectations: one being that those who staff the elected branches will exhibit good intentions toward citizens, and the other being that the elected branches will employ fair procedures in exercising their control over social goods and services (including those which are transparent, participative and respectful of citizens' rights (including the right to equality)). Accordingly, to say that citizens "trust" the elected branches with respect to social rights means, at least in part, that they expect such intentions and procedures from the elected branches.

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<sup>73</sup> Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 *International Journal of Constitutional Law* 712, 713.

<sup>74</sup> Fredman, 'Redistribution and Recognition' (n 66) 225-27. See also Fredman (n 25) 179.

<sup>75</sup> Fredman (n 73) 713.

<sup>76</sup> I say "strive" because, as Sandra Liebenberg and Beth Goldblatt have recognised, substantive equality 'contains a forward looking vision of a society where people are provided with the resources and the opportunities to develop, participate and flourish as human beings': (n 66) 342-43.

<sup>77</sup> Adopting this conceptualisation of equality as part of my conceptualisation of trust in the citizen-government relationship raises issues for my proposed approach to social rights enforcement. I address those issues in Chapter 4 when I consider in greater detail the value and parameters of a trust-based approach to social rights enforcement.

(ii) *The Expectation of Fiduciary Responsibility*

In the citizen-government relationship, the expectation of fiduciary responsibility is closely connected with the expectation of good will. For this reason, I will consider it next. However, before I get into the substance of this expectation in the citizen-government relationship, I shall first elaborate upon *why* I think that this expectation applies to this particular relationship.

It will be recalled from Chapter 1 that the expectation of fiduciary responsibility only applies to relationships of a fiduciary nature. In my view, the citizen-government relationship may be accurately characterised as such. In making this claim, I rely in part upon an important body of work developed by public law scholars in the last 10 years which has emphasised the fiduciary foundations of public authority – a body described as “fiduciary political theory”.<sup>78</sup> Scholars in this camp have argued that various relationships in the political realm (including those between political representatives and the people, judges and the people, and administrative agencies and the people) are fairly characterised as fiduciary in nature. Here, I make a similar suggestion in the social rights context with respect to the citizen-government relationship.<sup>79</sup>

To support my suggestion, I will employ Evan Fox-Decent’s conceptualisation of a fiduciary relationship (developed to advance his claim that the state-subject relationship is fiduciary in nature).<sup>80</sup> For Fox-Decent, three conditions are necessary and sufficient for a fiduciary relationship to arise: (i) the fiduciary must have “administrative”, discretionary power over some set of the beneficiary’s interests; (ii) the beneficiary must be ‘incapable of controlling the fiduciary’s exercise of power’; and (iii) the beneficiary’s relevant interests must be ‘capable of forming the subject matter of a fiduciary obligation’.<sup>81</sup> I will now consider each condition.

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<sup>78</sup> As a representative sample, see Evan J Criddle, ‘Fiduciary Foundations of Administrative Law’ (2006) 54 UCLA Law Review 117; Evan Fox-Decent, ‘The Fiduciary Nature of State Legal Authority’ (2005) 31 Queen’s Law Journal 259; Evan Fox-Decent, *Sovereignty’s Promise: The State as Fiduciary* (Oxford University Press 2011); Ethan J Leib, David L Ponet and Michael Serota, ‘A Fiduciary Theory of Judging’ (2013) 101 California Law Review 699; D Theodore Rave, ‘Politicians as Fiduciaries’ (2013) 126 Harvard Law Review 671. The terminology of ‘fiduciary political theory’ was coined by Ethan J Leib, David L Ponet and Michael Serota, ‘Translating Fiduciary Principles into Public Law’ (2013) 126 Harvard Law Review Forum 91, 91.

<sup>79</sup> It is beyond the scope of this thesis, however, to argue this point fully (ie with reference to the legal framework in a particular jurisdiction (as the above scholars have done in their respective works)).

<sup>80</sup> There is a difference of opinion in the literature as to what characterises a fiduciary relationship. I employ Fox-Decent’s conceptualisation because there is significant overlap between his conceptualisation and those of others, it is rooted in case law and his work has been highly influential in the fiduciary political theory field.

<sup>81</sup> Fox-Decent, *Sovereignty’s Promise* (n 78) 93-94. These three conditions are consistent with what Leib, Ponet and Serota have identified as the three indicia of fiduciary relationships: discretion, vulnerability and trust: ‘A Fiduciary Theory of Judging’ (n 78) 706. For additional support for my suggestion, see the work of Laura Underkuffler who has used fiduciary political theory to ground positive social rights: Laura S Underkuffler, ‘Property, Sovereignty, and the Public Trust’ (2017) 18 Theoretical Inquiries in Law 329; Laura S Underkuffler, ‘Fiduciary Theory: The Missing Piece for Positive Rights’ in Evan Criddle et al (eds), *Fiduciary Government* (Cambridge University Press 2018) (forthcoming). In doing so, Underkuffler characterises the citizen-government relationship as fiduciary in nature (though she does so using a broader idea of that relationship than I do).

Fox-Decent's first condition has two sub-conditions: (a) the fiduciary must exercise discretionary power over a set of the beneficiary's interests; and (b) that power must be "administrative" in nature – ie it must be "institutional" (the exercise of power takes place in an institution which has its own substantive values and internal practices), "purpose-laden" (the power is exercised for some purpose) and "other-regarding" (that purpose involves a party other than the fiduciary).<sup>82</sup> Both sub-conditions are satisfied in the citizen-government relationship. As for (a), it will be recalled that the social goods and services at issue in social rights are things which citizens need; and as such, citizens have an interest in obtaining them. Also recall that the elected branches exercise control over those social goods and services through the legislative and administrative steps which I outlined earlier in this chapter (ie the preparation, development and promulgation of primary legislation, the preparation and approval of the budget, and subsequent administrative action). Because in each of those steps, the elected branches exercise significant discretion, it is fair to say that the elected branches exercise discretionary power over a set of citizens' interests (ie citizens' interests vis-à-vis those social goods and services).

With respect to (b), I submit that the elected branches' discretionary power in this regard is "administrative" in nature. Its institutional character is obvious. As for its being purpose-laden and other-regarding, it satisfies these elements for two reasons. The first is the overarching fact of sovereignty (which Fox-Decent has used to argue that the state's power over its subjects is purpose-laden and other-regarding).<sup>83</sup> According to Fox-Decent, because the state assumes sovereign powers (which it exercises through its institutions), subjects have no choice but to 'entrust the specification, administration, adjudication, and vindication of their rights to the state'.<sup>84</sup> And for that reason, Fox-Decent has argued, the state exercises its powers for the purpose of benefiting its subjects. Included in those rights are social rights whose administration and specification citizens have no choice but to entrust to the state (and by extension, the elected branches which exercise its powers). Consequently, I think that Fox-Decent's argument may be fairly extended to the citizen-government relationship. Second, as will be recalled from earlier in this chapter, there is a good argument that citizens, via their payment of taxes, specifically entrust social goods and services to the state (and again by extension, to the elected branches). Both of the above points – the fact of sovereignty and citizens' specific entrustment of social goods and services to the elected branches via their payment of taxes – support the same conclusion: that the elected branches' discretionary power over citizens' interests vis-à-vis the relevant social

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<sup>82</sup> Fox-Decent, *Sovereignty's Promise* (n 78) 101.

<sup>83</sup> *ibid* 29. Owing to this overarching fact of sovereignty, Fox-Decent has recognised that 'with respect to the legislative, executive and judicial powers entailed by sovereignty, they each in their own familiar ways are institutional, purpose-laden, and other-regarding' (112).

<sup>84</sup> *ibid* 111.

goods and services is exercised for the purpose of benefiting citizens. And owing to that conclusion, their power may be fairly characterised as both purpose-laden and other-regarding.

The second condition of a fiduciary relationship is that the beneficiary is incapable of controlling the fiduciary's exercise of power – and following from that fact, the beneficiary is vulnerable to abuses of the fiduciary's power.<sup>85</sup> This condition is also satisfied in the citizen-government relationship. As Fox-Decent has argued for the state-subject relationship, '[p]rivate parties have no authority to ... exercise the powers necessary to determine' their rights: 'they do not get to make laws that apply to others' and so, 'are juridically incapable of exercising public authority'.<sup>86</sup> This argument applies no less to the citizen-government relationship. Aside from their limited voting power, citizens are incapable of controlling the elected branches' power over their interests vis-à-vis social goods and services. They do not dictate the content of social welfare legislation, they do not decide what is and is not included in the budget, and they do not control the administrative action through which the legislation is implemented. As a result, citizens are vulnerable to abuses of the elected branches' power.

Finally, the beneficiary's interests must be 'capable of forming the subject matter of a fiduciary obligation'.<sup>87</sup> The fiduciary relationship has trust at its core. As Fox-Decent has explained, the fiduciary concept was 'born of a rich and complex legal history animated by a concern to protect the integrity of relations of trust'.<sup>88</sup> But for Fox-Decent, in contrast to how the social science literature has conceptualised it, trust is a presumptive concept: that is, the fiduciary exercises his power 'on the basis of the beneficiary's trust' regardless of whether the beneficiary does anything to repose trust in him.<sup>89</sup> Thus, Fox-Decent has argued that in the state-subject relationship, trust is both the basis for the state's authority over its subjects and its duty to them. As he has summarised, the law, via the fiduciary principle, 'entrusts the state to establish legal order on behalf of the people'; and the state, in turn, 'exercises power on the basis of the people's trust ... precisely because the fiduciary principle has entrusted the state with public powers on their behalf'.<sup>90</sup> The same reasoning may be applied to the citizen-government relationship. Regardless of citizens' actual trust in the elected branches with respect to social rights, the fiduciary principle entrusts them with the above power on citizens' behalf; and the elected branches exercise their power on the basis of citizens' trust. The citizen-government relationship accordingly satisfies the fiduciary relationship's third and final condition.

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<sup>85</sup> *ibid* 101.

<sup>86</sup> *ibid* 111.

<sup>87</sup> *ibid* 93-94.

<sup>88</sup> *ibid* 30.

<sup>89</sup> *ibid* 105.

<sup>90</sup> *ibid* 106.

Now, in characterising the citizen-government relationship as a fiduciary relationship, I recognise that fiduciary political theory has its critics.<sup>91</sup> That said, for the reasons which scholars in this camp have put forward, I think that fiduciary political theory holds significant promise; and following thereon, I suggest that it can be applied to the citizen-government relationship.<sup>92</sup>

My suggestion that the citizen-government relationship is a fiduciary relationship also finds support in the work of Bernard Barber (from which, in large part, I derived the expectation of fiduciary responsibility in the first place).<sup>93</sup> As will be recalled from Chapter 1, Barber roots the expectation of fiduciary responsibility in the fact that in certain relationships, the trustee possesses special knowledge and skills which make his technically competent performance difficult to monitor by the truster. For him, ‘Trust of this kind [fiduciary responsibility] ... is a social mechanism that makes possible the effective and just use of power that knowledge and position give and forestalls abuses of that power.’<sup>94</sup> The citizen-government relationship seems to satisfy Barber’s description. In exercising their control over social goods and services, the elected branches possess (or at least are expected to possess) special knowledge and skills which would make it difficult for citizens, as trusters, to monitor their technical competence. I will elaborate upon such competence in the next section. Further, Barber specifically recognises the application of this expectation to the relationship between ‘The Public and Its Leaders’.<sup>95</sup> Therefore, there is good reason to believe that Barber himself would have concluded that the expectation of fiduciary responsibility applies to the citizen-government relationship.

If we accept that the expectation of fiduciary responsibility indeed does apply to the citizen-government relationship (as I have just sought to make out), this raises my next question: what precisely does the expectation involve? I noted earlier that this expectation is closely related to that of good will. Both involve, broadly speaking, an expectation that the elected branches will act in citizens’ interests; however, the fiduciary responsibility expectation takes it a step further. At its core, it is an expectation that the elected branches, in exercising their discretion over social goods and services, will not allow their staff’s interests to impact their decisions (thereby unfairly discounting or disregarding citizens’ or a subset of citizens’ interests). Fiduciary relationships (a category in which we are now including the citizen-government relationship) are said to give rise

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<sup>91</sup> For example, see Seth Davis, ‘The False Promise of Fiduciary Government’ (2014) 89 *Notre Dame Law Review* 1145; Timothy Endicott, ‘Equity and Administrative Behaviour: A Commentary’ in PG Turner (ed), *Equity and Administration* (Cambridge University Press 2016); Ethan J Leib and Stephen R Galoob, ‘Fiduciary Political Theory: A Critique’ (2016) 125 *The Yale Law Journal* 1820.

<sup>92</sup> For a response to the above critiques, see Evan Fox-Decent, ‘Challenges to Public Fiduciary Theory: An Assessment’ in D Gordon Smith and Andrew S Gold (eds), *Research Handbook on Fiduciary Law* (Edward Elgar 2018).

<sup>93</sup> Bernard Barber, *The Logic and Limits of Trust* (Rutgers University Press 1983).

<sup>94</sup> *ibid* 15-16.

<sup>95</sup> *ibid* 80-81. Barber devotes an entire chapter of his book to such relationships.

to a number of duties or obligations on the part of the fiduciary: these may include loyalty, care, and in the public law context, fairness and reasonableness.<sup>96</sup> The expectation of fiduciary responsibility is an expectation that these duties will be fulfilled. Again, it is beyond the scope of this thesis to offer an exhaustive analysis of each of these duties and to define precisely what they entail. However, as Fox-Decent has convincingly explained, ‘the most fundamental and general fiduciary duty’ (by which many of these duties are encompassed) is what he has described as ‘fidelity to the other-regarding purposes for which fiduciary power is held’.<sup>97</sup> As I elucidated earlier, on the basis of the beneficiary’s trust in him, the fiduciary is granted the power to act on the beneficiary’s behalf: ie to pursue her interests. The fiduciary’s duty (or “responsibility”, if you will, as per the language of the expectation herein) is to exercise said power exclusively for that purpose: he must pursue only the beneficiary’s interests.

In applying this duty to the citizen-government relationship, there are two issues which a reader may reasonably raise. The first relates to the identity of the beneficiary. In a political relationship, like the citizen-government relationship, the fiduciary has multiple beneficiaries (ie all citizens) whose interests are bound to conflict with one another (at least in some cases).<sup>98</sup> Thus, the fiduciary does not have one beneficiary whose singular set of interests he may pursue; accordingly, in fulfilling his duty, he is obliged to pursue multiple, competing interests which he must necessarily balance. That said, the core fiduciary duty – fidelity to the other-regarding purposes of the fiduciary’s power – demands that while the fiduciary pursues these multiple, competing interests, he does not allow *his own interests* to interfere therewith.<sup>99</sup> This brings me to the second issue: do the elected branches, as fiduciaries of citizens, have “interests”? Not per se; but those actors who staff the elected branches do, which may conflict with citizens’ (or a subset of citizens’) interests and which may be furthered at their expense. These actors’ core fiduciary duty, as staff of the elected branches, is to ensure that the latter does not happen. As Fox-Decent and Evan Criddle have well-described, the fiduciary principle ‘requires the state and its institutions to act for the good of the people rather than for the good of its officials or rulers’.<sup>100</sup>

For these reasons, I suggest that in the citizen-government relationship, the expectation of fiduciary responsibility both rightfully applies and that it amounts to an expectation that the elected branches, in exercising their control over social goods and services, will fulfil the duties

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<sup>96</sup> Fox-Decent, *Sovereignty’s Promise* (n 78) 34-37.

<sup>97</sup> *ibid* 37. See also Fox-Decent, ‘The Fiduciary Nature’ (n 78) 268. This also accords with Barber’s definition of the responsibility as a duty ‘to demonstrate a special concern for others’ interests above their own’: Barber (n 93) 14.

<sup>98</sup> Fox-Decent, *Sovereignty’s Promise* (n 78) 34.

<sup>99</sup> Fox-Decent, ‘The Fiduciary Nature’ (n 78) 280.

<sup>100</sup> Evan Fox-Decent and Evan J Criddle, ‘The Fiduciary Constitution of Human Rights’ (2009) 15 *Legal Theory* 301, 318.

of a fiduciary. At its core, it is an expectation that the elected branches will exercise said control exclusively for, to use Fox-Decent's words, 'other-regarding purposes' – that is to say, the elected branches, in exercising their control, will pursue only the interests of citizens and not the interests of their staff. Therefore, to say that citizens "trust" the elected branches with respect to social rights further means, again in part, that the elected branches will act in this manner.

*(iii) The Expectation of Competence*

Last but certainly not least, trust in the citizen-government relationship entails an expectation of competence. In fact, according to John Dunn, in political relationships, like the citizen-government relationship, the expectation of competence is probably the most important. Dunn has argued that 'modern political theory ... gives inadequate weight to the human importance of practical skill in politics' and has claimed that while both 'trust in the good intentions' of political actors and 'trust in their practical capacities' are vital to modern democracies, if we must choose between them 'it is wiser in most circumstances ... to opt for trust in practical capacity'.<sup>101</sup>

In the citizen-government relationship, the expectation of competence may be described, broadly speaking, as an expectation that the elected branches have the requisite competence to exercise their control over social goods and services and so, in turn, that they will exercise said control in a competent manner. But what does that mean? What defines "competence" from the elected branches? How do they exercise their discretion over social goods and services in a "competent" manner? I suggest that in the citizen-government relationship, competence engages yet another broad idea in which legal scholars and political scientists have long been interested: *evidence-based policy-making* (EBPM). In brief, it is my suggestion that the expectation of competence in this relationship translates into an expectation that the elected branches will exercise their control over social goods and services in accordance with the principles of EBPM.

EBPM is a model aimed at the development and implementation of the most effective public policies and programmes. It may be said to revolve around three forms of knowledge.<sup>102</sup> The first, and perhaps the most commonly associated with EBPM, is knowledge derived from scientific research. Under EBPM, policy-makers use the best available research from the natural and social sciences to better understand and improve public policies and programmes. However, as many scholars have emphasised, under EBPM, scientific research is not, or at least should not be, determinative: in JA Muir Gray's telling words, with EBPM, 'decisions are *based* on evidence

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<sup>101</sup> Dunn (n 36) 89-90.

<sup>102</sup> Brian W Head, 'Three Lenses of Evidence-Based Policy' (2008) 67 *The Australian Journal of Public Administration* 1.

and not *made by* evidence'.<sup>103</sup> Thus, EBPM necessitates a synthesis of knowledge from scientific research with other forms of knowledge.<sup>104</sup> Brian Head has usefully categorised these other forms of knowledge into what he has called “political knowledge”, on one hand, and “practical implementation knowledge”, on the other. “Political knowledge” – a form of knowledge which comes into play during the *development* stage for public policies and programmes – refers to the ‘know-how, analysis and judgment of political actors’.<sup>105</sup> It is a vast and varied form of knowledge indeed, including everything from persuasion/advocacy skills and the ability to build coalitions of support, to the capacity to negotiate trade-offs and compromises. “Practical implementation knowledge” – which comes into play during the policy and programme *implementation* stage – is knowledge relating to the management of social programmes. It encapsulates what one needs to know in order to ‘wrestle with everyday problems of program[me] implementation and client service’.<sup>106</sup> Stemming from ‘the “practical wisdom” of professionals in their “communities of practice”’, this form of knowledge assumes the form of government adopting a “best practice”.<sup>107</sup>

I suggest that these three forms of knowledge which define EBPM are what citizens would reasonably expect from “competent” government in its exercise of control over social goods and services. With respect to political actors (ie members of the legislature, Cabinet members), it seems reasonable that what Head has called “political knowledge” would be expected of such actors in carrying out their responsibilities vis-à-vis social goods and services (ie preparing, developing and promulgating primary legislation, as well as preparing and approving the budget) to be deemed competent. And by the same token, “practical implementation knowledge” would be expected of competent administrative decision-makers in carrying out their responsibilities in implementing social programmes. If not these two forms of knowledge, I cannot imagine what would amount to competence from the elected branches of government.

Moreover, it also seems reasonable that a competent government would be expected to possess the kind of knowledge from scientific research which EBPM demands. In exercising their control over social goods and services, the elected branches make decisions – including which social goods and services to fund/deliver, how much money to invest in a social programme, and who will/will not be covered by that programme – in order to serve certain policy ends. Scientific research, by offering insights into which policy initiatives are the most

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<sup>103</sup> JA Muir Gray, ‘Evidence Based Policy Making’ (2004) 329 *British Medical Journal* 988, 988 (emphasis added).

<sup>104</sup> Ittai Bar-Siman-Tov, ‘The Dual Meaning of Evidence-Based Judicial Review of Legislation’ (2016) 4 *The Theory and Practice of Legislation* 107, 110.

<sup>105</sup> Head (n 102) 5.

<sup>106</sup> *ibid* 7.

<sup>107</sup> *ibid* 7.

effective to achieve those ends, is thus of critical value. Accordingly, I do not think it too outlandish to suggest that competent decisions in this regard would be made on the basis of the best research which is available. Further, this suggestion follows from my discussion of competence from Chapter 1. As I explained there, a trustee's competence may come from a number of sources, including expert knowledge.<sup>108</sup> Now, granted, the elected branches' staff cannot be experts in all fields and sub-fields of social welfare. But surely it is reasonable that where a trustee, like the elected branches, does not possess the requisite knowledge and skills himself (as the elected branches may not), competence would demand that he make good faith efforts to seek out those who do. In such cases, the source of the trustee's competence is, rather than *his own* knowledge and skills, those of another actor (and the research that actor produces); and so, whether the trustee satisfies the competence criterion will depend on the competence of the actor upon whom he relies. Thus, to be truly competent, the trustee must make good faith efforts to seek out the most competent actor and so, the best available evidence from research.

Hence, the last expectation which comprises trust in the citizen-government relationship – the expectation of competence – is an expectation that the elected branches will exercise their control over social goods and services in a competent manner. I suggest that this expectation translates into an expectation that the elected branches will exercise said control in accordance with the principles of EBPM: that is, they (or more accurately their staff) will exhibit what Head has called “political knowledge” and “practical implementation knowledge” and they will base their decisions on the best available evidence from scientific research. And so, the final part to saying that citizens “trust” the elected branches with respect to social rights is that they expect the elected branches to use EBPM in exercising their control over social goods and services.

## Chapter Summary

From this chapter, we arrive at the conclusion that the citizen-government relationship may be accurately characterised as a trust relationship. It satisfies all three elements thereof (control, discretion/uncertainty and vulnerability) and thus, it is a relationship in which trust may arise. Trust in that relationship may be defined as a set of positive expectations held by citizens regarding the manner in which the elected branches will exercise the control they have over social goods and services which citizens need. Those expectations, I suggest, are that the elected branches will exercise good will toward citizens (their staff will exhibit good intentions and will follow fair procedures), will fulfil their fiduciary responsibility to citizens (they will pursue only the interests of citizens and not those of their staff) and have the requisite competence (they will

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<sup>108</sup> Barber (n 93) 9.

exercise their control in accordance with EBPM principles). In the next chapter, I outline yet another consequence of characterising the citizen-government relationship as a trust relationship: it is subject to what I call “the network conception of trust”. And as we will see in Chapter 4, this consequence is pivotal to political trust offering a tool for social rights enforcement.

## CHAPTER 3

### The Network Conception of Trust

Owing to the citizen-government relationship's characterisation in Chapter 2 as a trust relationship (ie as a relationship in which the three elements of control, discretion/uncertainty and vulnerability are present), we know that it is possible for trust to arise therein. In this chapter, I suggest that a further – and in my view, quite significant – consequence follows from that characterisation. It renders the citizen-government relationship subject to a notion from the social science scholarship on trust which I will call the “network conception of trust”. In brief, the network conception of trust posits that in contemporary societies, a trust relationship (like the citizen-government relationship) is embedded in a rich social context – or as part of a complex network of social relationships – upon which trust in that trust relationship also depends. Applying this network conception of trust to the social rights context, I suggest in this chapter that in contemporary social democracies, the citizen-government relationship is embedded in a complex network of trust relationships which exist between citizens, the elected branches, and other state and non-state actors (including, importantly, the courts), and that trust in the citizen-government relationship depends on the relationships in that network (including the relationship between citizens and the courts which arises out of social rights adjudication).

#### The “Network Conception of Trust”

What I am calling the “network conception of trust” does not belong to a single author or to a single discipline.<sup>1</sup> Rather, it is a broad idea which has been expressed by numerous writers on trust across a range of social science disciplines, including (but not limited to) sociology,<sup>2</sup> economics,<sup>3</sup> philosophy,<sup>4</sup> political theory,<sup>5</sup> and management.<sup>6</sup> Based on my reading, these writers'

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<sup>1</sup> The expression “network conception of trust” is drawn from a piece written by Karen S Cook and Russell Hardin, ‘Norms of Cooperativeness and Networks of Trust’ in Michael Hechter and Karl-Dieter Opp (eds), *Social Norms* (Russell Sage Foundation 2001).

<sup>2</sup> James Coleman, *Foundations of Social Theory* (Harvard University Press 1994); Karen S Cook and Alexandra Gerbasi, ‘Trust’ in Peter Hedstrom and Peter S Bearman (eds), *The Oxford Handbook of Analytical Sociology* (OUP 2009); *ibid*; Mark S Granovetter, ‘The Strength of Weak Ties’ (1973) 78 *American Journal of Sociology* 1360; Jocelyn Pixley, ‘Impersonal Trust in Global Mediating Organizations’ (1999) 42 *Sociological Perspectives* 647; Susan P Shapiro, ‘The Social Control of Impersonal Trust’ (1987) 93 *American Journal of Sociology* 623; Susan Shapiro, ‘The Grammar of Trust’ in Jocelyn Pixley (ed), *New Perspectives on Emotions in Finance: The Sociology of Confidence, Fear and Betrayal* (Routledge 2012); Lynne Zucker, ‘Production of Trust: Institutional Sources of Economic Structure, 1840 to 1920’ (1986) 8 *Research in Organizational Behavior* 53.

<sup>3</sup> Partha Dasgupta, ‘Trust as a Commodity’ in Diego Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (Basil Blackwell 1988); Mark Granovetter, ‘Economic Action and Social Structure: The Problem of Embeddedness’ (1985) 91 *American Journal of Sociology* 481.

<sup>4</sup> Annette C Baier, *Moral Prejudices: Essays on Ethics* (Harvard University Press 1995).

arguments (though obviously dissimilar in some respects) do ultimately share two fundamental features which I will use to define this network conception of trust. First, these scholars agree that in contemporary societies, relationships in which trust may arise are embedded in a rich social context. That social context is comprised of complex structures or “networks” of social relationships.<sup>7</sup> Second, they agree that trust in such a relationship ultimately depends on the other relationships which constitute the network in which the former relationship is embedded.

We can see this network conception of trust most clearly in the work of Karen Cook and Russell Hardin.<sup>8</sup> Cook and Hardin have sought to build on, and apply to the concept of trust, the scholarship of sociologist Richard Emerson on the concept of power.<sup>9</sup> For Emerson, a key flaw in the sociological power research up to the point in time in which he was working (ie the 1960s) was ‘the implicit treatment of power as though it were an attribute of a person or a group (“X is an influential person,” “Y is a powerful group,” etc.)’.<sup>10</sup> Breaking with this orthodoxy in the power literature, he argued that power is better seen as ‘a property of the social relation’, thereby shifting the focus of analysis on power from the individual to the relationship.<sup>11</sup> Following on from his relational understanding of power, Emerson, in his subsequent work (alone as well as collaboratively with colleagues who include Cook), theorised that so-called power-dependence relationships (or what they more broadly called “exchange relations”) “connect” with one another to form an “exchange network”.<sup>12</sup> By “connect”, Emerson and Cook meant that two exchange relations were contingent on one another or interdependent. They explained, ‘Two exchange relations between actors A-B and actors A-C are connected to form the minimal network B-A-C to the degree *that exchange in one relation is contingent on exchange (or nonexchange) in the*

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<sup>5</sup> Karen S Cook, Russell Hardin and Margaret Levi, *Cooperation without Trust?* (Russell Sage Foundation 2005); Roger Cotterrell, ‘Trusting in Law: Legal and Moral Concepts of Trust’ (1993) 46 *Current Legal Problems* 75; Henry Farrell, ‘Institutions and Midlevel Explanations of Trust’ in Karen S Cook, Margaret Levi and Russell Hardin (eds), *Whom Can We Trust? How Groups, Networks, and Institutions Make Trust Possible* (Russell Sage Foundation 2009); Margaret Levi, ‘A State of Trust’ in Valerie Braithwaite and Margaret Levi (eds), *Trust and Governance* (Russell Sage Foundation 1998); Charles Tilly, *Democracy* (Cambridge University Press 2007).

<sup>6</sup> Jörg Sydow, ‘Understanding the Constitution of Interorganizational Trust’ in Christel Lane and Reinhard Bachmann (eds), *Trust Within and Between Organizations: Conceptual Issues and Empirical Applications* (OUP 1998).

<sup>7</sup> Some writers, rather than using the term “network” as I have, have opted for alternative terms, including “system” or “mosaic”: see Coleman (n 2) for the former and Dasgupta (n 3) for the latter. However, the vast majority of writers have adopted the “network” terminology and accordingly, I have done so as well.

<sup>8</sup> Cook and Hardin (n 1). See also Cook, Hardin and Levi (n 5).

<sup>9</sup> Richard M Emerson, ‘Power-Dependence Relations’ (1962) 27 *American Sociological Review* 31; Richard M Emerson, ‘Power-Dependence Relations: Two Experiments’ (1964) 27 *Sociometry* 282; Karen S Cook and Richard M Emerson, ‘Power, Equity and Commitment in Exchange Networks’ (1978) 43 *American Sociological Review* 721; Karen S Cook et al, ‘The Distribution of Power in Exchange Networks: Theory and Experimental Results’ (1983) 89 *American Journal of Sociology* 275.

<sup>10</sup> Emerson, ‘Power-Dependence Relations’ (n 9) 31.

<sup>11</sup> *ibid* 32.

<sup>12</sup> For a summary, see Karen S Cook et al, ‘Social Exchange Theory’ in John DeLamater and Amanda Ward (eds), *Handbook of Social Psychology* (Springer 2013), 64.

*other relation*'.<sup>13</sup> Cook and Hardin have proposed that Emerson's work on power provides an appropriate model for a theory of trust. As they have explained it, Emerson's work 'does for the concept, power, what can be done for the concept, trust. It shifts the framework surrounding the study of power from that of an attribute of an individual ... to that of a property of a social relation'.<sup>14</sup> Following Emerson's lead, Cook and Hardin have adopted a relational understanding of trust.<sup>15</sup> They have defined trust, similar to the way I have in this thesis, as a three-part relationship involving a truster (A), a trustee (B) and some relatively defined matter (x), with the relationship taking the form of 'A trusts B to do x'.<sup>16</sup> Accordingly, they have suggested that trust necessarily depends on relational considerations, including the nature of the truster's interests, the trustee's interests, their knowledge of one another and other attributes such as gender, age or education level. But at the same time – and the key point here – Cook and Hardin have suggested that the 'commonplace discussion of trust between two individuals as though they were abstracted from their social context misses too much of what is at stake to make sense of social relations'.<sup>17</sup> Instead, they have argued that trust is best conceived of as 'embedded in a network of relations', and so, it also depends 'on the larger context of our social relations and the broader network of relations that surrounds us'.<sup>18</sup> Put simply, and in their words, trust is 'a function of iterated or ongoing interactions' in which the truster and the trustee are involved.<sup>19</sup>

James Coleman, in his highly influential book *Foundations of Social Theory*, has similarly developed what may be considered a network conception of trust. Like Cook and Hardin, Coleman has conceived of trust as arising in a relationship (or "relation" in his words) between a "trustor" and a trustee.<sup>20</sup> Coleman has argued that such trust relations exist in structures which he has called "systems of trust". For Coleman, these "systems" encompass groups of two- or three-party relations.<sup>21</sup> Specifically, he has identified three such systems (mutual trust, intermediaries in trust and third-party trust) and has suggested that within each system, trust in a trust relation depends on another trust relation; or to put it in slightly different, more active language, one trust relation impacts trust in another. A mutual trust system, according to Coleman, involves two actors being in two trust relations with one other (each actor occupying

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<sup>13</sup> Karen S Cook et al, 'The Distribution of Power in Exchange Networks: Theory and Experimental Results' (1983) 89 *American Journal of Sociology* 275, 277 (emphasis added).

<sup>14</sup> Cook and Hardin (n 1) 331.

<sup>15</sup> *ibid* 332. See also Cook, Hardin and Levi (n 5) 2.

<sup>16</sup> Cook and Hardin (n 1) 331.

<sup>17</sup> *ibid* 330.

<sup>18</sup> *ibid* 330-31

<sup>19</sup> *ibid* 330-31.

<sup>20</sup> Coleman (n 2) 96.

<sup>21</sup> *ibid* 177.

the role of trustor in one of those relations). He has suggested that the mutual trust system fosters trust in a trust relation by increasing the likelihood that the trustee in that relation will keep the trust (out of fear that if he does not, the trustor (who is the trustee in the second trust relation) will not keep her trust). In an intermediary in trust system, an actor outside the immediate trust relation serves as both the trustee for one party to the trust relation and as trustor for the other party, thereby acting as an intermediary between the two parties. Coleman has identified three kinds of intermediaries (advisors, guarantors and entrepreneurs). I shall briefly elaborate upon one intermediary – “the advisor” – as it is relevant to my later analysis. The advisor is an actor outside the immediate trust relation who essentially advises the trustor to trust the trustee. As Coleman has explained, the trustor’s relationship with the advisor fosters her trust in the trustee because the trustor ‘trusts the advisor’s judgment, leading him to place trust in the ability and integrity of the trustee ... It is the trustor’s trust in an advisor’s judgment that leads to placement of trust in the performance capability of the ultimate trustee’.<sup>22</sup> And lastly, a third-party system involves a situation where a trustor accepts a promise from a third party to aid in her transaction with the trustee. According to Coleman, the trustor’s relation with the third party impacts her trust in the trustee because it allows her to transact with the trustee where she would not otherwise. Additionally, and beyond these three systems of trust, Coleman has recognised that trust arises in larger systems (ie involving more than two or three parties). Such larger systems would likely be the kinds of “networks” which Cook and Hardin have in mind. In such larger systems, Coleman has argued that the smaller systems of mutual trust, intermediaries in trust and third-party trust act as “building blocks” which construct the larger system.<sup>23</sup>

One final example of a network conception of trust which I find helpful to the analysis in this thesis is that of Susan Shapiro.<sup>24</sup> Like the above scholars, Shapiro has conceived of trust as arising in a relationship (specifically an agency relationship ‘in which principals ... invest resources, authority, or responsibility in another [an agent] to act on their behalf for some uncertain future return’).<sup>25</sup> However, Shapiro’s network argument is much more targeted in scope than that of either Cook and Hardin or Coleman. She is focused on a specific type of network or system – the embedding of a trust relationship in a network of relationships between the trustor and a defined set of third parties who impose a variety of social control measures on the trustee in his relationship with the trustor (eg professional associations, regulatory watchdogs

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<sup>22</sup> *ibid* 181.

<sup>23</sup> *ibid* 188.

<sup>24</sup> Shapiro, ‘The Social Control’ (n 2). See also Shapiro, ‘The Grammar of Trust’ (n 2).

<sup>25</sup> Shapiro, ‘The Social Control’ (n 2) 626. As I noted in Chapter 1, I do not agree with this characterisation of a trust relationship as it necessitates that the trustee’s control over the good or service result from the trustor entrusting.

and certified public accountants). Shapiro has called these third parties “guardians of trust”. She has claimed that through such social control measures, a guardian of trust (and more precisely, his relationship with the truster) fosters trust between the truster and the trustee, with the resulting trust being “impersonal trust” (a term which should be recalled from my discussion of trust in Chapter 1).<sup>26</sup> Moreover, Shapiro, like Coleman and his smaller systems of trust, has recognised that such truster-guardian relationships rarely exist in isolation; as she has explained, they usually form part of ‘a complicated matrix of social-control strategies – that intervene at different points in the delivery of trust and scrutini[s]e different roles, records, or organi[s]ational routines from different perspectives, for different purposes’.<sup>27</sup> So, in Shapiro’s theory (in parallel to Coleman and Cook and Hardin), trust in a trust relationship depends on the network of relationships (here, truster-guardian relationships) in which that relationship is embedded.

### **The Network Conception Follows From a Relational View of Trust**

As Cook and Hardin have made clear, the network conception follows from a relational view of trust.<sup>28</sup> I mentioned briefly in Chapter 1 that the relational view of trust is to be distinguished from a competing view which considers trust a trait or a disposition of an individual actor.<sup>29</sup> In that view, the unit of analysis is the individual – that is, the truster. Focusing on the individual, that view envisages trust as depending on a single factor which is internal to the truster: whether she has a specific trait or a disposition towards trusting others. If the truster has this trait or disposition, we may say that she is a “trusting” person and accordingly, that trust exists.<sup>30</sup> Trust, in that view, does not depend on the party whom the truster is “trusting” (ie the trustee) or the circumstances surrounding that trust. In other words, trust is a *psychological* phenomenon.<sup>31</sup> In the relational view, in contrast, trust is treated as a property of a social relationship.<sup>32</sup> The unit of analysis is the relationship rather than the individual truster, and so, trust depends on that relationship.<sup>33</sup> In other words, trust, in the relational view, is a *social* phenomenon. Now, of course, trust depends on things which are internal to the relationship, including the nature of the good or service at issue in the relationship and the truster’s knowledge of or familiarity with the

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<sup>26</sup> *ibid* 636 (fn 18).

<sup>27</sup> *ibid* 644-45.

<sup>28</sup> Cook and Hardin (n 1) 330-31.

<sup>29</sup> Russell Hardin, ‘Conceptions and Explanations of Trust’ in Karen S Cook (ed), *Trust in Society* (Russell Sage Foundation 2001). See also Cook and Gerbasi (n 2) 220.

<sup>30</sup> Hardin (n 29) 12-13.

<sup>31</sup> Reinhard Bachmann and Andrew C Inkpen, ‘Understanding Institutional-Based Trust Building Processes in Inter-Organizational Relationships’ (2011) 32 *Organization Studies* 281, 282.

<sup>32</sup> Cook and Hardin (n 1) 330-31. See also Cook and Gerbasi (n 2) 220; Cook, Hardin and Levi (n 5) 2; Levi (n 5) 78.

<sup>33</sup> Cook and Gerbasi (n 2) 220; Cook and Hardin (n 1) 331.

trustee.<sup>34</sup> For example, I made the point in Chapter 1 that where the good or service at issue in the relationship (ie X) changes, the truster's expectation of the trustee's competence may change and accordingly, the extent to which she trusts the trustee may also change. However, at the same time, and as the above writers on trust have stressed, social relationships in contemporary societies are embedded in a rich social context. And because of such embeddedness, to use the apt words of sociologist Mark Granovetter, 'to construe them as independent is a grievous misunderstanding'.<sup>35</sup> It is from this latter point which the network conception of trust stems. Trust (as a property of a social relationship) depends not only on factors which are internal to that relationship, but also on *external* factors – that is, on the network in which it is embedded.

As should be clear by this point, in this thesis, following the lead of many prominent writers on the concept, I have adopted such a relational view of trust. Like Cook and Hardin, I have conceived of trust as arising in a three-part relationship between a truster, a trustee and some good or service (X). And that relationship is built on the three elements of control, discretion/uncertainty and vulnerability. Moreover, it will be recalled that in Chapter 2, I characterised the citizen-government relationship as such a trust relationship. From these two points, coupled with the foregoing discussion of the network conception of trust as following from a relational view, I suggest that it follows, in turn, that the network conception of trust is appropriately applied to the citizen-government relationship. And applying the network conception of trust to the citizen-government relationship, I make two principal claims. First, I claim that in contemporary social democracies, the citizen-government relationship is embedded in a network of trust relationships which exist between citizens, the elected branches of government, and other state and non-state actors. As I will explain in more detail in the next part, these actors include (but are not limited to) private providers of social goods and services, the media and – most importantly for the purpose of this thesis – courts. Second, I claim that trust in the citizen-government relationship ultimately depends on this network of relationships. Therefore, trust in that relationship depends on the other relationships in the network. And this includes – once again importantly for this thesis – citizens' relationship with courts which arises from constitutional social rights adjudication. I now proceed with making out these two claims.

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<sup>34</sup> Cook and Hardin (n 1) 331, 334.

<sup>35</sup> Granovetter, 'Economic Action and Social Structure' (n 3) 482.

## The Social Rights Network

### *Defining the Boundaries of the Social Rights Network*

Let us begin with my first claim: that the citizen-government relationship is embedded in a network of trust relationships between citizens, state and non-state actors. To make out this claim, I will try to show how the citizen-government relationship interconnects with a number of different parties and relationships to form a network configuration. Thus, I will essentially walk the reader through the construction of the network (what I will call the “social rights network”).

But before I do, I shall start by defining the boundaries of the social rights network. In contemporary social democracies, the protection of social rights involves an ever-larger cast of characters and array of relationships. Because of increasing globalisation, privatisation and public interest litigation, courts and other decision-makers, extra-governmental parties such as private industry, lawyers, legal aid bodies, non-governmental and international organisations, as well as foreign governments, have come to play a role in the overall process. In my view, all of these parties and the relationships which exist between them, citizens and the elected branches would constitute the rich social context in which the citizen-government relationship is embedded and accordingly, the full network of relationships for social rights (ie the full social rights network).

It would be impossible to analyse all of these parties and the relationships between them in the limited space of this chapter. Fortunately, my aim is not to do so. Instead it is merely to introduce the network conception of trust to social rights law for the specific purpose of my analysis in Chapter 4 on the proper role of courts in enforcing constitutional social rights. Given this specific objective, I will limit my consideration of the social rights network to a subset of three parties in the network and the relationships between them. They are: private providers of social goods and services; the media; and courts.<sup>36</sup> I have chosen these three parties for several reasons. First, they provide good illustrations by which I may introduce and apply the network conception to social rights law. Second, as I will explain shortly, they play pivotal roles in social rights matters and thus, it makes sense to include them in any thoughtful analysis of this field. And lastly, and obviously, I have chosen courts because they are the central focus of this thesis.

Before turning to the first party (private providers of social goods and services), I would like to make one point of clarification. In my view, like the citizen-government relationship, the relationships which exist between these parties, citizens and the elected branches may be accurately characterised as *trust* relationships. In fact, I anticipate that most, if not all, of the

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<sup>36</sup> My brief analysis of the parties which I have chosen should not be taken as a thorough analysis of their complex roles in the process of social rights protection. I fully acknowledge that their respective roles in this process are significantly more complicated than I can accommodate in this chapter.

relationships in the social rights network may be characterised as such. This is relevant because, as trust relationships, the extent to which a truster's trust in a trustee depends on another relationship of which she is part is likely to depend, in turn, on the extent to which she trusts the trustee in that second relationship. Coleman makes this point in his discussion of "the advisor" as an intermediary in trust. He explains that the truster's relationship with the advisor impacts his trust relationship with the trustee because she *trusts* the advisor. Presumably, if the truster does not trust the advisor, her relationship with the advisor will not impact her trust in the trustee. For this reason, in my analysis of the parties and relationships which follow, I also briefly outline how each relationship would be expected to satisfy the three elements of a trust relationship. However, with that said, I see no reason why, nor find any conclusion in the trust literature that, trust in a trust relationship only depends on the *trust* relationships in its social context or network. Accordingly, it is conceivable that some of the relationships in the "social rights network" would not satisfy the three elements of a trust relationship. And their failure to so satisfy would not necessarily detract from their capacity to impact trust in a trust relationship.

### *Constructing the Social Rights Network*

#### (i) Private Providers of Social Goods and Services

The first party which I will describe here as forming part of the social rights network is private providers of social goods and services. In contemporary social democracies, the provision of social goods and services by the state is entirely dependent on those who directly provide those goods and services. For example, public health care depends on, among many others, physicians, nurses and medical technicians. Governments may either employ such providers or, as is more commonly the case in recent years, outsource to them.<sup>37</sup> At the same time, as I mentioned briefly in Chapter 2 with respect to the direct/indirect control distinction, these providers rarely find themselves confined to a single, public system. In the vast majority of cases, they, as an overall group, have the opportunity to offer their goods and services privately. A given provider may have the option of offering her services concurrently in the public system and privately, or she may be compelled to choose one. In either case, there is likely to exist a cohort of providers who offer their goods and services privately. This cohort of providers is the focus of this section.

The existence of this cohort of providers has an important ramification for citizens on the receiving end. It means the availability of a private market, the effect of which is that citizens (technically speaking) are not wholly dependent on the elected branches for the social goods and

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<sup>37</sup> Stephen Goldsmith and William D Eggers, *Governing by Network: The New Shape of the Public Sector* (Brookings Institution Press 2004), 13-14.

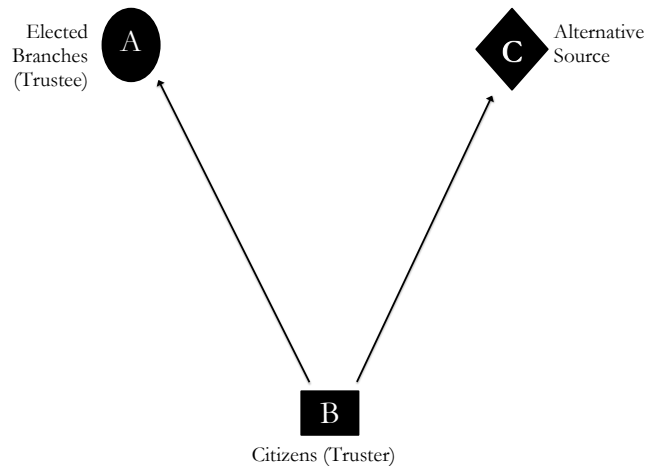
services which they need; they may have the option of obtaining them from sources alternative to the elected branches (ie private providers) who, like the elected branches, maintain control over the social goods and services. In Chapter 2, I referred to this state of affairs as the elected branches maintaining partial control. To make clear the ramification this state of affairs has for citizens, I will refer to private providers from here forward as “alternative sources”. Where a private market is available, in addition to the citizen-government relationship, citizens may also be said to have a relationship with the alternative source. By this I do not mean that citizens have opted for (or are even in a financial position to opt for) the alternative source over the elected branches (a point which will become relevant in the next part); I mean simply that the alternative source is available to citizens, making it part of the rich social context in which the citizen-government relationship is embedded. Expanding upon the three-part form which I developed in Chapters 1 and 2 (where the elected branches are the trustee (A), citizens are the truster (B), and X is the social good or service at issue), I will call the alternative source of X, C.

Consistent with what I suggested earlier, the relationship between citizens (B) and the alternative source (C) (what I call the “alternative source relationship”) may be characterised as a trust relationship. C, like the elected branches, maintains *control* over X, a social good or service which citizens need. This is what makes C an “alternative source” in the first place. Further, in the vast majority of cases, C also holds some *discretion* in exercising said control vis-à-vis citizens.<sup>38</sup> Thus, citizens *cannot be certain* about their interaction with the alternative source. And lastly, given the alternative source’s control and discretion over X, coupled with citizens’ need for X, citizens are *vulnerable* to the alternative source. Diagram 1 below reflects pictorially the citizen-government and alternative source relationships. The lines are the trust relationships and the arrows indicate the direction in which trust flows in the relationship from truster to trustee.

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<sup>38</sup> This discretion will vary from context to context and will, of course, depend upon regulation, professional standards and ethical considerations. However, by way of example, in education, private educational institutions have discretion over the standards for admission, who they admit, the courses they offer, the grading scheme and the awarding of diplomas.

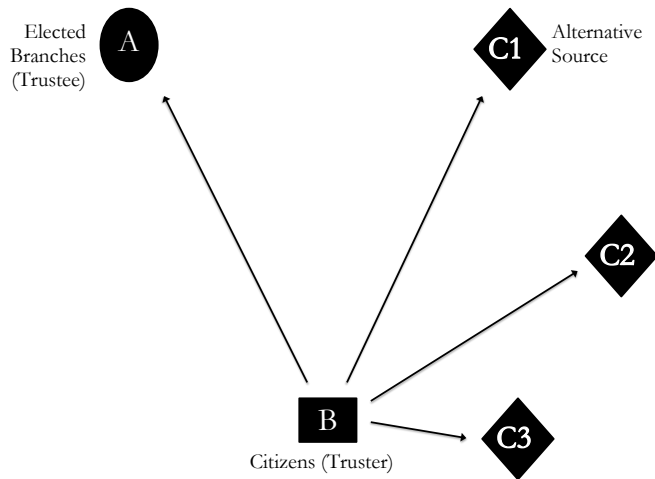
Diagram 1: Citizen-Government and Alternative Source Relationships



To provide some level of concreteness to the scenario depicted in Diagram 1, let us make X a defined good or service: primary education. Consistent with what I said earlier about the common concurrence of public systems and private markets, in most contemporary social democracies, primary education is available both publicly (through a public education system) as well as privately. The latter may be delivered by private educational institutions (such as institutions which are religiously-affiliated or based on a particular theory of teaching) or by private tutors. In this example, C in Diagram 1 represents one of these private institutions or private tutors and citizens may have the option of sending their children to a public institution (as part of the public education system) (A) or to the private institution or tutor (C).

Moreover, in contemporary social democracies, assuming a competitive market, it is unlikely that citizens would only have access to one alternative source of X. In our primary education example, we can expect citizens to have a range of alternative sources, including both multiple private institutions as well as private tutors. This means that citizens may not only have the option of turning to a source of X alternative to the elected branches, but additionally, in exercising this option, they have a choice of alternative sources. For the purpose of illustration, let us say that citizens have a choice of three alternative sources: C1, C2 and C3. Assuming the same circumstances as before (satisfying the elements of control, discretion/uncertainty and vulnerability), the relationships between citizens and each of C1, C2 and C3 may be characterised as trust relationships. This choice of alternative sources is depicted in Diagram 2 below.

Diagram 2: Choice of Alternative Source Relationships



Now, the foregoing analysis has captured one category of relationships in social welfare: the relationships between consumers of social goods and services (citizens) and their providers (the elected branches and the alternative sources). For the purpose of this thesis, this category of relationships is the most important. However, I would be remiss (in developing the network and in the interest of comprehensiveness) if I did not point out that these parties are involved in another category of relationships. In contemporary social democracies, the elected branches occupy dual roles: as a *source* of social goods and services to citizens (hence, the relationships I just described) and as a *representative* of citizens via the democratic process.<sup>39</sup> In their role as citizens' representative, the elected branches are also responsible for regulating the relationship between citizens and the alternative sources: this may include licensing and setting standards of practice, overseeing the liberty of these alternative sources to set fees or select to whom they deliver their services, restricting the power of these alternative sources' professional associations to sanction their members, and imposing criminal liability on these alternative sources.<sup>40</sup> Given this role and its responsibilities, I think that it is fair to say that the elected branches, in addition to being in relationships with citizens, are also in relationships with the alternative sources.

Like the citizen-government and alternative source relationships, I also think that it is fair to characterise such relationships as trust relationships. For example, we may conceive of the relationship between the elected branches and an alternative source as a trust relationship in which the elected branches are *truster* and the alternative source is *trustee*. This conception makes

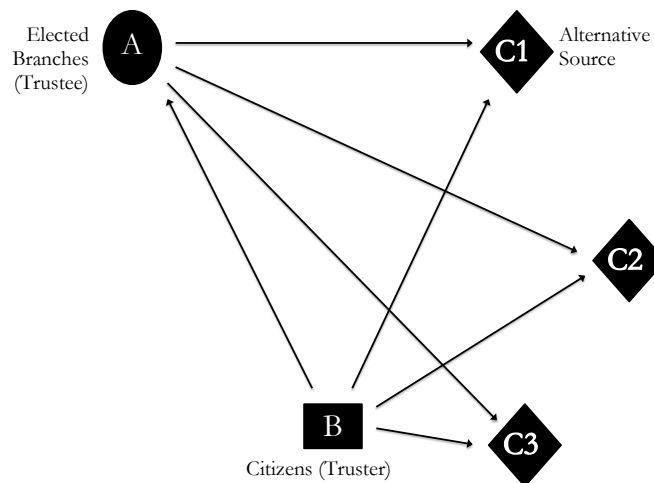
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<sup>39</sup> Varun Gauri and Daniel M Brinks, 'Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights' in Varun Gauri and Daniel M Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2010), 10-11.

<sup>40</sup> *ibid* 10.

sense if we recognise, as Bernard Barber has suggested, that the truster in a trust relationship does not necessarily need to be the direct recipient of the good or service which is at issue in the relationship.<sup>41</sup> For instance, a parent may be in a trust relationship with a third party for a good or service which his or her child will ultimately receive. This would be the case in our primary education example from earlier. So, how are the three elements of a trust relationship satisfied in this relationship? The alternative source continues to maintain *control* and *discretion* in exercising that control over X (a good or service which citizens need). However, in *this* relationship it is the elected branches (rather than citizens) who are uncertain: they are *uncertain* about the alternative source's interaction *with citizens*. And because the elected branches represent citizens (who are vulnerable to the alternative source as I described earlier), the elected branches too are *vulnerable* to the alternative source: unfavourable behaviour by the alternative source toward citizens opens the elected branches up to negative repercussions at the hand of citizens, including the possibility of being voted out of power. This specific group of trust relationships between the elected branches and each of the alternative sources (C1, C2 and C3) is depicted below in Diagram 3.

Diagram 3: Relationships Between Elected Branches and Alternative Sources



(ii) The Media

I turn next to a somewhat undervalued party in the social rights literature – the media. Scholars of both political science and media studies have recognised that in contemporary democracies, the media plays a fundamental role in the relationship between citizens and their governments.<sup>42</sup>

<sup>41</sup> Bernard Barber, *The Logic and Limits of Trust* (Rutgers University Press 1983), 17.

<sup>42</sup> Kees Aarts, Audun Fladmoe and Jesper Stromback, 'Media, Political Trust, and Political Knowledge' in Toril Aalberg and James Curran (eds), *How Media Inform Democracy: A Comparative Approach* (Routledge 2012), 98-99; Kelly

It is beyond the scope of this thesis to comprehensively consider this role, but I do wish to offer some elaboration to aid in applying the network conception. The media provides a critical, if not the primary, source of information for citizens about politics and current affairs.<sup>43</sup> As such, social scientists have theorised and experimentally shown that the media can and does have a tremendous impact on citizens' knowledge of and attitudes toward political actors and policies.<sup>44</sup>

The relationship between citizens and the media may too be accurately characterised as a trust relationship. The media *controls* a good or service which citizens need and/or want: political information. This control stems, in significant part, from its investigatory capabilities and its priority access to sources. However, the media is not simply a channel through which information flows; it has *discretion* in what information it conveys and how it conveys that information to the public. Owing to this discretion, it has been said (and empirically shown) that the media has both priming effects (based on how much attention it chooses to pay to a particular issue) as well as framing effects (based on the style in which it chooses to cover that issue) on citizens.<sup>45</sup> In fact, on the latter point, modern media coverage of political stories is more often journalists' opinions of political events as opposed to the substance of the events themselves.<sup>46</sup> For this reason, the media is said to occupy a new "interpretive" role in contemporary democracies, making it 'an unaccountable part of the political process'.<sup>47</sup> At the same time, the media has self-serving interests: it may be partisan to a particular political party or a particular ideology and, like any commercial industry which strives for self-preservation and profit, it has an interest in increasing the size of its overall audience. Given these self-serving interests, coupled with the media's control and discretion, citizens *cannot be certain* of their interaction with the media (ie what political information it will convey and how it will convey it). Finally, citizens' need and/or want for political information (and more importantly, the impact

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Blidook, 'Media, Public Opinion and Health Care in Canada: How the Media Affect "The Way Things Are"' (2008) 41 *Canadian Journal of Political Science* 355; Mark Bovens and Anchril Wille, 'Falling or Fluctuating Trust Levels? The Case of the Netherlands' in Sonja Zmerli and Marc Hooghe (eds), *Political Trust: Why Context Matters* (ECPR Press 2011), 59; Jan Müller, *Mechanisms of Trust: News Media in Democratic and Authoritarian Regimes* (Campus 2013), 17; Patricia Moy and Muzammil M Hussain, 'Media Influences on Political Trust and Engagement' in George C Edwards III, Lawrence R Jacobs and Robert Y Shapiro (eds), *The Oxford Handbook of American Public Opinion and the Media* (OUP 2011), 222-23; Joseph S Nye, Jr, 'Introduction: The Decline of Confidence in Government' in Joseph S Nye, Jr, Philip D Zelikow and David C King (eds), *Why People Don't Trust Government* (Harvard University Press 1997), 15-17; Joseph S Nye, Jr and Philip D Zelikow, 'Conclusion: Reflections, Conjectures and Puzzles' in Joseph S Nye Jr, Philip D Zelikow and David C King (eds), *Why People Don't Trust Government* (Harvard University Press 1997), 261-75; Orlando Patterson, 'Liberty Against the Democratic State: On the Historical and Contemporary Sources of American Trust' in Mark E Warren (ed), *Democracy and Trust* (Cambridge University Press 1999), 191.

<sup>43</sup> Aarts, Fladmoe and Stromback (n 42) 98-99, 103-04; Patterson (n 42) 191; Nye, Jr and Zelikow (n 42) 261.

<sup>44</sup> Richard Gunther and Anthony Mughan, *Democracy and the Media: A Comparative Perspective* (Cambridge University Press 2000), 16-20; Nye, Jr and Zelikow (n 42) 274.

<sup>45</sup> Blidook (n 42) 356-58 (who cites a number of studies in support of these claims).

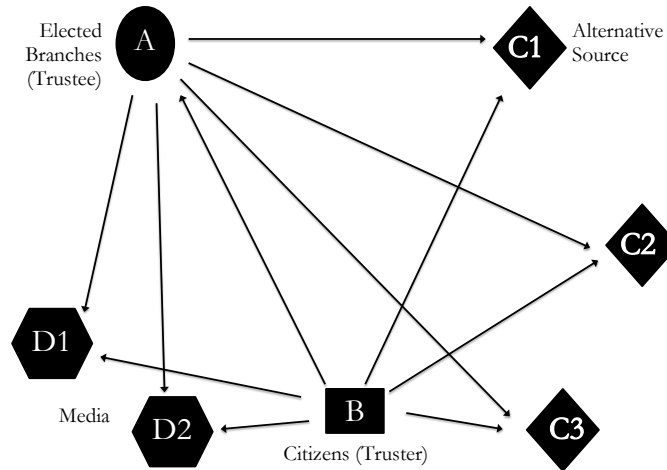
<sup>46</sup> Nye, Jr and Zelikow (n 42) 274.

<sup>47</sup> Nye, Jr (n 42) 17.

the information has on their knowledge and attitudes), renders citizens *vulnerable* to the media. Expanding once again upon the three-part form, I will call the media, D. And consistently assuming a competitive market as I did with private providers of social goods and services, it is inaccurate to conceive of the media as a single entity. As citizens have a choice of alternative sources, they too have a choice of media sources: they may choose between different types of media (print, television, radio) and between different companies of the same type. For the purpose of illustration, let us say that citizens have a choice between two sources: D1 and D2.

Now, a reader may rightfully ask: what about the elected branches? Are they not also in a trust relationship with the media? After all, they (and their policies) are the very subject of the political information which the media conveys; and most often, the media controls that information because the elected branches have provided it to them (thereby entrusting them with that political information). Accordingly, I think that the reader would be correct in this regard: the elected branches and the media are in a trust relationship. The good or service over which the media has *control* is again political information; but what the elected branches need and/or want is for the media to convey that information to citizens in a way which casts them in a positive light. Otherwise, they may again suffer negative repercussions from citizens. However, as I just explained, the media has *discretion* both as to substance and style: thus, the elected branches *cannot be certain* of what information it will convey to the public or how it will convey that information. For instance, the media may distort the story, omit positive aspects, take words uttered out of context or, as we see with recent allegations of so-called “fake news”, offer a story with no factual foundation. And because the information conveyed by the media has significant impact on citizens’ political knowledge and attitudes, the elected branches are also *vulnerable* to the media. Diagram 4 below provides a pictorial representation incorporating the media.

Diagram 4: Trust Relationships with the Media



(iii) Courts

Last, but certainly not least in this thesis, I come to the courts. Based on the thesis up to this point, we already know that the role of courts in enforcing constitutional social rights is contested. That is the reason why it is the central focus of this thesis in the first place. However, for the present purpose, I think that I may confidently draw a few, relatively uncontroversial conclusions which will enable me to establish courts as forming part of the social rights network.

The justiciability of social rights was once the subject of an intense debate among scholars, jurists and politicians across the globe. This debate reached its height when the new democracies of the Global South and the former-Soviet Union were trying to decide whether to include express (and justiciable) social rights provisions in their constitutions. Those who argued that social rights were not justiciable (and thus, had no place in a constitution) necessarily argued that courts had no role to play in this area. However, in the last few decades, scholars, jurists and politicians have (for the most part) come to accept that courts have at least *some* role to play. Such acceptance perhaps was inevitable given that an increasing number of constitutions now include express and justiciable social rights provisions, several courts have accepted their justiciability and, in many jurisdictions without express constitutional provisions, courts have recognised implicit constitutional protection for social rights.<sup>48</sup> Thus, as Anashri Pillay has summarised, ‘The weight of academic, judicial and political opinion in this area has moved away

<sup>48</sup> Xenophon Contiades and Alkmene Fotiadou, ‘Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation’ (2012) 10 International Journal of Constitutional Law 660, 673.

from justiciability to a consideration of the most effective judicial approaches to social rights.<sup>49</sup> David Landau has concurred in this point, noting, ‘For all practical purposes, the debate about whether to include social rights in constitutions is over ... Most of the more recent work in the field has focused on the specific question of *how* social rights should be enforced rather than the older question of *whether* they should be included in constitutional texts in the first place’.<sup>50</sup> Accordingly, in my view, we should accept (as it appears most scholars, jurists and politicians have) that social rights are justiciable and that courts have at least some role to play in the social rights arena. And if we do accept that point, we should also accept that courts form at least some part of the rich social context within which the citizen-government relationship is embedded.

But even if we do not accept such a role for courts – that is, we do not agree that social rights are justiciable and that courts *should* be intervening in social rights matters – I think that this conclusion (that courts form part of the citizen-government relationship’s social context) ultimately follows. Regardless of what we may think the courts should be doing, it is undeniable that over the last few decades, courts have played a role in this area: with increasing frequency, litigants have brought social rights matters before courts, and courts have decided their cases. In fact, scholars have described these past few decades as witnessing an “explosion” of social rights litigation.<sup>51</sup> For example, in 2009, Malcolm Langford made the point that ‘[i]f we were to speculate on the total number of decisions that have invoked constitutional and international [social] rights, a figure of at least one to two hundred thousand might be in order’.<sup>52</sup> In my view, this proliferation of litigation means that courts do form part of the social rights network. In the blunt but apt words of Daniel Brinks and Varun Gauri, ‘for good or ill – or, more accurately, for good *and* ill ... – the language of rights, the mechanism of courts, the intervention of lawyers, and the cumbersome tools of the law have become a permanent and prominent part of the

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<sup>49</sup> Anashri Pillay, ‘Economic and Social Rights Adjudication: Developing Principles of Judicial Restraint in South Africa and the United Kingdom’ [2013] Public Law 599, 599.

<sup>50</sup> David Landau, ‘The Reality of Social Rights Enforcement’ (2012) 53 Harvard International Law Journal 189, 190, 196. See also Aoife Nolan, Bruce Porter and Malcolm Langford, ‘The Justiciability of Social and Economic Rights: An Updated Appraisal’ (Human Rights Consortium, Belfast, Northern Ireland, 2007) <<http://socialrightscura.ca/documents/publications/BP-justiciability-belfast.pdf>> accessed 13 July 2017, 35: ‘Both our appraisal of common arguments against making social and economic rights justiciable and our analysis of jurisprudence in this area suggest that concerns about the justiciability of social and economic rights are generally ill-conceived and run contrary to experience’. For a similar position, see also Colm O’Cinneide, ‘The Problematic of Social Rights – Uniformity and Diversity in the Development of Social Rights Review’ in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014).

<sup>51</sup> Daniel M Brinks and Varun Gauri, ‘The Law’s Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights’ (2014) 12 Perspectives on Politics 375, 376; Malcolm Langford, César Rodríguez-Garavito and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making it Stick* (Cambridge University Press 2017).

<sup>52</sup> Malcolm Langford, ‘Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review’ (2009) 6 International Journal on Human Rights 91, 91.

policy-making landscape'.<sup>53</sup> And it is for this reason that I say that there is indeed a relationship between citizens and the courts which arises out of constitutional social rights adjudication.

Given the nature of such social rights matters – which involve the courts reviewing governmental decisions on social welfare – I think that it is accurate to say that, at a minimum, courts occupy a position in the social rights network between citizens and the elected branches of government. Such matters usually involve citizens, either acting alone or relying upon representatives (eg lawyers, non-governmental organisations, special interest groups), turning to the courts when they are dissatisfied with either the process or the results of governmental decision-making. In cases to date, citizens have challenged, among other things, governmental decisions not to fund or deliver whole categories of social programmes; where funded or delivered, the eligibility criteria for those programmes; and finally, their implementation.

Like the other relationships which I have considered up to this point in the chapter, the relationship between citizens and courts may be accurately characterised as a trust relationship. The courts have *control* over something which citizens need: a ruling in their favour vis-à-vis the social goods and services which they need. Put simply, that ruling brings them closer to those social goods and services. The courts also have *discretion* in delivering their rulings.<sup>54</sup> As Ronald Dworkin put it years ago, 'the general proposition, that the exercise of judicial choice or discretion within areas circumscribed more or less tightly by rules is not an occasional misfiring but a characteristic feature of the legal process, is today almost a law school cliché'.<sup>55</sup> This discretion relates not only to the court's interpretation of social rights but also to its granting of remedies for rights violations. Because of this discretion, citizens *cannot be certain* of how the courts will rule; and given their need for a favourable ruling, citizens are *vulnerable* to the courts.

Further, when citizens choose to litigate their claims, the courts become a truster in their own respect – that is, in their relationship with the elected branches. This trust relationship arises out of the fact that, in contemporary constitutional democracies, the courts must rely on the elected branches to enforce their constitutional decisions.<sup>56</sup> As I established in Chapter 2, in contemporary social democracies, the elected branches have *control* and *discretion* over social goods and services which citizens need. And although the courts' rulings may seek to impact the

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<sup>53</sup> Daniel M Brinks and Varun Gauri, 'A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World' in Varun Gauri and Daniel M Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2010), 303.

<sup>54</sup> On judicial discretion generally, see Ronald Dworkin, 'Judicial Discretion' (1963) 60 *The Journal of Philosophy* 624; Ronald M Dworkin, 'The Model of Rules' (1967) 35 *The University of Chicago Law Review* 14; Ronald M Dworkin, 'Social Rules and Legal Theory' (1972) 81 *The Yale Law Journal* 855; Kent Greenawalt, 'Discretion and Judicial Discretion: The Elusive Quest for the Fetters That Bind Judges' (1975) 75 *Columbia Law Review* 359.

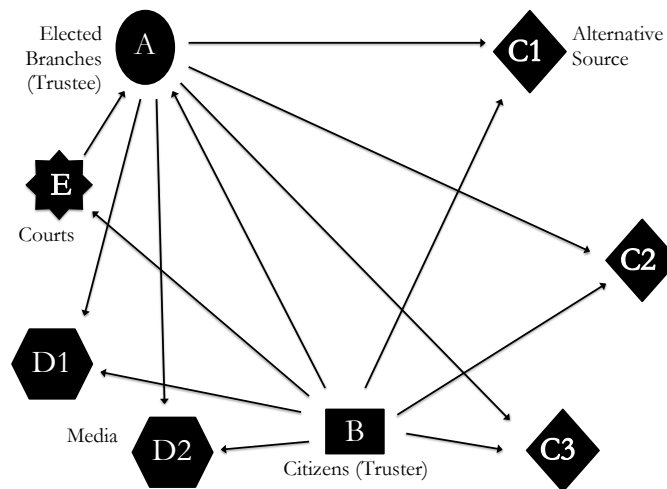
<sup>55</sup> Dworkin, 'Judicial Discretion' (n 54) 624.

<sup>56</sup> Mark Kesselman, Joel Krieger and William A Joseph, *Introduction to Comparative Politics: Political Challenges and Changing Agendas* (Wadsworth 2012), 337.

elected branches' exercise of control and discretion, the ultimate decision nonetheless remains that of the elected branches. For instance, a court may rule that a citizen (or a certain group of citizens) is entitled to a particular social good or service and order the elected branches to fund and/or deliver that good or service; but without the elected branches' ensuing decision to actually fund/deliver, the court's ruling is largely meaningless. For this reason, I think that we may fairly say that courts *cannot be certain* of how the elected branches will respond to their rulings. And finally, courts are *vulnerable* to the elected branches. That vulnerability chiefly assumes the form of institutional credibility: if the courts' rulings are not followed by the elected branches, it diminishes their credibility in the eyes of the elected branches and the public.<sup>57</sup> And to make matters worse, owing to such rulings, the judiciary may suffer repercussions from the elected branches, including a lack of cooperation in the future, a reduction in resources, or worse still, impeachment.<sup>58</sup> To quote Frank Cross, the courts 'are politically vulnerable institutions that have powerful reasons to be cautious in imposing restrictions on the other branches'.<sup>59</sup>

Further expanding upon the three-part form of the citizen-government trust relationship, and rounding out our social rights network in this chapter, I will refer to the courts as E. Diagram 5 below incorporates the courts into the social rights network, situating them, as I just described, between citizens and the elected branches of government.

Diagram 5: Trust Relationships with Courts



<sup>57</sup> Katharine Young, *Constituting Economic and Social Rights* (OUP 2012), 161.

<sup>58</sup> Frank B Cross, 'The Error of Positive Rights' (2001) *UCLA Law Review* 857, 887-89.

<sup>59</sup> *ibid* 887-88.

Before moving on from the construction of the social rights network (as part of my first claim) to my second claim, I would like to stress once again, in the interest of greater clarity, a point which I made earlier. The social rights network undoubtedly consists of relationships beyond those which I have identified and analysed in the above sections. Such relationships include not only relationships with new *parties* (ie other than the five parties which I analysed in the above sections) but also new *configurations* of these five parties beyond those which I have expressly identified. For instance, with respect to the relationship between the elected branches and alternative sources, we may conceive of a trust relationship operating in the reverse direction to that which I described in that section, wherein the alternative source is *trustee* and the elected branches are *trustee*. Or in the case of courts, we may speak of a trust relationship operating between courts and the media. But as my aim herein is not to provide an exhaustive analysis of the social rights network, I will not venture further to consider these parties or relationships.

*Trust in the Citizen-Government Relationship Depends on the Social Rights Network*

This brings me to my second claim: that trust in the citizen-government relationship depends on the network of relationships in which it is embedded. This claim follows from a straightforward application of the second fundamental feature of the network conception of trust (as I have referred to it) to the citizen-government relationship. If trust in a trust relationship depends on the network of relationships in which that relationship is embedded (as this feature posits), applying it to the citizen-government relationship means that trust in *that* relationship (as a trust relationship) depends on the network of relationships in which *it* is embedded. Additionally, if we accept, based on the foregoing constructive analysis, that the network in which the citizen-government relationship is embedded is that which I have called the social rights network, then that means that trust in the citizen-government relationship *depends on the social rights network*. Put simply, citizens' trust in the elected branches with respect to social rights depends on the relationships which constitute that social rights network. Or, to rephrase this claim using more active language: we can expect the relationships in the social rights network to be able to impact (and in the right circumstances, to foster) trust in the citizen-government relationship.

At this time, I think that two points of clarification are warranted. First, the claim that I am making here is a theoretical one. It draws from the work of the many writers on trust who I identified at this chapter's outset as advocating a network conception of trust and it applies that work to the citizen-government relationship. In my view, these writers' work – taken together to form what I have called the network conception of trust – supports the claim which I have made. However, to be fair, if we wanted to say with greater certainty that a specific relationship

in the social rights network *does indeed* impact trust in the citizen-government relationship, we should conduct an empirical investigation. In other words, we should measure trust in the citizen-government relationship as a variable of that other relationship. And as I pointed out in the Introduction, such an investigation is beyond the scope of this thesis. Granted, significant challenges would be in store for such an investigation, including difficulties with accurately measuring trust (as conceptualised) and controlling for the impact of a single relationship; however, I would be remiss if I did not draw attention to this important fact. Second, it is also beyond the scope of this thesis to go further than the claim which I have made by offering an analysis of *how* we can expect each trust relationship in the social rights network to be able to impact trust in the citizen-government relationship. Based on my reading of the above writers on trust, it is likely that different trust relationships would be expected to impact trust in the citizen-government relationship via different paths. Thus, just as it would be impossible to analyse all of the parties and the relationships which constitute the social rights network, it would be equally impossible to analyse all of these paths. Fortunately, again, my aim is not to do so. To repeat, my aim is to introduce the network conception of trust to social rights law for the specific purpose of my analysis in Chapter 4 on the proper role of courts in enforcing constitutional social rights. Therefore, I will limit my analysis in this thesis to those paths which are pertinent to this aim.

To illustrate the above two points, consider, for example, the interaction between the citizen-government relationship and the relationship between citizens and the media with respect to social rights (which we can call the “citizen-media relationship”). An application of the claim made in this section to these relationships suggests that we can expect the citizen-media relationship to be able to impact trust in the citizen-government relationship. After all, as I established earlier, the citizen-media relationship forms part of the social rights network in which the citizen-government relationship is embedded. Now, to say with greater certainty that the citizen-media relationship *does* impact trust in the citizen-government relationship would require empirical evidence which I have not collected. That said, there have been a wealth of empirical studies in support of this claim at a more general level (ie not in the specific context of social rights).<sup>60</sup> These studies have established that the media (through its relationship with citizens) can impact public trust in government. If we accept the foregoing conclusion, this raises the question of *how*: how can the citizen-media relationship be expected to impact trust in the citizen-government relationship? Here, I think that Coleman’s description of “the advisor” as an intermediary in trust is fitting. As I explained earlier, Coleman has argued that where a truster has

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<sup>60</sup> As a representative sample, see (and the studies referenced therein) Aarts, Fladmoe and Stromback (n 42) 98-99; Bovens and Wille (n 42) 59; Moy and Hussain (n 42) 222-23.

a relationship with a third party (“the advisor”) who advises her to trust a trustee, to the extent that the truster trusts the advisor’s judgment, that relationship fosters trust between her and the trustee. In fact, Coleman has specifically identified the media as such an advisor in contemporary societies (at least as of 1990 when he wrote *Foundations of Social Theory*), explaining that the media increasingly constitutes ‘the intermediary in whose judgment persons place trust’.<sup>61</sup> Applying Coleman’s idea to the social rights context, where the media, through its conveyance of political information vis-à-vis social rights to citizens, portrays the elected branches in a positive light, I think that it is fair to say that the media advises citizens to trust the elected branches with respect to social rights. And assuming that citizens trust the media (which is obviously not a given, especially today, but I will assume it to be true for now), based on Coleman’s argument, the media’s advice to trust the elected branches (and in turn, citizens’ relationship with the media) can be expected to foster citizens’ trust in the elected branches with respect to social rights.

### **Synthesis and Chapter Summary**

I end this chapter by returning to the party lying at the centre of this thesis – courts. Given my analysis in this chapter, it is fair to conclude that we can expect constitutional social rights adjudication by courts to be able to impact (and in the right circumstances, to foster) public trust in government. Why? From this chapter, we know that there is a relationship between citizens and courts which arises out of constitutional social rights adjudication. Given the recent proliferation of social rights adjudication, this relationship exists regardless of which position we adopt regarding the justiciability of social rights. Further, we know that the relationship between citizens and courts forms part of the rich social context (or social rights network) in which the citizen-government relationship is embedded. And lastly, in light of the immediately foregoing analysis, because the relationship between citizens and courts forms part of the social rights network, we can expect it to be able to impact trust in the citizen-government relationship. Accordingly, my conclusion follows: we can expect constitutional social rights adjudication by courts to be able to impact (and in the right circumstances, to foster) trust in the citizen-government relationship. In the next chapter, I employ this conclusion, along with the conceptual groundwork which I laid in Chapters 1 and 2, to advance the central argument of this thesis: that political trust has normative potential for social rights enforcement by courts.

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<sup>61</sup> Coleman (n 2) 194.

## CHAPTER 4

### Courts as Mediators of Government Trustworthiness

In this chapter, we arrive at what I consider to be the heart of the thesis. This is so for two reasons. First, this chapter represents a culmination of the last three chapters. In Chapters 1-3, I sought, at least chiefly, to develop the prerequisite theoretical building blocks for the argument which I now advance in this chapter – the central argument of the thesis. That argument is, put simply, that the concept of political trust has normative potential for defining the proper role of courts in enforcing constitutional social rights. To be more precise, I argue that courts can, and (for a host of reasons which I will outline shortly) should, use the concept of political trust as an adjudicative tool in their enforcement of constitutional social rights. In the process of doing so, I carve out a role for courts in this particular area as what I call “mediators of government trustworthiness”. Second, the illustrations which I offer in the next two chapters of the thesis (using concrete examples from South Africa and Canada) are principally aimed at illustrating the argument in this chapter. Accordingly, this chapter, in essence, prepares the reader for those two illustrations. In advancing this chapter’s argument, I organise my discussion around three simple but, to my mind, critical questions: (i) *Why courts?* (that is, why do courts warrant a special role in the social rights network?); (ii) *How trust?* (that is, how can courts use the concept of political trust as a so-called adjudicative tool in social rights enforcement?); and finally, (iii) *Why trust?* (that is, why should courts centre social rights enforcement on the concept of political trust?).

#### **Why Courts?: Justifying a Special Role for Courts in the Social Rights Network**

A reader may question why, after developing the social rights network in Chapter 3, I am now choosing to single out the courts and grant them a special role in that network. Accordingly, before elaborating upon my proposed role for courts as “mediators of government trustworthiness”, I will take a brief moment to justify granting a special role to courts. From Chapter 3 we know that courts form part of (or are embedded in) the social rights network in which the citizen-government relationship is embedded. That embeddedness, however, does not, by itself, warrant any special role for courts in the network: in this respect, courts are no different than any other party in the social rights network (including the media or private providers of social goods and services). Like those parties, courts are interconnected with various network actors via trust relationships such that trust between them and other actors in the social rights network ultimately depends on the array of relationships of which the network is comprised.

Instead, courts occupy a special role in the social rights network because of *why* they are embedded in the social rights network. In Chapter 3, I suggested, as a primary reason at least, that courts are embedded in the network because of the justiciability of constitutional social rights. If social rights are indeed justiciable, then courts, as constitutional guardians, must have some role to play in enforcing those rights. And that enforcement role justifies a special role for courts in the social rights network: unlike any other party in the social rights network, courts are under a constitutional obligation to oversee the citizen-government relationship.

My conclusion that social rights are justiciable merits further discussion than my analysis in Chapter 3 could afford. I shall elaborate upon it now. As I said there, social rights' justiciability was once intensely debated by scholars, jurists and politicians across the globe. That debate reached its peak during the late 1980s-early 1990s when the new democracies of the Global South and the former-Soviet Union sought to decide whether to include express (and justiciable) social rights provisions in their national constitutions. While the justiciability debate's lengthy timespan as well as incredible depth prevent me from offering anywhere near a comprehensive literature review in this chapter, I will do my best to summarise its central points in what follows.

The arguments against social rights' justiciability fell into two principal categories: institutional legitimacy and institutional capacity.<sup>1</sup> The argument from legitimacy follows on from the well-known criticism made against the institution of judicial review more generally. This criticism, most-frequently associated with Jeremy Waldron, challenges judicial review as anti-democratic and therefore as illegitimate.<sup>2</sup> Judicial review is argued to be such because it enables judges – who are unelected – to overrule the decisions and actions of democratically elected officials, thereby undermining the will of the majority. Alexander Bickel famously called this problem with judicial review the “counter-majoritarian difficulty”.<sup>3</sup> Building upon this criticism, the argument from legitimacy posits that the counter-majoritarian difficulty is all-the-more damning to judicial review where the decisions and actions being reviewed by the courts pertain to social rights. Why is that the case? First, social rights have significant budgetary consequences. If courts are allowed to adjudicate social rights matters, they would be interfering with the drawing of the budget and, in turn, would be encroaching upon one of the legislature's principal prerogatives.<sup>4</sup> Second, because resources are scarce, social rights are likely to conflict with one

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<sup>1</sup> See Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Carswell 1999), 233.

<sup>2</sup> Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *The Yale Law Journal* 1346.

<sup>3</sup> Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed, Yale University Press 1986), 16.

<sup>4</sup> For a summary of this argument (although not in support of it), see Cécile Fabre, ‘Constitutionalising Social Rights’ (1998) 6 *The Journal of Political Philosophy* 263, 280; Roberto Gargarella, ‘Deliberative Democracy,

another, necessitating the making of difficult choices which shape what society looks like.<sup>5</sup> For these reasons, it has been argued, the matters raised by social rights are best left to the elected and politically accountable branches of government; courts, being unelected bodies, lack legitimacy so as to interfere with or second-guess those branches' decisions or actions.

The argument from capacity arises, in large part, out of the idea of polycentricity which was developed by Lon Fuller.<sup>6</sup> According to Fuller, certain problems – which he called “polycentric” – are not suitable for adjudication. Polycentric problems are those characterised by the interconnection of several issues and which affect a large number of individuals, yielding a complex web of interdependent relationships.<sup>7</sup> The issues are interconnected (and the relationships, interdependent) in the sense that when an action is taken to address one issue, that action reverberates through the web, producing a series of unpredictable consequences vis-à-vis the other issues. Fuller argued that polycentric problems do not lend themselves well to adjudication because of certain defining characteristics of the adjudicative process, namely: adjudication is binary in nature, with the two parties having diametrically-opposed interests; the court can only satisfy one party's interests; and despite being affected by judicial rulings, third parties have limited influence over the outcome of a case. Relying on Fuller, the argument from capacity suggests that social rights raise polycentric problems.<sup>8</sup> For example, a governmental decision about whether to fund a health care treatment is said to be a polycentric problem because it has budgetary implications for a range of social goods and services and because it affects all the people who depend on those goods and services. To be concise, because governmental budgets are finite, a decision to fund one treatment means less funds available for other treatments as well as other social goods and services. Moreover, and relatedly, the argument from capacity posits that courts lack the expertise as well as the resources necessary to make social rights decisions. It has been said that judges are not competent to tell the government how to allocate resources because they have neither the training nor the information-gathering tools required to assess the suitability of a resource allocation decision.<sup>9</sup>

The arguments from legitimacy and capacity have been forcefully countered by several

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Dialogic Justice and the Promise of Social and Economic Rights' in Helena Alviar Garcia, Karl Klare and Lucy A Williams (eds), *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge 2015), 107.

<sup>5</sup> For a summary of this argument (although again not in support of it), see Fabre (n 4) 281.

<sup>6</sup> Lon Fuller, 'The Forms and Limits of Adjudication' (1978-1979) 92 *Harvard Law Review* 353. For a good summary of Fuller's argument, see Jeff King, 'The Pervasiveness of Polycentricity' [2008] *Public Law* 101.

<sup>7</sup> Mark Elliot and Robert Thomas, *Public Law* (2nd ed, OUP 2014), 551.

<sup>8</sup> For a summary, see King (n 6) 107-08, citing Trevor RS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001), 188-92; David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed, OUP 2002), 229-30; Stanley de Smith, Harry Woolf and Jeffrey Jowell, *Judicial Review of Administrative Action* (5th ed, Sweet and Maxwell 1995), 311-12.

<sup>9</sup> For a summary (although again not in support of it), see Fabre (n 4) 281.

scholars. For the most part, these counter-arguments highlight the questionable assumptions upon which the arguments from legitimacy and capacity are based. A full consideration of these counter-arguments is well beyond the scope of this chapter and this thesis. However, I will briefly outline a few of them. First, the argument from legitimacy assumes that members of the legislature (and the executive, by extension under a parliamentary system), due to their having been elected, are representatives of the people and are accountable to them through the democratic process. This representativeness and accountability, so the argument from legitimacy goes, renders the elected branches more legitimate than courts. Many scholars have challenged this assumption, especially as it pertains to low-income citizens. As I pointed out in Chapter 2, these scholars emphasise that those with low income (arguably those whom social rights are most intended to protect) do not exert much political influence.<sup>10</sup> Governmental policy-making is heavily influenced by the wealthy through lobbying and interest groups. Low-income citizens – who often feel excluded from the political and democratic process due to the wealthy’s heavy influence – tend not to participate in it, thereby generating a negative feedback loop. Constitutional social rights adjudication, it is said, offers low-income citizens an alternative forum in which their interests may be better protected and it introduces into the system another type of accountability from which low-income citizens may benefit: legal accountability.<sup>11</sup>

Second, the argument from capacity is built on an assumption that the judiciary’s competence vis-à-vis social rights matters is fixed, such that it cannot acquire the skills or the expertise necessary to competently decide such matters. Cécile Fabre, Virginia Mantouvalou and David Wiseman (among others) have questioned this assumption.<sup>12</sup> For them, the argument from capacity underestimates the courts’ ability to develop competence in this area. In Fabre’s words, ‘there is no reason why specialised judges could not be trained to acquire those skills, or could not seek advice from independent experts, as they actually already do’.<sup>13</sup> Wiseman has called the acquisition of such skills and knowledge by the judiciary “competence-building”.<sup>14</sup>

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<sup>10</sup> Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008), 34; Jeff King, *Judging Social Rights* (Cambridge University Press 2012), 157-69; Paul O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2013), 5; Kim Lane Scheppele, ‘A Realpolitik Defense of Social Rights’ (2004) 82 *Texas Law Review* 1921, 1926-27.

<sup>11</sup> Martha Jackman, ‘Charter Review as a Health Care Accountability Mechanism in Canada’ (2010) 18 *Health Law Journal* 1, 2; King, *Judging Social Rights* (n 10) 60; Gargarella (n 4) 107-08; Colm O’Cinneide, ‘Legal Accountability and Social Justice’ in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2013), 406-07; Margot Young, ‘Social Justice and the *Charter*: Comparison and Choice’ (2013) 50 *Osgoode Hall Law Journal* 669, 670-71.

<sup>12</sup> Fabre (n 4) 281-82; Virginia Mantouvalou, ‘In Support of Legalisation’ in Conor Gearty and Virginia Mantouvalou, *Debating Social Rights* (Hart Publishing 2010), 117; David Wiseman, ‘Competence Concerns in Charter Adjudication: Countering the Anti-Poverty Incompetence Argument’ (2006) 51 *McGill Law Journal* 503.

<sup>13</sup> Fabre (n 4) 282.

<sup>14</sup> Wiseman (n 12) 516.

Accordingly, as Aoife Nolan, Bruce Porter and Malcolm Langford have explained, quite appropriately I would think, if ‘states have concerns about the competence of courts ... to intervene in this area, they might want to investigate how courts ... can enhance their capacity, or how they can be assisted by other institutional actors in performing their necessary role, rather than suggesting that rights claimants should be left without any hearing or remedy at all’.<sup>15</sup>

Finally, both arguments assume that judicial review will take on a “strong form” with the effect that courts, in enforcing social rights, will overrule the decisions and actions of the elected branches. This assumption leads to a further assumption which is all-too-familiar in the social rights literature: that constitutional social rights enforcement requires courts to make the “hapless choice” between what Katharine Young has termed the “two wrongs of enforcement” – judicial usurpation and abdication: by assuming strong-form judicial review, the arguments from legitimacy and capacity assume that courts face a binary choice between usurping the policy-making role of the government and abdicating their judicial role as protector and enforcer of rights.<sup>16</sup> However, as with the other two counter-arguments, these assumptions have proved to not be well-founded. There is an ever-growing trend among social rights scholars to advocate weaker forms of judicial review built on principles of inter-institutional dialogue and deliberative democracy.<sup>17</sup> In essence, these scholars have suggested that courts can work *with* the elected branches, rather than be pitted against them, in their development of social policy. These weaker forms of judicial review make it no longer necessary for courts to choose between usurpation and abdication; instead they may opt for a middle ground between them. As Matthias Klatt has said, ‘usurpation and abdication do not represent a strict antagonism. Rather, they are a matter of degree. Both represent the two ends of the spectrum of different forms of judicial review’.<sup>18</sup>

These counter-arguments are not to say that the arguments from legitimacy and capacity are without merit. There is good reason for us to be concerned about giving the courts too much power vis-à-vis social rights so as to “usurp” government’s policy-making role. To use Colm O’Cinneide’s words, ‘it would be foolish to rely on legal controls to give effect to a “total” vision of social justice, i.e. a comprehensive system of resource distribution that satisfies a particular

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<sup>15</sup> Aoife Nolan, Bruce Porter and Malcolm Langford, ‘The Justiciability of Social and Economic Rights: An Updated Appraisal’ (Human Rights Consortium, Belfast, Northern Ireland, 2007) <<http://socialrightscura.ca/documents/publications/BP-justiciability-belfast.pdf>> accessed 13 July 2017, 6.

<sup>16</sup> Katharine Young, *Constituting Economic and Social Rights* (OUP 2012), 34. See also Frank I Michelman, ‘The Constitution, Social Rights, and Liberal Political Justification’ (2003) 1 *International Journal of Constitutional Law* 13, 16.

<sup>17</sup> Rosalind Dixon, ‘Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited’ (2007) 5 *International Journal of Constitutional Law* 391; Alana Klein, ‘Judging as Nudging’ (2008) 39 *Columbia Human Rights Law Review* 351; O’Connell (n 10) 194-96; Scheppele (n 10) 1935; Young (n 16) 6.

<sup>18</sup> Matthias Klatt, ‘Positive Rights: Who Decides? Judicial Review in Balance’ (2015) 13 *International Journal of Constitutional Law* 354, 361. See also King, *Judging Social Rights* (n 10) 8.

philosophical ideal of group justice'.<sup>19</sup> However, the arguments from legitimacy and capacity do not warrant the conclusion that social rights are/should be non-justiciable. They suggest, rather, that 'caution is warranted' in our determination of how courts should enforce social rights.<sup>20</sup>

And in recent years, it appears that scholars, jurists and politicians (for the most part) have accepted that conclusion. Following the height of the justiciability debate in the 1980s-1990s, most new democracies opted for the inclusion of express and justiciable constitutional social rights provisions.<sup>21</sup> The classic example here is the constitution of South Africa (the topic of Chapter 5). In fact, more than 90 percent of constitutions globally contain at least one express and justiciable social (or economic) rights provision.<sup>22</sup> Moreover, in many more established democracies whose constitutions do not include express provisions, courts have recognised implicit constitutional protection for social rights. This is the case in countries like India, Germany and Israel.<sup>23</sup> So, as O'Conneide has summarised the current climate around the justiciability of social rights, 'it is clear that key constitutional actors in many states (including legislators, judges and academic commentators) are becoming more accepting of the possibility that judicial protection of social rights may be a worthwhile addition to the repertoire of modern constitutionalism'.<sup>24</sup> And accordingly, as commentators like David Landau and Anashri Pillay have highlighted, recent years have witnessed a shift in the foregoing debate from the issue of justiciability to that of judicial approaches for enforcing social rights.<sup>25</sup> In other words, the focus of the debate has gone from *whether* courts should enforce social rights to *how* they should do so.

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<sup>19</sup> O'Conneide (n 11) 401.

<sup>20</sup> *ibid* 401. See also King, *Judging Social Rights* (n 10) 8.

<sup>21</sup> For more information, see the Toronto Initiative for Economic and Social Rights dataset which is available at <<http://www.tiesr.org/data.html>>.

<sup>22</sup> Courtney Jung, Ran Hirschl and Evan Rosevear, 'Economic and Social Rights in National Constitutions' (2014) 62 *The American Journal of Comparative Law* 1043, 1053. Moreover, 70 percent of constitutions include at least one social right which is recognised in the constitution itself as justiciable (1053).

<sup>23</sup> *Hartz IV*, BVerfG, Case No 1 BvL, 1/09, 125 BVerfGE 175; *Hassan v National Insurance Institute* [2012] HCJ 10662/04; *Olga Tellis & Ors v Bombay Municipal Corporation* [1985] 2 Supp SCR 51.

<sup>24</sup> Colm O'Conneide, 'The Problematic of Social Rights – Uniformity and Diversity in the Development of Social Rights Review' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014), 310.

<sup>25</sup> Louise Arbour, 'Freedom From Want – From Charity to Entitlement' (Dominion Institute, LaFontaine-Baldwin Lecture, 2005) <[http://www.urbancentre.utoronto.ca/pdfs/elibrary/Arbour\\_Charity-Entitlement\\_.pdf](http://www.urbancentre.utoronto.ca/pdfs/elibrary/Arbour_Charity-Entitlement_.pdf)> accessed 11 August 2017, 13; David Landau, 'The Reality of Social Rights Enforcement' (2012) 53 *Harvard International Law Journal* 189, 196; Malcolm Langford, 'The Justiciability of Social Rights: From Practice to Theory' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008), 29; Christopher P Manfredi, 'Déjà Vu All Over Again: *Chaoulli* and the Limits of Judicial Policymaking' in Colleen M Flood, Kent Roach and Lorne Sossin (eds), *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (University of Toronto Press 2005), 147; Nolan, Porter and Langford (n 15) 35; Marius Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 *South African Journal on Human Rights* 383, 404-05; Anashri Pillay, 'Economic and Social Rights Adjudication: Developing Principles of Judicial Restraint in South African and the United Kingdom' [2013] *Public Law* 599, 599.

For these reasons, I think that it may be fairly concluded that social rights (at least as a broad category) are justiciable. Of course, there will be readers who will disagree with my conclusion in this regard; and for those readers, I can do no more than refer to the vast body of literature which I have already cited above. However, in recognition of the apparent shift in the social rights enforcement debate, and in an effort to continue moving the debate forward, I start my argument here from the position that social rights are justiciable. Thus, it is not my intention to contribute to the justiciability debate (at least not directly); instead, I seek to contribute to the social rights enforcement debate in its new form (or “second wave”) – that is, the question of how courts should enforce social rights.<sup>26</sup> And since my argument assumes that social rights are justiciable (with courts thereby having some role to play in enforcing those rights), it follows, for the reasons I described earlier, that courts must occupy a special role in the social rights network.

### **How Trust?: Transforming Political Trust into a Social Rights Enforcement Tool**

The role which I propose for courts in their enforcement of citizens’ social rights is what I call “mediators of government trustworthiness”. To outline this judicial role, I will start by explaining the concept of trustworthiness and its relationship to trust. Then, I will move onto what I mean by the term “mediators” and how I conceive of courts “mediating” government trustworthiness when enforcing constitutional social rights. However, before fully delving into the details of this judicial role, I would like to make one point clear. This thesis does not suggest that the courts are the ideal branch of government to realise citizens’ constitutional social rights. For the reasons already outlined (ie legitimacy and capacity), the executive and legislative branches of government are better-positioned than the courts to realise citizens’ social rights. Moreover, there may be other good (and some may even argue better) means for citizens to vindicate their social rights than adjudication by courts (eg administrative tribunals, ombudsmen). That said, where social rights are constitutionalised, courts have a constitutional obligation to enforce them against the other branches of government. Courts as “mediators of government trustworthiness” is proposed in this chapter (and this thesis) as a defensible role with these circumstances in mind.

#### *What is Government Trustworthiness?*

The concept of trustworthiness follows on directly from the concept of trust. As the term itself suggests, trustworthiness implies that a trustee in a trust relationship is *worthy* of the truster’s trust

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<sup>26</sup> Richard Stacey, ‘Dynamic Regulatory Constitutionalism: Taking Legislation Seriously in the Judicial Enforcement of Economic and Social Rights’ (2017) 31 *Notre Dame Journal of Law, Ethics and Public Policy* 85, 85-86.

in him. As such, it represents the likelihood that the trustee will fulfil the truster's trust.<sup>27</sup> So, if trust is (as I argued in Chapter 1) a set of expectations held by the truster regarding whether the trustee will act with good will, competence and in fulfilment of his fiduciary responsibility to the truster, trustworthiness indicates that the trustee is likely to act in accordance with those expectations. A trustee is "trustworthy" if he is likely to act in accordance with the truster's expectations of trust. Hence, applying this idea to the citizen-government relationship – where trust means that citizens hold the expectations outlined in Chapter 2 (ie that the elected branches will exercise good will toward citizens, will fulfil their fiduciary responsibility to them and have the requisite competence to exercise control over social goods and services) – trustworthiness denotes that the elected branches are likely to act in accordance with those expectations.

A trustee's trustworthiness may stem from one of two sources.<sup>28</sup> First, a trustee may be trustworthy owing to his person or character. Put simply, his person or character make it such that acting with good will, competence and in fulfilment of his fiduciary responsibility is likely. If the truster trusts the trustee in these circumstances, the resultant trust is described, it will be recalled, as "personal trust" or "primary trust". Second, and important for my purpose, a trustee may be trustworthy owing to external constraints which have been imposed upon him so as to restrict the discretion which he exercises over the good or service. Here, rather than the trustee's person or character, it is the external constraints upon him which make it likely that the trustee will act with good will, competence and in fulfilment of his fiduciary responsibility. If the truster trusts the trustee in these circumstances, the resultant trust is "impersonal trust" or "secondary trust". Applying these two sources of trustworthiness to the citizen-government relationship, the elected branches' trustworthiness may therefore stem from either the person or character of the personnel who staff those branches, or, alternatively, from external constraints which have been imposed upon them in their decision-making on behalf of those institutions. As Philip Pettit has summed up these two sources of government trustworthiness, 'We may trust our politicians or bureaucrats ... to behave appropriately on the grounds that they are effectively bound to do so by the disciplines of office. Or we may trust them to behave appropriately on the grounds that

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<sup>27</sup> For this reason, some writers have even defined trust (rather than in terms of the expectations I have of good will, competence and fiduciary responsibility) in a circular manner in terms of the truster's expectations *about the trustee's trustworthiness*: a truster may be said to trust the trustee if she expects trustworthiness from him: Lawrence Becker, 'Trust as Noncognitive Security About Motives' (1996) 107 *Ethics* 43, 44.

<sup>28</sup> Orlando Patterson, 'Liberty Against the Democratic State: On the Historical and Contemporary Sources of American Trust' in Mark E Warren (ed), *Democracy and Trust* (Cambridge University Press 1999); Philip Pettit, 'Republican Theory and Political Trust' in Valerie Braithwaite and Margaret Levi (eds), *Trust and Governance* (Russell Sage Foundation 1998); Jocelyn Pixley, 'Impersonal Trust in Global Mediating Organizations' (1999) 42 *Sociological Perspectives* 647; Susan P Shapiro, 'The Social Control of Impersonal Trust' (1987) 93 *American Journal of Sociology* 623; Susan Shapiro, 'The Grammar of Trust' in Jocelyn Pixley (ed), *New Perspectives on Emotions in Finance: The Sociology of Confidence, Fear and Betrayal* (Routledge 2012).

they are cooperatively responsive to the reliance of individual people, or of the people as a whole, to their decisions. Or of course we may trust them at once on both sorts of grounds.<sup>29</sup>

### *The Promotion of Government Trustworthiness Through Judicial Constraints*

When I say that courts should act as “mediators” of government trustworthiness, I mean that they should promote the elected branches’ trustworthiness vis-à-vis social rights by offering citizens a means of impersonal trust. To explain this point, I shall refer the reader back to Chapter 3 and specifically to Susan Shapiro’s work on trust (which, it will be recalled, focused on impersonal trust).<sup>30</sup> To recap from Chapter 3: Shapiro has argued that actors who she has called “guardians of trust” (actors including professional associations, regulatory watchdogs and certified public accountants) – through the imposition of various social control measures (or social constraints) on a trustee in his relationship with a truster – can foster trust (specifically impersonal trust) between the truster and the trustee. In essence, it is Shapiro’s argument that via the imposition of such constraints, guardians of trust can promote a trustee’s trustworthiness.<sup>31</sup> They can increase the likelihood that the trustee will fulfil the truster’s trust. And it is this promotion of the trustee’s trustworthiness which fosters the truster’s trust in the trustee.

I suggest that like Shapiro’s guardians of trust, courts – in enforcing constitutional social rights – can impose trustworthiness-promoting constraints on the elected branches vis-à-vis their exercise of discretion over social goods and services. By doing so, courts act as a sort of guardian of trust (to use Shapiro’s term). I also suggest that through the imposition of such constraints, courts may be said to “mediate” the elected branches’ trustworthiness. To be clear, I use the term “mediate” not in its traditional legal sense but more in its sociological sense. From Chapter 3, we know that in the social rights network, courts occupy a position between citizens and the elected branches. Courts are an intermediary in the citizen-government relationship. If the courts constrain the elected branches’ discretion so as to promote their trustworthiness, I think that it is fair to say that courts are “mediating” that relationship – and they do so via trustworthiness. Accordingly, I label this proposed role for courts as “mediators of government trustworthiness”.

### *Defining Trustworthiness-Promoting Constraints*

This naturally leads me to my next question: what kinds of judicial constraint in social rights adjudication are “trustworthiness-promoting”? Based on the conceptual groundwork which I

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<sup>29</sup> Pettit (n 28) 299.

<sup>30</sup> Shapiro, “The Social Control” (n 28).

<sup>31</sup> For a similar view, see Pettit (n 28).

laid in Chapters 1 and 2, I contend here that trustworthiness-promoting constraints are characterised by two general features. First, contrary to what Cass Sunstein has called “judicial minimalism”, courts must decide social rights cases broadly.<sup>32</sup> They must set ‘broad rules for the future’ so as to prospectively constrain the elected branches’ discretion over social goods and services.<sup>33</sup> Why? As trust is a set of expectations (as I defined it in Chapter 1), and expectations are by definition beliefs about future events, trust is necessarily prospective. In the simplest of terms, trust relates to the trustee’s exercise of control over the good or service *in the future*. So, if trust in the citizen-government relationship is a set of expectations held by citizens regarding how the elected branches will (in the future) exercise their control over social goods and services (as I defined it in Chapter 2), for a judicial constraint to promote government trustworthiness (and so, increase the likelihood of the elected branches fulfilling citizens’ trust), it must constrain the elected branches’ *future* conduct. And a broad judicial ruling does just that (at least usually). Second, given trust’s focus on procedure, courts’ broad rulings must not be directed at the specific social goods and services to which citizens are entitled (ie the outcome of the government’s decision-making), but rather, the process by which the elected branches exercise their discretion.<sup>34</sup> Succinctly, it is the government’s procedure vis-à-vis the provision of social goods and services – rather than the outcome thereof – which must be the focus of constraint by the courts. Specifically, the judgments of courts must target what I have identified in this thesis as the constituent expectations of trust (good will, fiduciary responsibility and competence) so as to make their fulfilment by the elected branches more likely. And by making these expectations’ fulfilment more likely, such judgments, in effect, render the elected branches more trustworthy.<sup>35</sup>

The scope of this thesis does not permit me to set out a detailed account of what precisely trustworthiness-promoting judicial constraints would entail and how exactly courts can impose them (so as to mediate government trustworthiness). For this reason, I leave that line of inquiry for future research. However, I would like to outline, in very brief form, what such an approach to social rights enforcement would, generally speaking, look like. Generally speaking, it would have courts holding the elected branches to a *standard of trustworthiness*. Such a standard would consist of two inter-related forms of judicial intervention in social rights cases. First,

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<sup>32</sup> Cass R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press 1999), 10.

<sup>33</sup> *ibid* 9-10. However, as will become apparent shortly, I use the language of “standards” rather than “rules”.

<sup>34</sup> As I noted in Chapter 2, the respect for the right to equality sub-element of procedural fairness under the expectation of good will introduces some complication. I elaborate upon this point later in the chapter.

<sup>35</sup> By focusing on procedure rather than outcome, the proposed approach mitigates the concerns which Cass Sunstein outlines regarding judicial “maximalism”, including the possibility for mistakes. Moreover, Sunstein notes that minimalism is not appropriate ‘when a maximalist approach will promote democratic goals either by creating the preconditions for democracy or by imposing good incentives on elected officials, incentives to which they are likely to be responsive’: Sunstein (n 32) 57. In my view, trustworthiness is such a precondition for democracy and the trustworthiness standard proposed herein imposes the sort of good incentives which Sunstein describes.

courts would use the constituent expectations of trust to expressly define the elected branches' obligations to citizens in exercising their control over social goods and services. Those obligations are, in the broadest terms: (i) in line with the expectation of good will, to not behave intransigently and to employ fair procedures, including those which are transparent, participatory and respectful of citizens' rights (including equality); (ii) consistent with the expectation of fiduciary responsibility, to ensure that their staff's interests do not sway their decisions, so as to unfairly discount or disregard citizens' or a subset of citizens' interests; and (iii) corresponding to the expectation of competence, to develop (and implement) their social policies and programmes in accordance with the principles of EBPM. Courts would explicitly set out these obligations in their judgments (generally and as they play out in particular areas of social welfare) so that the elected branches and citizens know what their obligations and entitlements, respectively, are.

Second, courts would hold the elected branches accountable where they fail to meet this trustworthiness standard. To explain what such accountability would entail, again only generally speaking, I will rely on the useful definition of the term offered by Barbara Cameron in her work on social welfare in Canada. Cameron has defined accountability as 'a relationship between parties whereby one party is answerable to the other for the performance of commitments or obligations that are evaluated against criteria or standards known to the parties, and sanctions are applied for failure to meet the commitments'.<sup>36</sup> Adapting Cameron's definition of accountability for the present purpose, the elected branches would be answerable to the courts (and to citizens through the courts) for their constitutional social rights obligations. In this regard, the courts would be responsible for reviewing the elected branches' social welfare legislation and executive action vis-à-vis welfare. The 'criteria or standards' against which that legislation and executive action are evaluated would be derived from the constituent expectations of trust (as I outlined earlier). In other words, courts would, in enforcing constitutional social rights, in turn, *enforce* the elected branches' trustworthiness.<sup>37</sup> And where the elected branches have failed to comply with the trustworthiness standard (as outlined), they would be censured and sanctioned by the courts.

From a government trustworthiness-promoting perspective, it is absolutely imperative that *both* forms of judicial intervention be present – that is, it is not enough that courts review social welfare legislation and executive action vis-à-vis welfare without expressly defining the elected branches' obligations to citizens in advance. This is so for two inter-related reasons. For

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<sup>36</sup> Barbara Cameron, 'Accountability Regimes for Federal Social Transfers: An Exercise in Deconstruction and Reconstruction' in Peter Graefe, Julie M Simmons and Linda Ann White (eds), *Overpromising and Underperforming?: Understanding and Evaluating New Intergovernmental Accountability Regimes* (University of Toronto Press 2013), 260, cited in Martha Jackman, 'The Future of Health Care Accountability: A Human Rights Approach' (2016) 47 *Ottawa Law Review* 441, 443.

<sup>37</sup> Piotr Sztompka, *Trust: A Sociological Theory* (Cambridge University Press 1999), 87.

one thing, as Piotr Sztompka has pointed out, accountability (like that which I described above) ‘enhances trustworthiness because it changes the truster’s calculation of interests; it adds an extra incentive to be trustworthy, namely to avoid censure and punishment’.<sup>38</sup> Hence, we should expect judicial accountability to render the elected branches more trustworthy because they have an incentive to act trustworthily (ie to avoid the courts’ censure/punishment). However, if the elected branches are not made aware of what is expected of them in advance – and therefore, that for which they will be censured and/or punished by the courts – they are not likely to change their behaviour accordingly. For another, an express judicial definition of the elected branches’ obligations provides citizens (and those who represent citizens such as special interest groups and non-governmental organisations) with the tools they need to hold the elected branches accountable via non-judicial means. Since litigation is time-consuming and expensive, to truly promote government trustworthiness (ie increase the likelihood that the elected branches will act with good will, in fulfilment of their fiduciary responsibility and with the requisite competence) accountability (with its censures/punishments) cannot be limited to the courts.

### **Why Trust?: Justifying Political Trust as a Tool for Social Rights Enforcement**

If we accept, based on the foregoing, that the concept of political trust can be transformed into an adjudicative tool for social rights enforcement, it still does not justify *why*. Why should political trust be at the centre of social rights enforcement, operating as such a tool for courts in their enforcement role? Surely, the concept of political trust has some intuitive appeal when it comes to social rights enforcement: it seems correct on an intuitive level that courts, in fulfilling their role as enforcers of social rights, should be concerned with citizens’ trust in government. After all, should citizens not be entitled to trust their government vis-à-vis the social goods and services which they need; and so, should courts, in overseeing the citizen-government relationship, not be concerned with such? But with that said, I will now present four principled reasons (that is, beyond intuitive appeal) why I think that courts should use political trust as an adjudicative tool in their enforcement of social rights. The first follows from the fiduciary nature of the citizen-government relationship. Specifically, if we accept that the citizen-government relationship is a fiduciary relationship (as I presented in Chapter 2), then there is a good argument, based on the work of fiduciary law scholars, that trust should be at the centre of social rights enforcement. The second relates back to the Introduction and the instrumental value of public trust in government. I contend that by holding the elected branches to a standard of trustworthiness, courts should be able to foster citizens’ trust in the elected branches and, in

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<sup>38</sup> *ibid* 87-88.

turn, generate the valuable ends which follow from public trust in government. Third, I argue that the concept of political trust fits particularly well with social rights adjudication. By this I mean that political trust responds well to many of the difficulties which social rights enforcement is said to raise. And the final justification in this regard is connected with a standard defence for constitutional review: that is, constitutional review's potential to support or enhance democracy. I suggest that, consistent with this defence, the trustworthiness standard outlined herein can be said to support democracy. In the rest of this part, I will address each principled reason in turn.

*(i) The Relevance of Trust Follows from the Fiduciary Nature of the Citizen-Government Relationship*

The first reason I present in favour of courts using political trust as an adjudicative tool for social rights enforcement stems from the fiduciary nature of the citizen-government relationship. In Chapter 2, I built an argument, drawing on the work of public law scholars like Evan Fox-Decent and Evan Criddle as well as sociologist Bernard Barber, why the citizen-government relationship should be characterised as such: that is, it is a fiduciary relationship wherein the elected branches are a fiduciary to citizens. It was this characterisation which yielded the expectation of fiduciary responsibility as a constituent expectation of trust in that relationship.

If we accept the foregoing characterisation, there is a good argument which follows therefrom that the objective of social rights enforcement should be trust. In the private law context, fiduciary law scholars have argued, perhaps not surprisingly, that the law regulating the relationship between fiduciaries and their principals should centre on the concept of trust.<sup>39</sup> Seeing as fiduciary relationships have trust at their core, fiduciary law, in essence, 'regulates relationships that are based on reasonable trust'.<sup>40</sup> And thus, so the argument goes, it makes sense that fiduciary law should revolve around trust as a concept. In the most recent and, in my view, clearest example of this argument, Matthew Harding has claimed that given the centrality of trust to the fiduciary relationship, fiduciary law ought to be aimed at facilitating trusting relationships between fiduciaries and principals. In his words, 'a main purpose of fiduciary law [ought to be] to enable such relationships to form, persist and deepen in ways that generate the instrumental and intrinsic value' which such relationships have.<sup>41</sup> For Harding, fiduciary law can achieve this purpose by providing principals with 'guarantees that the conduct of the fiduciaries

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<sup>39</sup> Tamar Frankel, 'Fiduciary Law' (1983) 71 California Law Review 795; Joshua Getzler, "'As If.'" Accountability and Counterfactual Trust' (2011) 91 Boston University Law Review 973; Matthew Harding, 'Trust and Fiduciary Law' (2013) 33 OJLS 81.

<sup>40</sup> Tamar Frankel, 'Fiduciary Law in the Twenty-First Century' (2011) 91 Boston University Law Review 1289, 1291.

<sup>41</sup> Harding (n 39) 97.

will be consistent with the requirements of trustworthiness'.<sup>42</sup> In other words, owing to fiduciary law, a principal in a fiduciary relationship is able to expect the fiduciary to act trustworthily and so, can trust him with respect to the property or power which is at issue in their relationship.

If we apply the foregoing reasoning to the citizen-government relationship, it follows that social rights enforcement should centre on the concept of political trust. Why? Given that social rights enforcement is the means by which courts oversee the citizen-government relationship, its governing law (social rights law) regulates that relationship. And based on the above reasoning – that the law regulating a fiduciary relationship should centre on trust – it follows that social rights law – as law regulating a fiduciary relationship (the citizen-government relationship) – should centre on political trust. Social rights law should be aimed at facilitating trust between citizens and the elected branches with respect to social rights so as to 'generate the instrumental and intrinsic value' of citizen trust in the citizen-government relationship.

Granted, I recognise the dangers of extending private law principles to a public law context (given their differences both in purpose and application).<sup>43</sup> But I should point out that in characterising the citizen-government relationship as a fiduciary relationship, I do not adopt a "literalist" approach to public fiduciary theorising.<sup>44</sup> That is, I am not suggesting that the elected branches' duties to citizens are literally identical to those of a trustee in the private law context. And in arguing that social rights enforcement should centre on political trust, I am not advocating transplantation of private law doctrine to public law. I am suggesting, rather, as Fox-Decent has phrased it, that 'the principles relevant to acting on behalf of another in private law might help illuminate' this public law context.<sup>45</sup> Thus, to be sure, we need to exercise 'caution when considering the application of fiduciary concepts to public law' (and fiduciary duties in a public law context will assume a different form).<sup>46</sup> That said, I do think that the above broad reasoning can be justifiably extended to the social rights context in light of the fact that the fiduciary political theory literature has, like the private law literature, recognised trust's centrality to fiduciary relationships. For example, recall that for Fox-Decent, trust is the basis for the

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<sup>42</sup> *ibid* 95.

<sup>43</sup> Seth Davis, 'The False Promise of Fiduciary Government' (2014) 89 *Notre Dame Law Review* 1145, 1198-1206; Timothy Endicott, 'Equity and Administrative Behaviour: A Commentary' in PG Turner (ed), *Equity and Administration* (Cambridge University Press 2016), 375. For example, Timothy Endicott has noted that in the administrative law context, the role of the fiduciary is 'deeply different' from the role of administrative agencies in general and the role of judges in enforcing the fiduciary duties of trustees is different from their role in reviewing the lawfulness of administrative decision-making (375).

<sup>44</sup> Evan Fox-Decent, 'Challenges to Public Fiduciary Theory: An Assessment' in D Gordon Smith and Andrew S Gold (eds), *Research Handbook on Fiduciary Law* (Edward Elgar 2018). The "literalist" terminology has been used by Stephen R Galoob and Ethan J Leib, 'The Core of Fiduciary Political Theory' in D Gordon Smith and Andrew S Gold (eds), *Research Handbook on Fiduciary Law* (Edward Elgar 2018).

<sup>45</sup> Fox-Decent (n 44) 382 (fn 21).

<sup>46</sup> *ibid* 400.

state's authority over its subjects and its duty to them: their trust authorises the state to act on their behalf and, in turn, the state must act on the basis of that trust. So, given the public law literature's recognition of the key role played by trust in fiduciary relationships, I do not think that the above reasoning is misplaced in the social rights context.

Further, my suggestion in this regard finds support in an argument which Paul Finn has made. Finn – who may be included in the camp of fiduciary political theory scholars – has argued that we may fairly characterise government as a trust (and so, characterise government actors as trustees for the people).<sup>47</sup> In support of his argument, he has advanced three specific propositions: (i) that sovereign power resides in the people; (ii) that where the public's power is entrusted to others for the purposes of civil governance, the relevant actors are trustees for the people; and (iii) that those 'entrusted with public power are accountable to the public for the exercise of their trust'.<sup>48</sup> As part of his argument, and importantly for the present purpose, Finn has contended that the people – in virtue of their sovereignty – are entitled to have certain expectations about the manner of their governing. And such expectations may ground corresponding duties on government actors. One key expectation is what Finn has called the "integrity principle". It necessitates that 'government is structured and practised in ways that invite and retain public trust in government itself'.<sup>49</sup> In other words, the people are entitled to expect that government actors – as trustees for the people – will exercise public power in a trustworthy manner; and government actors may have a corresponding duty to the people to exercise the power which has been entrusted to them trustworthily.<sup>50</sup> Therefore, in light of Finn's work in this regard, there is some precedent in the public law literature for the idea that political trust can and should be used as the basis for a government's obligations to its citizens.

*(ii) Promoting Government Trustworthiness Should Generate the Valuable Ends of Public Trust in Government*

Additionally, the instrumental value of trust in the citizen-government relationship is itself a reason why the concept should be at the centre of social rights enforcement. As I documented in the Introduction, social scientists have long recognised the value of public trust in government

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<sup>47</sup> Paul Finn, 'Public Trust and Public Accountability' (1994) 3 Griffith Law Review 224; Paul Finn, 'A Sovereign People, A Public Trust' in PD Finn (ed), *Essays on Law and Government, Volume 1: Principles and Values* (The Law Book Company 1995).

<sup>48</sup> Finn, 'Public Trust and Public Accountability' (n 47) 227-28.

<sup>49</sup> Finn, 'A Sovereign People' (n 47) 27.

<sup>50</sup> In recent work, Finn has suggested that 'we should be slow to embrace' such trust/fiduciary principles 'so as to channel and control official decision making' (including judicial review), in large part owing to the fact that, in Finn's view, they are unlikely to 'provide workable criteria upon which to found judicial review of official decision making': Paul Finn, 'Public Trusts, Public Fiduciaries' (2010) 38 Federal Law Review 335, 335-36. However, I disagree with Finn in this regard; I suggest that my conceptualisation of trust in this thesis does provide such workable criteria.

to well-functioning democracies. It has been argued and experimentally demonstrated that such trust encourages public cooperation, affecting the public's willingness to accept authority decisions, its feelings of obligation to obey laws and its performance evaluations of authority figures. Accordingly, public trust in government has been tied to such valuable ends as social stability, economic welfare and effective governance.<sup>51</sup> Moreover, social scientists have noted trust's especial importance vis-à-vis social policy. I will not retrace that literature here.

Based on the application of the network conception of trust to the citizen-government relationship, we can expect constitutional social rights adjudication to be able to impact (and in the right circumstances, to foster) citizens' trust in the elected branches with respect to social rights. If we accept that conclusion, the promotion of government trustworthiness offers a suitable path by which such fostering of citizens' trust can occur. By imposing trustworthiness-promoting constraints on the elected branches (in the way I described earlier), courts should be able (via constitutional social rights adjudication) to foster citizens' trust in the elected branches with respect to social rights; and accordingly, they should be able to generate the foregoing valuable ends. There is a considerable body of theoretical literature to support this conclusion.<sup>52</sup> That literature makes clear that institutions 'can be made to support trust between persons by making them trustworthy'.<sup>53</sup> As Russell Hardin has recognised, 'The best device for creating trust is to establish and support trustworthiness'.<sup>54</sup> Hardin has explained this relationship between trust and trustworthiness as follows: a truster's learning to trust a trustee depends on the *success* of her trusting – that is, she will learn to trust the trustee if her trust therein proves to be well-placed. And the success of her trusting depends, in turn, on the trustee's *trustworthiness*: if the trustee is trustworthy, the truster's trust in him will likely prove to be well-placed. Therefore, as Hardin has quite reasonably concluded, 'we can imagine that enhancing trustworthiness in general will increase levels of trust'.<sup>55</sup> For this reason, writers on trust (including Shapiro as will be recalled from Chapter 3 and earlier) have argued that institutions may foster trust by imposing social control measures on the trustee, thereby promoting his trustworthiness.<sup>56</sup> Applying this theory to constitutional social rights adjudication, we may conclude that courts, by imposing

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<sup>51</sup> Russell J Dalton, *Democratic Challenges, Democratic Choices: The Erosion of Political Support in Advanced Industrial Democracies* (OUP 2004); Pippa Norris, 'Conclusion: The Growth of Critical Citizens and Its Consequences' in Pippa Norris (ed), *Critical Citizens: Global Support for Democratic Government* (OUP 1999); Bo Rothstein, *Just Institutions Matter* (Cambridge University Press 1998).

<sup>52</sup> Karen S Cook, Russell Hardin and Margaret Levi, *Cooperation without Trust?* (Russell Sage Foundation 2005); Russell Hardin, 'Trustworthiness' (1996) 107 *Ethics* 26; Pettit (n 28); Shapiro, 'The Social Control' (n 28).

<sup>53</sup> Hardin (n 52) 31.

<sup>54</sup> *ibid* 29.

<sup>55</sup> *ibid* 32.

<sup>56</sup> Cook, Hardin and Levi (n 52); Hardin (n 52); Pettit (n 28); Shapiro, 'The Social Control' (n 28).

trustworthiness-promoting constraints, should be able to foster citizens' trust in the elected branches with respect to social rights; and in turn from this, they should be able to generate the valuable ends which have been said and demonstrated to come with public trust in government.

Alternatively, even if we do not accept the foregoing (ie that by promoting the elected branches' trustworthiness we should be able to foster citizens' trust in them), there is a good argument that the promotion of trustworthiness in and of itself will generate the valuable ends of public trust in government. To repeat: the value of such trust stems from its effect on the public's willingness to accept authority decisions, feelings of obligation to obey laws and performance evaluations of authority figures. It is these effects which are said to generate the valuable ends of social stability, economic welfare and effective governance. But the research of Tom Tyler has established that, in actuality, it is not people's trust in authorities per se which is linked with these effects, but, more precisely, *people's attributions of authority trustworthiness*.<sup>57</sup> If people consider organisational authorities to be trustworthy (even though they may not trust them for whatever reason), then they are more likely to accept their decisions, obey their laws and positively evaluate them. So, regardless of whether trustworthiness has value as either a path to trust or in itself, it is reasonable to expect that courts' promotion of the elected branches' trustworthiness in constitutional social rights adjudication will generate the valuable ends noted.

*(iii) The Concept of Trust Fits Particularly Well with Constitutional Social Rights Adjudication*

Third, I suggest that political trust has normative potential for social rights enforcement because trust (as theorised in earlier chapters) fits particularly well with social rights adjudication and the difficulties which it is said to raise. Here, I advance three arguments: (a) because a constituent element of a trust relationship is discretion/uncertainty, trust responds to an aspect of social rights which has proven problematic for social rights adjudication – their prospectivity; (b) unlike much of the debate to date, centring social rights enforcement on trust rightfully brings the beneficiaries of social goods and services – that is, citizens – to the centre of social rights matters by shifting the emphasis of such adjudication from the bilateral relationship between courts and the elected branches, to the triangular relationship between courts, the elected branches and citizens; and (c) the trustworthiness standard which I propose offers a good middle ground between the “two wrongs of enforcement” – judicial usurpation and judicial abdication.

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<sup>57</sup> Tom R Tyler and Peter Degoey, ‘Trust in Organizational Authorities: The Influence of Motive Attributions on Willingness to Accept Decisions’ in Roderick M Kramer and Tom R Tyler (eds), *Trust in Organizations: Frontiers of Theory and Research* (Sage Publications 1996), 336.

(a) Trust Responds to the Prospectivity of Social Rights

Abram Chayes noted decades ago that traditional adjudication has a “retrospective orientation”: it focuses on the past conduct of the parties, is concerned primarily with assessing the legal consequences of that past conduct, and the remedy granted by the court derives logically from that conduct.<sup>58</sup> Chayes argued that this traditional idea of adjudication did not fit well with the then-emerging model of “public law litigation” in the United States. That model (exemplified by U.S. cases involving school desegregation like *Brown v Board of Education II*) is characterised by courts reviewing the application of regulatory policy and creating/managing ‘complex forms of ongoing relief’ in the form of injunctions, with the effect of reforming public institutions.<sup>59</sup> Chayes attributed the misfit between the public law litigation model and the traditional idea of adjudication, in large part, to the model’s *prospectivity* – ie its focus on the parties’ future conduct.

Public law litigation, Chayes suggested, is prospective in three respects. First, in public law litigation the court’s liability determination ‘is not simply a pronouncement of the legal consequences of past events’ (as it is for the traditional idea of adjudication) ‘but to some extent a prediction of what is likely to be in the future’.<sup>60</sup> Courts must make educated guesses about whether future actions ‘will materiali[s]e, in what circumstances, and with what consequences’.<sup>61</sup> Second, remediation in public law litigation is prospective in purpose. Whereas under the traditional idea of adjudication, relief seeks to ‘compensate for past wrong’, in public law litigation it ‘seeks to adjust future behavior[u]r’.<sup>62</sup> Public law litigation achieves this purpose by making use of injunctive relief. Finally, according to Chayes, injunctive relief is itself prospective in character. Not only is it a significant constraint on the parties’ future conduct (being enforceable by contempt), but because it is continuing, the parties may return to the court at a future time to enforce the order or modify it should the surrounding circumstances change.<sup>63</sup>

For the most part, constitutional social rights litigation fits within Chayes’s broader category of public law litigation. Consistent with his characterisation of public law litigation, social rights cases frequently involve the judicial review of policy and its application, regularly ask courts to create and manage complex injunctive relief (usually of an ongoing nature where courts choose to exercise their supervisory jurisdiction over their orders), and can result, if courts choose to intervene to such an extent, in the reform of public institutions. Therefore, as is true

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<sup>58</sup> Abram Chayes, ‘The Role of the Judge in Public Law Litigation’ (1976) 89 Harvard Law Review 1281, 1296.

<sup>59</sup> *ibid* 1284.

<sup>60</sup> *ibid* 1294.

<sup>61</sup> *ibid* 1296.

<sup>62</sup> *ibid* 1296, 1298.

<sup>63</sup> *ibid* 1292.

for public law litigation more generally, social rights litigation can be said to be prospective in nature. That said, *why* is social rights litigation prospective? What is it about such litigation that makes it prospective in nature? In my view, the litigation is prospective because *social rights* themselves are prospective in nature. Social rights demand courts, in order to enforce them adequately, to adopt a prospective orientation. This prospectivity may be attributed, in significant part, to three characteristic features of social rights: (i) their positiveness; (ii) their internal limitation based on available resources; and (iii) the fact that they are not immediately realisable. These features require courts, in defining the substance of a social right and in granting a remedy, to consider – and to some extent predict – the elected branches’ likely future conduct.

First, social rights are characteristically positive in nature.<sup>64</sup> A positive right is defined as a claim to something such as a particular good or service.<sup>65</sup> They are to be contrasted with negative rights which are rights ‘that something not be done, that some particular imposition be withheld’.<sup>66</sup> Accordingly, there is, as Cécile Fabre has put it, a “duty distinction” between positive and negative rights: positive rights ground positive duties, requiring the state to do something, whereas negative rights ground negative duties of non-interference.<sup>67</sup> As positive rights, the realisation of social rights requires state ‘action rather than inaction’.<sup>68</sup> This feature has been highlighted by critics of constitutional social rights adjudication to contrast social rights with civil and political rights which are characteristically negative. The positiveness of social rights necessitates that courts adopt a prospective orientation in a few respects. As Etienne Mureinik has correctly pointed out, as positive rights, there is more than one appropriate way in which a government may realise a social right. If a civil or political right ‘is denied, the court knows, almost without thinking, that it must respond by quashing the denial. The right generates its own remedy, and the remedy is usually an annulment’.<sup>69</sup> Social rights, in contrast, ‘can be delivered in many different ways, and it is always a matter of political and economic controversy which is the best’.<sup>70</sup> For this reason (coupled with the arguments from legitimacy and capacity), critics of

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<sup>64</sup> This is not to say that all social rights are positive. Social rights can come in the form of negative rights rather than positive ones (recall from the Introduction the duties to respect and protect which may arise from social rights). Nor is it to say that positiveness is unique to social rights. Positiveness is a feature often shared by social rights’ counterparts – civil and political rights. That said, because my primary concern in this thesis is governments’ duty to fulfil which arises from social rights (a duty which emphasises the positiveness of social rights) as well as the fact that the positiveness of social rights has been raised by commentators and jurists as a problematic issue for social rights adjudication, I maintain positiveness as a characteristic feature of social rights.

<sup>65</sup> Fabre (n 4) 263.

<sup>66</sup> Charles Fried, *Right and Wrong* (Harvard University Press 1978), 110, cited in *ibid* 263.

<sup>67</sup> Fabre (n 4) 263-64.

<sup>68</sup> Etienne Mureinik, ‘Beyond a Charter of Luxuries: Economic Rights in the Constitution’ (1992) 8 *South African Journal on Human Rights* 464, 467.

<sup>69</sup> *ibid* 467.

<sup>70</sup> *ibid* 467.

constitutional social rights adjudication have correctly highlighted the importance of discretion for the elected branches to arrive at an appropriate decision. Even those in favour of social rights adjudication accept this important point. As Albie Sachs has vividly said, governments have the ‘right ... to be stupid’; we must be ‘cautious about constitutional principles that preempt any government forward planning, for they inhibit democratic governmental experimentation and public innovation’.<sup>71</sup> So, unless courts wish to choose one means of realising a social right to the exclusion of all others, thereby inhibiting experimentation and innovation, they must leave the elected branches with some discretion. And the leaving of such discretion demands a prospective orientation. It requires courts to predict how the elected branches will likely exercise their discretion in the future and whether the courts should place restrictions on said discretion.

Moreover, as positive rights, courts cannot directly enforce social rights; rather, courts are ultimately dependent on the elected branches to implement any directive they make.<sup>72</sup> In this regard, Cass Sunstein has made the often-quoted observation: ‘Courts lack the tools of a bureaucracy. They cannot create government program[me]s. They do not have systematic overview of government policy’.<sup>73</sup> In the absence of a decision on the part of government to implement it, a court’s ruling on social rights may be nothing more than ‘merely symbolic or supportive’.<sup>74</sup> However, civil and political rights, as Mureinik has observed, are different in that they ‘are typically enforced by judicial review of government action, resulting, if the action is found to conflict with the right, in a court order striking it down’.<sup>75</sup> Alternatively, where the conflict arises out of a legislative omission or underinclusion, a court may read into or read down legislation. In either case, the issue is resolved, and the remedy implemented, immediately. With social rights, on the other hand, owing to the courts’ reliance on the elected branches for implementation, the issue cannot be resolved, and the remedy cannot be implemented, immediately; instead their resolution and implementation are necessarily pushed into the future. Therefore, once again, the courts must predict the elected branches’ likely future conduct and, more specifically, the likelihood of them actually implementing any ruling they should make.

Second, social rights are usually not absolute. The duty upon the state to realise social rights is frequently limited by available resources. As Fabre has pointed out, ‘Positive rights are

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<sup>71</sup> Albie Sachs, ‘Economic and Social Rights and the Right to Health: An Interdisciplinary Discussion Held at Harvard Law School in September, 1993’ (Harvard Law School Human Rights Program, 1995) <<http://hrp.law.harvard.edu/wp-content/uploads/2013/08/EconomicandSocialRightsandtheRighttoHealth.pdf>> accessed 11 August 2017, 24.

<sup>72</sup> Frank B Cross, ‘The Error of Positive Rights’ (2001) 48 UCLA Law Review 857, 892.

<sup>73</sup> Cass R Sunstein, ‘Against Positive Rights’ in Andras Sajó (ed), *Western Rights? Post-Communist Application* (Kluwer Law International 1996), 229, cited in *ibid* 891.

<sup>74</sup> Christopher E Smith, *Courts and the Poor* (Wadsworth 1991), 89, cited in Cross (n 72) 891.

<sup>75</sup> Mureinik (n 68) 467.

inevitably asserted to scarce goods, and consequently scarcity implies a limit to the claim'.<sup>76</sup> Not to oversimplify the point, but the state cannot provide something that is beyond its physical and financial means. Given this limitation, social rights provisions frequently include qualifying language to this effect. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (the "ICESCR") (to which 71 States Parties are signatories) qualifies the obligation to achieve the rights recognised in the Covenant 'to the maximum of [the State Party's] available resources'. A similar qualification is found in the text of many national constitutions which recognise social rights. As Jeff King has suggested, such qualification can be made either explicitly (eg sections 26(2) and 27(2) of the South African Constitution (the rights to housing and health, food, water and social security, respectively) which qualify the obligation on the state to achieve these rights to that which is 'within its available resources') or implicitly made through the use of vague terms such as "fair" or "reasonable" to describe either the obligation which is imposed on the state or the social goods or services which are at issue.<sup>77</sup>

This qualification on social rights also pushes courts towards a prospective orientation. This is so for two inter-related reasons. For one thing, "available resources" is an ambiguous concept.<sup>78</sup> As Darrel Moellendorf has explained, available resources can be understood in two senses: one narrow and the other broad.<sup>79</sup> In its narrow sense, available resources refers to those resources which a ministry or department has been allotted and which it has chosen to allocate to the protection of the right. In its broad sense, in contrast, available resources refers to any resources which the state can assemble and put towards the protection of the right.<sup>80</sup> Scholars such as Moellendorf as well as David Bilchitz have advocated the broad interpretation, arguing that the narrow sense 'would allow the government to avoid reali[s]ing conditional rights merely by virtue of its allocation of the budget',<sup>81</sup> and, as a result, would 'ignore the special weight that should be attached to rights'.<sup>82</sup> However, even if the broad interpretation is accepted, it, in turn, is open to multiple interpretations depending on where we decide the state must look to assemble resources. As Bilchitz has pointed out, available resources may refer to resources which are owned by the state, resources which may be obtained through increased taxes, and broader

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<sup>76</sup> Fabre (n 4) 263.

<sup>77</sup> King, *Judging Social Rights* (n 10) 103-04.

<sup>78</sup> David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (OUP 2007), 227-29; Mark S Kende, *Constitutional Rights in Two Worlds: South Africa and the United States* (Cambridge University Press 2009), 268-69; Darrel Moellendorf, 'Reasoning about Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims' (1998) 14 *South African Journal on Human Rights* 327, 330. Of note, terms such as "fair" and "reasonable" are equally ambiguous and therefore raise similar concerns.

<sup>79</sup> Moellendorf (n 78) 330.

<sup>80</sup> *ibid* 330.

<sup>81</sup> *ibid* 331. See also Bilchitz (n 78) 228-29.

<sup>82</sup> Moellendorf (n 78) 331.

still, resources from third parties like foreign loans.<sup>83</sup> The Committee on Economic, Social and Cultural Rights has adopted the broadest interpretation, noting that it ‘refers to both the resources existing within a State as well as those available from the international community through international cooperation and assistance’.<sup>84</sup> The ambiguity of the available resources concept militates in favour of a prospective orientation for a simple reason: the task of defining what resources are “available” is exactly the type of polycentric, budgetary decision which critics of social rights adjudication argue courts should not be making. For the courts to make such a decision would encroach ‘upon the jealously guarded “power of the purse”’,<sup>85</sup> and under the broadest interpretation of the concept, interfere with the state’s foreign relations. Given this fact, courts are unlikely to resolve, at least explicitly and clearly, the ambiguity in the available resources qualification, preferring instead to leave it in the discretion of the elected branches. Thus, as with the multiple ways open to governments to realise social rights, this discretion demands that courts adopt a prospective orientation. To repeat, it requires courts to predict how the elected branches will exercise their discretion in the future and consider possible constraints.

For another thing, “available resources” is a fluid concept. The availability of a resource depends on many factors, including whether it is physically available, the financial situation of the state, and under the broadest interpretation of available resources, the health of the state’s foreign relations. And all these factors are subject to change over time. For example, the fluidity of the available resources concept and its dependence on the state’s finances has become apparent following the 2008 Global Financial Crisis. In the fitting words of Xenophon Contiades and Alkmene Fotiadou, ‘Dependent upon the economic contingencies and the inevitable fluctuations of economic growth, the content of social rights is by definition open-ended and ever-changing’.<sup>86</sup> Thus, what is considered “available” today may not be tomorrow. In fact, on this point, the Committee on Economic, Social and Cultural Rights has said that in considering a claim that “resource constraints” explain a failure to make progress or the taking of retrogressive steps, the Committee would examine, among other things, changes to a State party’s financial circumstances.<sup>87</sup> Such circumstances include the ‘country’s current economic situation, in

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<sup>83</sup> Bilchitz (n 78) 228-29.

<sup>84</sup> Committee on Economic, Social and Cultural Rights, ‘An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” under an Optional Protocol to the Covenant’, E/C.12/2007/1 (2007) <<https://www.ohchr.org/EN/Issues/ESCR/OEWG/Pages/DocumentsSession4.aspx>> accessed 11 July 2018.

<sup>85</sup> Cross (n 72) 890.

<sup>86</sup> Xenophon Contiades and Alkmene Fotiadou, ‘Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation’ (2012) 10 *International Journal of Constitutional Law* 660, 670-71.

<sup>87</sup> Committee on Economic, Social and Cultural Rights (n 84). See also Diane Elson, Radhika Balakrishnan and James Heintz, ‘Public Finance, Maximum Available Resources and Human Rights’ in Aoife Nolan, Rory O’Connell and Colin Harvey (eds), *Human Rights and Public Finance: Budgets & the Promotion of Economic and Social Rights* (Hart Publishing 2013), 14-15.

particular whether the country was undergoing a period of economic recession' and the 'existence of other serious claims on the State party's limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict'.<sup>88</sup> Given this fluidity, a court cannot provide fixed content to "available resources"; for it to do so would be artificial, leading to serious injustices should resources become more available in the future and, placing the elected branches in an impossible position should resources instead become less available (eg in an economic downturn or resource shortage). Thus, again, the elected branches require discretion thereby necessitating, for the same reasons above, a prospective orientation.

Finally, characteristically speaking, social rights are not immediately realisable. Owing to resource constraints, it is generally understood that it would be unreasonable to expect the state to fully realise the social rights of all citizens immediately. As Cass Sunstein has said, 'No one thinks that every individual has an enforceable right to full protection of the interests at stake'.<sup>89</sup> Thus, the obligation on the state (which corresponds to most social rights) is usually in the form of a duty to work towards the "progressive realisation" of that right. Under article 2(1) of the ICESCR, States Parties have an obligation to 'take steps ... with a view to achieving progressively the full reali[s]ation of the rights' in the Covenant. Similar language is found in national constitutions. For example, sections 26(2), 27(2) and 29(1)(b) (the right to further education) of the South African Constitution place an obligation on the state to 'take reasonable legislative and other measures ... to achieve the progressive realisation' of the right (and in the case of section 29(1)(b), to make 'further education ... through reasonable measures ... progressively available and accessible'). This does not mean that the state does not have any immediate obligations. The Committee on Economic, Social and Cultural Rights has recognised two key obligations on States Parties which are of immediate effect: an obligation to ensure that the rights 'will be exercised without discrimination' and an obligation 'to take steps' towards achieving the realisation of the rights.<sup>90</sup> On the latter point, the Committee has indicated that such steps must be 'deliberate, concrete and targeted as clearly as possible towards meeting the obligations recogni[s]ed in the Covenant'.<sup>91</sup> In a somewhat similar fashion, the South African Constitutional Court has recognised immediate obligations on the state under the above-

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<sup>88</sup> Committee on Economic, Social and Cultural Rights (n 84).

<sup>89</sup> Cass R Sunstein, 'Social and Economic Rights? Lessons from South Africa' (2000) 11 Constitutional Forum 123, 130.

<sup>90</sup> General Comment No 3. See also General Comment No 1 which provides that States Parties have an immediate obligation 'to work out and adopt a detailed plan of action for the progressive implementation' of the rights.

<sup>91</sup> General Comment No 3.

mentioned provisions of their constitution: namely, an obligation to take reasonable measures to secure the rights and, relatedly, an obligation to meaningfully engage with the relevant parties.<sup>92</sup>

Nevertheless, the “progressive realisation” idea presents a significant challenge for social rights adjudication. Despite immediate obligations imposed on the state such as those identified above, progressive realisation means that the full realisation of social rights need not be, and so most likely will not be, realised immediately.<sup>93</sup> As Katharine Young has noted, the effect of progressive realisation is to grant governments ‘latitude to implement rights over time depending on the availability of necessary resources, rather than requiring them to guarantee rights immediately’.<sup>94</sup> The result of such latitude is to push the obligation on the state to fully realise social rights (and in turn, their enforcement by the courts) into the future. In other words, the full realisation of social rights becomes a future obligation which the courts cannot – at least with traditional approaches to adjudication – enforce in the present. To do so would, as Mitra Ebadolahi has said, ‘involve extended judicial oversight, necessitate repeat court appearances, and require the courts to engage in nuanced factual analyses of governmental actions. The costs of such activities can be prohibitive’.<sup>95</sup> Moreover, without a set timeframe within which social rights will be fully realised, this obligation on courts would become a permanent one.

So, how does the trustworthiness standard which I have outlined in this chapter respond to the prospectivity of social rights? It is responsive to their prospectivity because the concept of trust – from which trustworthiness follows on directly – is itself prospective in nature. Not only does trust relate to future events (as I explained in an earlier part), but it necessitates that the trustee has discretion in exercising control over the good or service at issue, and, in turn, that the truster is uncertain (at least to some extent). It is for this reason that Luhmann has described trust as having a ‘problematic relationship with time’.<sup>96</sup> Without discretion/uncertainty, we have neither trust nor trustworthiness – what we have is reliability. Now, because trustworthiness represents the likelihood that the trustee will fulfil the truster’s trust, a court – in applying the trustworthiness standard – must leave the elected branches with discretion in exercising their control over social goods and services. As I will explain shortly, if the court eliminated that

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<sup>92</sup> For example, see *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19, 2001 (1) SA 46; *Occupiers of 51 Olivia Road v City of Johannesburg* [2008] ZACC 1, 2008 (3) SA 208.

<sup>93</sup> Bruce Porter, ‘Rethinking Progressive Realization: How Should it be Implemented in Canada?’ (Social Rights Advocacy Centre, 2015) <<http://www.socialrights.ca/documents/publications/Porter%20Progressive%20Implementation.pdf>> accessed 12 August 2017, 3-4.

<sup>94</sup> Young (n 16) 71.

<sup>95</sup> Mitra Ebadolahi, ‘Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa’ (2008) 83 *New York University Law Review* 1565, 1567.

<sup>96</sup> Niklas Luhmann, *Trust and Power: Two Works* (Wiley 1979), 10.

discretion, it would not be promoting government trustworthiness, but reliability. Thus, the trustworthiness standard, while it does impose constraints on the elected branches' procedure vis-à-vis the provision of social goods and services, it nonetheless leaves them with discretion as to outcome. So, social rights' prospectivity – which necessitates that the elected branches have discretion as to how to realise those rights – does not prove problematic for the trustworthiness standard. On the contrary, trust (and by extension, trustworthiness) indeed require discretion.

(b) Trust Brings Citizens to the Centre of Social Rights Matters

Many social rights scholars have taken issue with the over-emphasis which courts in social rights cases have placed on their relationship with the elected branches, and, relatively speaking, the little weight which they have given to citizens and their interests.<sup>97</sup> Courts are overly concerned with institutional issues vis-à-vis social rights matters. This over-concern with institutional issues follows from the previously-noted arguments regarding the courts' legitimacy and capacity. While the social rights debate's focus has moved on from justiciability to judicial approaches, its underlying arguments, to a large extent, have not. Scholars and litigants who are opposed to judicial activism in social rights matters are now employing those arguments to advocate judicial restraint and deference to the elected branches. And so, not surprisingly, courts globally, in adjudicating social rights matters, continue to strongly emphasise these institutional issues.<sup>98</sup>

Danie Brand has made a good argument in this regard. In particular, Brand has argued that South African courts, due to their over-emphasis on and concern with such institutional issues, have employed 'the strategy of deference, in a binary institutional relations mode – that is, by deferring decisions to the other branches of government'.<sup>99</sup> As he has explained, deference is not neutral for claimants in social rights cases; rather it constitutes a "loss" for them. In Brand's words, 'when courts employ deference in socio-economic rights cases to deal with problems of institutional capacity, legitimacy, integrity, security or constitutional comity, they favour the point of view with respect to the issues in dispute of one of the parties to that dispute (the state) over another (the claimants)'.<sup>100</sup> Relying upon the theoretical work of Emiliós Christodoulis, Brand has argued that instead of conceiving of social rights adjudication in such binary terms, 'we

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<sup>97</sup> Danie Brand, 'Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa' (2011) 3 Stellenbosch Law Review 614, 630-31, citing Emiliós A Christodoulis, 'Paradoxes of Sovereignty and Representation' (2002) 1 TSAR 108; David Landau, 'A Dynamic Theory of the Judicial Role' (2014) 55 Boston College Law Review 1501; Bruce Porter, 'Enforcing the Right to Reasonableness in Social Rights Litigation: The Canadian Experience' in Malcolm Langford, César Rodríguez-Garavito and Julieta Rossi (eds), *Compliance with Socio-Economic Rights Judgments: Making it Stick* (Cambridge University Press 2017); Sachs (n 71) 14.

<sup>98</sup> Brand (n 97) 616-20.

<sup>99</sup> *ibid* 620.

<sup>100</sup> *ibid* 620.

should recognise that it occurs within a more complex triangular relationship’ – between courts, the elected branches *and citizens*.<sup>101</sup> On this point, Brand has suggested that ‘courts should move away from regarding the institutional problems they face in deciding socio-economic rights cases in binary, institutional relations terms’ and instead ‘should recognise that ... they stand in relationship not only to the representative branches of government’, but also to citizens.<sup>102</sup> In other words, citizens (and their interests) must be brought to the centre of social rights matters. Based on this argument, Brand has proposed that South African courts operationalise this ‘shift of perspective’ into ‘their doctrine, techniques and reasoning’ in social rights cases.<sup>103</sup>

Responding to such scholarly criticism, the trustworthiness standard brings citizens and their interests to the centre of social rights matters. First, owing to its roots in the network conception of trust, the trustworthiness standard necessarily conceptualises social rights adjudication as a triangular relationship between courts, the elected branches and citizens. Recognising that courts are in a relationship with citizens as well as the elected branches, it envisages courts as using those two relationships to mediate the relationship which the two parties have with one another (much in accordance with what Brand has suggested). Further, by focusing on the elected branches’ trustworthiness, and, in turn, on citizens’ trust in the elected branches, citizens are a paramount consideration in this standard. While the relationship between courts and the elected branches is relevant (including the issues of legitimacy and capacity such that courts should not usurp the elected branches’ policy-making role), that relationship (and these institutional issues) do not, under this standard, overshadow the interests of citizens.

#### (c) Trustworthiness Offers a Good Middle Ground for the “Two Wrongs of Enforcement”

As I noted earlier, in enforcing social rights, there are two errors or “wrongs” which a court can make.<sup>104</sup> The first is judicial usurpation which ‘occurs when the judiciary interprets and applies [social] rights in such a manner that it assumes control of the political system ... crowding out ... the democratically elected branches’.<sup>105</sup> In essence, the courts usurp the policy-making role of the elected branches. The second wrong, judicial abdication, ‘occurs when the judiciary declines to protect constitutional rights’, thereby abdicating its own role as protector and enforcer of

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<sup>101</sup> *ibid* 631.

<sup>102</sup> *ibid* 631. See also Porter, ‘Enforcing the Right to Reasonableness’ (n 97) 222 who has said: ‘Under the traditional separation of powers doctrine, courts have the ultimate authority to interpret rights and to determine how they apply in a particular context. This interpretive role must be informed by a dialogue not only with governments, but also with rights holders’.

<sup>103</sup> Brand (n 97) 631.

<sup>104</sup> Young (n 16) 134. See also Michelman (n 16) 16.

<sup>105</sup> Young (n 16) 134. See also Klatt (n 18) 361.

constitutional rights.<sup>106</sup> For example, a court may be said to be abdicating its role where it shows too much deference to the elected branches of government.<sup>107</sup> However, as it will be recalled, usurpation and abdication ‘do not represent a strict antagonism’: ‘they are a matter of degree’ and, as such, courts can – and should – opt for a middle ground between these two extremes.<sup>108</sup>

In my view, the trustworthiness standard which I have outlined in this chapter offers the courts such a middle ground. And it does so because of the procedural orientation of trust (that is, as conceptualised). Given this orientation, the trustworthiness standard would have courts reviewing (at least principally) the procedure by which the elected branches exercise their control over social goods and services (rather than the outcome thereof).<sup>109</sup> In other words, given trust’s procedural orientation, the courts, in applying the trustworthiness standard, would not be defining the substance of social policy so as to usurp the elected branches’ policy-making role. However, the courts would be ensuring that the procedure followed by the elected branches in developing and implementing social policy evinces good will, competence and fulfilment of its fiduciary responsibility to citizens. And in so doing, they could still, I suggest, play a meaningful role in social rights protection so as to not abdicate their constitutional role as rights enforcer.

In this regard, the trustworthiness standard finds parallels in other procedural approaches to social rights enforcement.<sup>110</sup> Granted, procedural approaches to social rights enforcement have been the subject of much criticism. Such criticism has been, in large part, in response to the “reasonableness” approach adopted by the South African Constitutional Court in interpreting and applying its constitution’s social rights provisions (which scholars have interpreted as significantly procedural in nature).<sup>111</sup> The principal concerns which have been raised by scholars in this camp are that procedural approaches (like reasonableness): (i) fail to set standards or lay

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<sup>106</sup> Young (n 16) 134.

<sup>107</sup> Klatt (n 18) 361.

<sup>108</sup> *ibid* 361.

<sup>109</sup> As I explain shortly, I say “principally” here because the respect for the right to equality sub-element of procedural fairness under the expectation of good will necessitates some substantive content.

<sup>110</sup> For example, see Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta Law 2010); Brian Ray, ‘Engagement’s Possibilities and Limits as a Socioeconomic Rights Remedy’ (2010) 9 *Washington Global Studies Law Review* 399; Brian Ray, ‘Proceduralisation’s Triumph and Engagement’s Promise in Socio-Economic Rights Litigation’ (2011) 27 *South African Journal on Human Rights* 107; Brian Ray, *Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa’s Second Wave* (Cambridge University Press 2016).

<sup>111</sup> David Bilchitz, ‘Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance’ (2002) 119 *South African Law Journal* 484; Bilchitz (n 78) 136-76; Danie Brand, ‘The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or “What are Socio-Economic Rights For?”’ in Henk Botha, Andre van der Walt and Johan van der Walt (eds), *Rights and Democracy in a Transformative Constitution* (Sun Press 2003); Marius Pieterse, ‘Resuscitating Socio-Economic Rights; Constitutional Entitlements to Health Care Services’ (2006) 22 *South African Journal on Human Rights* 473; Marius Pieterse, ‘Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited’ (2007) 29 *Human Rights Quarterly* 796. There have also been more recent criticisms aimed at the “proceduralisation” of social rights in terms of the Court’s adoption of engagement as an enforcement tool in social rights cases: for example, see Kirsty McLean, ‘Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on *Joe Slovo*’ (2010) 3 *Constitutional Court Review* 223.

down principles which can guide future policy-making (as well as aid courts in future social rights cases); and (ii) they have limited practical effect in that they do little to protect vulnerable groups (and following from this, they may discourage litigation). These concerns are valid. However, I think that the trustworthiness standard for social rights enforcement which I am proposing herein, while principally procedural, would mitigate these two concerns to a significant degree.

On the first concern, we know that the trustworthiness standard would have courts use trust's three expectations to define the elected branches' obligation to citizens. Consequently, unlike many procedural approaches (including reasonableness), the trustworthiness standard *would* set standards and lay down principles, both to guide future policy-making and to aid courts in future cases: those standards and principles stemming from the expectations of trust.

Further, I submit that the trustworthiness standard would mitigate the concern of procedural approaches having limited practical effect. Why? By using trust's three expectations to define the elected branches' obligations, courts would promote what Brian Ray has termed the "institutionalisation" of procedural remedies. In his work, Ray has argued that engagement (a procedural remedy introduced by the Constitutional Court which obliges governments to engage meaningfully with affected communities on social welfare matters) 'can give poor people and their advocates an important enforcement tool'.<sup>112</sup> But to do so, it must be institutionalised. For Ray, institutionalisation requires governments to adopt measures which 'ensure systematic implementation of engagement' such that they 'work to develop a more generalised capacity for engagement outside of specific projects'.<sup>113</sup> In parallel to Ray's argument vis-à-vis engagement, I suggest that the expectations of trust – if institutionalised in the elected branches' exercise of control over social goods and services – could do a lot to protect vulnerable groups.<sup>114</sup> That is, they would promote government good will, competence and fulfilment of fiduciary responsibility in the way I described in Chapter 2. And the trustworthiness standard would encourage the institutionalisation of these expectations because, again, courts would use the expectations to define the elected branches' obligations. Put simply, the expectations would not only serve as an accountability measure (used by courts on an ad hoc basis to review decisions), but the elected branches would be expected to develop and implement social policy broadly in compliance with those expectations (with failure to comply giving rise to court intervention). The trustworthiness standard would therefore promote those expectations' 'systematic implementation' in the elected branches' overall exercise of control over the social goods and services at issue in social rights.

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<sup>112</sup> Ray, 'Proceduralisation's Triumph' (n 110) 117.

<sup>113</sup> *ibid* 117.

<sup>114</sup> I elaborate upon such protection in the next section.

Now, it will be recalled that my conceptualisation of trust in the citizen-government relationship engages the notion of substantive equality (as part of the procedural fairness element of respect for citizens' rights (including the right to equality)). Consequently, the trustworthiness standard cannot be fairly described as entirely procedural.<sup>115</sup> But this more substantive element of the trustworthiness standard, I suggest, does not preclude it from nonetheless striking a good middle ground between the two wrongs of enforcement. On this point, a distinction can – and should – be drawn between, on one hand, what equality signifies and, on the other, how courts should enforce a constitutional right to equality.<sup>116</sup> As I explained in the Introduction, human rights in contemporary democracies have several roles and functions beyond the courts.

In light of the foregoing distinction, Sandra Fredman – despite advocating a substantive conception of equality – has said that courts, given their institutional limitations, should occupy a catalytic role. She has emphasised that 'the existence of a right does not mean that the court needs to make primary decisions about the allocation of resources'.<sup>117</sup> According to Fredman, courts – rather than detract from democracy (which would be the case if they made primary decisions about resource allocation) – can and should enhance democracy by requiring decision-makers to justify, in light of the equality principle, their decisions vis-à-vis social welfare. They should require decision-makers to 'show that their choice of eligibility criteria' satisfies the four objectives (or dimensions) of substantive equality (which I outlined in Chapter 2) such that their choice 'not only redresses disadvantage, but also promotes respect and dignity, accommodates diverse identities, and facilitates participation or counters social exclusion'.<sup>118</sup> For example, as she has noted, 'Redistributive decisions should not be made on the basis of criteria which undermine status equality, such as stereotypical assumptions and unwarranted general[is]ations'.<sup>119</sup>

I agree substantially with Fredman's view on the role of courts in enforcing the right to equality.<sup>120</sup> It not only recognises the complexity of inequality (including its social context) but acknowledges the limited legitimacy and capacity of courts in making resource allocation decisions. Accordingly, it neither strips equality of substance (in a way that a formal conception of equality would) nor yields judicial usurpation of the elected branches' policy-making role. And

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<sup>115</sup> As I said earlier, it is for this reason that I have described the trustworthiness standard as having courts *principally* reviewing the procedure by which the elected branches exercise their control over social goods and services.

<sup>116</sup> Fredman (n 10) 182, 32-33. See also Klatt (n 18) 356.

<sup>117</sup> Fredman (n 10) 182.

<sup>118</sup> *ibid* 182.

<sup>119</sup> *ibid* 182.

<sup>120</sup> Of note, Fredman – as part of the substantive equality dimension of participation – conceives of courts as themselves deliberative fora. I do not agree with this aspect of Fredman's view. In this regard, I agree with Murray Wesson and the points which he has raised regarding treating courts as deliberative fora: 'Disagreement and the Constitutionalisation of Social Rights' (2012) 12 Human Rights Law Review 221, 232. Consequently, I do not suggest that this aspect of Fredman's view be incorporated into a trust-based approach to social rights enforcement.

so, incorporating Fredman's approach to equality into the otherwise procedural trust-based approach to social rights enforcement would enable the resultant approach, though not entirely procedural, to nonetheless strike a good middle ground between the two enforcement wrongs. I thus suggest that her approach to equality can and should form part of this trust-based approach.

The middle ground offered by the trustworthiness standard – and its appeal for social rights enforcement – is most apparent when we consider the well-recognised tension in the administrative state between technocracy and democracy.<sup>121</sup> Given the increasing technological complexity of government-regulated areas (including the delivery of social goods and services), the administrative state has necessarily come to rely on experts. Contemporary administrative agencies are increasingly staffed by experts trained in everything from the medical sciences to urban planning. However, this administrative expertise has generated a tension. On one hand, expertise provides a strong – and, in fact, the central – rationale for courts affording deference to administrative agencies on matters of social policy. Owing to judges' lack of training in the relevant areas, generally speaking, courts are in a comparatively disadvantaged position to resolve such matters.<sup>122</sup> Hence, there is good reason to leave such matters to those with the expertise. On the other hand, there exists a valid fear of “regulation by experts”.<sup>123</sup> As many have noted, experts suffer from a panoply of limitations which militate against deferring to them.<sup>124</sup> Such limitations include not only the possibility that experts will not apply the expertise for which they are being relied upon, but that expertise is itself not as objective as some would suggest it is, experts being unduly influenced by the interests of well-organised businesses (so-called ‘agency capture’ or factionalism) or their own interests. Moreover, because the decisions made by experts are often value-laden (with technical and political decisions overlapping), expertise should not usurp democratic values such as participation and transparency.<sup>125</sup> As Susan Rose-Ackerman has put it, ‘Analysis, however competent, cannot eliminate deep disagreements over values’.<sup>126</sup>

The outlined trustworthiness standard is responsive to this tension. Through its constituent expectation of competence (which, it will be recalled, translates into an expectation

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<sup>121</sup> Catherine Donnelly, ‘Participation and Expertise: Judicial Attitudes in Comparative Perspective’ in Susan Rose-Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Edward Elgar 2010); King, *Judging Social Rights* (n 10) 229; Martin Shapiro, “‘Deliberative,’ ‘Independent’ Technocracy v. Democratic Politics: Will the Globe Echo the E.U.?” (2005) 58 *Law and Contemporary Problems* 341.

<sup>122</sup> King, *Judging Social Rights* (n 10) 248.

<sup>123</sup> Martin Shapiro (n 121) 343.

<sup>124</sup> Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge University Press 2012), 85-88; King, *Judging Social Rights* (n 10) 235-40; Harold J Laski, *The Limitation of the Expert* (The Fabian Society 1931).

<sup>125</sup> Martin Shapiro (n 121).

<sup>126</sup> Susan Rose-Ackerman, ‘Regulation and Public Law in Comparative Perspective’ (2010) 60 *University of Toronto Law Journal* 519, 528.

of EBPM), it accords expertise the prominent role which it deserves. Specifically, it necessitates that governmental decisions with respect to social goods and services be based on the relevant evidence from the natural and social sciences. However, it does not blindly defer to experts. First, the expectation of competence is defined by reference to the evidence upon which the decision is based and not the expertise of the decision-maker. Thus, it ensures that the expert applies the expertise for which she is relied upon. Second, because EBPM encapsulates more than merely knowledge from scientific research (but includes what Brian Head has called “political knowledge” and “practical implementation knowledge”), the trustworthiness standard necessarily adopts a more holistic approach to expertise. To repeat, with EBPM, ‘decisions are based on evidence and not made by evidence’.<sup>127</sup> And lastly, under the trustworthiness standard, competence is in no way the end of the story. The other two expectations – good will and fiduciary responsibility – allow a court, in enforcing social rights, to consider the democratic values (including participation and transparency) with which expertise is frequently in tension.

*(iv) The Trustworthiness Standard Supports Democracy*

A final justification which I will put forward for centring social rights enforcement on political trust relates to a standard defence for constitutional review. Scholars of constitutional law have long suggested that while courts may be counter-majoritarian (as Waldron and others have forcefully argued), they are not (at least not necessarily) anti-democratic.<sup>128</sup> Via constitutional review, courts can, rather, *support* or *enhance* democracy (as well as the values which underlie it).<sup>129</sup>

In the social rights context, commentators have relied upon variations of this defence to carve out democratically defensible roles for courts in enforcing social rights.<sup>130</sup> Rosalind Dixon, for example, has argued that courts can remedy “blockages” in the legislative process (which produce omissions and delays in that process) – what she has called “blind spots” and “burdens of inertia”.<sup>131</sup> According to Dixon, because the resultant omissions and delays ‘are not driven by

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<sup>127</sup> JA Muir Gray, ‘Evidence-Based Policy Making’ (2004) 329 *British Medical Journal* 988, 988.

<sup>128</sup> Broadly speaking, see Ronald Dworkin, *Freedom’s Law: The Moral Reasoning of the American Constitution* (OUP 1996); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980); David Feldman, ‘Democracy, The Rule of Law and Judicial Review’ (1990) 19 *Federal Law Review* 1. For a summary of this defence (although not in support of it), see Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007); Richard Bellamy, ‘The Democratic Qualities of Courts: A Critical Analysis of Three Arguments’ (2013) 49 *Representation* 333, 335. Of course, it is well beyond the scope of this section (and this thesis) to offer a literature review on this point.

<sup>129</sup> For some examples of this line of argument, see Ely (n 128); William N Eskridge, Jr, ‘Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics’ (2005) 114 *The Yale Law Journal* 1279; Feldman (n 128); Peter W Hogg, ‘The *Charter* Revolution: Is It Undemocratic?’ (2001) 12 *Constitutional Forum* 1; Patrick J Monahan, ‘Judicial Review and Democracy: A Theory of Judicial Review’ (1987) 21 *UBC Law Review* 87.

<sup>130</sup> Dixon (n 17); Fredman (n 10); Wesson (n 120).

<sup>131</sup> Dixon (n 17).

resource constraints or supported by principled forms of justification’, they have ‘profound significance to the legitimacy of the constitutional system’; thus, by remedying the blockages, courts support democracy (specifically, they ‘enhance the overall inclusiveness and responsiveness of a constitutional democracy’).<sup>132</sup> Sandra Fredman has similarly relied upon this defence (but has granted courts a larger role than Dixon has). Specifically, she has argued that the judicial enforcement of social rights is justified to the extent that it strengthens democracy.<sup>133</sup> As she has explained, ‘a major role of [social] rights duties is to strengthen democracy’; hence, ‘justiciability [of such rights] may be appropriate to the extent that it can be harnessed to the achievement of these aims’.<sup>134</sup> Fredman has identified three key values which, according to her, lie behind the democratic ideal: accountability, participation and equality. And so, she has argued that to the extent that social rights enforcement can support these three key values, it is justified.

The trustworthiness standard, I submit, is compatible with this defence for constitutional review: that is, courts, by using the trustworthiness standard to enforce constitutional social rights (in the way I have proposed), can be said to *support* or “strengthen” democracy.<sup>135</sup> Thus, I suggest, courts as mediators of government trustworthiness offers a democratically defensible role for courts in the enforcement of social rights. So, how exactly can the trustworthiness standard be said to support democracy? I suggest here at least two ways. First, it can be said to support democracy because political trust is itself supportive of – or “good for” – democracy (that is, under the rights circumstances). This conclusion follows from the previously-described link between political trust and cooperation. Owing to that link (which it will be recalled ties political trust to the valuable ends of social stability, economic welfare and effective governance), many writers have argued that political trust is supportive of democracy as a form of government.<sup>136</sup> Put simply, political trust facilitates democracy. For example, Mark Warren has developed a particularly convincing argument in this respect (with which I agree). According to Warren, “democracy” may be defined as ‘the systems of institutions and associations that enable

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<sup>132</sup> *ibid* 403-05, 394.

<sup>133</sup> Fredman (n 10) 100-13. For similar reasoning (although in the broader public law context), see Feldman (n 128). As Feldman has summarised: ‘Judicial review has a place in democratic constitutions, alongside political and bureaucratic processes, in advancing the values on which democratic society is based. So long as it pursues those values, judicial review is not undemocratic’ (30).

<sup>134</sup> Fredman (n 10) 100.

<sup>135</sup> I recognise that “democracy” is open to interpretation (and thus, that whether the trustworthiness standard can be said to support democracy depends on one’s definition of the term). For the purpose of this argument, I adopt the definition of “democracy” advanced by Mark Warren which I set out below: Mark E Warren, ‘What Kinds of Trust Does a Democracy Need? Trust from the Perspective of Democratic Theory’ in Sonja Zmerli and Tom WG van der Meer (eds), *Handbook on Political Trust* (Edward Elgar 2017), 33.

<sup>136</sup> Bernard Barber, *The Logic and Limits of Trust* (Rutgers University Press 1983), 93; Joseph S Nye, Jr, ‘Introduction: The Decline of Confidence in Government’ in Joseph S Nye, Jr, Philip D Zelikow and David C King (eds), *Why People Don’t Trust Government* (Harvard University Press 1997), 4-5; Mark Warren, ‘Trust and Democracy’ in Eric M Uslaner (ed), *The Oxford Handbook of Social and Political Trust* (OUP 2018); Warren (n 135).

people to engage in collective self-government with respect to matters that affect their self-determination'.<sup>137</sup> When people trust, 'they relinquish some control over their self-determination to the will of others'.<sup>138</sup> However, given the previously-described link which exists between trust and cooperation, such relinquishment of control comes with a significant benefit: people 'can dramatically increase their collective capabilities, since trust enables cooperative divisions of labour, and does so without the burdens of coercion or other costly means of organi[s]ation'.<sup>139</sup> It is this benefit which makes political trust supportive of or "good for" democracy: owing to its power to increase people's collective capabilities in this manner, political trust 'expands domains of collective self-rule', thereby supporting the very idea of democracy (at least as defined).<sup>140</sup>

To be sure, political trust is not always good for democracy. For one thing, since trust 'can be deferential, naïve or misplaced', it can (and often does) support authoritarian politics.<sup>141</sup> And such politics are, for obvious reasons, not good for democracy. Some writers have thus argued that rather than political trust, *distrust* or scepticism is valuable to democracy because it 'keeps constituents alert, and therefore public officials responsive'.<sup>142</sup> As I have said, I do not dispute this argument. But its applicability, as I will explain shortly, is limited to certain kinds of trust. For another, trust can be problematic for democracy since it provides 'the social glue for clans, ethnic and racial groups, and sectarian religious communities'; it holds 'together criminal conspiracies and corrupt exchanges'; and it 'is involved in "bad social capital": relationships of mutual social investment that have broader divisive or corrosive social effects' (eg organised crime).<sup>143</sup> And all of these consequences, we can reasonably conclude, are bad for democracy.

Therefore, according to Warren, political trust must satisfy two conditions to be good for democracy (or "democracy-supporting"). First, it must be "warranted". Put simply, government actors must be worthy of citizens' trust in them (ie trustworthy with respect to the relevant good or service at issue in their trust relationship). By being trustworthy, government actors grant citizens the knowledge (or in Warren's terms, "the warrant") which is necessary for them to make 'a good trust judgment'.<sup>144</sup> This condition, in my view, distinguishes those circumstances in which political trust is valuable to democracy from those where, rather, distrust or scepticism are valuable. Where a government has shown itself to be untrustworthy, of course citizens should

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<sup>137</sup> Warren (n 136) 33.

<sup>138</sup> *ibid* 33. For greater clarity, Warren is speaking of trust at a behavioural level.

<sup>139</sup> *ibid* 33.

<sup>140</sup> Warren (n 136) 75. See also *ibid* 33.

<sup>141</sup> Warren (n 135) 35.

<sup>142</sup> Cook, Hardin and Levi (n 52) 165.

<sup>143</sup> Warren (n 136) 82.

<sup>144</sup> *ibid* 81.

not blindly trust their government; they should be sceptical.<sup>145</sup> But distrust or scepticism of an unwarranted nature (ie where government has *not* shown itself to be untrustworthy) is not valuable to democracy.<sup>146</sup> Second, to be good for democracy, we must be able to publicly justify the trust in question to those who are affected by the relevant trusting relationship. In other words, trust is only consistent with democracy if those who are affected by a trusting relationship find (or would find) the relationship acceptable. Corrupt relationships, crime organisations, and ethnic and religious factions, for instance, are built on trusting relationships (and the trust in them is usually warranted); however, the trust is not democracy-supporting since the relationship has a negative impact on others who, if they were aware of the reasons supporting the trusting relationship, would not approve of it. Consequently, a trusting relationship ‘is democratically legitimate just to the extent that it could be justified to those affected by its externalities’.<sup>147</sup>

The trustworthiness standard outlined in this chapter promotes trust which satisfies both of Warren’s conditions. First, because the standard focuses on trustworthiness (as opposed to some other means of promoting citizens’ trust), the trust expected to result from its application may be fairly characterised as warranted. Citizens – via social rights adjudication – are given the knowledge or “the warrant” they need to make ‘a good trust judgment’ vis-à-vis the elected branches with respect to social rights.<sup>148</sup> Further, the trustworthiness standard satisfies Warren’s second condition. As he has explained, the second condition maps roughly onto a distinction which has been drawn in the trust literature between “generalised” trust (ie trust in people generally) and “particularised” trust (ie trust between particular individuals); the condition is usually met where the relevant trust is of a more general nature (ie citizens’ trust in government generally) as opposed to a more particular nature (ie particular citizens’ trust in particular government actors).<sup>149</sup> It is trust of the latter nature which supports the corrupt relationships, crime organisations, and ethnic and religious factions which are bad for democracy. In contrast to such cases, the trustworthiness standard promotes trust in the citizen-government relationship which is of a more general nature. Granted, some citizens are likely to be negatively impacted by

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<sup>145</sup> As Onora O’Neill has put it, ‘it is foolish to assume that we should always, or indeed generally, seek to “restore trust” or to “build more trust”. Where we have to deal with untrustworthy persons or institutions it would be a bad idea to aim for more trust’: Onora O’Neill, ‘Accountable Institutions, Trustworthy Cultures’ (2017) 9 *Hague Journal on the Rule of Law* 401, 406.

<sup>146</sup> Warren (n 135) 35. See also Pamela S Karlan, ‘Foreword: Democracy and Disdain’ (2011) 126 *Harvard Law Review* 1.

<sup>147</sup> Warren (n 136) 81.

<sup>148</sup> In this regard, the trustworthiness standard responds to a call which Warren has made that ‘[i]nstitutions that make warrants available for good trust decisions should be a key consideration in the design and reform of democratic institutions’: Warren (n 135) 36.

<sup>149</sup> Warren (n 136) 82; *ibid* 35. That said, particularised trust can, in some very limited cases, be democracy-supporting.

a trusting citizen-government relationship (since not all citizens will be satisfied with the outcome of governmental decision-making). But because the trustworthiness standard is rooted in criteria which are aimed at promoting a general form of citizens' trust in the elected branches with respect to social rights (ie procedural fairness, competence and the fulfilment of fiduciary responsibility) – rather than that of a more particular nature – the trusting relationship cannot be reasonably considered unacceptable. We can thus publicly justify the trusting relationship to those citizens who are negatively affected by it. So, based on the foregoing, the trustworthiness standard, I submit, promotes the kind of trust which is good for democracy or “democracy-supporting”; and following from this conclusion, the standard can be said to support democracy.

Moreover, there is another reason, I contend, why the trustworthiness standard can be said to support democracy. And it relates to a more specific defence for constitutional review. It has been argued that one of the ways in which constitutional review supports or enhances democracy is by protecting the rights of minorities from the so-called “tyranny of the majority”. Courts, given their isolation from the electoral process as well as their independence from government interference, are said to be in a better position to protect minorities. Hence, constitutional review ‘is justified as a counter-weight to potentially myopic, prejudiced, careless and occasionally tyrannous majorities and the democratically elected politicians who feel obliged to respond to their demands’.<sup>150</sup> The trustworthiness standard, in my view, is compatible with this more specific defence: that is, courts, by applying the trustworthiness standard in their enforcement of constitutional social rights, would be expected to protect the rights of minorities.

This conclusion follows from the expectations by which I have conceptualised trust in the citizen-government relationship (and which courts would therefore enforce in applying the trustworthiness standard). First of all, those expectation elements of a more procedural nature would go a long way towards ensuring that the interests of minorities are represented in the process by which the elected branches exercise their control over social goods and services.<sup>151</sup> This is especially so, as I have noted, if the expectations are institutionalised. For example, the expectation of good will includes an expectation (under the element of participation) that the elected branches will sincerely consider the views of all those groups affected by the relevant exercise of control. And courts, in enforcing that expectation's element, would require that the elected branches so consider those views (and hold them accountable should they fail to do so). Such a requirement for participation is an important means of protecting minorities' rights. It would ensure that minorities (including low-income citizens who are poorly represented in the

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<sup>150</sup> Bellamy, ‘The Democratic Qualities’ (n 128) 334. See also Ely (n 128); Feldman (n 128).

<sup>151</sup> In this regard, the trustworthiness standard parallels John Hart Ely's “representation-reinforcing” theory of judicial review: Ely (n 128).

democratic process) are given a voice in that process and that their voice is indeed heard therein (when it might not (and probably would not) otherwise be).<sup>152</sup> Additionally, we know from the preceding section that the expectation of good will further includes a more substantive element: an expectation that the elected branches, in exercising control over social goods and services, will respect citizens' right to equality (under the element of respect for citizens' rights). Specifically, as I described in Chapter 2, this sub-element demands that the elected branches exercise said control in furtherance of substantive equality. And courts would enforce this sub-element by requiring that the elected branches justify their exercise of control, showing that their decisions in this regard satisfy Fredman's four objectives (or dimensions) of substantive equality. Requiring this sort of justification from the elected branches offers another important means of protecting the rights of minorities. Not only does it reinforce the participation of minorities in the relevant decision-making process (since participation is one of Fredman's four objectives or dimensions), but it also ensures, as Fredman has aptly highlighted, that the elected branches will not base their exercise of control on stereotypical assumptions – assumptions which have the ultimate effect of furthering the structural inequalities and assumptions which disadvantaged minorities face.<sup>153</sup>

### **A Trust-Based Critique of Other Forms of Constraint in Social Rights Adjudication**

Before concluding this chapter and turning to the illustrations in Chapters 5 and 6, I will briefly consider two additional forms of judicial constraint which are common in constitutional social rights adjudication – that is, two additional ways in which courts can and do constrain the elected branches' discretion over social goods and services other than via what I have called trustworthiness-promoting constraints. For reasons which will become apparent shortly, I label these two forms of constraint “vulnerability-mitigating” and “reliability-promoting”. I consider these additional constraints in this section for two inter-related purposes. First, I think that by contrasting these two forms of judicial constraint with trustworthiness-promoting constraints, I can provide greater clarity to what the latter category of judicial constraint entails. Second, these two forms of constraint have been criticised by legal scholars on several grounds, including their violating the separation of powers and their potential to worsen inequities between citizens. Like those scholars, I offer a critique of these two forms of constraint; but I do so on the basis of trust and trustworthiness. Specifically, I argue that neither constraint promotes government

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<sup>152</sup> Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 *South African Journal on Human Rights* 163, 164. Fredman, however, takes the requirement for participation one step further by characterising courts as deliberative fora: Fredman (n 10).

<sup>153</sup> Fredman (n 152) 171. This outcome would also be reinforced by courts' enforcement of the expectation of competence which would require the elected branches to make their decisions vis-à-vis social goods and services on the basis of scientific evidence.

trustworthiness; and if we accept based on the foregoing argument that government trustworthiness (and in turn, public trust in government) are valid concerns for social rights enforcement, it follows that these two forms of constraint's failure to promote such trustworthiness militates against their adoption by courts in enforcing constitutional social rights.

#### Vulnerability-Mitigating Constraints

The first form of judicial constraint is what I will call “vulnerability-mitigating”. In imposing this form of constraint on the elected branches, courts – this time in line with judicial minimalism (unlike trustworthiness-promoting constraints) – decide social rights cases narrowly.<sup>154</sup> They restrict their rulings to the specific issue or issues in the case before them and to the particular claimant or claimants who have brought that case to them. Thus, courts ‘try to decide cases rather than to set down broad rules’.<sup>155</sup> Further, courts, in deciding those cases, overrule the elected branches and grant the claimants a social good or service which they have requested in the litigation. Therefore, and again unlike trustworthiness-promoting constraints, courts using this form of constraint focus on the outcome of governmental decision-making (rather than its process). Courts achieve this end by exercising their broad remedial powers, including mandatory orders which require the elected branches to provide the good or service, supervisory orders which require the elected branches to report to the courts (or to a third party) regarding their fulfilment of the courts’ mandatory orders, and coercive orders (eg contempt orders) where the elected branches fail to comply with the courts’ mandatory and/or supervisory orders.

The vulnerability-mitigating form of constraint is best exemplified by Brazilian courts’ interpretation and application of the constitutional right to health. The “Brazilian model” for right-to-health litigation (to borrow Octavio Ferraz’s term) ‘is characteri[s]ed by a prevalence of individuali[s]ed claims demanding curative medical treatment (most often drugs) and by an extremely high success rate for the litigant’.<sup>156</sup> As Ferraz has explained, this model has existed in Brazil since the late 1990s when the Supreme Federal Tribunal (Brazil’s highest court) interpreted the right to health as ‘an individual entitlement to the satisfaction of one’s health needs with the most advanced treatment available, irrespective of costs’.<sup>157</sup> Since that time,

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<sup>154</sup> Cass R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press 1999), 10.

<sup>155</sup> *ibid* 10.

<sup>156</sup> Octavio Luiz Motta Ferraz, ‘The Right to Health in the Courts of Brazil: Worsening Health Inequities?’ (2009) 11 *Health and Human Rights Journal* 33, 34.

<sup>157</sup> *ibid* 34.

Brazilian courts have ordered their government to provide treatment for diabetes, HIV/AIDS, Parkinson's disease, Alzheimer's disease, hepatitis C and multiple sclerosis (among others).<sup>158</sup>

As I said earlier, this form of judicial constraint has been argued problematic on many grounds. First, there are significant concerns of equity. As Ferraz has contended in the context of Brazil, this form of constraint has the potential to (and most likely will) worsen existing inequities between citizens.<sup>159</sup> Relying on empirical data on Brazil's right-to-health litigation, Ferraz has convincingly shown that contrary to what one may expect, such litigation has not benefited low-income citizens in Brazil. On the contrary, and in his words, it has 'by and large benefited a minority of individuals who are able to access lawyers and courts to force the state to provide expensive treatment that the public health system should not provide under any plausible interpretation of the constitutional right to health'.<sup>160</sup> Therefore, owing to Brazil's right-to-health litigation (which, as I have already explained, is characterised by the vulnerability-mitigating form of judicial constraint), this minority of citizens has been privileged over the rest of the population, including low-income citizens.<sup>161</sup> Second, this form of judicial constraint raises considerable separation of powers issues. Since this form of constraint is a highly intrusive form of judicial intervention – with the courts demanding that the elected branches provide citizens with a good or service they had previously decided not to – it may reasonably be (and has been) suggested that courts, in imposing it, usurp the policy-making role of the elected branches.<sup>162</sup>

I raise here another problem with this form of judicial constraint: its inability to promote government trustworthiness. If government trustworthiness is the likelihood that the elected branches will fulfil citizens' three expectations of trust, there is no reason (to my mind, at least) why this form of constraint should promote such trustworthiness. This form of constraint obliges the elected branches to provide litigants with the social good or service which they have requested. But why should the elected branches, as a result of such a specific and individualised obligation imposed upon them, be more likely – in their future interactions with citizens – to fulfil those three expectations of trust?<sup>163</sup> I can see no reason for it. Unlike the trustworthiness-promoting constraints described earlier, this constraint does very little to constrain the elected

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<sup>158</sup> *ibid* 35-36.

<sup>159</sup> *ibid*; Octavio Luiz Motta Ferraz, 'Harming the Poor Through Social Rights Litigation: Lessons From Brazil' (2011) 89 *Texas Law Review* 1643.

<sup>160</sup> Ferraz, 'Harming the Poor' (n 159) 1667.

<sup>161</sup> For an additional criticism of such individualised relief, see Bilchitz (n 78) 203-05.

<sup>162</sup> Ferraz, 'The Right to Health' (n 156); Ferraz, 'Harming the Poor' (n 159). See also Frank I Michelman, 'The Constitution, Social Rights, and Liberal Political Justification' (2003) 1 *International Journal of Constitutional Law* 13, 16.

<sup>163</sup> On the contrary, there is the distinct possibility that this form of constraint will make government *less trustworthy* out of resentment towards what may be perceived as excessive judicial interference or out of belief that they need not be concerned with process since outcome will ultimately be determined by the courts.

branches' future conduct (ie it does not set out any standard for the future, including for accountability purposes in future cases). It also does nothing to target the process by which the elected branches exercise their discretion over social goods and services (which, as we know, is the very focus of trust). So, if we accept the validity of government trustworthiness to the enforcement of constitutional social rights, this form of judicial constraint proves problematic.

Based on the conceptual groundwork laid in Chapters 1 and 2, I contend that instead of promoting government trustworthiness, this form of judicial constraint *mitigates the vulnerability of citizens to the elected branches*. It will be recalled from those chapters that citizens' vulnerability to the elected branches depends, in part, on the availability of the social good or service at issue from a source alternative to the elected branches. That alternative source is usually a provider on the private market; and so, where citizens have access (including financially) to that private market, such providers mitigate citizens' vulnerability to the elected branches. I suggest that much like private providers, courts also have the potential to mitigate citizens' vulnerability to the elected branches by serving as an alternative source of social goods and services. How so? Through the courts' power of judicial review and their often-broad remedial powers, courts technically maintain control (albeit indirect control) over social goods and services.<sup>164</sup> And owing to such control, courts can (at least technically speaking again) offer citizens another source of the social goods and services which they need. Now, where a court, in its prior cases (ie its precedent), shows itself willing to exert its technical control over social goods and services, it, in turn, establishes itself as an alternative source for citizens of those social goods and services. It indicates to citizens (as litigants in future social rights cases before that court) that, as was the case with private providers, if the elected branches do not provide them with the social goods and services which they need, those citizens may turn to the court to obtain them. And so, like private providers, that court can mitigate citizens' vulnerability to the elected branches. In my view, where a court imposes the present form of constraint on the elected branches (granting litigants in a case the social good or service which they have requested) a court does just this. It shows itself willing to exert its technical control over social goods and services, thereby establishing itself as an alternative source: and so, it mitigates citizens' vulnerability to the elected branches. This is, in essence, what Brazilian courts have done with respect to the right to health.

To be precise, and making matters worse for this form of judicial constraint, a court only mitigates citizens' vulnerability to the elected branches to the extent that citizens can take advantage of the alternative access the court offers (again like a private provider). Hence, it is not

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<sup>164</sup> In this regard, courts are not that dissimilar from the elected branches where those branches have chosen to outsource the provision of social goods and services to private providers.

just that this form of judicial constraint does not promote government trustworthiness; but, given litigation's time and expense which inevitably favour the financially advantaged, for low-income citizens who do not have the meaningful option of litigating their social rights, courts (where they employ this form of constraint) do not even go so far as to mitigate those citizens' vulnerability. And thus, in line with Ferraz's argument, they worsen inequities between citizens.<sup>165</sup>

#### Reliability-Promoting Constraints

The second form of judicial constraint is what I will call "reliability-promoting". In parallel to the trustworthiness-promoting category of constraint, this form of constraint involves courts making broad rulings which prospectively constrain the elected branches' discretion over social goods and services. But instead of courts' judgments targeting the process of the government's decision-making, they target the specific social goods and services to which citizens are entitled (ie the outcome of that decision-making). Specifically, courts, in imposing this form of constraint on the elected branches, make broad rulings which interpret constitutional social rights as rights to defined social goods and services (or a specific quantity thereof), thereby imposing a constitutional obligation on the elected branches to provide those goods and services to the relevant rights-holders. For instance, a right to health may be interpreted as a right to a certain medical treatment, or a right to water as a right to a certain water litreage per person per month.

The reliability-promoting form has definite similarities with its vulnerability-mitigating counterpart. In fact, the two forms of constraint frequently co-occur in social rights cases. In both forms, courts' constraint on the elected branches' discretion over social goods and services has the same broad consequence: citizens' obtaining social goods and services. The difference between the two lies in the temporality of that constraint. And such temporality follows from the breadth of the judicial rulings in each. In the vulnerability-mitigating form, the constraint on the elected branches' discretion is mainly retrospective.<sup>166</sup> A court, in reviewing a past governmental action or decision, narrowly overrules *that past action or decision* and orders that the elected branches provide the social good or service to the litigants. By ruling that way, and exerting control over the social good or service, the court becomes an alternative source of social goods and services for citizens in the future. However, the constraint the court imposes on the elected

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<sup>165</sup> Daniel M Brinks and Varun Gauri, 'A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World' in Varun Gauri and Daniel M Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2010), 305; Conor Gearty, 'Against Judicial Enforcement' in Conor Gearty and Virginia Mantouvalou (eds), *Debating Social Rights* (Hart Publishing 2010), 58.

<sup>166</sup> I say "mainly" because under any common law system, the court's ruling will have some precedential value. Now, I do recognise that Brazil – the jurisdiction which I have used to illustrate the vulnerability-mitigating constraint in the last section – is not a common law system (but, rather, it is a civil law system). However, given this constraint's mainly retrospective effect, I consider it reasonable to use Brazil for this limited illustrative purpose.

branches has little carry-forward value with respect to future interactions between citizens and the elected branches. It tells citizens who are not the litigants little about their future interactions with government. In the reliability-promoting form, in contrast, courts' constraint on the elected branches' discretion has much greater prospective function. By deciding cases broadly and interpreting a constitutional social right as a right to a defined social good or service, a court's constraint has much greater impact on the future interactions between the elected branches and citizens generally. Granted, when a court constrains the elected branches' discretion in this way, it frequently orders provision of the social good or service at issue to the litigants in the immediate case (thereby employing the vulnerability-mitigating form of constraint). However, and what distinguishes the two forms, they also restrict the elected branches' discretion so as to limit the possible outcomes of future interactions between the elected branches and citizens.

This form of constraint is generally preferred to its vulnerability-mitigating counterpart as it does not raise the same equity concerns: because the court's ruling applies broadly, its benefit is not limited to those citizens who have the financial resources to litigate their social rights. That said, this form of constraint nonetheless remains problematic from a separation of powers standpoint. By interpreting a constitutional social right as a right to a defined good or service, the courts are, in essence, making social policy. By determining which social goods and services the state must provide, the courts are, given limited budgets, allocating resources away from state provision of other goods and services and, in turn, prioritising between them. Accordingly, in imposing this form of constraint, the courts may reasonably be said once again to be usurping the elected branches' role.<sup>167</sup> But in addition to such separation of powers issues, this form of constraint is also problematic because it fails to promote government trustworthiness. Granted, like trustworthiness-promoting constraints, this form of constraint does constrain the elected branches' future conduct (via the court's use of broad rulings). But since the court's judgment targets the outcome of governmental decision-making vis-à-vis social goods and services rather than its process (and specifically the three expectations which constitute trust), there is again no reason (to my mind, at least) why this form of constraint should increase the likelihood of the elected branches fulfilling those expectations. Because the court's judgment here does not target the three constituent expectations of trust, this form of judicial constraint, in contrast with the trustworthiness-promoting category of constraint, neither informs the elected branches to act in accordance with those expectations nor offers them any incentive to do so. So, why should they?

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<sup>167</sup> For example, recognising this problem with interpreting social rights as rights to defined goods and services, Sandra Fredman has noted that 'the right need not lie in a bundle of goods. It can also be a right to an act, such as the creation of institutions, enabling or facilitative powers, or programmes of further action': Fredman (n 10) 77.

Hence, if we once more accept the validity of government trustworthiness to the enforcement of constitutional social rights, this form of judicial constraint similarly proves problematic.

Based again on the conceptual groundwork from Chapters 1 and 2, I suggest that this form of judicial constraint – rather than promote the elected branches’ trustworthiness – *promotes their reliability with respect to the specific social good or service at issue*. Reliability, it will be recalled, covers those circumstances in which the outcome of the interaction between a truster and a trustee follows entirely from external constraints: that is, where external constraints imposed upon the trustee are so great that they eliminate his discretion and dictate the outcome of his interaction with the truster. In such circumstances, the truster is able to predict the outcome of her interaction with the trustee because of those constraints on outcome (thereby rendering the trustee reliable). In my view, the present form of judicial constraint serves this function. By making broad rulings which interpret constitutional social rights as a right to a defined social good or service, courts impose constraints on the elected branches which essentially eliminate their discretion over that good or service; and, in turn, they dictate the outcome of their future interactions with citizens vis-à-vis that specific good or service.<sup>168</sup> For instance, if a court interprets a constitutional right to health as a right to a specific class of chemotherapy drugs, the elected branches are, owing to that decision, under a constitutional obligation to make such drugs available to the right’s holders. The court’s interpretation of the right to health in this manner essentially eliminates the elected branches’ discretion vis-à-vis chemotherapy drugs and, so, dictates whether citizens are able to obtain such drugs from the elected branches in the future. And following therefrom, since discretion/uncertainty is a constituent element of a trust relationship, where a court imposes this form of constraint on the elected branches, trust is no longer a possibility in the citizen-government relationship (at least with respect to that specific social good or service). Put concisely, via this form of judicial constraint the court effectively renders that specific case of the citizen-government relationship a “non-trust” relationship.

## Chapter Summary

This brings me to the end of this chapter. In brief recap: I have argued that courts can, and (for the reasons provided herein) should, in their enforcement of constitutional social rights, use the concept of political trust as an adjudicative tool. They do so by holding the elected branches to a standard of trustworthiness (a standard which entails the imposition of trustworthiness-promoting constraints on the elected branches’ discretion over social goods and services). In pursuing this end, courts serve as “mediators of government trustworthiness”. In the two

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<sup>168</sup> This, of course, assumes that the elected branches comply with the ruling.

remaining chapters, I illustrate this argument (as well as its theoretical foundation from Chapters 1-3) using two concrete examples from the social rights world. The first such illustration – the prevention of mother-to-child transmission of HIV in South Africa – is the focus of Chapter 5.

## CHAPTER 5

### The Prevention of Mother-To-Child Transmission of HIV in South Africa

One has but to read several of the commentators on the South African controversies over AIDS – journalists, politicians, activists, scholars – to reali[s]e that the intellectual landscape of the AIDS epidemic has been reduced to simple terms: on one side, medicine and science, people of good will and good sense, efficacy and truth; on the other, a president and a few dissidents, corrupt politicians and quack scientists, incompetence and error.

– Didier Fassin<sup>1</sup>

This chapter illustrates the arguments made in this thesis (including, of particular importance, this thesis's central argument about social rights enforcement) using the prevention of mother-to-child transmission of HIV (PMTCT) in South Africa during the late 1990s and early 2000s. I have chosen this specific example for several reasons (which I outlined in the Introduction). Without repeating those reasons, I would, however, like to re-emphasise two of them. First, since the South African government's response to the HIV/AIDS epidemic made international headlines, it has subsequently been researched and discussed by many commentators, ranging from lawyers and activists to anthropologists and media scholars. These commentators' writings on the epidemic offer a wealth of material which I can use to illustrate these arguments. But note that in order to make the illustration in this chapter as authentic as it can be, I have sought to prioritise in my illustration, to the extent possible, the work of commentators in South Africa. Second, this example generated one of the most famous decisions made by the South African Constitutional Court – *Minister of Health v Treatment Action Campaign* ("TAC") – wherein the Court faced a constitutional challenge to the South African government's policy on PMTCT.<sup>2</sup> Hence, it also offers a concrete social rights case to which I can apply this thesis's central argument.

### Constitutional Background

Social rights are expressly protected in the South African Constitution.<sup>3</sup> The principal provisions which protect social rights are sections 26-29 of the Bill of Rights.<sup>4</sup> Sections 26 and 27 use

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<sup>1</sup> *When Bodies Remember: Experiences and Politics of AIDS in South Africa* (University of California Press 2007), 76.

<sup>2</sup> [2002] ZACC 15, 2002 (5) SA 721.

<sup>3</sup> The decision to provide such protection to social rights was highly contentious. Whereas a coalition of civil society organisations campaigned vigorously for their inclusion, certain other groups objected, relying on the arguments against justiciability which I outlined in Chapter 4. For a good summary of this debate, see Sandra Liebenberg, 'South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty' (2002) 6 *Law, Democracy and Development* 159, 161-62. In the end, however, the argument for full inclusion won the day and social rights were expressly included in the South African Constitution.

parallel language to protect the right to housing, and the rights to health, food, water and social security, respectively. Sections 26(1) and 27(1) set out the basic rights. In principal part, they guarantee ‘everyone ... the right to have access to’ ‘adequate housing’ (under section 26(1)) and ‘health care services, including reproductive health care’, ‘sufficient food and water’ and ‘social security’ (under section 27(1)). Sections 26(2) and 27(2) place a corresponding positive obligation on the state. They require the state to ‘take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation’ of the rights in sections 26(1) and 27(1).<sup>5</sup> And third, sections 26(3) and 27(3) place negative obligations on the state: section 26(3) prohibits the state from making non-court-ordered or arbitrary evictions, and section 27(3) prohibits the state from refusing to provide emergency medical treatment. Next in the set comes section 28. It is a provision which applies specifically to children. Section 28(1) guarantees ‘every child’ a host of rights including under section 28(1)(c), ‘the right ... to basic nutrition, shelter, basic health care services and social services’. And finally, section 29 of the Constitution protects the right to education. In particular, section 29(1) provides that ‘everyone has the right’ to ‘a basic education, including adult basic education’ as well as ‘further education, which the state, through reasonable measures, must make progressively available and accessible’.<sup>6</sup>

The social rights in the Constitution are justiciable. This conclusion is supported not only by their express inclusion in the Constitution, but also by section 7(2) of the Constitution which requires the state ‘to respect, protect, promote and fulfil the rights in the Bill of Rights’, section 8(1) which provides that the ‘Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state’, and section 39(2) which requires ‘every court, tribunal, or forum’ to ‘promote the spirit, purport and objects of the Bill of Rights’ in every matter involving the interpretation of legislation and the development of the common law or customary law.<sup>7</sup> The Constitutional Court has affirmed the justiciability of its social rights and, in

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<sup>4</sup> I say “principal” provisions for two reasons: (i) as I describe below, the South African Constitution establishes a framework for social rights protection and thus, there are other provisions which, in conjunction with sections 26-29, protect social rights; and (ii) there are other provisions which are targeted at specific groups (eg section 35(2) is targeted at detained persons and confers the right ‘to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment’. Moreover, beyond the provisions described herein, the South African Constitution contains a panoply of other provisions which offer support to sections 26-29, including section 7(2) which places an overarching obligation on the state to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’.

<sup>5</sup> It should be noted that whether sections 26(2) and 27(2) qualify the rights in sections 26(1) and 27(1) or are standalone provisions is a source of contention among scholars.

<sup>6</sup> Additionally, section 29(2) guarantees ‘everyone ... the right to receive education in the official language or languages of their choice in public educational institutions’ – but only where ‘reasonably practicable’. And section 29(3) guarantees everyone a right to establish and maintain – at their own expense – independent educational institutions, provided they meet certain requirements set out therein.

<sup>7</sup> Jonathan Berger, ‘Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education’ in Varun Gauri and Daniel M Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2008), 42.

fact, has relied upon the foregoing provisions (or the ultimate substance underlying them) to justify its affirmation. In its *First Certification* decision of 1996, the Court stated for the first time that ‘these rights are, at least to some extent, justiciable’.<sup>8</sup> Dispelling the argument that the financial implications of social rights render them non-justiciable, the Court stated: ‘many of the civil and political rights entrenched ... will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability’.<sup>9</sup> Hence, the Court decided, ‘At the very minimum, socio-economic rights can be negatively protected from improper invasion’.<sup>10</sup> Since that time, the Court has re-affirmed social rights’ justiciability in its jurisprudence, including in the leading case of *Government of the Republic of South Africa v Grootboom* (“*Grootboom*”) (as well as in the *TAC* decision itself).<sup>11</sup> In *Grootboom*, Yacoob J. (writing for a unanimous court) made clear that ‘the issue of whether socio-economic rights are justiciable at all has been put beyond question by the text of our Constitution as construed in the [First] Certification judgment ... The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case’.<sup>12</sup>

### **Factual Background**

In the late 1990s, the prevalence of HIV in the South African population was escalating rapidly; and not before long it had reached unprecedented levels. By 2000, UNAIDS estimated that approximately 19.9 percent of adults in South Africa were living with HIV, up from 12.9 percent only two years earlier.<sup>13</sup> This statistic gave South Africa the unenviable title of being the country with the largest number of people living with HIV and/or AIDS (PLHIV) (4.2 million in 2000).

Particularly problematic was the steady and rapid rise in the percentage of pregnant women in South Africa who were living with HIV (PWLHIV). Whereas in 1990, only 0.8 percent of pregnant women were living with HIV, by 2002, that number had jumped to 26

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<sup>8</sup> *Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26, 1996 (4) SA 744 [78].

<sup>9</sup> *ibid.*

<sup>10</sup> *ibid.*

<sup>11</sup> [2000] ZACC 19, 2001 (1) SA 46.

<sup>12</sup> *ibid* [20]. There continues to be some debate among scholars regarding justiciability. That said, I concur with the view expressed by Marius Pieterse, ‘Coming to Terms with Judicial Enforcement of Socio-Economic Rights’ (2004) 20 *South African Journal on Human Rights* 383, 404: ‘whether we like it or not, socio-economic rights are as justiciable as civil and political rights’ and, thus, ‘[p]ost-1996 South African courts are not only allowed, but constitutionally *obliged* to pronounce on the validity of legislation and policy in the socio-economic sphere’.

<sup>13</sup> Joint United Nations Programme on HIV/AIDS (UNAIDS), ‘AIDS in a New Millennium: A Grim Picture with Glimmers of Hope’ (Report on the Global HIV/AIDS Epidemic, 2000) <[http://data.unaids.org/pub/report/2000/2000\\_gr\\_en.pdf](http://data.unaids.org/pub/report/2000/2000_gr_en.pdf)> accessed 6 June 2017, 9.

percent.<sup>14</sup> The numbers rose markedly during the period from 1995 to 2002, with the prevalence of HIV infection in pregnant women being estimated at 10.4 percent in 1995, 17 percent in 1997, 22.4 percent in 1999 and 24.8 percent in 2001. This rise in HIV infection prevalence among pregnant women was particularly problematic because of the potential for intrapartum transmission of HIV from mothers to children during pregnancy. It is estimated that without any intervention, the risk of transmitting HIV from mother to child is between 20 and 45 percent.<sup>15</sup> As a result, by 1998, it was estimated that up to 70,000 children were born each year with HIV.<sup>16</sup>

Fortunately, during the same period, significant advancements were made in treating HIV patients (including treatments for PMTCT purposes). In 1994, it was discovered that the use of the antiretroviral drug (ARV), AZT, could dramatically reduce the risk of mother-to-child transmission of HIV (MTCT).<sup>17</sup> Additionally, contrary to popular belief that AZT had to be administered relatively early in pregnancy to be effective, a subsequent clinical trial in Thailand demonstrated that starting administration of AZT late in pregnancy – specifically, at 36 weeks – nonetheless yielded significant reductions in MTCT.<sup>18</sup> Then, in July 1999, the results of a clinical trial conducted in Uganda (called HIVNET 012) were released, showing that an alternative ARV, nevirapine, could be used to reduce MTCT.<sup>19</sup> The results showed that a single dose of nevirapine could cut MTCT by half when given to mothers immediately prior to labour and to infants shortly after birth (in the form of a syrup).<sup>20</sup> The appeal of nevirapine was that it was equally effective to AZT, but could be administered using a less complex regimen and, accordingly, at a significantly reduced cost. By that point, nevirapine had already been approved by the Food and Drug Administration in the United States (FDA) for the treatment of people with HIV infection (which had happened in 1996).<sup>21</sup> Moreover, in 1999, following the release of the HIVNET 012 results, the World Health Organization listed nevirapine on its *Model List of Essential Drugs*.<sup>22</sup>

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<sup>14</sup> Peter Barron et al, 'Eliminating Mother-To-Child HIV Transmission in South Africa' (Bulletin of the World Health Organization, 2013) <[www.who.int/bulletin/volumes/91/1/12-106807/en](http://www.who.int/bulletin/volumes/91/1/12-106807/en)> accessed 1 November 2016, 70-74.

<sup>15</sup> UNICEF, 'Prevention of Mother to Child Transmission (PMTCT)' (2017) <[https://www.unicef.org/supply/index\\_42855.html](https://www.unicef.org/supply/index_42855.html)> accessed 6 June 2017.

<sup>16</sup> Gilbert Marcus and Steven Budlender, 'A Strategic Evaluation of Public Interest Litigation in South Africa' (The Atlantic Philanthropies, 2008) <[http://www.atlanticphilanthropies.org/app/uploads/2015/09/public\\_interest\\_litigation\\_sa.pdf](http://www.atlanticphilanthropies.org/app/uploads/2015/09/public_interest_litigation_sa.pdf)> accessed 6 June 2017, 69.

<sup>17</sup> *ibid* 69.

<sup>18</sup> *ibid* 69-70.

<sup>19</sup> *ibid* 74.

<sup>20</sup> Mandisa Mbali, *South African AIDS Activism and Global Health Politics* (Palgrave Macmillan 2013), 125, citing LA Guay et al, 'Intrapartum and Neonatal Single-Dose Nevirapine Compared with Zidovudine for Prevention of Mother-to-Child Transmission of HIV-1 in Kampala, Uganda: HIVNET 012 Randomised Trial' [1999] *Lancet* 354.

<sup>21</sup> National Institute of Allergy and Infectious Disease (NIAID), 'Nevirapine Approved by FDA: First Non-Nucleoside Reverse Transcriptase Inhibitor' (1996) <<https://aidsinfo.nih.gov/news/322/nevirapine-approved-by-fda--first-non-nucleoside-reverse-transcriptase-inhibitor>> accessed 6 June 2017.

<sup>22</sup> As revised December 1999, s 6.4.2.

However, ARVs were extremely expensive at that time in South Africa. For instance, Edwin Cameron (now a Justice of the Constitutional Court, then a judge of the South African High Court, who revealed in 1999 that he was living with HIV) noted in his address at the International AIDS Conference in 2000 that a monthly supply of ARVs (at that time) cost the South African rand equivalent of USD\$400.<sup>23</sup> Owing to this high cost, the South African government told the public that it could not afford to offer ARVs on its public health system.<sup>24</sup>

Not before long, the South African government became the target of the Treatment Action Campaign (the “TAC”) and its mobilisation efforts. The TAC is a South African HIV/AIDS activist organisation which was launched in December 1998 ‘to campaign for access to AIDS treatment’.<sup>25</sup> It was co-founded by its HIV-positive leader Zachie Achmat along with ten other activists. Given that the government had (at that point) defended its decision to not provide ARVs on affordability grounds, the TAC focused its efforts on bringing down the cost of ARVs in South Africa. It did so by mobilising support from international bodies (including Médecins Sans Frontières, Oxfam International and Health-Gap) who collectively put pressure on the pharmaceutical companies manufacturing ARVs to reduce their prices in developing countries.<sup>26</sup> It also inserted itself into then-pending litigation. That litigation arose out of the South African National Department of Health’s decision in 1997 to pass the *Medicines and Related Substances Control Amendment Act* (the “*Medicines Act*”).<sup>27</sup> Under the *Medicines Act*, the government could use two techniques which would enable it to access ARVs at a fraction of the cost it was paying: (i) the parallel importation of ARVs from other countries (where those ARVs were cheaper than what was being offered to the South African government by their manufacturers); and, (ii) compulsory licensing which enabled local manufacturers to produce generics of the brand-name drugs at a lower cost.<sup>28</sup> Predictably, multinational drug companies as well as the Pharmaceutical Manufacturers’ Association (the “PMA”) strongly opposed the *Medicines Act* and, in February 1998, challenged its constitutionality in the High Court.<sup>29</sup> The TAC, in its attempt to bring down ARVs’ costs, put pressure on the PMA, demanding that it withdraw its challenge and bringing a motion to join the litigation as *amicus curiae* (which it was ultimately granted in March

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<sup>23</sup> Edwin Cameron, ‘The Deafening Silence of AIDS’ (2000) 5 *Health and Human Rights* 7, 12.

<sup>24</sup> Pieter Fourie and Melissa Meyer, *The Politics of AIDS Denialism: South Africa’s Failure to Respond* (Ashgate 2010), 98.

<sup>25</sup> TAC webpage <[http://www.tac.org.za/about\\_us](http://www.tac.org.za/about_us)> accessed 4 November 2016.

<sup>26</sup> Mark Heywood, ‘Debunking “Conglomo-Talk”: A Case Study of the *Amicus Curiae* as an Instrument for Advocacy, Investigation and Mobilisation’ (2001) 5 *Law, Democracy and Development* 133, 157; Mark Heywood, ‘South Africa’s Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health’ (2009) 1 *Journal of Human Rights Practice* 14, 24; Mbali (n 20) 164.

<sup>27</sup> Fourie and Meyer (n 24) 100. In fact, the Director General of the Health Department, in an affidavit deposed as part of the PMA case, stated repeatedly under oath that the sole barrier to the use of antiretroviral drugs in South Africa was affordability: Heywood, ‘Debunking “Conglomo-Talk”’ (n 26) 158.

<sup>28</sup> Fourie and Meyer (n 24) 100; Mbali (n 20) 121.

<sup>29</sup> Heywood, ‘Debunking “Conglomo-Talk”’ (n 26) 139.

2001).<sup>30</sup> Six weeks later, on 19 April 2001, the PMA withdrew the matter.<sup>31</sup> The international pressure which was exerted on the pharmaceutical companies also resulted in their bringing down the cost of various ARVs in South Africa by two-thirds.<sup>32</sup> Moreover, and to further erode the South African government's defence that ARVs were unaffordable, Boehringer Ingelheim, nevirapine's manufacturer, offered the government a free supply of the drug for five years.<sup>33</sup>

Up to this point in time, the South African government had suggested that affordability was the 'sole barrier' preventing the provision of ARVs on the public health system.<sup>34</sup> Thus, it was reasonable to assume that given the TAC's string of successes in making ARVs more affordable, ARVs would now be made available on the public system to those who needed them. Nevertheless, the South African government maintained its refusal to provide ARVs on the public system.<sup>35</sup> Although the defence of affordability lingered for ARVs other than nevirapine (since their cost of one-third their original price was still relatively high), now, the government was also questioning the safety and efficacy of ARVs (despite the preponderance of evidence in this regard supporting ARVs generally and nevirapine specifically).<sup>36</sup> In fact, immediately after the PMA withdrew its case, the then-Minister of Health, Dr. Manto Tshabalala-Msimang, indicated that the government had 'no immediate plans to use the landmark legal victory' to obtain ARVs.<sup>37</sup> She said: 'We never said we want to use antiretrovirals. But we have to place our options on the table to see what we will use'.<sup>38</sup> The health minister explained that ARVs were 'still too expensive, too dangerous and too difficult to manage for the government to incorporate them into its AIDS-fighting plans'.<sup>39</sup> With respect to nevirapine (for which affordability presented no issue because it was made available for free by its manufacturer), she announced that before the drug could be offered on the public system, it would be tested for a period of two years at two pilot sites in each province of South Africa.<sup>40</sup> Simultaneously, the government's pilot programme imposed restrictions on physicians working in the public system who were not located in the relevant sites, prohibiting them from offering nevirapine to their pregnant patients living with HIV.<sup>41</sup> It is the latter PMTCT programme which was challenged in the *TAC* case.

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<sup>30</sup> *ibid* 140-41, 160.

<sup>31</sup> *ibid* 160.

<sup>32</sup> *ibid* 157.

<sup>33</sup> Marcus and Budlender (n 16) 74-75.

<sup>34</sup> Mbali (n 20) 121.

<sup>35</sup> Heywood, 'Debunking "Conglomo-Talk"' (n 26) 156.

<sup>36</sup> Fourie and Meyer (n 24) 99-100.

<sup>37</sup> HIV Treatment Bulletin, 'Drug companies withdraw HIV drug lawsuit against South Africa' (2001) <<http://i-base.info/htb/4380>> accessed 4 November 2016.

<sup>38</sup> *ibid*.

<sup>39</sup> *ibid*.

<sup>40</sup> Marcus and Budlender (n 16) 76-77.

<sup>41</sup> *TAC* [4].

## **The Illustration**

The relationship between PWLHIV and the South African government with respect to PMTCT represents a case of the citizen-government relationship. As such, it satisfies the three elements of – and so may be characterised as – a trust relationship. I will not spend too much time on this characterisation (as I think by this point it is self-evident). But in brief: the South African government had control over ARVs (including nevirapine) which PWLHIV needed; the government had discretion in providing those ARVs, thereby leaving PWLHIV uncertain of how the government would exercise its control; and owing to their need for ARVs, coupled with the government's control and discretion thereover, PWLHIV were vulnerable to the government.

The network conception of trust posits that as a trust relationship, this relationship between PWLHIV and the South African government was embedded in a network of interdependent relationships. That network of relationships consisted of the many parties which I identified in Chapter 3 to define the boundaries of the social rights network (eg lawyers, legal aid bodies, non-governmental and international organisations, foreign governments, etc). In the factual background which I have provided in this chapter, we can already begin to see how various parties such as the TAC, international organisations (eg Médecins Sans Frontières, Oxfam International and Health-Gap), the PMA as well as several pharmaceutical manufacturers may have formed part of the network. Pursuant to the network conception of trust, PWLHIV's trust in the South African government also depended on these other relationships. Or, as I have otherwise put it, we can expect that such relationships were able to impact PWLHIV's trust.

Obviously, this illustration cannot cover everything in this thesis. However, I will try my best to illustrate this thesis's central points. I have chosen to divide this illustration up by party. Specifically, it will mirror my description of the social rights network from Chapter 3. Accordingly, this illustration will centre around the same subset of parties which I used there: private providers of social goods and services, the media and, of course, the courts. In this example of PMTCT in South Africa, those parties translate into: the physicians who worked in South Africa's private health system, the South African media and the South African courts. With respect to the latter party, I will focus this illustration specifically on the South African Constitutional Court. Additionally, since the focus of this thesis is political trust (and more specifically, trust in the citizen-government relationship), I will also centre this illustration around the relationship between PWLHIV and the South African government with respect to PMTCT.

*Physicians in the Private Health System*

Like most countries in the world, South Africa had (and continues to have) a two-tiered health care system.<sup>42</sup> On one hand, there is the private health system. It is made up of well-paid physicians (including general practitioners and specialists) as well as modern medical facilities.<sup>43</sup> Although it served/serves only 20 percent of South Africa's population, it accounted/accounts for the majority of national spending on health.<sup>44</sup> On the other hand, there is the public health system. While it served/serves more than 80 percent of the population, it accounted/accounts for a much smaller percentage of national spending (20 percent as of 2001). Problematically, the South African private and public health systems divide not only across socio-economic lines (which is the case in most countries), but also across racial lines: the public system served/serves mostly black people whereas the private system served/serves mostly white people.<sup>45</sup>

The relationship between PWLHIV and physicians who worked in South Africa's private health system represents a case of the "alternative source" relationship from Chapter 3. As with alternative sources more generally, physicians in South Africa's private system had control over the very social good or service which the South African government also had control in its trust relationship with PWLHIV (ARVs, including nevirapine). Given their control in this regard, these physicians served as an alternative source of ARVs (including nevirapine) for PWLHIV. In concise terms, PWLHIV had two potential sources of ARVs (at least technically speaking): the South African government and these physicians who worked in the private health system.

Now, for those PWLHIV who had access to the private health system, physicians who worked in that system were not just a technically available source – but a practical one. And thus, their relationship with these private physicians served to mitigate their vulnerability. To be clear, even the relevant subset of PWLHIV, who had access to the private system, were (at least to some extent) vulnerable to the South African government. This is so because in the South African health system, patients with private health insurance are not barred from the public system.<sup>46</sup> They may, and often do, use both systems, relying on the public health system in order to prevent exhausting their coverage under their private policies. In other words, despite having access to the private system, the South African government remained a potential source of ARVs for these PWLHIV. However, because these PWLHIV also had access to the private system,

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<sup>42</sup> Heywood, 'Debunking "Conglomo-Talk"' (n 26) 136.

<sup>43</sup> Lisa Forman and Jerome Amir Singh, 'The Role of Rights and Litigation in Assuring More Equitable Access to Health Care in South Africa' in Colleen M Flood and Aeyal Gross (eds), *The Right to Health at the Public/Private Divide: A Global Comparative Study* (Cambridge University Press 2014), 293.

<sup>44</sup> In 2001, Heywood explained that it accounted for 80 percent of spending: Heywood, 'Debunking "Conglomo-Talk"' (n 26) 136. In 2014, Forman and Singh explained that it accounted for 60 percent: *ibid* 293.

<sup>45</sup> Heywood, 'Debunking "Conglomo-Talk"' (n 26) 136.

<sup>46</sup> Forman and Singh (n 43) 295.

they, unlike those PWLHIV who were limited to the public system, had access to an alternative source of ARVs via their relationship with private physicians. So, despite being vulnerable to the government, due to this relationship, they were not wholly dependent on the government for the ARVs they needed. If the South African government refused to provide ARVs, these PWLHIV had the option of turning to the private system and, more specifically, to the physicians therein who also had control over ARVs.

The latter scenario is precisely what happened in this case. In the period leading up to the *TAC* decision (as well as for years after the decision), whereas patients who were using the private health system were able to get ARVs (including nevirapine) from their physicians, those using the public system could not.<sup>47</sup> This was so for at least two reasons. First, as is commonly the case with health care treatments in a public health system, it was due to the high cost of ARVs. According to the South African government, ARVs' high price tag made the drugs unaffordable to offer on South Africa's public health system. In fact, prior to 2001 (when, in response to international pressure, pharmaceutical manufacturers reduced the cost of various ARVs in South Africa by two-thirds), the prices of ARVs were so high that even many patients who were using the private health system did not have access to them: ARVs were accessible only to those patients who were wealthy and could afford to pay the exorbitant costs directly out of pocket, or those patients with very well-funded insurance policies (eg politicians and members of the judiciary).<sup>48</sup> Post-2001, due to their reduced cost, ARVs became accessible to a greater proportion of patients using the private system.<sup>49</sup> Moreover, and as I pointed out earlier, there was an additional reason why patients using the public system could not get ARVs. Physicians who were working in that system were prohibited by law from offering their patients nevirapine. No such prohibition existed for physicians who worked in the private system. Therefore, even when nevirapine became affordable (ie when it was offered for free by its manufacturer), patients on the public health system still did not have access to the drug. As we will see shortly, a number of factors underlay the South African government's decision to implement this prohibition.

### *South African Media*

Not surprisingly, the relationship between PWLHIV and the South African media represents a case of the "citizen-media relationship". As with the media more generally, the South African media represented an important source of political information for South Africans. For example,

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<sup>47</sup> That is, of course, with the exception of the pilot sites for the nevirapine programme developed in 2000 and adopted in 2001: *TAC* [41-42].

<sup>48</sup> Ida Susser, *AIDS, Sex, and Culture: Global Politics and Survival in Southern Africa* (Wiley-Blackwell 2009), 99.

<sup>49</sup> Heywood, 'Debunking "Conglomo-Talk"' (n 26) 157.

and with respect to HIV/AIDS and PMTCT specifically, Sean Jacobs and Krista Johnson have pointed out that ‘as a result of their elevated role in politics after apartheid’, the South African media ‘attained a central role in shaping the discourse about HIV/AIDS’.<sup>50</sup> Further, as a case of the citizen-media relationship, we can expect, based on the network conception of trust from Chapter 3 as well as the empirical research which I cited in that chapter, that the South African media was able to impact PWLHIV’s trust in their government with respect to PMTCT.

In Chapter 3, I suggested that James Coleman’s “advisor” as an intermediary in trust offers a fitting model to explain the mechanics of this category of impact. I will now use the PMTCT example to illustrate this point. In so illustrating, I will focus primarily on print media (ie newspapers and magazines) as it has been the focus of media research in this area. Coleman has argued (it will be recalled) that where a truster has a relationship with a third party (“the advisor”) who advises her to trust a trustee, to the extent that the truster trusts the advisor’s judgment, that relationship fosters trust between her and the trustee.<sup>51</sup> Presumably the reverse is also true. If the advisor advises the truster *not* to trust the trustee, to the extent that the truster trusts the advisor’s judgment, her relationship with the advisor will *hinder* trust between her and the trustee. In the PMTCT case, a number of South African publications served as such advisors. They essentially advised PWLHIV *not* to trust the South African government with respect to PMTCT. And therefore, to the extent that PWLHIV trusted those publications, we can expect that such publications hindered trust between PWLHIV and the South African government.

How did these South African publications serve as such advisors? I suggest that they did so by portraying the South African government – in their news stories, editorials and cartoons – as *untrustworthy*. That is, they portrayed the South African government as not likely to fulfil citizens’ expectations of good will, fiduciary responsibility and competence. To be clear, the illustration in this section should not be taken as an exhaustive analysis of South African print media during the relevant time. For instance, there were presumably a few publications which portrayed the South African government as trustworthy (and such publications, to the extent that they were trusted by PWLHIV, can be expected to have *fostered* trust in government). But media scholars (as well as anthropologists) have argued, and empirically demonstrated, that during the PMTCT debate in South Africa, the media’s portrayal of the South African government was overwhelmingly negative.<sup>52</sup> For example, Nicola Spurr (at the time a research

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<sup>50</sup> Sean Jacobs and Krista Johnson, ‘Media, Social Movements and the State: Competing Images of HIV/AIDS in South Africa’ (2007) 9 *African Studies Quarterly* 127, 128.

<sup>51</sup> James Coleman, *Foundations of Social Theory* (Harvard University Press 1994), 194.

<sup>52</sup> Fassin (n 1); Fourie and Meyer (n 24); Jacobs and Johnson (n 50); Mia Malan, ‘Exposing AIDS: Media’s Impact in South Africa’ (2006) 7 *Georgetown Journal of International Affairs* 41; Nicola Spurr, ‘Who is Setting the PMTCT Agenda? A Quantitative Content Analysis of Media Coverage of PMTCT in SA’ (Nelson Mandela Foundation in

fellow in the HIV/AIDS and the Media Project at the University of Witwatersrand) conducted a retrospective monitoring exercise of South African newspapers during 2000, 2002 and 2004, using a broad range of English-language newspapers.<sup>53</sup> In her exercise, she coded newspaper articles which addressed the PMTCT debate according to the “key message” which they conveyed. Spurr observed a ‘generally negative portrayal of government’ in those articles, with many of the articles’ key messages casting the South African government in a negative light.<sup>54</sup> Accordingly, in my illustration here, I focus on this negative portrayal and therefore, on the media as an advisor so as to *not* trust the South African government with respect to PMTCT.

First, many publications portrayed the South African government as untrustworthy by casting doubt on its competence to deal with South Africa’s HIV/AIDS epidemic. Specifically, these publications did so by revealing a key motivation behind the South African government’s refusal to provide ARVs on its public health system – the adoption of HIV/AIDS denialism by the then-president, Thabo Mbeki – and challenging that motivation’s scientific foundation.<sup>55</sup> In doing so, these publications essentially presented the South African government as not acting (as well as not likely to act in the future) in accordance with the principles of EBPM.

Mbeki’s denialism wove together two major ideologies.<sup>56</sup> The first was one of African nationalism and anti-imperialist, postcolonial thinking. This ideology saw ARVs ‘as profiting Western drug manufacturers and injuring Africans, while ignoring the sociohistorical roots of the epidemic in apartheid’s generations of poverty and neglect’.<sup>57</sup> The second ideology was a dissident view on HIV/AIDS. The dissident view rejected the evidence linking HIV and AIDS (which the vast majority of the scientific and medical community had accepted at that point), saw the AIDS epidemic in Africa as more likely caused by a compound of factors, including malnutrition and poverty (and that other illnesses were being mis-described as HIV-related in

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Partnership with the HIV/AIDS and the Media Project, 2005)

<[https://www.nelsonmandela.org/uploads/files/Baby\\_Steps.pdf](https://www.nelsonmandela.org/uploads/files/Baby_Steps.pdf)> accessed 6 June 2017, 11; Susser (n 48).

<sup>53</sup> Spurr notes that articles were collected ‘from a news clippings service run by the University of the Free State’ and that the exercise was ‘restricted to English language print media’: Spurr (n 52) 12. The SA Media collection – most likely the one to which Spurr is referring – currently covers 120 South African newspapers and periodicals: <<http://library.ukzn.ac.za/TopNav/ElectronicResources/newspaperarticles749.aspx>> accessed 21 July 2017.

Moreover, with respect to the date range of Spurr’s exercise, she explains that these calendar years were chosen because ‘of important events around PMTCT that unfolded then’: Spurr (n 52) 12.

<sup>54</sup> Spurr (n 52) 15.

<sup>55</sup> William Forbath, ‘Cultural Transformation, Deep Institutional Reform, and ESR Practice: South Africa’s Treatment Action Campaign’ in Lucie E White and Jeremy Perelman (eds), *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty* (Stanford University Press 2010), 57-58; Mark Heywood, ‘Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case Against the Minister of Health’ (2003) 19 *South African Journal on Human Rights* 278, 282; Heywood, ‘South Africa’s Treatment Action Campaign’ (n 26) 20.

<sup>56</sup> Forbath (n 55) 57-58.

<sup>57</sup> *ibid* 57-58.

order to generate markets for ARVs), and consequently, argued that ARVs (which were seen as dangerous rather than life-saving interventions) were an improper use of scarce resources.<sup>58</sup>

Mbeki became President of South Africa in June 1999, succeeding Nelson Mandela. Mbeki's denialist views came to light later that year when, during an address to the National Council of the Provinces (NCOP) in October, he began to question the safety of AZT.<sup>59</sup> In his address, he made reference to 'legal cases pending' in South Africa, the United Kingdom and the United States 'against AZT on the basis that this drug is harmful to health', noted that there was 'a large volume of scientific literature alleging that, among other things, the toxicity of this drug is such that it is in fact a danger to health', and revealed that, based on such, he had tasked the health minister with investigating AZT further.<sup>60</sup> In May 2000, the health minister formally announced that a Presidential Panel would be held to investigate the science behind AIDS.<sup>61</sup>

When these denialist views came to light, the story of Mbeki and his HIV/AIDS denialism made the rounds of various press agencies.<sup>62</sup> As Mandisa Mbali has pointed out in her historical tracing of AIDS activism in South Africa, from May 2000, 'the debate, as it played out in the media, revolved around Mbeki's questioning of the link between HIV and AIDS, which was emerging as a major barrier to the government's adoption of a PMTCT programme'.<sup>63</sup> The media lambasted the president for his denialist views, especially in light of rumours circulating at the time that Mbeki spent his nights surfing the net (where he apparently learned about AIDS dissidents) and used that "research" as the basis for his policies.<sup>64</sup> For example, Mbali, in her work, refers to a cartoon which appeared in the 20 July 2000 edition of the Johannesburg newspaper *The Star* wherein Mbeki is shown sitting at a computer, smoking a pipe with the caption: 'Now, if I can only find a connection between HIV and cigarettes, I'll have another diversion'.<sup>65</sup> Similarly, Didier Fassin, in his anthropological examination of the AIDS crisis in South Africa, describes an opinion column by political analyst Siphoo Seepe in the 14 December 2001 edition of the Johannesburg newspaper the *Weekly Mail and Guardian*.<sup>66</sup> In it, Seepe called the South African President 'Professor Mbeki (PhD.www)' and awarded him the title 'instant graduate of the Internet Medical School'. Seepe summarised the then-state of the South African government as follows: 'If anything, South Africa has become, at government level, a purveyor

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<sup>58</sup> *ibid* 58; Heywood, 'Preventing Mother-to-Child' (n 55) 282.

<sup>59</sup> Mbali (n 20) 125.

<sup>60</sup> *ibid* 126.

<sup>61</sup> *ibid* 127.

<sup>62</sup> Fassin (n 1) 56.

<sup>63</sup> Mbali (n 20) 127.

<sup>64</sup> Fassin (n 1) 56; *ibid* 130. In fact, in his October 1999 address to the NCOP, Mbeki had urged MPs to consult the internet in order to learn more about AIDS: *ibid* 130.

<sup>65</sup> Mbali (n 20) 130.

<sup>66</sup> Fassin (n 1) 56.

and compost heap of discredited ideas'.<sup>67</sup> Fassin also references a caricature published by the cartoonist Dr. Jack in the 19 April 2002 *Weekly Mail and Guardian*.<sup>68</sup> That caricature, as Fassin describes it, 'shows the head of state in his pajamas and slippers facing his computer on whose screen one can see the homepage "virusmyth," one of the main websites of AIDS heterodoxy; leaning languorously on the computer, the famous reporter is smiling down at him'.<sup>69</sup>

Furthermore, the media did not spare the health minister, who had been doing the president's bidding and had supported the president's dissident views well after the *TAC* decision in July 2002. For instance, following the 2006 International AIDS Conference in Toronto wherein the health minister's official stand in the conference exhibition hall focused on remedying HIV with 'beetroot, garlic, lemon juice and olive oil' rather than ARVs, many publications dubbed the health minister pejorative names.<sup>70</sup> These names included "Dr. Garlic", "Dr. Beetroot", "Dr. No" and "Dr. Doolittle".<sup>71</sup> Similarly, in a 25 May 2006 opinion piece in the *Weekly Mail and Guardian*, written by a staff reporter and titled 'We must kill this cancer now', the author summarised the denialists' views as 'vegetarian quackery' and referred to a group of well-known denialists (whose advice the health minister had sought) as a 'network of denialist loonies'.<sup>72</sup> The author, in turn, criticised the health minister as well as the president, explaining that these well-known denialists 'are not the real problem. In most societies, they would simply be ignored, and would continue feeding each other's sad delusions in small cult groups ... The problem in South Africa is that they have the ear of the president and the health minister'.<sup>73</sup>

In summary, these publications presented the South African government as basing its PMTCT policies and programmes on the president's late-night internet research which turned up 'discredited ideas' and 'dangerous quackery' being pushed by 'denialist loonies'. This is in stark contrast with what would be expected of a competent government, basing such policies and programmes on knowledge derived from scientific research (in accordance with the principles of EBPM). Moreover, it is arguable that these publications also called into question the South African government's competence more broadly in governmental policy-making – in other words, and to again use Brian Head's terms, its "political knowledge" and "practical implementation knowledge". As Sipho Seepe commented in a 2001 interview, 'When someone is

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<sup>67</sup> *ibid* 289.

<sup>68</sup> *ibid* 56.

<sup>69</sup> *ibid* 56.

<sup>70</sup> Mark Heywood, 'Picking Up the Pieces: The End of AIDS Denialism and Its Aftermath' in SS Abdool Karim and Q Abdool Karim (eds), *HIV/AIDS in South Africa* (Cambridge University Press 2010), 447.

<sup>71</sup> Jacobs and Johnson (n 50) 141-42.

<sup>72</sup> <<https://mg.co.za/article/2006-05-25-we-must-kill-this-cancer-now>> accessed 6 June 2017.

<sup>73</sup> *ibid*.

as stubborn as the president about a field he is not expert in, it makes one wonder how reliable his opinions are in the areas he is supposed to know about – such as economics’.<sup>74</sup>

Second, many South African publications challenged whether the government was exercising (and would likely exercise in the future) good will toward its people. In this regard, these publications challenged both of the sub-expectations of good will: that is, good intentions and fair procedures. First, owing to the president and health minister’s refusal to accept prevailing scientific and medical opinion on ARVs’ safety and efficacy, the government was portrayed as lacking the political will to deal with South Africa’s HIV/AIDS epidemic – in other words, it was portrayed as behaving intransigently. Both Spurr and Mia Malan have noted this trend in their empirical research.<sup>75</sup> In Spurr’s study, for instance, three of the top ten key messages which she observed in newspaper articles related to the government’s will. These messages were: ‘The government is too stubborn in the face of scientific evidence and public or other pressures’ (representing 4.2 percent of all key messages), ‘An impediment to effective PMTCT is political will’ (representing 3.0 percent of all key messages) and ‘The government lacks the political will to deal with HIV/AIDS’ (representing 2.5 percent of all key messages).<sup>76</sup>

Additionally, certain publications attacked the fairness of the government’s procedures in making decisions on PMTCT and ARVs. A good example is their challenge to the transparency of the government’s decision-making.<sup>77</sup> The issue of transparency is best seen in the relationship between the executive and South Africa’s Medical Research Council (MRC). The MRC is a parastatal medical research organisation funded primarily by the National Department of Health.<sup>78</sup> Its mandate is ‘to promote the improvement of the health and the quality of life of the population of [South Africa] through research, development and technology transfer’.<sup>79</sup> In September 2001, the MRC produced a report titled ‘The Impact of HIV/AIDS on Adult Mortality in South Africa’.<sup>80</sup> In it, the MRC concluded that in 2000, AIDS ‘accounted for about 25% of all deaths’ and accordingly that it had ‘become the single biggest cause of death’ in South Africa.<sup>81</sup> Up to that point in time, President Mbeki had denied that the HIV/AIDS epidemic was

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<sup>74</sup> Helen Suzman Foundation, ‘Interview with Professor Siphoo Seepe, scientist and newspaper columnist’ (2001) <<http://hsf.org.za/resource-centre/focus/issue-23-third-quarter-2001/interview-with-professor-siphoo-seepe-scientist-and-newspaper-columnist>> accessed 7 November 2016.

<sup>75</sup> Malan (n 52) 44; Spurr (n 52) 15.

<sup>76</sup> Spurr (n 52) 15.

<sup>77</sup> Malan (n 52) 44.

<sup>78</sup> South African Medical Research Council (SAMRC), ‘Fact Sheet’ <<http://www.mrc.ac.za/SAMRCfactSheet.pdf>> accessed 16 November 2016.

<sup>79</sup> South African Medical Research Council webpage <<http://www.mrc.ac.za>> accessed 16 November 2016.

<sup>80</sup> Rob Dorrington et al, ‘The Impact of HIV/AIDS on Adult Mortality in South Africa: Technical Report’ (SAMRC, 2001) <<http://www.mrc.ac.za/bod/complete.pdf>> accessed 12 August 2017.

<sup>81</sup> *ibid* 6.

the leading cause of death in South Africa.<sup>82</sup> And subsequent media coverage challenged the government's – and in particular the health minister's – behaviour regarding the MRC's report on transparency grounds. For instance, in one article, Lynne Altenroxel, a former reporter for *The Star*, filed a story titled 'Witchhunt for AIDS whistleblower' wherein she reported that the MRC report had actually been leaked to the media without the government's permission (the government had apparently put a hold on its release because it disagreed with the MRC's findings).<sup>83</sup> She also summarised a letter in her possession which had been written by the health minister to the MRC. In that letter, as Altenroxel reported, the health minister demanded that the "anti-dissident" who had leaked the report be found and dealt with, writing that 'since mid-February, an investigator has been tracking down, interrogating – and even suggesting lie-detector tests on – a host of people who might have had access to the controversial document'.<sup>84</sup> In another article, this time in *You* magazine, Charlene Smith, a freelance correspondent, reported that the government had 'threatened three times to withdraw the MRC's funding if it [did not] toe the [government's] line on AIDS'.<sup>85</sup> Such articles conveyed the message that the government was not being transparent; on the contrary, it was actively trying to hide from the South African public relevant research which had been produced by medical research scientists.

Lastly, many publications challenged the South African government's sense of fiduciary responsibility to its people. They did so by highlighting potential conflicts of interest held by various government officials. The best example of such conflicts is the so-called "Virodene saga". In 1997, the South African government decided to champion a purported anti-AIDS drug called Virodene P058.<sup>86</sup> The drug had been accidentally discovered by a laboratory technician, Olga Visser, and patented by a company her husband, Zigi Visser, had registered, Cryopreservation Technologies.<sup>87</sup> Though Virodene had not been approved by the South African Medical Control Council (MCC) (the South African equivalent of the FDA) (the MCC concluded that the drug had not been sufficiently tested and declared it unfit for human consumption), the government championed it nonetheless.<sup>88</sup> This championing began in January 1997 when the then-Minister of Health, Nkosazana Diamini-Zuma, facilitated a meeting between the Vissers and the full Cabinet.<sup>89</sup> Their presentation was received by the Cabinet with a

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<sup>82</sup> *ibid.*

<sup>83</sup> Mia Malan, 'The Scientific Politics of AIDS: A Media Perspective' (Master's Thesis, University of Stellenbosch, 2003), 106-08, cited in Malan (n 52) 47.

<sup>84</sup> *ibid.* 47.

<sup>85</sup> *ibid.* 47.

<sup>86</sup> Fourie and Meyer (n 24) 95-96.

<sup>87</sup> Mbali (n 20) 113. The active compound in the drug had originally been researched for the purpose of "heart-freezing" technology. However, the scientists noticed its antiviral properties: Fassin (n 1) 41; Mbali (n 20) 113.

<sup>88</sup> Fourie and Meyer (n 24) 95-96.

<sup>89</sup> *ibid.* 95-96.

standing ovation. Thereafter both the National Department of Health and the Office of the Deputy President (then Thabo Mbeki) advocated Virodene as the better alternative to ARVs, touting Virodene as ‘a possible African solution to an African problem’.<sup>90</sup> And despite significant doubts by scientists and AIDS activists about the efficacy and safety of Virodene, the health minister publicly urged the MCC to ‘work with researchers to resolve the status of Virodene’.<sup>91</sup>

It was in early 1998 that the South African media conveyed to the public that there was a potential conflict of interest. The Democratic Party (DP) (now the Democratic Alliance (DA)) claimed that the government’s promotion of Virodene was motivated by the financial interests of the African National Congress (ANC) – the party in power – rather than the best interests of the South African people. On 2 March 1998, DP MP Mike Ellis called a press conference in Parliament at which he released a memo which suggested that the ANC – and the health minister and deputy president in particular – had been promised a six percent share in the manufacturer of Virodene, Cryopreservation Technologies.<sup>92</sup> The media ran with the story. As Pat Sidley, a medial journalist in Johannesburg, has summarised, ‘press reports suggested that the government’s interest in the “miracle” drug was financial and that it did not want to see any discovery of this nature in the hands of drug companies’.<sup>93</sup> For example, a 4 March 1998 article in the Cape Town newspaper *Cape Argus* reported that Hugo Snyckers, acting manager of Cryopreservation Technologies, had claimed that ANC members who helped promote Virodene ‘were to be rewarded with company shares ... as part of a “black empowerment” initiative’.<sup>94</sup> Similarly, a 13 March 1998 article in the *Weekly Mail and Guardian* repeated Ellis’s allegations.<sup>95</sup> Even though – following an inquiry by the Public Protector – the health minister and deputy president were found not to be involved in business transactions around Virodene, as Fassin has aptly noted, ‘the rumo[u]r had produced its deleterious effects on the government’s integrity’.<sup>96</sup>

In my view, the cumulative effect of the foregoing negative media coverage – speaking to the South African government’s competence to deal with the HIV/AIDS epidemic, its good will toward its people and its sense of fiduciary responsibility thereto – was to portray the government as untrustworthy. These publications presented the South African government as unlikely to fulfil their expectations of trust in the future. And to the extent that PWLHIV trusted

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<sup>90</sup> *ibid* 97.

<sup>91</sup> Mbali (n 20) 114.

<sup>92</sup> *ibid* 114.

<sup>93</sup> Pat Sidley, ‘Miracle AIDS cure hits the South African press’ (1997) 314 *British Medical Journal* 450.

<sup>94</sup> Glynnis Underhill, ‘South Africa: Virodene shares for ANC were a “black empowerment” move’ *Cape Argus* (Cape Town, 4 March 1998) <<http://allafrica.com/stories/199803040067.html>> accessed 12 August 2017.

<sup>95</sup> Mbali (n 20) 114.

<sup>96</sup> Fassin (n 1) 46.

these publications, we can expect, following from the network conception of trust and Coleman's work, that these publications hindered trust between PWLHIV and their government.

*Constitutional Court of South Africa*

As with citizens and courts more generally in social rights matters, there existed a relationship between PWLHIV and the Constitutional Court. That relationship followed from two factors: first, the justiciability of South Africa's constitutional social rights (which, by the time of *TAC*, had been fully recognised by the Court); and second, the reality that at the relevant time, social rights cases had been brought to the Court by South Africans (including PWLHIV in the *TAC* case itself). In this thesis, I have suggested that a court, in enforcing constitutional social rights, can, and should, mediate government trustworthiness by imposing trustworthiness-promoting constraints on government in exercising its discretion over social goods and services. In this section, I will illustrate this suggestion with reference to the *TAC* decision. Specifically, I will address the following question: did the Court mediate the South African government's trustworthiness (and if not, how could it have)? In addressing this question, I will also illustrate the other two forms of judicial constraint (vulnerability-mitigating and reliability-promoting) which I outlined and distinguished from trustworthiness-promoting constraints in Chapter 4.

The *TAC* litigation stemmed from a constitutional challenge launched by the TAC (together with other members of civil society) in August 2001.<sup>97</sup> The TAC had been threatening litigation for a few years as part of its mobilisation efforts. However, by this point in 2001, it had become apparent that the government would not cede to the TAC's demands for the widespread provision of nevirapine in the public system nor respond to its requests for legally valid reasons justifying its decision in this regard.<sup>98</sup> Also, by this point, the TAC had put in place the necessary elements which ensured that it had the strongest possible claim (eg communications with the government had been documented, various obstacles to legal action had been removed, etc).<sup>99</sup> The TAC challenged the constitutionality of the government's PMTCT programme principally under two provisions of South Africa's Constitution: sections 27 and 28(1)(c). It will be recalled from earlier in the chapter that section 27(1) guarantees 'the right to have access to ... health care services' and section 27(2) obliges the state to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of that right. As the government's PMTCT programme necessarily affected the babies of PWLHIV, it also

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<sup>97</sup> Mark Heywood, 'Contempt or Compliance? The TAC Case After the Constitutional Court Judgment' (2003) 4 ESR Review 7, 8.

<sup>98</sup> Heywood, 'Preventing Mother-to-Child' (n 55) 290-91.

<sup>99</sup> *ibid* 290.

engaged section 28(1)(c) which guarantees every child ‘the right ... to basic nutrition, shelter, basic health care services and social services’. Accordingly, the TAC sought a declaration that the government’s PMTCT programme was unconstitutional as an infringement of both provisions. Further, it requested that the government be ordered to make nevirapine available to PWLHIV who gave birth in public health facilities (and to their newborn babies) and that the government plan and implement in a reasonable manner an effective national PMTCT programme.<sup>100</sup>

The court of first instance, the High Court of South Africa, ruled in favour of the TAC, granting an order which was substantially in accordance with what the TAC had sought.<sup>101</sup> Thus, the government appealed to the Constitutional Court, which heard the appeal in May 2002 and issued its unanimous decision two months later on 5 July 2002. As the Court phrased it, the appeal raised two main, inter-related issues: (i) whether the government was ‘constitutionally obliged and had to be ordered forthwith to plan and implement an effective, comprehensive and progressive programme’ for PMTCT in South Africa; and (ii) the constitutionality of the government-imposed ‘restrictions on the availability of nevirapine in the public health sector’.<sup>102</sup> The Court focused its decision substantially on section 27 (rather than section 28(1)(c)); therefore, I will equally focus on section 27 in my summary here as well as my later analysis.

The Court held that ‘section 27(1) does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2)’.<sup>103</sup> Instead, it concluded that the two must be read together with the ultimate effect of imposing a “reasonableness” obligation on the South African state.<sup>104</sup> In drawing this conclusion, the Court relied on the interpretation it had made in its earlier *Grootboom* case in respect of the parallel provisions of sections 26(1) and 26(2). There, the Court decided that sections 26(1) and 26(2) ‘are related and must be read together’ such that section 26 imposes an obligation on the state ‘to devise and implement a coherent, co-ordinated programme’; and a court’s role, in its enforcement of section 26, is to subject such programmes to a standard of reasonableness.<sup>105</sup>

Applying its reasonableness standard to the facts of *TAC*, the Court resolved the two main issues in the case as follows. On the first issue, the Court held that section 27 imposed a constitutional requirement on the state to provide ‘reasonable measures within available resources for the progressive realisation of the rights of [PWLHIV and their] newborn babies’.<sup>106</sup>

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<sup>100</sup> *ibid* 294-95.

<sup>101</sup> *TAC* [8].

<sup>102</sup> *ibid* [4-5].

<sup>103</sup> *ibid* [39].

<sup>104</sup> *ibid* [39].

<sup>105</sup> *ibid* [95, 34].

<sup>106</sup> *ibid* [122].

It thus issued a declaratory order to this effect, namely that '[s]ections 27(1) and (2) of the Constitution require the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat [MTCT]'.<sup>107</sup> It also declared that the programme had to include 'reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of [MTCT], and making appropriate treatment available to them for such purposes'.<sup>108</sup> With respect to the second issue, the Court held that the government's policy of confining nevirapine to the applicable pilot sites was indeed *not* reasonable.<sup>109</sup> In so holding, it placed significant weight on the fact that the drug's cost was not a factor (because as noted earlier it was offered for free by its manufacturer). The Court also rejected the various concerns (which the government had set out to justify its confined policy) relating to nevirapine's efficacy and safety, the public health system's capacity, and the possibility of drug resistance to nevirapine and other ARVs in the future. Accordingly, the Court issued a declaratory order that the government's PMTCT programme fell short of compliance with the above-described constitutional requirements in that 'doctors at public hospitals and clinics other than the research and training sites were not enabled to prescribe nevirapine' and in that it 'failed to make provision for counselors at hospitals and clinics other than at research and training sites'.<sup>110</sup>

Further, the Court issued a mandatory order (with which the government had to comply 'without delay'). That order had four parts: (i) that the government 'remove the restrictions that prevent nevirapine from being made available for the purpose of [PMTCT] at public hospitals and clinics that are not research and training sites'; (ii) that it 'permit and facilitate the use of nevirapine for the purpose of [PMTCT]' and 'make it available for this purpose at hospitals and clinics' (where the drug was medically indicated); (iii) that it 'make provision if necessary for counselors' at such hospitals and clinics who are 'trained for the counselling necessary for the use of nevirapine to reduce [MTCT]'; and (iv) that the government '[t]ake reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of nevirapine for the purpose of [PMTCT]'.<sup>111</sup>

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<sup>107</sup> *ibid* [135].

<sup>108</sup> *ibid* [135].

<sup>109</sup> *ibid* [80].

<sup>110</sup> *ibid* [135].

<sup>111</sup> *ibid* [135].

Did the Court Mediate the South African Government's Trustworthiness?

Based on my analysis from Chapter 4, the Constitutional Court did in fact mediate the South African government's trustworthiness. However, and unfortunately in my view, it did so only to an absolute minimal extent. As I will explain very shortly, the Court could have done so much more in its *TAC* decision in order to serve as a mediator of government trustworthiness.

Consistent with the trustworthiness standard, the Court in *TAC* did lay down a broad rule of interpretation for section 27 of the Constitution. That broad rule – which was drawn from *Grootboom* and which imposes an obligation of reasonableness on the South African state – does, in accordance with the trustworthiness standard developed in Chapter 4, expressly define the South African government's obligation to citizens in exercising their control over social goods and services. In doing so, it lets citizens (and their representatives) know what their entitlements are (at a very abstract level) and it provides lower courts with a standard (though as I will elaborate, not a very good standard) by which they can hold the government accountable in subsequent social rights cases. Additionally, in furtherance of trustworthiness-promoting ends, that broad rule constrains the process by which the government exercises discretion over social goods and services (rather than the outcome of that process). In essence, the Court's rule obliges the government, in exercising its discretion in this regard, to adopt 'reasonable measures'.<sup>112</sup>

The problem with the Court's judgment vis-à-vis trustworthiness promotion is that the Court, in laying down as well as applying that broad rule to the facts of *TAC*, does very little work to provide a principled basis upon which to assess the notion of reasonableness.<sup>113</sup> In *Grootboom* (the case from which the notion of reasonableness originally derives), Yacoob J. (writing for the Court) outlined a set of considerations which speak to the reasonableness of a governmental programme. Those considerations are the following: (i) the programme must be 'comprehensive and coordinated'; (ii) it must be 'balanced and flexible'; (iii) 'appropriate financial and human resources' must be made available for the programme; (iv) it must 'make appropriate provision for ... short, medium and long term needs'; (v) it must be 'reasonably implemented'; and (vi) it must cater to '[t]hose whose needs are the most urgent'. However, as several social rights scholars have criticised, quite rightly in my opinion, these considerations leave the notion

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<sup>112</sup> In fact, some social rights scholars have criticised the reasonableness standard for "proceduralising" social rights: Danie Brand, 'The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or "What are Socio-Economic Rights For?" in Henk Botha, Andries Johannes Van der Walt and JC Van der Walt, *Rights and Democracy: In a Transformative Constitution* (African Sun Media 2004); Marius Pieterse, 'Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited' (2007) 29 *Human Rights Quarterly* 796; Marius Pieterse, 'Procedural Relief, Constitutional Citizenship and Socio-Economic Rights as Legitimate Expectations' (2012) 28 *South African Journal on Human Rights* 359.

<sup>113</sup> David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (OUP 2007), 161.

of reasonableness extremely vague.<sup>114</sup> Owing to the use of ambiguous terms like “appropriate”, “balanced” and “comprehensive”, the reasonableness approach is left, as David Bilchitz has put it, “empty”, standing ‘in for whatever the Court regards as a desirable feature of state policy’.<sup>115</sup>

Because of the vagueness (or “emptiness” if you will) of the Constitutional Court’s reasonableness approach, it holds very little promise for promoting government trustworthiness. First, because the Court does little to detail precisely what it means by “reasonable”, there is no reason to believe that the concepts of reasonableness and trustworthiness overlap. Second, even assuming an overlap, an accountability measure – such as the reasonableness approach – is only likely to change a government’s behaviour in a trustworthy direction and so, likely to promote trustworthiness, if that government knows the ‘criteria or standards’ by which they will be held accountable (and thus, that for which they will be censured or punished). In my view, the reasonableness approach fails in this respect. To borrow Bilchitz’s apposite words, it leaves the government ‘without clear guidance as to the nature of their obligations’.<sup>116</sup> From the Court’s vague articulation of reasonableness, the government cannot know these ‘criteria or standards’.

To be fair, in *TAC* the Court did expand upon the list of reasonableness considerations laid down in *Grootboom* so as to impose a constraint which is both clearly articulated and goes to government trustworthiness. That constraint is a requirement of transparency (and as will be recalled from Chapter 2, transparency is an element of procedural fairness which is, in turn, central to trust’s constituent expectation of good will). Specifically, the Court explained that for a governmental programme to be “reasonable”, it must be transparent such that ‘its contents must be made known’ to all concerned.<sup>117</sup> Applying that requirement to the facts of *TAC*, it stated:

The magnitude of the HIV/AIDS challenge facing the country calls for a concerted, co-ordinated and co-operative national effort in which government in each of its three spheres and the panoply of resources and skills of civil society are marshaled, inspired and led. This can be achieved only if there is proper communication, especially by government. In order for it to be implemented optimally, a public health programme must be made known effectively to all concerned, down to the district nurse and patients. Indeed, for a public programme such as this to meet the constitutional requirement of reasonableness, its contents must be made known appropriately.<sup>118</sup>

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<sup>114</sup> *ibid* 176; Dennis M Davis, ‘Adjudicating the Socio-Economic Rights in the South African Constitution: Towards “Deference Lite”?’ (2006) 22 *South African Journal on Human Rights* 301, 312; Forbath (n 55) 67.

<sup>115</sup> Bilchitz (n 113) 161.

<sup>116</sup> *ibid* 176.

<sup>117</sup> *TAC* [123]. For a summary of these considerations, see also Sandra Liebenberg, ‘South Africa: Adjudicating Social Rights Under a Transformative Constitution’ in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008), 85.

<sup>118</sup> *TAC* [123].

Unfortunately, the Court did not go any further than this small step so as to incorporate other trustworthiness-promoting constraints (ie other than transparency) into its reasonableness approach. As a mediator of government trustworthiness, the Court would have gone further, defining reasonableness in terms of the three expectations of trust (including the various elements of each expectation). For example, in furtherance of trust's expectation of competence, the Court could have incorporated principles of EBPM into reasonableness. Such an approach would demand that for a governmental programme (including South Africa's PMTCT programme) to be "reasonable", it be rooted in the best available evidence from scientific research. In this way, reasonableness would have presented an obstacle for South Africa's government basing its PMTCT policy on the president's and health minister's HIV/AIDS denialist views, instead demanding that it be based on prevailing scientific opinion in the field. Or as yet another example, this time in furtherance of the expectation of good will, the Court could have incorporated into reasonableness a requirement of participation. Such a requirement would add to the list of reasonableness considerations laid down in *Grootboom*, whether those impacted by a governmental programme were able to express their views thereon and whether those views were sincerely considered by the relevant government authorities. In fact, this is precisely what the Court did five years later in its decision of *Occupiers of 51 Olivia Road v City of Johannesburg*.<sup>119</sup> In that case, occupiers of two buildings in the inner city of Johannesburg challenged an order granted by a lower court which authorised the City of Johannesburg to evict the occupiers on the basis that those buildings were unsafe and unhealthy. As part of its resolution of that case, the Court issued an order 'aimed at ensuring that the City and the occupiers engaged with each other meaningfully on certain issues', including on the issue of how to make 'the buildings as safe and as conducive to health as is reasonably practicable'.<sup>120</sup> In other words, it demanded that the occupiers of the buildings be given an opportunity to participate in the City's decision-making process around eviction and the safety/health of the buildings. Of note, the Court rooted this "meaningful engagement" requirement in the government's overarching obligation to take 'reasonable measures'.<sup>121</sup> Consequently, the effect of the *Olivia Road* decision was, as Anashri Pillay has stated, to include as a 'factor for a court to consider in evaluating the reasonableness of government action', 'the question of meaningful engagement'.<sup>122</sup>

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<sup>119</sup> [2008] ZACC 1, 2008 (3) SA 208.

<sup>120</sup> *ibid* [5] (emphasis added).

<sup>121</sup> *ibid* [9-10].

<sup>122</sup> Anashri Pillay, 'Towards Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement' (2012) 10 *International Journal of Constitutional Law* 732, 745.

Interestingly, instead of mediating the government's trustworthiness (ie by imposing trustworthiness-promoting constraints on the government) – which may, in turn (based on my discussion in Chapter 4), be expected to impact citizens' trust in government – the Court seems to have taken steps to impact citizens' trust in another way: by assuming a sort of “advisor” role, akin to that which I described in respect of the media. It did so by using its judgment in *TAC* as an opportunity to express confidence in the South African government – specifically, confidence in the government's good will toward its people (and the courts). This expression of confidence arose out of the Court's consideration of whether it should exercise supervisory jurisdiction over the implementation of its order. In deciding that supervision was unnecessary, the Court stated: “The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case”.<sup>123</sup> In expressing such confidence, I suggest that the Court effectively portrayed the government as trustworthy (specifically, as likely to fulfil the expectation of good will) and, in turn, it effectively advised PWLHIV (and South Africans more generally) to trust their government. Problematically, the Court's intervention in this regard (not rooted in the concept of trustworthiness as were the transparency requirement or other constraints noted above), promoted trust in government which may not have been warranted. Put simply, there was no external reason – other than the Court's assurance itself – for PWLHIV and South Africans to believe that the government would behave in a trustworthy fashion.<sup>124</sup>

In fact, the facts leading up to this expression of confidence by the Court demonstrate that trust in this case was not warranted. For one thing, research conducted on the implementation of the Court's *Grootboom* order showed that at the time the *TAC* decision was handed down (and indeed even years after that) the government had failed to implement the Court's order therein.<sup>125</sup> Thus, there was little reason to expect the results to be any different for the *TAC* case. For another thing, just prior to the release of the Court's *TAC* decision, the health minister threatened on national television – clearly and unequivocally – to disobey any order that the Court would make in the case.<sup>126</sup> When explicitly asked whether she would ‘stand by whatever the Court decides’ she repeatedly responded “no”, explaining that it was her view that ‘the judiciary cannot prescribe from the bench’.<sup>127</sup> Moreover, the South African

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<sup>123</sup> *TAC* [129].

<sup>124</sup> Of note, Mark Heywood has said that its request for supervision ‘was a signal of ... the degree of distrust that existed between civil society and government over the management of the HIV/AIDS epidemic, particularly government's opposition to the use of anti-retroviral drugs’: Heywood, ‘Contempt or Compliance?’ (n 97) 8.

<sup>125</sup> Kameshni Pillay, ‘Implementing *Grootboom*: Supervision Needed’ (2002) 3 ESR Review 13. See also David Bilchitz, ‘Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence’ (2003) 19 South African Journal on Human Rights 1, 24-25.

<sup>126</sup> Bilchitz, ‘Towards a Reasonable Approach’ (n 125) 23-24; Heywood, ‘Preventing Mother-to-Child’ (n 55) 308.

<sup>127</sup> Lynne Altenroxel, ‘More Damage Control after Manto Says No’ *The Star* (Johannesburg, 25 March 2002), cited in Heywood, ‘Preventing Mother-to-Child’ (n 55) 308.

government's response to the Court's judgment and order in *TAC* confirm that trust therein was indeed not warranted. Mark Heywood (the former treasurer of the TAC) has repeatedly stressed that the government did not immediately comply with the Court's order.<sup>128</sup> An ARV programme was only implemented in mid-2004 – two years after the *TAC* order was made. As well, the order was actively defied in some provinces for years thereafter. In provinces like Gauteng and Western Cape (which include Johannesburg and Cape Town, respectively) 'where there was already a commitment to establishing a comprehensive PMTCT programme ... the judgment unshackled health departments and politicians and opened the door to implementation'; but in other provinces (eg Mpumalanga), there was no such implementation.<sup>129</sup> Thus, as Heywood has explained, the TAC's advocacy and legal team had to effectively force them into compliance.

Did the Court Instead Mitigate Citizens' Vulnerability or Promote the Government's Reliability?

Before concluding this chapter, I would like to take a brief moment to consider the other two forms of judicial constraint which I outlined in Chapter 4 and to illustrate them using *TAC*.

Consistent with the vulnerability-mitigating form of constraint, the Court did issue a mandatory order with the effect of (or at least it should have had the effect of) granting the claimants access to the social good or service which they sought – nevirapine. That order (it will be recalled) required the government to, among other things, 'permit and facilitate the use of nevirapine for the purpose of [PMTCT]' and 'make it available for this purpose at hospitals and clinics' (where the drug was medically indicated). Therefore, theoretically speaking at least, the *TAC* decision could very well have served as a precedent whereby the Court had shown itself willing to exert control over social goods and services and, in turn, had established itself as an alternative source for citizens of those goods and services. And if so, we could conclude that the Court mitigated citizens' vulnerability to the South African government (at least the vulnerability of citizens who had the financial means to bring their cases before the Constitutional Court).

However, practically speaking, several factors in *TAC* militate *against* it mitigating citizens' vulnerability. First, *TAC* is not a traditional social rights case. The governmental conduct which was at issue was primarily that of interference (ie the government prohibiting, or interfering with PWLHIV's ability to gain access to, nevirapine whose cost was negligible) as opposed to omission (ie the government refusing to cover the cost of a social good or service). As such, *TAC* did not offer an ideal precedent from a vulnerability-mitigating standpoint: from the case, it was unclear how far the Court would go in future social rights cases where a more

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<sup>128</sup> Heywood, 'Contempt or Compliance?' (n 97) 9-10; Heywood, 'South Africa's Treatment Action Campaign' (n 26) 27.

<sup>129</sup> Heywood, 'Contempt or Compliance?' (n 97) 9.

traditional, positive claim to a social good or service would be advanced.<sup>130</sup> Second, owing to the interference nature of the challenged conduct, the Court's mandatory order contained both positive dimensions (those noted above) as well as negative dimensions (that is, the requirement that the government 'remove the restrictions that prevent nevirapine from being made available for the purpose of [PMTCT] at public hospitals and clinics that are not research and training sites'). And militating against the mitigation of citizens' vulnerability, the government, in implementing that order, chose to ignore (or in Heywood's diplomatic words, "misunderstood") its positive dimensions, focusing exclusively on the negative dimensions.<sup>131</sup> It was through those positive dimensions of the order that the Court would have mitigated citizens' vulnerability: through those positive dimensions, the Court exerted control over the social good or service at issue in the case (nevirapine) and, in turn, granted it to the claimants. Without those positive dimensions (which the order – as implemented by the government – effectively was), *TAC* does not represent a vulnerability-mitigating precedent. And the final factor which militates against *TAC* being vulnerability-mitigating is the Court's choice, as I alluded to earlier, to not exercise supervisory jurisdiction over the order's implementation. Although the government ignored (or "misunderstood") the positive dimensions of the order, if the Court had chosen to supervise its implementation, such defiance (or misunderstanding) could have been corrected. But the Court did not and so, while the Court's order should have theoretically granted the claimants access to the nevirapine which they sought, for many (as noted) it did not (at least not for some time).<sup>132</sup>

Likewise, I would say that the Court did not promote the South African government's reliability. Consistent with the reliability-promoting form of judicial constraint, the Court in *TAC* did lay down a broad rule of interpretation for section 27 of the Constitution. However, as I have already explained and contrary to this form of constraint, that rule did not target the outcome of the government's exercise of discretion over social goods and services (but rather the process by which said discretion is exercised). The reliability-promoting form of constraint would have had the Court interpret section 27 as a right to a specific social good or service. For example, the Court, using this constraint form, would have interpreted section 27 as including a specific right to nevirapine or a more general right to ARVs. Such an interpretation would be

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<sup>130</sup> Heinz Klug, 'Access to Health Care: Judging Implementation in the Context of AIDS' (2002) 18 *South African Journal on Human Rights* 114, 123.

<sup>131</sup> As Heywood has diplomatically explained, the government 'seems to have ... misunderstood [the Court's order] as simply a negative injunction to remove the restrictions on the availability of Nevirapine. The positive dimensions of the order, such as permitting and facilitating the use of Nevirapine and the taking of reasonable measures to extend access to it, seem to have been misunderstood': Heywood, 'Contempt or Compliance?' (n 97) 9. In fact, in a statement issued on the day the *TAC* decision was released, the health minister went so far as to suggest that the Court had "confirmed" the government's PMTCT approach: Heywood, 'Preventing Mother-to-Child' (n 55) 278.

<sup>132</sup> Heywood, 'Contempt or Compliance?' (n 97) 9-10.

reliability-promoting since it would have dictated the outcome of future interactions between citizens and the government and, in turn, enabled citizens to predict the outcome of those interactions. As the government would consequently have a constitutional obligation to provide nevirapine or ARVs (as the case may be), it would have to, in the future, ensure that nevirapine or ARVs are made available to citizens. And assuming government compliance with the Court's ruling, the ultimate effect of the Court's judgment would be to promote government reliability.

### **Chapter Summary**

In this chapter, I have used the prevention of mother-to-child transmission of HIV in South Africa (and the South African Constitutional Court's controversial *TAC* decision) to illustrate the arguments which I have made in this thesis. This includes, of course, this thesis's central argument about social rights enforcement. In the next and final chapter of this thesis (Chapter 6), I provide a second illustration – the reduction of wait times in Canada's public health care system (which for reasons detailed there, I think offers a good counterbalance for this chapter).

## CHAPTER 6

### The Reduction of Wait Times in the Canadian Public Health System

In the starkest terms, *Chaoulli* obliges all Charter-watchers to accept ... that Charter adjudication is energised by a political ideology which emphasises, among other things, that individual entitlements are much more important than social responsibilities, that negative liberty is to be promoted at the expense of positive liberty, that people's capacity to exercise their rights is a matter of choice rather than circumstance, and that legislatures are not only not to be trusted, but are the breeding grounds of capricious and arbitrary decision-making.

– Allan Hutchinson<sup>1</sup>

In this final chapter, I provide a second illustration of the arguments made in this thesis (including, of course, its central argument about social rights enforcement); this time I use the example of wait times in the Canadian public health system during the late 1990s and early 2000s. As with PMTCT in South Africa, I have chosen this example for several reasons; but I will once again re-emphasise only a few of them. First of all, this example generated a highly controversial decision by the Supreme Court of Canada – *Chaoulli v Quebec (Attorney General)* (“*Chaoulli?*”) – wherein the Supreme Court was confronted with, in Allan Hutchinson's words, a challenge to ‘the very nature of both Canadian health care and Canadian democracy’.<sup>2</sup> Second, because the Court's decision was so controversial, as well as surprising to most people, the case and its surrounding facts were the subject of much academic debate across disciplines.<sup>3</sup> Therefore, owing to the wealth of literature arising out of this debate, this example is, much like PMTCT in South Africa, ideal for illustrative purposes. And lastly, I think that wait times in Canada's public health system – generally and in respect of the *Chaoulli* decision in particular – offer a good counterbalance for the illustration offered in Chapter 5. Why? Because unlike the *TAC* case where a vulnerable group challenged a governmental decision which had a negative impact on that group, *Chaoulli* involved the reverse: a relatively less vulnerable group challenging a decision which had a positive impact on the most vulnerable segments of society.

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<sup>1</sup> Allan C Hutchinson, “‘Condition Critical’: The Constitution and Health Care” in Colleen M Flood, Kent Roach and Lorne Sossin (eds), *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (University of Toronto Press 2005), 109.

<sup>2</sup> *ibid* 109.

<sup>3</sup> By way of example, *Chaoulli* was the subject of an entire edited collection published by the University of Toronto Press (Colleen M Flood, Kent Roach and Lorne Sossin (eds), *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (2005)) as well as a special issue of the *Osgoode Hall Law Journal* in 2006.

## Constitutional Background

Unlike its South African counterpart, the Canadian Constitution does not expressly provide a list of protected social rights.<sup>4</sup> Nonetheless, as several scholars, advocates and jurists have emphasised, there is significant scope for social rights protection in Canada's Constitution. In particular, there are two principal sections of the Canadian Constitution which may be, and indeed have been, argued as the basis for a constitutional guarantee of social rights in Canada.<sup>5</sup>

The first is section 7 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”). Section 7 guarantees everyone ‘the right to life, liberty and security of the person’ as well as ‘the right not to be deprived [of those rights] except in accordance with the principles of fundamental justice’. It has frequently been argued that the right to life, liberty and security of the person should be interpreted as guaranteeing the necessities of life, including medically necessary health care and a certain level of social assistance in order to meet basic needs.<sup>6</sup> In this regard, it has been advocated that the Supreme Court of Canada follow the lead set by courts in other jurisdictions, including the Indian Supreme Court (which has interpreted the right to life in its constitution as encompassing a ‘right to livelihood’),<sup>7</sup> as well as the Israeli Supreme Court and the German

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<sup>4</sup> That is, with the exception of minority language education provisions: see section 23 of the *Charter*. As Wayne MacKay has explained, this omission was not accidental. When the *Charter* was drafted, its drafters saw social and economic policy as outside the purview of courts. Accordingly, social rights advocates opposed the *Charter* as promoting an illusion of rights. Thus, rather than lobby to be included in the *Charter* text (as other groups including women, persons with disabilities and Aboriginals did) these advocates largely boycotted the process: Wayne MacKay, ‘Social and Economic Rights in Canada: What are They and Who Can Best Protect Them?’ in B Adell and J Magnet (eds), *Canadian Rights and Freedoms: 25 Years under the Charter* (Butterworths 2009) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2123479](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2123479)> accessed 16 August 2017.

<sup>5</sup> I say “principal” because there is scope for social rights protection in other provisions as well. For example, the often-overlooked section 36(1) of the *Constitution Act, 1982*, may provide the basis for constitutional social rights. This provision states that ‘without altering the legislative authority of Parliament or of the provincial legislatures’, the federal and provincial governments ‘are committed to (a) promoting equal opportunities for the well-being of Canadians; (b) furthering economic development to reduce disparity in opportunities; and (c) providing essential public services of reasonable quality to all Canadians’: Patrick Macklem, ‘Social Rights in Canada’ in Daphne Barak-Erez and Aeyal M Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Hart Publishing 2007), 225-26. Additionally, social rights may arguably be protected under the Canadian limitations provision – section 1 of the *Charter*. Section 1 states that the *Charter* ‘guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. Scholars have suggested that provisions like section 1 have scope for social rights protection: for Canada specifically, see Martha Jackman and Bruce Porter, ‘Socio-Economic Rights Under the Canadian Charter’ in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008), 220. For a more general argument in this regard, see Xenophon Contiades and Alkmene Fotiadou, ‘Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation’ (2012) 10 International Journal of Constitutional Law 660; Xenophon Contiades and Alkmene Fotiadou, ‘Socio-Economic Rights, Economic Crisis, and Legal Doctrine: A Reply to David Bilchitz’ (2014) 12 International Journal of Constitutional Law 740.

<sup>6</sup> Louise Arbour, ‘Freedom From Want – From Charity to Entitlement’ (Dominion Institute, LaFontaine-Baldwin Lecture, 2005) <[http://www.urbancentre.utoronto.ca/pdfs/elibrary/Arbour\\_Charity-Entitlement\\_.pdf](http://www.urbancentre.utoronto.ca/pdfs/elibrary/Arbour_Charity-Entitlement_.pdf)> accessed 11 August 2017; Martha Jackman, ‘The Protection of Welfare Rights Under the Charter’ (1988) 20 Ottawa Law Review 257; Martha Jackman, ‘Charter Review as a Health Care Accountability Mechanism in Canada’ (2010) 18 Health Law Journal 1; Margot Young, ‘Section 7 and the Politics of Social Justice’ (2005) 28 UBC Law Review 539; Margot Young, ‘Social Justice and the *Charter*: Comparison and Choice’ (2013) 50 Osgoode Hall Law Journal 669.

<sup>7</sup> *Oлга Tellis & Ors v Bombay Municipal Corporation* [1985] 2 Supp SCR 51.

Constitutional Court (both of which have interpreted the right to human dignity in their basic laws as guaranteeing a minimum subsistence).<sup>8</sup> For example, Martha Jackman has repeatedly and forcefully argued that interpreting section 7 as encompassing social rights is necessary both to reflect the values, aspirations and traditions of the Canadian community, as well as to comply with Canada's international obligations (as a signatory to the ICESCR).<sup>9</sup> In Jackman's words, 'A *Charter* interpreted to deny constitutional protection for welfare rights, a *Charter* which therefore fails to take into account this fundamental aspect of our national character, will be a truncated shadow of who we are, an unfaithful reflection of who we wish to be'.<sup>10</sup> In a similar fashion, Margot Young, though wary that progress will be made on this front imminently due to the dominant political consensus in Canada, has said that section 7 has 'transformative potential' and accordingly, that it 'offers hope ... for anchoring a fundamental entitlement of well-being'.<sup>11</sup>

Second, there is scope for social rights protection under section 15 of the *Charter* – the equality provision. Section 15(1) guarantees that every individual 'is equal before and under the law' and guarantees them 'the right to the equal protection and equal benefit of the law without discrimination' (including discrimination based on the enumerated grounds of race, national or ethnic origin, colour, religion, sex, age and mental or physical disability).<sup>12</sup> Much like with section 7, it has frequently been argued that section 15 should be interpreted as encompassing social rights.<sup>13</sup> This argument is rooted in the notion of substantive equality – a notion which the Supreme Court of Canada has affirmed as an underlying vision for section 15.<sup>14</sup> As the Supreme Court has put it, substantive equality 'entails the promotion of a society in which all are secure in the knowledge that they are recogni[s]ed at law as human beings equally deserving of concern, respect and consideration'.<sup>15</sup> Thus, the argument (which has been similarly advanced in other

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<sup>8</sup> *Hartz IV*, BVerfG, Case No 1 BvL, 1/09, 125 BVerfGE 175; *Hassan v National Insurance Institute* [2012] HCJ 10662/04.

<sup>9</sup> Jackman, 'The Protection of Welfare Rights' (n 6); Martha Jackman, 'The Last Line of Defence for [Which?] Citizens: Accountability, Equality, and the Right to Health in *Chaoulli*' (2006) 44 *Osgoode Hall Law Journal* 349; Martha Jackman, 'Reality Checks: Presuming Innocence and Proving Guilt in *Charter* Welfare Cases' in Margot Young et al (eds), *Poverty: Rights, Social Citizenship, and Legal Activism* (UBC Press 2007); Martha Jackman, 'Charter Remedies for Socio-Economic Rights Violations: Sleeping Under a Box?' in Robert J Sharpe and Kent Roach (eds), *Taking Remedies Seriously* (Canadian Institute for the Administration of Justice 2010); Jackman, 'Charter Review as a Health Care' (n 6); Jackman and Porter (n 5).

<sup>10</sup> Jackman, 'The Protection of Welfare Rights' (n 6) 338.

<sup>11</sup> Young, 'Section 7 and the Politics' (n 6) 540, 560. See also Young, 'Social Justice and the *Charter*' (n 6).

<sup>12</sup> Please note that section 15 has been interpreted by the Supreme Court to include grounds analogous to those enumerated, including citizenship status, sexual orientation, marital status and off-reserve band member status.

<sup>13</sup> Jackman, 'Charter Remedies for Socio-Economic Rights' (n 9); Bruce Porter, 'Claiming Adjudicative Space: Social Rights, Equality, and Citizenship' in Margot Young et al (eds), *Poverty: Rights, Social Citizenship, and Legal Activism* (UBC Press); Young, 'Social Justice and the *Charter*' (n 6).

<sup>14</sup> Jackman, 'Charter Review as a Health Care' (n 6) 20.

<sup>15</sup> *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 [171], affirmed in *R v Kapp* 2008 SCC 41, [2008] 2 SCR 483 [15].

jurisdictions) essentially provides that the promotion of substantive equality necessitates positive action by government – in the form of social rights – so as to empower the most disadvantaged ‘to participate meaningfully both in political and legal processes, unshackling them from the benevolence and whim of the powerful, and enabling them to control their own destinies’.<sup>16</sup>

Despite such scope for social rights protection, in the period leading up to *Chaoulli* (and indeed to the present) the Supreme Court had/has been extremely hesitant (or “timid”, to use Louise Arbour’s words) to read positive social rights into the Canadian Constitution; and in turn, it had/has refused to impose a corresponding positive obligation on the state in respect of social goods and services.<sup>17</sup> This hesitancy is rooted in the Court’s insistence on maintaining a distinction between positive and negative rights – with the Court fearful of the former. The fact that this distinction has been ‘long abandoned under international human rights law and increasingly rejected in other constitutional democracies’ – not to mention the intense criticism it has received in Canadian academic circles – has done very little to sway the Court in its position or to calm its fears about positive rights.<sup>18</sup> Thus, in the lead-up to *Chaoulli* (and again to the present), the Court had/has interpreted the *Charter* as overwhelmingly protecting negative rights.

### **Factual Background**

The Canadian public health system has long suffered from a wait time “problem”. As early as 2002, former Saskatchewan Premier Roy Romanow in his report as part of a commission on the ‘Future of Health Care in Canada’ pointed out: ‘Waiting for health care is a serious concern for Canadians and it has become a preoccupation for health care professionals, managers, and governments’.<sup>19</sup> However, health care wait times are not in and of themselves problematic. In fact, wait times are said to be a necessary characteristic of an efficient health care system.<sup>20</sup> As Colleen Flood and Tracey Epps have explained, ‘It would be extremely inefficient to run a

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<sup>16</sup> Arbour (n 6) 14.

<sup>17</sup> *ibid* 11; Lorne Sossin, ‘Towards a Two-Tier Constitution? The Poverty of Health Rights’ in Colleen M Flood, Kent Roach and Lorne Sossin (eds), *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (University of Toronto Press 2005), 170-71.

<sup>18</sup> Jackman, ‘The Protection of Welfare Rights’ (n 6) 281. Moreover, international bodies, including the CESCR have criticised Canada with respect to its courts’ treatment of economic, social and cultural rights: Jackman, ‘Charter Review as a Health Care’ (n 6) 26-27; Bruce Porter and Martha Jackman, ‘Introduction: Advancing Social Rights in Canada’ in Martha Jackman and Bruce Porter (eds), *Advancing Social Rights in Canada* (Irwin Law 2014), 2. See also Bruce Porter, ‘Enforcing the Right to Reasonableness in Social Rights Litigation: The Canadian Experience’ in Malcolm Langford, César Rodríguez-Garavito and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making It Stick* (Cambridge University Press 2017).

<sup>19</sup> Roy J Romanow, ‘Building on Values: The Future of Health Care in Canada’ (Commission on the Future of Health Care in Canada, 2002) <<http://publications.gc.ca/collections/Collection/CP32-85-2002E.pdf>> accessed 16 August 2017, 138 [“Romanow Report”].

<sup>20</sup> Colleen M Flood and Tracey Epps, ‘Waiting for Health Care: What Role for a Patients’ Bill of Rights?’ (2004) 49 McGill Law Journal 515, 552. See also *Chaoulli* [2].

system at a capacity that could meet all health needs the moment they arise (hospitals would be often empty, hospital beds would be unused or used by people who do not really need to be there, and health care professionals would be underutilized, all at great expense).<sup>21</sup>

In Canada, wait times are problematic in two respects.<sup>22</sup> The first problem is the length of time which people wait for health care services. Of course, wait times vary by service, provider/institution and geographical location,<sup>23</sup> however, that being said, Canadians (including physicians, political officials and members of the media) have frequently challenged wait times in their public health systems as, on average, “unreasonable” or “excessive”.<sup>24</sup> For example, Romanow in his report noted that “[t]ime and time again, [his] Commission heard that, when it comes to access to specific diagnostic procedures and some surgical procedures, wait lists ... and waiting times ... are too long”.<sup>25</sup> Similarly, former Senator Michael Kirby (as Chair of the Standing Senate Committee on Social Affairs, Science and Technology), in a response to the Romanow report, emphasised that ‘excessively long waiting times’ are ‘the health care issue of greatest concern to Canadians’.<sup>26</sup> The second problem with wait times in Canada’s public health system is the improper management of waiting lists.<sup>27</sup> Romanow criticised waiting lists for being ‘handled in a somewhat haphazard manner’.<sup>28</sup> He stressed that as of 2002, waiting lists were managed by individual physicians or hospitals with little coordination between those physicians/hospitals, there were few rules which governed when and whether a patient should be put on a waiting list or ‘when the clock starts ticking’, and there was no serious procedure in place for auditing lists.<sup>29</sup> Kirby’s response, similarly again, urged the development and implementation of ‘clinical, needs-based waiting list management systems’ across Canada.<sup>30</sup>

Given Canada’s wait time problem, a cohort of individuals and organisations (what I will call the “pro-privatisation movement”) suggested – or more accurately, advocated – increased privatisation of health care services. They suggested that such increased privatisation was the

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<sup>21</sup> Flood and Epps (n 20) 552.

<sup>22</sup> Romanow Report (n 19) 141. See also *ibid* 552.

<sup>23</sup> Timothy Caulfield, ‘*Chaoulli v Quebec (Attorney General)*: The Supreme Court of Canada Deals a Blow to Publicly Funded Health Care’ (2015) <[https://www.law.uh.edu/healthlaw/perspectives/September2005/\(TC\)ChaoulliComment.pdf](https://www.law.uh.edu/healthlaw/perspectives/September2005/(TC)ChaoulliComment.pdf)> accessed 9 December 2016, 2-3.

<sup>24</sup> Michael Kirby, ‘Response to the Romanow Report’ (Standing Senate Committee on Social Affairs, Science and Technology, 2002) <<https://sencanada.ca/content/sen/committee/372/soci/press/04dec02-e.pdf>> accessed 16 August 2017, 20 [“Kirby Response”].

<sup>25</sup> Romanow Report (n 19) 138.

<sup>26</sup> Kirby Response (n 24) 20.

<sup>27</sup> Romanow Report (n 19) 141-44.

<sup>28</sup> *ibid* 143.

<sup>29</sup> *ibid* 141-43.

<sup>30</sup> Kirby Response (n 24) 22.

“solution” to the wait time problem. To adequately explain the movement’s suggestion in this regard, I will first take a step back and describe the basic structure of the Canadian health system.

Canada’s public health system is probably best described as ‘publicly funded yet privately delivered’.<sup>31</sup> This means that although health care services in the public system are state-funded, the hospitals and physicians delivering those services are private actors: hospitals are private not-for-profit entities which are heavily regulated by government, and physicians are private for-profit contractors. Thus, the public health system in Canada is only “public” with respect to its funding, not its delivery. As Canada is a federal state, that funding comes from the Canadian provinces via the federal government. Under the Canadian Constitution, jurisdiction over health care largely rests with the provinces.<sup>32</sup> In exercise of this jurisdiction, each of the Canadian provinces administers its own public health insurance plan. The federal government, though constitutionally granted a few areas of direct responsibility, mostly exercises indirect power over health care via its spending power. Specifically, the federal government provides funding to the provinces for health care services; and by attaching requirements to such health care funding, the federal government indirectly exercises power over health care. Its vehicle in this respect is the *Canada Health Act* (the *CHA*). Effectively, the *CHA* serves two principal ends: (i) it requires the provinces – via their respective health insurance plans – to provide first-dollar coverage of all hospital and physician services which are considered “medically necessary” (a term which is not defined in the *CHA* and which has been the subject of significant academic and political debate);<sup>33</sup> and (ii) it establishes a set of criteria which the provinces must satisfy in their insurance plans in order to receive full federal funding in respect of those hospital and physician services.<sup>34</sup>

At the same time, and like most other countries, Canada has a private health system. In fact, only 70 percent of all health care expenditures in Canada are paid from public funds; the remaining 30 percent come from private sources (ie either private insurance or out-of-pocket spending).<sup>35</sup> For example, in 2004 (when the Supreme Court heard the *Chaoulli* case), of the 130

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<sup>31</sup> Colleen M Flood and Bryan Thomas, ‘Blurring of the Public/Private Divide: The Canadian Chapter’ (2010) 17 *European Journal of Health Law* 257, 260.

<sup>32</sup> Joan M Gilmour, ‘Fallout from *Chaoulli*: Is it Time to Find Cover?’ (2006) 44 *Osgoode Hall Law Journal* 327, 328-29.

<sup>33</sup> Colleen M Flood and Sujith Xavier, ‘Health Care Rights in Canada: The *Chaoulli* Legacy’ (2008) 27 *Medicine and Law* 617, 633.

<sup>34</sup> Specifically, the *CHA* sets out five criteria which provinces – in their insurance plans – must satisfy: public administration, comprehensiveness, universality, portability and accessibility. An expansion upon these five criteria is beyond the scope of this chapter. For an excellent summary of these criteria, see Colleen M Flood and Sujit Choudhry, ‘Strengthening the Foundations: Modernizing the Canada Health Act’ (Commission on the Future of Health Care in Canada, Discussion Paper No 13, 2002) <[https://www.law.utoronto.ca/documents/Flood/romanow\\_report.pdf](https://www.law.utoronto.ca/documents/Flood/romanow_report.pdf)> accessed 10 February 2017.

<sup>35</sup> Note that these figures are approximate. Also note that these figures have remained relatively stable from 1997 up to the present: Canadian Institute for Health Information, ‘National Health Expenditure Trends, 1975 to 2016’

billion Canadian dollars in total health care spending in Canada, 91 billion dollars came from the public purse and the remaining 39 billion dollars was privately funded.<sup>36</sup> However, Canada's private health system is unique from those of other countries in a very significant respect: in Canada, those services which are covered by the public system (ie medically necessary hospital and physician services) attract close to 100 percent public financing; therefore, as Colleen Flood has put it, there is virtually no *duplicative* private tier for medically necessary services in Canada.<sup>37</sup>

This lack of a duplicative private tier is owed to active steps which have been taken by the provinces (and the federal government) to prevent such a tier from developing. First off, the majority of provinces (six in total) expressly prohibit private insurance for medically necessary hospital and physician services.<sup>38</sup> For example, in the province of Quebec, such prohibitions are found in section 11 of the *Hospital Insurance Act* (the "HOLA") and section 15 of the *Health Insurance Act* (the "HEIA") (the provisions challenged in *Chaoulli*).<sup>39</sup> But as Flood has convincingly argued, such express prohibitions on private insurance are only part of the reason why there is no duplicative private tier for medically necessary services in Canada.<sup>40</sup> She has suggested that the absence of such a tier is attributable to a myriad of provincial legislative provisions which 'cumulatively provide disincentives for a flourishing duplicative private tier'.<sup>41</sup> Among other things, these provisions prohibit physicians from subsidising private practice from the public plan, as well as prohibit physicians from relying on the public sector for the bulk of their income while using the private sector to top up their incomes.<sup>42</sup> An example of the latter are prohibitions on so-called "user charges" and "extra billing" for medically necessary services.<sup>43</sup> As Flood and Sujith Xavier have explained it, the above provisions limit 'the extent to which physicians can or are willing to work in the private sector by requiring them to be fully in or fully out of the publicly-funded payment system'.<sup>44</sup> In support of her argument, Flood has pointed to the fact that although four provinces (Saskatchewan, Newfoundland, New Brunswick and Nova

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(2016) <[https://www.cihi.ca/sites/default/files/document/nhex-trends-narrative-report\\_2016\\_en.pdf](https://www.cihi.ca/sites/default/files/document/nhex-trends-narrative-report_2016_en.pdf)> accessed 16 August 2017, 31. See also Flood and Thomas (n 31) 259; Gilmour (n 32) 329.

<sup>36</sup> Gilmour (n 32) 329.

<sup>37</sup> Flood and Thomas (n 31) 259, 265.

<sup>38</sup> Colleen M Flood and Tom Archibald, 'The Illegality of Private Health Care in Canada' (2001) 164 *Canadian Medical Association Journal* 825, cited in Colleen M Flood, 'Chaoulli's Legacy for the Future of Canadian Health Care Policy' (2006) 44 *Osgoode Hall Law Journal* 273, 298-99.

<sup>39</sup> Specifically, these provisions prohibit *contracting for* private health insurance.

<sup>40</sup> Flood (n 38) 298-99.

<sup>41</sup> *ibid* 298.

<sup>42</sup> *ibid* 298-99.

<sup>43</sup> Note that "user charges" and "extra billing" are also prohibited under the *CHA* itself.

<sup>44</sup> Flood and Xavier (n 33) 623.

Scotia) do not expressly prohibit private insurance for medically necessary services, no significant private sector has developed therein. These provinces do, however, use the above disincentives.<sup>45</sup>

Now, let us return to the pro-privatisation movement and its suggestion vis-à-vis the wait time problem. The pro-privatisation position had (and still has) a strong support base in Canada, including powerful actors like private insurance firms, pharmaceutical companies and bankers – all who stand to gain financially, in a significant way, from increased private health care.<sup>46</sup> As Dr. Marie-Claude Goulet, chair of Médecins Québécois pour le Régime Public [Quebec Physicians for a Public System], has explained, the ‘privat[is]ation strategy ... [is] driven by financial interests. Health represents a huge market with a vast potential for profit. Everybody needs health care at some point in their lives, and people are prepared to pay when it has to do with their health’.<sup>47</sup> It was also supported by some physicians and patients (including, as I will explain shortly, the claimants in *Chaoulli*) who grew tired of what they considered to be “unreasonable” or “excessive” wait times. The pro-privatisation movement’s argument vis-à-vis privatisation offering a “solution” to the wait time problem is a rather simple one: introducing a private tier for medically necessary services in Canada should reduce wait times in the public system by reducing demand for publicly-insured services, thereby shortening waiting lists for such services.

To be sure, this argument has intuitive appeal. However, the provinces, for a number of reasons, refused to turn to privatisation in order to solve their wait time problem. First, the privatisation of medically necessary health care services was seen to violate how the majority of the Canadian public views health care. As Romanow stressed in his 2002 report, most Canadians subscribe to the principle that health care should be based on need, not ability to pay.<sup>48</sup> They view quality and timely health care as ‘a right of citizenship, not a privilege of status or wealth’.<sup>49</sup> Allowing patients to use their money to gain access to better or faster health care is in direct opposition to this principle. Second, there was a longstanding concern that introducing a duplicative private tier would threaten the quality and sustainability of Canada’s public system.<sup>50</sup> Contrary to suggestions by pro-privatisation actors, this concern was not anecdotal; it was rooted

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<sup>45</sup> That is, with the exception of Newfoundland. In Flood’s words, presumably in Newfoundland ‘the potential private market is insufficient to flourish even in the absence of laws suppressing it’: Flood (n 38) 289.

<sup>46</sup> Silvana Forti, ‘The Privatization of Health and the Defense of the Public System in Quebec (2010) 5 Social Medicine 123, 125-26.

<sup>47</sup> *ibid* 125.

<sup>48</sup> Romanow Report (n 19) xvi. See also Flood and Thomas (n 31) 276; Flood and Xavier (n 33) 618; Martha Jackman, ‘The Future of Health Care Accountability: A Human Rights Approach’ (2016) 47 *Ottawa Law Review* 441, 469; Roy Romanow, ‘In Search of a Mandate?’ in Colleen M Flood, Kent Roach and Lorne Sossin (eds), *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (University of Toronto Press 2005), 528.

<sup>49</sup> Romanow Report (n 19) xvi.

<sup>50</sup> Colleen M Flood, ‘Litigating Health Rights in Canada: A White Knight for Equity?’ in Colleen M Flood and Aeyal Gross, *The Right to Health at the Public/Private Divide* (Cambridge University Press 2014), 85.

in well-established health care system research which makes clear that such parallel financing of services increases (rather than decreases) overall costs and raises serious questions of fairness.<sup>51</sup> Thus, allowing a duplicative private tier to develop in Canada would, based on this research, increase costs in the public system and leave the patients remaining therein – likely low-income and unhealthy/uninsurable citizens – with an inefficient, unfair and unsustainable system.

Finally, a compelling body of research conducted across a range of jurisdictions established that while intuitively the introduction of a duplicative private tier should reduce wait times (as pro-privatisation actors had suggested), experience had proven that said benefit is not, in actuality, realised. For example, as documented in a 2004 OECD report, in the case of Ireland (where private health insurance has grown steadily since its introduction in 1957, reaching 48 percent of the Irish population as of 2002), wait times have not decreased.<sup>52</sup> Similar patterns are observable in Australia and Great Britain.<sup>53</sup> Researchers have offered, supported by empirical data, several explanations for such patterns. They include: (i) the introduction of a private tier diverts resources away from the public system; (ii) given that the private system is most likely more lucrative than the public system, introducing such a tier creates incentives for physicians to maintain long waiting lists; and (iii) rather than shift demand from the public to the private system, the introduction of such a tier increases overall demand for health care services.<sup>54</sup> Moreover, there was evidence to support the conclusion that more than not reduce wait times in the public system, the introduction of a duplicative private tier could actually – and quite perversely – have the opposite effect.<sup>55</sup> This is so since healthier patients would be drawn to the private health system, thereby increasing the average complexity of cases in the public system.<sup>56</sup>

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<sup>51</sup> Theodore R Marmor, 'Canada's Supreme Court and its National Health Insurance Program: Evaluating the Landmark *Chaoulli* Decision from a Comparative Perspective' (2006) 44 Osgoode Hall Law Journal 311, 317-18. For this reason, many countries, much like Canada, have taken measures to prevent a duplicative private tier from developing: Flood (n 38) 278; Flood and Xavier (n 33) 623. A notable exception is, of course, the United States. But with the United States, in the blunt words of health economist Robert Evans, the indisputable research is that while the country does have some excellent health care, 'as a *system* for organi[s]ing, delivering and particularly for financing health care, the American approach is, by international standards, grossly inefficient, heartbreakingly unfair, monumentally top-heavy with bureaucracy, and off the charts in both the level and the rate of escalation of costs. And for all that, Americans are not particularly healthy, relative to the rest of the developed world': Robert G Evans, 'Going for the Gold: The Redistributive Agenda Behind Market-Based Health Care Reform' (1997) 22 Journal of Health Politics, Policy and Law 427, 435.

<sup>52</sup> Organisation for Economic Co-Operation and Development (OECD), *Private Health Insurance in OECD Countries* (The OECD Health Project, 2004) <<http://www.oecd.org/health/privatehealthinsuranceinoecdcountries-theoecdhealthproject.htm>> accessed 16 August 2017, 177.

<sup>53</sup> *ibid* 177; Carolyn Hughes Tuohy, Colleen M Flood and Mark Stabile, 'How Does Private Finance Affect Public Health Care Systems? Marshaling the Evidence from OECD Nations' (2004) 29 Journal of Health Politics, Policy and Law 359, 373.

<sup>54</sup> OECD (n 52) 177-79; Tuohy, Flood and Stabile (n 53) 373-76.

<sup>55</sup> Tuohy, Flood and Stabile (n 53) 376.

<sup>56</sup> *ibid* 376.

For the foregoing reasons, no public report published in Canada leading up to *Chaoulli* had formally recommended privatisation.<sup>57</sup> Roy Romanow found there was ‘no evidence these solutions will deliver better or cheaper care, or improve access (except, perhaps, for those who can afford to pay for care out of their own pockets)’; he also stressed that ‘the principles on which these solutions rest cannot be reconciled with the values at the heart of medicare or with the tenants of the *Canada Health Act* that Canadians overwhelmingly support’.<sup>58</sup> Michael Kirby concluded that ‘Canada’s single public funder model must be maintained for hospital and doctor services’; in his Committee’s view, ‘Not only does a single public insurer/funder mean that everyone gets treated equally, but it is also enormously more efficient than the often-advocated funding model that mixes public pay and private pay patients, that is, the “two-tier” model’.<sup>59</sup> Accordingly, Canada’s provinces never moved in the direction of a duplicative private tier.

Because the pro-privatisation position was not gaining the desired traction in political circles, in the early 2000s the movement turned to the courts. Kirby, in expressing concern with the wait time problem, predicted this response. He noted: ‘Unless Canadians are guaranteed timely treatment, the future of publicly funded health care is likely to be at risk, most probably as a result of a constitutional challenge based on the right of individual Canadians to have access to timely care and to purchase private health insurance to provide it’.<sup>60</sup> Such challenges also ‘took advantage of a period when the health system was being heavily critici[s]ed, particularly in the media’.<sup>61</sup> The essential argument underlying these challenges is the following: owing to the wait time problem in Canada’s public health system, the legislative provisions which the provinces have enacted (so as to prevent a duplicative private tier from developing) are unconstitutional. Specifically, due in significant part to the mental and physical suffering associated with waiting for treatment, these provisions, it has been argued, violate Canadians’ rights to life and security of the person as protected by section 7 of the *Charter* (among other rights in other sections).

*Chaoulli* was the first of such challenges in Canada. At issue in the case were section 11 of the *HOLA* and section 15 of the *HEIA* – both of which, it will be recalled from earlier, prohibit private health insurance for medically necessary health care services in Quebec. The challenge

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<sup>57</sup> Marie-Pascale Pomey et al, ‘Stakeholder Views on Privatization of the Quebec Health Care System’ (2016) 42 Canadian Public Policy 324, 325. See also Jeff A King, ‘Constitutional Rights and Social Welfare: A Comment on the Canadian *Chaoulli* Health Care Decision’ (2006) 69 Modern Law Review 631, 634: ‘The reports uniformly recommend the retention of single-tier medicine. They show that the Romanow Report, Kirby Report, a public Quebec report ... all found that a private health insurance market would increase the waiting times in the public system. They also point to expert testimony and reports showing that two-tier health care systems result in a diversion of resources and commitment from the public to the private system’.

<sup>58</sup> Romanow Report (n 19) xx.

<sup>59</sup> Kirby Response (n 24) 9.

<sup>60</sup> *ibid* 25.

<sup>61</sup> Forti (n 46) 125.

was lodged by two individuals in the province of Quebec: Jacques Chaoulli and George Zeliotis. Chaoulli was a physician who had unsuccessfully attempted to obtain a licence to operate an independent private hospital in Canada. Zeliotis was an individual patient who had suffered a number of health problems over the years and had complained about delays in accessing care in the public health system.<sup>62</sup> Unlike the *TAC* case in which an activist organisation (the TAC) was behind the litigation (and indeed was the main claimant in the case), *Chaoulli* had no such formal organisational backing. Chaoulli and Zeliotis joined forces for the specific purpose of the legal challenge; and Chaoulli both financed the litigation and was self-represented therein.<sup>63</sup> But in light of the pro-privatisation movement, there was, of course, sizeable support for their cause.

### The Illustration

Much like the case of PMTCT in South Africa, this example of wait times in Canada's public health system may be thought of as a network of interdependent relationships. Again, this network configuration follows from the fact that the relationship between Canadians and their government with respect to wait times – a case of the more general citizen-government relationship (of course, with the exception of the fact that social rights are not constitutionalised in Canada) – may be accurately characterised as a trust relationship: the government had control over the medically necessary services for which Canadians were waiting; the government had discretion in providing those services (including the use of waiting lists as a means of rationing and/or prioritising those services' delivery), thereby leaving Canadians uncertain of how the government would exercise its control; and owing to their need for the services at issue, coupled with the government's control and discretion, Canadians were vulnerable to their government.<sup>64</sup>

Paralleling my analysis in Chapter 5, I will use this example to illustrate this thesis's arguments, centring around the same parties and relationships which I analysed there. In this example of wait times in Canada, the relevant parties translate into: physicians who worked in Canada's private health system, the Canadian media and the Canadian courts. And with respect to the courts, I will again focus my illustration on an apex court: the Supreme Court of Canada.

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<sup>62</sup> *Chaoulli* [5].

<sup>63</sup> Frontier Centre for Public Policy, 'Dr. Jacques Chaoulli' (2008) <<http://archive.fcpp.org/posts/dr-jacques-chaoulli>> accessed 21 July 2017. As is evident from the Court's judgment, Zeliotis had legal representation.

<sup>64</sup> It should be noted that when I refer to the Canadian "government" I mean both the federal and provincial governments. Recall that both levels of government exercise power over health care: the provincial governments directly and the federal government indirectly via its spending power. This includes power over wait times. In fact, in *Chaoulli*, the proceeding was commenced against both the provincial government (the Attorney General of Quebec) and the federal government (the Attorney General of Canada).

### *Physicians in the Private System*

Owing to the structure of Canada's health care system, physicians working in the private system played (and still do play) a very different role than their South African counterparts. Because Canada does have a parallel private health system but that system is not duplicative in nature, while there were (and are) physicians who work in the private system, they did not offer (since either they legally could not offer or there were disincentives in place to discourage them from offering) the same medically necessary health care services as physicians in the public system.

This lack of duplication in the Canadian public health system meant that physicians in the private system did not serve as an “alternative source” of the social goods and services which Canadians sought in their relationship with their government – medically necessary health care services. Accordingly, and in contrast to the wealthy South African PWLHIV from Chapter 5, for wealthy Canadians who had access to the private health system, physicians in that system did *not* mitigate their vulnerability to the Canadian government.<sup>65</sup> Owing to the system's structure, wealthy Canadians could not turn to the private health system to obtain medically necessary care should the Canadian government refuse to provide it (or, as is the case here, should it fail to provide it as quickly as Canadians would like). Therefore, every Canadian (regardless of her financial means) was wholly dependent on the Canadian government for medically necessary health care. The public system was intentionally designed to achieve that outcome. By not discriminating based on wealth – that is, furthering the principle that health care should be based on need, not ability to pay – the public health system was rendered an equaliser of vulnerability.<sup>66</sup>

### *Canadian Media*

The relationship between Canadians and the Canadian media represents yet another case of the more general “citizen-media relationship”. And it follows from this, based on both the network conception of trust and the relevant empirical research cited in Chapter 3, that we can expect the Canadian media to be able to impact Canadians' trust in their government with respect to health care wait times. Additionally, there is a body of specific empirical media research from Canada

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<sup>65</sup> With that said, one minor point of clarification is necessary. When I refer to physicians in the private system, I am limiting myself to physicians who were working in Canada. Of course, private physicians outside of Canada were available to those Canadians who could afford and were willing to pay the costs for such out-of-country medical care. Canadian regulation has never prohibited this kind of “medical tourism”. Thus, for those wealthy Canadians who had the financial means to enter this tourism market, out-of-country physicians could and did serve as an alternative source for medically necessary health care services, with the effect of mitigating this small subset of wealthy Canadians' vulnerability to the Canadian government.

<sup>66</sup> As I will explain later in this chapter, the Supreme Court's decision in *Chaoulli* changed the role played by such physicians and fundamentally changed their relationship with those people who could afford access to them. In essence, *Chaoulli* created an opening for a system of duplication and generated an “alternative source” role for physicians in the Canadian private market.

which lends further support to this conclusion.<sup>67</sup> Put concisely, that body of research suggests that the Canadian media's reporting on public health care (including with respect to wait times) can and does impact public perceptions regarding the state of health care services in Canada.

As with the PMTCT case in Chapter 5, I will use this example of wait times in Canada's public health system to illustrate how the media can operate as an "advisor" in the relationship between citizens and their government. Specifically, I will demonstrate how many publications in Canada advised Canadians not to trust their government with respect to wait times by portraying the latter as untrustworthy. And following from that, to the extent that Canadians trusted these publications, we can expect that they hindered Canadians' trust in their government. However, before I get into this illustration, I should point out that the same limitations which I set out in my Chapter 5 illustration equally apply here. First, I focus my illustration again on print media (and more specifically still, on newspapers) for the same reason which I provided there: most of the relevant media research which has been conducted in Canada has focused primarily on newspapers. Second, I centre my illustration on these newspapers' portrayal of the Canadian government as *un*trustworthy (rather than trustworthy) because, as I will demonstrate shortly, the relevant empirical work establishes that during the relevant time, newspapers' portrayal of the Canadian public health system and the Canadian government vis-à-vis health care and wait times was, generally speaking, highly negative in nature. That said, there were many publications which did portray the Canadian government in a positive light; and therefore, to the extent that Canadians trusted those publications, they may have instead fostered their trust in government. And lastly, I would like to stress again that my illustration in this section is precisely that – an illustration. It should not be taken as an exhaustive analysis of Canadian newspapers and their impact on the Canadian public's trust in government during the relevant time period.

My choice to focus the illustration in this section on newspapers' portrayal of the Canadian government as untrustworthy is based on the findings made in Canadian media research. First of all, that research has found that during the relevant period, Canadian newspapers portrayed the public health system in an increasingly negative manner. For example, Stuart Soroka, Antonia Maioni and Pierre Martin, in a content analysis of articles published in the Toronto-based newspaper, the *Toronto Star*, have shown that the public system was with increasing regularity portrayed as in a state of "crisis". Their study specifically examined, in the

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<sup>67</sup> Kelly Blidook, 'Media, Public Opinion and Health Care in Canada: How the Media Affect "The Way Things Are"' (2008) 41 *Canadian Journal of Political Science* 355; Stuart N Soroka, 'Public Perceptions and Media Coverage of the Canadian Healthcare System: A Synthesis' (Canadian Health Services Research Foundation, 2011) <<http://www.cfhi-fcass.ca/sf-docs/default-source/commissioned-research-reports/Soroka1-EN.pdf?sfvrsn=0>> accessed 17 August 2017; Stuart Soroka, Antonia Maioni and Pierre Martin, 'What Moves Public Opinion on Health Care? Individual Experiences, System Performance, and Media Framing' (2013) 38 *Journal of Health Politics, Policy and Law* 893.

period from 1995 to 2010, the coincidence of the terms “wait lists” (and various derivatives thereof) and “crisis”. Their results established a clear increase in the coincidence of these two terms over time, with an especially clear increase following the year 2000.<sup>68</sup> In another study, Kelly Blidook arrived at a similar finding.<sup>69</sup> Using a sample of five English-language newspapers from across Canada, she conducted a similar analysis of the coincidence of the terms “health care” and “crisis” between 1994 and 2000. Blidook observed a substantial increase in the two terms appearing together, with the majority of that increase taking place in 1999 and 2000.<sup>70</sup>

In addition to how the public *system* was portrayed, there is evidence to suggest that the politicians responsible for that system were also portrayed negatively. For such evidence, we may consider again Blidook’s work. In a study related to the previous (but focusing this time on television media coverage around the time of the 2000 Canadian federal election), Blidook analysed how the five major political parties were portrayed in health-related stories as compared with non-health-related stories.<sup>71</sup> Her findings are quite revealing. She found that across all news stories where at least one party was mentioned, one or more of the parties was portrayed more negatively in health stories than in non-health stories (although not to a statistically significant extent). However, where there was a statistically significant difference was with respect to the governing party – the Liberals – who had been in power for seven years prior. The Liberal party was 28 percent more likely to be portrayed negatively in health stories than in non-health stories. Moreover, of those cases in which the Liberal party was portrayed non-negatively in health stories, the vast majority were neutral (as opposed to positive). Negative coverage of the Liberals in health stories outpaced positive coverage thereof by a ratio in excess of 10:1. For Blidook, these research findings, taken together, ‘strongly suggest[] that the frame of health care coverage portrayed a problem with the system’.<sup>72</sup> Although I acknowledge that Blidook’s study did not directly address newspaper coverage of health issues nor wait times per se, I think that her findings and her conclusions may be appropriately extended for my purpose – that is, to support the suggestion that Canadian newspapers’ portrayal of the government with respect to wait times was, generally speaking, highly negative in nature. First, although television news and newspaper coverage are distinct, I do not think that it is unreasonable to relate them. In this regard, I am supported by media research.<sup>73</sup> Also, research which has been conducted on newspaper coverage

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<sup>68</sup> Soroka, Maioni and Martin (n 67) 912-13.

<sup>69</sup> Blidook (n 67) 360.

<sup>70</sup> *ibid* 360.

<sup>71</sup> *ibid* 360.

<sup>72</sup> *ibid* 360.

<sup>73</sup> James N Druckman, ‘Media Matters: How Newspapers and Television News Cover Campaigns and Influence Voters’ (2005) 22 *Political Communication* 463, 464.

has yielded similar findings to those of Blidook. For example, Christen Rachul and Timothy Caulfield, in a content analysis of newspaper articles across Canada dealing with government-related health care and access thereto between 2003 and 2012, found that many of the underlying themes of articles were negative towards the government.<sup>74</sup> In particular, they found that the ‘Canadian print news media was overwhelmingly sympathetic towards patients and increasing government funding for medication, procedures, and other treatments’.<sup>75</sup> Moreover, one of the most common themes which they observed in the articles they reviewed was ‘the government is letting its citizens and residents down by not providing access’ (accounting for 14.3 percent of all articles).<sup>76</sup> Second, it is true that Blidook’s study did not focus specifically on wait times (nor did Rachul and Caulfield’s study for that matter). But research conducted by Stuart Soroka has shown that from 1997 to 2009 (which necessarily includes the 2000 time period of Blidook’s study and most of the time period in Rachul and Caulfield’s study), a significant number of health news stories centred on the issue of wait times.<sup>77</sup> To quote Soroka, health care wait times were a ‘major public concern’ and played ‘a prominent role in media coverage’ at that time.<sup>78</sup>

So, how did these publications – via such negative coverage – portray the government as untrustworthy (and so, advise Canadians not to trust government with respect to wait times)? I suggest that they did so in two principal ways: by challenging the fairness of governmental procedures around wait times (an element which, it will be recalled, speaks to the government’s good will) and by questioning the government’s competence to deal with the wait time problem. And by doing so, these publications suggested that the government was not likely, in future interactions, to fulfil Canadians’ expectations of good will and competence vis-à-vis wait times.

First, many publications challenged the fairness of governmental procedures around wait times on equality grounds.<sup>79</sup> Specifically, waiting list administration procedures were portrayed as unfairly advantaging certain groups of patients (eg the wealthy and the socially connected) to the disadvantage of the less wealthy/less socially connected. For instance, in an article published in the national newspaper *The National Post* titled ‘Swap a favour, treat a friend’, Heather Sokoloff reports on how certain patients frequently jump to the front of waiting lists.<sup>80</sup> This select group

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<sup>74</sup> Christen Rachul and Timothy Caulfield, ‘The Media and Access Issues: Content Analysis of Canadian Newspaper Coverage of Health Policy Decisions’ (2015) 10 *Orphanet Journal of Rare Diseases* 102, 103-05.

<sup>75</sup> *ibid* 105.

<sup>76</sup> *ibid* 104-05.

<sup>77</sup> Soroka (n 67) 36.

<sup>78</sup> *ibid* 36.

<sup>79</sup> In fact, Rachul and Caulfield’s content analysis study found that one of the most common themes in the articles which they reviewed was ‘inequality in the healthcare system’ (accounting for 10.6 percent of all articles reviewed): Rachul and Caulfield (n 74) 104-05.

<sup>80</sup> Heather Sokoloff, ‘Swap a favour, treat a friend’ *The National Post* (7 September 2004).

of patients includes, according to Sokoloff's sources, friends of hospital administrators, physicians and other health care professionals, and those who have something to offer these actors in exchange for preferential treatment (what she calls "favour-swapping"). Sokoloff describes this practice as 'Canada's little-discussed, unofficial two-tier medical system, where those with education, connections – and sometimes plain old tenacity – can jump to the front of the queue'. Another example is an article written by well-known health reporter André Picard in the national newspaper *The Globe and Mail*.<sup>81</sup> Picard describes a study conducted by a team of researchers at the University of Manitoba which found that Canada's wealthy have greater access to diagnostic imaging procedures, including CT scans and MRIs. As Picard explains it, this is so because wealthy Canadians know 'how to work the system': they are more likely to have access to physicians (both family physicians and specialists who can refer them), to be well-educated about such technologies and to be an assertive health consumer. Extrapolating from the study to the wait time problem in Canada, Picard suggests that though the 'research did not look at wait times per se' it ultimately 'implies that wealthier patients do not wait as long as the less affluent'.

In essence, these articles depicted the procedures in place for administering waiting lists in Canada's public health system as unequal (an element which, it will be recalled from Chapter 2, is central to procedural fairness and, in turn, good will). Specifically, these procedures were portrayed as discriminating on the basis of wealth (as well as social status). And since the government has responsibility for the public system (at least ultimately, through its financing thereof as well as its regulation of the hospitals which are administering the waiting lists), such articles, by necessary implication, challenged the government's good will toward Canadians.

Second, several publications portrayed the Canadian government as untrustworthy by casting doubt on its competence to deal with the wait time problem. How so? Put simply, they represented the government's decision to prevent a duplicative private tier from developing in Canada (in the ways I described earlier) as not rooted in the relevant evidence (and so, as not consistent with the principles of EBPM).<sup>82</sup> As I have explained, there is a wealth of health care system research to support the conclusion that parallel financing of health care services increases (not decreases) costs and raises serious questions of fairness. Accordingly, there was/is good reason to believe that if the Canadian government were to allow a duplicative private tier to develop in Canada, the public system (in which low-income and unhealthy/uninsurable citizens would have no choice but to remain) would be inefficient, unfair and unsustainable. Despite the existence of this body of research, many reporters who covered the *Chaoulli* decision and

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<sup>81</sup> André Picard, 'Rich get better access to CT scans, MRIs; A Winnipeg study finds the wealthy's connections move them up the line' *The Globe and Mail* (8 November 2005).

<sup>82</sup> Flood (n 38) 295-97.

addressed the wait time problem made no mention of it. These reporters instead, usually advocating some form of two-tier system for medically necessary services, presented their own “evidence” pertaining to the experiences of foreign jurisdictions.<sup>83</sup> In a nutshell, they suggested that since jurisdictions other than Canada have parallel public and private health systems which seemingly work well, Canada could and should do the same. Problematically, as Colleen Flood has explained, these reporters, in presenting such foreign experiences, omitted important contextual details which have significant bearing on the comparability of these jurisdictions to Canada.<sup>84</sup> As a consequence, these reporters, as Flood has put it, ‘grossly oversimplified the debates about public and private health insurance’, thereby demonstrating a ‘poor grasp of health policy’.<sup>85</sup> So, how did these reporters portray the government as incompetent to deal with the wait time problem? In my view, they did so through such oversimplification. By presenting foreign experiences in the way they did (decontextualised and thus, grossly oversimplified), they suggested to Canadians that there was/is evidence to support the efficacy of a two-tier health care system in Canada (ie their “evidence” from foreign jurisdictions); and because this evidence was not resulting in reforms to the system, that their government was either unaware of it or chose to ignore it (rather than the actual reason – its validity based on the health care system research). Either way, the government’s policy on wait times, according to the suggestions of these reporters, did not account for important evidence; and as such, it was not evidence-based.

To illustrate my point, consider an article to which Flood refers which was published by Lysiane Gagnon (a regular columnist in the Montreal-based newspaper *La Presse*) in the 14 November 2005 edition of *The Globe and Mail*.<sup>86</sup> In it, Gagnon criticises Canada’s public health system and, consistent with what I have said, advocates a parallel private system for medically necessary care in Quebec. But in so advocating, she makes no mention of the health care system research which I have noted. Nor does she make reference to the many health policy and health law scholars who, in commenting upon the *Chaoulli* decision, emphasised this research and the majority’s failure to understand it. Rather, she simply highlights that ‘[a]ll of Western Europe allows the co-existence of private and public medical services’ and without taking any steps to contextualise the relevant jurisdictions, argues that Quebec should draw inspiration from the systems in France, the UK and Sweden. In making her argument, Gagnon directly attacks the Quebec government for not emulating such jurisdictions, stating, ‘Only a diehard ideologue, or

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<sup>83</sup> As will become apparent shortly, such “evidence” from foreign jurisdictions was also relied upon by the majority of the Supreme Court in deciding *Chaoulli*.

<sup>84</sup> *ibid* 295-97.

<sup>85</sup> *ibid* 295.

<sup>86</sup> Lysiane Gagnon, ‘A pill Quebec won’t swallow’ *The Globe and Mail* (14 November 2005).

someone who hasn't travelled much, can argue that countries like France and Sweden, whose institutions were built by a succession of socialist governments, have an unfair system'. Another example is an article published by well-known columnist Margaret Wenté in the 11 June 2005 edition of *The Globe and Mail* (only two days after the *Chaoulli* decision was released).<sup>87</sup> Like Gagnon, Wenté is critical of Canada's public system and uses systems in other jurisdictions (France and Germany being specifically mentioned) to support her argument in favour of a two-tier system. But again, making no effort to contextualise those jurisdictions' systems, she simply notes that they 'have private as well as public medicine' and that they 'manage to provide universal access without waiting times for treatment' (a suggestion with which I am fairly certain many health policy experts would disagree).<sup>88</sup> And then, attacking what she sees as a failure on the part of the Canadian government to not develop a two-tier system, Wenté pejoratively states that via *Chaoulli*, the 'Supreme Court has handed us permission to grow up. We should take it'.

In summary, I submit that the foregoing negative media coverage – which challenges the fairness of Canada's waiting list administration procedures and the government's competence to solve the wait time problem – portrayed the government as untrustworthy. These publications depicted the Canadian government as unlikely to fulfil Canadians' expectations of trust (specifically good will and competence) and, in turn, advised them not to trust their government with respect to wait times. And so again, to the extent that Canadians trusted these publications, we can expect, based on the network conception of trust as well as Coleman's theory, that their effect was to hinder trust between Canadians and their government with respect to wait times.

#### *Supreme Court of Canada*

Lastly, let us turn to the Supreme Court. Like the relationship between PWLHIV and the South African Constitutional Court, Canadians and their Supreme Court had a relationship which followed from two factors: first, as with the South African example, the reality that Canadians had brought social rights cases to the Supreme Court (including in respect of wait times in *Chaoulli*); and second, from how the Supreme Court had approached social rights. On the latter factor, the Canadian Supreme Court is very different from its South African counterpart. Whereas the South African Constitutional Court furthered its relationship with South Africans by pronouncing upon (specifically, recognising) the justiciability of the express social rights provisions contained in their constitution, the Canadian Supreme Court – because the Canadian

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<sup>87</sup> Margaret Wenté, 'Forget keeping medicare above water; Not even Roy Romanow had enough fingers to save the present health-care system' *The Globe and Mail* (11 June 2005).

<sup>88</sup> As I explained earlier, wait times are a necessary characteristic of an efficient health care system: Flood and Epps (n 20) 552. As such, it is highly unlikely that any country would have no wait times for treatment.

Constitution does not have such express social rights provisions – did not have to make, and so, did not make, an equivalent pronouncement. Nevertheless, the Supreme Court had, in its *Charter* jurisprudence, expressly left open the possibility of such recognition, specifically in section 7.<sup>89</sup> In *Gosselin v Quebec (Attorney General)* (which was decided only two years prior to *Chaoulli*), the Court decided that it would leave ‘open the possibility that a positive obligation to sustain life, liberty or security of the person may be made out in special circumstances’ (even though the majority of the Court concluded that such “special circumstances” did not exist in that particular case).<sup>90</sup> In my view, this express opening contributed to the relationship between the Court and Canadians. It signalled the Court’s openness to its mediating the relationship between Canadians and their government with respect to social rights (even if such mediation remained theoretical for the moment); and if nothing else, it may have encouraged Canadians to litigate before the Court.

*Chaoulli* involved a constitutional challenge to the two Quebec provisions which I identified earlier (section 15 of the *HELA* and section 11 of the *HOLA*) – both of which prohibited private health insurance for medically necessary services. The claimants argued that these provisions violated their rights under both the *Charter* and the *Quebec Charter of Human Rights and Freedoms* (the “*Quebec Charter*”) (a statutory bill of rights which applies exclusively in Quebec and under which courts have the power to review legislation for consistency therewith).<sup>91</sup> More specifically, they claimed under the *Quebec Charter* a violation of section 1 (the rights to life and to personal security, inviolability and freedom) and under the *Charter*, violations of section 7 (the right to life, liberty and security of the person), section 12 (the right not to be subjected to cruel and unusual treatment or punishment) and section 15 (the right to equality).

*Chaoulli* and *Zeliotis* did not challenge the constitutionality of the prohibition on private health insurance per se. Rather, they challenged the prohibition as set against the backdrop of the wait time problem in Canada. They argued that the prohibition in these provisions – combined with the wait time problem – yielded a violation of the above-mentioned rights. Without the wait times in the public health system, the prohibition in section 15 of the *HELA* and section 11 of the *HOLA*, according to their challenge, would not be unconstitutional. Their challenge rested on the reasonable assumption that a private system for medically necessary care, if permitted by governments in Canada, would come with no or significantly reduced wait times when compared against the public system. Thus, as Deschamps J. summarises in her opinion, the

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<sup>89</sup> [2002] 4 SCR 429. For additional support from the Court that section 7 may ground a positive right, see *Re B.C. Motor Vehicle Act 1985* [1985] 2 SCR 486; *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927.

<sup>90</sup> *Gosselin* (n 89) [83].

<sup>91</sup> For the legislative review power, see section 52 of the *Quebec Charter*.

claimants contended that ‘the prohibition [in the *HELA* and the *HOLA*] deprives them of access to health care services that do not come with the wait they face in the public system’.<sup>92</sup>

The importance of the wait time backdrop of the claimants’ challenge is key to my trust-based analysis of the *Chaoulli* decision. Because the challenge was brought against this backdrop, the *Chaoulli* case could have been – but unfortunately was not – framed by the parties as well as the Court in an alternative, positive manner. That alternative was as a challenge to the wait time problem itself. Such a challenge would have been in line with more traditional claims in social rights litigation (as we saw, for example, in the *Grootboom* and *TAC* cases): that the government has a positive obligation under the Constitution to provide a social good or service – in this case, medically necessary care in a timely manner. Therefore, Chaoulli and Zeliotis, on behalf of all Canadians, could have challenged the government’s management of wait times in the public health system, and the Supreme Court could have determined the government’s constitutional obligations vis-à-vis its management of wait times. But that did not happen. As Bruce Porter has critically, but correctly in my view, suggested, the Court ‘insists on framing the case exactly as the more advantaged [claimants] and their many supporters among the private healthcare providers would have the Court frame it: as a challenge to government interference with the “rights” of the more affluent to avoid waiting lists, rather than as a challenge to ensure that waiting lists do not violate the rights of those in need of care’.<sup>93</sup> I will return to this framing of the case shortly.

At first instance, the Quebec Superior Court dismissed the matter. The trial judge found that neither section 12 nor section 15 of the *Charter* was engaged. As for section 7, she held that while the provisions deprived the claimants of their right to life, liberty and security of the person, said deprivation was ‘in accordance with the principles of fundamental justice’. On this front, the trial judge concluded that the purpose of the prohibition was to discourage the development of a parallel private system for medically necessary care, a purpose motivated by considerations of equality and human dignity.<sup>94</sup> The Quebec Court of Appeal dismissed the appeal brought by the claimants. Thus, the claimants further appealed the decision to the Supreme Court of Canada which heard the appeal in June 2004 and issued its decision on 9 June 2005. The Court focused its decision substantially on section 7 of the *Charter* and section 1 of the *Quebec Charter*; accordingly, I will equally focus my analysis in this chapter on these sections.

*Chaoulli* was decided by a seven-member panel (rather than the full Court which has nine members). The Court’s judgment is divided into three opinions: the opinion of McLachlin C.J. and Major and Bastarache JJ. (delivered by McLachlin C.J. and Major J.); an opinion by

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<sup>92</sup> *Chaoulli* [2].

<sup>93</sup> Bruce Porter, ‘A Right to Health Care in Canada: Only if You Can Pay for It’ (2005) 6 ESR Review 8, 10.

<sup>94</sup> Although argued, the trial judge did not mention the challenge under the *Quebec Charter: Chaoulli* [8].

Deschamps J. (concurring in part); and a dissenting opinion (delivered by Binnie and LeBel JJ.). McLachlin C.J. and Major J. concluded that the impugned provisions violated both section 7 of the *Charter* and section 1 of the *Quebec Charter*, and that neither violation could be justified under the charters' respective limitations sections (section 1 of the *Charter* and section 9.1 of the *Quebec Charter*). With respect to section 7, they said that the impugned provisions deprived the claimants of their rights to life and security of the person due to the 'psychological and physical suffering' which follows from waiting lists – suffering which would not be sustained 'but for the prohibition on medical insurance' imposed by the impugned provisions.<sup>95</sup> McLachlin C.J. and Major J. also held that the impugned provisions were "arbitrary" and, as such, their deprivation of the rights to life and security of the person did not accord with the principles of fundamental justice.<sup>96</sup> On the issue of arbitrariness, the government argued (supported by expert evidence which summarised and was in line with the health care system research to which I referred earlier) that the impugned provisions' objective in prohibiting private health insurance was to ensure the quality of public health care in Canada. McLachlin C.J. and Major J. largely rejected this argument, discrediting the government's expert evidence as based on 'assertions of belief' and instead choosing to rely on so-called "evidence" of the 'experience of other developed countries with public health care systems which permit access to private health care'.<sup>97</sup> And as I have already said, McLachlin C.J. and Major J. reasoned that the violation could not be justified under section 1.<sup>98</sup> On section 1 of the *Quebec Charter*, McLachlin C.J. and Major J. concurred with the conclusion drawn by Deschamps J. in her separate opinion (which I consider next).

Deschamps J. decided the case exclusively under the *Quebec Charter*.<sup>99</sup> As she points out in her opinion, section 1 of the *Quebec Charter* is similar to section 7 of the *Charter*: the major distinction between them being the absence of any reference to the principles of fundamental justice in section 1. Accordingly, for reasons which parallel those provided in McLachlin C.J. and Major J.'s opinion with respect to section 7, Deschamps J. concluded that the impugned provisions violated the claimants' rights to life and security under section 1 of the *Quebec Charter*.

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<sup>95</sup> *Chaoulli* [111, 153].

<sup>96</sup> *ibid* [128].

<sup>97</sup> *ibid* [139-53].

<sup>98</sup> As Margot Young has explained, 'it is unlikely that the government will be able to justify an infringement of section 7 under section 1 of the *Charter*, unless there are "extraordinary circumstances where concerns are grave and the challenges complex"'. Thus, 'governments rarely attempt section 1 justifications for section 7 infringements': Margot Young, 'The Other Section 7' (2013) 62 *Supreme Court Law Review* 4, 39-40.

<sup>99</sup> Deschamps J. explains: 'In the case of a challenge to a Quebec statute, it is appropriate to look first to the rules that apply specifically in Quebec before turning to the *Canadian Charter*, especially where the provisions of the two charters are susceptible of producing cumulative effects, but where the rules are not identical': *Chaoulli* [26]. And because she concluded that the *Quebec Charter* had been violated, she reasoned that it was not necessary to consider the arguments based on the *Charter*. [15].

In her opinion, she stresses that '[w]aiting lists are real and intentional' (employed by the government as a form of health care rationing); she, like McLachlin C.J. and Major J., describes the evidence regarding the physical and psychological consequences of waiting lists; and, ultimately, she arrives at the conclusion that the impugned provisions denied Quebeckers, including the claimants, 'a solution that would permit them to avoid waiting lists'.<sup>100</sup> Deschamps J. also reasoned that the government's violation of the rights to life and security could not be justified under section 9.1 of the *Quebec Charter*. Like section 1 of the *Charter*, section 9.1 obliges Quebec courts to consider the importance of the government's objective in enacting the law which infringes the right or freedom, the rationality of the connection between that objective and the law in question, whether the law in question infringes the right or freedom as minimally as possible, and the proportionality of the infringement vis-à-vis the objective.<sup>101</sup> While Deschamps J. accepted the government's objective (defined above) as important and rationally connected with the impugned provisions, she concluded that said provisions did not minimally impair the rights to life and security. In support of this conclusion, she points to alternative measures which Quebec could have adopted (but did not adopt) to protect the public health care system, such as those adopted by other Canadian provinces and by other OECD countries.<sup>102</sup>

The dissenting justices disagreed with McLachlin C.J. and Major J.'s conclusion that the impugned provisions were arbitrary. For them, 'the prohibition against private health insurance is a rational consequence of Quebec's commitment to the goals and objectives of the *Canada Health Act*'.<sup>103</sup> They found this conclusion to be supported by the evidence.<sup>104</sup> Binnie and LeBel JJ. explained that 'there is nothing in the evidence to justify our colleagues' disagreement with [the trial judge's] conclusion that general availability of health insurance will lead to a significant expansion of the private health sector to the detriment of the public health sector'.<sup>105</sup> In opposition to McLachlin C.J. and Major J., they rejected the claimants' arbitrariness argument as 'based largely on generalis[s]ations about the public system' which, for them, were rooted in an overly optimistic and oversimplified view of the benefits of private health insurance and its adverse effects on the public system.<sup>106</sup> Moreover, the dissenting justices decided that the courts were not the proper forum to decide the reasonableness of wait times in the public system.

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<sup>100</sup> *ibid* [37-45].

<sup>101</sup> As Deschamps J. explains in her judgment, 'in the context of the relationship between citizens and the state, [section 9.1] is of the same nature as [section 1] of the *Canadian Charter*': *ibid* [47].

<sup>102</sup> *ibid* [59-98].

<sup>103</sup> *ibid* [164].

<sup>104</sup> *ibid* [166].

<sup>105</sup> *ibid* [168].

<sup>106</sup> *ibid* [169].

According to Binnie and LeBel JJ. the claimants' 'case does not rest on constitutional law but on their disagreement with the Quebec government on aspects of its social policy. The proper forum to determine the social policy of Quebec in this matter is the National Assembly'.<sup>107</sup>

In the end, the legal impact of *Chaoulli* was limited to the province of Quebec.<sup>108</sup> Because McLachlin C.J. and Major J.'s opinion concurred with that of Deschamps J. on the *Quebec Charter* but the reverse is not true – that is, Deschamps J. did not concur with McLachlin C.J. and Major J. on the *Charter*, deciding the case exclusively under the *Quebec Charter* – the majority holding was ultimately that of Deschamps J. In other words, the Court ultimately held and declared, in a 4-3 split, that the impugned provisions (section 15 of the *HELA* and section 11 of the *HOLA*) constituted a violation of the *Quebec Charter*. However, the Court did not specify a remedy for the adjudged violation. It essentially offered the Quebec government a choice: reduce wait times in the public system to a “reasonable” level or remove the prohibitions on private insurance.<sup>109</sup>

As I indicated earlier, in the period leading up to *Chaoulli*, the Supreme Court had never read positive social rights into the Canadian Constitution. And that did not change in *Chaoulli*.<sup>110</sup> Accordingly, my analysis of the *Chaoulli* decision will proceed slightly differently from that of *TAC*. Specifically, my normative argument applies in a slightly different way here. Because social rights (including a right to health) have not been constitutionalised in Canada (in contrast to South Africa, which constitutionalised the right to health in section 27), I cannot, in my analysis of *Chaoulli*, directly apply my courts as mediators of government trustworthiness argument to the Supreme Court. Unlike in Chapter 5 (where I showed how the Constitutional Court could have mediated government trustworthiness in enforcing its constitutional right to health), here, I will instead show how the Supreme Court could have mediated government trustworthiness *if it had recognised a right to health in its constitution*. Hence, as I explained in the thesis's Introduction, in the case of Canada, my normative argument, in addition to addressing how the right to health should be enforced, indirectly acts as an argument in support of the constitutionalisation of such a right.

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<sup>107</sup> *ibid* [167].

<sup>108</sup> Flood (n 50) 95. I say that *Chaoulli*'s “legal impact” is limited to Quebec because, as many commentators have argued, the case's political impact is more far-reaching: Romanow (n 48); Peter H Russell, ‘Chaoulli: The Political versus the Legal Life of a Judicial Decision’ in Colleen M Flood, Kent Roach and Lorne Sossin (eds), *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (University of Toronto Press 2005).

<sup>109</sup> On a further hearing, the province requested an 18-month stay to respond to the holding; but the Court only granted 12 months: Supreme Court of Canada News Bulletin No 29272 (8 August 2005), cited in King (n 57) 642.

<sup>110</sup> If anything, and on the contrary, McLachlin C.J. and Major J. noted in obiter that the ‘*Charter* does not confer a freestanding constitutional right to health care’; rather, according to them, ‘where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*’: *Chaoulli* [103]. To support the conclusion that this statement was obiter, see Jackman, ‘Charter Review as a Health Care’ (n 6) 18. However, as it has been observed by Margot Young, this was not a majority opinion: Young, ‘The Other Section 7’ (n 98) 24.

## Did the Court Mediate the Canadian Government's Trustworthiness?

I suggest that unlike the Constitutional Court in *TAC*, the Supreme Court in *Chaoulli* did not, in any respect, mediate the Canadian government's trustworthiness. Why is that the case? Because the Court laid down no broad rule which defined the government's obligations to Canadians in its exercise of control over medically necessary health care – and therefore, it could not (and so, did not) increase the likelihood that the government would, in its future interactions with Canadians, fulfil their three expectations of trust.<sup>111</sup> Granted, the majority did, as the Constitutional Court did in *TAC*, use the concept of reasonableness to assess the constitutionality of the impugned provisions; but fundamentally distinct from the Constitutional Court's reasonableness approach, it did not use that concept as a basis for developing an overarching obligation on the state. Rather, it used reasonableness as a basis for invalidating those provisions, concluding that the government could not impose exclusivity on Canadians if it failed to provide the services which were the object of the exclusivity within a "reasonable" time.

Most likely, the Court did not lay down such a broad, obligation-defining rule because the right to health had not been constitutionalised. Whereas in *TAC* the Constitutional Court laid down its reasonableness obligation in interpreting section 27 (which, as we know, contains a right to health), the Supreme Court did not have a comparable provision to interpret. So, because the Court was not obliged to – it accordingly did not – lay down any such rule. And the Court, exercising its usual hesitancy (or "timidity" if you prefer) to read positive social rights into its constitution, refused to judicially recognise a right to health in other constitutional provisions.

That said, if a right to health were constitutionalised in Canada (either via constitutional amendment or, as is more likely the case in Canada, via judicial interpretation), how could the Court have mediated the government's trustworthiness in *Chaoulli*? In my view, it could have done so via two inter-related steps. First, it could have employed the constitutional right to health to frame the case in positive terms. As I explained earlier, the Court chose to frame the case (in line with how the claimants framed it) as a matter of government interference with constitutional rights rather than as a positive right to medically necessary care in a timely manner. But as several social rights scholars in Canada have argued, the Court could have instead framed

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<sup>111</sup> It is noteworthy that Patrick Monahan has argued that *Chaoulli* does establish a broad rule: patient accountability. He has argued that as a result of *Chaoulli*, 'those responsible for funding the healthcare system and providing care are ultimately answerable to patients for the timeliness of service provided and, further, that this accountability can be enforced through the legal system': Patrick J Monahan, '*Chaoulli v Quebec* and the Future of Canadian Healthcare: Patient Accountability as the "Sixth Principle" of the Canada Health Act' (CD Howe Institute, 2006) <[https://www.cdhowe.org/sites/default/files/attachments/research\\_papers/mixed//benefactors\\_lecture\\_2006.pdf](https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed//benefactors_lecture_2006.pdf)> accessed 18 August 2017, 5. However, even if we accept Monahan's argument, the problem with the majority's approach, in my view, is that it offers little by way of remedy. If the government fails to meet its "obligation", the Court can do little more than offer patients the opportunity to exit the public system which is failing them. And that, again in my view, is not a true obligation.

the case in the latter, positive way.<sup>112</sup> The claimants' decision to frame the case negatively in no way obliged the Court to accept that framing.<sup>113</sup> I contend that a positive framing of the case is consistent with the mediation of government trustworthiness. This is so because such a framing would have enabled the Court to consider the government's obligations to Canadians vis-à-vis the social good or service at issue in the case (medically necessary health care services); and following from that consideration, the Court could have – in parallel to the Constitutional Court's reasonableness obligation in *TAC* – laid down a broad rule in relation thereto so as to increase the likelihood of the government fulfilling Canadians' expectations of trust. However, by framing the case negatively (and following therefrom, the majority finding that the impugned provisions were unconstitutional), *Chaoulli* did little more than enable those Canadians who were in a position to exit the public system (financially and with respect to their health) to do so.

As a second step, the Court, in considering the government's obligations and laying down a broad rule, could have imposed requirements vis-à-vis the *process* by which the Canadian government employs waiting lists in its exercise of control over medically necessary services. Such requirements would, again, have been such so as to increase the likelihood that the government would, in its future interactions, fulfil Canadians' expectations of trust (ie act with good will toward Canadians, fulfil its fiduciary responsibility thereto and exercise the requisite competence). In other words, they would have promoted trustworthiness. For example, in furtherance of trust's expectation of competence, the Court could have required that the government's policies and programmes pertaining to waiting lists be based on the best available evidence from research.<sup>114</sup> This includes the issue of whether to introduce a duplicative private tier to help reduce wait times. Thus, the Court could have compelled the government – in deciding whether to introduce such a private tier as a solution to the wait time problem – to base that decision on the relevant evidence. Ironically, the government had been doing that. Therefore, as a mediator of government trustworthiness, the Court would have essentially sought to reinforce the kind of EBPM in which the government had already been engaging.

The approach which I am suggesting would not have been completely unfamiliar for the Court. In parallel to it, the Court, in its 1997 *Judges' Remuneration Reference* wherein it defined the

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<sup>112</sup> Porter, 'A Right to Health Care in Canada' (n 93) 10; Kent Roach, 'The Courts and Medicare: Too Much or Too Little Judicial Activism?' in Colleen M Flood, Kent Roach and Lorne Sossin (eds), *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (University of Toronto Press 2005), 193-94.

<sup>113</sup> Actually, an intervener in the case, the Charter Coalition on Poverty, specifically requested that instead of declaring the provisions unconstitutional as it did, that the Court consider 'an effective and systemic remedy for all, not just the most advantaged': Supplementary Factum of Charter Committee on Poverty and Canadian Health Coalition [18, 50-1], cited in Roach (n 112) 197.

<sup>114</sup> Donna Greschner and Steven Lewis have advocated such an approach: Donna Greschner and Steven Lewis, 'Auton and Evidence-Based Decision-Making: Medicare in the Courts' (2003) 82 *The Canadian Bar Review* 501.

obligations of provincial governments in setting the salaries of provincial court judges pursuant to section 11(d) of the *Charter*, interpreted that section as imposing a number of procedural requirements.<sup>115</sup> These included a requirement that governments, prior to proceeding with any proposal, refer said proposal for review to a “judicial compensation commission” which must be *independent* (such that the commission is not controlled by a single branch of government), *objective* (such that the commission will ‘make recommendations on judges’ remuneration by reference to objective criteria, not political expediencies’) and *effective* (such that, among other things, the government will not change or freeze judicial remuneration until the commission’s report has been received and that the commission’s reports will ‘have a meaningful effect on the determination of judicial salaries’).<sup>116</sup> Moreover, the Supreme Court recommended that in the aims of ensuring the objectivity of such commissions, the enabling legislation or regulations include ‘a list of relevant factors to guide the commission’s deliberations’ which might include ‘increases in the cost of living, the need to ensure that judges’ salaries remain adequate, as well as the need to attract excellent candidates to the judiciary’.<sup>117</sup> David Wiseman has argued, quite rightly in my view, that the Supreme Court should impose similar requirements in its adjudication of social rights cases.<sup>118</sup> In his words, ‘if the validity of governmental action affecting judicial salaries depends upon conformity to this process, why not demand that the validity of governmental action affecting the adequacy of social assistance conform to a similar process?’<sup>119</sup> To my mind, the procedural requirements which the Supreme Court laid down in the *Judges’ Remuneration Reference* are very similar to those which I have described as trustworthiness-promoting: they require procedural fairness (speaking to the expectation of good will) as well as reliance on appropriate evidence/data (speaking to the expectation of competence). Thus, as Wiseman has argued more generally, the Court in *Chaoulli* could have imposed the same (or at least similar) procedural requirements on the government vis-à-vis medically necessary care.

Unfortunately, the Supreme Court did not do that. Interestingly again, much like the Constitutional Court in *TAC*, the Court’s limited impact on Canadians’ trust was to assume a sort of “advisor” role for Canadians, advising them on whether to trust their government with respect to wait times. But unlike the Constitutional Court (which used their judgment to express confidence in South Africa’s government, albeit without warrant therefor), the Supreme Court in *Chaoulli* used their judgment to express a *lack of confidence* in the Canadian government with

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<sup>115</sup> [1997] 3 SCR 3.

<sup>116</sup> *ibid* [166-76].

<sup>117</sup> *ibid* [173].

<sup>118</sup> David Wiseman, ‘Competence Concerns in Charter Adjudication: Countering the Anti-Poverty Incompetence Argument’ (2006) 51 McGill Law Journal 503.

<sup>119</sup> *ibid* 542.

respect to wait times. And in doing so, again like in *TAC*, it portrayed the government as untrustworthy. How? Specifically, Deschamps J. does so when she justifies the Court's intervention in the case. In setting out her justification, she not only highlights the wait time problem (as McLachlin C.J. and Major J. do), but goes on to stress the government's refusal to remedy the problem despite them having, in her view, ample time and evidence to do so (not to mention having made many promises to Canadians in this regard). Deschamps J. explains:

The government had plenty of time to act. Numerous commissions have been established ... and special or independent committees have published reports ... Governments have promised on numerous occasions to find a solution to the problem of waiting lists. Given the tendency to focus the debate on a sociopolitical philosophy, it seems that governments have lost sight of the urgency of taking concrete action.<sup>120</sup>

It is my opinion that, in making this statement, Deschamps J. effectively calls into question the government's good will toward Canadians in addressing the country's wait time problem. Now, of course, Deschamps J. was well within her powers to so criticise the government. However, her criticism in this regard is problematic because after so criticising the government, she takes no real steps to correct the failings she identifies (other than to declare the impugned legislative provisions unconstitutional). And so, rather than promote government trustworthiness, the effect of Deschamps J.'s critique is to show the government to be untrustworthy. Canadians are effectively being told that the government had everything it needed to remedy the wait time problem (including ample time and evidence), had promised to remedy it, and yet, it did not. In my view, this strongly implies a lack of good will on the part of government. The situation would have been different if Deschamps J. had highlighted these failings but then, through her judgment and remedy granted, addressed them. But she did not. Without judicial intervention to correct the problem, why should Canadians expect anything to change? Why should they expect the government, going forward, to exercise good will toward them with respect to wait times?<sup>121</sup>

Did the Court Instead Mitigate Citizens' Vulnerability or Promote the Government's Reliability?

As I did in Chapter 5, I will conclude this chapter with a brief consideration and illustration using *Chaoulli* of the other two forms of judicial constraint which I outlined in Chapter 4.

With respect to the vulnerability-mitigating form of judicial constraint, *Chaoulli* is a rather interesting case. *Chaoulli* does not fit this form of constraint as I described it in Chapter 4. While

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<sup>120</sup> *Chaoulli* [96].

<sup>121</sup> As Colleen Flood has pointed out, the easiest response to *Chaoulli* for the Quebec government (and, so, also for other provincial governments should challenges be successful in their provinces) would have been to simply lift the ban on private insurance: Colleen Flood, 'Chaoulli: Political Undertows and Judicial Riptides' (2008) *Health Law Journal* (Special Edition) 211, 230.

the Court did grant the claimants that which they sought in the case – a declaration that the impugned provisions were unconstitutional – because the Court chose to frame the case in negative terms, it did not order the government to provide the claimants with the social good or service which was at issue – medically necessary care (in a timely manner). Thus, I do not think that we can reasonably say that the Court, through *Chaoulli*, showed itself willing to exert control over social goods and services or established itself to citizens as an alternative source thereof.

However, the Court did mitigate (or at least it had the potential to mitigate) citizens' vulnerability in another sense. By declaring the impugned legislative provisions unconstitutional and effectively opening up the possibility for a private market for medically necessary care, the Court's decision had the potential to mitigate the vulnerability of a certain group of citizens: the wealthy and healthy Canadians who would have access to that private market.<sup>122</sup> It will be recalled that owing to the lack of a duplicative private tier for medically necessary care, physicians in Canada's private health system did not serve as an alternative source of the social goods and services which Canadians sought from their government (medically necessary health care services). The majority's decision in *Chaoulli* cast doubt over whether that would continue to be the case. To be fair, the majority did not expressly demand that private health insurance be allowed; rather, it offered the government a choice between that and reducing wait times in the public system. But as many scholars have suggested, this legal effect must be distinguished from *Chaoulli*'s political effect – which was to legitimise privatisation.<sup>123</sup> In the words of Colleen Flood, the majority decision ultimately gave the pro-privatisation position 'the normative imprimatur of legitimacy (indeed superiority) from no lesser body than the Supreme Court of Canada'.<sup>124</sup>

For the wealthy and healthy in Quebec, the potential for mitigated vulnerability was very tangible. The Quebec government was obliged to respond to *Chaoulli*; if it did not, section 15 of the *HEIA* and section 11 of the *HOLA* would have been struck down after 12 months. And further to the legitimation which the majority's decision provided the pro-privatisation position, it also offered the Quebec government a relatively easy way out of the wait time problem. Based on the majority's decision, the Quebec government was under no obligation to tackle the unenviable task of reducing wait times in the public system; it sufficed to give Quebecers the option to buy private insurance. And as commentators have suggested, the latter option was the more appealing one for the Quebec government. Privatisation is, as Flood has said, 'a tempting solution for many governments as it diminishes accountability – the wealthy can exit to the

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<sup>122</sup> Gilmour (n 32) 341.

<sup>123</sup> Flood, '*Chaoulli*'s Legacy' (n 38) 303; Flood, '*Chaoulli*: Political Undertows' (n 121) 220; Flood and Thomas (n 31) 269-70; Gilmour (n 32) 339-40; Russell (n 108) 15-16.

<sup>124</sup> Flood, '*Chaoulli*'s Legacy' (n 38) 275. See also Flood and Thomas (n 31) 269-70.

private tier and there are fewer powerful people to hold the governments' feet to the fire for improvements in public Medicare'.<sup>125</sup> If the Quebec government had decided to take this easy way out, the effect of the majority's decision would have been to mitigate wealthy and healthy Quebecers' vulnerability. Rather than the Court itself serving as an alternative source of social goods and services, it would have generated an alternative source in physicians working in the private health system. Those Quebecers in a position to take advantage of the new private market for medically necessary services would have had their vulnerability mitigated.<sup>126</sup> Such Quebecers would have no longer been wholly dependent on the Quebec government for medically necessary health care services (in parallel to South Africans from Chapter 5). And thus, speaking to Octavio Ferraz's concerns which I raised in Chapter 4, it would have worsened the inequities between Quebecers vis-à-vis access to medically necessary care. Fortunately, the Quebec government's response to *Chaoulli* was more ambitious and sophisticated than this easy way out. It indeed decided to lift the ban on private health insurance – but only for three areas which were identified in *Chaoulli* as having unreasonable wait times (hip and knee replacement surgery, and cataract surgery).<sup>127</sup> And it coupled this selective ban lift with measures to cap or guarantee wait times in those areas so as to significantly reduce incentives to buy private health insurance. Therefore, while the potential for mitigated vulnerability among wealthy and healthy Quebecers was realised to some extent (with private insurance being made available in respect of those three areas), it was much less than the majority's decision had the potential to allow.

For Canadians outside Quebec, this potential for mitigated vulnerability was less tangible but still present. Although the legal impact of *Chaoulli* was limited to Quebec, three members of the Court also concluded that the impugned provisions violated section 7 of the *Charter*. This implied that the prohibitions on private insurance which exist in five Canadian provinces outside Quebec would not withstand constitutional scrutiny for these justices. This, coupled with *Chaoulli*'s political effect of legitimising privatisation, made it very likely that challenges similar to that in *Chaoulli* would be commenced in other Canadian provinces.<sup>128</sup> And indeed related challenges have since been lodged in the provinces of Alberta (*Murray v Alberta*),<sup>129</sup> Ontario (*McCreith and Holmes v Ontario*),<sup>130</sup> and most recently, British Columbia (*Cambie Surgeries Corp. et al v*

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<sup>125</sup> Flood, 'Chaoulli: Political Undertows' (n 121) 230.

<sup>126</sup> In this regard, the dissenting justices noted in their opinion: 'It is Quebecers who have the money to afford private medical insurance and can qualify for it who will be the beneficiaries of the [claimants'] constitutional challenge': *Chaoulli* [165].

<sup>127</sup> Flood and Thomas (n 31) 268; Flood and Xavier (n 33) 620.

<sup>128</sup> Flood, 'Chaoulli's Legacy' (n 38) 298; Flood and Thomas (n 31) 267; Gilmour (n 32) 335.

<sup>129</sup> [2007] 445 AR 1 (QB).

<sup>130</sup> Toronto 07-CV-339454PD3 (Ont Sup Ct).

*British Columbia*).<sup>131</sup> The latter case – which, at the date of writing, is being heard by a trial court in the province of British Columbia – is spearheaded by Dr. Brian Day, a former president of the Canadian Medical Association (CMA) and a long-time advocate for increased private health care in Canada. If challenges like that commenced by Dr. Day are successful in their respective provinces, the effect may be the opening of a private market in health care in Canada. As Colleen Flood and Bryan Thomas have summed up the current situation, because of *Chaoulli*, it seems ‘more like a matter of “when” Canada will move formally from its position of one-tier medicine [to two-tier medicine] rather than “if”’.<sup>132</sup> And if that is indeed what transpires, the ultimate impact will be mitigated vulnerability for the wealthy and healthy in Canadian society.

Moreover, since the Court did not lay down any broad rule regarding the government’s exercise of control over medically necessary services, it also could not promote the Canadian government’s reliability. Based on my analysis from Chapter 4, the reliability-promoting form of constraint would have had the Court lay down such a rule – specifically with respect to outcome. It would have had the Court interpret one of the constitutional provisions at issue in *Chaoulli* as encompassing a specific social good or service. For instance, the Court could have interpreted section 7 as a right to medically necessary health care in a reasonable time, or as a right (where the government chooses to provide medically necessary care) to have said care delivered in a reasonable time; and in so doing, it could have defined “reasonable” time as some fixed amount. Such an interpretation would have enabled Canadians to predict how their interactions with the Canadian government vis-à-vis wait times would transpire in the future – that is, the length of wait times they should expect in their future encounters with the public health care system.

Some have argued that the Court should have taken this approach. For example, Bruce Porter has claimed that the Court should have addressed questions like ‘What is treatment within a reasonable time?’ and ‘How short a waiting list is short enough?’ – questions which the Court, under the reliability-promoting form of constraint, would have raised and answered.<sup>133</sup> For him, these ‘are the very issues that a court must be prepared to consider – and to give government direction on – in assuming their role of guardians of the constitutional rights of all, including those who rely on the state for access to necessary health care.’<sup>134</sup> However, such an approach would have suffered from many problems: it would have violated the separation of powers

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<sup>131</sup> Vancouver No S-090663 (BC SC).

<sup>132</sup> Flood and Thomas (n 31) 269-70.

<sup>133</sup> Porter, ‘A Right to Health Care in Canada’ (n 93) 10.

<sup>134</sup> *ibid* 10.

(about which Binnie and LeBel JJ., in their dissent, seem to have concerns) and, of course, for the reasons set out in Chapter 4, it would have failed to promote government trustworthiness.<sup>135</sup>

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<sup>135</sup> *Chaoulli* [163-67].

## CONCLUSION

Cases like *Chaoulli* and *TAC* are not all that exceptional. As I have stressed throughout this thesis, constitutional social rights litigation is on the rise globally. Granted, the rate of increase varies across jurisdictions, but, with that said, the trend overall is upward. With increasing regularity, citizens are seeking to constitutionally challenge their governments' resource allocation decisions and are requesting that courts grant them the social goods and services which the state has denied them – either by enforcing the social rights provisions contained in their constitutions or, where no such provisions exist, by reading social rights into vague constitutional provisions. And in the aftermath of the Global Financial Crisis, with the imposition of austerity measures following therefrom, such litigation is likely to become even more common than it is at present.

### **Synthesising the Thesis's Central Argument**

In this thesis, I have used the concept of political trust as a dominant structuring principle to carve out a defensible role for courts in enforcing constitutional social rights. I have argued that courts can, and should, in so enforcing social rights, hold the elected branches of government to a standard of trustworthiness – a concept which, as we now know, follows on directly from trust. They do so by imposing what I have described as trustworthiness-promoting constraints on the elected branches in their exercise of control over social goods and services. And I have labelled the foregoing role for courts in this area: mediators of government trustworthiness.

Chapters 1 and 2 offered the conceptual groundwork for this argument, defining what it means to say that citizens “trust” their government with respect to social rights. That definition not only provided the three constituent expectations of trust – good will, competence and fiduciary responsibility – around which I constructed my proposed role for courts, but it also yielded two points which are pivotal to this role's defensibility in legal terms: first, that trust (and by necessary implication, trustworthiness) necessitates governmental discretion over social goods and services; and second, that trust (and trustworthiness) focuses on the process – as opposed to the outcome – by which governments make decisions vis-à-vis such goods and services.

Owing to the necessary discretion and procedural focus of trust and trustworthiness, courts as mediators of government trustworthiness strikes the delicate balance between the two enforcement wrongs of judicial abdication and judicial usurpation. On one hand, by holding the elected branches to a standard of trustworthiness, courts ensure that governmental resource allocation decisions are made fairly, competently and in the best interests of the public. And that, at least in my view, affords courts a meaningful role to play in social rights protection. For

instance, as we saw in Chapter 5 as applied to *TAC*, the Constitutional Court could have barred the South African government from basing its PMTCT policies on the suspect theories of HIV/AIDS denialists and ensured – or at least made it more likely – that such theories would not serve as the basis of future social policy. And applied to *Chaonlli* in Chapter 6, the Supreme Court could have obliged the Canadian government to address the wait time problem, rather than give privileged Canadians a way to exit a failing health system. Thus, I think that it is fair to say that as mediators of government trustworthiness, courts do not abdicate their responsibilities as constitutional guardians. But at the same time, in fulfilling this role, courts also do not intervene to such an extent that they may be said to usurp the elected branches' policy-making role. Since this role has courts principally reviewing the procedure by which the elected branches exercise control over social goods and services (rather than the outcome thereof), courts do not, as judicial usurpation implies, interpret or apply social rights 'in such a manner that [they assume] control of the political system ... crowding out ... the democratically elected branches'.<sup>1</sup> While governments' allocation decisions must be made fairly, competently and in the public's best interests, those decisions are ultimately left with the elected branches. In this way, courts as mediators of government trustworthiness finds parallels in other procedural approaches to social rights enforcement (but, in my view, as I argued in Chapter 4, it mitigates the principal concerns which have been raised by scholars with respect to those procedural approaches).

Chapter 3 augmented the defensibility of this role for courts. It did so by laying the foundation for a claim that courts as mediators of government trustworthiness can help generate the valuable ends following from political trust and its tie to public cooperation: social stability, economic welfare and effective governance. That foundation was the network conception of trust. Applied to the relationship between citizens and their governments with respect to social rights, that conception yielded the conclusion that courts, through social rights adjudication, should be able to foster citizens' trust in their governments. And in Chapter 4, supported by the trust literature, I argued that courts can so foster political trust by imposing the trustworthiness-promoting constraints by which courts as mediators of government trustworthiness is defined. As a result, this judicial role has the added benefit of furthering public cooperation, including, as I documented at the outset, promoting public tax compliance and support for social policies. Moreover, to further strengthen the defensibility of my proposed role for courts in enforcing constitutional social rights, I set out in Chapter 4 a set of additional arguments – both theoretical (rooted in the fiduciary nature of the citizen-government relationship and, in line with a standard

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<sup>1</sup> Katharine Young, *Constituting Economic and Social Rights* (OUP 2012), 134. To repeat, this is with the exception of the procedural fairness sub-element regarding equality. But as I noted in Chapter 4, while this sub-element is more substantive, it can nonetheless be enforced to strike a good middle ground between the two wrongs of enforcement.

defence for constitutional review, the role's potential to support democracy) as well as pragmatic (pertaining to the many difficulties which constitutional social rights adjudication is said to raise).

### **Limitations of the Thesis and Avenues for Future Research**

As with any research, this thesis is not without its limitations. For starters, the scope of this thesis has not permitted me to develop the courts as mediators of government trustworthiness role in the detail which I think it requires (and ultimately deserves). Specifically, I have not been able to set out precisely what trustworthiness-promoting constraints entail or how courts can impose them. In Chapter 4 (as well as the illustrations in Chapters 5 and 6), I described such constraints with reference to the three expectations of trust (as explicated in Chapter 2), and I submitted that courts, in imposing the constraints, would use those expectations to define the elected branches' obligations to citizens, and hold them accountable where they fail to fulfil those obligations (thereby enforcing the expectations). Those two forms of judicial intervention, I suggested in that chapter, amount to the courts holding the elected branches to a standard of trustworthiness. However, and I think predictably, translating the three constituent expectations of trust into judicially enforceable obligations will necessarily come with complications which must be addressed. Hence, future research can be directed at providing greater depth into each of these expectations of trust as they fulfil their function as judicially enforceable obligations.

To elaborate, consider first, the expectation of good will which encompasses an expectation that the elected branches will exhibit good intentions (ie not act intransigently) toward citizens in exercising their control over social goods and services. As mediators of government trustworthiness, courts would define the elected branches' obligations in terms of the exhibition of good intentions (or non-intransigence). But what happens if the elected branches have repeatedly refused to fulfil that expectation – that is, they have exercised said control in an intransigent manner and have offered no indication that they will change their conduct in the future? Presumably the courts would need to escalate their response in such cases, imposing constraints of the reliability-promoting form. But are such constraints justifiable from the perspective of promoting government trustworthiness? In answering that question, future research could make use of the work of John Braithwaite on regulatory pyramids.<sup>2</sup> According to Braithwaite, we “enculturate” trust by nurturing trust until we have been given reason to escalate to interventions based on distrust. As he has put it, “The problem with institutions that assume

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<sup>2</sup> John Braithwaite, ‘Institutionalizing Distrust, Enculturating Trust’ in Mark E Warren (ed), *Trust and Democracy* (Cambridge University Press 1999).

that [actors] will not be virtuous is that they destroy virtue'.<sup>3</sup> By starting from a position of trust, we give those actors reason to exhibit good intentions. But at the same time, by 'signalling very clearly a preparedness to escalate intervention to progressively less trusting interventions when trust is abused' (and following with such escalation where necessary), those who may be so inclined to not exhibit good intentions are likely to be deterred from acting in that way. Applying Braithwaite's framework to social rights adjudication, it could be argued that in enforcing the expectation of good intentions, courts could start from the assumption that the elected branches will exhibit good intentions toward citizens; but should make clear that such conduct is expected and that they are prepared to escalate to more intrusive interventions (eg mandatory, coercive and supervisory orders) if it proves necessary. And though we know that such interventions are not trustworthiness-promoting, once this point has been reached, arguably trustworthiness (and trust) should no longer be the objective. As Canadian Supreme Court Justice Frank Iacobucci once said, at this point, the elected branches 'have proven themselves unworthy of trust'.<sup>4</sup>

Or what about the expectation of fiduciary responsibility? Relying in large part on the fiduciary political theory literature, particularly the work of Evan Fox-Decent, I defined the fiduciary expectation, at least at its core, as an expectation that the elected branches will exercise their power exclusively for 'other-regarding purposes' – that is, to pursue only citizens' interests and not those of their staff. But based on that literature, we also know that it encompasses more broadly duties of loyalty, care, fairness and reasonableness. Thus, how do we translate those duties so as to be useable for social rights enforcement purposes? Future research can seek to answer this question with reference to both the fiduciary political theory literature as well as the literature and jurisprudence on the enforcement of fiduciary duties in the private law context.

And lastly, the same can be said for the expectation of competence. This expectation, it will be recalled, translates into an expectation of evidence-based policy-making (EBPM): courts oblige the elected branches to exercise their control over social goods and services on the basis of the best available evidence from research. But incorporating EBPM into adjudication raises its own set of questions. For instance, one noteworthy question is the extent to which courts, in enforcing the expectation of EBPM, should evaluate the evidence which is at issue on its merits. That is, is it enough that the elected branches consult such evidence even though they misapply or refuse to follow it? Or should courts assess the evidence itself? And related thereto, how should scientific evidence be balanced against the other two forms of EBPM knowledge? These questions have close links with a recent body of scholarship into the 'novel cross-national

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<sup>3</sup> *ibid* 351.

<sup>4</sup> *Little Sisters Book and Art Emporium v Canada* [2000] 2 SCR 1120 [257].

phenomenon' which has been termed "evidence-based judicial review" (EBJR).<sup>5</sup> EBJR basically describes a recent trend observed across jurisdictions wherein courts, in reviewing governmental decision-making, engage with EBPM principles. Of note, Ittai Bar-Siman-Tov has made the argument that EBJR can come in one of two forms: where courts themselves engage in 'independent ... evidence-based decision-making'; and where courts, rather than so engage with the evidence, 'require evidence that [the decision-making which is under review] was a product of ... evidence-based decision-making'.<sup>6</sup> I would imagine that the boundary between these two forms is a fuzzy one and the direction in which courts should lean will depend, intertwining with the expectation of good will, on a government's prior conduct (ie its intransigence). That said, these questions and hypotheses are best left as the topic for a future research project.

Another (at least arguable) limitation of this thesis is its theoretical nature. In particular, my conclusion that courts, through social rights adjudication, should be able to foster citizens' trust in their governments is not an empirical one. Rather, it has been extrapolated from the network conception of trust as applied to the social rights context. As I suggested in Chapter 3, empirical evidence would certainly bolster this conclusion. Therefore, that kind of empirical investigation may serve as the basis for future research. And this thesis has done much of the conceptualisation work for such research. However, I will stress once again that significant challenges would be in store for such an investigation. As with much of the empirical scholarship on trust, it would likely prove difficult to accurately measure trust (as I have conceptualised it) and to control for the singular impact of the courts. On the latter point, if we accept the network conception, trust in the citizen-government relationship will depend on not only the relationship between courts and citizens arising out of adjudication, but other relationships (involving, for instance, private providers and the media); and there are likely to be interaction effects. Having said that, if such challenges can be overcome, this line of research would be a worthwhile one.

### **Contribution of the Thesis to the Social Rights Literature**

I conclude this thesis by returning to the conversation which I identified at its outset: the proper role of courts in enforcing constitutional social rights. It is this conversation, specifically in its "second wave" of how courts should go about enforcing such rights (ie judicial approaches), to which I have sought to contribute. Hopefully via this thesis I have succeeded in that endeavour.

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<sup>5</sup> Ittai Bar-Siman-Tov, 'The Dual Meaning of Evidence-Based Judicial Review of Legislation' (2016) 4 *Theory and Practice of Legislation* 107, 107-08. See also Alberto Alemanno, 'The Emergence of the Evidence-Based Judicial Reflex: A Response to Bar-Siman-Tov's Semi-Procedural Review' (2013) 1 *Theory and Practice of Legislation* 327; Ittai Bar-Siman-Tov, 'Semiprocedural Judicial Review' (2012) 6 *Legisprudence* 271.

<sup>6</sup> Bar-Siman-Tov, 'The Dual Meaning' (n 5) 112-13.

Political trust offers a new, and I think helpful, perspective from which to examine social rights adjudication. It allows us to assess the impact of different forms of judicial intervention in such adjudication in terms of a concept whose value social scientists have stressed for decades – both generally and in specific relation to social policy. And in the current global economic climate, given political trust’s ties to public tax compliance as well as support for social policies, such value should not be underestimated. While undoubtedly social rights should protect the marginalised members of society, at the same time, we cannot forget that the social goods and services which are the subject of social rights are ultimately funded by citizens’ taxes. Hence, to the extent that we can reinforce such tax compliance and support for policies, I think we should.

Now, of course, as I explained at the outset of the thesis, political trust does present a sort of danger: that is, that citizens will support regressive social policies (where such policies are not absolutely necessary). And this may, in turn, lead to the erosion of social welfare. For this reason, we must be cautious in our embrace of political trust as a tool for social rights enforcement. In my view, however, my proposed role for courts – by focusing on the concept of trustworthiness (rather than that of trust alone) – does introduce a degree of caution. It ensures that governments, in exercising their control over social goods and services (including the introduction of regressive social policies), act in a trustworthy manner. As such, it creates conditions which foster citizens’ trust in the elected branches with respect to social rights (rather than seek to increase such trust without any foundation for it).<sup>7</sup> Consequently, any trust which citizens hold in governments with respect to social rights as a result (including vis-à-vis regressive policies) would not be blind or indiscriminate – but instead warranted. And in this way, my proposed role for courts may be said to support democracy. Furthermore, because the protection of social rights does not – and should not – stop at the courts, the other means by which social rights are protected (and realised) (which will not centre on political trust) can help mitigate the dangers which the concept presents, including its potential to erode social welfare.

Moreover, throughout this thesis, I have identified many justifications in support of my proposed role for courts as mediators of government trustworthiness. To that list I add one more. And I add it here because, in my view, it highlights the crux of this thesis’s contribution. A recurring theme in the second wave literature is the need for innovation or creativity – both in the procedures by which courts enforce social rights as well as in the remedies they grant for violations thereof.<sup>8</sup> To my mind, courts as mediators of government trustworthiness fits the bill

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<sup>7</sup> Karen S Cook, Russell Hardin and Margaret Levi, *Cooperation Without Trust?* (Russell Sage Foundation 2005), 56; Onora O’Neill, *A Question of Trust* (Cambridge University Press 2002).

<sup>8</sup> Geoff Budlender, ‘The Role of Courts in Achieving the Transformative Potential of Socio-Economic Rights’ (2007) 8 ESR Review 9, 10-11; David Landau, ‘The Reality of Social Rights Enforcement’ (2012) 53 Harvard

in this regard. Not only is trust itself an innovative concept for social rights adjudication (as I have explained), but by filling this role, courts are not limited to the bilateral choice between deference and policy-making. They can and do review social welfare legislation and government action on several intermediate grounds, including the fairness of the procedures which were followed, the evidence upon which decisions were made, as well as potential conflicts of interest.

However, innovation/creativity must be balanced against considerations of pragmatism. It makes little sense to advocate a role for courts which either they cannot, or they will not, fill. This is especially true in newer democracies where courts are likely to lack the legal legitimacy which comes with decades of deciding cases.<sup>9</sup> Courts as mediators of government trustworthiness, I think, strikes an appropriate balance here. While trust and trustworthiness as concepts themselves (and as legal standards) are new to courts, the concepts which they engage are not. Those concepts, to recap, include transparency, participation, equality, evidence-based decision-making, and fiduciary duties of loyalty, care, fairness and reasonableness. Accordingly, as mediators of government trustworthiness, courts would not be venturing into completely uncharted waters. Therefore, political trust (with its resulting courts as mediators of government trustworthiness role) offers us an approach to enforcing constitutional social rights which – although innovative – is ultimately rooted in extremely pragmatic considerations.

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<sup>9</sup> Theunis Roux, 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 International Journal of Constitutional Law 106.

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