
Introduction

Social rights have become a central component of the modern constitution. The vast majority of constitutions globally contain at least one social (or economic) right.¹ And the general trend is towards more of these rights. In 2016, for instance, 51 constitutions had more social and economic rights than they did in 2000, whereas only four had less.² Where social rights are not expressly protected in constitutions (e.g., in older constitutional documents), it is commonplace for courts to read social rights into general constitutional provisions like the rights to life and human dignity.³

Despite this global pattern of greater protection of social rights constitutionally, the role of the courts in enforcing these rights against government actors remains unresolved. Jurists and politicians have long engaged in a conversation regarding the judicial enforcement of social rights. This conversation has come to pass in a series of waves.⁴ In its

¹ Courtney Jung, Ran Hirschl and Evan Rosevear concluded in a 2014 study that 90 per cent of 195 constitutions then in force contained at least one 'economic and social right', with rights to education, health care and social security (the rights which, as I note later, I am including under the category of 'social rights') being especially prevalent: Courtney Jung, Ran Hirschl and Evan Rosevear, 'Economic and Social Rights in National Constitutions' (2014) 62 *American Journal of Comparative Law* 1043, 1053. See also Evan Rosevear, Ran Hirschl and Courtney Jung, 'Justiciable and Aspirational Economic and Social Rights in National Constitutions' in Katharine G. Young (ed.), *The Future of Economic and Social Rights* (Cambridge: Cambridge University Press, 2019), pp. 37–65.

² Rosevear et al., 'Justiciable and Aspirational', p. 46.

³ For example, see the social rights protected under the right to dignity in Israel's Basic Law: Human Dignity and Liberty: 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: Cambridge University Press, 2014), p. 165. See also relevant cases from the German Constitutional Court and the Indian Supreme Court: *Hartz IV*, 125 BVerfGE 172; *Olga Tellis and Others v. Bombay Municipal Corporation* [1985] 2 Supp SCR 51.

⁴ For this terminology of 'waves', see Richard Stacey, 'Dynamic Regulatory Constitutionalism: Taking Legislation Seriously in the Judicial Enforcement of Economic

'first wave', the conversation centred on justiciability – that is, whether social rights are enforceable by the courts. That wave reached its peak during the late 1980s to 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. Now in its 'second wave', the conversation's focus is different. Many new democracies, after intense debate, opted for the inclusion of express and enforceable social rights provisions in their constitutions.⁵ Consequently, most jurists and politicians, with the passage of time, have come to accept that social rights are indeed justiciable. And the conversation now centres on the question of how the courts should enforce social rights.

Given the prevalence of constitutionalised and justiciable social rights globally, this question demands an answer. And the urgency of answering it intensifies with the corresponding proliferation – or as some scholars have described it, the 'explosion' – of social rights litigation.⁶

In this book, I address the above question using a concept that has received much attention recently – in academic circles and the media. That concept is public trust in government or what I call 'political trust'. In broad terms, this book examines social rights law from the perspective of political trust.⁷ It uses the concept as an analytical lens for this area of law, addressing, among other things, what it means to trust one's government with respect to social rights, how trust functions in the context of social rights and what we can reasonably expect the impact of different modes of social rights adjudication to be on the public's trust in government actors. My principal objective in this book, however, is more

and Social Rights' (2017) 31 *Notre Dame Journal of Law, Ethics and Public Policy* 85, 85–86.

⁵ Rosevear et al., 'Justiciable and Aspirational', p. 62. See also Adam Chilton and Mila Versteeg, *How Constitutional Rights Matter* (Oxford: Oxford University Press, 2020), pp. 172–173, 176.

⁶ 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 Octávio Luiz Motta Ferraz, 'The Right to Health in the Courts of Brazil: Worsening Health Inequities?' (2009) 11 *Health and Human Rights* 33; Chilton and Versteeg, *How Constitutional Rights Matter*, p. 198. In 2009, for example, Malcolm Langford noted 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 would be in order': Malcolm Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review' (2009) 6 *International Journal on Human Rights* 91, 91.

⁷ By 'social rights law', I mean the law pertaining to constitutional social rights, including their judicial enforcement.

precise: that objective is to advance a normative argument regarding the judicial enforcement of constitutional social rights. I propose that the courts, when they are enforcing these rights against government actors, should focus their analysis on political trust. They should aim, I suggest, to promote the trustworthiness of government actors – specifically vis-à-vis their provision of social goods and services to the public. And following on from this, I employ political trust as the basis for a new legal framework for judicially enforcing social rights.

1.1 Political Trust and Public Cooperation

As a starting point, we may ask: why political trust? That is, why should we examine social rights law from the perspective of political trust? And why should political trust provide the basis for a legal framework for judicially enforcing social rights? Owing to the complex and multi-layered nature of these two questions, answering them will be an ongoing process in the book. I will begin, however, by considering the relationship between political trust and public cooperation which provides, I submit, a central reason why political trust is of significance to social rights law.

Dating back at least 50 years, scholars across disciplines 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.⁸ This tie is explained as follows. When the public has greater trust in government, it is 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

⁸ See Christina Boswell, *Manufacturing Political Trust: Targets and Performance Measurement in Public Policy* (Cambridge: Cambridge University Press, 2018); Russell J. Dalton, *Democratic Challenges, Democratic Choices: The Erosion of Political Support in Advanced Industrial Democracies* (Oxford: Oxford University Press, 2004); Pippa Norris, 'Conclusion: The Growth of Critical Citizens and Its Consequences' in Pippa Norris (ed.), *Critical Citizens: Global Support for Democratic Government* (Oxford: Oxford University Press, 1999), pp. 257–272; Bo Rothstein, *Just Institutions Matter* (Cambridge: Cambridge University Press, 1998). In addition to the instrumental value of political trust, it has also been argued that political trust is intrinsically valuable: see Matthew Harding, 'Trust and Fiduciary Law' (2013) 33 *Oxford Journal of Legal Studies* 81; Colleen Murphy, *A Moral Theory of Political Reconciliation* (Cambridge: Cambridge University Press, 2010).

its limited resources for coercion on the relatively few disobedient.⁹ As Russell Dalton has said, '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 therefore the workings of democracy'.¹⁰ As voluntary compliance with laws and government demands becomes the norm in a democracy, public cooperation translates into social stability.¹¹

The link between political trust and public cooperation finds significant support in empirical research. Tom Tyler, for instance, has consistently demonstrated that individuals' trust in authority figures increases their cooperation with those figures. 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.¹² These findings have been replicated across a range of contexts and groups.¹³ Similarly, Dalton, using the 1995–98 World Values Survey, has shown a positive correlation between levels of political support (a concept closely tied to political trust) and people's willingness to obey the law.¹⁴ 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 correlate in a positive direction with willingness to obey the

⁹ Russell Hardin, 'Trust in Government' in Valerie Braithwaite and Margaret Levi (eds.), *Trust and Governance* (New York: Russell Sage Foundation, 1998), p. 10.

¹⁰ Dalton, *Democratic Challenges, Democratic Choices*, p. 159. Some writers have described this benefit of trust as reduced 'transaction costs' for governments: Dalton, *Democratic Challenges, Democratic Choices*, p. 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* (Colchester: ECPR Press, 2011), p. 189.

¹¹ Dalton, *Democratic Challenges, Democratic Choices*, p. 165.

¹² For a summary, see Tom R. Tyler and Peter DeGoeij, '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* (Thousand Oaks, CA: Sage Publications, 1996), p. 336.

¹³ Tom R. Tyler and Yuen J. Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (New York: Russell Sage Foundation, 2002).

¹⁴ Dalton, *Democratic Challenges, Democratic Choices*, pp. 165–166.

law, with institutional and community support having the strongest correlation. Lastly, Sofie Marien and Marc Hooghe, in a study much like that of Dalton but using the European Values Survey 1999–2001, obtained similar findings to those of Dalton.¹⁵ They found that respondents with higher levels of political trust, specifically trust in political institutions, were significantly less likely to have permissive attitudes towards law-breaking (the inverse of the ‘willingness-to-obey-the-law’ measure that Dalton used in his study)¹⁶ than those with lower levels of political trust. Marien and Hooghe found that this relationship held even controlling for variables like the respondents’ age, gender, education level and religious practice.¹⁷

This link between political trust and public cooperation is significant for social rights law owing to two inter-related reasons. First, public cooperation manifests itself as public willingness to pay taxes – a source of revenue that is critical to financing the state’s fulfilment of social rights.¹⁸ Social rights reflect constitutional entitlements to social goods and services that one needs to lead a decent life, with the state having a corresponding obligation to provide the public with those goods and services.¹⁹ The state’s provision of these goods and services, however, depends on resources which the public itself provides. The public pays taxes to the state and, using the revenue collected from those taxes, the

¹⁵ 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.

¹⁶ 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, *Democratic Challenges, Democratic Choices*, p. 166.

¹⁷ 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, ‘Conclusion’.

¹⁸ 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* (Abingdon: Routledge, 2013), p. 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 Do Not Trust Government* (Cambridge, MA: Harvard University Press, 1997), p. 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, CA: Stanford University Press, 2007), pp. 1–29.

¹⁹ Cécile Fabre, *Social Rights under the Constitution: Government and the Decent Life* (Oxford: Oxford University Press, 2003), p. 7; Jeff King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012), p. 17.

state administers social programmes. Public taxes are therefore a prerequisite to state-provided social goods and services. In the words of Eric Uslaner, '[t]axes are the economic glue of social programs, the source of government's ability to transfer resources – and, indeed, to function at all'.²⁰ And 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'.²¹

Given the above-described link between political trust and public cooperation, writers have argued that the public's willingness to pay taxes, as a form of public cooperation, depends on the public's trust in government.²² The public, it has been suggested, is less likely to pay taxes if it does not trust its government. This jeopardises the state's ability to provide the public with social goods and services. At the same time, the public's unwillingness to pay taxes, it has also been suggested, can generate a vicious, self-perpetuating circle: if the state cannot provide social goods and services to the public owing to the public's unwillingness to pay taxes, this will lead the public to become even less trusting of its government – and thus, even less willing to pay taxes.²³ And '[s]uch a cumulative downward spiral', as Joseph S. Nye, Jr. has claimed, tying the concept of political trust to social stability, 'could [ultimately] erode support for democracy as a form of governance'.²⁴

The relationship between political trust and public willingness to pay taxes (or public tax compliance) similarly finds support in empirical research. John Scholz and Mark Lubell, for instance, have shown a positive relationship between political trust and public tax compliance using a US Internal Revenue Service survey which asked a sample of taxpayers in New York about tax compliance and civic values.²⁵ In an

²⁰ 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* (Bern: Peter Lang, 2007), p. 19.

²¹ 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* (Abingdon: Routledge, 2013), p. 407.

²² Norris, 'Conclusion', p. 264.

²³ Nye, Jr., 'Introduction', p. 4; Eric M. Uslaner, 'Corruption, the Inequality Trap and Trust in Government' in Zmerli and Hooghe, *Political Trust*, pp. 141–142.

²⁴ Nye, Jr., 'Introduction', p. 4.

²⁵ 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 Braithwaite and Levi, *Trust and Governance*; John T. Scholz and Neil Pinney, 'Duty, Fear, and Tax Compliance: The Heuristic Basis of

analysis of that survey data combined with in-person interviews, Scholz and Lubell 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 to pay taxes. Based on their results, Scholz and Lubell concluded that 'trust in government . . . significantly influence[s] tax compliance'.²⁶ Additionally, 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.²⁷ Such attitudes were even a better predictor than the probability of detection and whether fellow members of the public paid their fair share.²⁸

Secondly, in addition to public willingness to pay taxes, public cooperation manifests itself as overall public support for governmental social policies. Accordingly, writers have argued that the public's support for its government's social policies likewise depends on its trust in government: if the public does not trust its government, it will not support the policies that its government develops and implements, including social policies that fulfil social rights.²⁹ It has been suggested that trust functions as a cognitive heuristic that the public relies on when forming opinions about

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, *Democratic Challenges, Democratic Choices*, p. 169 and Uslaner, 'Tax Evasion, Trust', p. 22, emphasise, it is difficult to objectively measure compliance with government regulations.

²⁶ Scholz and Lubell, 'Trust and Taxpaying', 412.

²⁷ 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* (Ann Arbor: University of Michigan Press, 1992), pp. 193–222.

²⁸ For further empirical support, see Ho Fai Chan, Mohammed Wangsit Supriyadi and Benno Torgler, 'Trust and Tax Morale' in Eric M. Uslaner (ed.), *The Oxford Handbook of Social and Political Trust* (Oxford: Oxford University Press, 2018), pp. 497–534; Dalton, *Democratic Challenges, Democratic Choices*; Christoph Kogler et al., 'Perceptions of Trust and Power Are Associated with Tax Compliance: A Cross-cultural Study' (2023) 11 *Economic and Political Studies* 365; Margaret Levi and Audrey Sacks, 'Legitimizing Beliefs: Sources and Indicators' (2009) 3 *Regulation & Governance* 311; Kristina Murphy, 'The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders' (2004) 28 *Law and Human Behavior* 187.

²⁹ See Jonas Edlund, 'Trust in the Capability of the Welfare State and General Welfare State Support: Sweden 1997–2002' (2006) 49 *Acta Sociologica* 395.

social policies.³⁰ Faced with the complex institutional arrangements of the welfare state and the uncertain consequences of social policies, the public turns to trust: '[o]ther 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'.³¹ And if the public does not support governmental policies, those policies are not likely to succeed. In particular, political trust is necessary to grant governments the flexibility they need to effectively carry out their policies. The more the public trusts its government, the more likely the public will grant what Margaret Levi has termed 'contingent consent'.³² That is, the public is more likely to support a governmental policy, or at least to tolerate that policy, even if the likely outcome of that policy is perceived to be personally unfavourable to the individual.³³ For example, a public who trusts its government is more likely to agree to a tax increase in support of a policy or to a proposed reform of that policy. For this reason, it is said that aside from its relevance as an influence on the public's provision of critical resources in the form of tax money, political trust is furthermore, as a heuristic linked to public support for social policies, in and of itself 'a critical resource for government'.³⁴

The above-noted claim that political trust can impact the public's support for its government's social policies is likewise backed by empirics. Virginia Chanley and colleagues have offered convincing evidence here.³⁵ Using US survey data specifically, 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

³⁰ Marc J. Hetherington, *Why Trust Matters: Declining Political Trust and the Demise of American Liberalism* (Princeton, NJ: Princeton University Press, 2005); Thomas J. Rudolph, 'Political Trust, Ideology, and Public Support for Tax Cuts' (2009) 73 *Public Opinion Quarterly* 144, 144–145; Trüdinger and Bollow, 'Evaluations of Welfare State', p. 191. For a summary, see Thomas J. Rudolph, 'Political Trust as a Heuristic' in Sonja Zmerli and Tom van der Meer (eds.), *Handbook on Political Trust* (Cheltenham: Edward Elgar, 2017), pp. 197–211.

³¹ Hetherington, *Why Trust Matters*, p. 51.

³² Margaret Levi, *Consent, Dissent and Patriotism* (Cambridge: Cambridge University Press, 1997).

³³ 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.

³⁴ Trüdinger and Bollow, 'Evaluations of Welfare State', p. 189.

³⁵ 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.

policy areas, including education, health care, welfare, aid to cities, and the environment').³⁶ They found a positive correlation: greater trust in government correlated with greater policy mood. Chanley and colleagues have concluded that their findings are 'consistent with theoretical expectations concerning the importance of trust in government for public willingness to commit public resources for policy ends'.³⁷ A study conducted by Stefan Svallfors using Swedish survey data yielded similar findings to those of Chanley and colleagues.³⁸ In fact, contrary to what one may expect, Sven Steinmo 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.³⁹ In interviews he conducted with citizens of Sweden, the United Kingdom and the United States, Steinmo found that the vast majority – including Americans – said they would agree to an increase in their taxes if they 'could be guaranteed that increased government spending would be efficiently and effectively used to address society's problems'.⁴⁰ He found, however, that American respondents were especially likely to follow up their responses 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'.⁴¹ In parallel, Eva-Maria Trüdinger and Uwe Bollow have demonstrated a positive relationship between political trust and support for welfare state reforms.⁴² In their interviews with over 1,800 Germans, respondents were asked to report the level of trust they had in various political institutions or actors, and to evaluate the

³⁶ Ibid, p. 245.

³⁷ Ibid, p. 253.

³⁸ 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* (London: Palgrave MacMillan, 2002), pp. 184–205.

³⁹ Sven Steinmo, *Taxation and Democracy: Swedish, British and American Approaches to Financing the Modern State* (New Haven, CT: 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* (Boulder, CO: Westview Press, 1994), pp. 106–131. For a more recent, but relevant, consideration of this area, see Sven H. Steinmo (ed.), *The Leap of Faith: The Fiscal Foundations of Successful Government in Europe and America* (Oxford: Oxford University Press, 2018).

⁴⁰ Steinmo, *Taxation and Democracy*, p. 199.

⁴¹ Ibid, p. 199.

⁴² Trüdinger and Bollow, 'Evaluations of Welfare State'.

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 reforms.⁴³

The public tax compliance and social policy support that follow from political trust are especially important today given present circumstances that 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’.⁴⁴ By this he meant that owing to a set of circumstances that 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 public support for the welfare state, the result of these pressures would not be the welfare state’s dismantling, but, rather, moderate cost-cutting efforts by governments. For him, ‘neither the alternatives of standing pat or dismantling are likely to prove viable in most countries’; instead, ‘we should expect strong pressures to move towards more centrist – and therefore more incremental – responses’ with ‘[t]hose seeking to generate significant cost reductions while modernizing particular aspects of social provision . . . [holding] the balance of political power’.⁴⁵

Over the past 20 years, we have witnessed the sort of cost-cutting efforts that Pierson prophesied – in both affluent and developing democracies alike.⁴⁶ In fact, owing to the 2008 global financial and economic crisis, the COVID-19 public health crisis and the follow-on cost-of-living

⁴³ 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. For a relatively recent summary, see Jack Citrin and Laura Stoker, ‘Political Trust in a Cynical Age’ (2018) 21 *Annual Review of Political Science* 49, 61–62.

⁴⁴ Paul Pierson, ‘Coping with Permanent Austerity: Welfare State Restructuring in Affluent Democracies’ in Paul Pierson (ed.), *The New Politics of the Welfare State* (Oxford: Oxford University Press, 2001).

⁴⁵ Ibid, p. 417.

⁴⁶ James Connelly, ‘Conclusion: Remaining the Welfare State?’ in James Connelly and Jack Hayward (eds.), *The Withering of the Welfare State: Regression* (London: Palgrave Macmillan, 2012), pp. 208–216; Staffan Kumlin, ‘Overloaded or Undermined? European Welfare States in the Face of Performance Dissatisfaction’ in Svallfors, *The Political Sociology of the Welfare State*, pp. 80–116.

or socio-economic crisis, austerity has become the 'new normal'.⁴⁷ Although the global financial and COVID-19 crises did, at least initially, lead to periods of fiscal expansion, those expansion periods were short-lived (limited to one or two years) and were followed by long periods of fiscal austerity, with the current period of fiscal austerity expected to last until 2025.⁴⁸ In both cases, many governments globally reduced public spending, frequently on social goods and services.⁴⁹

Given the current state of events, it seems that now, more than ever, governments need the public to pay taxes and to support social policies. If not, the lack of cooperation in this regard, coupled with the circumstances that have given rise to 'permanent austerity' and the string of recent crises, will seriously endanger the ability of states to provide social goods and services to the public. The significance of political trust to social rights law, I therefore submit, is undeniable.

1.2 The Book's Objectives

Owing, at least in part, to the above link between trust and cooperation, there have been a growing number of scholarly calls for greater attention to be paid to trust in our study of law.⁵⁰ As Frank Cross once commented: '[t]he importance of trust should surely command the attention of lawmakers be they legislators, administrators, or judges. Trust, obviously essential to successful interpersonal relationships, is also of great significance to national economic well-being and governance.'⁵¹ The concept of trust is not new to law, however. Legal scholars, in fields ranging from contracts and trusts to medical and fiduciary law, have

⁴⁷ See Aoife Nolan, 'Introduction' in Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge: Cambridge University Press, 2014), pp. 1–4; Isabel Ortiz and Matthew Cummins, 'Austerity: The New Normal: A Renewed Washington Consensus 2010–24' (Initiative for Policy Dialogue, Working Paper, October 2019) <http://policydialogue.org/files/publications/papers/Austerity-the-New-Normal-Ortiz-Cummins-6-Oct-2019.pdf>, accessed 16 November 2022, 9; Isabel Ortiz and Matthew Cummins, 'End Austerity: A Global Report on Budget Cuts and Harmful Social Reforms in 2022–25' (Initiative for Policy Dialogue, September 2022) https://assets.nationbuilder.com/eurodad/pages/3039/attachments/original/1664184662/Austerity_Ortiz_Cummins_FINAL_26-09.pdf?1664184662, accessed 16 November 2022, 8–15.

⁴⁸ Ortiz and Cummins, 'End Austerity', 8, 9.

⁴⁹ *Ibid.*, 8.

⁵⁰ See Matthew Harding, 'Manifesting Trust' (2009) 29 *Oxford Journal of Legal Studies* 245; Tom R. Tyler, 'Trust and Law Abidingness: A Proactive Model of Social Regulation' (2001) 81 *Boston University Law Review* 361.

⁵¹ Frank B. Cross, 'Law and Trust' (2005) 93 *Georgetown Law Journal* 1457, 1459.

recognised the importance of trust to law, and have used the concept to better understand and advance their respective fields.⁵² Matthew Harding, for instance, in his work using trust to study fiduciary law, has proposed that legal scholars' frequent references to the concept of trust 'suggests that trust may be an important organizing idea when thinking about what law is, what effect it has and what it ought to be doing'.⁵³

Trust is likewise not new to public law. Not only is the concept deeply embedded in the writings of many political philosophers,⁵⁴ trust additionally has gained prevalence in modern public law scholarship. For example, there is a growing body of work that emphasises the fiduciary foundations of public authority – a body described as 'fiduciary political theory'.⁵⁵ Legal 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

⁵² 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; Cross, 'Law and Trust'; 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; Harding, 'Manifesting Trust'; Matthew Harding, 'Responding to Trust' (2011) 24 *Ratio Juris* 75. See also the various chapters in Paul B. Miller and Matthew Harding (eds.), *Fiduciaries and Trust: Ethics, Politics, Economics and Law* (Cambridge: Cambridge University Press, 2020).

⁵³ Harding, 'Manifesting Trust', 245. See also Matthew Harding, 'Contracts, Fiduciary Relationships and Trust' in Miller and Harding, *Fiduciaries and Trust*, pp. 55–73.

⁵⁴ See Deborah Baumgold, 'Trust in Hobbes' Political Thought' (2013) 20 *Political Theory* 1; Patti Tamara Lenard, 'The Political Philosophy of Trust and Distrust in Democracies and Beyond' (2015) 98 *The Monist* 353. See also the various chapters in Lazlo Kontler and Mark Somos (eds.), *Trust and Happiness in the History of European Political Thought* (Leiden: Brill, 2017).

⁵⁵ 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: 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.

and the people – are fairly characterised as fiduciary in nature. Of particular note, for many of these fiduciary political theory scholars, it is trust that lies at the core of this fiduciary characterisation.

Trust has never been used, however, to advance the study of social rights law. This book seeks to fill that gap in the literature. As I outlined earlier, I use the concept of political trust to build, in particular, a normative argument about the appropriate role of the courts in enforcing constitutional social rights. That argument is the one identified at the outset: that the courts, when enforcing these rights against government actors, should focus their analysis on political trust, aiming specifically to promote the trustworthiness of government actors vis-à-vis their provision of social goods and services to the public. And in tandem with that argument, I develop a new legal framework, rooted in political trust, for judicially enforcing social rights. To develop this normative argument and trust-based legal framework for social rights enforcement, I use political trust as an analytical lens for social rights law – that is, I analyse the law, especially the judicial enforcement of social rights, with reference to theoretical and empirical research on the concept of trust from various disciplines, including philosophy, sociology, psychology and political theory.

In developing this normative argument and trust-based legal framework, I centre my analysis on a specific relationship: the relationship that exists, in constitutional, social democracies, between citizens and the representative or elected branches of government, particularly with respect to social rights (what I refer to as the ‘citizen–government relationship’). Before proceeding, I will clarify a few terms. First, by ‘constitutional, social democracies’, I mean democratic states where (i) state actors, including the courts, are bound by a constitution that grants and constrains those actors’ powers, and (ii) citizens are provided by the state with a subset of social goods and services, following on from social rights that are guaranteed in the constitution. Next, by ‘representative or elected branches of government’, I mean the legislature and the executive, the latter of which includes civil servants and the administrative agencies relevant to social welfare. Lastly, by ‘citizens’, I do not mean it in the sense of citizenship as legal status. I use the term, rather, to refer to those individuals guaranteed social rights under the relevant constitution. So, depending on the jurisdiction, the term may include residents and individuals of other legal status.

In constitutional, social democracies, there exists a relationship between citizens and the representative or elected branches of

government with respect to social rights. To repeat, 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 social programmes. Constitutional social rights afford citizens constitutional protections vis-à-vis those goods and services, and establish corresponding state obligations.⁵⁶ Hence, it is this relationship around which my analysis revolves.

I have chosen this relationship owing to the literature to which I seek to contribute. This book's focus is on the longstanding conversation among jurists and politicians about the judicial enforcement of social rights. That conversation, including its 'first wave' on justiciability, is premised on a distinction between the legislature and the executive – as elected bodies – and the judiciary – as an unelected body. As I explain in Chapter 4, this distinction has been used by some commentators to challenge the legitimacy of the courts in deciding social rights matters. At the same time, it has been used by other commentators to argue for greater judicial involvement in this area because courts, being unelected, are arguably in a better position to protect the interests of low-income citizens not adequately represented in the political and democratic processes. There is thus an orthodoxy in the social rights literature to focus on the tripartite relationship between citizens, these representative or elected branches, and the courts. For this reason, I have chosen to exclude the courts from the citizen–government relationship. I have also chosen to collapse the legislature and the executive into one body (what I refer to as the 'elected branches'). While I 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 more central to my analysis. Where the distinction between the legislature and the executive is relevant to my analysis, however, I consider the two independently.

1.3 The Book's Scope

In the interests of greater clarity, I will take a moment here to outline the scope of the book.

⁵⁶ Such rights may guarantee citizens the social goods and services themselves or they may guarantee citizens 'access' (or some equivalent) to the social goods and services.

1.3.1 *Defining Constitutional Social Rights*

First of all, 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'.⁵⁷ 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 book, my focus is national constitutions. So, when I refer to 'social rights' in this book, unless otherwise stated, I mean such constitutionalised social rights. In particular, I am concerned mainly with a defined, but rather large, subset of constitutional social rights: rights to health, housing, education and social security.⁵⁸ Additionally, in referring to constitutional social rights, I do not mean only those rights set out expressly in a constitutional document. In using the term, I also refer to social rights that have been read into general constitutional provisions (e.g., rights to life, human dignity or security of the person) by the courts. Lastly, it is well recognised that social rights give rise to a tripartite set of duties on governments: 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).⁵⁹ It is the duty to fulfil that is my primary concern in this book as it raises the greatest issues of public resource allocation, making it the main reason why the enforcement of constitutional social rights by the courts is so contentious. Therefore, 'social rights', as used in this book, also refers specifically to positive social rights of this nature.

1.3.2 *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

⁵⁷ King, *Judging Social Rights*, pp. 18–19.

⁵⁸ 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). Also, while some commentators prefer the language of the 'right to health care', I use the 'right to health', which also appears often in the literature.

⁵⁹ Henry Shue, *Basic Rights, Subsistence, Affluence, and U.S. Foreign Policy* (Princeton, NJ: Princeton University Press, 1980), p. 52; Henry Shue, 'The Interdependence of Duties' in Philip Alston and Katarina Tomasevski (eds.), *The Right to Food* (Leiden: Martinus Nijhoff Publishers, 1985), p. 86. See also David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights* (Oxford: Oxford University Press, 2007), p. 184; King, *Judging Social Rights*, p. 35.

fellow citizens (what is often referred to as ‘social trust’); the trust of citizens in state actors, including both political and legal institutions, as well as the individuals who staff them (what is often referred to as, and what I am calling, ‘political trust’); the horizontal trust among state actors; and the top-down vertical relationship where state actors form beliefs and expectations about the behavioural dispositions of citizens.⁶⁰ This book does not address the category of social trust. It focuses predominantly on political trust, particularly citizens’ trust in legislative and executive actors, and to some extent, the other two. While I acknowledge that social trust and political trust are related, as many writers have argued, there are also significant differences between the two types of trust, including with respect to their underlying foundations and consequences.⁶¹ Hence, I leave the concept of social trust aside for the purpose of this book.

In focusing on political trust, I want to emphasise that I am not concerned, at least not *per se*, with citizens’ trust in the courts. I say ‘not *per se*’ because some of the claims that I make do rest on an assumption, to some extent, that citizens trust the courts. This is the case, for example, with my claim in Chapter 4 that the courts, via their enforcement of social rights, can foster trust in the citizen–government relationship. As I explain there, for social rights enforcement to promote the elected branches’ trustworthiness with respect to social rights, and foster citizens’ trust in the elected branches, citizens must trust the courts. Specifically, they must trust the courts to hold the elected branches accountable where those branches do not fulfil citizens’ trust in them.

The assumption that I make of citizens’ trust in the courts is not baseless. Empirical studies have consistently shown across jurisdictions that relative to the elected branches of government, the courts benefit from a high level of public support or trust.⁶² Of course, there are

⁶⁰ See Claus Offe, ‘How Can We Trust Our Fellow Citizens?’ in Mark E. Warren (ed.), *Democracy and Trust* (Cambridge: Cambridge University Press, 1999), p. 44.

⁶¹ For a consideration of the difference between social trust and political trust, see Kenneth Newton, ‘Social and Political Trust in Established Democracies’ in Norris, *Critical Citizens*, p. 179.

⁶² For relevant surveys, see, for example, OECD: OECD, ‘Building Trust to Reinforce Democracy: Summary Brief Presenting the Main Findings from the OECD Trust Survey’ (2022), www.oecd.org/governance/trust-in-government/oecd-trust-survey-main-findings-en.pdf, accessed 7 March 2022, 2 (with 56.9 per cent of respondents across 22 countries in 2021 having trust in the courts, compared to 41.4 per cent for national

circumstances in which the public does not trust the courts. For instance, in some jurisdictions, recent years have seen a decline in the public's support or trust in the courts, especially with the COVID-19 public health crisis.⁶³ Likewise, in jurisdictions where judicial corruption is widespread (as I discuss in Chapter 7), the public is less likely to trust the courts. And these circumstances may seem to undermine the above claim as well as the trust-based framework that I propose. This may be true. But in these circumstances, I think the same can be said for any approach to social rights enforcement. Owing to the link between political trust and public cooperation, public trust in the courts is central to the rule of law, necessary for public respect of the law and compliance with court decisions.⁶⁴ No matter which approach to social rights enforcement is adopted, it will be undermined by the public's lack of

government and 39.4 per cent for national legislatures); South Africa: Afrobarometer, 'South Africans' Trust in Institutions and Representatives Reaches New Low' (24 August 2021), <https://news.gallup.com/poll/4732/supreme-court.aspx>, accessed 7 March 2022, 7 (with 42 per cent of respondents in 2021 indicating that they had 'a lot' of trust or 'somewhat' trusted the courts, compared to 38 per cent for the President and 27 per cent for Parliament; and these numbers were significantly higher in previous years); UK: Office for National Statistics, 'Trust in Government, UK: 2022' (2022), www.ons.gov.uk/peoplepopulationandcommunity/wellbeing/bulletins/trustinggovernmentuk/2022, accessed 7 March 2022 (with 68 per cent of respondents in 2022 indicating trust in the courts and legal system, compared to 35 per cent for national government and 42 per cent for local government); US: Gallup, 'Trust in Government' (2022), <https://news.gallup.com/poll/5392/trust-government.aspx>, accessed 7 March 2022 (with 47 per cent of respondents in 2022 indicating a 'great deal' or 'fair amount' of trust in the judicial branch, compared to 43 per cent for the executive branch and 38 per cent for the legislative branch). For scholarship in this area, see Gregory A. Caldeira and James L. Gibson, 'The Etiology of Public Support for the Supreme Court' (1992) 36 *American Journal of Political Science* 635; Gregory A. Caldeira and James L. Gibson, 'The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support' (1995) 89 *American Political Science Review* 356; James L. Gibson, Gregory A. Caldeira and Vanessa A. Baird, 'On the Legitimacy of National High Courts' (1998) 92 *American Political Science Review* 343; James L. Gibson, Gregory A. Caldeira and Lester Kenyatta Spence, 'Measuring Attitudes toward the United States Supreme Court' (2003) 47 *American Journal of Political Science* 354; James L. Gibson and Gregory A. Caldeira, *Citizens, Courts, and Confirmations* (Princeton, NJ: Princeton University Press, 2009).

⁶³ See Gallup, 'Supreme Court Trust, Jobs Approval at Historical Lows' (29 September 2022), <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx>, accessed 7 March 2022 (indicating a 20-percentage-point drop in trust for the judicial branch in the US between 2020 and 2022); Afrobarometer, 'South Africans' Trust' (indicating that, for the first time, public trust in the courts has fallen below 50 per cent); Anne Wallace and Jane Goodman-Delahunty, 'Measuring Trust and Confidence in Courts' (2021) 12 *International Journal for Court Administration* 1.

⁶⁴ Wallace and Goodman-Delahunty, 'Measuring Trust and Confidence in Courts'.

trust in the courts. I therefore submit that where the assumption does not hold – and citizens do not, in fact, trust the courts – we must remedy citizens' lack of trust. Remedying that lack of trust in the courts, however, is not something I address in this book.

1.3.3 *Political Trust, Not Political Satisfaction*

As well, political trust in this book should be distinguished from what may be termed 'political satisfaction'. There is a tendency among lay-people and writers on trust alike to conflate citizens' trust in government actors and their satisfaction with the outcomes that the government produces. As I elaborate in Chapter 2, this conflation follows on from what I suggest are erroneous definitions of trust as a concept. 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 that is favourable to me. By this definition, if I am satisfied with the outcomes that you have produced in the past, I should expect you to produce outcomes that are favourable to me in the future, and it necessarily follows on from that expectation that I trust you. For reasons that I describe in that chapter, however, such a definition of trust is problematic. Instead, trust is better understood, I suggest, in procedural terms – that is, I trust you if I expect that you will follow a defined procedure in your interaction with me. I define the relevant procedure in much greater detail in the forthcoming chapters. Accordingly, in this book, I maintain a distinction between political trust and political satisfaction.

As a necessary implication of this, the trust-based framework that I propose draws a distinction between the procedure followed by the elected branches in making decisions about social goods and services, and the outcome of that decision-making. Under the framework, the courts, in enforcing social rights, focus on the former rather than the latter. Granted, the procedure-outcome distinction is not clear-cut;⁶⁵ but at this point, I simply want to flag that the framework leans heavily towards procedure. This idea is discussed in detail in Chapters 2 and 4.

⁶⁵ Colm O'Cinneide, 'Legal Accountability and Social Justice' in Nicholas Bamforth and Peter Leyland (eds.), *Accountability in the Contemporary Constitution* (Oxford: Oxford University Press, 2013), p. 392.

1.3.4 'Warranted' or 'Intelligent' Trust, Not Blind Trust

Not all trust in government is good. As I highlight in Chapter 4, some scholars have pointed out that political trust may in fact be detrimental (i.e., where government is not trustworthy); and in these cases, citizen distrust or scepticism is beneficial because it 'keeps constituents alert, and thus public officials responsive'.⁶⁶ I do not dispute that argument. I do, however, draw a distinction between blind trust, and 'warranted' or 'intelligent' trust.⁶⁷ I elaborate on the distinction between these types of trust in Chapter 4. Thus, when I reference the recognised value of political trust (i.e., following on from the link between political trust and public cooperation), I mean the latter.

1.3.5 Theoretical Arguments, Not an Empirical Investigation

I also want to say something about the nature of the claims that I make in this book. Like most fields of study, the literature on trust is composed of two principal categories. First, there is a body of theoretical work. Scholars across disciplines 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 decreased trust. Secondly, scientists have conducted empirical investigations of trust. In an effort to test untested theoretical arguments or to understand more generally the social determinants and consequences of trust, they have examined the relationship between trust and many variables. The approach I adopt in this book falls into the former category. I do not offer an empirical investigation of political trust. I advance, rather, theoretical arguments regarding political trust and the judicial

⁶⁶ Karen S. Cook, Russell Hardin and Margaret Levi, *Cooperation without Trust?* (New York: Russell Sage Foundation, 2005), p. 165; Margaret Levi, 'A State of Trust' in Braithwaite and Levi, *Trust and Governance*, pp. 95–96; Onora O'Neill, *A Question of Trust* (Cambridge: Cambridge University Press, 2002); Onora O'Neill, 'Trust, Trustworthiness, and Accountability' in Nicholas Morris and David Vines (eds.), *Capital Failure: Rebuilding Trust in Financial Institutions* (Oxford: Oxford University Press, 2014), pp. 172–190; Onora O'Neill, 'Accountable Institutions, Trustworthy Cultures' (2017) 9 *Hague Journal on the Rule of Law* 401.

⁶⁷ Mark E. Warren, 'Introduction' in Mark E. Warren (ed.), *Democracy and Trust* (Cambridge: Cambridge University Press, 1999), p. 4; Mark E. Warren, 'Democratic Theory and Trust' in Warren, *Democracy and Trust*; Mark Warren, 'Trust and Democracy' in Eric M. Uslaner (ed.), *The Oxford Handbook of Social and Political Trust* (Oxford: Oxford University Press, 2018), pp. 75–94; O'Neill, 'Trust, Trustworthiness, and Accountability', p. 178.

enforcement of constitutional social rights. And in doing so, I import theoretical and empirical research on trust into this area of law.

To be clear, in using the term ‘empirical’, I seek to distinguish the theoretical arguments that I advance regarding trust, from the empirical studies that have been conducted in the social science scholarship on trust. I do not mean to suggest, however, that I will only be considering social rights enforcement in an abstract way without reference to cases and other jurisdiction-specific materials. As we will see later, particularly in Chapters 5–7, I use cases and constitutions from a wide range of jurisdictions, including Canada, Colombia, Germany, Kenya, Latvia, South Africa, Uganda and the UK, to illustrate how the trust-based framework operates in practice.

1.3.6 Restriction to Social and Constitutional Democracies

Lastly, I point out that the arguments advanced in this book are, at least technically, restricted to specific jurisdictions. First, owing to the book’s focus on constitutional social rights and their enforcement by courts, its arguments are restricted to constitutional democracies, as I have defined that term, with a system of judicial review. Secondly, because the book is focused on social rights that are positive in nature – and the corresponding duty on governments to fulfil the rights in question – its arguments are also restricted to social democracies, as I have defined that term.

I say ‘at least technically’ because in my view, this book’s arguments also have relevance for, and can be applied to, jurisdictions beyond these two categories. In particular, I want to highlight their relevance for jurisdictions that do not meet the definition of a social democracy. Technically speaking, the trust-based framework that I propose can only be applied by courts in jurisdictions where social rights have been constitutionalised. If a jurisdiction has not constitutionalised social rights, there are no rights to be enforced and consequently, nothing to which the framework can be applied. However, in jurisdictions where social rights have not been constitutionalised, the framework nonetheless offers the courts a recommendation about how, if their jurisdictions were to constitutionalise social rights (either via constitutional amendment or by the courts reading them into general provisions), they could, and I would put forward should, enforce the rights. And in cases where courts in these jurisdictions have been hesitant to read social rights into their constitutions’ general provisions (as is the case in Canada, for example, as we will see in Chapter 5), to the extent that this hesitation is attributable

to concerns about the drawbacks of existing enforcement frameworks, the trust-based framework may help allay these concerns.

1.4 A Cautionary Note about the Applicability of the Trust-Based Framework

Despite the above restrictions, the trust-based framework, I am thus suggesting, can be applied to a very large number of jurisdictions with different legal systems (e.g., common law and civil law), constitutional cultures, political climates and socio-economic structures. In making this suggestion, I recognise the problems with advocating a uniform legal approach across jurisdictions.⁶⁸ At the same time, however, owing to political trust's tie to social stability, economic welfare and effective governance – ends which are not jurisdiction specific – alongside the reasons that I present in Chapter 4 for why trust should provide the basis for a social rights enforcement framework, the trust-based framework, in my view, has broad currency. So, rather than take an overly cautious approach and restrict the framework to a small set of jurisdictions, I present the framework at a general level, leaving it to readers with expertise in their respective jurisdictions to determine more precisely how it applies to their jurisdictions, including any required modifications. However, I do want to stress that the framework cannot, and will not, apply in exactly the same manner across different jurisdictions. For instance, as I point out in Chapters 4 and 7, it will apply differently depending on constitutional text, including the language used in relevant social rights provisions.

Following on from the trust-based framework's broad applicability, I use a wide range of jurisdictions to illustrate the framework, particularly in Chapters 5–7. As I have mentioned, these include Canada, Colombia, Germany, Kenya, Latvia, South Africa, Uganda and the UK. I have chosen these jurisdictions for many reasons. First, I have done so because their respective courts have decided social rights cases which, in my view, are especially apt at demonstrating the trust-based framework. In some cases, the relevant jurisdictions do not meet the definitions of constitutional democracy and social democracy that I have set out (e.g., Canada

⁶⁸ See Colm O'Connell, '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* (Oxford: Hart, 2014), pp. 299–317.

and the UK). But as I explain later, these jurisdictions and their respective cases are nonetheless valuable to illustrate how the trust-based framework operates in practice. Secondly, I have chosen these jurisdictions for practical reasons. These include my linguistic limitations as an English-language speaker (with these jurisdictions' courts either publishing in English or having translations and academic commentary available in English), and my legal training and familiarity with many of these jurisdictions. Lastly, but related to my first point, I have also chosen many of these jurisdictions in the interests of clarity. Given the novelty of political trust, both as a concept and as a vocabulary for the area of social rights law, I think it makes sense to illustrate the framework with reference to familiar cases from familiar jurisdictions (e.g., South Africa, Germany and Canada). At the same time, however, given scholarly criticisms of the prevalent pattern in the social rights scholarship to focus on a limited set of jurisdictions, I have sought to balance my use of familiar jurisdictions with less familiar and under-represented ones in the scholarship (e.g., Kenya, Latvia and Uganda).⁶⁹

1.5 Situating the Trust-Based Framework in Existing Frameworks

The trust-based framework that I propose aligns, in certain respects, with approaches that have either been employed by courts in different jurisdictions or proposed by other academic writers. This should not be too surprising since we should expect existing approaches, even if only done on an intuitive level, to promote the trustworthiness of government actors vis-à-vis their provision of social goods and services. And in detailing the framework in subsequent chapters, I will highlight the relevant alignments. However, the trust-based framework is also distinguishable from such approaches in many respects. In subsequent chapters, I will also point out these differences, and the corresponding limitations, in my view, of alternative approaches to social rights enforcement.

That said, as an introduction to the framework and its contribution to the literature, I will briefly outline some key differences. First, what distinguishes the trust-based framework from other approaches to social rights enforcement is its comprehensiveness. As we will see in Chapter 2, trust consists of three expectations – goodwill, competence and fiduciary

⁶⁹ See Ran Hirschl, 'From Comparative Constitutional Law to Comparative Constitutional Studies' (2013) 11 *International Journal of Constitutional Law* 1, 8–9.

responsibility. These expectations, when applied to the citizen–government relationship and used to develop the framework, incorporate into social rights enforcement several requirements, including government transparency, engagement or participation, equality, evidence-based policy-making and non-corruption. While each of these requirements has, to some extent, been advocated in the social rights literature and employed by various courts in their social rights cases, they have never been brought together to construct a unified legal framework. The trust-based framework does precisely this, with the aim of promoting the trustworthiness of government actors vis-à-vis their provision of social goods and services. Thus, in line with what Harding has argued vis-à-vis law more broadly, the concept of political trust, in the framework, serves as an organising idea for social rights law.

Secondly, owing to trust’s procedural orientation, the trust-based framework – which focuses on the procedure followed by the elected branches in making resource allocation decisions – stands in contrast to approaches that focus on the outcome of that decision-making. This includes the individualised enforcement model prevalent in Latin American jurisdictions. As I explain in Chapter 4, that model is problematic – in terms of the separation of powers and equity. The trust-based framework, as a principally procedural approach, does not share these problems.

The trust-based framework instead aligns with procedural approaches to social rights enforcement, including the ‘reasonableness review’ standard used by the South African Constitutional Court in enforcing its social rights. That said, for reasons I explain in Chapter 4, the framework mitigates concerns that have been raised in the literature about such approaches.⁷⁰

⁷⁰ David Bilchitz, ‘Giving Socio-economic Rights Teeth: The Minimum Core and Its Importance’ (2002) 119 *South African Law Journal* 484; Bilchitz, *Poverty and Fundamental Rights*, pp. 136–176; 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* (Stellenbosch: Sun Press, 2003), pp. 33–56; 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,

1.6 The Book's Structure

Chapters 2 and 3 lay some necessary conceptual foundation. Chapter 2 draws on theoretical and empirical literature to offer a conceptualisation of trust in the social rights context. It first envisages trust as relational, meaning that trust may only arise in a relationship that contains three elements: control, discretion/uncertainty and vulnerability (a 'trust relationship'). Secondly, it defines trust in a trust relationship as a set of three expectations held by a trustor about a trustee: an expectation that the trustee will exercise goodwill towards the trustor ('expectation of goodwill'); an expectation that the trustee will exercise competence towards the trustor ('expectation of competence'); and an expectation that the trustee will fulfil their fiduciary responsibility (if any) to the trustor ('expectation of fiduciary responsibility'). The chapter then applies this conceptualisation to the citizen–government relationship, characterising it as a trust relationship and defining trust in it.

Chapter 3 adds a further layer of conceptual foundation by applying to the citizen–government relationship what I call the 'network conception of trust' from the scholarship on trust. In doing so, it makes a claim of how trust functions in the social rights context. According to this conception, trust arises in, and depends on, complex structures or networks of relationships. Applying this conception to the citizen–government relationship, the chapter therefore argues that in contemporary democracies, the citizen–government relationship exists in a network of relationships and that trust in the citizen–government relationship depends on the relationships that constitute the network – including, importantly, the relationship between citizens and the courts that arises out of the adjudication of social rights by courts. This argument adds nuance to our understanding of trust and lays foundation for my contention in Chapter 4 that the courts, via their enforcement of social rights, can foster citizens' trust in the elected branches.

Using the foundation laid in Chapters 2 and 3, Chapter 4 outlines four justifications for why political trust is not only a valuable perspective from which to examine social rights law but should also provide the basis for a social rights enforcement framework. The first justification relates to the value of political trust to well-functioning democracies. The second follows on from what I argue is the fiduciary nature of the citizen–

see Kirsty McLean, 'Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on *Joe Slovo*' (2010) 3 *Constitutional Court Review* 223.

government relationship, in line with the growing fiduciary political theory literature. The third pertains to political trust's fit with social rights adjudication. By this I mean that political trust responds well to the challenges posed by social rights adjudication. And the final justification is linked to a traditional defence for constitutional review – that is, constitutional review's potential to support or enhance democracy. I suggest that consistent with this defence, the trust-based framework supports democracy. The chapter also lays the foundation for the final three chapters – Chapters 5–7 – by offering a brief overview of what a trust-based framework for the judicial enforcement of social rights involves.

Chapters 5–7 then proceed to develop the framework. Each chapter focuses on a constituent expectation of trust as applied to the citizen–government relationship: Chapter 5 on the expectation of goodwill; Chapter 6 on the expectation of competence; and Chapter 7 on the expectation of fiduciary responsibility. Each one also uses various social rights cases to illustrate.