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**RETHINKING GOVERNANCE AND CONSTITUTIONALISM IN AFRICA: THE
RELEVANCE AND VIABILITY OF SOCIAL TRUST-BASED GOVERNANCE AND
CONSTITUTIONALISM IN MALAWI**

By

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DECLARATION

I declare that this thesis, which I hereby submit for the degree Doctor Legum (LLD), at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at this or any other tertiary institution.

Mwiza Jo Nkhata

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DEDICATION

This thesis is dedicated to my parents Jo Nkhata Snr and Isabel Kaonga

SUMMARY

The failures of constitutionalism and good governance in Africa are well documented. Importantly, these failures have also highlighted the importance of constitutionalism and good governance in Africa. This study centrally explores the relevance and viability of social trust-based governance and constitutionalism in Malawi, specifically, and Africa, generally. Social trust-based governance and constitutionalism is an approach to governance and constitutionalism that is informed by the trust concept and is also fully mindful of local conditionalities in its operationalisation. By referring to the Constitution of Malawi and other pieces of legislation in Malawi, this study demonstrates that there is a legal basis for articulating and practising social trust-based governance and constitutionalism in Malawi. This legal basis stems primarily from sections 12 and 13 of the Constitution but is also supported by legislation like the Corrupt Practices Act, Public Finance Management Act, Public Procurement Act and the Public Audit Act.

In spite of the fact that there is a basis for social trust-based governance and constitutionalism in Malawi it is evident that governance and constitutionalism in Malawi have not, so far, been practised in line with the stipulations of the social trust-based approach. The current approach to governance and constitutionalism in Malawi is heavily steeped in the liberal democratic tradition. In this connection, this study demonstrates the limitations of the liberal democratic approach to governance and constitutionalism in Malawi principal among which is the lack of autochthony. Since the apparatus of liberal democracy has subsequently become quite entrenched in Malawi and most African countries, it is argued that the way forward involves creating a synthesis out of liberal democracy and the norms, traditions and values indigenous to Africa. This study identifies the philosophy of *ubuntu* as being an important source of values and principles that can be utilised to confer some autochthony to governance and constitutionalism in Malawi, specifically and Africa, generally. The approach adopted in this study concedes that neither a rigid insistence on liberal democratic constitutionalism nor a strict adherence to *ubuntu*-based governance and constitutionalism can succeed in Malawi. The solution is to utilise values from both traditions in order to generate a viable approach to governance and constitutionalism.

In this study, the viability and relevance of social trust-based governance and constitutionalism is demonstrated by reference to the relationship between the branches of government, public resource management and the accountability of public functionaries and citizenry empowerment in Malawi. This study argues that a social trust-based approach to governance and constitutionalism can improve the relations between the branches of

government, reinvigorate public resource management and also enhance accountability of public functionaries and empower the populace in line with the Constitution's vision. The Constitution, as the supreme law of the land, thus remains integral to governance and constitutionalism in Malawi.

Keywords: Governance, constitutionalism, democracy, ubuntu, public resource management, trust, fiduciary obligations, public functionaries, accountability, participation.

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CHAPTER 1: INTRODUCTION

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1.1 Statement of the research problem

The adoption of a new Constitution cannot by itself be a panacea for the diverse governance problems that a country may be facing. The 1994 Constitution of the Republic of Malawi (the Constitution or the 1994 Constitution) has manifestly proven this truism.¹ While the adoption of a new constitution may form the basis for articulating a preferred governance framework, a more central preoccupation must revolve around making the governors accountable and keeping their powers within constitutionally prescribed limits.² In Malawi, the governance paradigm as expounded by the Constitution offers immense hope to the ‘constitutionalist’.³

¹ A similar argument has been made in respect of constitutions and constitutionalism. The existence of a constitution which articulates democratic values and principles is not sufficient for the establishment of a political system which is democratic in practice. At the same time, however, a democratic constitution remains a necessary condition for the development of constitutionalism – See HWO Okoth-Ogendo “Constitutions without constitutionalism: Reflections on an African Paradox” in IG Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 3 and FE Kanyongolo “The constitution and the democratisation process in Malawi” in O Sichone (ed) *The state and constitutionalism in Southern Africa* (1998) 1. An example of a country with a constitution but no constitutionalism would be Swaziland – see T Maseko “Constitution-making in Swaziland: The cattle-byre Constitution Act 001 of 2005” Paper presented at African Network of Constitutional Law Conference on Fostering Constitutionalism in Africa, Nairobi, April 2007, <http://www.publiclaw.uct.za/usr/public_law/Nairobi/Maseko_ConstitutionalismMakingInSwaziland.doc> (Accessed 23 March 2010) and T Maseko “The drafting of the Constitution of Swaziland, 2005” (2008) 8 (2) *African Human Rights Law Journal* 312-336.

² J Hatchard & others *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspective* (2004) 57-60.

³ The term ‘constitutionalist’ in this context is used to refer to individuals who believe in governance according to a steadfast adherence of the constitutional framework and its stipulations. The belief is in both the norms in a constitution as well as the values that the norms stand for.

However, the governance pattern over the fifteen years after the Constitution was adopted has offered very little encouragement to constitutionalists principally due to the wanton lack of fidelity to constitutional stipulations.⁴ Malawi thus faces a governance quagmire where one of the principal tasks is to attach and embed constitutional stipulations and values in the management of government structures. This quagmire has resulted in an enduring crisis of governance and constitutionalism in the country.⁵

In the light of the above predicament, Kanyongolo has argued that the solution to the shortcomings of the Constitution and constitutional practice in Malawi is the entire deconstruction of the existing liberal democratic constitutional discourse and the reconstruction in its place of a more autochthonous scheme of constitutional principles.⁶ The reconstructed discourse must, he further argues, preserve the essence of the idea of democracy without naively ignoring its material and historical context.⁷ According to Kanyongolo, part of the reconstruction should include the 'drafting of a clear and concise constitutional document' which should then be subjected to a consultative process.⁸

However, in the light of the current and likely future political climate in Malawi, what hope can one have that the solution being proposed by Kanyongolo will solve the shortfalls of the Constitution and constitutional practice generally?⁹ It is submitted that it is not reasonably foreseeable to have a political consensus in Malawi that will in unison clamour for the repeal of the 1994 Constitution and the adoption of a new constitution.¹⁰ In spite of the apparent

⁴ The current Constitution of the Republic of Malawi (Act No. 20 of 1994) entered into provisional operation on 18 May 1994 and became fully operational on 18 May 1995 – see section 212 of the Constitution of the Republic of Malawi and D Chirwa "A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi" (2005) 49 (2) *Journal of African Law* 207 210-212.

⁵ Governance is generally understood to include constitutionalism as one of its elements. This study, however, deliberately presents the two concepts in a dichotomised fashion. This has been done in order to draw sufficient attention to each of the concepts but also to emphasize the breadth of each concept.

⁶ FE Kanyongolo "The limits of liberal democratic constitutionalism in Malawi" in KM Phiri & KR Ross (eds) *Democratisation in Malawi: A stocktaking* (1998) 369.

⁷ As above.

⁸ As above.

⁹ For example, the lack of an easy consensus over basic suggestions in the on-going constitutional review process is, arguably, indicative of the problems of reaching consensus over proposals for a comprehensive renegotiation of the Constitution.

¹⁰ The practice of constitutional amendment since the adoption of the Constitution offers poignant parallels in this regard. Although the Constitution has been amended and re-

shortfalls in Malawi's Constitution, it is clear that the country is bound to work with the framework established by the 1994 Constitution and either regress or progress with it. In the circumstances a more reasonable aspiration is to determine how the 1994 Constitution, with all its perceived shortfalls, may be used to improve constitutionalism and governance with a view to generating as many benefits as possible and ensuring that the poor and marginalised access such benefits. This study's main research question thus is:

- Can a social trust-based approach to governance and constitutionalism in Malawi overcome the shortfalls of the liberal democratic approach?

In answering the main research question, the following underlying questions will also be addressed:

- Is there a legal basis for recognising social trust-based governance and constitutionalism in Malawi?
- What have been the dominant patterns and major shortfalls in governance and constitutionalism in Malawi so far? In the same connection, to what extent has governance and constitutionalism reflected the social trust-based approach?
- How has liberal democratic constitutionalism and governance fared in Malawi, specifically, and Africa, generally? Further, does the performance of liberal democratic constitutionalism and governance call for the consideration of alternative paradigms of governance and constitutionalism?
- In what ways can the social trust-based approach to governance and constitutionalism be utilised in Malawi to address the failings of liberal democratic constitutionalism?

In attempting to answer the above questions, this study will offer an alternative approach to understanding constitutional discourse in Malawi by proposing a recognition and revitalisation of the constitutionally founded framework for social trust-based governance and constitutionalism.¹¹ In focussing on the social trust-based framework, this study is particularly

amended on numerous occasions, it is clear that most of the amendments have not been preceded by consultation with the citizenry and a desire to serve partisan interests seems to have been the principal spur behind most amendments – see D Chirwa “Democratisation in Malawi 1994-2002: Completing the vicious cycle?” (2003) 19 (2) *South African Journal on Human Rights* 316 321-323 and W Kita & C Chiphwanya “Constitutional amendment or disbandment” (2003) 7 (1) *UNIMA Students Law Journal* 19.

¹¹ This approach is alternative to liberal democratic constitutionalism which has, seemingly, and largely without scrutiny and interrogation been accepted as the governing framework for

mindful of the fact the Constitution reflects a clear intention to be transformative and responsive to the needs of the populace.¹² Underlying the proposed emphasis on social trust-based governance is an attempt to establish whether or not the framework of the social trust imbued with *ubuntu* can provide a viable approach to constitutionalism and governance in Malawi. This study can thus be said to be heeding Kanyongolo's call for a reconstruction of the discourse on constitutionalism in Malawi.¹³ As earlier alluded to, at the core of any attempt to develop a solid foundation for constitutionalism in Malawi must be the deconstruction of the current liberal democratic framework and the reconstruction of a new and autochthonous scheme in its place.¹⁴ The reconstruction being proposed in this study will draw inspiration from traditional African concepts, values and principles, specifically the concept of *ubuntu* – *umunthu* in Malawi, but the *Nguni* version *ubuntu* will be used in this study.¹⁵ *Ubuntu* will be used to provide an autochthonous grounding to the discourse on constitutionalism and governance in Africa, generally, and Malawi, specifically. It is important to note that in talking about social trust-based governance and constitutionalism this study will be referring to governance and constitutionalism that draws inspiration from the values underlying both *ubuntu* and the social trust.

1.2 Definitions

At this juncture brief definitions of the concepts central to this study are in order.¹⁶ *Ubuntu* is the 'fundamental ontological and epistemological category in African thought.'¹⁷ It finds

understanding the Constitution. This approach is constitutionally founded in sections 12 and 13 of the Constitution of the Republic of Malawi.

¹² See, S Gloppen & FE Kanyongolo "Courts and the poor in Malawi: Economic marginalisation, vulnerability and the law" (2007) 5 (2) *International Journal of Constitutional Law* 258.

¹³ FE Kanyongolo (note 6 above) 369. While this study agrees with Kanyongolo on the need to deconstruct and then reconstruct constitutional discourse in Malawi, it does not argue for the adoption of a new constitution as part of the process. The study centrally calls for a creative interpretation of the current Constitution to achieve the ideals that motivated its adoption.

¹⁴ As above.

¹⁵ The diversity in Africa entails that there is no heterogeneity in 'traditional African concepts, values and principles.' It is thus only the general pattern of distinctly indigenous African values that is referred to here. Other scholars, however, assert that '[a]lthough there are many diverse African cultures, there are commonalities to be found among them in such areas as values systems, beliefs and practices. These areas largely reflect the African world view.' – M Munyaka & M Motlhabi "Ubuntu and its socio-moral significance" in MF Murove (eds) *African ethics: An anthology of comparative and applied ethics* (2009) 63. In this study 'Africa' generally refers to Sub-Saharan Africa.

¹⁶ The definitions being provided at this stage are only introductory. A concerted effort to define the concepts central to this study is undertaken in Chapter 2 of this study.

expression in many African languages and traditions but conveys the same essence.¹⁸ Its essence is often reducible to the Zulu maxim *umuntu ngumuntu ngabantu* meaning a person is a person through others.¹⁹ *Ubuntu* represents an African world view. It can be interpreted both as a factual description as well as a rule of conduct or social ethic.²⁰ It both describes human beings as ‘being-with-others’ and prescribes what ‘being-with-others’ should be all about.

Another concept central to this thesis is the equitable notion of ‘trust’. The ‘trust’ has been defined by various scholars.²¹ As Moffat points out, a ‘trust’ in English law is in some measure the translation into legal terms of the word ‘trust’ as used in ordinary speech.²² Its conceptual starting point is a confidence reposed in another person which confidence so reposed gives rise to moral obligations to which the courts aided by the legislature have purported to develop parallels.²³ The essence of the trust is the imposition of an equitable obligation on a person (often known as a trustee or more generally as a fiduciary). This obligation requires that person to act in good faith when dealing with the interests of the person on whose behalf the confidence was given (this person is often referred to as a beneficiary).²⁴ Trusts can arise in various ways. Suffice it to point out that the two broad

¹⁷ MB Ramose “An African perspective on justice and race” <<http://them.polylog.org/3/frm-en.htm>> (Accessed 8 September 2009).

¹⁸ See R Tumbulasi & H Kayuni “Can African feet divorce Western shoes? The case of ‘Ubuntu’ and democratic good governance in Malawi” (2005) 14 (2) *Nordic Journal of African Studies* 147-161.

¹⁹ A Shutte *Philosophy for Africa* (1993) 46.

²⁰ DJ Louw “Ubuntu: An African assessment of the religious other” <<http://www.bu.edu/wcp/Papers/Afri/AfriLouw.htm>> (Accessed 8 September 2009).

²¹ See G Moffat *Trusts law: Text and materials* (2005) 1-4; G Thomas & A Hudson *The law of trusts* (2004) 13-22 and D Hayton *Underhill’s law relating to trusts and trustees* (1979) 1.

²² It is particularly when one understands the moral dimension to the legal notion of trust that it becomes manifestly apparent that variants of the trust concept existed in Africa, generally, and Malawi, specifically, before the introduction of the common law to African countries – Cf. S Asante “Fiduciary principles in Anglo-American law and the customary law of Ghana – A comparative study” (1965) 14 (4) *International and Comparative Law Quarterly* 1114; A Mbalanje “Land law and land policy in Malawi” in J Arantzen & others (eds) *Land policy and agriculture in Eastern and Southern Africa* at <<http://www.unu.edu/unupress/unupbooks/80604e/80604E09.htm>> (Accessed 20 May 2008) and B Pachai *Malawi: The history of the nation* (1973) Chapter 6.

²³ G Moffat (as above) 1-3.

²⁴ G Thomas & A Hudson (note 21 above) 13.

ways in which a trust can arise are by being expressly created by a founder²⁵ or by operation of law.²⁶ Generally speaking, a trust can have any number of beneficiaries or even founders and the benefits accruing from the trust may take various forms, for example, cash or benefits in kind.²⁷

Cotterrell has defined a 'social trust' as a trust in a broad moral sense involving reliance, in social relationships on other people's good will, solicitude and competence; or a confidence that general expectations in familiar social circumstances will not be frustrated.²⁸ In a social trust-based relationship confidence is within the parameters of the particular relationship, bestowed in an individual for the performance of specific duties or the management of specific resources.²⁹ The individual on whom the confidence is conferred is under a legal obligation to perform his duties or manage the resources under his charge principally for the benefit of those that have bestowed the confidence in him. The social trust, it must be stated, evokes both moral and legal obligations in the relationships where it occurs. It must be further noted that the social trust is much broader than the trust as conceived in Anglo-American legal thought. However, it is with respect to the legal obligations that the social trust evokes that this study is centrally concerned.

Considerable 'controversy' surrounds the definitions of constitutionalism and good governance.³⁰ Admittedly, there are both narrow and broad conceptualisations of constitutionalism.³¹ Without attempting to probe the various conceptualisations of constitutionalism at this juncture, suffice it to point out that constitutionalism is essentially concerned with the fidelity of actions, especially on the part of the government, to the spirit of the constitution.³² With respect to 'good governance', this is clearly a much used but ill-

²⁵ *Re Kayford* [1975] WLR 279 and *Paul v Constance* [1977] WLR 527.

²⁶ *Vandervell v IRC* [1967] 2 AC 291 and *Westdeutsche Landesbank v Islington LBC* [1996] AC 669.

²⁷ G Moffat (note 21 above) 3-4.

²⁸ R Cotterrell "Trusting in the law: Legal and moral concepts of the trust" in M Freeman & B Hepple (eds) (1993) 46 *Current Legal Problems, Part 2* 75.

²⁹ P Todd *An introduction to the law of trusts* (1986) 10.

³⁰ The controversies are explored at length in Chapter 2 of this study.

³¹ FE Kanyongolo "Constitutionalism and the removal of presidential term limits from the Constitution of the Republic of Malawi" (2003) 7 (1) *UNIMA Students Law Journal* 59 61.

³² MJ Nkhata "Human rights and constitutionalism: Insights on the freedom of assembly and the right to demonstrate" (2003) 7 (1) *UNIMA Students Law Journal* 45 46. The term good governance also comes with a lot of conceptual baggage. For example, while good

defined concept and the use of the adjective ‘good’ is perhaps adopted merely for emphasis for while governments may be ‘good’ or ‘bad’, governance immediately presupposes the conscious management of regime structures with a view to enhancing the legitimacy of the public realm.³³ Social trust-based governance is thus that form of governance that is expressly informed by social trust notions and operationalises itself by a continuous and conscious reference to the stipulations of the social trust concept. Importantly, social trust-based governance is never oblivious to the material circumstances in which it operates.³⁴

Liberal democracy, it is said, has great salience in the modern world.³⁵ It is present in most of the world’s most powerful and influential nations and is being tried out in many of the world’s developing countries. Liberal democracy, it must be noted, is a particular form of democracy that is based upon a set of assumptions about the individual and his relationship to society.³⁶ Liberal democracy balances the principle of limited government against the ideal of popular sovereignty.³⁷ On the one hand, the ‘liberal component’ in liberal democracy is reflected in a network of internal and external checks on government that are designed to guarantee liberty and afford citizens protection against the state. On the other hand, the ‘democratic component’ of liberal democracy is achieved by a system of regular and competitive elections conforming to principles of universal suffrage and political equality. Liberal democracies are marked by, among other things, a constitutional government based on checks and balances and the separation of powers among the branches of government, regular elections respecting the principle of universal suffrage, political pluralism, respect for

governance is generally parroted as the solution for Africa’s woes one wonders to who must the ‘good’ in good governance alludes to.

³³ J Hatchard & others (note 2 above) 2 quoting G Hyden & Michael Bratton *Governance and politics in Africa* (1993) 7 2.

³⁴ The study’s reference to ‘social trust-based governance and constitutionalism’ must be construed to include *ubuntu*-based governance and constitutionalism. ‘Social trust-based governance and constitutionalism’ is used short-handedly to denote governance and constitutionalism informed by both *ubuntu* and the social trust.

³⁵ K Bollen “Liberal democracy: Validity and method factors in cross-national measures” (1993) 37 (4) *American Journal of Political Science* 1207 1208.

³⁶ For a comprehensive interrogation of liberal democracy, see Chapter Four of this thesis particularly section 4.2.1.1.

³⁷ A Heywood *Political ideologies: An introduction* (2007) 40.

human rights and a healthy civil society.³⁸ It is a system of governance according to the preceding ideals that the Constitution aspires for and which this study, in the main, critiques.

1.3 Background to the research problem

The Preamble to the Constitution reveals that its adoption was, in part, motivated by the desire to ‘guarantee the welfare and development of the people of Malawi’ and also the creation of a ‘constitutional order ... based on the need for an open, democratic and accountable government.’ This preambular statement must not be taken as empty rhetoric or a simple pedantic proclamation.³⁹ It is an assertion of the peoples’ will to create a government and define the parameters of its operation.⁴⁰ The definition and demarcation of the parameters of the operation of various government departments is uniquely a functionality of what is sometimes referred to as governance. Governance thus remains one of the core functions of any government and it is predictive of numerous outcomes within a particular country.

From a continental perspective, it has been argued that many of Africa’s problems are a result of her incapacity to create capable states.⁴¹ A capable state being one that is characterised by, among other attributes, transparency, accountability, the effective sharing of resources between rural and urban populations and the creation of a predictable, open and enlightened policy making environment.⁴² As acknowledged, the two most daunting challenges facing the African continent today revolve around the institutionalisation of

³⁸ A Heywood (as above) 41.

³⁹ I Salevao “Reinventing government as a friend of the people: Common law and equity, legislation and the constitution” <<http://eprints.anu.edu/archive/00002354/01/samoa%20Update%202003-salevao.pdf>> (Accessed 24 June 2008).

⁴⁰ The creation of government and the demarcation of parameters of operation is conditioned by several factors key among them being the country’s political history and its future aspirations - FE Kanyongolo (note 1 above). On the role of the citizenry’s constituent power in the crafting of constitutions, see *Njoya and others v Attorney General and others* (2004) AHRLR 157 (KeHC 2004) and ML Mbaio “The politics of constitution-making in Zambia: Where does the constituent power lie?” Paper presented at African Network of Constitutional Law Conference on Fostering Constitutionalism in Africa, Nairobi, April 2007 <http://www.publiclaw.uct.ac.za/usr/public_law/Nairobi/Mbaio_ConstitutionMakingZambia.do> (Accessed 23 March 2010).

⁴¹ A Nsibambi “The interface between the capable state, the private sector and civil society in acquiring food security” Keynote paper at the conference on building for the capable state in Africa, Institute of African Studies, Cornell University, 24-8 October 1997 quoted by J Hatchard & others (note 2 above).

⁴² J Hatchard & others (note 2 above) 9.

democratic governance and achievement of sustainable development under conditions of durable peace and stability.⁴³ Evidence of this widespread dilemma can be quickly accessed by perusing any ranking of countries that uses development indicators.⁴⁴

Even more specifically, successive governments in Malawi have long recognised the centrality of good governance in the resolution of the myriad problems that the country faces.⁴⁵ The recognition of the primacy of governance to the amelioration of the social and economic conditions in Malawi has, quite accurately, been preceded by an acknowledgment that the failures of leadership – governance – in the one form or the other are at the core of the underdevelopment evident not only in Malawi but also across Africa.⁴⁶ For example, in the Malawi Poverty Reduction Strategy (MPRS) it was acknowledged that poverty could not be reduced unless there was development oriented governance.⁴⁷ The Malawi Growth and Development Strategy (MGDS) also concedes that the success of all the interventions that it proposes will be dependent on the prevalence of good governance.⁴⁸ The MGDS further emphasises that achievement of the long term national goals will depend on good governance from all angles within the economy.⁴⁹ However, it is important to point out that the emphasis on good governance in both the MPRS and the MDGS varies significantly from

⁴³ K Matlosa & others “Introduction” in K Matlosa & others (eds) *Challenges of conflict, democracy and development in Africa* (2007) 1.

⁴⁴ One will immediately discover that African countries, almost uniformly, fill the bottom bracket on such indices – MJ Nkhata “The social trust and leadership roles: Revitalising duty bearer accountability in the protection of social and economic rights in Malawi and Uganda” (2005) University of Pretoria: LLM Thesis - <http://repository.up.ac.za/dspace/bitstream/2263/1153/1/nkhata_mw_1.pdf> (Accessed 21 September 2009). Writing in 2007 scholars noted that almost a half century after independence African peoples remained amongst the world's poorest – A Seidman & others (eds) *Africa's challenge: Using law for good governance and development* (2007) 3.

⁴⁵ See Government of Malawi *Vision 2020: Long term perspective study* (1998). Although the Vision 2020 remains the overarching framework for development planning in Malawi, it has largely faded into obscurity after the initial hype with which it was launched – see Capacity Development Consultancies *What happened to Vision 2020? Lessons for NGOs* <http://impactalliance.org/ev_en.php?ID=6416_203&ID=DO_TOPIC> (Accessed 17 February 2010).

⁴⁶ L Dzimbiri “Competitive politics and chameleon-like leaders” in K Phiri & K Ross (eds) (note 6 above) 87.

⁴⁷ Government of Malawi *Malawi Poverty Reduction Strategy Paper* <<http://www.imf.org/External/NP/prsp/2002/mwi/01/043002.pdf>> (Accessed 17 July 2007).

⁴⁸ Government of Malawi *The Malawi Growth and Development Strategy* 61 <<http://www.Malawi.gov.mw/Economic%20Planning/MGDS%20November%202006%20-%20MEPD.pdf>> (Accessed 30 July 2007). The MGDS is the Government's current overarching medium term strategy for poverty reduction for 5 years from the 2006-2007 fiscal year.

⁴⁹ As above.

that proposed in this study. The major variation, which is explained in detail later in the study, stems from the point that good governance as conceptualised in the MPRS and MDGS follows the Washington Consensus and is formulated from a perspective informed largely by liberal democratic theory. This study argues for a shift on the discourse on governance beyond the liberal democratic perspective by making a deliberate recourse to African traditions, norms and institutions.

At the expense of being repetitive, it must be reiterated that the unanimity of opinion from recent government initiatives in Malawi is to recognise the primacy and centrality of good governance in the attainment of the diverse development objectives. Needless to state that one quickly notices that Malawi's failures in the institutionalisation of good governance are a reflection of the general governance and development dilemma faced by most African countries.⁵⁰

Close scrutiny, however, reveals to any discerning observer that there is no heretical novelty about the emerging emphasis on governance in Malawi. Aside from the global emphasis on good governance in Africa that emerged at the end of the 1980s,⁵¹ the Constitution establishes the governance framework that must be followed in Malawi. This framework, it must immediately be noted, makes a fundamental break with the governance ideals that had prevailed in Malawi since independence in 1964. A clear picture of the fundamentals underlying this framework is patent from an analysis of sections 12 and 13 of the Constitution. Section 12 of the Constitution outlines the underlying principles upon which the Constitution is founded while section 13 lists what are termed the principles of national policy.⁵² The principles of national policy relate to the outcomes that the state must progressively work towards achieving through policies and legislation. Admittedly, a searching analysis of the underlying principles of the Constitution and the entire

⁵⁰ J Hatchard & others (note 2 above) 8 and D Moyo *Dead aid: Why aid is not working and how there is another way for Africa* (2009) 22.

⁵¹ Arguably, the global emphasis on better governance in Africa was most prominently signified by the World Bank's 1989 report – World Bank *Sub Saharan Africa: From crisis to sustainable development* (1989) in which it was asserted that at the core of Africa's development problems was a crisis of governance.

⁵² For a comparative analysis of the place and role of constitutional foundational principles, see C Roederer "Founding provisions" in S Woolman & others *Constitutional Law of South Africa* (2007) 13-I - 13-31 and B de Villiers "Directive principles of state policy and fundamental rights: The Indian experience" (1992) 8 (1) *South African Journal on Human Rights* 29.

constitutional framework reveals a heavy liberal democratic influence.⁵³ A not so often emphasised fact, however, is that sections 12 and 13 of the Constitution attempt to strike a recognisable balance between liberal democracy, on the one hand, and social democracy or at least social trust-based notions, on the other hand.⁵⁴ Notably, section 12 outlines what might be termed as a social contract doctrine of governance: that all ‘legal and political authority of the state derives from the people of Malawi’ to be ‘exercised in accordance with’ the Constitution ‘solely to serve and protect their interests.’⁵⁵ This, significantly, is followed by at least two tenets which unmistakably articulate the trust concept. One requires all ‘persons responsible for the exercise of powers of state’ to do so ‘on trust’ to the ‘extent of their lawful authority and in accordance with their responsibilities to the people of Malawi.’⁵⁶ Evidently, in spite of liberalism’s dominant influence in the Constitution, the terminology used in section 12 also implies the creation of a social trust between the various public functionaries and the citizenry in Malawi.⁵⁷ Key social trust indicators from section 12 include terms like ‘trust’, ‘accountability’, ‘good governance’ and ‘transparent.’⁵⁸ The Constitution is thus based on doctrines of both the social contract and social trust.⁵⁹ The overriding emphasis in the Constitution is that government does not exist solely to control the people but also to serve their needs and welfare.

This study will thus interrogate social trust-based governance and constitutionalism and highlight the practical implications and benefits that it can generate. It is argued in this study that articulating a social trust-based conception of governance and constitutionalism would guarantee, with a firm degree of certainty, the accountability of all those involved in the management of public resources, for example, by recognising that vulnerability and dependence can also be the basis for allocating rights and obligations – this approach is in

⁵³ FE Kanyongolo (note 6 above) 353.

⁵⁴ G Kamchedzera & C Banda “‘We are people too’: The right to development, the quality of rural life, and the performance of legislative duties during Malawi’s first five years of multiparty politics” Research Dissemination Seminar Number Law/2001-2002/001 <<http://www.sarpn.org.za/documents/d0001966/index.php>> (Accessed 20 May 2008).

⁵⁵ Section 12 of the Constitution of the Republic of Malawi.

⁵⁶ As above.

⁵⁷ G Kamchedzera in J Lewis & others (eds) *Human rights and the making of constitutions: Malawi, Kenya, Uganda* (1995) 28-33.

⁵⁸ G Kamchedzera & C Banda (note 54 above).

⁵⁹ J Ansah “The 1994 Malawi Constitution and the role of the judiciary” Paper presented at the First National Conference on Review of the Constitution, Capital Hotel, Lilongwe, 28-31 March 2006, 4 and CM Silungwe “The rhetoric and practice in land reform in Malawi: A contextualised governmentality analysis” (2009) 3 (1) *Malawi Law Journal* 26 48.

contrast to contract dominated discourse which emphasises individual equality and autonomy in allocating rights.⁶⁰ The parallel(s) sought to be developed in this study will draw heavily on two sources: firstly, African concepts and traditional values, generally, but the concept of *ubuntu* specifically and, secondly, the concept of the trust especially the public trust. From the trust concept this study will specifically draw inspiration from the manner in which the law allows beneficiaries of a trust to ‘control’ and to ‘manage’ trustees’ to discharge their duties in the furtherance of the beneficiaries’ interests.⁶¹

Importantly, this study will also demonstrate that a social trust conception of governance and constitutionalism stands a meaningful chance of triggering the realisation of the vision and promises embodied in the Constitution.⁶² It will also be demonstrated that social trust-based governance and constitutionalism possesses many symmetries with African traditional forms of governance and that this places it in a unique position to succeed. The emphasis on social trust-based governance is premised on an acknowledgment of the realities of globalisation and the ubiquity of free market economy ideals. This reality starkly emphasises the hollowness of allocating rights and obligations on the basis of equality and individual autonomy since this allocation is unduly exclusionary of the poor and vulnerable who do not have either the desired equality or freedom to participate as equals.⁶³ The poor and marginalised, however, form a significant proportion of the population of Malawi and their predicament warrants discourse aimed at ameliorating their predicament.⁶⁴

⁶⁰ MJ Nkhata (note 44 above) 5.

⁶¹ In a typical trust relationship, the property control, property management and sometimes the nominal title are all vested in the trustees while the property benefit is made accruable to the beneficiaries even though in some trusts the trustees may also be part of the class of beneficiaries. Trustees owe the beneficiaries an unwavering duty of loyalty and equity has developed diverse remedies and strategies that beneficiaries can activate in the event the trustee breaches his duties. For a concise discussion of how the trust operates, especially within private law, see R Pearce & another *The law of trusts and equitable remedies* (2006).

⁶² It is clear from the constitutional change debate in Malawi that the adoption of the Constitution in 1994 was a clear statement of the need to break with Malawi’s autocratic past and lay the foundation for a new political and social-economic order – J Banda “The constitutional change debate of 1993-1995” in K Phiri & K Ross (eds) (note 6 above) 316 317.

⁶³ IG Shivji “Critical elements of a new democratic consensus in Africa” in H Othman (ed) *Reflections on leadership in Africa forty years after independence* (2000) 25 28.

⁶⁴ As of 2006 it was estimated that 52.4 per cent of the population, translating into 6.3 million people, lived below the poverty line – Government of Malawi (note 48 above). It has also been revealed that almost ten years after the transition to multipartyism the state had consistently failed to address the manifestations and causes of ill-being amongst rural communities – G Kamchedzera & C Banda (note 54 above).

1.4 Focus and objectives of the study

Concededly, the 1994 Constitution shifted the law in a general pro-poor direction. However, the need for pro-poor social change in Malawi remains immense.⁶⁵ It must be noted that one of the hallmarks of the Constitution is its deliberate attempt to cater for the welfare of the poor and marginalised in Malawi. This pro-poor shift is, arguably, most prominently manifested by section 13 of the Constitution which catalogues an ambitious list of objectives that the state must actively pursue in a bid to improve the welfare and development of the people of Malawi. This study is thus an attempt to discern the full potential that the social trust concept, as a legal concept with constitutional foundation, can make in transforming the current constitutional framework into one filled with vibrancy and responsiveness. On the one level, this study will thus be engaged in the construction of a framework that can be utilised to transform the constitutional promise that the law can be used to ameliorate the livelihoods of Malawians, irrespective of their societal placement. On the other level, this study will examine how the Constitution, as the basic but most supreme law of the land, can cogently contribute to an improvement in the social-economic conditions of a broader cross-section of Malawians. More specifically the study will explore how the constitutional social trust can be used to enhance the accountability of public functionaries in the management of public resources.⁶⁶ In this regard there will be a continuous attempt to focus on the accountability of public functionaries and public institutions to the general populace in as far as the general management of the public realm is concerned. The values that underlie *ubuntu* will centrally inform the discussion in this study and deliberate recourse will continuously be made to *ubuntu* so that the resulting discourse has a discernible foundation in African intellectual tradition. This study argues that the foundation in African intellectual tradition will enhance the legitimacy of the social trust-based approach to governance and constitutionalism.

The analysis in this study is conducted at two levels that are not exclusionary of each other. At the one level, this study will make a case for the recognition of the social trust as the 'organising metaphor' in as far as governance and constitutionalism are concerned. The preoccupation at this level will be to demonstrate how the social trust can be used as an organising principle informing both governance and constitutionalism. The study will demonstrate that the social trust-based framework can be utilised as providing a conceptual

⁶⁵ S Gloppen & FE Kanyongolo (note 12 above) 258.

⁶⁶ Public resources as used in this study are not limited to financial or economic resources but also include human resources and organisational resources meant for the public benefit.

and philosophical grounding for governance and constitutionalism. At the other level, this study will argue that the existing legal framework should be construed so as to activate social trust-based governance and constitutionalism as the supervening framework in Malawi. In this connection the study will be arguing that the social trust-based framework for governance and constitutionalism can be utilised as a basis for a workable governance framework. This study's argument in this regard is that there are principles within the Constitution and other laws in Malawi that can be used as yardsticks for evaluating governance and constitutionalism in line with the ideals that the social trust-based framework supports. The belief is that recognising and utilising social trust-based governance would temper governance and constitutionalism in line with the Constitution's ideals. It is also believed that social trust-based governance and constitutionalism would broaden the range of remedies that the citizenry would possess against public functionaries for failures in governance and constitutionalism. Additionally, by founding social trust-based governance and constitutionalism in African traditions a paradigm with real autochthony will also be articulated. The autochthony, it will continuously be argued, ideally positions this approach to succeed in Africa especially because of the legitimacy that it is likely going to possess.

1.5 Significance of the study

Constitutions are relevant for democratic governance, the attainment of social justice and societal progress.⁶⁷ The Constitution can be said to be a statement of Malawi's collective objectives and also the manner in which these objectives must be attained. In Malawi, no constitutional provisions better captures these objectives than section 13 just as section 12 is the best formulation as to how the process of attaining these goals ought to be managed.⁶⁸ The Constitution, it can be argued, provides a blue print for the practice of governance in Malawi hence the need to pay close attention to its stipulations in articulating governance strategies.

Writing in 1998 about the prospects of democracy in post-authoritarian Malawi, Von Doepp expressed concern that the inter-related crises of political stability and governability had

⁶⁷ J Hatchard & others (note 2 above) 28.

⁶⁸ These constitutional provisions are supported by a range of legislation supporting integrity, accountability and probity in public institutions and among public functionaries. Some of the prominent pieces of legislation in this regard are the *Public Finance Management Act*, Act No. 7 of 2003; *Public Audit Act*, Act No. 6 of 2003; *Corrupt Practices Act*, Act No. 18 of 1995 and the *Public Procurement Act*, Act No. 8 of 2003.

increasingly rendered institutions for solving collective problems inoperable and ineffective.⁶⁹ The result is that little attention has been devoted to critical issues such as poverty reduction and underdevelopment which has merely entrenched inequalities and marginalisation. Again, while one may easily note that vulnerability and marginalisation are common occurrence across the African continent,⁷⁰ this prevalence does not make such conditions acceptable and merely calls for greater effort to systematically eliminate them. This study is important because it seeks to provide a concretely founded basis for using Malawi's Constitution and other resources within Malawi's legal system to regulate and inform governance and in the process establish a vibrant and responsive framework for the management of the public realm. The focus on governance and constitutionalism is justified on the basis that these aspects have a direct correlation to the amelioration of the livelihoods of the citizenry. A significant improvement in constitutionalism and governance is bound to also significantly improve the general management of the public realm thereby leading to an immediate improvement in the livelihoods of Malawians.⁷¹ This study contends that both the preceding results can be attained by ensuring fidelity to the stipulations of the Constitution in all governance initiatives. Even more significantly, this study's approach is a deliberate departure from the dominant liberal democratic construction of governance that has informed constitutionalism and governance in Malawi and much of Africa. The ultimate significance of this study is its attempt to consciously heed the call for the development of a governance paradigm that is adequately nuanced to serve the needs of Malawi.⁷² As earlier stated, in articulating social trust-based governance and constitutionalism this study will interrogate the symmetry between the social trust and the African concept of *ubuntu*. The objective in this respect is to found both governance and constitutionalism within a distinctly identifiable autochthonous African philosophy.

⁶⁹ P von Doepp "The kingdom beyond *zasintha*: Churches and political life in Malawi's post-authoritarian era" in K Phiri & K Ross (eds) (note 6 above) 102 106-107 113.

⁷⁰ G Kamchedzera (note 57 above) 29.

⁷¹ An important underlying concession here is the interconnectivity between leadership and governance hence the study's deliberate attempt to focus on public functionaries in its analysis. On how the quality of leadership can have a bearing on both democracy and development see L Pye "Democracy and its enemies" in J Hollifield & C Jillson (eds) *Pathways to democracy: The political economy of democratic transitions* (2000) 27-28.

⁷² Assessing the progress of democratisation in Europe in contradistinction to Africa Herbst has argued that for meaningful democratisation, African countries must not wholesale adopt European models which were developed within specific contexts but must instead develop their own nuanced systems that can adequately mirror the social and political conditions that exist in Africa – J Herbst "Understanding ambiguity during democratisation in Africa" in J Hollifield & C Jillson (eds) (as above).

1.6 Assumptions

This study is premised on two inter-related assumptions. Firstly, the study assumes that the Constitution remains central to constitutionalism and governance generally and the regulation of public functionaries specifically. In this connection, the study further assumes that the current practice of governance in Malawi, for its manifest want of fidelity to constitutional stipulations, cannot properly address the needs of the citizenry especially the vulnerable and marginalised. Social trust-based governance and constitutionalism is thus offered as the framework with the potential to trigger a meaningful operationalisation of governance as conceived by the Constitution. It must be stated that while this study recognises the importance of constitutions for governance, it is also mindful of the fact that no one constitutional model is ideal for all places or all times.⁷³ Clearly, even though constitutions are central to governance and constitutions, no constitution can, by itself, solve all the ills of a particular society.

The second assumption, building on the first, is that support for social trust-based governance and constitutionalism need not be wholly sourced from institutions or models outside the Malawian legal system. In other words, the solutions to the Malawi's governance crisis are to be had, principally, within Malawi's own institutions and traditions. Foreign experiences and models' utility must thus be limited to comparative analysis only. A significant fact in this regard is that traditional African societies, before the advent of colonialism, had their own systems of social and political organisation with in-built checks and balances.⁷⁴ The irony, however, is that beginning from the 'independence era' little, if any attention, has been paid by most African countries to traditional systems of governance in framing constitutions or articulating governance paradigms. This study will consciously look to traditional forms of governance, in as far as can be discerned, to determine their congruency to the proposed social trust-based model – it is in this connection that the concept of *ubuntu* is relevant. The assumption in this regard is that observance and enforcement of the proposed governance model is likely to be more easily engendered if it reflects values that the broader populace can relate to. Both assumptions are premised on the benignity and potency of the law if carefully and selectively applied to societal regulation.

⁷³ H Okoth-Ogendo (note 1 above) 19-20.

⁷⁴ B Davidson *The Blackman's burden* (1993) 225.

1.7 Literature review

The manner in which governments must be run has been the subject of extensive scholarly interrogation dating back to the times of Hobbes,⁷⁵ Locke,⁷⁶ through to Rousseau,⁷⁷ Montesquieu,⁷⁸ Marx⁷⁹ and remains the subject of avid scholarly interrogation to date. Out of the resulting expansive scholarly expose different traditions have emerged suggesting particular ways which, supposedly, represent the best way of managing the affairs of the state. The late 20th Century witnessed an increasing ascendancy of liberalism in a world that has increasingly become ideologically uni-polar. This rise to dominance of liberalism – both in its political and economic manifestation – has led some commentators to assert that

⁷⁵ Thomas Hobbes (1588-1679) was a famous English philosopher who is regarded as one of a handful of truly great political philosophers rivalling in significance Plato, Aristotle, Locke and Rousseau. His work on political philosophy significantly shaped most of the current Western political philosophy. Arguably his most memorable work remains *Leviathan* (1651). In *Leviathan* Hobbes starts with a state of nature – a war of all against all – which comes about as a result of everyone having the right and licence to do everything in the world. The social contract, which he articulates at length in *Leviathan*, is thus an escape from the state of war. For Hobbes society is thus a population beneath a sovereign authority to whom all individuals cede their natural rights for the sake of their protection. Although Hobbes is famous for articulating the social contract as a foundation for government, he is also infamous for using the social contract theory to arrive at the conclusion that we ought to submit to the authority of an absolute, undivided and unlimited sovereign power – *Stanford Encyclopaedia of Philosophy* <<http://plato.stanford.edu/entries/hobbes-moral>> (Accessed 1 July 2008).

⁷⁶ John Locke (1632-1704) was an influential British philosopher whose works are largely characterised by opposition to authoritarianism. The opposition is both on the level of the individual person and on the level of institutions such as government and the church. His works have been equally important in the development of the social contract theory and his ideas clearly influenced Rousseau and Voltaire. His most prominent contribution to political philosophy is the *Two treatise of government* (1689) – *Stanford Encyclopaedia of Philosophy* <<http://plato.stanford.edu/entries/locke>> (Accessed 1 July 2008).

⁷⁷ Jean-Jacques Rousseau (1712-1778) was a major French philosopher and composer of the Enlightenment Period whose works heavily influenced the French Revolution. In political theory, Rousseau's most important work is, without doubt, *The social contract* (1762). In *The social contract* Rousseau argues that by moving out of the state of nature and joining the social contract and abandoning their claims of natural right, individuals can both preserve themselves and remain free. The social contract explains at length how a government could exist in such a way that it protects the equality and character of its citizens. – *The internet encyclopaedia of philosophy* <<http://www.ep.utm/r/rousseau.htm#H4>> (Accessed 1 July 2008).

⁷⁸ Charles Louis de Secondat, Baron de Montesquieu *Complete works, Volume 2 The spirit of laws* (1748).

⁷⁹ Karl Marx (1818-1883) was a 19th century scholar and political activist. His scholarly works address a range of political issues as well as general social issues. Marx argued that capitalism, like previous socioeconomic systems, will produce internal tensions which will lead to its destruction. Just as capitalism replaced feudalism, capitalism itself will be replaced by communism, a classless society which emerges after a transitional period in which the state would be nothing but the revolutionary dictatorship of the proletariat. Marx is often cited as the father of modern communism and though he was a relatively obscure figure during his lifetime, his ideas began to exert considerable influence on workers' movements after his death as was demonstrated by the Bolshevik victory in the Russian October revolution – <<http://www.historyguide.org/intellect/marx.html>> (Accessed 2 July 2008).

liberalism represents the end of humanity's intellectual creativity in as far as the formulation of governance paradigms is concerned.⁸⁰ Even though history has vindicated the dominance of liberalism, and in as far as governance is concerned liberal democracy, it has also been recognised by many a scholar that while there may not immediately be competing theories or visions to rival liberal democracy, the achievement of sustainable and genuinely liberal democracy has been uniquely elusive.⁸¹ On top of this, the concept of democracy itself, within the liberal framework, remains bitterly contested to this day.⁸² Even more striking are the 'failures' of liberal democracy in Africa. These 'failures' raise concerns about the suitability of liberal democracy as a governance model in Africa. In this connection two major strands are evident. On the one hand, some scholars assert that the continued failures of liberal democracy in Africa have proven its irrelevance and it must thus be abandoned altogether. On the other hand, other scholars assert that in spite of its failures the solution lies, not in abandoning liberal democracy as a whole, but modifying it with a sufficient infusion of localised conditionalities that would make it meaningfully functional. For the latter group of scholars the frailties and shortfalls of liberal democracy juxtaposed with its continuing popularity entail less radical solutions in attempting to make it fully functional and responsive. It is suggested that in spite of the dominance of the Western model, liberal democracy can only become meaningfully operative in Africa if its conceptual framework is reconstructed to reflect the diverse local conditions obtaining in Africa.⁸³

⁸⁰ The suggestion that liberal democracy represents the end of history was made by F Fukuyama "The end of history?" (1989) 16 *The National Interest* <<http://www.wesjones.com/eoh.htm#source>> (Accessed 3 July 2008) where he argued that the failure of socialism meant the unabashed victory of economic and political liberalism and the end point of mankind's ideological evolution and the universalisation of Western democracy as the final form of human government. Fukuyama's 'end of history' assertion, by his own concession – F Fukuyama *The end of history and the last man* (1992), has been the subject of diverse scholarly discussion. For example, J Gray *Liberalisms: Essays in political philosophy* (1989) argues that despite its overwhelming dominance in Anglo-American philosophy, liberalism has never succeeded in showing that liberal democratic institutions are uniquely necessary to justice and human good. For a more incisive critique of Fukuyama's end of history thesis, see J Derrida *Specters of Marx: The state of the debt, the work of mourning and the new international* (1994). Derrida argues, among other things, that the triumphalistic assertions about the fall of communism are misplaced and erroneously conflate and equate the fall of communism with the failure of Marxism and also ignore the numerous contradictions and failures of liberalism.

⁸¹ L Pye "Democracy and its enemies" in J Hollifield & C Jillson (eds) (note 71 above) 22.

⁸² C Ake *The feasibility of democracy in Africa* (2003) 10; Roux posits that 'Democracy is a noun permanently in search of a qualifying adjective' - T Roux "Democracy" in S Woolman & others *Constitutional law of South Africa* (2006) 10-i 10-1.

⁸³ IG Shivji "State and constitutionalism: A new democratic perspective" in IG Shivji (ed) (note 1 above) 27- 29, 36; FE Kanyongolo (note 6 above) 369; K Kwaa Prah "Democracy and the African challenge: Does liberal democracy work for Africa?" in K Matlosa & others (eds) *The state, democracy and poverty eradication in Africa* (2008) 17 and S Ndlovu-Gatsheni & G

The rise and rise of liberalism has essentially meant that the global discourse on governance has largely been framed within the liberal democratic mould. As should easily be apparent, the Western conception of governance is largely informed by liberal democratic ideals and it is this formulation that has been and is still being ‘passed’ on to Africa. In spite of the distinctly foreign origins and formulations of liberal democratic governance most African countries have uncritically embraced the Western model largely as a result of donor conditionalities.⁸⁴ The rise of liberal democracy in Africa has coincided with what has also been referred to as the Third Wave of Democratisation.⁸⁵ The late 1980’s and the early 1990’s revealed the increased emphasis that African governments were now placing on governance – albeit initially largely as a result of donor pressure. In Malawi this increased emphasis culminated in the adoption of a new Constitution and the re-introduction of multiparty politics after over 30 years of one party rule.⁸⁶ In as far as scholarly comment on the transition to multi-partyism in Malawi is concerned, emphasis has unduly been on the political processes surrounding the adoption of the new Constitution⁸⁷ and sometimes on the

Dzinesa “Liberal democracy and the African context: The experience of South Africa” in K Matlosa & others (as above) 91.

⁸⁴ Democratic governance in Africa was clearly accelerated by the end of the Cold War when most Western governments, foregoing the priorities and exigencies of the Cold War, refused to offer further support to authoritarian regimes and the Bretton Woods institutions made aid to Africa contingent on ‘democratic reform’ - K Matlosa (note 43 above) 1-8. The result was that most authoritarian states opened up their political spaces and allowed multiparty elections in which some notable African statesmen were ousted by opposition leaders. For example, Dr Kamuzu Banda of Malawi was replaced by Bakili Muluzi while in Zambia Kenneth Kaunda, was replaced by Frederick Chiluba – M Meredith *The state of Africa* (2006).

⁸⁵ The Third Wave of Democratisation has been used to refer to the general democratisation trend that gripped Africa from between 1989/1990 resulting in the unseating of most dictatorships across Africa. It is argued that the Third Wave started around 1974 and gathered momentum around 1989/1990 – C Young “Africa: An interim balance sheet” in L Diamond & M Plattner (eds) *Democratisation in Africa* (1999) 63. For a deeper analysis of the phenomenon, see SP Huntington *The third wave: Democratisation in the late twentieth century* (1991). Notably, there are other scholars who do not subscribe to Huntington’s taxonomy or merely contest some points in Huntington’s analysis, see UJ van Beek “Editor’s introduction” in UJ van Beek (ed) *Democracy under construction: Patterns from four countries* (2006) 21.

⁸⁶ Malawi gained independence from Britain on 6 July 1964. The Independence Constitution retained the Queen as the Head of State and also contained a bill of rights. In 1966, a new constitution was adopted transforming the country into a Republic and also excluding all the human rights provisions that had been included in the Independence Constitution. The 1966 Constitution formally proscribed multi-partyism and essentially merged the ruling party and government into a monolith of absolute power – D Chirwa (note 10 above) 316 -318; FE Kanyongolo (note 6 above) 358-361.

⁸⁷ G Kamchedzera & C Banda (note 54 above) 3-4. Examples of such commentaries include C. Ng’ong’ola “Managing the Transition to Political Pluralism in Malawi – Legal and Constitutional Arguments”, (1996) 34 (2) *The Journal of Commonwealth and Comparative Politics* 85-110

electoral process subsequent to the transition.⁸⁸ Little attention, if any at all, has been paid to the underlying ideological implications of the transition and what this portends for future governance of the country.⁸⁹

The emerging focus on governance in individual African countries has largely replicated itself at the continental level with the Organisation of African Unity (OAU) and then subsequently the African Union (AU) expressly recognising the importance of good governance for African development.⁹⁰ On the continental level the AU has demonstrated its commitment to good governance by adopting the African Charter on Democracy, Elections and Governance (the Charter on Democracy) in January 2007.⁹¹ Together with other AU initiatives like the African Peer Review Mechanism,⁹² The Charter on Democracy represents a significant perspective shift on the African continent.⁹³

and M Nzunda & K Ross (eds) (1995) *Church, Law, and Political Transition in Malawi 1992-94*.

⁸⁸ For example, M Ott & others (eds) *The power of the vote: Malawi's 2004 parliamentary and presidential elections* (2004).

⁸⁹ With the lone exception of FE Kanyongolo (note 6 above) who, as early as 1998, understood the liberal democratic nature of the 1994 Constitution and attempted to point out the limitations of such an ideological choice especially in the light of the hurried manner in which the Constitution was adopted.

⁹⁰ The OAU was the forerunner to the AU. Formed in 1963, the Charter establishing the OAU did not expressly articulate matters of governance as part of its mandate. With its Charter's emphasis on state sovereignty and non-interference in member states internal affairs, the OAU did not make significant contribution to good governance on the continent. Conversely, the Constitutive Act of the AU expressly commits the AU to the attainment of democratic governance on the continent – see, for example, articles 3(g) and 4(m) of the AU Constitutive Act.

⁹¹ For a copy of the African Charter on Democracy, Elections and Governance, see <<http://www.africa-union.org/root/AU/Documents/Treaties/text/Charter%20on%20Democracy.pdf>> (Accessed 2 July 2008). For a critical evaluation of the Charter, see S Ebobrah "Is democracy now an issue in Africa? An evaluation of the African Charter on Democracy, Elections and Governance" (2007)1 (2) *Malawi Law Journal* 131.

⁹² Malawi has acceded to the African Peer Review Mechanism thus making itself amenable to scrutiny in such critical areas as: democracy and political governance, economic governance and management, corporate governance and socio-economic governance – see M Hansungule "Malawi and the African peer review mechanism: A bold step towards good governance?" (2008) 2 (1) *Malawi Law Journal* 3.

⁹³ Malawi has neither signed nor ratified the African Charter on Democracy, Elections and Governance. For a list of the countries that have signed and ratified the Charter on Democracy, see <<http://www.africa-union.org/root/au/documents/treaties/treaties.htm>> (Accessed 6 August 2010).

With regard to the concept of *ubuntu*, it is notable that there is a growing body of literature that has explored the concept. In most of the literature scholars have readily admitted the difficulties in fashioning an all embracing definition of the concept.⁹⁴ It is often readily accepted that *ubuntu* is a multidimensional concept which embodies uniquely African values. Although the term *ubuntu* linguistically derives its origin from *Nguni* languages of Southern Africa, Kwamwangamalu has demonstrated that it actually is a pan-African concept that is found in many African languages although under different formulations.⁹⁵ Kwamwangamalu has also provided a socio-linguistic analysis of the concept even though he, rightly, concedes that this is not the only perspective from which the concept can be discussed. Cornell and Van Marle have also explored *ubuntu* in terms of its significance for South African constitutional law especially in as far as the question of African identity manifests itself in African jurisprudence and legal ideals.⁹⁶ A more nuanced exposition on the relevance of *ubuntu* to South African constitutional jurisprudence has been provided by Mokgoro who has argued that the values of *ubuntu* if properly harnessed can be utilised in harmonising legal values and practises.⁹⁷ In this connection it is apt to note that the South African Constitutional Court has already expressly referred to *ubuntu* in some of its judgments.⁹⁸ Bhengu has also demonstrated that the *ubuntu* concept can be utilised to construct an African version of democracy.⁹⁹ In the context of Malawi, Tambulasi and Kayuni have confirmed that the concept of *ubuntu* finds expression in several Malawian languages and that *ubuntu* and principles of democratic governance are compatible and complementary.¹⁰⁰ Tambulasi and Kayuni, importantly, also demonstrate the propensity for abuse that surrounds much of the recourse to *ubuntu*.

⁹⁴ English refers to *ubuntu* as the 'untranslatable concept' – R English "Ubuntu: The quest for an indigenous jurisprudence" (1996) 12 (4) *South African Journal on Human Rights* 641.

⁹⁵ MN Kamwangamalu "Ubuntu in South Africa: a Sociolinguistic Perspective to a Pan-African Concept" *Critical Arts: A South-North Journal of Cultural & Media Studies* (1999) 13 (2) 24-41.

⁹⁶ D Cornell & K Van Marle "Exploring Ubuntu tentative reflections" (2005) 5 (2) *African Human Rights Law Journal* 195.

⁹⁷ JY Mokgoro "Ubuntu and the law in South Africa" at <<http://web.archive.org/web/20040928041520/www.puk.ac.za/law/per/documents/98v1mokg.doc>> (Accessed 22 September 2010).

⁹⁸ For example, *S v Makwanyane* 1995 (6) BCLR 665 (CC) and *AZAPO v The President of the Republic of South Africa* 1996 (8) BCLR 1015 (CC).

⁹⁹ MJ Bhengu *Ubuntu: The essence of democracy* (1996).

¹⁰⁰ R Tambulasi & H Kayuni (note 18 above) 147-161.

Quite apart from the question of good governance and *ubuntu*, the law of trusts and fiduciary obligations is of some fair antiquity having emerged from the equitable jurisdiction of the Chancery Courts in England. From its ancestral origins in England, equity's sphere of influence expanded considerably following the expansion of the British Empire and is now still applicable in almost all former British colonies.¹⁰¹ In as far as the emergence of equitable jurisdiction is concerned, one of the most cited reasons for its emergence was the deliberate attempt to mitigate the rigours of the common law.¹⁰² Arguably, the most prominent progeny of equity is the concept of the trust especially as used in private law for property management.¹⁰³ Without doubt the role of equity has been most prominent in private law. The result has been that, while there is an ancient and well-developed jurisdiction guiding the conduct of relationships of trust between private individuals, courts of equity have shunned the elaboration of a parallel jurisdiction between government and the governed.¹⁰⁴ As pointed out by Salevao, however, in 18th century England the notion that government was a trust in favour of the governed and that public officials (both elected and appointed) were trustees for the people was readily accepted.¹⁰⁵ However, the eminence of these ideas was short lived and they were shortly eclipsed by the notion of representative democracy and its attendant consequences. The overall result, in mainstream Anglo-American legal thought, is that the relationship between equity and public law remains the

¹⁰¹ For example, in Malawi the legal validity of the common law, doctrines of equity and statutes of general application in force in England on the 11 August 1902 was transferred to Malawi (then British Central Africa) by Article 15 of the British Central Africa Order in Council of 1902. The legal efficacy of the 'received' law was further continued by section 15 of the Republic of Malawi (Constitution Act) 1966, Act No. 23 of 1966. The applicability of statutes of general application was once the subject of some animated academic debate, see J Finnis "Plain speaking about some existing laws (1981) 3 *UNIMA Students Law Journal* 38; CEP Haynes *Confusion double confounded, the appearance of reality* (as above) 1 and C Nzunda *A sequel to confusion double confounded, the appearance of reality* (as above) 9. Section 200 of the 1994 Constitution further guarantees the continued validity of all 'Acts of parliament, common law and customary law' in force on the appointed day (being 18 May 1994, the day on which the Constitution came into provisional operation – section 215 of the Constitution) to the extent that they are not inconsistent with the Constitution.

¹⁰² In origin, the equitable jurisdiction was undoubtedly based on moral principles designed to remove injustices incapable of being dealt with in the common law courts – P Pettit *Equity and the law of trusts* (2006) Chapter 1.

¹⁰³ The trust as known today is the direct successor of the medieval *use*. The *use* (from Latin *ad opus*) was used by property owners to appoint third parties to manage their property on behalf of themselves or specified beneficiaries. The jurisdiction for the enforcement of these arrangements did not lie in the Royal Courts but a complaint could be made by way of petition to the King in Council. In due course the practice arose where the Chancellor, who was at the time the King's principal minister would investigate the matter and recommend a remedy – A Oakley *Parker and Mellows: The modern law of trusts* (2003) Chapter 1.

¹⁰⁴ G Dal Pont & others *Equity and trusts in Australia and New Zealand* (1996) 116.

¹⁰⁵ I Salevao (note 39 above) 3- 4 and PD Finn "A sovereign people, a public trust" in PD Finn (ed) *Essays on law and government Vol 1: Principles and values* (1995) 1 9-10.

subject of rudimentary perusal by commentators and is largely unexplored by the courts in spite of the absence of a compelling reason for the non-applicability of equity to this realm.¹⁰⁶ The public trust has not been interrogated with the same vigour and depth as the private trust. It is largely with the public trust that this study is concerned.

Recently, however, the notion of government as a trust has re-emerged as an important category for conceptualising the nature, end and functions of government.¹⁰⁷ This has been prompted in part by the manifest failures of representative democracy and other attendant liberal democratic institutions. The emerging trend has been to conceptualise the governors as being in fiduciary positions vis-à-vis the governed with the result that the regulatory framework used to monitor and control trustees can be utilised to develop parallels for monitoring and controlling public officers.¹⁰⁸ It must be reiterated, however, that this remains an area in which very little scholarly ink has flowed.

The interconnectivities between the law governing fiduciaries and other branches of law has, admittedly, been further hampered by the lack of a fixed and all embracing definition of what amounts to a fiduciary relationship or who can appropriately be classified as a 'fiduciary'.¹⁰⁹ This situation has ensured that some controversy has always surrounded the extension of the concept to other fields of law. As the discussion in the chapters to follow will demonstrate, many a scholarly work has attempted to unravel the 'fiduciary mystique' by proposing definitions of the fiduciary concept without putting the debate to eternal rest.¹¹⁰

¹⁰⁶ G Dal Pont & others (note 104 above) 116.

¹⁰⁷ Salevao (note 39 above) 4.

¹⁰⁸ See, PD Finn "Public trust and public accountability" (1994) 3 (2) *Griffith Law Review* 225 and PD Finn "Integrity in government" (1992) 3 *Public Law Review* 243.

¹⁰⁹ While the quest for a precise definition which identifies the characteristics of the fiduciary relationship continues without evident signs of success, Mason argues that the lack of a comprehensive all embracing definition has actually allowed courts to apply, in line with equitable jurisdiction, flexible standards reflecting different community standards and legal traditions – A Mason "The place of equity and equitable remedies in the contemporary common law world" (1994) 110 *Law Quarterly Review* 238 246.

¹¹⁰ Some of the notable works include: A Scott "The fiduciary principle" (1949) 37 (4) *California Law Review* 539; E Weinrib "The fiduciary obligation" (1975) 25 (1) *University of Toronto Law Journal* 1; PD Finn "The fiduciary principle" in T Youdan (ed) *Equity, fiduciaries and trusts* 1-56; R Flannigan "The fiduciary obligation" (1989) 9 (3) *Oxford Journal of Legal Studies* 285 and JRM Gautreau "Demystifying the fiduciary mystique" (1989) 68 (1) *Canadian Bar Review* 1. For other useful perspectives on the law of fiduciary obligations see, P Birks "The content of fiduciary obligation" (2000) 34 *Israel Law Review* 3; DG Smith "The critical resource theory of fiduciary duty" (2002) 55 *Vanderbilt Law Review* 1399; JH Langbein "Questioning the trust law duty of loyalty: Sole interest or best interest" (2005) 114 (5) *Yale Law Journal* 929 and M Conaglen "The nature and function of fiduciary loyalty" (2005) 121 *Law Quarterly Review* 452.

The extension of fiduciary regulation into the public law domain through the notion of the social trust forms part of the broader preoccupation of this study – in this connection this study closely follows the developments around the public trust. Repeated abuses of authority and trust by public functionaries necessarily call for a closer scrutiny of the relationship between public functionaries (the governors) and the citizenry (the governed).¹¹¹ Concededly, and as later chapters will demonstrate, a re-scrutinisation of the relationship between the governors and the governed through the lens of the social trust does not entail a wholesale importation of the principles of trusts as applied in private law – to do so would be plain naïveté. Conversely, however, to deny the applicability of any such trust relationship is to deny the very fundamentals of democracy.¹¹² Arguably, the central thesis of the doctrine of representative government is that the powers of government belong to and are derived from the governed¹¹³ and not just at a rhetorical level. Mason J., of the Australian High Court, has confirmed this position by positing that the relationship between the governors and the governed in a representative democracy evinces all the major hallmarks of a fiduciary relationship thus making it amenable to fiduciary regulation.¹¹⁴ In the main, the assertion that the powers of government belong to and are derived from the people ought to be given substantive and efficacious meaning and not left to be filled with political rhetoric.

Although Cotterrell, for example, has proposed a definition of the social trust, his enquiry has largely been aimed at the provision of a theoretical framework for appreciating the ever increasing and pressing role of trusts in society and also to demonstrate how the wider moral notion of trust can be used as a basis for social relationships.¹¹⁵ Apart from a few Australian works on the subject, the general notion of government as a trust has often been regarded as a mere ‘political metaphor’ in Anglo-American legal discourse.¹¹⁶ Notably, an early opportunity to articulate the notion of government as a trust in Malawi was missed when the Malawi Supreme Court of Appeal (MSCA) dismissed the case of *President of Malawi and*

¹¹¹ G Dal Pont & others (note 104 above) 116.

¹¹² As above.

¹¹³ Per Deane & Toohey JJ in *Nationwide News Pty Ltd v Will* (1992) 66 ALJR 658 680.

¹¹⁴ *Australian Capital Television Pty Ltd v Commonwealth (No. 2)* (1992) 66 ALJR 695 703.

¹¹⁵ R Cotterrell (note 28 above).

¹¹⁶ Salevao (note 39 above) 3. A prime example of this dominant approach in the Anglo-American legal tradition is offered by the decision in *Tito v Waddell* (1977) Ch 106. This case is discussed at greater length in Chapter 2 of this study.

another v RB Kachere and others on technical grounds.¹¹⁷ However, in the extension of equitable doctrines to the management of government institutions and the general control of public officers one may easily find a connection to good governance as increasingly accepted across Africa. This interface between good governance and fiduciary regulation remains almost wholly unexplored in Africa even though several authors have demonstrated that variants of the fiduciary concept have always been recognised in Africa.¹¹⁸ In as far as Malawi is concerned, at least three scholars have expressly recognised that the Constitution constitutes the governors as trustees or at least fiduciaries vis-à-vis the governed.¹¹⁹ None of the scholars, however, has gone on to explore the various implications that arise from such a constitutional design. This study is an attempt to plug that gap. By premising the study directly on constitutional provisions this study is also an attempt to expose an alternative theory for understanding and improving constitutional institutions and constitutional governance in Malawi.¹²⁰ Further, by focusing on the duties of public functionaries this study intends to demonstrate that through tenets established by the Constitution a more efficacious accountability governance scheme can be recognised and practised than what currently obtains. An important dimension of this governance framework is offered by the

¹¹⁷ MSCA Civil Appeal No. 20 of 1995 (Being High Court Civil Case No.2187 of 1994). This case, which was commenced not long after the Constitution was adopted, will be discussed in greater detail later in the study. Suffice it to point out that the issues raised by the applicants were clearly premised on the assumption that the government had breached its trust with the citizenry. The case was dismissed on the basis that the applicants did not have *locus standi*. For a critique of the Malawian courts' approach on *locus standi*, see MJ Nkhata "Public interest litigation and locus standi in Malawian constitutional law: Have the courts unduly fettered access to justice and legal remedies?" (2008) 2 (2) *Malawi Law Journal* 209-225. For an earlier Malawian authority which seemingly contradicts the holding in *President of Malawi and another v RB Kachere and others*, see *Taulo and others v Attorney General and others* [1993] 16(2) MLR 856.

¹¹⁸ S Asante (note 22 above) ; A Mbalanje (note 22 above) and B Pachai (note 22 above).

¹¹⁹ G Kamchedzera "Democratic accountability, well-being, policy and leadership's compliance with human rights principles" Paper presented at a workshop on *Constitutionalism and democratic accountability in Malawi and South Africa: Ten years after change* Blantyre 12-13 July 2003; FE Kanyongolo (note 6 above) 353 postulates that under the 1994 Constitution '...power was to be primarily located in the people of Malawi; with the state exercising it only as trustee and with due respect for the fundamental rights and liberties of the people of individuals' and R Kasambara "Constitutionalism and democratic accountability during the multiparty decade in Malawi: Challenges and opportunities for the civil society" Paper presented at a workshop on *Constitutionalism and democratic accountability in Malawi and South Africa: Ten years after change* Blantyre 12-13 July 2003.

¹²⁰ At a different level this study may also be conceived as further developing what administrative law has long recognised, to wit, that statutory power conferred for public purposes is conferred on trust and can only be validly used in the manner that the legislature intended in conferring the power – W Wade & C Forsyth *Administrative law* (2004) 354. See also, *Commissioners of Customs and Excise v Cure and Deeley Ltd* (1962) 1 QB 340 366-7.

values of *ubuntu* when merged with constitutional principles and the trust concept. The infusion of the principles underlying *ubuntu* into governance and constitutionalism, this study argues, will confer legitimacy on the social trust-based approach.

1.8 Methodology

This study will rely on desk research. Its approach is the comparative-analytical approach with the result that the viability of particular propositions obtained from the material under consideration will continuously be tested by making reference to similar developments in other jurisdictions. Extensive cross-jurisdictional research will also be conducted not only to establish whether or not the propositions being propounded are recognised in other jurisdictions but also to decipher whether these offer viable alternatives for governance and constitutionalism. It is also hoped that the cross-jurisdictional referencing will also help in providing insights about the viability of the social trust-based governance and constitutionalism framework that is being proposed in this study. In terms of cross-jurisdictional references, the study will largely refer to jurisprudence from common law jurisdictions because of their conceptual affinities to the Malawian legal system which is modelled on the English common law system. In this connection the study will largely be relying on jurisprudence dealing with the trust as developed in the common law world.¹²¹ It must also be pointed out that the research in this study while centrally focussing on legal materials also draws heavily from analyses of political science materials.

1.9 Limitations of the study

This study is essentially about the efficacy of the law as a tool for social restructuring – the deliberate adoption of specified legal interventions with the objective of bringing about particular results. From the preceding assertion arises this study's major limitation.¹²²

¹²¹ As earlier pointed out – see footnote 97 - the legal validity of the common law, doctrines of equity and statutes of general application in force in England on the 11 August 1902 was transferred to Malawi (then British Central Africa) by Article 15 of the British Central Africa Order in Council of 1902. However, this study's reliance on the common law will be moderated by references to literature on Malawi that demonstrates that parallels to the trust have always existed in traditional systems of governance in Malawi.

¹²² Concededly there are scholars who argue that the law is inherently unsuitable as a tool for societal change, for example, because of its constant recognition of generality at the expense of particularity – K Van Marle "Love, law and South African community: Critical reflections on 'suspect intimacies' and 'immanent subjectivity' in H Botha & others (eds) *Rights and democracy in a transformative constitution* (2003) 231 241. For an instructive treatise on the law's limitations, see A Allot *The limits of law* (1980). Christodoulidis also argues that the law routinely allows a selective manifestation of conflict which makes it unsuitable as a guarantor of public deliberative processes – EA Christodoulidis *Law and reflexive politics* (1998) xv-xvi.

Although various authors have consistently asserted the law's claim to normative regulation, it is a fact that the law remains just one form of power in society and it does not have a monopoly to societal regulation.¹²³ As acknowledged, the law cannot by itself achieve all social and economic transformation in a society.¹²⁴ As a matter of fact, it is generally acknowledged that not even the most progressive constitution can solve all ills of a particular society.¹²⁵ The study's inspiration, however, is drawn from the fact that in spite of the above detractions from the law's 'liberative' potential, it is also widely acknowledged that in social restructuring, the law may very well be conceived of as a double-edged sword.¹²⁶ Depending on the measures adopted and the manner in which they are implemented the law may play either a positive or negative role.¹²⁷ The delicate task is the crafting of legal interventions to maximise the positive role of the law while excluding, in as far as is possible, its negative role.¹²⁸

It is also important to realise that while governance has repeatedly been recognised as being the basis of any meaningful pro-poor intervention in Malawi, it must be conceded that even the ideal of governance may not solve all problems that Africa or Malawi faces. A social trust-based conception of governance and constitutionalism, however, is intended to utilise the existing institutions and mechanisms to ensure that the constitutional promises are realised in such a manner that the benefits derived therefrom are equitably enjoyed by everyone. This study thus concedes that social trust-based governance and constitutionalism by itself may not be a comprehensive solution but rather social trust-based governance and constitutionalism will inevitably lead to the creation of a framework through which numerous solutions to specialised problems may then be applied efficaciously.¹²⁹

¹²³ G Kamchedzera & C Banda (note 54 above) 12.

¹²⁴ H Englund *Prisoners of freedom: Human rights and the African poor* (2006) 128.

¹²⁵ J Hatchard & others (note 2 above) 25.

¹²⁶ For example, in spite of the Marxist disdain for the law as an instrument of class oppression it is still accepted by some Marxists that the law is necessary in all societies of any complexity. The law is thus not a nakedly pliable instrument of oppression – EP Thompson *Whigs and Hunters: The Origin of the Black Act* (1975) 258-269. See also, DH Cole "An unqualified human good: EP Thompson and the rule of law" (2001) 28 (2) *Journal of Law and Society* 177-203.

¹²⁷ S Gloppen & F Kanyongolo (note 12 above).

¹²⁸ R Cotterrell *Sociological jurisprudence* (1992) 44-65.

¹²⁹ This concession is made on a clear understanding that linearity is hardly a forgone outcome between social trust-based governance and sustainable development much in the same way as there is no linearity between democracy and development – A Adedeji "Democracy and development: A complex relationship" in K Matlosa & others (eds) (note 43 above) 19.

Even more important here is the social, political and cultural context. The Constitution and constitutional practice in Malawi is juxtaposed against a deeply rooted neopatrimonialistic ethos.¹³⁰ This neopatrimonialistic ethos is largely not supportive of constitutionalism and good governance.¹³¹ While this is an obvious challenge, it does not, this study contends, entail that no effort should be expended in formulating approaches for dealing with the effects of neopatrimonialism.¹³² Additionally, it is important to appreciate that this study is essentially constructed as a conceptual approach to improving governance and constitutionalism in Malawi. Thus, even though an attempt is made in Chapter Five to demonstrate the practical relevance of the social trust-based approach to governance and constitutionalism in Malawi, the attempt does not purport to be a blue print for governance and constitutionalism in Malawi. It is merely an attempt at providing an indication of the possible direction that governance and constitutionalism in Malawi must be heading for constitutionalism to take root in the country.

¹³⁰ D Booth & others *Drivers of change and development in Malawi* ODI Working Paper 261 (2006) 16-20 <<http://www.odi.org.uk/resources/download/1318.pdf>> (Accessed 20 September 2009).

¹³¹ It is important to note that in most of Africa, non-democratic attributes have become deeply embedded in the social fibres of society and are resilient – G Malaba “The fostering of attitudes for development in a transition to democracy” in AP Burger (ed) *Ubuntu: Cradles of peace and development* (1996) 65 66.

¹³² Max Weber is credited with coining the term patrimonialism. He used it to denote a form of political domination in which the exercise of authority has arbitrary elements and is under the direct control of a ruler. The patrimonial ruler extends personal favours to stay in power often at the expense of traditional limitations on authority, see M Hawkesworth & M Kogan (eds) *Encyclopedia of government and politics* (1992) 230-231. Neopatrimonialism is a later form of patrimonialism and it combines the traditional patrimonial attributes with elements of rational bureaucratic control. The neopatrimonial state is often accused of being responsible for stultifying development in Africa – DW Brinkerhoff & AA Goldsmith “Clientelism, patrimonialism and democratic governance: An overview and framework for assessment and programming” <http://www.abtassociates.com/reports/2002601089183_30950.pdf> (Accessed 7 August 2010). Although patrimonialism and neopatrimonialism are widely used in relation to Africa, the terms themselves have received little critical analysis for the purposes of understanding African politics - G Erdmann & U Engel “Neopatrimonialism revisited – beyond a catch-all concept” (2006) GIGA Working Paper No. 16. According to Mkandawire, the term neopatrimonialism attempts to explain everything and ends up explaining nothing – T Mkandawire “Thinking about developmental states in Africa” <http://www.unu.edu/hq/academic/Pg_area4/Mkandawire.html> (Accessed 7 August 2010). Nugent asserts that the literature around neo-patrimonialism that attempts to explain how the networks actually function as contrasted to merely asserting their existence is very limited, see P Nugent “States and social contracts in Africa” (2010) 63 *New Left Review* 35.

A further limitation of this study relates to the fact that the solutions being proffered herein are all applicable within the context of the organisation of the nation-state. In this regard it is important to note that globalisation, however defined, has steadily worked to erode the 'consummate' power that traditionally resided in the nation-state.¹³³ The overall effect of globalisation is that it may, in some contexts, detract from the authority that the state would ordinarily have while at the same time ceding authority to the 'amorphous space of transnational phenomena which is not amenable to democratic control.'¹³⁴ In as far as governance-based interventions inevitably require the existence of a fully functional state, globalisation, to the extent that it may remove some matters from state control, may serve to undermine governance initiatives. However, this study takes solace from the fact that the diversity of the processes that fall under the globalisation umbrella can be harnessed to bring about numerous positive effects.¹³⁵ As a matter of fact, the rapid move towards democratisation that has been experienced in Africa from the late 1980's has been credited to forces of globalisation in its political manifestation. In this connection it is also important to note that in spite of its colonial origins, the state remains pivotal to the consolidation of democracy, constitutionalism and the maintenance of stability in Africa.¹³⁶

1.10 Overview of the chapters

This study is divided into six chapters. Chapter One has been directed at introducing the study, explaining its significance, justification, among others, and addressing all other preliminary matters.

Chapter Two, which will form the study's conceptual framework, will define and explore *ubuntu*, the social trust, constitutionalism as well as good governance in detail. The interface between *ubuntu*, the social trust, constitutionalism and good governance will also be explored with the objective of expounding on the interconnectivities that exist between the concepts. The justification for this study's equation of social trust-based governance and constitutionalism to *ubuntu*-based governance and constitutionalism will become apparent

¹³³ C Ake (note 82 above) 26-28 and Chaloka Beyani in J Lewis & others (note 57 above) 39.

¹³⁴ C Ake (as above).

¹³⁵ It is important in this connection to note that there are various dimensions to globalisation. The principal dimensions are economic, cultural, social and political – G Modelski "The four dimensions of globalisation" <<https://faculty.washington.edu/modelski/Global4.html.html>> (Accessed 10 September 2009). Importantly, globalisation, if properly harnessed can be a source of immense good – see J Stiglitz *Globalisation and its discontents* (2002).

¹³⁶ GK Kieh "Reconstituting the neo-colonial state in Africa" (2009) 26 (1) *Journal of Third World Studies* 41 42.

after Chapter Two unravels the interconnectivities between the concepts. Chapter Two also argues for the articulation of a paradigm for governance and constitutionalism that is based neither wholly on Western concepts nor African traditional values. The Chapter argues, that there is a need to synthesise the good from both intellectual traditions to come up with a workable paradigm for governance and constitutionalism. The overall objective of Chapter Two is to provide a theoretical framework for appreciating social trust-based governance and constitutionalism in Africa, generally, and Malawi, specifically.

Chapter Three will begin by providing a governance and constitutionalism profile for Malawi. This profile will demonstrate how much attention has been paid by successive Malawi governments to matters of governance and constitutionalism. The discernible governance patterns will also be evaluated to determine whether or not past initiatives in governance and constitutionalism could have benefited from a deliberate infusion of social trust norms. The discussion in Chapter Three will also highlight some of the major lessons that the patterns from governance and constitutionalism in Malawi reveal. From an analysis of the patterns in governance and constitutionalism Chapter Three will conclude by arguing that there is a need for a paradigm shift in the conceptualisation of governance and constitutionalism in Malawi.

In conceptualising alternative approaches to constitutionalism and good governance, Chapter Four will offer a critique of liberal democracy especially as practised in Malawi, specifically and Africa, generally. This critique will be conducted because it is under liberal democratic frameworks that most African countries have attempted to attain constitutionalism and good governance. It is also in Chapter Four that concrete connections will be made between social trust-based governance and African traditions, concepts and values especially *ubuntu*. Chapter Four concludes by urging the conceptualisation and practice of governance and constitutionalism from a perspective that takes cognisance of African values without at the same time ignoring the positive values in the Western model.

Chapter Five will demonstrate how the revitalisation of social trust based-governance can be operationalised in Malawi. By referring to the current constitutional framework and other statutes an attempt will be made to demonstrate the relevance and practice of social trust-based governance and constitutionalism in Malawi. By focussing on selected thematic areas Chapter Five will also demonstrate how social trust-based governance can be implemented in Malawi and postulate on the possible changes that this may bring about. Finally, Chapter Six will present this study's conclusions.

CHAPTER 2: UNDERSTANDING THE CONCEPTS AND THEIR RELEVANCE: *UBUNTU*, THE SOCIAL TRUST, GOOD GOVERNANCE AND CONSTITUTIONALISM

- 2.1 Introduction
- 2.2 What is *ubuntu*?
- 2.2.1 *Ubuntu* in modern day Africa: Romantic idealism or potent catalyst?
- 2.3 Understanding the social trust
- 2.3.1 The law and fiduciary relationships
- 2.3.2. Identifying fiduciaries and fiduciary relationships
- 2.3.3 Fiduciaries and fiduciary relationships in an evolving society
- 2.4 Good governance
- 2.4.1 Emergence of the good governance concept
- 2.4.2 Elements commonly associated with good governance
- 2.4.3 Is good governance important for Africa?
- 2.5 Constitutionalism
- 2.5.1 What is meant by constitutionalism?
- 2.5.2 Some major aspects of constitutionalism
- 2.5.3 Constitutions and constitutionalism: Is constitutionalism important in Africa?
- 2.6 The interface between *ubuntu*, the social trust, good governance and constitutionalism
- 2.6.1 *Ubuntu*, constitutionalism and good governance: The case for conceiving government as an enforceable trust
- 2.7 Impediments to recognising government as an enforceable trust
- 2.7.1 'Political metaphor' and 'true trusts': Exploring the conundrum
- 2.7.2 The case for circumventing the objections against recognising government as an enforceable trust and some consequential governance implications
- 2.8 A conceptual starting point: Government as trust and administrative law
- 2.9 What is social trust-based governance? The search for a viable paradigm for governance and constitutionalism in Africa
- 2.10 Conclusion

2.1 Introduction

This chapter endeavours to explain the basic concepts around which this study is constructed. The concepts to be explained are *ubuntu*, the social trust, good governance and constitutionalism. In the course of explaining these concepts, their importance, mainly from the perspective of governance and constitutionalism in Africa, will also be highlighted.

Importantly, aside from expounding on what the concepts are ordinarily understood to connote the Chapter will also highlight the interface that exists between *ubuntu*, the social trust, good governance and constitutionalism. By further explaining how each of the concepts manifests itself in practice, it is hoped that by the end of the Chapter the case for social trust-based governance will have become clear. The imperatives for recognising and enforcing social trust-based governance and constitutionalism together with some common objections to social trust based-governance are also discussed in this Chapter. Suggestions about circumventing these objections are also presented in this Chapter.

2.2 What is *ubuntu*?

The concept of *ubuntu*, like many other African concepts, does not easily lend itself to a rigid definition.¹ In spite of *ubuntu*'s widespread use in speech, its meaning cannot be ascertained with mathematical exactitude.² Numerous connotations are associated with *ubuntu*.³ Because of its ingrained 'Africanness' defining *ubuntu* using a non-African language, English for example, and also from an abstract, as contrasted from a concrete view, defies the very essence of the African world-view that underlies *ubuntu*.⁴ To properly appreciate *ubuntu* one must thus deliberately seek to understand the world view of the people in which it has roots.⁵

¹ JY Mokgoro "Ubuntu and the law in South Africa" <<http://web.archive.org/web/20040928041520/www.puk.ac.za/law/per/documents/98v1mokg.doc>> (Accessed 22 September 2010). This study agrees with Bohler-Muller that 'pinning' down the meaning of *ubuntu* in order to render it more useful and less worthless may actually diminish the potential of this value in African philosophy - N Bohler-Muller "Some thoughts on the ubuntu jurisprudence of the Constitutional Court" in D Cornell & N Muvangua (eds) *Law in the ubuntu of South Africa* 478 487 <http://isthisseattaken.co.za/pdf/Papers_Cornell_Muvangua.pdf> (Accessed 24 June 2010).

² RN Richardson "Reflections on reconciliation and ubuntu" in R Nicolson (ed) *Persons in community: African ethics in global culture* (2008) 65 78.

³ T Metz "Toward an African moral theory" (2007) 15 (3) *The Journal of Political Philosophy* 321 323.

⁴ As Tutu acknowledges 'Ubuntu is very difficult to render into a Western language. It speaks of the very essence of being human.'- DM Tutu *No future without forgiveness* (1999) 31. See also, DB Ntsebeza "Can truth commissions in Africa deliver justice" in A Bösl & J Diescho (eds) *Human rights in Africa: legal perspectives on their protection and promotion* (2009) 375 384 where the author also concedes that it is impossible to explain *ubuntu* in one word.

⁵ A Shutte "Ubuntu as the African ethical vision" in MF Murove (ed) *An anthology of comparative and applied ethics* (2009) 85 89. It must be noted that much of the literature on *ubuntu* harps on the supposed unique Africanness that underlies the concept. While there is clearly an underlying Africanness to *ubuntu* it is also important to realise that most of the values that *ubuntu* stands for are not exclusively African ideals. By way of illustration, *ubuntu* bears significant similarities to Jean-Luc Nancy's concept of 'being singular plural' which contends that there can be no existence without coexistence, see, Jean-Luc Nancy *Being*

Linguistically, *ubuntu* is a *Nguni* concept that means ‘personhood.’⁶ However, the term is found among many other African ethnic groups though not necessarily under the same name.⁷ For example, in *Shona* it is *unhu* and in both *Tswana* and *Sotho* it is *botho*. Kayuni and Tambulasi posit that in Malawi *ubuntu* is known as *umunthu* in Chewa and *umundu* in Yao.⁸ In thinking about the translations of *ubuntu* into English and other non-African languages one must be mindful of the potential for considerable loss of culture specific meanings that may occur in the process.⁹ Nevertheless, as Mbigi has argued, *ubuntu* is the essence of being human and it embodies a positive perception of African personhood.¹⁰ It refers to the collective interdependence and solidarity of communities of affection. *Ubuntu* is concerned with the welfare of everyone in the community.¹¹ *Ubuntu* is thus an African view of life and worldview.¹² It is also the collective consciousness of the African people which is

singular plural (2000). It is also to be noted that Jean-Luc Nancy’s ‘being singular plural’ is heavily influenced by the Heideggerian concept of *mitsein* (being-with) which embodied Heidegger’s argument about how individuation is bound up in being with others. For a helpful analysis, see S Sorial *Heidegger and the problem of individuation: Mitsein (being-with), ethics and responsibility* PhD Thesis: University of New South Wales (2005):

⁶ L Mbigi *The spirit of African leadership* (2005) 69. According to Iroanya, where the name *ubuntu* comes from is not important, it is the philosophy underlying the concept which is important – RO Iroanya “Citizenship-Indigeneship contradictions and resource control in Africa – A case for the African tradition of ubuntu” <http://www.unisa.ac.za/contents/faculties/humanities/pol/docs/Africa_Day_Paper_Ubuntu.doc> (Accessed 23 June 2009).

⁷ NM Kamwangamalu “Ubuntu in South Africa: A sociolinguistic perspective to an African concept” <<http://www.highbeam.com/doc/1G1-90925444.html>> (Accessed 13 April 2010) For a more comprehensive list of *ubuntu*’s equivalents in various African languages see J Broodryk “Ubuntu life coping skills: Theory and practice” Paper delivered at CCEAM Conference 12-17 October 2006, Nicosia, Cyprus <<http://www.topkinisis.com/conference/CCEAM/wib/index/outline/PDF/BROODRYK%20John.pdf>> (Accessed 13 April 2009).

⁸ R Tambulasi & H Kayuni “Can African feet divorce Western shoes? The case of ‘Ubuntu’ and democratic governance in Malawi” (2005) 14 (2) *Nordic Journal of African Studies* 147 148.

⁹ DA Forster “Validation of individual consciousness in strong artificial intelligence: An African theological contribution” (2006) 247 PhD Thesis, University of South Africa. at <<http://spirituality.org.za/files/D%20Forster%20doctorate.pdf>> (Accessed 20 January 2010).

¹⁰ L Mbigi (note 6 above) 69.

¹¹ RN Nicolson “Introduction” in RN Nicolson (ed) (note 2 above) 1 9.

¹² Mkhize states that ‘Ubuntu is not new. Similar concepts are found across Africa over many centuries, back to ancient times’ – N Mkhize “Ubuntu and harmony: An African approach to morality and ethics” in RN Nicolson (ed) (note 2 above) 35 36. According to Broodryk ‘Ubuntu is an ancient African worldview based on the primary values of intense humanness, caring,

also conceptualised as African humanism.¹³ It is important, however, to realise that *ubuntu* is a philosophical ethic. This is because some of its detractors have often trivialised it as coming from an outmoded form of life.¹⁴ In the context of this study, it is conceded that aside from *ubuntu's* lack of amenability to an all embracing definition, the utility of the concept of *ubuntu* to law has also been the subject of diverse and differing scholarly opinions.¹⁵

As an African philosophy of life, *ubuntu* in its most fundamental sense represents personhood, humanity, humanness and morality.¹⁶ It describes group solidarity where such group solidarity is central to the survival of society in a context of scarce resources. As pointed out in Chapter One, the *ubuntu* philosophy finds its cardinal embodiment in the *Zulu* expression *umuntu ngumuntu ngabantu* (*motho ke motho batho* in *Sotho*) which literally means a person can only be a person through others – often reduced to ‘I am because we are’ in English.¹⁷ It is, again, important to recall that *ubuntu* is both a factual description and a rule of conduct or social ethic.¹⁸ This is because it not only describes human being as

sharing, respect, compassion and associated values, ensuring a happy and qualitative human community life in the spirit of family’ – J Broodryk *Ubuntu: Life lessons from Africa* (2002) 56.

¹³ E Prinsloo “Ubuntu culture and participatory management” in P Coetzee & A Roux (eds) *Philosophy from Africa: A text with readings* (1998) 41.

¹⁴ D Cornell “Ubuntu pluralism and the responsibility of legal academics to the new South Africa” (2009) 20 (1) *Law and Critique* 43 49. The trivialisation of *ubuntu* accords with the dominant Western perception which has tended, almost uniformly and uncritically, to perceive in negative light anything that originates from Africa. For helpful analyses of this perception see A Mbembe *On the post colony* (2001) Chapter 1 – “Introduction: Time on the move” and JF Bayart *The state in Africa: The politics of the belly* (1993) – “Introduction: The historicity of African societies”.

¹⁵ See, for example, D Cornell (as above); D Cornell & K van Marle “Exploring ubuntu: Tentative reflections” (2005) 5 (2) *African Human Rights Law Journal* 195 196 and R English “Ubuntu: The quest for an indigenous jurisprudence” (1996) 12 (4) *South African Journal on Human Rights* 641.

¹⁶ JY Mokgoro (note 1 above).

¹⁷ L Mbigi & J Maree *Ubuntu: The spirit of African transformation management* (1995) 1-7 quoted by JY Mokgoro (note 1 above). Within Malawi, Tambulasi and Kayuni have identified several *Chewa* epithets that epitomise *ubuntu* philosophy and these include *lende nkukankhana* (one prospers with the help of others) and *mutu umodzi susenza denga* (To successfully accomplish a task one needs the help of others) – Tambulasi & Kayuni (note 8 above) 149.

¹⁸ DJ Louw “Ubuntu and the challenges of multiculturalism in post-apartheid South Africa” <<http://www.phys.uu.nl/~unitwin/ubuntu.doc>> (Accessed 22 June 2009).

'being-with-others' but also prescribes what 'being-with-others' should entail.¹⁹ The significance of *ubuntu* becomes much clearer when its social value is highlighted. In Mokgoro's words:²⁰

Group solidarity, compassion, respect, human dignity, humanistic orientation and collective unity have, among others been defined as key social values of Ubuntu. Because of the expansive nature of the concept, its social value will always depend on the approach and the purpose for which it is depended on. Thus its value has also been viewed as a basis for a morality of cooperation, compassion, communalism and concern for the interests of the collective respect for the dignity of personhood, all the time emphasising the virtues of that dignity in social relationships and practices. For purposes of an ordered society, Ubuntu was a prized value, an ideal to which age-old traditional African societies found no particular difficulty striving for.

In *ubuntu* governed societies, therefore, there is emphasis on duties and virtues though rights are always implied.²¹ The *ubuntu* philosophy is firmly premised on an acknowledgment that a human being is a social being. A society governed by *ubuntu* emphasises that everyone should participate in society and not disappear in the whole. A tradition of consultation and decision making by ordinary members of society is also embodied in *ubuntu*.²² The consultation that precedes decision making in societies that acknowledge *ubuntu* is derived from an old age pre-colonial African ethos that, arguably, permeated all pre-colonial African societies.²³ The consultation preceding decision making in most pre-colonial African societies has led scholars to conclude that most African societies were inherently democratic even though the word democracy may not have been in use then.²⁴

¹⁹ DJ Louw *Ubuntu: An African assessment of the religious other* <<http://www.bu.edu/wcp/Papers/AfriLouw.htm>> (Accessed 8 September 2009).

²⁰ JY Mokgoro (note 1 above).

²¹ E Prinsloo (note 13 above) 43.

²² As above.

²³ While it is often remarked that decision-making in traditional African societies was governed by consensus, this assertion, like most other generalisations about complex subjects, must be taken with a pinch of prudence. Even though there is considerable evidence in support of the preceding assertion, the diversity and variety of African political systems means that the implementation of the consensus principle was obviously varied – K Wiredu "Democracy and consensus in African traditional politics: A plea for non-party polity" in P Coetzee & A Roux (eds) (note 13 above) 374-375 and M Hansungule "Administering the African society through the living law" in L Lindholt & S Schaumburg-Muller (eds) *Human rights in development yearbook 2003: Human rights and local/living law* (2005) 398.

²⁴ J Sindane & I Liebenberg "Reconstruction and the reciprocal other: The philosophy and practice of Ubuntu and democracy in African society" (2003) 19 (3) *Politea* 31 34-37.

Ubuntu must not, however, be confused with a simple form of communalism or communitarianism, if by these terms one implies the privileging of the community over the individual.²⁵ For *ubuntu*, the community is relevant because a person fulfils his potential through it. The community is the context through which an individual fulfils his potential.²⁶ *Ubuntu* thus defines a person through one's relationship with others. Understood from the *ubuntu* perspective the word 'individual' signifies a plurality of personalities corresponding to the multiplicity of relationships in which the individual in question stands.²⁷ The community, clearly, is not a rent-seeking abstraction existing outside the individual that seeks automatic priority of individual interests. As Cornell and Van Marle ably argue:²⁸

... what is at stake here is the process of becoming a person or, more strongly put, how one is given the chance to become a person at all. The community is not something "outside" some static entity that stands against individuals. The community is only as it is continuously brought into being by those who "make it up".... The community, then, is always being formed through an ethic of being with others, and this ethic is in turn evaluated by how it empowers people. In a dynamic process the individual and community are always in the process of coming into being. Individuals become individuated through their engagement with others and their ability to live with their capability is at the heart of how ethical interactions are judged.

Ubuntu is thus not just about communalism, communitarianism or collectivism.²⁹ Neither does *ubuntu* result in the automatic and pervasive prioritisation of the community over the individual. It is argued that a crucial component of *ubuntu* is interdependence.³⁰ This flows

²⁵ D Cornell & K van Marle (note 15 above) 195.

²⁶ M Munyaka & M Motlhabi "Ubuntu and its socio-moral significance" in MF Murove (ed) (note 5 above) 63 68.

²⁷ DJ Louw (note 19 above). As Louw demonstrates this perspective contrasts markedly with the Cartesian conception of individuality. In Cartesian terms the individual or self can be conceived without thereby necessarily conceiving the other. The Cartesian individual exists prior to or separately and independently from the rest of community or society. Strikingly the ultimate embodiment of the Cartesian individual is expressed in the statement *Cogito ergo sum* (I think therefore I am) which is in direct contrast to *umuntu ngumuntu ngabantu*.

²⁸ D Cornell & K van Marle (note 15 above) 205-206.

²⁹ Concededly the communality and consensus that *ubuntu* emphasises may be abused to enforce group solidarity while at the same time legitimating 'tyrannical customs' or 'totalitarian communalism'. This is all unnecessary where *ubuntu* is employed to acknowledge unity and diversity – DJ Louw (note 18 above).

³⁰ L Mbigi (note 6 above) xv.

from *ubuntu*'s foundational premise that a human being only becomes a full human being through others.

Importantly, it is not enough for Africans to hold that their governing philosophy is *ubuntu*. Africans need to translate this uniquely African perspective into an organised, disciplined and prosperous way of modern life characterised by justice and the establishment of sustainable and fair communities.³¹ *Ubuntu* and its ideals must thus be related concretely to solving the problems that Africa is currently facing. As Sindane and Liebenberg argue, the philosophy of *ubuntu* needs to be studied closely in order to strengthen and revive those features that can enrich governance and give democracy a distinctly African flavour.³² Clearly, the present preoccupation by Africans should not be to rehearse the ancient wisdom that characterised pre-colonial African societies but the re-articulation of the ethical insights that characterised pre-colonial societies in ways that help Africa solve the problems it is currently facing.³³

2.2.1 *Ubuntu* in modern day Africa: Romantic idealism or potent catalyst?

Ubuntu in its 'pure form' evidently belongs to Africa's past and more specifically to the period preceding the advent of colonialism. Changes in African societies since the inception of colonialism necessarily entail the impossibility of reverting back to *ubuntu* in its 'pure form.'³⁴ However, as Mokgoro has asserted, the call to a reaffirmation of *ubuntu* should not be understood as a call for a reincarnation of *ubuntu* in exactly the same manner that it was practised in the years before colonialism.³⁵ Rather the failures of imported institutions in Africa make it imperative that Africa should re-establish contact with landmarks of modernity under indigenous impetus.³⁶ This, according to this study, means that there is a pressing need to reevaluate most of the imported institutions through the lens of ideals that are intrinsically African in nature. *Ubuntu* is an example of a concept that can be used to imbue foreign concepts like liberal democracy and constitutionalism, with a uniquely African flavour.

³¹ As above 72.

³² J Sindane & I Liebenberg (note 24 above) 37.

³³ RN Nicolson "Introduction" in RN Nicolson (ed) (note 2 above) 5.

³⁴ Biko, however, argued that the in spite of the 'severe blows' and the 'battering' that African culture underwent its fundamentals remain evident in everyday life. He contended that it is very difficult to kill the truly African heritage – S Biko "Some African cultural concepts" in A Stubbs (ed) *Steve Biko: I write what I like, Selected writings* (1996) 40-47.

³⁵ JY Mokgoro (note 1 above).

³⁶ A Mazrui cited by Mokgoro (noted 1 above).

In this process parallels and correlates can be established and the foreign concepts indigenised as well.

Foundational work on the relevance of *ubuntu* in several other disciplines already exists. *Ubuntu* has thus been explored within religion, politics, law, business, social security, education, healthcare, gender and globalisation.³⁷ As later extrapolations in this study will demonstrate, the focus in this study lies with the applicability of *ubuntu* for governance and constitutionalism. This study recognises, without unduly romanticising the position, that the *ubuntu* concept is inherently democratic as it has inbuilt mechanisms for protecting the individual and society's rights.³⁸ It is also recognised that, in practice, the positive tenets of *ubuntu* and democracy can complement each other.³⁹ Even more importantly, this study will demonstrate that *ubuntu* can be a principal catalyst in the development of indigenous jurisprudence across Africa.⁴⁰ In as far as the development of indigenous jurisprudence is concerned, the values underlying *ubuntu* can, for example, be utilised to determine the

³⁷ See, DJ Louw (note 18 above). For an example of an interrogation of *ubuntu* within the context of African Christian anthropology, see DA Forster (note 9 above). For a deeper interrogation of the relevance of *ubuntu* to Christianity, see M Battle *Ubuntu: I in you and you in me* (2009). For a critique of Western capitalism through *ubuntu* lens, see MF Murove "On African ethics and the appropriation of Western capitalism: Cultural and moral constraints to the evolution of capitalism in Post-colonial Africa" in RN Nicolson (ed) (note 2 above) 85-110. For the relevance of *ubuntu* to informal social security systems, see CI Tshoose "The emerging role of the constitutional value of *Ubuntu* for informal social security in South Africa" (2009) 3 (1) *Journal of African Legal Studies* 12-19. For *ubuntu* and servant leadership, see K Creff "Exploring ubuntu and the African renaissance: A conceptual study of servant leadership from an African perspective" <http://www.regent.edu/acad/global/publications/sl_proceedings/2004/ceff_exploring_ubuntu.pdf> (Accessed 22 June 2010). Several jurisprudential analyses of *ubuntu* also exist and include, among others: M Ramose "Law through ubuntu" in D Cornell & N Muvangua (eds) (note 1 above) 398, R English (note 15 above) and D Cornell & K van Marle (note 15 above). Arnoldi-Van der Walt has argued during apartheid South African trade unions and liberation movements largely relied on *ubuntu* for organising their membership – SE Arnoldi-Van der Walt "An evaluation of ubuntu as an Afrocentric management (and) communication approach" D Phil Thesis: University of Pretoria (2000) 117-119. It must be conceded that *ubuntu* has spiritual overtones especially when the role of ancestors is invoked in appreciating its value. However, the religious connotations inherent in *ubuntu* do not suggest the imposition of a particular form of spirituality or religion within social contexts marked by diversity and secularism. *Ubuntu*, it is argued, can very well support 'secular spirituality' which is spirituality experienced without the strictures of organised religion – Cf. CW du Toit "Secular spirituality versus secular dualism: Towards post secular holism as model for natural theology" (2006) 62 (4) *HTS* 1251.

³⁸ R Tumbulasi & H Kayuni (note 8 above).

³⁹ J Sindane & I Liebenberg (note 24 above) 39.

⁴⁰ R English (note 15 above) 641.

validity of law and also a society's understanding of justice.⁴¹ This demonstrates not just the malleability and flexibility of the *ubuntu* concept but also its continued relevance to African societies. This study, therefore, while conceding the impossibility of incarnating *ubuntu* in its pre-colonial form nevertheless joins voice with those asserting that there are values in the *ubuntu* philosophy which can be retrieved and utilised in present day societies.

Shutte presents an accurate summary of the values that would pervade a society governed in accordance with *ubuntu*. In such societies authority to govern would come from the community making up the society – this by itself is not novel but in *ubuntu* governed societies the people give the authority from their natural desire to be 'part of the fullest form of human community possible.'⁴² As Shutte puts it '[u]buntu sees political power as being accorded by the people as a whole to the few, to exercise over them and create conditions for personal growth and community...'.⁴³ Government, in this context, is not viewed as machine neither is governing viewed as a machine-like process.⁴⁴ The people view government as their government and they do not abdicate their responsibility for it after elections. In such societies grassroots participation in government is also deliberately encouraged and avenues for its realisation are created. *Ubuntu* also fosters patriotism.⁴⁵ This is because it enables of one's love for oneself to extend to the community as a whole. This is a very important dynamic for leaders.

It may be argued that the 'absence' of *ubuntu* in present day African societies necessarily points to the irrelevance of the concept to governance and constitutionalism in Africa. This argument ignores the fact that as a result of colonial influences Africa needs to consciously reinvent itself to properly benefit from concepts such as *ubuntu*.⁴⁶ Africans must act proactively in order to realise the benefits that *ubuntu* can confer on present day African

⁴¹ MB Ramose "An African perspective on justice and race" <<http://them.polylog.org/3/frm-en.htm>> (Accessed 8 September 2009).

⁴² A Shutte "Politics and the ethic of ubuntu" in MF Murove (ed) (note 5 above) 375 377.

⁴³ As above 386.

⁴⁴ As above 379.

⁴⁵ As above 383.

⁴⁶ For an illustration of how such a reinvention could be attained see M Hansungule (note 23 above) 371-401.

societies. Besides, the present ‘absence’ of *ubuntu* is not to be exaggerated. As Nicolson has noted:⁴⁷

Of course the fact that Africans do not always exemplify ideas such as *ubuntu* does not mean that traditional African values are discredited or of no significance, any more that the activities of some Middle Eastern rulers negate the validity of Islamic values, or the activities of President Bush and his advisers negate the validity of traditional Christian values. It is often true that people fail to live out their stated values. But the crises in Africa do mean that we must be careful not to overstate the hold that traditional African ethics have in practice in African society. They perhaps exist as a concept, as an ideal, as a lodestar, but not always as a fully lived reality.

Nicolson, this study submits, correctly embodies both the optimism and caution that must characterise approaches to *ubuntu* in present day Africa. What is notable is that, it is not that *ubuntu* is currently irrelevant but that one needs to be cautious and deliberate in having recourse to *ubuntu* and its values.⁴⁸

2.3 Understanding the social trust

Trusts as a distinctive legal category are a progeny of equity.⁴⁹ Although, as a legal category, trusts have been significantly developed in Anglo-American jurisprudence and other legal systems based on the Anglo-American model, commentary on trusts law typically makes no reference to the discussion of the idea of ‘trust’ in moral or social theory.⁵⁰ As stated in Chapter One, this is in spite of the fact that the legal concept of trust is, arguably, in some way no more than a translation into legal terms of the word ‘trust’ as used in ordinary

⁴⁷ RN Nicolson “Introduction” in RN Nicolson (ed) (note 2 above) 6.

⁴⁸ For the dangers of manipulation of *ubuntu*, see RN Richardson “Reflections on reconciliation and ubuntu” in RN Nicolson (ed) (note 2 above) 65 78-81. For another call to caution in dealing with traditional African systems and values, see C Villa-Vicencio “Transitional justice and human rights in Africa” in A Bösl & J Diescho (eds) *Human rights in Africa: legal perspectives on their protection and promotion* (2009) 33 40.

⁴⁹ By equity is meant the distinctive concepts, doctrines, principles and remedies which were developed and applied by the old Court of Chancery, as they have been refined and elaborated over the years – A Mason “The place of equity and equitable remedies in the contemporary common law world” (1994) *110 Law Quarterly Review* 239. Equity’s vitality lies in the fact that “[t]he fundamental notions of equity are universal applications of principle to continually recurring problems: they may develop but cannot age or wither” – RP Meagher & others *Equity: Doctrines and remedies* (1984) xv.

⁵⁰ R Cotterrell “Trusting in law: Legal and moral concepts of trust” in MDA Freeman & BA Hepple (eds) *Current Legal Problems* (1993) Vol. 46 Part II Collected Papers 75 76.

speech.⁵¹ The conceptual origins of the ‘trust’ in the Anglo-American legal tradition are premised on the reposition of confidence in an individual(s) for the performance of specified tasks. It is the reposition of confidence that gives rise to obligations which the courts aided by equity and in some cases the legislature have purported to develop and enforce legal parallels.⁵²

Trusts, however, must be understood as one device under the broad umbrella of the social trust.⁵³ According to Cotterrell, by social trust is meant:⁵⁴

... a trust in a broad moral sense; involving reliance, in social relationships, on other people’s good will, solicitude and competence; or a confidence that general expectations in similar social circumstances will not be frustrated.

The social trust as the broad umbrella under which several trust-based devices can be classified is much broader than the trust as developed in the Anglo-American legal tradition. As Cotterrell’s definition suggests, the social trust embodies both legal and moral conceptions of the term ‘trust’. In any social trust-based relationship, therefore, confidence is, within the parameters of the relationship, reposed in an individual(s) for the performance of specified duties or for the general management of particular resources for the benefit of designated third parties. The individual(s) in whom the confidence is reposed are often termed ‘trustees’ or more generally ‘fiduciaries’ and the individual(s) on whose behalf the trustees act are generally termed ‘beneficiaries.’⁵⁵ Crucial indicators of all social trust-based relationships are altruism, interdependence and confidence.⁵⁶ The fact that altruism, interdependence and confidence are at the core of any social trust-based relationship is a manifestation of the uniqueness of the ‘trust’ within the common law realm.⁵⁷ It is to be noted

⁵¹ G Moffat & others *Trusts: Text and materials* (2005) 1-5.

⁵² As above.

⁵³ Under this broad umbrella trusts subdivide into trusts in the higher sense and trusts in the lower sense. Trusts that occur in private law generally fall under trusts in the lower sense while public law trusts fall under trusts in the higher sense.

⁵⁴ R Cotterrell (note 50 above) 75.

⁵⁵ J Mowbray & others *Lewin on trusts* (1964) 3.

⁵⁶ GS Kamchedzera *Access to property, the social trust and the rights of a child* PhD Thesis: Cambridge University (1996) Chapter 1. As earlier alluded to, it is also this study’s argument that there was/is an inherent fiduciary tenor to societal organisation in traditional Malawian societies. This point is addressed at length in Chapter Four of this thesis especially part 4.4.

⁵⁷ An immediate contrast here is between the law of trusts and the law of contract. Historically, contract was developed by the common law courts while trusts were a creature of equity and

that the 'trust' enshrines ideas otherwise rare in most doctrines of common law systems.⁵⁸ This is epitomised by the imposition of general positive duties to act in the best interests of others even where no link of legal agreement, no consideration received by the trusted or detriment suffered by those who trust, binds the duty holder with those for whom he acts.⁵⁹

While 'trusting' may suggest a purely moral obligation conveyed on the trusted, the involvement of the law in the relationship between the trusted and conveyor of trust alters the dynamics of the relationship between the parties considerably.⁶⁰ The law radically mitigates the risk that trusting would ordinarily involve in social relationships.⁶¹ This is because, practically, it is the person who is trusted who holds power over the one who trusts, as by trusting one takes the risk that the trusted will act to meet one's expectations in diverse and unforeseen circumstances. As Fox-Decent argues '[t]o say that a beneficiary can trust and rely on a fiduciary just means that from a legal point of view, the law guarantees that the fiduciary must exercise power on the basis of the beneficiary's trust.'⁶² The law thus mitigates the risk that trusting would ordinarily entail by reversing, to some significant extent, the balance of power and dependence in the relationship between the trusted and the 'trustor'. The effect of the law's intervention in this context is that it is the person who trusts,

administered in Chancery Courts. Further, a contract represents a bargain between the contracting parties giving each some advantage while the beneficiary of a trust is a volunteer and the trustee himself normally need not obtain a benefit under the trust. It is also the essence of a contract that the agreement is supported by consideration while a trust does not require consideration for validity – PH Pettit *Equity and the law of trusts* (2006) 28-29 and G Moffat & others (note 43 above) 15-16. Trusts must also be distinguished from tort even though breaches of fiduciary duties may lie parallel to tortious claims, see PH Winfield *The province of the law of tort* (1931) Chapter VI and WVH Rogers *Winfield and Jolowicz Tort* (2006) 15-16. Two prominent factors distinguishing trusts from tort are that, firstly, trusts are built around fiduciary duties and secondly, claims for breach of trust are often for liquidated damages while tort damages are always unliquidated. There are, concededly, juristic similarities between the two concepts.

⁵⁸ R Cotterrell (note 50 above) 77.

⁵⁹ For a critical evaluation of the trust concept especially in as far as it relates to ownership of property and societal power relations generally, see R Cotterrell "Power, property and the law of trusts: A partial agenda for critical legal scholarship" in P Fitzpatrick & A Hunt (eds) *Critical legal studies* (1987) 77-90.

⁶⁰ E Fox-Decent "The fiduciary nature of state legal authority" (2005) 31 *Queen's Law Journal* 259, 263 – "... the law presumes that the fiduciary acts on the basis of the beneficiary's trust, though it is really the law rather than any particular act of the beneficiary that entrusts the fiduciary with power."

⁶¹ R Cotterrell (note 50 above) 78.

⁶² E Fox-Decent (note 60 above) 303.

the beneficiary, who acquires power to ensure that the person trusted, the trustee or fiduciary, fulfils the terms of the trust.⁶³ This is achieved by the creation of a network of legal duties that the trustee or fiduciary must always observe in acting on behalf of those that have given the trust. Further, equity has also devised a range of remedies that the beneficiaries can activate against errant fiduciaries. Principal among the remedies that equity grants to beneficiaries are the rights to demand an account and also to trace trust resources that have been transferred or appropriated in breach of the terms of the trust. The result is that a person morally dependent on the goodwill of another is converted into an equitable owner of resources able to call upon the law to control the trustee/fiduciary in order to secure one's interests.⁶⁴ The significance of the law's intervention, therefore, is that instead of putting one's trust in a trustee or fiduciary, one is allowed to have confidence in the law which guarantees and regulates the fiduciary's behaviour at all times. Strictly speaking, therefore, the trust is put in the law and not necessarily in the individual person of the fiduciary.

In spite of the diversity of devices that may fall under the umbrella of the social trust the unifying strand among all such devices is that they are underlain by fiduciary principles. The result of having a unifying strand in all social trust-based devices is that such devices are all similarly regulated by fiduciary principles. Since all social trust-based devices are governed and defined by fiduciary principles all social trust-based relationships can also aptly be referred to as fiduciary relationships.⁶⁵ In this study, therefore, the term 'trust' will be used to denote not only strict trusts but also 'trust-like' situations or 'trustee-like' positions as the basic function of the term fiduciary is to export the incidents of the express trust to new situations.⁶⁶ Further, the terms 'trustee' and 'fiduciary' are also used interchangeably unless a contrary intention is expressly stated. It is important to note that while all trustee/beneficiary relationships are fiduciary relations not all fiduciary relations are trustee/beneficiary relations. The fiduciary concept being broader embraces all trustee/beneficiary relationships and a host of other relationships that are also regulated by

⁶³ R Cotterrell (note 50 above) 78.

⁶⁴ R Cotterrell (note 59 above) 88.

⁶⁵ MJ Nkhata *The social trust and leadership roles: Revitalising duty bearer accountability in the protection of social and economic rights in Malawi and Uganda* LLM Thesis: University of Pretoria (2005) 11.
<http://repository.up.ac.za/dspace/bitstream/2263/1153/1/nkhata_mw_1.pdf> (Accessed 21 September 2009).

⁶⁶ P Birks "The content of fiduciary obligation"
<http://shelburne.butterworths.co.uk/trusttaxes/articles/dataitem.asp?ID=14312&tid=7>
(Accessed 7 August 2005).

fiduciary principles.⁶⁷ It is the ‘fiduciary’ standard that unifies the different relationships under the same umbrella. The ‘fiduciary standard’ enjoins the trustee/fiduciary to always act in the interests of the other – to act selflessly and with undivided loyalty.⁶⁸

2.3.1 The law and fiduciary relationships

Tan asserts that fiduciary law is ‘notoriously ambiguous, incorporating notions of loyalty, trust and good faith. It is almost incapable of precise definition.’⁶⁹ Of the trust, Pettit notes that no one has succeeded in producing a wholly satisfactory definition even though the general idea underlying the trust is not difficult to grasp.⁷⁰ The result is that a comprehensive and universally acceptable definition of the term ‘fiduciary’ has yet to be crafted. This, however, is not for want of effort. Several jurists have proposed definitions which, unfortunately, have invariably, upon further introspection, been found wanting in one aspect or another.⁷¹ It is this that, undoubtedly, prompted Mason to note, on at least two occasions, that the search for an exhaustive definition of the term ‘fiduciary’ is probably misplaced.⁷² As noted by Finn, the complexities in fashioning a universal and comprehensive definition have largely been compounded by the diversity of both the circumstances in which the term is employed and relief granted on the basis of a court having established a fiduciary relationship.⁷³ In spite of the obvious definitional pitfalls, this study adopts the definition proposed by Finn where.⁷⁴

⁶⁷ LS Sealy “Fiduciary relationships” (1962) 20 (1) *Cambridge Law Journal* 69 72.

⁶⁸ PD Finn “The fiduciary principle’ in TG Youdan (ed) *Equity, fiduciaries and trusts* (1989) 1 4.

⁶⁹ D Tan “The fiduciary as an accordion term: Can the crown play a different tune?” (1995) 69 (6) *The Australian Law Journal* 440 441.

⁷⁰ PH Pettit (note 57 above) 28-29 and G Moffat & others (note 51 above) 27.

⁷¹ For some notable attempts at constructing comprehensive definitions of the term ‘fiduciary’ see A Scott “The fiduciary principle” (1949) 37 (4) *California Law Review* 539; EJ Weinrib “The fiduciary obligation” (1975) 25 (1) *University of Toronto Law Journal* 1; LS Sealy (note 67 above); JC Shepherd “Towards a unified concept of fiduciary relationships” (1981) 97 *Law Quarterly Review* 51 and PD Finn (note 68 above).

⁷² Mason has actually suggested that the fiduciary relationship is probably a concept still in search of principle - A Mason “Themes and prospects” in PD Finn (ed) *Essays in equity* (1985) 242 246.

⁷³ PD Finn (note 68 above) 1-2.

⁷⁴ As above 54. Millett LJ approved Finn’s definition of a fiduciary in *Bristol and West Building Society v Mothew* (1998) 1 Ch 1 18. Finn himself, however, acknowledged the limitations of his definition and stated that ‘At best, all one can ask for is a description of a fiduciary...’ and agreed with Mason that the search for a definition of fiduciary may actually be misplaced.

... a person will be a fiduciary in his relationship with another when and in so far as that other is entitled to expect that he will act in that other's or in their joint interest to the exclusion of his own several interest.

The definition by Finn has the merit of highlighting what has consistently been touted as the hallmark of any fiduciary relationship which is the duty of loyalty that the fiduciary owes to beneficiaries.⁷⁵ As Moffat puts it, the core of the term 'fiduciary' is that a person in a position described and recognised as fiduciary is under a duty of loyalty to some other person(s) or body.⁷⁶ Clearly, therefore, for a person to be a fiduciary 'he must first and foremost have bound himself in some way to protect and/or advance the interests of another.'⁷⁷ Notably, one may assume fiduciary duties gratuitously and sometimes one may be constituted a trustee by operation of law.⁷⁸ The duty of loyalty owed by the fiduciary to the beneficiaries remains the hallmark of all fiduciary relationships.⁷⁹ It remains acutely important, however, to note that in spite of the fundamental similarities amongst all fiduciary relationships most fiduciary relationships remain unique in their own right. A cursory review of some prominent fiduciary relationships reveals that some are 'more intense than others' and, generally, the greater the 'independent authority [of the fiduciary], the stricter the duty of loyalty.'⁸⁰

It is always important to properly determine the circumstances under which a fiduciary relationship can be said to exist as the law rigorously enforces the rights and obligations inhering in all fiduciary relationships. This is because fiduciary principles are doctrines of equity and equitable remedies apply in all relationships found to be fiduciary in nature. Classifying a relationship as fiduciary thus exposes the parties to the full breadth of equitable

⁷⁵ A Scott (note 71 above) 540, where a fiduciary is defined as 'a person who undertakes to act in the interests of another person. It is immaterial whether the undertaking is in the form of a contract. It is immaterial that the undertaking is gratuitous.' See also, LS Sealy "Some principles of fiduciary obligation" (1963) 21 (1) *Cambridge Law Journal* 119 122.

⁷⁶ G Moffat *Trusts law: Text and materials* (1994) 545.

⁷⁷ PD Finn *Fiduciary obligations* (1977) 9 quoted by JC Shepherd (note 71 above) 65. See also, LS Sealy (note 67 above) 73-74.

⁷⁸ In the history of equity the office of trustee was normally gratuitous though it subsequently came to be recognised that trustees may be remunerated in appropriate circumstances. The constructive trust remains the most prominent example of people being made trustees by operation of law.

⁷⁹ JC Shepherd *The law of fiduciaries* (1981) 48.

⁸⁰ AW Scott (note 71 above) 541.

regulation and monitoring.⁸¹ As all social trust-based relationships are underlain by fiduciary principles, the core of equity provides, as will be demonstrated in Chapters Four and Five, a sound and solid basis for regulating public functionaries and all those entrusted with the management and control of public resources. This is because the positions that public functionaries occupy and the duties that they undertake to discharge necessarily make them amenable to fiduciary regulation.

The fact that the notion of loyalty is central to fiduciary regulation is fully reflected in the rules to which equity subjects anyone who is classified as a fiduciary.⁸² The main proscriptions that a fiduciary faces are those against conflict of interest and improper gain.⁸³ The law recognises a three-tiered substratum of duties that fiduciaries must observe at all times.⁸⁴ The first duty stipulates that a fiduciary must not place oneself in a position where duty and personal interest may conflict.⁸⁵ The test in this regard is to determine whether the fiduciary has entered into engagements in which a fiduciary can have a personal interest conflicting with the interests of one's beneficiaries.⁸⁶ This rule is applied very strictly and actual conflict need not be proven for a fiduciary to be censured on this basis.⁸⁷ According to Oliver LJ in *Swain v Law Society*, however, 'the rule is not so much that it is improper for him put himself in that position but that if he does so, he is obliged by his trust to prefer the interest of his beneficiary.'⁸⁸ The second duty requires the fiduciary to manage the resources under his control prudently. According to Jessel MR, this requires the fiduciary to 'conduct the business [of the trust] in the same manner that an ordinary man of business would conduct

⁸¹ Mason has argued that the search for a comprehensive definition of the term 'fiduciary' may have been hampered by the realisation that breach of fiduciary unleashes equitable remedies which are often far reaching and have the potential to disrupt the serene flow of commercial transactions – A Mason (note 72 above) 246.

⁸² S Dorsett "Comparing apples and oranges: The fiduciary principle in Australia and Canada after Breen v Williams" (1996) 8 (2) *Bond Law Review* 158 159.

⁸³ M Evans *Outline of equity and trusts* (1988) 86.

⁸⁴ For a discussion of the various dimensions to the rules regulating fiduciaries see LS Sealy (note 75 above) 119.

⁸⁵ *Bray v Ford* (1896) AC 44 51, Per Lord Herschell – 'It is an inflexible rule of a Court of Equity that a person in a fiduciary position ... is not, unless otherwise expressly provided entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict.' See also, *Boardman v Phipps* (1967) 2 AC 46, *Regal (Hastings) Ltd v Gulliver* (1967) 2 AC 134 and *Guinness Plc v Saunders* (1990) 2 AC 663.

⁸⁶ *Aberdeen Railway Company v Blaikie* (1854) 1 Macq. 461 471.

⁸⁷ *Keach v Sandford* (1726) Sel. Cas. Ch. 61.

⁸⁸ (1981) 3 All ER 797.

his own.⁸⁹ The third duty requires the fiduciary to act fairly to those entitled to benefit from his exercise of duty. The effect of this is that the fiduciary is bound to hold an even hand among the beneficiaries and not favour one as against the other.⁹⁰ Notably, being even-handed among the beneficiaries may, in some cases, require that the fiduciary treat different classes of beneficiaries differently. A concrete illustration of the even-handedness that the law requires is manifested by the rule in *Howe v Earl of Dartmouth*⁹¹ which requires a trustee to act fairly between a life tenant and the remaindermen in choosing investments.

2.3.2 Identifying fiduciaries and fiduciary relationships

In the light of the above it is in order to briefly discuss some concrete ways in which courts have identified fiduciary obligations and held persons to be fiduciaries. It is important to immediately acknowledge that fiduciary relationships are not limited to legal and technical relationships and may involve relations and duties that may be moral, social, domestic or merely personal.⁹² This means that a broad spectrum of relationships can be covered by fiduciary principles and in varying degrees.

Although different approaches have been adopted to determine the existence of a fiduciary relationship, a two-limbed test is often preferred.⁹³ The first limb of the test consists of a list of prescribed relationships and these are relationships considered to be indisputably fiduciary in nature.⁹⁴ In as far as the first limb is concerned there is little, if any, controversy about the 'fiduciariness' of the relationships covered by this limb. Most relationships in this category have been defined and classified over a long period of judicial construction and interpretation. Perhaps the only notable reluctance in this connection has been the judicial reluctance to extend fiduciary obligations to parties in what are perceived to be 'commercial

⁸⁹ *Speight v Gaunt* (1883) 22 Ch D 727 739; *Learoyd v Whitely* (1887) 12 App Cas 727 and *Rae v Meek* (1889) 14 App Cas 558.

⁹⁰ *Lloyds Bank v Duker* (1987) WLR 1324 1330-1331.

⁹¹ (1802) 7 Ves 137.

⁹² *Metcalf v Leedy, Wheeler and Company* 140 Fla.149 (1939) 191.

⁹³ J McCamus "Fiduciary obligations and commercial law: Four sources of complexity" <www.ciaj-icaj.ca/francis/publications/1997.html> (Accessed 20 August 2009).

⁹⁴ Although the most prominent fiduciary relationship is that between a trustee and beneficiary, other indisputably fiduciary relationships include; guardians and wards, agent and principal, lawyers to clients, executors to legatees and partners, directors and companies - *S Dorsett* (note 82 above) 158 159.

relationships'.⁹⁵ However, a deeper analysis of some of the most prominent fiduciary relationships demonstrates that most fiduciary relationships are inherently commercial in nature. It is thus a fundamental misconception to suggest that fiduciary relationships do not have a role to play in commercial life.⁹⁶

The application of the second limb of the test has constantly been mired in controversy.⁹⁷ The second limb of the test identifies as fiduciary those relationships which, on their particular facts, evidence fiduciary traits. Although this limb of the definition is open-textured, the core test is the requirement that a relationship must possess the essential fiduciary elements before it can be classified as one. Under the second limb, a minimum threshold is used to determine the existence of a fiduciary relationship. As long as the threshold is met, it is no defence to a claim for breach of fiduciary duty that the alleged fiduciary did not undertake or hold out as a fiduciary. The central test is to determine whether, in the circumstances, 'one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter in issue.'⁹⁸ Additionally, the courts have looked for the presence of certain critical indicators in identifying fiduciary relationships. For example, in *Hodgkinson v Simms* La Forest J identified discretion, influence, vulnerability and trust as non-exhaustive examples of evidential factors to be considered in deducing the existence of a fiduciary relationship.⁹⁹ Further, Finn has suggested that ascendancy, influence, vulnerability, trust, confidence and dependence are relevant factors in identifying fiduciaries.¹⁰⁰ The presence of one or a combination of the preceding factors implies the existence of a fiduciary relationship and subjects the parties to fiduciary regulation.

The lack of complete congruence in the identification of the indicators for identifying fiduciary relationships merely highlights the fact, earlier alluded to, that there are different bases for founding fiduciary relationships. For example, La Forest J in *LAC Minerals v International*

⁹⁵ As exemplified by decisions like *Manchester Trust v Furness* (1895) 2 QB 539 545 Per Lindley J; *In Re Wait* (1927) 1 Ch 606 634 Per Atkin LJ and *Hospital Products Ltd V United States Surgical Corporation* (1984) 156 CLR 41.

⁹⁶ J McCamus (note 93 above) 56.

⁹⁷ As above 57.

⁹⁸ *Hodgkinson v Simms* (1994) 3 SCR 377 409.

⁹⁹ As above.

¹⁰⁰ PD Finn (note 68 above) 27.

*Corona Ltd*¹⁰¹ identified three different instances in which relationships have been held to be fiduciary: first, are the traditional categories of fiduciary relationship (the relationships that are indisputably fiduciary), second, are the cases of specific fiduciary duty arising on the facts and lastly, the remedial or 'fictional' fiduciary relationships. What should be manifest is that the second limb of the test for identifying fiduciaries retains the flexibility and malleability to extend fiduciary regulation into new spheres of human activity while proceeding on a principled foundation.

Although different judges and scholars have expressed the wording of the indicators necessary for identifying fiduciary relationships differently, the distinguishing characteristic of any fiduciary relationship is the loyal securing of a beneficiary's interest above that of the fiduciary. The fiduciary's principal task then becomes the advancement of the interests of the beneficiary above his own personal interests.¹⁰² The duty of loyalty in a fiduciary relationship is such that the fiduciary or trustee, however one may be termed, is strictly forbidden from exploiting the relationship to extract a personal gain. Effectively, the law requires a person in a fiduciary position to engage in self denial when discharging duties as a fiduciary.¹⁰³ It is, therefore, because of the law's involvement that the normal hazards of trusting in other people are minimised.

2.3.3 Fiduciaries and fiduciary relationships in an evolving society

From the above, it should be clear that a universally acceptable definition of who a fiduciary is remains elusive even though there is a general agreement as to the factors that must be present before a fiduciary relationship can be held to exist. It is this study's contention, however, that the lack of a universally precise definition, far from detracting from the value of the law regulating fiduciaries, actually reinforces and galvanises the law relating to fiduciary relationships.¹⁰⁴ As aptly put by Mason:¹⁰⁵

¹⁰¹ (1989) 61 DLR (4th) 14 27.

¹⁰² S Dorsett (note 82 above) 61.

¹⁰³ S Worthington "When is self denial obligatory" <<http://eprints/se.ac.uk/archive/00000202/01/CLJfinal.pdf>> (Accessed 10 August 2005).

¹⁰⁴ By tracing the history of the use of the 'trust concept' Sealy demonstrates that insisting on fixed definitions can actually have a limiting and restrictive effect as happened with the 'trust concept' when progressively some instances covered under the concept were excluded when technical definitions of the trust were adopted. This trend was only brought in check with the entry into common judicial usage of the term 'fiduciary' - LS Sealy (note 67 above) 71-72.

¹⁰⁵ A Mason (note 49 above) 246.

The absence of [a] clear definition has enabled the courts to classify as fiduciaries persons who would not have been so regarded at an earlier time. The reason why the classification has been more extensive is that courts, reflecting higher community standards or values, perceive in a wide variety of relationships that one party has a legitimate expectation that the other party will act in the interests of the first party or at least in the joint interests of the parties and not solely self-interestedly.

In keeping with equity's proverbial flexibility as a system of law, the lack of a clear definition has allowed courts in different jurisdictions to extend relief on the basis of the fiduciary principles into areas hitherto not countenanced. The result has been that the law relating to fiduciaries has constantly evolved and remained alert to evolving societal needs and demands. As confirmed by judicial pronouncements from several jurisdictions, just like the tort of negligence, the categories of relationships that may be classified as fiduciary remains open.¹⁰⁶ The implication of this is that, generally, courts will remain willing to recognise new classes of fiduciaries if such relationships meet the threshold for recognising a fiduciary relationship.¹⁰⁷ The fact that no fiduciary relationship has ever been recognised in a particular area is no bar to the recognition of new classes of fiduciaries in the same sphere at a future date. This is because although largely founded in private law, fiduciary law has public functions and exists to protect social interests perceived to be valuable by society.¹⁰⁸ It is needless to state that social interests requiring protection are bound to evolve over time. The inherent flexibility surrounding the deployment of fiduciary principles has meant that courts have employed equity and the law of fiduciaries:¹⁰⁹

... to maintain the integrity, credibility and utility of relationships perceived to be of importance in a society. And [the fiduciary principle] is used to protect interests, both personal and economic, which a society is perceived to deem valuable.

The true nature of the fiduciary principles manifestly originates in public policy to maintain the integrity and the utility of those relationships in which the role of one party is perceived to

¹⁰⁶ *English v Dedham Vale Properties Ltd* (1978) 1 ALL ER 382 398 Per Slade J; *Guerin v The Queen* (1984) 2 SCR 335 Per Dickson J and M Kirby "Equity's Australian isolationism" WA Lee Equity Lecture, Queensland University of Technology, Brisbane 19 November 2008 <http://www.lawqut.edu.au/ljj/editions/v8n2/pdf/10_CurrentIssues_Equity_KIRBY.pdf> (Accessed 24 June 2010).

¹⁰⁷ MJ Nkhata (note 65 above) 12.

¹⁰⁸ S Worthington (note 103 above) and A Mason (note 49 above) 246.

¹⁰⁹ PD Finn (note 68 above) 26.

be the service of the interests of the other and it insists upon a fine loyalty in that service.¹¹⁰ It may be noted here that many governments expressly state that they are in place to serve the populace – this, it is argued, is also a factor that must make governments amenable to fiduciary regulation.¹¹¹ As the need to preserve integrity and utility in basal societal relations is a continuing and evolving need, the law of fiduciaries has remained aptly positioned to respond to changing needs and demands in society. The continuing prominence and relevance of the law relating to fiduciaries has, admittedly, led to an unprecedented expansion of relationships subject to fiduciary regulation.¹¹² This rise in prominence has convinced some scholars to assert that human society has generally evolved away from contract-based discourse into one that is predominantly premised on fiduciary principles.¹¹³ Clearly, the law relating to fiduciaries remains continuously relevant to societal regulation generally.

2.4 Good governance

2.4.1 Emergence of the good governance concept

Good governance (in this study also shorthandedly referred to as ‘governance’) has increasingly taken centre stage in development discourse and its presence has been established as an important prerequisite for progress in all societies.¹¹⁴ It is notable, however, that emphasis on good governance has not always been the vogue.¹¹⁵ The rise to prominence of the concept, especially in Africa, is often traced to the World Bank’s 1989 report in which the World Bank postulated that a crisis of governance was the root cause of Africa’s development problems.¹¹⁶ In the years after the World Bank Report there has been increasing concession of the centrality of governance in the amelioration of Africa’s problems. Sano correctly argues that in spite of the proliferation in use of the good

¹¹⁰ As above 27.

¹¹¹ The case for conceiving government as an enforceable trust is explored at length under part 2.6 in this Chapter.

¹¹² T Frankel “Fiduciary law” (1983) 71 (3) *California Law Review* 795.

¹¹³ As above 798.

¹¹⁴ P Ramsamy *Good governance in the Southern African Development Community* (2002) 1.

¹¹⁵ It may be noted that in colonial Africa governance was coercive and oppressive with no room for citizen participation or accountability. This point is further developed in Chapters 3 and 4.

¹¹⁶ World Bank *Sub-Saharan Africa: From crisis to sustainable growth* (1989) xii 60. The fact that the emergence of good governance in Africa is often traced to this report and other donor initiatives brings its own complications. An exclusive emphasis on this fact, for example, may erroneously lead one to conclude that there was no good governance in any form in Africa.

governance concept it essentially remains a development concept.¹¹⁷ This means that the concept has often been used in connection with developing countries – even though ‘developed’ nations could also benefit from its tenets – and also with a predominant focus on state competence. Good governance, however, remains a much used but ill-defined concept.¹¹⁸ It is important to note that good governance is much more than putting limits on the power of government.¹¹⁹ Good governance extends beyond the traditional focus on regulation of state exercise of authority to include the involvement of the citizenry in the promotion of societal welfare.

It must be pointed out that there is no single comprehensive and universally accepted definition of ‘good governance’.¹²⁰ This lack of a single and universally acceptable definition while imbuing the concept with considerable flexibility, however, can also be a source of uncertainty in operationalising the concept’s ideals. For example, there remain areas of ambiguity in terms of the relationship of governance to development, institutional reforms and public policy processes and outcomes.¹²¹ For the purposes of the current study, however, good governance is understood to denote:¹²²

... a system of values, policies, and institutions by which a society manages its economic, political, and social affairs through interaction within and among the state, civil society, and private sector.

¹¹⁷ H Sano “Good governance, accountability and human rights” in H Sano & G Alfredsson (eds) *Human rights and good governance: Building bridges* (2002) 123.

¹¹⁸ J Hatchard & others *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern Africa perspective* (2004) 2.

¹¹⁹ AA Mazrui “Constitutional change and cultural engineering: Africa’s search for new directions” in J Oloka-Onyango (ed) *Constitutionalism in Africa: Creating opportunities, facing challenges* (2001) 22.

¹²⁰ For an illustration of the varying emphases that donor agencies may have in defining good governance and some of the consequences of this see S Agere *Promoting good governance: Principles, practices and perspectives* (2000) 3. For a list of some of the definitions of good governance adopted by various donor agencies/governments see H Sano (note 117 above) 129-131.

¹²¹ D Olowu “Introduction: Governance and policy management capacity in Africa” in D Olowu & S Sako (eds) *Better governance and public policy: Capacity building for democratic renewal in Africa* 1.

¹²² OP Dwivedi “On common good and good governance: An alternative approach” in D Olowu & S Sako (eds) (as above) 35 37.

Although good governance has been used to denote diverse issues, implicit in the above definition, and arguably in most conceptions of good governance, is the relationship between politics, government and governance.¹²³ Good governance has sometimes been used interchangeably with democracy even though good governance clearly goes beyond traditional conceptions of democracy.¹²⁴ In this regard one notices that democratisation is one of the prominent aspects that have been uniformly linked to governance, especially in Africa. It must be added that experiences in Africa clearly demonstrate that while democratic change does significantly contribute to better governance, it does not, by itself, necessarily lead to improved policy processes and outcomes.¹²⁵ For example, in spite of the massive wave of democratisation that engulfed most of Africa in the late 1980's and early 1990's, the prevailing governance indicators in most African countries remain dismal.¹²⁶ It is arguable, however, that the initial emphasis on improved governance in African countries has, almost imperceptibly, shifted to a concern with the notion of democracy.¹²⁷

Arguably, the shift in emphasis to good governance, especially in Africa, is a direct result of the failure of economic reform programmes that were championed by the Bretton Woods institutions.¹²⁸ Most prominent of the economic reform programmes championed by the International Monetary Fund, for example, were the Structural Adjustment Programmes (SAPs) which in the 1980's became aid conditionalities for most African countries. It is now apparent that the SAPs failed miserably to stimulate substantial growth in almost all African countries and only served to generate resentment towards the various governments by the populace. The failure of the SAPs, however, highlighted the governance crisis that the African continent was experiencing, more prominently in the 1980's. This governance crisis

¹²³ As above.

¹²⁴ P Ramsamy (note 114 above) 1.

¹²⁵ D Olowu "Governance, institutional reforms and policy processed in Africa: Research and capacity building implications" in D Olowu & S Sako (eds) (note 121 above) 53.

¹²⁶ Also at issue here, however, is the true nature of the democratisation that African countries have supposedly undergone. It is arguable that very little substantive democratisation has been achieved in most African countries.

¹²⁷ D Venter "Elections and electoral systems in emerging democracies: A case for electoral system re-design in Malawi" Paper presented at the Malawi Constitutional Review Conference, Lilongwe, 28-31 March 2006.

¹²⁸ For an in-depth critique of the economic reform policies which have been 'forced' on African countries by the World Bank and IMF and why these failed to bring about any significant growth and development, see J Stiglitz *Globalisation and its discontents* (2002) especially Chapters 1 and 2.

was manifested by, among others, authoritarian rule, systemic clientelism, corruption and abuse of state resources and a general breakdown of the public realm.¹²⁹ The institutionalisation of good governance was thus hailed as the remedy for the diverse problems being faced by Africa.¹³⁰

It is important to note that good governance remains a multi-dimensional concept, the interrelated dimensions of which include the political, institutional and technical dimensions.¹³¹ The political dimension is concerned with the form of political authority that exists in a country and it encompasses democratic governance and such elements as decentralisation, legal and institutional frameworks, accountability, transparency and popular participation. The institutional dimension is concerned with the ability to manage and get things done through institutional mechanisms. The technical dimension focuses on resource constraints and the technical know-how concerning efficient and effective utilisation of resources in quality service delivery and economic development. Popular participation, however, remains the cornerstone of good governance. Popular participation connotes involving people, even at the grassroots, in the choice, execution and evaluation of programmes designed to improve their livelihood.¹³²

2.4.2 Elements commonly associated with good governance

It has been asserted that measuring governance poses challenges that are rarely encountered in the economic or social development fields.¹³³ Part of the complexity in measuring governance or devising tools for measuring governance stems from the initial lack of an all embracing definition of the concept. Another source of controversy has arisen as a result of the tendency in international development circles to assimilate good governance with liberal democracy.¹³⁴ This has meant that those countries that question liberal democracy as a framework for better governance have sometimes perceived calls for better governance as means of extending Western influence and resisted them on that

¹²⁹ D Olowu (note 121 above) 53 59.

¹³⁰ J Hatchard & others (note 118 above) 5-10.

¹³¹ MK Hussein "Good governance and decentralisation at the local level: The case of Malawi" (2003) 22 (2) *Politea* 78 80.

¹³² As above.

¹³³ G Hyden & J Court "Comparing governance across countries and over time: Conceptual challenges" in D Olowu & S Sako (ed) (note 121 above) 13 25.

¹³⁴ As above.

basis. The point here is that the measurement of good governance is not an exact science.¹³⁵

In spite of the definitional and conceptual complexities surrounding good governance there is often a tentative agreement as to its essence. While different terminologies may be employed by different authors there is a measure of agreement on the underlying purport of good governance. It has been suggested that the differences in opinion on what is embodied by good governance actually crystallise along two lines; one regarding the substantive content of governance and the other regarding its character in practice.¹³⁶ Along the first line are those who view governance as concerned with the rules of conducting public affairs and along the second line are those who view it as steering or controlling public affairs. The rules approach emphasises the institutional determinants of choice while the steering approach concentrates on how choices are made. Essentially, therefore, governance involves a full range of activities involving all stakeholders in a country such as all governmental institutions, political parties, interest groups; non-governmental organisations including the civil society, the private sector and the public at large.¹³⁷ Good governance implies a complexity of activities, pluralistic in nature, inclusive in decision making, set in a multi-institutional organisational context, empowering the weaker sections of society and geared to achieve the generally accepted common good.¹³⁸

While approaches to achieving good governance will, inevitably, vary from place to place, the following stand out as the most common elements; accountability, transparency, combating corruption, participatory governance and an enabling legal and judicial framework.¹³⁹ In this context, accountability requires holding elected or appointed individuals and organisations charged with a public mandate to account for specific actions, activities or decisions to the public from whom they derive authority. Transparency is defined as public knowledge of government and confidence in its intentions. Transparency requires an open and public process for making and implementing policies affecting the citizenry. Combating

¹³⁵ UM Killander *The role of the African Peer Review Mechanism in inducing compliance with human rights* LLD Thesis, University of Pretoria (2009) 4.

¹³⁶ G Hyden & J Court (note 133 above) 14.

¹³⁷ GH Frederickson *The spirit of public administration* (1997) 86 Quoted by OP Dwivedi "On common good and good governance: An alternative approach" in D Olowu & S Sako (ed) (note 121 above) 39.

¹³⁸ As above.

¹³⁹ Sam Agere (note 120 above) 3.

corruption is also a key indicator of commitment to good governance. A pro-governance and pro-development legal and judicial system is one in which laws are clear and are uniformly applied through an objective and independent judiciary. Such a system also provides adequate sanctions for breach of the law. An enabling judicial and legal framework also promotes the rule of law and respect for human rights. Where the preceding factors have ascendancy good governance may be said to prevail.

2.4.3 Is good governance important for Africa?

As earlier pointed out, considerable attention has been generated around the good governance concept especially for the greater part of the last two decades amongst political leaders, international development agencies and social scientists.¹⁴⁰ In Africa and most of the Third World, good governance has emerged to become the basis for development cooperation and is now at the core of contemporary debates in social sciences.¹⁴¹ Admittedly, the motivations for renewed interest in good governance by donor agencies and most Western governments remain diverse.¹⁴² Arguably, the motivation may in part be generated by a genuine desire among some donor agencies to give serious attention to a neglected dimension in development cooperation. On the converse, however, it is arguable that the impetus may also have been generated by the need to find a scapegoat for the failure of the Structural Adjustment Programmes especially in Africa.¹⁴³

Irrespective of the motivation for the renewed focus on good governance, especially in Africa, it is commendable that global attention is finally focusing on a material determinant for development in Africa. As pointed out in Chapter One, in spite of possessing vast natural resources Africa has remained the least developed continent largely as a result of failures of governance.¹⁴⁴ While Africa's underdevelopment must be appreciated within its peculiar

¹⁴⁰ V Moharir "Governance and policy analysis" in D Olowu & S Sako (eds) (note 121 above) 107.

¹⁴¹ J Pierre & BG Peters *Governance, politics and the state*, (2000) cited by V Moharir (as above).

¹⁴² This is what leads to the question, to whom has the 'god' in good governance been directed so far? Is good governance good for the people of the developing and underdeveloped countries that are 'compelled' to make changes to attain it or is it meant to be good to the donors and other financial lenders?

¹⁴³ V Moharir (note 140 above).

¹⁴⁴ J Hatchard & others (note 118 above) 5-11.

historical conditions,¹⁴⁵ it remains important to acknowledge that bad governance has remained basal in creating the predicament facing most African countries. Without unduly simplifying the problems and hence solutions relevant to the different African countries, it is arguable that if issues of governance were properly resolved, Africa would be poised to become one of the fastest growing regions in the world.¹⁴⁶ With a proper governance framework, building on the essentials highlighted in part 2.3.2 above, just and honest governments would be in place and this would facilitate the adoption of policies that would stimulate growth and equitable allocation of societal resources. Without insisting on a particular model or conception of governance it must be apparent that good governance remains fundamentally important to Africa. (Good) governance is itself not alien to Africa and one need only look at the values that underlie *ubuntu* to see how some of its values coincide with the major elements of good governance. The challenge, however, remains the institutionalisation of the fundamentals of governance across the African continent without the veneer of cultural imperialism. To avoid the facade of cultural imperialism it is apposite that discourse on good governance in Africa must deliberately seek to connect the fundamentals of good governance to values and ideals that are indigenous to Africa. It is for these reasons that this study advocates an explicit linkage of *ubuntu* to the practice of governance in Malawi and other African countries.

Africa's post-colonial history has amply demonstrated the need for proper governance structures in all African countries at all times. As will be apparent later in this study, the focus of emphasis, if Africa has to escape from the clutches of the governance crisis, must be on the creation of developmental states across the continent. A development state is one that plays a front-line role in advancing socio-economic development.¹⁴⁷ Although Africa faces numerous challenges in the development and institutionalisation of the developmental state, good governance will always remain a fundamental component of any such drive. It is only when institutions and structures for attaining good governance are in place and functioning efficiently and effectively that Africa will truly have begun the march away from its governance crisis.

¹⁴⁵ B Munslow "Democratisation in Africa" (1993) 46 (4) *Parliamentary Affairs* 478.

¹⁴⁶ J Hatchard & others (as note 118 above).

¹⁴⁷ K Matlosa "Democracy and development in Southern Africa: Strange bedfellows" in K Matlosa and others (eds) *Challenges of conflict, democracy and development in Africa* (2007) 57 70-71 & K Matlosa "The feasibility of a democratic developmental state in Southern Africa" in K Matlosa and others (eds) *The state, democracy and poverty eradication in Africa* (2006) 46.

2.5 Constitutionalism

2.5.1 What is meant by constitutionalism?

The definition of constitutionalism is quite controversial.¹⁴⁸ There is no generally accepted definition of the concept.¹⁴⁹ Constitutional discourse has manifestly demonstrated that constitutionalism is one of those paradigms that, though much used, is incapable of being amenable to a universally acceptable definition. Constitutional scholars have experienced great difficulties in attempting to define constitutionalism.¹⁵⁰ As ButleRitchie has stated '[c]onstitutionalism is an ambiguous concept, or at least the term is used in ambiguous ways.'¹⁵¹ Constitutionalism, however, remains a cornerstone in the organisation of most modern states.¹⁵² In spite of the definitional difficulties, it is apparent that two broad conceptions of constitutionalism are evident. One can either adopt the narrow conception of constitutionalism or the broader one.¹⁵³

The narrow conception of constitutionalism accords with the understanding of constitutionalism as developed within the liberal democratic mould.¹⁵⁴ It is premised on a heavy distrust of government authority where it is left unchecked or over-concentrated in one branch of government. According to this view, while human beings generally concede the necessity of having a government they have also continuously been mindful of the need to

¹⁴⁸ J Ihonvbere "Towards a new constitutionalism in Africa" at <http://www.kituoachakatiba.co.ug/Nigeria_CDD_paper.htm> (Accessed 4 June 2008).

¹⁴⁹ CM Fombad "Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from Southern Africa" <http://www.saifac.org.za/docs/res_Papers/RPS%20No%2018.pdf> (Accessed 23 March 2010).

¹⁵⁰ As above.

¹⁵¹ D ButleRitchie "The confines of modern constitutionalism" (2004) 3 (1) *Pierce Law Review* 1.

¹⁵² G van der Schyff "Exploring constitutionalism in the democratic rechtsstaat" in G van der Schyff (ed) (2008) *Constitutionalism in the Netherlands and South Africa: A comparative study* 1.

¹⁵³ J Oloka-Onyango "Constitutionalism in Africa: Yesterday, today, tomorrow" in J Oloka-Onyango (ed) (note 119 above) 2.

¹⁵⁴ ButleRitchie provides a clear expose that links this perception of constitutionalism to liberalism especially liberal thought as crafted during the enlightenment – D ButleRitchie (note 151 above) 2-6. For modern constitutionalism's connection to liberalism generally and liberal democracy specifically, see A Weale (ed) *Democracy* (1999) especially Chapter 9. Constitutionalism in the narrow sense draws heavily on the liberal tradition, as argued 'Constitutionalism is, therefore, an expression of that view which came to be known as liberalism...' – see RS Kay "American Constitutionalism" in L Alexander (ed) *Constitutionalism: Philosophical foundations* (1998) 16 19.

limit arbitrariness on the part of their governments.¹⁵⁵ The principal role of constitutionalism then becomes the control of government and the limitation and delineation of its powers. Within this liberal perspective, constitutionalism emphasises individual rights and limited government powers.¹⁵⁶ A most often quoted definition of constitutionalism under this approach has been provided by De Smith and he postulates thus:¹⁵⁷

The idea of constitutionalism involves the proposition that the exercise of governmental power shall be bound by rules, rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their permissible content – Constitutionalism becomes living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.

This understanding of constitutionalism, from a liberal democratic perspective, Shivji has argued, has been uncritically embraced and propagated by most African constitutional lawyers without any serious interrogation or analysis.¹⁵⁸ Referring specifically to De Smith's definition of constitutionalism, Shivji concludes that this conception is minimalist and unduly oblivious to social conditions obtaining in Africa.¹⁵⁹ Clearly, while the liberal democratic conceptualisation of constitutionalism may be the most widespread understanding of constitutionalism, social conditions obtaining in Africa, for example, necessitate a deliberate and deep introspection of such a conceptualisation.¹⁶⁰ It is because of the need for further introspection of the liberal democratic definition of constitutionalism that other scholars have advocated for a broader understanding of constitutionalism.

¹⁵⁵ BO Nwabueze *Constitutionalism in the emergent states* (1973) 1.

¹⁵⁶ JM Mbaku "Constitutionalism and governance in Africa" <<http://www.westafricareview.com/issue6/mbaku.html>> (Accessed 24 August 2008).

¹⁵⁷ SA de Smith *The new Commonwealth and its constitutions* (1964) 106.

¹⁵⁸ IG Shivji "State and constitutionalism: A new democratic perspective" in IG Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 27.

¹⁵⁹ IG Shivji (as above) 28 -29. A similar position is taken by Gutto who argues that the classical formulation of constitutionalism is representative of a narrow conception of state powers i.e. simply dividing it into three arms – SBO Gutto "The rule of law, democracy and human rights: Whither Africa? (1997) 3 (1) *East African Journal of Peace and Human Rights* 130 133.

¹⁶⁰ An example of scholarly work on constitutionalism in Africa that proceeds 'uncritically' within the framework constructed by De Smith is BO Nwabueze (note 155 above).

The broader understanding of constitutionalism is critical of liberal democratic constitutionalism for being unduly legalistic and dwelling almost exclusively on constitutionally prescribed authority to the exclusion of social forces in the study of politics and constitutions.¹⁶¹ The broader understanding of constitutionalism argues that in understanding constitutionalism a deliberate attempt must be made to focus not only on the 'instrumentalities of governance' but also on the 'broader context of social, economic, political, gendered and cultural milieu wherein those instrumentalities operate.'¹⁶² Adopting the contextualised approach serves to avoid the largely discredited liberal or neo-liberal approach that attempts to posit law as a phenomenon that is abstract and detached from real life.¹⁶³ Further, the narrow conception of constitutionalism fails to ascribe to a constitution any role in the transformation of society even though that is the intention of most constitutions adopted during the Third Wave of Democratisation in Africa.¹⁶⁴ Importantly, the narrow conception of constitutionalism is likely to generate undue reverence and adherence to the supposed fundamental values of constitutionalism, for example, the rule of law and separation of powers. African experiences, however, have demonstrated that an undue reverence and adherence to these principles has negatively affected constitutionalism in Africa.¹⁶⁵ Clearly, in the light of the prevailing social, economic and political situation in Africa, the broader conceptualisation of constitutionalism has much to commend it for constitutions and constitutionalism to have greater and continued relevance in Africa.

This study subscribes to the broader understanding of constitutionalism and it is this perspective that must be kept in mind in appreciating this study's recourse to constitutionalism. It is meritorious to appreciate constitutionalism from a perspective that acknowledges the centrality of the 'instrumentalities of governance' without at the same time belittling the importance of social factors in shaping constitutionalism. This study takes this

¹⁶¹ O Akiba "Constitutional government and the future of constitutionalism in Africa" in O Akiba (ed) *Constitutionalism and society in Africa* (2004) 3 6-7.

¹⁶² J Oloka-Onyango (note 153 above) 2.

¹⁶³ FE Kanyongolo "Constitutionalism and the removal of presidential term limits from the Constitution of the Republic of Malawi" (2003) 7 (1) *UNIMA Students Law Journal* 59 61.

¹⁶⁴ For example, the Constitution of the Republic of Malawi and the Constitution of the Republic of South Africa.

¹⁶⁵ GP Tumwine-Mukubwa "Ruled from the grave: Challenging antiquated constitutional doctrines and values in commonwealth Africa" in J Oloka-Onyango (ed) (note 119 above) 287 – the author demonstrates how values like parliamentary supremacy and presumption of constitutionality were appropriated in most of Commonwealth Africa to legitimate oppressive tendencies by governments.

position fully mindful of the importance of a system that properly checks the exercise of state authority in a framework designed for that purpose while at the same time being fully mindful of the social factors that may influence and shape the practice of constitutionalism. In conceptualising and implementing constitutionalism, therefore, the prevailing social conditions remain a factor that must be properly acknowledged. In as far as constitutionalism is concerned, while the ultimate objectives may be the same, room must always be provided for divergent but principled circumstance-based approaches by different countries.

2.5.2 Some major aspects of constitutionalism

Irrespective of the above-discussed two perspectives to understanding constitutionalism there are some commonly agreed fundamentals that constitutionalism embodies.¹⁶⁶ The major difference between the narrow and broad approach to understanding constitutionalism is essentially a question of focus: the narrow approach is more legalistic in its focus while the broad approach is wider and inclusive in its focus. While accepting the fundamentals that the narrow approach supports it is prudent to take a broader understanding especially when considering how the fundamentals are translated to concrete action and also considering the failures of liberal democratic constitutionalism in Africa.¹⁶⁷

Constitutionalism is essentially about a principled balancing of the exercise of state authority. At an almost irreducible minimum constitutionalism postulates two forms of limitations on a government: power is proscribed and procedures are prescribed.¹⁶⁸ In the first place, authority to take certain actions regarding members of the community is withheld. The state is thus prohibited from interfering in certain areas that are preserved for private activity. In the second place, directives are established determining the manner in which policy will be formulated and implemented within specific areas of jurisdiction in the state. This means that governmental institutions are established and their functions, powers, and interrelationships are defined. Where the established procedures are contravened government action in that regard is illegal. In such a framework it becomes easy to challenge abuses of state authority in the light of the pre-existing prescriptions in relation to the exercise of all state authority. The special value of constitutionalism lies not merely in reducing the power of the state but

¹⁶⁶ CM Fombad (note 149 above) argues that constitutionalism has a certain irreducible minimum core of values that are designed to make governments accountable.

¹⁶⁷ IG Shivji (note 158 above) 36.

¹⁶⁸ WG Andrews *Constitutions and constitutionalism* (1961) 13 – 14.

in effecting the reduction by the advance imposition of rules.¹⁶⁹ From the preceding, most liberal democratic constitutionalists distil three elements of constitutionalism that must always be present in a constitutional government.¹⁷⁰ Firstly, a state must always have an independent judiciary to which all may resort for the enforcement of their constitutional rights. Secondly, there must be a separation between the legislative, executive and judicial functions of the government. Thirdly, there must be a limitation of governmental powers vis-à-vis society with respect to protecting fundamental human rights. It is important, however, that the mechanics of regulating a government must be contextualised in order to achieve viable constitutionalism.

Writing from an African perspective, Oloka-Onyango concedes that in spite of the diversity and variation on the voices that have spoken out on constitutionalism the basic preoccupation has remained fairly uniform and consistent.¹⁷¹ The critical concern for Africa is the move away from mere theorisations about constitutionalism to a practical institutionalisation of the basic tenets of constitutionalism. In attempting to achieve the institutionalisation of constitutionalism some of the fundamental questions relate to the management and arrangement of state structures, ensuring the effective operation of state structures in the light of existing conditions, how to properly cater for the diverse interests of non-state actors and also the questions of accountability and transparency in governance.¹⁷² In moving away from mere theorisations towards the institutionalisation of constitutionalism it is important to constantly bear in mind that constitutionalism can never take root in Africa if there is no massive consultation with traditional culture, custom and legal precedents.¹⁷³ This makes it imperative that all discourse on constitutionalism in Africa must benefit from a serious inwards appraisal by African states. Only through such a serious inwards gaze can Africa's cultural heritage aid the institutionalisation of constitutionalism. Again, it is for this purpose that this study proposes that discourse on constitutionalism in Africa should benefit from the values underlying *ubuntu*. African states must consciously move beyond a strict

¹⁶⁹ RS Kay (note 154 above) 23.

¹⁷⁰ O Akiba (note 161 above) 3 6.

¹⁷¹ J Oloka-Onyango (note 153 above) 3.

¹⁷² As above.

¹⁷³ A Mazrui (note 119 above) 18 20.

liberal legalistic conception of constitutionalism and experiment with, among others, transformative constitutionalism.¹⁷⁴

2.5.3 Constitutions and constitutionalism:¹⁷⁵ Is constitutionalism important in Africa?

In reflecting on the importance or lack thereof of constitutionalism in Africa one must properly appreciate the historical trajectory over which constitutionalism has been practised in Africa. This is fully in accord with the broad conceptualisation of constitutionalism that this study supports – one cannot properly comprehend the broad approach to constitutionalism if one ignores the social conditions in which constitutionalism has been practised in Africa. Immediately, one notes that Africa’s experience with constitutionalism has not been a very happy one.¹⁷⁶ According to Oloka-Onyango, Africa’s experience with the phenomenon of constitutionalism has not been easy or uncomplicated.¹⁷⁷ One notices that the jubilation and expectation of constitutional governance that accompanied the adoption of the Independence Constitutions in the 1960’s was quickly dashed by military coups, emergency decrees and autocratic rule.¹⁷⁸ Even though almost all of the newly independent African states maintained a written constitution in the one form or the other, the practice of constitutionalism suffered serious setbacks in the decades after independence. This was largely as a result of the unwillingness of the wielders of state authority to govern according to the terms of the relevant constitution. Various reasons have been given for the

¹⁷⁴ The notion of transformative constitutionalism is unravelled at greater length in Chapter Five of this study. For a lucid expose of the concept see K Klare “Legal culture and transformative constitutionalism” (1998) 14 (1) *South African Journal on Human Rights* 146. See also K van Marle “Transformative constitutionalism as/and critique” (2009) 20 (2) *Stellenbosch Law Review* 286-301. For a critical view of the concept, see T Roux “Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?” (2009) 20 (2) *Stellenbosch Law Review* 258-285.

¹⁷⁵ The distinction between constitutions and constitutionalism, it has been said, is more than an exercise in semantics – CM Fombad (note 149 above). See, also, HWO Okoth-Ogendo “Constitutions without constitutionalism: Reflections on an African political paradox” in IG Shivji (note 158 above) 1-25.

¹⁷⁶ O Akiba (note 161 above) 7. According to Fombad ‘The history of constitutionalism and constitutional democracy in Africa is not a particularly happy one’ – Fombad (note 149 above).

¹⁷⁷ J Oloka-Onyango (note 153 above) 4 and P Slinn “A fresh start for Africa? New African constitutional perspectives for the 1990s” (1991) 35 (1/2) *Journal of African Law* 1 2.

¹⁷⁸ O Akiba (note 161 above) 7. In spite of the general jubilation that accompanied independence across Africa, generally, Chisiza, in an early treatise, soberly pointed out the political, economic and cultural complications that lay ahead for most African countries – DK Chisiza *Africa: What lies ahead* (1962).

unwillingness of the rulers to subject themselves to the directives contained in constitutions but principal among them was the lack of autochthony in most constitutions.¹⁷⁹ While constitutions should normally be the result of a founding pact by the people, no African constitution adopted at independence could claim this distinction.¹⁸⁰ The deliberate dis-involvement of the people in crafting constitutions was continued in most constitutional documents that replaced Independence Constitutions.¹⁸¹ This lack of involvement by the populace deprived most constitutional documents of the legitimacy they so desperately needed in order to be functional in an effective manner.

In reflecting on the causes of the travails of constitutionalism in most African countries, most scholars are agreed that the blue print for the massive violations of the constitutions and constitutionalism was actually drawn during the colonial period.¹⁸² In this regard one of the greatest ironies of the colonial era was the system of governance that the departing colonialists left for the newly independent states. What is immediately notable is that while powers of state during colonialism were not exercised on the basis of any popularly crafted constitution which limited the power of the government while guaranteeing individual human rights, the political order that was bequeathed to most independent states purported to provide otherwise. The result was that while colonialism itself was based on a discriminatory, coercive and oppressive system, the departing colonialists left most African countries with constitutions that purported to provide for separation of powers, checks and balances and individual human rights.¹⁸³ The contrast between how the colonialists had ‘governed’ the

¹⁷⁹ It has often been asserted that constitution making in the period preceding independence in most African countries was a very elitist process – JM Mbaku (note 146 above) and FE Kanyongolo “The limits of liberal democratic constitutionalism in Malawi” in KM Phiri & KR Ross (eds) *Democratisation in Malawi: A stocktaking* (1998) 353 356-359.

¹⁸⁰ BO Nwabueze (note 155 above) 23-28.

¹⁸¹ For example, Kanyongolo argues that the 1966 Constitution of the Republic of Malawi, replacing the 1964 Independence Constitution was actually drafted by an elite group of politicians from the Malawi Congress Party and imposed on the nation – FE Kanyongolo (note 179 above) 358-359.

¹⁸² IG Shivji “State and constitutionalism: A new democratic perspective” in IG Shivji (ed) (note 158 above) 27 28; FE Kanyongolo (note 179 above) 354-356; HWO Okoth-Ogendo (note 175 above) 7-9 and J Hatchard & others (note 118 above) 311-312. As to the role of the law in colonialism, see R Roberts & K Mann “Law in colonial Africa” in K Mann & R Roberts (eds) *Law in colonial Africa* (1991) 3-48.

¹⁸³ A perfect example of such a constitution would be the 1964 Independence Constitution of the Republic of Malawi. This Constitution provided for a Westminster system of government and had a chapter on human rights. Unsurprisingly, this Constitution was repealed within two years of independence. The 1966 Constitution, which replaced the 1964 Constitution, did not

territories under their rule and how they in effect ‘directed’ that the territories should be governed after their departure could not have been starker. In such a context, in spite of constitutions spelling out clear limitations on state authority, most post-independence African leaders proceeded to govern in a manner unfettered by any constitutional restraints.

In essence, therefore, it is the nature of colonialism itself that sowed the seeds for the massive authoritarianism that was to be experienced in most African countries.¹⁸⁴ It has been argued that the political elites that succeeded the departing colonialists lacked both the political commitment and economic independence to attempt any radical transformation of the colonial state.¹⁸⁵ The colonial experience profoundly affected the manner in which post-colonial African leaders conceptualised the notion of constitutionalism and their desire to move away from the colonial inheritance. Post-colonial African leaders ‘inherited both a form of state governance and its substance that were largely inimical to the progressive realisation of the democratic rights and interests of their people.’¹⁸⁶ This effectively shaped the manner in which the practice of governance unfolded in most African countries over the passing decades.¹⁸⁷

In spite of the obviously rough road that constitutionalism has had to travel in Africa it is trite that both constitutions and constitutionalism remain fundamentally important. Since, as African experiences have demonstrated, constitutions by themselves are not automatic guarantees of constitutionalism the need to vigilantly work towards the ideals of

contain a Bill of Rights and transformed Malawi into a one party state and achieved a heavy centralisation of authority in the executive. Through an amendment to the 1966 Constitution Dr Banda, the then Head of State, was made president for life – See, FE Kanyongolo (note 179 above) 354 -361.

¹⁸⁴ B Munslow “Why has the Westminster model failed in Africa” *Parliamentary Affairs* (1983) 36 (2) 218-228. Munslow argued that the failure of multiparty democracy in former British and French territories after independence was not ‘so much a failure by Africans to learn the lesson of parliamentary government; rather, the lesson of authoritarian colonial rule was taught and learnt too well.’

¹⁸⁵ K Matlosa “Democracy and development in Southern Africa: Strange bedfellows” in K Matlosa & others (eds) (note 147 above) 59.

¹⁸⁶ J Oloka-Onyango (note 153 above) 4.

¹⁸⁷ Mutharika argues that the incapability of African states is directly traceable to colonialism which effectively subverted African cultural identity - AP Mutharika “Some thoughts on rebuilding African state capability” (1998) 76 (1) *Washington University Law Quarterly* 281 282.

constitutionalism remains a pressing necessity.¹⁸⁸ Constitutionalism, especially when considered together with good governance, remains fundamental if Africa is to reverse the governance crisis that has effectively crippled the entire continent. As earlier pointed out, a reversal of the governance crisis remains central to the general amelioration of the abysmal conditions prevailing in most African countries. The creation of the developmental state, alluded to earlier on, cannot materialise in a context devoid of constitutionalism. Constitutionalism must thus be considered as a crucial component in the drive towards entrenching good governance.

Admittedly, constitutionalism is centrally about the spirit of the constitution other than the mere letter of a constitutional document. This means, in essence, that the importance of constitutionalism can only be felt where the citizenry identifies with a particular constitutional document and is animated to see to its implementation.¹⁸⁹ It is thus the will of the people rather than the text of the constitution that is central to the entrenchment of constitutionalism.¹⁹⁰

It is thus incumbent on the citizenry in any country to ensure that those exercising governmental authority demonstrate continuous fidelity to the stipulations of the constitution. The citizenry's desire to see the implementation of the constitution in full, however, depends on their identification with the values on which the constitution is premised.¹⁹¹ This is why citizen participation in constitution making remains fundamentally important. The spirit of the constitution, which must be promoted at all times, is essentially made up of the values that underlie the entire constitutional document – these are the premises on which the

¹⁸⁸ NS Khembo "The constitution, constitutionalism and democracy in Malawi: The reign of a parliamentary oligarchy" in AG Nhlema (ed) *The quest for peace in Africa: Transformations, democracy and public policy* (2004) 269 270 – 273.

¹⁸⁹ One of surest ways in which the citizenry can identify with a constitution is where it is fully involved in the drawing up of a constitutional document. While most independence constitutions were criticised for having been imposed from above the wave of constitution-making processes in most of Africa from the 1990s is commendable for the deliberate attempt at achieving autochthony that underlay most of the processes – J Hatchard & others (note 108 above) Chapters 3 & 13. Ideologically, however, most Third Wave constitutions returned to the same models that had been left by the departing colonialists thus putting a question mark on their legitimacy – See, P Slinn (note 177 above) 4-5.

¹⁹⁰ L Hand *The spirit of liberty* (1960) 189-190 cited by J Hatchard & others (note 118 above) 309.

¹⁹¹ Constitutionalism can only take root if there is a widely shared consensus on the legitimacy of the Constitution itself – RS Kay (note 154 above) 29-32.

constitutional order is constructed.¹⁹² Adherence to these underlying values remains axiomatic if constitutionalism is to be attained.

2.6 The interface between *ubuntu*, the social trust, good governance and constitutionalism

A central contention of this study is that there is a fundamental connection between the concepts that have been discussed hereinabove. In the paragraphs below an attempt is made to highlight the interconnectivities between these concepts. A further attempt is also made to discuss some of the conceptual objections to the realisation of a functional relationship between the four concepts in a manner conceptualised by this study. Possible justifications for moving beyond the conceptual objections are also discussed.

2.6.1 *Ubuntu*, constitutionalism and good governance: The case for conceiving government as an enforceable trust

Constitutionalism and good governance are intimately interlinked. This interconnectivity is not the subject of much controversy. A constitution, it must be recalled, is the embodiment of the supervening architectural structure and institutional arrangements for governance in a country. Measures and ideals for government practice must, ideally, all be embodied in a constitution. Constitutionalism helps in the transformation of these measures and ideals into reality.¹⁹³ This study contends that in the relationship between constitutions, constitutionalism and good governance, *ubuntu* and the social trust can provide the necessary catalytic factors to ensure better governance and improved constitutionalism in Malawi and most Africa countries. Fundamental to this is the understanding that government is a trust for the governed. This means that government officials, both elected and appointed, are trustees for the people and hold trusts for the public and are accountable to the public for the holding of public offices and exercise of public power.¹⁹⁴ It must be

¹⁹² In some countries with a written constitution a glimpse of the values underlying the entire constitution may be had from a section of the constitution titled 'fundamental principles' or 'founding provisions'. In Malawi, for example, Chapter III of the Constitution dealing with fundamental principles gives a clear idea as to the foundation on which the entire constitutional order is built - See MJ Nkhata "Human rights and constitutionalism: Insights on the freedom of assembly and the right to demonstrate" (2003) 7 (1) *UNIMA Students Law Journal* 45 46-47.

¹⁹³ See, RS Kay (note 154 above) 17-25.

¹⁹⁴ I Salevao "Reinventing government as a friend of the people: Common law and equity, legislation and the constitution" 3
<<http://eprints.anu.edu/archive/00002354/01/samoa%20Update%202003-salevao.pdf>>
(Accessed 24 June 2008).

reiterated, as pointed out in Chapter One, that the trust at issue here is the public trust. The public trust, it must be recalled, unlike the private trust is not limited to the regulation of property-based relationships.¹⁹⁵ The public trust focuses on the regulation of fiduciary power and position.¹⁹⁶

Conceptualising the relationship between the governors and the governed as a trust requires further justification as significant arguments have been advanced against such a position.¹⁹⁷ In spite of the arguments of the detractors, which will be dealt with in the next section, this study asserts that at a general level of certainty the central tenet of the notion that government is a trust is that the relationship between the governed and the governors is essentially a fiduciary one.¹⁹⁸ In this regard it is important to realise, as underscored by Finn, that ‘the most fundamental fiduciary relationship in our society is manifestly that which exists between the community (the people) and the state, its agencies and officials.’¹⁹⁹ One must also acknowledge that it is in the realm of government that fiduciary power is the most pervasive, the most intense and its abuse the most threatening to the community.²⁰⁰ It is notable that in representative democracies those entrusted with public power are also the ones most likely to abuse it. This presents an urgent need for a principled regulation of these powers. Since, as this study argues, government powers are fiduciary powers they must be exercised within the framework and constraints of a fiduciary law which attaches both rights and duties to the exercise of all public powers.

A deeper interrogation of the true nature of the relationship between the governors and the governed highlights most of the imperatives for the full recognition of the fiduciary relationship that exists between the governors and the governed. One need only consider the roles that constitutions and most statutory enactments confer on public officials, both elected and non-elected, to realise that there is a significant secession of authority in their favour by the citizenry. The fiduciary nature of the relationship between the governors and

¹⁹⁵ PD Finn “The forgotten trust: The people and the state” in M Cope (ed) *Equity: Issues and trends* (1995) 131 139.

¹⁹⁶ As above 140.

¹⁹⁷ See part 2.7 below for some of the major arguments against recognising government as a trust and this study’s response to these arguments.

¹⁹⁸ I Salevao (note 194 above) 4.

¹⁹⁹ PD Finn “A sovereign people, a public trust” in PD Finn (ed) *Essays on law and government Volume 1 Principles and values* (1995) 1 9.

²⁰⁰ PD Finn (note 195 above) 132.

the governed is brought out in an even more pronounced form in countries where democracy is the governing paradigm. Without doubt, democratically elected governments operate in a representative capacity, the authority to do so having been conferred by the people whom the government represents.²⁰¹ In the Australian context Deane J and Toohey J in *Nationwide News Pty Ltd v Wills* explained the point thus.²⁰²

The central thesis of the doctrine [of representative government] is that the powers of government belong to, and are derived from, the governed, that is to say, the people of the Commonwealth. The repositories of government power under the Constitution hold them as representatives of the people under a relationship, between representatives and represented, which is a continuing one.

The above point was also captured succinctly by Chief Justice Vanderbilt in *Driscoll v Burlington-Bristol Bridge Company* when he posited that.²⁰³

[Public officers] stand in a fiduciary relationship to the people whom they have been elected or appointed to serve ... As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of their office, they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity.... They must be impervious to corruption influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly....

These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon entering public office. The enforcement of these obligations is essential to the soundness and efficiency of our government, which exists for the benefit of the people. (Emphasis added)

Even though constitutions may, generally, not explicitly classify the governors or rulers as fiduciaries, it can manifestly be seen that the relationship between the governors and the

²⁰¹ G Dal Pont & others *Equity and trusts in Australia and New Zealand* (1996) 116.

²⁰² (1992) 177 CLR 1. In *Australian Capital Television Pty Ltd v Commonwealth of Australia* (No.2) (1992) 108 ALR 577 593 Mason CJ stated thus 'The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives.'

²⁰³ 86 A. 2d 201 at 221-22 (N.J. Sup Ct. 1952).

citizenry exhibits many, if not all, of the hallmarks of a fiduciary relationship.²⁰⁴ For example, by reference to the ‘undertaking test’, earlier referred to in the definition of a ‘fiduciary’, it should be evident that in a democracy a country’s constitution will invariably provide for the representation of the citizenry by persons chosen by the populace. This supports the assertion that the representatives so chosen undertake to act on behalf of the populace that has given them the confidence and trust.²⁰⁵

Even more importantly, recognising governors as fiduciaries brings real content to the notion of popular sovereignty on which most democratic forms of governance are founded. While popular sovereignty is often alluded to as the foundation of most modern democratic governments, a fiduciary regulation of the relationship between the governors and the governed can give popular sovereignty meaningful content.²⁰⁶ This it can achieve by, as earlier alluded to, clearly stipulating and enforcing the terms and conditions on which popular sovereignty is ceded to the governors and also spelling out a stringent regulatory framework for the exercise of authority on behalf of the citizenry. This, in the main, means that there is a pressing need to refocus on what is, arguably, a fundamental but often ignored premise that ‘... the people are sovereign, that government and its institutions exist for them and to their ends ...’.²⁰⁷ The statements affirming that sovereignty is derived from the people that litter most African constitutions need to be given meaningful content.

A focus on the use that most constitutions are meant to perform also accentuates the governance imperatives for conceiving government as a trust. Generally, the essence of constitutions is about power: by whom it is to be used, to what ends, with what justifications, subject to what constraints, and on what conditions.²⁰⁸ For governance and constitutionalism the focus is that government power must always be used for the purpose and in the manner prescribed by law. A crucial component in this regard is that the governors must always not only make themselves amenable to regulation by the prevailing law but also that they must

²⁰⁴ G Dal Pont & others (note 201 above) 117.

²⁰⁵ As above. Representation, however, is a complex concept and is amenable to various meanings – HF Pitkin *The concept of representation* (1967).

²⁰⁶ For example, the preamble to the Republic of South Africa Constitution, 1996, begins ‘We, the people of South Africa’ and in the Constitution of the Republic of Malawi, 1994, the preamble begins ‘The people of Malawi ...’. There are significant implications to this purported promulgation of a constitution on the peoples’ behalf which must be taken seriously. It is wrong to reduce these statements of promulgation to empty rhetoric.

²⁰⁷ PD Finn “Public trust and public accountability” (1994) 3 (2) *Griffith Law Review* 224 225.

²⁰⁸ As above 227.

constantly be accountable for the exercise of government authority. As a result of fiduciary regulation of the relationship between the governors and the governed, a basis for the creation of legitimate expectations about a high standard of conduct for public officials in exercising public powers is created.²⁰⁹ Implicit in this standard is the duty of loyalty to the people, a duty to act in the best interests of the people, a duty of prudence and good judgment especially in managing public resources and a duty to act honestly and responsibly in discharging public duties. Thus conceptualising the relationship between the governors and the governed as fiduciary forms the basis for the creation of a vibrant accountability and regulation framework in respect of all public officers.²¹⁰

One must realise that in talking about government as being in an enforceable trust with regard to its citizens this study is merely reaffirming the existence of a public trust between a government and its citizenry. What is unique about the public trust is that, unlike its private counterpart, it is not restricted to property based relationships.²¹¹ The public trust is not concerned with the regulation of property relationships but focuses on the regulation of fiduciary power and position.²¹² In achieving this, the public trust largely follows courses which parallel those used by equity to regulate private trusts and sometimes adopts equitable principles without modification.²¹³ The public trust, however, remains distinct. For

²⁰⁹ I Salevao (note 194 above) 6.

²¹⁰ In this regard it may be important to dwell, for example, in the Australian context, on what Finn has called the manifest failures of representative democracy and responsible government in properly making the wielders of government authority fully accountable to the citizenry - PD Finn (note 207 above) 224. As poignantly pointed out by Finn, representative democracy uniquely makes the gatekeepers of sovereign power the very persons who have an incentive to be its poachers – PD Finn “The abuse of power in Australia: Making our governors our servants” (1994) 5 *Public Law Review* 43 45 quoted by G Dal Pont & others (note 201 above) 118.

²¹¹ PD Finn (note 195 above) 131.

²¹² As above 140.

²¹³ The public trust is already well known in most of common law Africa and as the Kenyan High Court recognised, the fiduciary duties that the public trust may evoke may coincide with existing statutory obligations in some cases – *Peter K Waweru v The Republic* Misc. Civ. Appl. 118 of 2004 (Judgment of 2 March 2006). See, also, MC Wood “Instilling a fiduciary obligation in governance” <<http://www.thefreelibrary.com/Instilling+a+fiduciary+obligation+in+governance.-a019672899330>> (Accessed 20 June 2009) – ‘While a sovereign trusteeship differs from a private one in significant ways, nevertheless, basic standards from the private realm apply with equal force.’

example, as contrasted to private trusts, the public trust is perpetual and designed to secure the management of resources for the public benefit rather than private exploitation.²¹⁴

The upshot of recognising that government power is fiduciary is that all government power is ultimately limited by the fiduciary purpose for which it has been given.²¹⁵ This reduces itself to the assertion that ‘the institutions of government, the officers and agencies of government exist for the people, to serve the interests of the people and, as such, are accountable to the people.’²¹⁶ Notwithstanding this, as Finn has poignantly noted, it is one thing to acknowledge a trusteeship in government and quite another to give it practical substance and normative content.²¹⁷ This study can also be viewed as an attempt to give a tentative practical direction to the trusteeship of government within the Malawian context.

Repeated abuses of government authority and ‘trust’ have served not only to highlight the weaknesses of most of the current public accountability paradigms but also the need to seriously scrutinise the relationship between the governors and the governed. Nowhere is the need to scrutinise this relationship more acute than Africa especially in the light of the numerous governance and constitutional crises that the continent has experienced. Constitutionalism and good governance remain crucial components in this re-conceptualisation. Crucially, this study will demonstrate that where constitutionalism and good governance are expressly conceptualised within the social trust-based framework a meaningful foundation for accountability can be constructed.

It must be expressly stated that it is not part of this study’s argument that *ubuntu* and the social trust are synonymous – it is also not being argued that the public trust is synonymous with *ubuntu*. Rather, this study contends that there are, in spite of the disparities in origin, considerable overlaps between *ubuntu* and the social trust especially in terms of the values that the two concepts embody. It must be recalled that it was earlier demonstrated that interdependence, altruism and confidence are foundational to any social trust-based relationship. It must also be recalled that among the values that have been identified as

²¹⁴ MC Wood “Advancing the sovereign trust of government to safeguard the environment for present and future generations (Part I): Ecological realism and the need for a paradigm shift” (2009) *Environmental Law* 43 68.

²¹⁵ PD Finn (note 195 above) 141.

²¹⁶ PD Finn (note 199 above) 14.

²¹⁷ As above.

underlying *ubuntu* are the following:²¹⁸ reciprocity, dignity, harmony, humanity, group solidarity, compassion and respect. Clearly, compassion and group solidarity from *ubuntu* closely mirror interdependence and altruism on which the social trust is based. The desire to preserve interests perceived to be of crucial importance to society underlies both *ubuntu* and the social trust. *Ubuntu* can thus be utilised to generate the acceptance of the social trust for governance and constitutionalism. *Ubuntu* could be used to garner acceptance of the social trust as a legal concept. The ‘marriage’ between *ubuntu* and the social trust can be used to generate legitimacy and acceptance of values common to both concepts. This ‘marriage’ would avoid having to base the discourse on governance and constitutionalism on either the trust or *ubuntu*. It is this study’s contention that *ubuntu* and the social trust must complement each other in order to boost governance and constitutionalism in Africa, generally and Malawi specifically. This would ensure that inspiration for constitutionalism and governance in Africa is founded on a synthesis that draws from African traditions as well as the Western norms. Conceptually, however, the starting point in Africa must always be *ubuntu*.

Ubuntu can, if properly ‘re-defined’²¹⁹, play an important role in the development of both public law and private law.²²⁰ For example, *ubuntu* can be conceptualised as the basis for a distinctly African jurisprudence.²²¹ The *ubuntu* conception of law accords with a holistic notion of the universe to which mankind belongs.²²² Law in this context contributes to the ‘being’ of human beings in society. Notably, the South African Constitutional Court has made some considerable progress in articulating *ubuntu* in law.²²³ A focus on the values that must

²¹⁸ R Tumbulasi & H Kayuni (note 8 above) 148 and JY Mokgoro (note 1 above).

²¹⁹ This study deliberately employs the notion of ‘re-definition’ in order to avert the dangers of manipulation inherent in most current uses of *ubuntu*.

²²⁰ T Bekker “The re-emergence of ubuntu: A critical analysis” in D Cornell & N Muvangua (eds) (note 1 above) 490.

²²¹ MB Ramose (note 41 above).

²²² *Ubuntu* locates human beings as essential components in the cosmos. The African worldview proceeds on a unity between the self, the other and the entire cosmos in an integrated manner – D Foster “Identity in relationship: The ethics of ubuntu as an answer to the impasse of individual consciousness” in CW du Toit (ed) *The impact of knowledge systems on human development in Africa* (2007) 245-289.

²²³ Among the Constitutional Court’s decisions that either directly or indirectly address *ubuntu* are the following: *S v Makwanyane* 1995 (3) SA 391 (CC), *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217, *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC), *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) and *Dikoko v Mokhatla* 2006 (6) SA 235 (CC). These cases are discussed in Chapter Five of this study.

underlie an *ubuntu*-based society reveals the close affinities between *ubuntu* and the social trust. To derive maximum benefits from the symmetries between *ubuntu* and the social trust one needs to conduct an incisive ‘sublation’²²⁴ of *ubuntu* and the social trust. This sublation must lead to a distillation of principles from both *ubuntu* philosophy and the social trust that can then be used to inform governance and constitutionalism. Importantly, in this sublation one must neither privilege *ubuntu* over the social trust nor the converse. For example, the Malawian legal system is still heavily founded on the common law. All interventions into the Malawian legal system cannot ignore this fact and must formulate solutions that are mindful of this crucible. In the sublation, therefore, one must retrieve from the social trust those values that can help garner a judicial recognition of *ubuntu* that can then inform constitutional discourse.²²⁵ For example, while interdependence is common to both *ubuntu* and the social trust, it is clear that the western conception of interdependence is different from the African version.²²⁶ The process of sublation must thus be utilised to come up with an understanding of interdependence that mirrors both the Western conception and the African version – a ‘creative synthesis’.

2.7 Impediments to recognising government as an enforceable trust

The notion that government is a trust has had a long but unhappy history.²²⁷ Salevao asserts that in eighteenth century England it was commonly accepted that government was a trust, that public offices were offices of trust and confidence concerning the public and that public officials were officers who discharged duties in which the public had a vested interest.²²⁸ He concedes that the prevailing intellectual climate may have contributed to an easy acceptance

²²⁴ Mamdani notes that discussions on Africa’s present predicament involve two clear tendencies; modernist and communitarian. An emphasis on either of the two positions results in an impasse in both practical politics and a paralysis of perspective. The solution, he argues, is not choosing the one strategy over the other but in sublating both through a double cutting move that simultaneously critiques and affirms – M Mamdani *Citizen and subject: Contemporary Africa and the legacy of the late colonialism* (1996) 3-4.

²²⁵ While *ubuntu* is easier to read into the South African Constitution, considering the fact that it was included in the post-amble of the Interim Constitution and the courts have already accepted that it underlies, for example, the Bill of Rights the same cannot be said of Malawi. Creative interpretation will have to be undertaken to imply *ubuntu* into the Malawian Constitution, for example, by considering section 13 of the Constitution.

²²⁶ See T Bekker (note 220 above) 493 – the individual in western societies is the cornerstone of the society and not the group as such. See, also, M Hansungule (note 23 above) 396 – The African philosophical outlook is based on the group.

²²⁷ PD Finn (note 199 above) 10-11 and PD Finn (note 195 above) 132-133.

²²⁸ I Salevao (note 194 above) 3.

of this proposition which easily found resonance in naturalist philosophy. Public power was thus essentially conceived as fiduciary in nature and origin and that those exercising public power had a trusteeship for the public.²²⁹

The rise to prominence of the notion of government as a trust was, however, not long lived. Within a few decades of its emergence it faded into the background of legal and political thought eclipsed by notions of representative and responsible democracy.²³⁰ The result of this, in English legal and political thought, was the comprehensive rejection of the notion of government as a trust as nothing more than a ‘political metaphor.’²³¹ By asserting that the notion of government as a trust was a mere ‘political metaphor’ English courts necessarily asserted that such a trust could not be judicially enforced. It is, arguably, in the same sense – the political metaphor sense – that Locke and other social contract theorists use the terms ‘fiduciary’ and ‘trust’ in their works.²³² With hindsight one now easily realises why the notion of government as a trust was never passed on to most British colonial territories.

The rejection of the notion of government as a trust has its origins, in part, in the development of equity and its relationship with public law. While the role of equity in private law has remained prominent with the result that a comprehensive and well developed jurisprudence exists regulating relationships of trust between private individuals, the same cannot be said of equity and public law.²³³ There is, however, no patent reason why the application of equity should not be extended into the public law realm. Strikingly, such a restrictive approach to the application of equity runs counter to equity’s much hallowed flexibility and the general principle of guaranteeing litigants access to the same rights and remedies.²³⁴ Equity and equitable remedies do have relevance in public law but as earlier

²²⁹ ES Morgan *Inventing the people* (1989) Chapter 5 Quoted by I Salevao (note 194 above) 3.

²³⁰ I Salevao (note 194 above). Finn notes that the fading of this ‘most elementary proposition’ from legal consciousness raises some real curiosity in the collective amnesia that humanity has suffered – PD Finn (note 195 above) 131.

²³¹ PD Finn (note 199 above) 12. The ‘political metaphor’ is contrasted to a ‘true trust’ which is the one that is amenable to judicial enforcement.

²³² See, for example, J Locke “The second treatise of government: An essay concerning the true original, extent and end of civil government” reprinted in P Laslett (ed) *Two treatises of government* (1988) 266 366-367 371. Laslett confirms the point by arguing that although Locke used the term ‘trust’ with legal overtones it is clear he never intended to imply the full legal consequences thereof – 114-115.

²³³ G Dal Pont & others (note 201 above) 116.

²³⁴ Equity as a system of law is premised on several maxims which manifest its flexibility to provide remedies in all cases irrespective of the formal strictures of the common law. One

stated, one cannot wholesale uproot the principles of equity in private law for application in the public law realm.

2.7.1 'Political metaphor' and 'true trusts': Exploring the conundrum

The categorisation of the trust relationship between government and its citizenry as a mere 'political metaphor' strikes at the root of the objections for recognising government as an enforceable trust in the Anglo-American legal tradition and systems affiliated to it. Notably in this connection, one must realise that social trust-based devices, whatever form they take, may be classified into two broad categories and these are trusts in the higher sense and trusts in the lower sense.²³⁵ The dominant perception in the Anglo-American legal tradition has been that trusts in the higher sense involve governmental obligations which are essentially political in nature and can thus not be enforced in the courts.²³⁶ Trusts in the lower sense, however, are what have also been called 'true trusts' and these are considered the proper subject of judicial supervision. It is on the basis of this distinction that English courts have steadfastly refused to enforce any trust perceived to be one in the higher sense.²³⁷

Practically, the implication of this distinction is that in English courts, and by extension in most jurisdictions based on the common law,²³⁸ the Crown (the government) can never be held liable to be in an enforceable fiduciary relationship with its subjects. However, this study

such maxim is that 'Equity will not suffer a wrong be without a remedy'. Practically, this means that a court exercising its equitable jurisdiction would not turn away a litigant for want of an appropriate remedy but would consider the case on its facts and fashion a remedy to fit the litigant's case. For a fuller discussion of the maxims of equity see RP Meagher & others (note 49 above) Chapter 3 and M Haley *Equity & trusts* (2004) 3-5.

²³⁵ MJ Nkhata (note 65 above) 17.

²³⁶ The public trust would be put in the category of trusts in the higher sense.

²³⁷ A list of English authorities bears ample testimony to this resistance by English courts. Examples of such authorities include, *Rustomjee v R* (1876) 2 QBD 69, *Kinloch v Secretary of State for India* (1882) 7 App. Cas. 619, *Civilian War Claimants' Association Ltd v R* (1931) All ER Rep 432 and *Tito v Waddell* (1977) Ch 106.

²³⁸ Most common law jurisdictions, especially former British colonies, are affected by this doctrinal hiccup because Britain imported its system of law into most of these colonies and the development of local jurisprudence in such countries has been heavily shaped by the British system. For example, under article 15 of the British Order in Council, 1902, Malawi officially received the English common law and the doctrines of equity as developed in England. This makes all the common law developed before the reception date binding in the country (as the application of the common law and equity was continued by the 1964 and 1966 Constitutions) and later developments in the common law remain highly persuasive.

argues that this ‘wholesale shielding’ of the government from regulation by fiduciary principles creates conditions for lessened accountability and diligence on the part of public officials thereby jeopardising constitutionalism and good governance. From an African perspective it is further argued that this is not in accord with the accountability and transparency that *ubuntu* supports in the management of the public realm. While the English legal system may have specialised local factors mandating the adoption and maintenance of such a position the need to enhance accountability on the part of public functionaries in Africa demands a critical evaluation of such a position. It must be borne in mind that from the perspective of governance and constitutionalism, the situation in Africa requires that all mechanisms for guaranteeing accountability be brought to bear on public functionaries. To this end, one cannot exclude an accountability mechanism merely by following precedent without critical reflection.

To properly appreciate the conundrum at issue here one needs to note that about three decades ago the English High Court (Chancery Division) provided an emphatic affirmation of the distinction between trusts in the higher sense and trusts in the lower sense and the implications flowing therefrom in *Tito and others v Waddell and others*.²³⁹ In the light of the importance of the court’s holding in this case, it is axiomatic that the facts and the reasoning of the court be briefly summarised. The plaintiffs in the case were all former landowners on an island in the Western Pacific known as Ocean Island (also called Banaba by the natives). Ocean Island was a British colonial territory. In 1900 phosphate was discovered on Ocean Island and the British Crown granted a licence to a British company to mine the phosphate. At all times the Crown was represented on Ocean Island by a Resident Commissioner whose approval was required for all purchases or lease of native lands on the island. In subsequent agreements entered into between the landowners, the mining company and the resident commissioners, it was agreed that a fund should be established for the benefit of the Banabans where royalties collected from the mining should be paid. The agreements also stated that the company would restore the land worked out in the mining.

Subsequently the plaintiffs commenced an action against the British Crown in respect of several transactions that had been concluded between the landowners and the Crown and the mining company. Specifically, the plaintiffs claimed that in respect of the agreements in question the Crown was in breach of its fiduciary obligations by failing to ensure the restoration of worked out land. The plaintiffs also claimed that the Crown had breached its

²³⁹ (1977) Ch 106.

fiduciary duties in respect of the way in which it had administered the royalties collected from managing the fund as a result of palpable conflicts of duty and interest. In its holding the court did indeed find that the relationship between the Banabans and the Crown was a fiduciary relationship (specifically trustee/beneficiary relationship). However, the court held that the type of trust relationship that existed in this case was a trust in the higher sense and hence unenforceable through the courts. The judge, Megarry V-C, after referring to several English decisions,²⁴⁰ held that the reference in the agreements to an office holder other than an individual as a trustee served to highlight the fact that this was not a 'true trust'. He further highlighted the problems of applying the law of perpetuities, the ascertainment of beneficiaries and their beneficial interests as some of the factors that denied the existence of a 'true trust' in the circumstances. In relation to the management of the royalties, the court found that the Ordinance relied on by the plaintiffs actually conferred a statutory duty on the Resident Commissioner with respect to the management of the money collected and that it did not evince an intention to create a fiduciary obligation. For the purposes of this study it is apt to note that the effect of *Tito and others v Waddell and others* has, generally, been to keep out fiduciary regulation of public functionaries in England and most common law jurisdictions.

Although *Tito and others v Waddell and others* represents the settled position in English law, it is notable that other common law jurisdictions have, over the passage of time, relaxed the distinction that Megarry V-C expounded. The emerging approaches from Canada and Australia reveal that courts in these countries have not steadfastly stuck to the formulation by Megarry V-C in *Tito v Waddell*. For example, Australian and Canadian courts have demonstrated a willingness to recognise that the government may very well assume responsibilities as a trustee in the lower sense and be brought to account as such.²⁴¹ This willingness has been aided by the respective courts' ability to appreciate the facts of each case on its own basis and by applying established legal doctrine in a 'progressive' manner without unnecessarily being bound by the strictures of precedent and doctrine. Such an

²⁴⁰ Principal among the authorities referred to in this regard were: *Rustomjee v R* (1876) 2 QBD 69, *Kinloch v Secretary of State for India* (1882) 7 App. Cas. 619, *Civilian War Claimants' Association Ltd v R* (1931) All ER Rep 432.

²⁴¹ *Mabo v Queensland* (No. 2) (1992) 175 CLR 1, *Guerin v The Queen* (1984) 2 SCR 335; *Sparrow v The Queen* (1990) 1 SCR 1075. Moffat & others (note 42 above) also questions the approach adopted by Megarry VC in *Tito v Waddell* by highlighting similar cases that have been decided differently outside England including *Delgamuukw v British Columbia* (1991) 79 DLR (4th) 185.

approach conforms to the assertion earlier highlighted in this study that the categories of fiduciary relationships should not be considered as a closed class.

Further, outside of the 'prominent' common law jurisdictions one notices remarkable progress in recognising that the government, in appropriate cases, should be held to be in a judicially enforceable fiduciary relationship in its dealings with the citizenry. One such example is offered by *Minors Oposa v Secretary of the Department of Environment and Natural Resources (Minors Oposa decision)* – a case from the Philippines.²⁴² In this case an action was commenced by a number of Filipino children claiming the enforcement of their right to a balanced and healthful ecology. The action alleged that the applicants' right to a balanced and healthful ecology was being threatened by the manner in which the Government was granting timber logging licences. The children, who were joined by their parents, brought the action on their own behalf and on behalf of their unborn children. The court found in favour of the applicants and held that the applicants' right to a balanced and healthful ecology was indeed threatened by the timber logging licences being granted by the government.

What is most notable about the *Minors Oposa decision* is that the court found in favour of the applicants even though the action was largely premised on a violation of rights found in the 'State policies and Principles' part of the Constitution.²⁴³ Specifically in this connection, the court held that the inclusion of the rights claimed in the State policies and Principles merely served to highlight their importance rather than indicate their unenforceability. In the words of the court:²⁴⁴

While the right to a balanced and healthful ecology is to be found under the Declaration of principles and state policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self preservation and self perpetuation ... the advancement of which may even be said to predate all governments and institutions.

²⁴² (1994) 33 *International Legal Materials* 173.

²⁴³ Cf. Section 14 of the Constitution of the Republic of Malawi, 1994, which states the principles of national policy outlined in Chapter three, shall be directory in nature though courts are bid to have regard to them in construing legislation and policy.

²⁴⁴ Per Davide Jr. J 187-188.

Effectively, the *Minors Oposa* decision recognised the fiduciary duties that the government of the Philippines had in caring for the environment.²⁴⁵ In granting relief on behalf of the unborn children, the court also affirmed the duty of the state to ensure inter and intra-generational equity in the utilisation of natural resources. Even more poignant is the fact that the vindication of the rights of the unborn petitioners actually accords very well with a social trust-based conception of human rights. This is because a social trust-based conceptualisation of human rights acknowledges that vulnerability and dependence can be a basis for allocating rights and obligations.²⁴⁶ A degree of judicial activism on the part of the court thus brought about the resolution of a dispute in a manner that, this study argues, was poised to contribute to both good governance and constitutionalism in the Philippines. One should not belittle the underlying fiduciary tenor to the reasoning in the court's judgment. Even more important to note are the similarities between the values that the *Minors Oposa decision* promotes – i.e. inter and intra-generational equity – to some of the values identified as underlying *ubuntu*.

2.7.2 The case for circumventing the objections against recognising government as an enforceable trust and some consequential governance implications

As earlier stated, central to this study's thesis is the contention that government, generally, and in Malawi, specifically, is an enforceable fiduciary relationship with its citizenry. This proposition, as noted from the discussion of *Tito and others v Waddell and others*, has generated some considerable resistance in most legal systems based on the English model. In spite of the objections, this study argues that it is worth reflecting on whether the insistence on a strict distinction between trusts in the higher sense and trusts in the lower sense serves a greater societal good in all countries at all times. This study holds the view that a rigid insistence on the distinction between trusts in the higher sense and trusts in the lower sense is without merit. It seems to be the case that the apprehension towards recognising the relationship between the governors and the government as a true trust is unduly but severely heightened without proper justification.

At the outset one ought to realise that a finding that there is a 'true trust' between the government and its citizens must be preceded by a finding that the relationship between the parties is fiduciary in nature. It is trite to note that there are numerous fiduciary relationships

²⁴⁵ MJ Nkhata "Good governance and the utility of social trust based notions to the Malawi Poverty Reduction Strategy" LLB (Honours) Dissertation: University of Malawi (2003) 21.

²⁴⁶ G Kamchedzera (note 56 above) 39.

that can be formed between individuals in society even though, admittedly, the archetypal fiduciary relationship remains that between a trustee and a beneficiary.²⁴⁷ The bases for founding fiduciary relationships, however, remain diverse and disparate.²⁴⁸ In the light of the earlier concession, that categories of fiduciary relationships remain unclosed, it is arguable that the existence or non-existence of fiduciary duties in societal relationships should be dependent on the specific circumstances of each relationship. The role of the established principles, therefore, should be to determine, in a fair and principled manner, whether or not a particular case qualifies to be classified as fiduciary or not. A rigid approach to the recognition of fiduciary relationships stultifies the immense fertility of the law of fiduciary obligations.

Clearly, therefore, there can be no basis for a blanket exclusion of the government's involvement in enforceable fiduciary relationships with the citizenry. Bearing in mind the fact that there are different bases for founding fiduciary relationships one must also concede that each fiduciary relationship is unique in its own light. The fact that the government or any of its agencies are described as fiduciaries or undertake tasks imposing fiduciary duties would not and should not automatically exclude the possibility that such a relationship is enforceable by the courts – either wholly or in part. The uniqueness inherent in each fiduciary relationship entails that enforcement of particular fiduciary relationships by the court must also take full cognisance of this uniqueness in crafting enforcement strategies. The distinctiveness of fiduciary relationships necessarily entails that no one model of enforcement will be good for all fiduciary relationships at all times. In 'worrying' about the implications of recognising the so called 'political metaphor' as a true trust, one may do well to dwell on Frankfurter J's statement in *SEC v Cheney Corporation* that²⁴⁹

[t]o say that a man is a fiduciary only begins the analysis; it gives direction to further enquiry. To whom is he a fiduciary? What obligations does he owe as fiduciary? In what respects has he failed to discharge these obligations? And what are the consequences of his deviation from duty?

A finding that the relationship between the government and its citizenry is, in a particular context, a trust in the lower sense is thus only the beginning of an enquiry. Such a finding would, of course, necessarily entail the existence of an enforceable fiduciary relationship

²⁴⁷ S Dorsett (note 82 above) 159.

²⁴⁸ See, *In re Coomber* (1911) Ch 723 per Fletcher Moulton LJ.

²⁴⁹ (1943) 318 US 80 85-86.

between the government and its citizenry. However, even though the fiduciary concept is used to import incidents of an express trust into trust-like and trustee-like situations such a finding would not automatically import all incidents of the express trust into the situation between the government and the citizens.²⁵⁰ Admittedly, such a relationship would fall to be regulated by duties that closely mirror those developed for private trusts. It is important, at the risk of being repetitive, to always recognise that fiduciary relations are unique and distinct in their special ways requiring differing treatment in the different contexts. The mode of enforcement of fiduciary relationships often depends on the nature of the relationship between the parties and may be unique to that type of fiduciary relationship.

Clearly, where a court holds the government to be a trustee in the lower sense this finding by itself would not mean that all incidents of the express trust as known in private law would immediately become applicable to the regulation of the particular case. At the same time, however, one must acknowledge that the notion of government as a trust is largely informed by principles of trusts as developed in private law.²⁵¹ It would, however, be foolhardy to label the relationship between the government and citizenry as fiduciary and then apply principles of private trusts in their entirety - without modification - to regulate such a relationship. Private trusts concepts applied in isolation are unlikely to achieve 'the optimum balance between the autonomy ceded by the people to the government and the responsible use of this collective authority by the government.'²⁵² However, to deny in total the relevance or applicability of fiduciary regulation to any such relationship is to deny the fundamentals of democracy.²⁵³ Evidently, once it is recognised that there are unique characteristics to the democratic nature and tenets of government, it must be recognised that the private trust cannot provide an exact analogy. In applying the principles of trust to 'trusts in the higher sense' principles of private trusts must be modified to take into account the reality and complexity of public representation and in so doing, provide a reasoned and principled basis for reform be it judicial or legislative.²⁵⁴

²⁵⁰ P Birks (note 66 above).

²⁵¹ I Salevao (note 194 above) 6.

²⁵² G Dal Pont & others (note 201 above) 116.

²⁵³ Finn, quoting Mason CJ, refers to the 'evolving concept of a modern democracy' whose focus is not simply on majoritarian rule but extends to the notion of responsible government which also respects fundamental rights and dignity of the people – PD Finn (note 199 above) 7.

²⁵⁴ G Dal Pont (note 201 above) 116-117 and Salevao (note 194 above) 6.

In determining whether or not an enforceable relationship must be recognised in a particular context, it is important to establish whether the more vulnerable party would be left without effective remedies for monitoring the relationship if the fiduciary duties inhering in the relationship are made unenforceable.²⁵⁵ It is always important to realise that the content of a fiduciary obligation (and hence a fiduciary relationship) will be tailored by the circumstances of the specific relationship from which it arises. This is especially important because fiduciary obligations, with the passage of time, have been developed to protect and preserve not just narrow legal, economic and proprietary interests but also to defend fundamental human and personal interests.²⁵⁶ In the context of democratic governance, for example, the government must inevitably engage in resource allocation in a context of scarce resources and multiple competing interests.²⁵⁷ It is especially in the mediation of competing societal interests that the analogy of the trust becomes more nuanced rather than diminished.²⁵⁸ Obviously, to totally exclude the application of fiduciary principles to relations formed between the government and its citizens even where all indicators of ‘fiduciarieness’ are present is an undue fetter in the development of the law of fiduciary obligations. It is arguable that it is doctrinal strictures that have prevented the expansion of fiduciary regulation into public law rather than a patent and proven undesirability of such expansion.

Limiting the enforceability of trusts in the higher sense, regardless of the circumstances in which they occur, also overlooks the fact that the law of fiduciary obligations is actually founded in equity.²⁵⁹ Equity as a system of law was designed and still functions to redress specific wrongs rather than following a rigid application of rules of law, for example, by preventing those holding positions of power from abusing their authority and providing justice rooted in conscience.²⁶⁰ It runs against the general purport of equitable jurisdiction to deny expansion of equitable relief in the face of prodding by conscience. It must always be

²⁵⁵ S Worthington (note 103 above).

²⁵⁶ *Norberg v Wynrib* (1992) DLR (4th) 449 499 Per McLachlin J.

²⁵⁷ G Dal Pont & others (note 201 above) 118.

²⁵⁸ The fact that the government cannot simultaneously act in the interests of everyone is not fatal to the concept of government as a trust. Rather this only enhances the analogy and parallel between the role of government as a trustee with that of a trustee of a large discretionary trust – G Dal Pont & others (note 201 above) 118. For a discussion of discretionary trusts see JE Martin *Hanbury and Martin modern equity* (1993) Chapter 8.

²⁵⁹ T Hammond ‘The “stolen generation” – Finding a fiduciary duty’ <www.murdoch.edu.au/elaw/issues/V52/hammond52_abstract.html> (Accessed 17 June 2008).

²⁶⁰ I Salevao (note 194 above).

recalled that '[t]he courts of equity have striven to protect the vulnerable from abuse by persons with power over them and ... the potential for such abuse is one of the hallmarks of a fiduciary relationship'.²⁶¹

It further seems to be the case that the distinction between trusts in the higher sense and trusts in the lower sense is also premised on the fact that 'true trusts' are a private law creation while trusts in the higher sense belong to the public law domain. In this connection it is indeed notable, as pointed out earlier, that while trusts have been fully elaborated in private law there is no similar elaboration of the operation and relevance of the trust concept in public law.²⁶² The effect of this is that fiduciary obligations found to occur within the public law domain have generally been treated as judicially unenforceable. The reluctance to extend and modify the principles and remedies available in private law to public law, it is argued, proceeds on the shaky assumption that the private/public law divide remains brightly demarcated to this date.²⁶³ However, a neat and clear distinction between private law and public law has, in recent years, become increasingly difficult to sustain.²⁶⁴ This has been largely as a result of the global acceleration of corporatisation and privatisation of bodies and functions traditionally viewed as public in many jurisdictions.²⁶⁵ The result is that the state has, in modern times, given up some of its traditional functions while also undertaking functions which traditionally might never have been thought to be state functions. Consequently the public law/private law divide is currently so blurred and not as rigid as it might have been historically. This, it is argued, has sufficiently altered the dynamics as to create a basis on which a cross-application of remedies and concepts between private law and public law can be conducted. Again, this call for cross-applicability is not to suggest a wholesale importation of private law remedies into the public law domain and vice-versa. Rather, it is to suggest that a court faced with the necessary facts should be able to import and modify particular principles, if this would bring about an equitable

²⁶¹ D Sweeny "Broken promises: The Crown's fiduciary duty to aboriginal peoples" (1995) 3 (75) *Aboriginal Law Bulletin* 4 7.

²⁶² G Dal Pont (note 201 above).

²⁶³ Cf. HWR Wade *Administrative Law* (1977) 36.

²⁶⁴ Van der Walt argues that the distinction between private and public law has eluded scholars for a long time and is no longer tenable – J van der Walt *Law and sacrifice: Towards a post-apartheid theory* (2005) 3-5. According to Ackermann J, it could be dangerous to attach consequences to or infer solutions from concepts such as 'public law' and 'private law' when the validity of such concepts and the distinctions which they imply are being seriously questioned – see *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

²⁶⁵ I Salevao (note 194 above).

resolution of the dispute. A court should, therefore, not be held to say, as Megarry V-C did in *Tito and others v Waddell and others*, that although a particular dispute generated a fiduciary relationship between the parties, the court could not enforce such a trust.

Arguably, the main reason why English courts have been reluctant to enforce trusts in the higher sense is because of the doctrine of parliamentary supremacy that still prevails in the United Kingdom. The doctrine of parliamentary supremacy also referred to as parliamentary sovereignty entails that parliament has the supreme law-making powers and it can make and unmake any laws in the country. Additionally, the doctrine stipulates that no-one has the right to override or set aside legislation lawfully passed by parliament. Significantly, this means that the court's function, strictly speaking, is limited to interpreting the law the way parliament has passed it.²⁶⁶ In the context of trusts in the higher sense, an English court would thus require an unequivocal constitution of the government as a trustee in the lower sense by parliament before holding that a statutory enactment has constituted the government as trustee in the lower sense.²⁶⁷ So far British courts have been unable to find such form of expression in statutory enactments and the judicial regulation of fiduciary relations between the government and the citizenry has yet to be attempted.

In as far as the foundation of the English position rests, in a significant part, on the doctrine of parliamentary supremacy important contrasts may be drawn. In countries like Malawi where the overarching doctrine is constitutional supremacy entirely different dynamics are at play.²⁶⁸ The courts are granted a materially broader latitude in construing legislation and can even declare legislation unconstitutional for failure to meet constitutional stipulations.²⁶⁹ In comparing a parliamentary supremacy jurisdiction from a constitutional supremacy one, it must be noted that that the construction of the legislative intention is conducted within

²⁶⁶ The sovereignty of parliament is a peculiar feature of the British Constitution. The principle of sovereignty of parliament necessarily engenders caution on the part of the courts when construing legislation – HWR Wade & CF Forsyth *Administrative law* (2004) 26.

²⁶⁷ See, for example, *Civilian War Claimants Association* (note 237 above) and *Rustomjee v The King* (note 237 above).

²⁶⁸ The supremacy of the Constitution of the Republic of Malawi is established by sections 5 and 199.

²⁶⁹ See, for example, section 108(2) of the Constitution of the Republic of Malawi which expressly empowers the High Court to review any law for consistency with the constitution. In *Malawi Congress Party and others v Attorney General and others* Civil Cause No. 2074 of 1995 a High Court judge declared the Press Trust Reconstruction Act of 1994 to be unconstitutional. This decision was, however, reversed on appeal to the Supreme Court.

different moulds. In the one, the overriding objective is to discern what parliament intended while in the other there is the additional task of discerning the conformity of the legislation under construction to the constitution. Importantly, where argument is made that a constitutional provision constitutes the government a trustee in the lower sense, such an argument will be construed differently from one alleging the constitution of a government as a trustee based on a statutory enactment. This flows from the fundamental distinction between the principles for statutory construction and those for construing constitutions.²⁷⁰ There is thus a higher probability of a court agreeing with a contention that the government has been constituted a fiduciary where the argument is founded on the constitution and in relation to provisions that allude to such a relationship.²⁷¹ Strikingly, it is centrally on the basis of constitutional provisions, principally, that this study argues the government of Malawi is constituted a trustee vis-à-vis the citizenry, generally.

Further, in spite of all the historical and practical connectivities between, for example, the Malawian legal system and the English system, one must concede that English constitutional practice cannot have automatic supremacy in Malawi.²⁷² Malawian courts are thus not bound to follow the categorisation and implications that Megarry VC and other English judges before him drew in relation to trusts in the higher sense. In construing the common law, a judge in Malawi ought to be more concerned with ensuring the common law's compliance

²⁷⁰ The Malawi Supreme Court has held that in cases of constitutional interpretation as contrasted to statutory interpretation, the courts must adopt a broad and purposive approach as opposed to a legalistic and pedantic approach – *Fred Nseula v Attorney General* MSCA Civil Appeal No. 32 of 1997 and *Attorney General v Dr Mapopa Chipeta* MSCA Civil Appeal No. 33 of 1994 both confirming *Minister of Home Affairs v Fisher* (1979) 2 All E.R. 21 at 25-26. See also the Ghanaian case of *Tuffour vs. Attorney General* (1980) G.L.R. 637, 647-648, which has also been cited with approval by Malawian courts, where the court said that a 'broad and liberal spirit is required for the interpretation of the constitution ... a doctrinaire approach to interpretation would not do...'

²⁷¹ This study is mindful of the warning by Lord O'Hagan that there is no magic in the word 'trust'. That the use of the word in a statutory enactment or other document may not necessarily create an enforceable trust – *Kinloch v Secretary of State for India* (note 237 above) 630. At the same time, however, it is important to realise that the word 'trust' need not be used in order to create a trust. The totality of the obligations between the parties to a relationship may constitute the one party a trustee/fiduciary and the other a beneficiary.

²⁷² PD Finn (note 199 above) 3 – history may give traditional British legal doctrines prominence but never primacy in Malawi. In another scholarly piece, Finn has argued that the distinction between strict trusts (trusts in the lower sense) and the political metaphor (trusts in the higher sense) may be apt in England with its traditional difference to the Crown but not elsewhere – PD Finn (note 195 above) 140.

with the principles upon which the Constitution is founded.²⁷³ It is here argued that a court conducting a faithful reflection upon Malawi's Constitution would never encounter the hurdles that Megarry VC encountered. It is not farfetched to assert that a Malawian court is bound to reach conclusions that are materially different. Two Malawi High Court decisions lend credence to this position. Firstly, in *Masangano v Attorney General*²⁷⁴ the court indicated its intention not to shy away from the resolution of any issue that would come before it even if the same was overtly political. The court clearly stated that it would not be held back by the political question doctrine or the question of justiciability – the court also noted that these doctrines are in the wane in the United Kingdom.²⁷⁵ Secondly, in *Ex Parte SGS*²⁷⁶ the court also stressed that following from section 14 of the Constitution, there is no part of the Constitution which is a no go area as courts bear the responsibility for protecting and enforcing the Constitution in its entirety. This, in this study's view, reinforces the position that should the question of whether section 12 of the Constitution, for example, place the Government of Malawi in an enforceable fiduciary relationship, the courts would not 'avoid' such a matter and are likely to answer it in the affirmative.

Even more importantly, the whole notion of a trust in the higher sense does not augur well with the manner in which governance was practised in traditional African societies. This is because it essentially shields the exercise of political power from fiduciary regulation. As Sindane and Liebenberg demonstrate, with ample illustrations from across Africa, political power in traditional African societies also entailed specific responsibilities.²⁷⁷ Political power was adequately checked and the rulers were accountable to the populace and amenable to removal from office for dereliction of duty – this removal from office is akin to the removal of a trustee for breach of trust. There was, generally speaking, no blanket immunity from accountability by the rulers. Clearly, the distinctly African perspective on governance, which

²⁷³ See S Banda "Constitutional mimicry and common law reform in a rights-based post colonial setting: The case of Malawi and South Africa" (2009) 53(1) *Journal of African Law* 142-170.

²⁷⁴ *Gable Masangano v Attorney General, Minister of Home Affairs, Commissioner of Prisons* Constitutional Case No. 15 of 2007.

²⁷⁵ More to the point is the dicta of Davide Jr. J in the *Minors Oposa decision* where he stated that – 'It must nevertheless be emphasised that the political question doctrine is no longer the insurmountable obstacle to the exercise of judicial power or the impenetrable shield that protects executive and legislative actions from judicial inquiry or review' – at 193.

²⁷⁶ *In the matter of the Ministry of Finance Ex Parte SGS Malawi Ltd* Misc. Civil Application No. 40 of 2003.

²⁷⁷ J Sindane & I Liebenberg (note 24 above) 34 35. Admittedly there were variations across Africa in the prevailing political systems.

endows responsibilities on the rulers while not shielding them from accountability, has much to commend it and must be studied closely to revive those features that can enrich governance and constitutionalism.²⁷⁸ This approach, it must be acknowledged, is very much steeped in *ubuntu* values.²⁷⁹

In the main, a blanket refusal to subject the government to fiduciary regulation, in appropriate circumstances, makes a mockery of the rule of law and its guarantee to an effective remedy in the event of a grievance. Clearly, if there was a call for judicial enforcement of the trust between the government and its citizens, such a case will have to be treated on its unique facts requiring equally unique enforcement measures. In crafting this unique approach courts would have to consider constitutional imperatives in a particular country to ensure that enforcement of this type of trust should fall within the broader constitutional intendment. Such an approach, this study believes, would greatly enhance diligence and accountability in the performance of all public duties. What is being suggested here is not the ‘throwing of the fiduciary label’²⁸⁰ at any and every societal moral outrage but the careful and principled extension of what is ultimately a very versatile legal concept to cover a very important sphere of human activity.²⁸¹

2.8 A conceptual starting point: Government as a trust and administrative law

Administrative law provides useful conceptual parallels for properly understanding the assertion that government is a trust in favour of the governed. This is so even though the fiduciary concept is hardly ever expressly articulated in administrative law. As Mason once asserted, ‘modern administrative law ... from its earliest days has mirrored the way in which equity has regulated the exercise of fiduciary powers.’²⁸² Mason’s views find consonance with Finn who asserts that administrative law has readily accepted that if government power

²⁷⁸ As above 37.

²⁷⁹ Cf. T Metz (note 3 above) 321-341.

²⁸⁰ S Worthington (note 103 above) 500-508.

²⁸¹ FW Maitland, the English jurist, is on record as having stated that the trust remains the greatest and most distinctive achievement of all Englishmen in the field of jurisprudence. This, according to Maitland, was not because the trust embodied basic ethical principles but because of its versatility and generality which allowed it to be applied in multifarious contexts- See FW Maitland *Equity* (1936) 223 and FW Maitland *Selected historical essays* (1936) 129 quoted by G Moffat & others (note 51 above) 1.

²⁸² A Mason (note 49 above) 238.

is fiduciary it is ultimately limited by the fiduciary purpose for which it has been given.²⁸³ Evident in administrative law is a network of obligations and remedies that, even without using fiduciary language, clearly import some of the duties and rights that are ordinarily recognised by the law of fiduciary obligations.²⁸⁴ Principal examples that illustrate this assertion can be had from the concept of judicial review and also the principles that administrative law has developed to regulate the exercise of discretion on the part of public functionaries.²⁸⁵

In administrative law, 'judicial review' refers to the inherent power of superior courts to review the decisions of public officials in the administration of government and to grant appropriate orders.²⁸⁶ All administrative decisions are amenable to judicial review. By 'administrative decision' is meant, broadly, a decision by a public official in the exercise of some public power associated with a public office. The term 'decision' includes not only decisions understood as final determinations in a matter but also acts, omissions or conduct engaged in prior to the making of such a decision. A close analysis of the remedies that are available in judicial review reveals that these remedies, almost uniformly, mirror principles of fiduciary regulation. For example, equitable principles such as accountability, honesty, responsibility, reasonableness and fairness are amply reflected in all the common law prerogative remedies.²⁸⁷ By way of illustration, a writ of certiorari is issued to quash or set aside an invalid decision. The underlying principle is that a decision maker does not have unfettered discretion. The writ of prohibition is granted on an application to prevent an invalid decision being carried out or enforced. The rationale here is that the power of a decision

²⁸³ PD Finn (note 195 above) 141.

²⁸⁴ I Salevao (note 194 above) 10 -12.

²⁸⁵ By 'public functionary' this study refers to individuals that have assumed leadership roles in society. Public functionaries are thus not restricted to public officers, strictly construed, but include bureaucrats and all other public officers, both elected and appointed. The distinctive feature is that the 'job' of a public functionary inevitably involves the management of public resources in the one form or the other.

²⁸⁶ I Salevao (note 194 above) 10 – 11.

²⁸⁷ In British administrative law and other systems that borrow from the British system, prerogative remedies are designed primarily for the control of government powers and duties. The distinguishing feature of these remedies is that they are granted at the suit of the government. They are prerogative in the sense that they were originally only available to the government (the Crown in England). These remedies were essentially designed to maintain efficiency and order in the functioning of government departments. A fuller discussion of prerogative remedies is offered by HWR Wade *Administrative law* (2004) Chapter 16.

maker is limited by law. Mandamus is issued to compel a public official to perform his duties in a clear vindication that public officials exist for the benefit of the public.

One also notes that statutory enactments will invariably confer a great degree of discretion on public officials in the discharge of their functions. In regulating this discretion administrative law has uniformly held that no such thing as absolute discretion exists in the discharge of statutory power. As put by Wade, statutory power conferred for public purposes is conferred on trust and not absolutely.²⁸⁸ This means that such power can only be rightly used if it is used in the manner in which parliament when conferring the power can be said to have intended. It is an unshifting axiom in administrative law that every power has legal limits however wide the language of the enabling statute. The notion of absolute and unfettered discretion, it is argued, cannot be sustained in a system where the rule of law reigns.²⁸⁹ Since discretion is conferred on public functionaries in trust for the public, the propriety of the exercise of such discretion can be judged by reference to the purpose for which they were so entrusted.²⁹⁰

Although it is rare to find, in administrative law, express reference to fiduciary principles, it is clear that administrative law's regulation of public functionaries has an underlying fiduciary tenor. The operation of the process of judicial review and the regulation of the discretionary powers inherent in public offices, among others, offer a clear illustration of the latent fiduciary nature of such regulation. The central tenet is that every public authority is in fact a fiduciary of the power it wields.²⁹¹ The power may be conferred either for the benefit of only a prescribed section of the public or the general good of the entire nation but it is a power that must never be misused or abused. If somehow the power has been abused the courts have a constitutional duty to intervene and rectify the situation. Whether there has been an abuse of such public power or not is a determination that can only be resolved by reference to the specific factors of each case. Although administrative law does offer an exciting conceptual

²⁸⁸ HWR Wade *Administrative law* (1982) 353-354.

²⁸⁹ The inhibitions on the exercise of power that the rule of law achieves led the Marxist-Historian Thompson to assert that the rule of law is 'an unqualified human good' – EP Thompson *Whigs and hunters: The origin of the Black Act* (1975) 266.

²⁹⁰ *Premachandra v Major Montague Jayawickrema and another* <http://www.lawnet.lk/docs/case_law/slr/HTML/1994SLR2V90.htm> (Accessed 29 July 2008).

²⁹¹ *Selangor v Sagong Tasi* Paragraph 52 - 57 <[http://www.ipsofactoj.com/appeal/2006/Part1/app2006\(1\)-010.htm](http://www.ipsofactoj.com/appeal/2006/Part1/app2006(1)-010.htm)> (Accessed 29 July 2008).

starting point, one must constantly be mindful of the limitations of administrative law to give expression to fiduciary regulation. This limitation is most manifest in the language that administrative law employs. For example, judicial review itself focuses more on the duties of public officers rather than on the rights that the citizenry possess against such public functionaries. Nevertheless, administrative law gives a clear indication of the potential that fiduciary regulation of public functionaries can achieve. The foundations in administrative law, it is argued, can be utilised to extend fiduciary principles into other spheres of law.

2.9 What is social trust-based governance and constitutionalism? The search for a viable paradigm for governance and constitutionalism in Africa

Hatchard and others argue that to harness Africa's potential and set the pace for the reversal of the governance crisis and other crises besetting the continent, Africa's quest is one for a 'golden triptych of good governance, constitutionalism and sustainable development'.²⁹² This study contends that the infusion of fiduciary principles into governance practices and constitutionalism is one of the viable ways of achieving this triptych. Social trust-based governance and constitutionalism can thus be defined as a form of governance and constitutionalism that is expressly informed by social trust notions and operationalises itself by a continuous and conscious reference to the stipulations of the social trust without ignoring the material conditions in which it is implemented. For African countries, social trust-based governance fully acknowledges the need to look within the African countries themselves in articulating and practising governance and constitutionalism. One concept that African countries can retrieve from within themselves to use in articulating governance and constitutionalism is *ubuntu*.

The regulation of public functionaries remains central to the realisation of social trust-based governance and constitutionalism. It is in this connection that fiduciary principles, so well developed by equity, must be properly modified in such a way that public functionaries are fully amenable to fiduciary regulation. Governance and constitutionalism must thus be viewed with a social trust lens and practised on that basis. Even more importantly, these established legal doctrines must be concretely connected to indigenous African concepts like *ubuntu* to ease their acceptance, legitimacy and chances of entrenchment in African communities. Conceptually, therefore, one must start by acknowledging that African indigenous systems of regulation have a role in governance and constitutionalism. Only upon making such a concession should one attempt to connect such systems with other

²⁹² J Hatchard & others (note 118 above) 2.

established legal doctrines like the trust. Needless to say, as Chapter Five will demonstrate, that the diversity of the public functionaries involved in the operations of government necessarily entails that the obligations inherent in specific offices will inevitably vary. Fiduciary regulation of public functionaries will thus largely depend on the type of public functionary and the duties that the law has conferred on his/her office.

2.10 Conclusion

This Chapter has explained and analysed the four concepts – *ubuntu*, the social trust, good governance and constitutionalism – that are all central to this study. In explaining and analysing the concepts effort was also made to highlight the interconnectivities that exist between the four concepts. The chapter demonstrated that good governance and constitutionalism are intimately connected. It was also demonstrated that there are significant conceptual overlaps between *ubuntu* and the social trust – part 2.6.1. Centrally, the Chapter also made a case for approaching governance and constitutionalism from a perspective that is expressly informed by *ubuntu* and the social trust. Such an approach, it was argued, would represent a significant revitalisation of governance and constitutionalism in Africa, generally, and Malawi specifically. This approach would also be representative of a significant conceptual shift in the manner in which governance and constitutionalism are perceived and practiced in Africa. The shift would be towards measured autochthony in conceptualising governance and constitutionalism.

The Chapter also demonstrated how by reference to *ubuntu* and the social trust, recourse can be had to fiduciary law as a means of strengthening governance and constitutionalism in Africa. This conceptual shift is necessary in order to properly orient governance and constitutionalism in favour of the citizenry. In this connection this Chapter also explained the intricacies of applying fiduciary regulation to public functionaries and the management of the public realm generally. Some of the objections that may be encountered in implementing social trust-based governance and constitutionalism were also discussed with possible ways of circumventing them highlighted. In the main, the Chapter demonstrated that a broad approach to constitutionalism and good governance can embrace both a distinctly African perspective which can also benefit from established legal devices that are founded on the social trust. The underlying argument in this regard is that it is important to strike a balance between ‘imported’ values and concepts and indigenous concepts in order to achieve a functional balance. To create a workable governance paradigm it is necessary to diversify the intellectual resources that recourse is had to without unduly privileging particular intellectual resources. It is thus not a case of either traditional African governance or

governance and constitutionalism informed by Western values. Rather the concern is to come up with a 'creative synthesis' that simultaneously benefits from traditional African concepts and values while at the same time drawing inspiration from Western concepts.

In Chapter Three a profile of the patterns in governance and constitutionalism in Malawi as well as the lessons that can be learned from the patterns will be presented. A position will also be taken as to the underlying determinant of the patterns in governance and constitutionalism. Chapter Four will analyse the underlying determinants for governance and constitutionalism in Malawi and also make a case for an alternative paradigm for governance and constitutionalism in Malawi. In determining the need for an alternative paradigm, Chapter Four will also critique liberal democracy, which has predominantly informed governance and constitutionalism in Malawi and most African countries. Chapter Five will utilise the framework developed in this Chapter to give an indication of the possible direction Malawi should be heading in order to attain social trust-based governance and constitutionalism. This will be achieved by analysing a few selected areas and highlighting the steps that need to be taken to achieve social trust-based governance and the benefits that this can confer.

CHAPTER 3: PATTERNS IN GOVERNANCE AND CONSTITUTIONALISM IN MALAWI

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3.1 Introduction

Malawi has been an independent nation for over 45 years with a 'stable' and functioning central authority. This, arguably, is evidence that governance, in some form, has been practised in the country. Even more ubiquitous in the post-independence period has been the existence of a constitution as the basic framework for governance in Malawi at every point in the country's post-independence history. In further shaping the context for the discussion in Chapters Four and Five, this Chapter provides a contextualised discussion of governance and constitutionalism in Malawi. By looking at the history of governance and constitutionalism in Malawi an attempt is made to unearth and highlight the patterns that are discernible from governance and constitutionalism as practised in Malawi. This, it is hoped, should illuminate the background against which this study proposes social trust-based constitutionalism and governance as the way forward for Malawi. Even more importantly, the

history of constitutionalism and governance in Malawi will be presented in this Chapter because, as Clark argued, the personality of a country and the characteristics of its inhabitants stem directly from past events.¹ The history presented in this Chapter will, therefore, provide the context within which governance and constitutionalism in Malawi must be appreciated. Although the focus in this chapter is on governance and constitutionalism in Malawi after independence, a brief discussion of the situation before independence is also provided. The discussion in this chapter is conducted from a perspective that focuses on legal and political developments. The first part of this Chapter deals with the history of governance and constitutionalism in Malawi while the second part analyses the patterns that are discernible from the history discussed. The patterns discussed in the second part of the Chapter are derived from and should be understood together with the history discussed in the first part of the Chapter.

3.2 A brief history of constitutionalism and governance in Malawi

3.2.1 The pre-colonial period²

Like most countries in Southern Africa, Malawi's pre-colonial history remains largely unknown as it was never comprehensively written down.³ This means that there are no existing systematic records of the country's history before the advent of colonialism.⁴ The little that is known about this era has been pieced together from the accounts of various travellers to the area and also the first Europeans to settle in the area now known as Malawi. Archaeological and anthropological studies carried out from the 1950s onwards have also provided invaluable insights into Malawi's pre-colonial history.⁵

¹ J Desmond Clark "Prehistoric origins" in B Pachai (ed) *The early history of Malawi* (1972) 17.

² The 'pre-colonial period' is used here to generally refer to the period before the declaration of a protectorate over the area that is now known as Malawi. Because of its significance, colonialism is used as the epochal delineator of the periods under discussion in this chapter.

³ B Pachai "Introduction" in B Pachai (ed) (note 1 above) xv.

⁴ B Pachai's *The early history of Malawi* (note 1 above) arguably, represents the most comprehensive attempt at a compilation of Malawi's pre-colonial history. Tobias posits that 'scholars have probed the roots of Malawian history into the proto-historic past. They have found that, with deeper delving, fewer and fewer written records were available; more and more was it necessary to depend upon oral tradition, material culture, the languages men speak and spoke, to draw inferences about the comings and goings and the identity and way of life, of early inhabitants' – PV Tobias "The men who came before history" in B Pachai (ed) (note 1 above) 1.

⁵ J Desmond Clark (note 1 above) 18.

Malawi's earliest recorded history begins with the records of Portuguese travellers in the seventeenth century.⁶ The emerging picture indicates that pre-colonial Malawi was occupied by various social groups that exercised authority within their specific precincts. It is often agreed that the first people to occupy Malawi were the *Akafula*, also known as *Batwa* or 'pygmies'.⁷ These people were later displaced or absorbed by *Bantu* groups that moved into the region.⁸ Between the thirteenth and sixteenth centuries most of central and southern Malawi was settled by *Bantu*-speaking groups. These *Bantu*-speakers were at first 'a collective part of the vast and widely settled community of *Maravi* peoples.'⁹ Kanyongolo notes that the first inhabitants of Malawi did not live as part of an organised state in the modern sense.¹⁰ They did not have a common legal system and each group was governed by norms of tradition that were considered as binding only on members of that group. Two features, among others, stand out in the way these early inhabitants of Malawi organised themselves.¹¹ Firstly, they established structures of governance that in most cases were relatively centralised but they did not adhere to the notions of separation of powers as understood in modern constitutional law. Secondly, these societies did nevertheless provide a degree of protection for human rights even though this was 'mainly in relation to entitlements based on communal solidarity and patriarchy rather than on individualism and gender equality.'¹² In the 19th century the *Nguni* peoples from the south and the *Yao* from the southeast invaded and settled in large parts of Malawi. The most recent group to enter Malawi were the *Lomwe* who came from Mozambique in the late 19th century.¹³

It is clear, therefore, that when the first European settlers arrived in 1870, Malawi was populated by settled groups that exercised authority within their respective areas with

⁶ J Pike *Malawi: A political and economic history* (1968) 45. Clark argues that the records kept by travellers and other early visitors to Malawi, and arguably most of Africa, are notable for their lack of continuity in their handling of the subject matter and their ambiguity in both their meaning and also reference to places and people – J Desmond Clark (note 1 above).

⁷ DD Phiri *History of Malawi: From the earliest times to the year 1915* (2004) 14.

⁸ G Bauer & S Taylor *Politics in Southern Africa: State and society in transition* (2005) 21.

⁹ B Pachai *Malawi: The history of the nation* (1973) 4.

¹⁰ FE Kanyongolo "The Constitution" in N Patel & L Svasand (eds) *Government and politics in Malawi* (2007) 23 28.

¹¹ As above.

¹² As above.

¹³ G Bauer & S Taylor (note 8 above) 22.

varying degrees of effectiveness.¹⁴ As earlier intimated, the political and social organisation of these groups varied from one tribal group to the other.¹⁵ In spite of this, the supremacy of a chief over the tribal groups and their villages was, generally, recognised. However, how far a particular chief could exercise his rule largely depended upon his personal authority and power. During the pre-colonial era, judicial power was exercised by hereditary traditional authorities to reconcile or promote various social and political interests in the context of pre-capitalist communities.¹⁶ Almost all tribes had more or less institutionalised court procedures which used unwritten customary law to settle disputes and punish the guilty.¹⁷ Domestic disputes were first settled by the family elders and where this was unsuccessful the matter would be decided by the village elders against whose decision an appeal to the local chief could be made. Notably, however, the village elders and chiefs were only representatives of political and judicial power. This meant that they could not decide a dispute without the agreement of their advisers and the role of the chief was to confirm the decision proposed by the advisers.¹⁸ It is also clear that decision making in most pre-colonial Malawian societies was characterised by consultation and was very participatory.¹⁹ Although societies generally recognised chiefs as their leaders, there was often a deliberate insistence on consultation before making any decisions affecting the community at large.

It is immediately noticeable that even though the pre-colonial systems of Malawi manifest many elements that are commendable, for example, a large degree of democratic governance, these systems also evidence traits that are deplorable, for example, overt prejudice against women.²⁰ Clearly, therefore, if the history of Malawi during this period has

¹⁴ J McCracken *Politics and christianity in Malawi 1875-1940: The impact of the Livingstonia Mission in the Northern Province 1875-1940* (2000) 30-32.

¹⁵ F von Benda-Beckmann *Legal pluralism in Malawi: Historical development 1858-1970 and emerging issues* (2007) 33-34.

¹⁶ FE Kanyongolo "Courts, elections and democracy: The role of the judiciary" in M Ott & others (eds) *The power of the vote: Malawi's 2004 parliamentary and presidential elections* (2004) 195-197.

¹⁷ F von Benda-Beckman (note 15 above) 34.

¹⁸ As above.

¹⁹ Cf. G Clutton-Brock *Dawn in Nyasaland* (1959) 13.

²⁰ WC Chirwa & others *Democracy report for Malawi 2* <<http://www.idea.int/publications/sod/upload/Malawi.pdf>> (Accessed 20 February 2009). In the same vein, although this study calls for the involvement of traditional leaders in governance in Malawi it is also conceded that traditional leadership is caught up in societal power relations and may be utilised to victimise women and other less dominant groups in society. Traditional leadership has also demonstrated a tendency to favour the ruling party of

any importance at all, it is for the laudable traits that governance often followed – for example, consultation and participation in decision making – and not for its unacceptable attributes. It is to these admirable traits that resort must be had in devising governance paradigms and seeking inspiration for constitutionalism.

3.2.2 The colonial period

Three groups of Europeans, the Portuguese, Germans and British, in addition to the Arabs, were interested in Malawi before the territory was declared a British protectorate.²¹ The Portuguese were the first to arrive via Mozambique in the seventeenth century, followed by the Germans who entered through the North from Tanganyika. When the British arrived they had to contend with the Portuguese and the Germans, as well as the Arabs who were engaged in a 'lively trade in ivory and slaves.'²² During the mid-1800s significant missionary activity was also commenced in Malawi following the travels to the area by the Scottish missionary explorer Dr David Livingstone.

Pachai contends that the actual establishment of a British protectorate over Malawi took place in three stages.²³ Firstly, on 19 August 1889, John Buchanan, Acting British Consul, wrote to Serpa Pinto, leader of the Portuguese expedition to Malawi, telling him that the *Kololo* people living north of the Ruo River were placed under British protection. When the Portuguese rejected this claim, the British took the second step when Buchanan declared a British Protectorate over a wider area which he described as 'Makololo, Yao and Machinga Countries' on 21 September 1889. The third, and arguably most decisive step, was taken on 14 May 1891 when the territories adjoining Lake Malawi were added to the regions adjoining the Shire River as part of the British Protectorate. It must be appreciated, however, that the declaration of the protectorate was 'neither a sudden nor an automatic affair.'²⁴ The declaration of the protectorate in May 1891 was preceded by a long debate between the

the time thus compromising its neutrality, independence and accountability to its constituents. It is thus important to be cautiously optimistic about the role of traditional leadership in present day Malawi – Cf. RL Muriaas "Local perspectives on the 'neutrality' of traditional authorities in Malawi, South Africa and Uganda" (2009) 47 (1) *Commonwealth and Comparative Politics* 28 37.

²¹ G Bauer & S Taylor (note 8 above) 22.

²² As above.

²³ B Pachai (note 9 above) 81.

²⁴ Z Kadzamira "Constitutional changes in Malawi: 1891-1965" in G Smith & others (eds) *Malawi: Past and present, Selected papers from the University of Malawi history conference 1967* (1971) 80.

British Foreign Office and Harry Hamilton Johnston, the first Commissioner and Consul-General to the territory.²⁵ In as far as the motivation for establishing a protectorate over Malawi (then known as British Central Africa) is concerned, it is clear that Britain established the protectorate in order to safeguard the interests of the British missionaries, planters and traders against encroachment from other European powers, notably the Portuguese and the Germans. As Kadzamira puts it:²⁶

A protectorate was proclaimed because British interests in Central Africa could not be safeguarded in any other way. Thus British interests came first, those of the native inhabitants were secondary. This theme was endorsed with the establishment of the protectorate and was to continue throughout colonial rule in Malawi until major constitutional changes occurred some seventy years later.

Between the time the protectorate was proclaimed in 1889 up to 1907 the country was known as British Central Africa. In terms of administration, the protectorate was governed under the British Central Africa Order-in-Council of 1889 up to 1902. The early form of government in the protectorate may be described as direct rule.²⁷ There was a central administration headed by the Commissioner and Consul-General who was assisted by a Deputy Commissioner and Consuls. These were followed by Vice-Consuls under who served several administrative officials including a Secretary to the Administration and a judicial officer.

The next milestone in Malawi's constitutional history occurred in 1902. On 11 August 1902 a new Order-in-Council for British Central Africa came into force. The British Central Africa Order-in-Council of 1902 is widely regarded as the country's first Constitution.²⁸ The 1902 Order-in-Council also represents the first attempt to define the territorial limits of the

²⁵ Phiri suggests that there was a measure of deceit on the part of the early British settlers (the African Lakes Company, for example) especially in the manner in which they negotiated the treaties with the local chiefs and thereby acquired land particularly in Southern Malawi – DD Phiri (note 7 above) 200-202.

²⁶ Z Kadzamira (note 24 above) 81.

²⁷ Direct rule in Malawi was practised particularly between 1891-1896 - B Pachai (note 8 above) 83. Notably, indirect rule was only hesitatingly introduced in the late 1920s. The European settlers in Malawi were not enthusiastic about indirect rule for fear that it may strengthen the tribal rulers – B von Benda-Beckman (note 15 above) 40-41.

²⁸ F von Benda-Beckman (as above) 36 and M Chigawa "The fundamental values of the Republic of Malawi Constitution of 1994" Concept Paper No. 1 Constitutional Review Conference 2006, Capital Hotel Lilongwe, 28-31 March 2006.

protectorate within a constitutional document.²⁹ Importantly, the 1902 Order-in-Council heralded the introduction of several fundamental changes in the organisation of the protectorate. Arguably, the most important feature of the 1902 Order-in-Council was that it attempted to embody the concept of separation of powers.³⁰ It created, for the first time, an 'administration' headed by the Commissioner and a 'Court of Record' or High Court.³¹ The High Court had 'full jurisdiction, civil and criminal, over all persons and over all matters in the Protectorate'.³² The enactment of laws, however, was left within the powers of the Commissioner. Article 15(2) of the 1902 Order-in-Council contained the reception clause for English law in Malawi and established the English judicial model in Malawi.³³ Thereafter English law was applied in all courts with the exception that customary law could be enforced in cases involving Africans under article 20 of the Order-in-Council.³⁴ Notably, there were no provisions in this 'constitution' relating to human rights. Nevertheless, the 'constitution' required that in making ordinances, 'the Commissioner [should] respect existing native laws and customs except so far as the same may be opposed to justice or morality'.³⁵

The next important stage in Malawi's constitutional development came in 1907 when the Nyasaland Order-in-Council of that year was adopted.³⁶ Under this Order-in-Council, the name of the protectorate was changed from British Central Africa to Nyasaland.³⁷ The concept of the separation of powers was given stronger expression with the creation of a Legislative Council consisting of the Governor and at least two other persons. This body was given power to legislate for the Protectorate. However, in doing so, it had to observe any conditions, provisions and limitations prescribed by any instrument under His Majesty's Sign Manual and Signet. Remarkably, the Governor was given the right of veto in the making and

²⁹ See, Article 1 BCA Order-in-Council, 1902.

³⁰ M Chigawa (note 28 above).

³¹ See, Articles 4 and 15 respectively of the BCA Order-in-Council, 1902.

³² Article 15 (1) of the BCA Order-in-Council, 1902.

³³ F von Benda-Beckman (note 15 above) 37.

³⁴ Aside from the exception in article 20 the judicial institutions of African peoples were not formally recognised in the protectorate – F von Benda-Beckman (note 15 above) 38.

³⁵ Article 12(3) of the BCA Order-in-Council, 1902.

³⁶ The first and main Nyasaland Order-in-Council was adopted on 6 July 1907. There was another one (No.2), which was adopted on 21 December 1907. It clarified the law to be applied by the courts in the Protectorate.

³⁷ See, Preamble to the Order-in-Council of 1907.

passing of such Ordinances. Kadzamira accurately conveys the total effect of the aforementioned constitutional developments when he states that:³⁸

The introduction of a legislative council did not reduce the authority of the governor. In fact the governor not only had the final word on all governmental matters but he also had complete control over the legislature since its members were practically hand-picked by him. Thus the legislature was subordinate to the governor and enacted legislation only on his instructions. In theory the legislature had “power to make ordinances for the peace, order and good government of all persons in the Protectorate.” In practice, the main function of the legislative council was to consult European opinion especially from planters and traders.

Apart from minor constitutional amendments and changes in representation, the constitutional order of 1907 remained intact until 1961.³⁹ However, it is important to note that in the period before independence, Malawi (then Nyasaland) was involved in an ‘abortive’ federation with Northern Rhodesia and Southern Rhodesia. In 1953 the colonial administrators of Nyasaland and the two Rhodesias established the Federation of Rhodesia and Nyasaland. The passing of the Federation (Constitution) Order-in-Council, which received royal assent on 1 August 1953, confirmed the establishment of the federation, in spite of bitter opposition from Africans in the three territories involved.⁴⁰ African opposition to the federation was fuelled by fears that the federation would result in the entrenchment of the imperial order and thereby indefinitely postponing independence for the territories involved.⁴¹

It is worth noting that the establishment of the Federation of Rhodesia and Nyasaland coincided with a rise in nationalist sentiments across Malawi. In 1944 the various regional organisations then operating in the country had come together to form the Nyasaland African Congress (NAC). In 1946 the NAC was officially recognised by the colonial government and was also endorsed by the chiefs as a body representing the African population.⁴² Nationalist

³⁸ Z Kadzamira (note 24 above) 83. See, also, B Pachai (note 9 above) 238.

³⁹ Z Kadzamira (as above) 82.

⁴⁰ For a detailed account of the Federation of Rhodesia and Nyasaland see J Pike (note 5 above) Chapter 4. For an account of the Malawian opposition to the federation especially the role of Malawian traditional leaders see G Clutton-Brock (note 19 above) 43-57.

⁴¹ FE Kanyongolo “The limits of liberal democratic constitutionalism in Malawi” in KM Phiri & KR Ross (eds) *Democratisation in Malawi: A stocktaking* (1998) 355. Clutton-Brock also argued that the establishment of the Federation was motivated by the desire by the colonists to secure their interests in Central Africa – As above 35-42.

⁴² G Bauer & S Taylor (note 8 above) 23.

agitation for independence reached a crescendo in 1958 when riots broke out in the country and a state of emergency was declared. Subsequently most nationalist leaders, including Dr Banda, who had returned to the country earlier in the year to lead the nationalist movement, were detained and the NAC was banned.⁴³ In 1959 the NAC was transformed into the Malawi Congress Party (MCP) and when Dr Banda and other nationalists were released from detention in 1960 earnest negotiations were commenced to grant self government to Malawi. In that year, the Lancaster House Constitutional Conference gave Nyasaland a 'responsible' government.⁴⁴ In 1961 the first general elections were held and won overwhelmingly by the MCP.⁴⁵ This paved the way for eventual self-government in February 1963 and independence from Great Britain on 6 July 1964 with Dr Banda as the Prime Minister and the British monarch as the Head of State.⁴⁶

3.2.3 The post-colonial period

Needless to state that Malawi's post-independence history begins immediately with the grant of independence by Britain on 6 July 1964. In this discussion, and for better clarity, the post-independence period will be split into three broad segments and these are the immediate post-independence (1964-1966), the First Republic (1966-1994) and the Second Republic (1994 to date).

3.2.3.1 The immediate post-independence: 1964 –1966

The pre-independence negotiations between the nationalists and Britain yielded Malawi the 1964 Independence Constitution. This Constitution, which was negotiated in Britain, like in most British colonial territories, embodied a 'Westminster model' of governance.⁴⁷ On paper, such a constitution permitted political pluralism and competition for office through regular elections and also incorporated a Bill of Rights securing, mostly first generation civil and political rights.⁴⁸ The Independence Constitution retained the three organs of government,

⁴³ As above 25.

⁴⁴ M Chigawa (note 28 above).

⁴⁵ In the 1961 elections the Malawi Congress Party won 22 out of 28 seats in the Legislative Assembly and 5 out of the 10 positions in the Executive Council – F von Benda-Beckman (note 15 above) 44.

⁴⁶ For a fuller account of the processes surrounding Malawi's independence, see B Pachai (note 9 above) Chapter 17.

⁴⁷ J Hatchard & others *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspective* (2004) 15-17.

⁴⁸ C Ng'ongola "Judicial mediation in politics in Malawi" in H Englund (ed) *A democracy of chameleons* (2001) 62 63. A similar situation obtained in Zambia, see ML Mbao "The politics

namely the executive, the legislature and the judiciary. However, the Head of State remained the Queen of England although the executive organ was headed by the Prime Minister, Dr Banda.⁴⁹

A significant event that occurred during this period which had considerable repercussions on constitutionalism and governance in Malawi in subsequent years is shorthandedly referred to as the 'Cabinet Crisis' of 1964. The Cabinet Crisis, an open manifestation of differences between Dr Banda and his ministers, erupted barely three months after independence. Although explanations vary, the Cabinet Crisis was essentially a challenge by Dr Banda's ministers against his increasingly autocratic tendencies and also a manifestation of ideological differences between Dr Banda and his ministers.⁵⁰ While ideological differences⁵¹ between Dr Banda and some of his younger ministers were, arguably, at the root cause of the Crisis it is evident that regional and ethnic differences exacerbated the rift.⁵² As a result of the impasse brought about due to the Cabinet Crisis, Dr Banda dismissed three of his ministers and four more ministers resigned in support of their dismissed colleagues.

The Cabinet Crisis had dire consequences for governance in Malawi.⁵³ Subsequent to the Cabinet Crisis all organised opposition was banned and the disgraced former ministers were forced to flee the country.⁵⁴ As Kaspin has argued, the Cabinet Crisis set the tone for the

of constitution-making in Zambia: Where does the constituent power lie?" <http://www.publiclaw.uct.za/usr/publi_law/Nairobi/Mbao_ConstitutionMakingZambia.doc> (Accessed 23 March 2010). As experiences in both Malawi and Zambia came to prove, the guarantees in the Independence Constitutions were quickly abrogated.

⁴⁹ See section 59 of the Independence Constitution.

⁵⁰ J Banda "The constitutional change debate of 1993-1995" in KM Phiri & KR Ross (eds) (note 41 above) 316-318. The Cabinet Crisis has been the subject of extensive scholarly analyses. For one of the most comprehensive analyses, see C Baker *Revolt of the ministers: The Malawi Cabinet Crisis, 1964-1965* (2001). See, also, FE Kanyongolo (note 10 above) 23-29.

⁵¹ The ideological differences included the question of commencing diplomatic relations with The Peoples Republic of China (which Dr Banda opposed) and also the maintenance of ties with apartheid South Africa and the general foreign policy stance with regard to Portugal and Mozambique (Dr Banda favoured the maintenance of ties with both Portugal and South Africa while his younger ministers were opposed to this). The rate of Africanisation, especially in the civil service, was also at issue. For a fuller discussion, see J Pike (note 6 above) Chapter 5.

⁵² L Vail & L White "Tribalism in the political history of Malawi" in L Vail (ed) *The creation of tribalism in Southern Africa* (1989) 178-181.

⁵³ J Banda (note 50 above) 318.

⁵⁴ G Bauer & S Taylor (note 7 above) 25.

parameters within which the Banda regime was to operate for the next thirty years.⁵⁵ A dominant feature of state politics in this era was the banning, detention, maiming and murder of all rivals and critics of government.⁵⁶ The state actively used its security apparatus to pursue all so called ‘dissidents’ both within and outside the country.⁵⁷ What is often not recognised, however, is that the Cabinet Crisis also deprived Dr Banda’s regime of a common legitimacy across the length and breadth of the country.⁵⁸ This crisis of legitimacy, arguably, explains why the Banda regime resorted to oppressive and exclusionary tactics to maintain itself in power. Ironically, it is this lack of legitimacy that also sustained opposition to Dr Banda’s regime in the early 1990s.⁵⁹

3.2.3.2 The First Republic: 1966 – 1994

In July 1965, Dr Banda, as the Prime Minister, announced that Malawi would become a republic.⁶⁰ He then appointed a Constitutional Committee which came up with draft proposals for the next stage of constitutional development.⁶¹ The proposals by the Constitutional Committee attempted to provide a ‘comprehensive’ justification for the

⁵⁵ D Kaspin “The politics of ethnicity in Malawi’s democratic transition” (1995) 33 (4) *Journal of Modern African Studies* 595 603.

⁵⁶ As above.

⁵⁷ Among those who fell foul of the regime are Orton and Vera Chirwa, who were ‘abducted’ from Zambia, tried and convicted for treason and sentenced to death – the sentences were commuted to life imprisonment but Orton died in jail. Attati Mpakati, leader of the Socialist League of Malawi, also died mysteriously in exile in Zimbabwe.

⁵⁸ WC Chirwa “‘We want change’: Transition or transformation” in M Tsoka & C Hickey (eds) *Democracy, decentralisation and human development* (1998) 5-6.

⁵⁹ This merely highlights the fact that there was significant domestic impetus for the subsequent breakdown of authoritarianism and re-introduction of multi-party politics - concededly, donors did play a role even though most of them continued supporting Dr Banda until 1991/1992 – W Breytenbach & C Peters-Berries “Malawi: Has the struggle for democracy just begun?” (2003) 33 (4) *Africa Insight* 71 72.

⁶⁰ It is arguable that the move to adopt the Republican Constitution was, from Dr Banda’s perspective, a way of preventing a repeat of the events that had led to the Cabinet Crisis. In any event Dr Banda was the prime driver behind the move to adopt the Republican Constitution; the population was ‘rallied’ behind the idea after the decision to adopt the Republic Constitution had already been made.

⁶¹ The Committee was chaired by Mr Aleke K Banda, then a close political ally of Dr Banda. Perhaps as a sign of the fragile political alliances that Dr Banda continually constructed and reconstructed, Mr Aleke K Banda was subsequently detained without trial for a lengthy period of time. A communication on his behalf was subsequently commenced before the African Commission on Human and Peoples Rights – *Achuthan and another (On behalf of Banda and others) v Malawi* (2000) AHRLR 144 (ACHPR 1994).

constitutional order that was to be adopted.⁶² For example, under the Independence Constitution, the Head of State was the British monarch who was represented by a Governor-General and the Head of Government was the Prime Minister. The Governor-General's office was purely ceremonial and all executive power rested with the Prime Minister. In this connection, the Constitutional Committee proposed that the office of the Governor-General should fall away and that the Prime Minister should become both the Head of State and also Head of Government. The Constitutional Committee held the view that a system that divided authority between a ceremonial Head of State and political Head of State was not viable for Malawi. The Constitutional Committee took the position that⁶³

[i]t [the splitting of authority between a ceremonial head of government and the prime minister] is, however, quite contrary to the tradition of Africa, where it is viewed as unnatural and illogical. The people of Africa are realistic and are accustomed to giving ceremonial honour and respect both publicly and privately to the rulers who actually exercise the authority and responsibility of governing them.

The Constitutional Committee rejected proposals for the office of the Vice President arguing that such a position 'encourages an element of division of responsibility in the Executive.'⁶⁴ The Constitutional Committee also recommended that Malawi should become a one-party state under the Republican Constitution. In the opinion of the Constitutional Committee:⁶⁵

Experience over recent years has convinced the present Government that the country cannot afford the wasteful disunity which is engendered by the existence of a number of small parties in opposition to the major ruling party It is felt that this essential unity can best be achieved in the Republican Constitution by providing for a One-Party state, to enable the Malawi Congress Party to devote itself to the development of the nation without the wasteful attrition engendered by small opposition groups.

The general thrust of the proposals made by the Constitutional Committee leaned towards the creation of a very strong executive, generally, and a very strong presidency, specifically. Like in most of post-independence Africa, the pattern of strong and centralised leadership

⁶² Government of Malawi *Proposals for the Republican Constitution of the Republic of Malawi* (1965).

⁶³ As above 4.

⁶⁴ As above 5.

⁶⁵ As above 7. The one party state was confirmed in section 4 of the 1966 Constitution.

was defended throughout the 1960s and 1970s on the basis that it would promote development.⁶⁶ The principle that the Constitutional Committee followed was stated thus:⁶⁷

There is a need in a country comparatively underdeveloped and inexperienced in nation-hood for a form of government which will afford the necessary degree of unity, resolution and stability to permit the maximum fulfilment of the country's human and physical resources in the shortest period of time.

The proposals of the Constitutional Committee were presented at the annual convention of the Malawi Congress Party (MCP) where the delegates unanimously adopted them.⁶⁸ Cabinet also adopted the proposals and they were subsequently passed by an MCP dominated parliament. On 6 July 1966 the country became a republic under a new Constitution.

From 1966 to 1994 Dr Banda presided over a one-party state that was notable for its suppression of any form of dissent. The Republican Constitution was amended in 1971 to make him president for life, thus, supposedly, confirming that he would rule Malawi for the remainder of his life.⁶⁹ For thirty years Dr Banda's one-party regime retained a firm grip on Malawi. The hallmarks of this period, as Phiri and Ross have stated, were an intolerant political culture, hero worship, centralised authority, intimidation of political critics and exclusiveness.⁷⁰ Further, as Kaunda has stated, from 1966 the MCP government was neither representative of the people nor did it have a popular mandate to formulate and implement development policy.⁷¹ From 1966 up to 1992 there was no serious challenge mounted to the total control by Dr Banda and his MCP.⁷² A deeper evaluation of this epoch is presented below under Part 3.4.

⁶⁶ KM Phiri & KR Ross "Introduction: From totalitarianism to democracy in Malawi" in KM Phiri and KR Ross (eds) (note 41 above) 11.

⁶⁷ Government of Malawi (note 62 above) 3.

⁶⁸ FE Kanyongolo (note 41 above) 359.

⁶⁹ See, section 9 of the 1966 Constitution.

⁷⁰ KM Phiri & KR Ross (note 66 above) 10-11.

⁷¹ JM Kaunda "The state and democracy in Malawi" Centre for Social Research 4 February 2002 (Unpub).

⁷² MS Nzunda & KR Ross "Introduction" in MS Nzunda & KR Ross (eds) *Church, law and political transition in Malawi 1992-1994* (1995) 7.

3.2.3.3 The Second Republic: 1994 to date

The survival of Dr Banda's regime was largely due to the continued support of the world's major Western powers in the context of Cold War politics. Dr Banda managed to sustain a considerable support base among Western powers based on his staunch opposition to communism. Ironically, it is this very support base that contributed to the demise of his regime.⁷³ The collapse of the Soviet Union engendered profound changes in the various political systems especially in Africa and Latin America.⁷⁴ The changes in the global political climate exerted pressure for the opening up of political space in Malawi. One must, however, not overemphasise the influence that external factors played in the democratisation of Malawi and most African countries in the late 1980s and early 1990s.⁷⁵ While external factors did indeed contribute to the democratisation of Africa, such factors are probably more limited than is often asserted.⁷⁶ In this connection it is important to realise that demands for democracy in any country are inevitably grounded in their own historicity. What the external factors achieved in Africa was merely to catalyse internal dynamics within African countries.⁷⁷

As a result of pressure from various domestic⁷⁸ and international quarters, Dr Banda agreed to hold a national referendum in 1993.⁷⁹ During the referendum the majority of the voters cast their ballots in favour of adopting a multi-party system of government.⁸⁰ The results of

⁷³ A significant contribution in this regard was the decision by the international donor community at its meeting in Paris in May 1992 to suspend development aid to Malawi until its record on human rights and good governance improved – MS Nzunda & KR Ross (as above).

⁷⁴ See, WC Chirwa (note 58 above).

⁷⁵ W Breytenbach & C Peters-Berries "Malawi: Has the struggle for democracy just begun?" (2003) 33 (4) *Africa Insight* 71 72.

⁷⁶ JF Bayart *The state in Africa: The politics of the belly* (1993) x-xi.

⁷⁷ As above.

⁷⁸ From a domestic perspective, the transition to a multi-party dispensation was set afoot on the first Sunday of lent, 8 March 1992, when the local catholic Bishops issued a pastoral letter entitled *Living our Faith* which was read from pulpits across the country. The pastoral letter called for better wages, education and health care, freedom of expression, justice and rights protection, a climate of openness, a more just distribution of wealth and an end to corruption. See also, D Cammack "Democratic transition in Malawi: From single party-rule to a multi-party state" in J Daniel & others *Voting for democracy: Watershed elections in contemporary Anglophone Africa* (1999) 183 186.

⁷⁹ FE Kanyongolo *Malawi: Justice sector and the rule of law* (2006) 35.

⁸⁰ During the referendum voters were asked to choose whether Malawi should remain a one-party state with the MCP as the sole political party or whether they wished that Malawi should change to a multiparty system of government. 63% of the voters voted for a change to a

the referendum heralded significant changes on the Malawian political scene, which culminated in the adoption of a new Constitution in 1994.

It is generally agreed that the 1993 referendum marked a turning point in the history of Malawi and was a major step in breaking with the country's past.⁸¹ Faced with defeat during the referendum, the government was compelled to embark on a process of transition to multi-partyism and ostensibly democracy. The government was also compelled to initiate some immediate legal reforms to facilitate the transition. The result was that, for example, the 1966 Constitution was amended to so as to bring back the Bill of Rights that had been rejected in 1966⁸² and presidential powers were also greatly reduced. Further, the life presidency was immediately discarded from the Constitution and several other oppressive and controversial laws were repealed or amended.⁸³

For the purposes of managing the transition, the government established the National Consultative Council (NCC) and the National Executive Committee (NEC) in terms of the National Consultative Council Act of 1993 (NCC Act) to ensure that the transition to multi-partyism was independently managed.⁸⁴ The NEC was entrusted with executive power while the NCC was tasked with, among other things, initiating appropriate legislative measures to amend the Constitution necessary for holding the impending General Elections and also the drafting of the electoral legislation.⁸⁵ The NCC was composed of leaders from the MCP appointed by Dr Banda and representatives from the newly formed opposition groups and

multipart system of government – L Dzimbiri “The Malawi Referendum of June 1993” (1994) 13 (3) *Electoral Studies* 229-234.

⁸¹ D Chirwa “A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi” (2005) 49 (2) *Journal of African Law* 207 210.

⁸² Constitutional (Amendment) Act No. 3 of 1993.

⁸³ M Chigawa (note 28 above) 13. Some of the laws that were repealed include the Forfeiture Act, Cap. 14:06 of the Laws of Malawi, repealed by Act No.22 of 1993; the Decency in Dress Act, Cap. 7:04 of the Laws of Malawi repealed in 1993. The Preservation of Public Security Act, Cap. 14:02 of the Laws of Malawi was not repealed as such but substantial amendments to it were made in 1993.

⁸⁴ For a succinct assessment of the legal aspects of the transition to multipartyism in Malawi, see C Ng'ong'ola “Managing the transition to political pluralism in Malawi: Legal and constitutional arrangements” (1996) 34 (2) *Journal of Commonwealth and Comparative Politics* 85-110.

⁸⁵ Section 5(1) of the NCC Act.

faith organisations appointed by their peers.⁸⁶ It soon became apparent that the 1966 Constitution needed to be abandoned altogether and that amending it would not suffice. The decision to adopt a new constitution rather than amend the 1966 Constitution was taken in November 1993 at a workshop convened by the NCC.⁸⁷ In February 1994 the NCC hosted a Constitutional Drafting Conference that was attended by appointees of various political parties and the result was the adoption of an Interim Constitution on the basis of which the General Elections of May 1994 were contested.⁸⁸

Bakili Muluzi of the United Democratic Front (UDF) won the presidency during the 1994 elections but his party failed to gain a sufficient parliamentary majority to enable him to move legislation easily through parliament.⁸⁹ The UDF's failure to gain a sufficient parliamentary majority created an environment for massive political machinations to enable it to govern with ease.⁹⁰ The second democratic elections were held in 1999. Bakili Muluzi of the UDF again won the presidency but his party was again unable to garner sufficient parliamentary seats to enable him to control parliament.⁹¹ Again, the UDF had to rely on alliances to enable it to assume a modicum of control in parliament.

For the purposes of governance and constitutionalism, the abortive attempt by Bakili Muluzi to amend the Constitution to allow him to serve a third term in office deserves further attention here. Bakili Muluzi's second term of office was destined to terminate in 2004 and by

⁸⁶ D Chirwa "Democratisation in Malawi 1994-2002: Completing the vicious circle" (2003) 19(2) *South African Journal on Human Rights* 316, 317-318.

⁸⁷ In deciding to adopt a new constitution it was argued, in part, that the 1966 Constitution contained provisions that were diametrically opposed to political pluralism and democratisation and that only a new constitution could remedy this – J Banda (note 50 above) 316 321.

⁸⁸ J Banda (note 50 above) 321.

⁸⁹ D Cammack (note 78 above) 193-201.

⁹⁰ This included an alliance with the Alliance for Democracy (AFORD) which soured not long afterwards. The UDF, however, persisted in keeping some AFORD Members of Parliament within its ranks resulting in lengthy litigation – *Mponda Mkandawire v Attorney General* Misc. Civil Cause No. 49 of 1996. The UDF/AFORD alliance, however, was preceded by an alliance between the MCP and AFORD which, by reason of its superiority in parliament, effectively crippled the UDF government in parliament. Some of the repercussions of this alliance were manifested in *Attorney General and others v MCP and others* MSCA Civil Appeal No. 22 of 1996 (The Press Trust Case) and prompted an amendment on the constitutional provision prescribing the quorum of the National Assembly.

⁹¹ For a comprehensive discussion of the General Elections of 1999, see M Ott & others *Malawi's second democratic elections: Process, problems and prospects* (2000).

virtue of section 83(3) of the Constitution he was barred from running for a third term in office.⁹² In spite of the express stipulations of the Constitution on the matter, in 2002 the Bakili Muluzi administration tabled a bill before parliament proposing to amend section 83(3) in such a manner that it would allow incumbent presidents to serve an unlimited number of terms in office (the Open Terms Bill).⁹³ This bill was tabled and debated in parliament but failed to gain the required majority for its passage into law.⁹⁴ Not long afterwards, however, another attempt was made by the Bakili Muluzi administration to amend section 83(3) of the Constitution. A Constitution Amendment Bill was published in the Gazette on 6 September 2002 proposing the amendment of section 83(3) to allow presidents to serve a maximum of three terms in office (the Third Term Bill).⁹⁵ This amendment further proposed to entrench section 83 by listing it in the Schedule to the Constitution so that, in future, any proposed amendment to the section would only be done with the approval of the majority vote of Malawians expressed in a referendum.⁹⁶ This bill was introduced in parliament but was subsequently withdrawn before it could be debated.⁹⁷ The implications of the Open Terms Bill and the Third Term Bill are analysed in greater detail under part 3.4 below. Suffice it to state that, as one commentator has pointed out, the proposed Third Term/Open Term Bills represented one of the worst forms of abuse of the powers of constitutional amendment in

⁹² Section 83(3) provides ‘The President, the first Vice-President and the Second Vice-President may serve in their respective capacities a maximum of two consecutive terms, but when a person is elected or appointed to fill a vacancy in the office of the President or Vice-President, the period between that election or appointment and the next election of a President shall not be regarded as a term.’ The High Court has confirmed that section 83(3) bars anyone who has been president for two terms from seeking a third term irrespective of whether the terms were consecutive or not - *The State, The Electoral Commission Ex Parte Bakili Muluzi and United Democratic Front* Constitutional Cause No. 2 of 2009.

⁹³ For a succinct analysis of the debate around the amendment of section 83(3) by the Bakili Muluzi administration, see FE Kanyongolo “Constitutionalism and the removal of presidential term limits from the Constitution of the Republic of Malawi” (2003) 7 (1) *UNIMA Students Law Journal* 59.

⁹⁴ Constitution (Amendment) Bill No. 1 of 2002.

⁹⁵ Constitution (Amendment) Bill No. 14 of 2004.

⁹⁶ A Kamanga “Amendments to the Constitution since 18th May 1994” 28, Presentation at the National Constitutional Review Conference, 29 March 2006, Capital Hotel, Lilongwe, Malawi.

⁹⁷ It is likely that the bill was withdrawn because of the opposition that it was facing both inside and outside parliament. The UDF may also not have been wanted to be defeated twice on the same issue especially after the ‘Open-Terms Bill’ had been defeated in parliament.

Malawi.⁹⁸ The attempts to tamper with the presidential term limits also rank among the greatest challenges that democratisation in Malawi has faced since 1994.⁹⁹

After failing to amend the Constitution to allow Bakili Muluzi to stand for another term, the UDF fielded Bingu wa Mutharika as its presidential candidate for the 2004 General Elections. The UDF duly won the election and Bingu wa Mutharika was sworn in as president. However, for the third time, the UDF failed to gain a parliamentary majority. Notably, as a result of differences within the UDF, Bingu wa Mutharika who had been elected president on a UDF platform, decided to resign from the UDF and form his own political party, the Democratic Progressive Party (DPP). This meant that the President had to govern with a political party that did not contest the General Elections and thus had no sitting Members of Parliament. This presented numerous governance challenges to the government of Bingu wa Mutharika and some of these challenges are discussed under part 3.4 below. Bingu wa Mutharika and his DPP did, however, record a landslide victory in the 2009 General Elections. This victory conferred a second term in office on Bingu wa Mutharika while granting him and his DPP a clear parliamentary majority as well.

3.3 Trends in constitutionalism and governance in Malawi

3.3.1 An evaluation of governance and constitutionalism in colonial Malawi

Colonial rule, Pike states, by its very nature, was short and sharp.¹⁰⁰ Short in the sense that most African countries were occupied by colonial powers for less than one hundred years.¹⁰¹ Colonial rule was, however, also remarkable for its disruptive influence. In the short expanse of time that colonialism reigned, it successfully destroyed ancient structures of tribal life among African peoples.¹⁰² As Hatchard and others have noted:¹⁰³

⁹⁸ A Mswoya "Amendments to the Constitution and preservation of its sanctity" 26, Constitutional Review Programme: Discussion Paper No. 7.

⁹⁹ B de Klerk "Is the face of democracy changing in Malawi?" (2002) 4 *Conflict Trends* 15-16.

¹⁰⁰ J Pike (note 6 above) 3.

¹⁰¹ In Malawi for example, the country was officially a protectorate only for seventy-three years (from 1891 to 1964).

¹⁰² Colonialism, argues Kiros, did not leave any stone unturned in its strategy of destroying the natives' cultural heritage – T Kiros "Frantz Fanon 1925-1961" in K Wiredu (ed) *A companion to African philosophy* (2004) 216 218.

¹⁰³ J Hatchard & others (note 47 above) 14.

Colonial rule was philosophically and organisationally elitist, centralist and absolute and left no room for either constitutions or representative institutions. The colonial administration not only implemented policy, it made it as well. ... As colonial rulers sought expedient collaborators, they distorted or destroyed pre-colonial governance systems by creating or encouraging arrangements such as indirect rule, which made local chiefs more despotic and created new ones (warrant chiefs) where none had previously existed.

Colonial rule was, arguably, also naive if not obtuse.¹⁰⁴ From an initial belief that African societies were primitive, pagan and backward the desire to quickly 'civilise' African peoples was formed. It is now manifest that the civilising mission proceeded on a large number of misconceptions about Africa and its peoples' ways of life.¹⁰⁵ As independence came to pass it was, it seems, simplistically assumed by the departing colonialists that upon their departure societies in Africa would be constructed corresponding to a Western pattern.¹⁰⁶ Unsurprisingly, over half a century after independence, this simplistic assumption has not come to pass and is nowhere close to being fulfilled.

Like in other colonial territories across Africa, in spite of pretensions to benignity, colonial rule in Malawi was heavily repressive and brutal.¹⁰⁷ Although, as pointed earlier, the first attempt to constitute the territory and people of Malawi was supposedly achieved with the declaration of the Protectorate in 1889, it is notable that the declaration of the protectorate and the assumption of power over it were not based on any social compact between the colonialists and the people of Malawi.¹⁰⁸ It is unsurprising, therefore, that the new legal order did not reflect the interests of the vast majority of the population and was predicated on satisfaction of the objectives of the colonial regime. The colonial state and its apparatuses

¹⁰⁴ For a detailed analysis of the nature of colonial rule especially in the way it developed in Malawi and Zambia, see R Rotberg *The rise of nationalism in Central Africa: The making of Malawi and Zambia 1873-1964* (1965) especially Chapter II.

¹⁰⁵ K Wiredu "Introduction: African philosophy in our time" in K Wiredu (ed) (note 102 above) 1. According to Wiredu, colonialism involved a project of de-Africanisation which was, arguably, most prominently manifested in the sphere of religion.

¹⁰⁶ J Pike (note 6 above) 3-4.

¹⁰⁷ A thorough and enlightened analysis of the nature of the colonial state in Africa is offered by M Mamdani *Citizen and subject: Contemporary Africa and the legacy of late colonialism* (1996). Arguably, the pinnacle of colonial exploitation and oppression in Africa was witnessed in the Congo Free State (now Democratic Republic of the Congo). In A Hoschild's *King Leopold's Ghost: A story of greed, terror and heroism in colonial Africa* (1998) the horrors of Leopold's rule in the Congo are well captured.

¹⁰⁸ FE Kanyongolo (note 41 above) 354.

were central in the emergence and development of a process of accumulation in Malawi and in most of Southern Africa by Europeans.¹⁰⁹ From the moment the Protectorate was officially proclaimed, colonisation entailed, among others, the massive expropriation of African lands to enhance settler and corporate enterprises.¹¹⁰ Further, colonialism, under the guise of pacification and policing the natives, erected an elaborate legislative and administrative apparatus to meet the demands of colonial production.¹¹¹ In all these processes African interests and participation were systematically ignored and subordinated to the interests of the colonial state.

As Kanyongolo has argued, during colonial rule in Malawi, the power of the state was not exercised on the basis of any constitutional principles limiting the power of government or guaranteeing individual rights and liberties.¹¹² The denial of constitutional principles by the colonial regime was a calculated ploy because to allow a constitutional regime would have militated against the exploitative goals of colonialism. In this context, the question of constitutionalism did not arise. Societal power relations were thus constructed on the basis of the interests of the dominant class (the colonialists) and not by reference to any neutral constitutional principles. The colonial government was not at all accountable to the natives and instead remained accountable to the colonial office in London.¹¹³ The overall objective of the colonial strategy was to regulate the African population and entrench colonial hegemony.¹¹⁴ In the context of Malawi, colonialism entailed a political system of domination and subjugation that rationalised, reinforced and facilitated commercial agriculture activities based on the exploitation of the traditional sector as a cheap labour reservoir - this attribute, perhaps as an indication of the continuities between the colonial state and the post-colonial

¹⁰⁹ M Chipeta "Political process civil society and the state" in GCZ Mhone (ed) *Malawi at the crossroads: The postcolonial political economy* (1992) 34.

¹¹⁰ Writing on the British colonisation of Malawi, Kaunda notes that 'Colonial rule was designed for control and exploitation of the colonised people to maintain the Empire' – JM Kaunda (note 71 above) 1-2. Mbaku argues that Europeans established colonies in Africa through force and not by mutual agreement of the relevant stakeholders. Colonial institutions, hence, were primarily 'structures of exploitation, despotism, and degradation' - JM Mbaku "Constitutionalism and governance in Africa" <<http://www.westafricareview.com/issue6/mbaku.html>> (Accessed 24 August 2008).

¹¹¹ M Chipeta (note 109 above) 35.

¹¹² FE Kanyongolo (note 41 above) 354.

¹¹³ WC Chirwa & others (note 20 above) 2.

¹¹⁴ M Chipeta (note 109 above) 35.

state, survived the colonial state.¹¹⁵ Sadly, one notes that the post-colonial state in Malawi has persisted to manifest, albeit in a modified form, some of the same attributes that characterised the state during colonialism.¹¹⁶

Colonial rule in Malawi, as in most African countries, was also founded on explicit racial discrimination. Race was a determining feature in the allocation of rights and responsibilities.¹¹⁷ The use of race in societal relations was remarkably perverse from the onset of colonialism. It is thus not surprising that in spite of attempts to create a form of government that, supposedly, embodied the concept of separation of powers between 1902 and 1907, Africans in Malawi were only nominated to serve in the Legislative Council in 1945.¹¹⁸ Even with their nomination to the Legislative Council, it was only with the 1961 Elections that Africans began to influence decisions of the Legislative Council. Before 1961, African representation in government decision-making processes was severely constrained.¹¹⁹ It must be obvious, therefore, that colonial rule not only deliberately disenfranchised the majority of the population in Malawi but also effectively sidelined them in the governance processes. This merely confirms the non-participatory nature of the colonial governance framework in Malawi and other former colonial territories. What is remarkable in this regard is that colonial governance frameworks were non-participatory by design.

Racial discrimination was also manifested by colonialism's attitude towards local customary law and other traditional forms of governance. One notes that almost with a culture of superiority, colonialism subjugated all local customary laws and systems of governance to its dictates. The clearest evidence in this regard remains the assertion that native law, though the primary regulator of relations between natives, would only apply if it was not 'repugnant

¹¹⁵ GCZ Mhone "The political economy of Malawi: An overview" in GCZ Mhone (ed) (note 109 above) 1.

¹¹⁶ JM Kaunda (note 71 above). The continuities between the colonial and post-colonial state persist to this date and are largely as a result of the way in which some of the traits of the colonial state or attributes engendered by the colonial state have become embedded in the Malawian social fabric - See D Booth and others *Drivers of change and development in Malawi* ODI Working Paper 261 (2006) 20 <<http://www.odi.org.uk/resources/download/1318.pdf>> (Accessed 20 September 2009).

¹¹⁷ As Fanon noted, the colonial world was a compartmentalised world and what demarcated it was the fact of belonging or not belonging to a given race – F Fanon *The wretched of the earth* (1967) 29-31.

¹¹⁸ Z Kadzamira (note 24 above) 82-83.

¹¹⁹ JM Kaunda (note 71 above) 3.

to justice and morality.¹²⁰ The subsequent colonial resort to native institutions for governance purposes under the umbrella of indirect rule must be looked at with great circumspection.¹²¹ At the outset, indirect rule, though recognising African institutions of governance was principally aimed at easing the colonialists' governance problems and thus, arguably, enhancing productivity from the colonial territory.¹²² What is unmistakable is that where colonialism attempted to use traditional systems and structures, it grossly manipulated such systems to meet its own ends.¹²³ Traditional systems of governance when used at the behest of colonial administrations were no longer truly traditional systems of governance but distorted imitations.

Even the formation of the Federation of Rhodesia and Nyasaland must be understood as an attempt to preserve and entrench the colonial hegemony not only in Malawi but also in the two Rhodesias. As Kanyongolo has argued, the formation of the Federation was merely meant to consolidate the dominant positions of power by the colonialists.¹²⁴ As earlier pointed out the Federation was established in the face of clear and bitter opposition from both politicians and traditional rulers in Malawi.¹²⁵ The fact that the colonialists nevertheless went ahead with the Federation confirms the disregard that they had for African opinion on matters affecting African welfare. Even more revealing are the reasons why the Federation was constituted in spite of stiff African opposition to it.¹²⁶ From the British Government's perspective, the Federation was seen as a means of strengthening the sphere of British

¹²⁰ Article 20 BCA Order-In-Council of 1902 and Z Kadzamira (note 24 above) 82.

¹²¹ There is a broad consensus among scholars that the very nature of the colonial state was crucial in the creation of the despotism and authoritarianism that emerged in post-independence Africa – R Fattouh "Liberal democracy in Africa" (1990) 105(3) *Political Science Quarterly* 455-456.

¹²² The doctrine of indirect rule was pioneered by Lord Lugard and had been accepted in London in the 1920s as the best approach for governing natives. Indirect rule was an attempt to grant traditional rulers the status of independent organs by giving them limited political, administrative and judicial powers – See F Lugard *The dual mandate in British Tropical Africa* (1922).

¹²³ WC Chirwa & others (note 20 above) 29.

¹²⁴ FE Kanyongolo (note 41 above) 354.

¹²⁵ As early as 1938 the Bledisloe Commission recommended that there should be no unification of the three territories. Some of the reasons highlighted by the Commission were, firstly, the strong opposition to the idea by Africans, secondly, the differences in the African policies in the three territories and the differences both economically and constitutionally of the three territories - B Muluzi & others *Democracy with a price: The history of Malawi since 1900* (1999) 53-54.

¹²⁶ These reasons are succinctly summarised by Muluzi & others (as above) 60-61.

political influence in British Central Africa while at the same time preventing Southern Rhodesia from drifting towards Afrikaner South Africa. The settlers' motivation for the establishment of the Federation was principally the securing of white domination in British Central Africa. It was argued that the Federation would also bring about a viable integration of the economies of the three territories. As can be seen, and in line with the colonial system of governance, the promotion of African interests did not feature in the motivations for the establishment of the federation. Neither was there an attempt to garner consensus and use it as a basis for constituting the Federation.

Such was the nature of colonialism that even in formulating Malawi's Independence Constitution, it is arguable, that the departing colonialists did not necessarily act in the best interests of the majority of the population. Like in other countries making the transition from colonialism, the 1964 Constitution was largely a compromise between the departing colonialists and the nationalist leaders of the day.¹²⁷ This process of compromise was such that while the nationalists were eager to acquire the reins of power, the colonialists were concerned with the welfare of their nationals that would stay behind in the now independent territory. The departing colonialists were thus especially keen to ensure that the property rights of their nationals were safeguarded from arbitrary interference.¹²⁸ Needless to state, therefore, that the Independence Constitution of Malawi was not a product of comprehensive and broad based consultations and it thus did not embody any consensus about the basis for the future governance of the country. The process for the adoption of the 1964 Constitution was clearly flawed.¹²⁹ As Kanyongolo has noted, the negotiations for a new Constitution were conducted, from the Malawian side, by small delegations representing narrow political interests.¹³⁰ Consequently, the Independence Constitution was offered to the people of Malawi as a *fait accompli*. The Independence Constitution was thus lacking in authority for want of popular legitimacy and it is not surprising that the holders of state power

¹²⁷ FE Kanyongolo (note 41 above) 356-357.

¹²⁸ A telling indication of this intention was the almost universal inclusion of a right to property guarantee in most Independence Constitutions – See section 16 of the Independence Constitution of the Republic of Malawi. Unsurprisingly, no concession was made with regard to the obviously unfair manner in which the property rights sought to be protected were acquired.

¹²⁹ It is arguable that it is not only the process of adopting the 1964 Constitution that was questionable. The imposition of a liberal democratic framework in the 1964 Constitution also evidenced deliberate obliviousness to the material context.

¹³⁰ FE Kanyongolo (note 41 above) 357.

did not feel themselves bound to exercise power in line with its stipulations.¹³¹ Conversely, this lack of legitimacy also meant that the population did not feel particularly strong about any constitutional violations on the part of the holders of state power. The lack of ownership of the constitutional document was a massive detracting factor for constitutionalism and good governance in the country.

For the purposes of this study's thesis it is important to note that the most enduring and dangerous attribute that colonisation bequeathed to Africa was the invasion and colonisation of African cultures and African independent imaginations of the world.¹³² As Fanon recognised, colonialism was not content with merely holding the colonised in its grip.¹³³ It went further by distorting, disfiguring and destroying the history of all colonised people. In disrupting and obliterating the cultural life of the conquered people colonialism often resorted to the introduction of new legal relations and the banishment of natives and their customs.¹³⁴ In Ramose's words: ¹³⁵

[Colonial conquest was not only genocidal but] also epistemicidal at the same time. Coupled with its mission to Christianise and "civilise", colonisation was by intention and inspiration poised to annihilate and obliterate all the experiences of the indigenous conquered peoples, replacing their experience and knowledge with its own unilaterally defined meaning of experience, knowledge and truth. It succeeded to a very large extent in doing so. Its success was a veritable intellectual and spiritual holocaust from which the indigenous conquered peoples are yet to recover.

Unfortunately, this 'epistemicide' continues to influence most African countries largely as a result of 'coloniality'. 'Coloniality' refers to the existence of colonial situations in contexts where direct colonial administrations have been replaced.¹³⁶ Coloniality, it is further argued, captures the crucial fact of the continuity of the colonial forms of domination after the end of direct colonial administrations. The 'mythology of decolonisation', however, obscures the

¹³¹ As above.

¹³² S Ndlovu-Gatsgeni & G Dzinesa "Liberal democracy and the African context: The experience of South Africa" in K Matlosa & others (eds) *The state, democracy and poverty eradication in Africa* (2008) 91 99.

¹³³ F Fanon (note 117 above) 169.

¹³⁴ As above 190.

¹³⁵ MB Ramose "In memoriam: Sovereignty and the 'New' South Africa" (2007) 16 (2) *Griffith Law Review* 310 313.

¹³⁶ S Ndlovu-Gatsgeni & G Dzinesa (note 132 above) 99.

realities of coloniality in Africa. One must constantly recall that in the interaction between Western and African cultures there has constantly been present a prejudicial otherness with which Africa has been perceived.¹³⁷ This prejudicial otherness has often been utilised to denigrate anything that claims to be authentically African. Clearly, in articulating discourse on governance and constitutionalism in Africa one must be mindful of both the persisting 'coloniality' and the 'epistemicide' that Africa has had to endure. Even more importantly, one must consciously seek to transcend these factors.

3.3.2 An evaluation of governance in post-colonial Malawi: The First Republic, 1964-1994

While marking formal independence, the departure of the colonialists in July of 1964, for Malawians, was, ironically, also a harbinger for a subtler form of oppression which was, arguably, worse than colonialism.¹³⁸ In one sense, therefore, while independence, supposedly, shifted the reins of power to Africans the mechanisms of the state retained their colonial form and in some cases even consolidated their oppressive tendencies. This, arguably, represents what Fanon referred to as decolonisation without a proper transition.¹³⁹ It is now clear that the formal transfer of power from the colonialists was not accompanied by a structural change in the exercise of state power. The result was that the promise that independence held was never transformed into tangible benefits for the citizenry.¹⁴⁰

As earlier pointed out, one of the defining moments in newly independent Malawi was the 1964 Cabinet Crisis. From a governance perspective the result of the Cabinet Crisis was that the flight into exile of the ministers who had fallen out with Dr Banda allowed him to freely

¹³⁷ A Mbembe *On the post-colony* (2001) Chapter 1.

¹³⁸ B Muluzi & others (note 125 above) viii.

¹³⁹ F Fanon (note 117 above) 27. According to Fanon, decolonisation without a transition is simply the replacing of a certain species of men by another species of men. For effective decolonisation, Fanon argued, there must be a change of structure from the bottom up. Such a change must thus be willed by the collective consciousness of the people.

¹⁴⁰ Almost invariably the leadership that had led a particular country to independence transformed themselves into an elite that was became primarily interested in amassing personal wealth and maintaining patronage networks to secure their tenure of office. Davidson argues that the failure of the independence states in Africa was largely as a result of the alien origins of the concept of the state and the attempt to plant it in Africa without serious regard to local conditions - B Davidson *The Blackman's burden: Africa and the curse of the nation state* (1992) 9-18. Arguably the most succinct history of post-colonial Africa is provided by M Meredith *The state of Africa: A history of fifty years of independence* (2006).

embark on a process of consolidating his power.¹⁴¹ The departure of the ministers left Dr Banda with a very subservient cabinet and parliament and it became very easy for him to take steps towards the entrenchment of his authority.¹⁴² For example, the 1966 Constitution, adopted after the Cabinet Crisis, formally declared Malawi a one-party state¹⁴³ and an amendment in 1970 made Dr Banda President for life.¹⁴⁴ The same Constitution also declared that the President would have the 'supreme executive authority of the Republic' with power to appoint ministers and other executive officers as he saw fit and to act 'in his own discretion without following the advice tendered by any person.'¹⁴⁵ The President was also handed effective control of parliament through provisions that enabled him to appoint not more than fifteen Members of Parliament¹⁴⁶ and also provisions that allowed him to dissolve parliament at any time¹⁴⁷ or when it passed a vote of no confidence in the government or when it insisted on passing a bill that the President could not assent to.¹⁴⁸ It must be pointed out that the centralisation of the state and the concentration of authority in the person of Dr Banda did not augur well with the traditional forms of governance that prevailed in pre-colonial Malawi. The form of governance adopted by Dr Banda cannot be said to be congruent to the values that underlie ubuntu especially for the manner in which avenues for participation and consultation were curtailed.¹⁴⁹ Overall, in spite of Dr Banda's 'triumph' during the Cabinet Crisis, it is clear that he remained suspicious of any form of opposition and undertook very draconian steps to stifle any opposition both within the country and outside it as well. The result was that during his reign Malawi was virtually turned into a police state.

¹⁴¹ C Ng'ong'ola (note 48 above) 63.

¹⁴² B Muluzi & others (note 125 above) 90.

¹⁴³ Section 4 of Constitution of the Republic of Malawi, 1966.

¹⁴⁴ Republic of Malawi (Constitution)(Amendment) (No. 3) Act No. 35 of 1970.

¹⁴⁵ Sections 8 and 47 Constitution of the Republic of Malawi, 1966.

¹⁴⁶ Section 20 Constitution of the Republic of Malawi, 1966.

¹⁴⁷ Section 45 Constitution of the Republic of Malawi, 1966.

¹⁴⁸ Section 35 Constitution of the Republic of Malawi, 1966. It is notable here that in traditional Malawi and most African societies, leaders could be removed from office for blatant failures to discharge their duties. Dr Banda, by shielding himself, from any such possibility was clearly denying a role for traditional norms of governance in Malawi.

¹⁴⁹ Participation in government during Dr Banda's time was limited to agreeing with the government's policies. One disagreed with Dr Banda at his own peril.

Posner has identified three broad trends that came to characterise politics in Malawi after the Cabinet Crisis.¹⁵⁰ The first was the centralisation of political and economic power in the hands of Dr Banda. Politically, Dr Banda assumed several cabinet portfolios for himself.¹⁵¹ Parliament was completely subjugated to the executive and this subjugation was made even more thorough by the 1966 Constitution. As the MCP had been made the only lawful political party in the country after 1966¹⁵² all political activity had to be conducted within the framework and discipline of the MCP. Even more striking was Dr. Banda's insistence that the Annual Convention of the MCP was the 'primary' parliament in Malawi.¹⁵³ This meant, in effect, that the decisions and resolutions that were made by the MCP took precedence over those of parliament. This was confirmed by the fact that a number of legislative enactments, including the 1966 Constitution, had their origins from Final Resolutions of MCP Annual Conventions. Clearly, parliament was not only subservient to the executive but also to the MCP.¹⁵⁴

From a constitutional perspective, the subordination of parliament to the executive was manifested through several provisions in the 1966 Constitution. For example, the President had power to appoint the Speaker of Parliament as well as to dismiss him.¹⁵⁵ This meant that the head of the legislative organ held his office at the pleasure of the President. Again, and as pointed out earlier, the President had power to appoint fifteen people into parliament as nominated members of the National Assembly.¹⁵⁶ These people held their office at the exclusive pleasure of the President. The President had constitutional powers to direct that any such member should vacate his seat in the National Assembly.¹⁵⁷ Further, all Members

¹⁵⁰ D Posner "Malawi's new dawn" (1995) 6 (1) *Journal of Democracy* 131 134-135.

¹⁵¹ After independence Dr Banda assumed responsibility for a number of ministries and at one stage he was holding six portfolios as well as keeping a 'close watch' on all government business – J Pike (note 6 above) 162-163. Notably, under the 1966 Constitution the President could assign any portfolio to himself. Section 54 provided that 'The President may by direction in writing, assign to himself or any Minister or Deputy Minister responsibility for any business of Government, including the administration of any department of government.'

¹⁵² Section 4 Constitution of the Republic of Malawi, 1966.

¹⁵³ M Chigawa (note 28 above) 7.

¹⁵⁴ As above.

¹⁵⁵ See, section 25 Constitution of the Republic of Malawi, 1966.

¹⁵⁶ Section 20 Constitution of the Republic of Malawi, 1966.

¹⁵⁷ See, section 28(2)(i) Constitution of the Republic of Malawi, 1966.

of Parliament had to be members of the MCP.¹⁵⁸ If a Member of Parliament ceased to be a member of the party, he was required to vacate his seat in the National Assembly.¹⁵⁹ Although parliaments are normally supposed to offer a check on executive authority, the combination of the preceding factors meant that parliament, during Dr Banda's rule, never performed any such checking or general oversight functions. Parliament could thus not act as an effective counterweight to Dr Banda's excessive authority because any attempt to do so would have put it at the risk of dissolution.¹⁶⁰ As Ihonvbere has noted, parliament in Malawi during Dr Banda's time was no more than a joke, set up and manipulated by Dr Banda to confer a veneer of democracy on the regime.¹⁶¹

The position was not fundamentally different in relation to the judiciary.¹⁶² As regards the judiciary, one notes that the President had the power to appoint the Chief Justice¹⁶³ and the other judges were appointed by the President in consultation with the Judicial Service Commission.¹⁶⁴ The President could, however, remove a person from the office of judge if he considered it in the public interest so to remove him. The judiciary, as will be demonstrated later in the Chapter, was rendered largely obsolete by the creation of the Traditional Courts and could not assert its relevance to governance and constitutionalism.¹⁶⁵

¹⁵⁸ See, section 23 (d) Constitution of the Republic of Malawi, 1966.

¹⁵⁹ See, section 28(2)(h) Constitution of the Republic of Malawi, 1966.

¹⁶⁰ C Ng'ong'ola (note 84 above) 87.

¹⁶¹ JO Ihonvbere "From despotism to democracy: The rise of multiparty politics in Malawi" (1997) 18 (2) *Third World Quarterly* 225-247.

¹⁶² For a fuller discussion of the relationship between the presidency and the judiciary and cabinet during Dr Banda's era, See M Chigawa (note 28 above).

¹⁶³ Section 63(1) Constitution of the Republic of Malawi, 1966 provided that 'The Chief Justice shall be appointed by the President.'

¹⁶⁴ Section 63(2) stipulated that 'The Judges shall be appointed by the President after consultation with the Judicial Service Commission.' By virtue of section 71 of the 1966 Constitution, the Judicial Service Commission consisted of; the Chief Justice, as Chairman, the Chairman of the Public Service Commission or his delegate and such Justice of Appeal or Judge as may be designated by the President acting in consultation with the Chief Justice. Although the President was not a member of the Judicial Service Commission, section 72 of the 1966 Constitution effectively gave him power to appoint judicial officers as this provision vested all powers to appoint judicial officers in the President.

¹⁶⁵ After falling out with High Court judges Dr Banda initiated the creation of the Traditional Court system. The judges in the Traditional Courts were chiefs with no formal legal training and rules of evidence did not apply. These courts were given jurisdiction over treason and murder and were routinely used to try Dr Banda's opponents. For a discussion of the Traditional Court system see M Machika *The Malawi legal system: An introduction* (1983) 1-30.

As earlier pointed out, the net effect of the above described situation was the creation of a very strong presidency in Malawi during the First Republic. From a governance and constitutionalism perspective, it is important to note that all these machinations effectively nullified several fundamental values associated with constitutionalism and good governance.¹⁶⁶ Dr Banda's absolute authority negated any meaningful operationalisation of the concept of limited government, separation of powers, the rule of law and judicial independence. For example, the sweeping powers that the President had in relation to parliament meant that it could not perform any meaningful role in checking the exercise of power by the executive. The powers of the President in relation to the judiciary ensured that it remained subservient to the executive. As Chigawa has stated, since the tenure of office of the judges was effectively in the hands of the executive it was very improbable that any sitting judge could antagonise the executive.¹⁶⁷

The second trend identified by Posner in relation to the First Republic is the ruthless treatment of political opponents and the total control of public life by the MCP and its affiliates.¹⁶⁸ As Meredith aptly notes, Dr Banda run Malawi as his personal fiefdom demanding not just obedience but servility.¹⁶⁹ He insisted on personally directing even the smallest details of Malawi's affairs. He is alleged to have once stated that everything was his business in the country and that his word was the law in Malawi.¹⁷⁰ It is arguable that during Dr Banda's time Malawi was not just a one-party state but effectively a one-man state.¹⁷¹ During Dr Banda's era political space was significantly shrunk and proscribed. Participation in the political arena was uniformly dependent on membership of the MCP and also only to support the government. There was no room for dissent of any form. Political dissenters were routinely detained and sometimes even tortured.¹⁷² Those that fled into exile were often tracked, abducted and brought home to stand trial for treason, as happened with Orton and Vera Chirwa in 1981, or assassinated in exile as happened with Attati Mpakati in 1983 and

¹⁶⁶ M Chigawa (note 28 above) 12.

¹⁶⁷ As above 11.

¹⁶⁸ Posner (note 150 above) 134-135.

¹⁶⁹ M Meredith (note 140 above) 164-165.

¹⁷⁰ As above 165.

¹⁷¹ D Venter "Malawi: The transition to multiparty politics" in J Wiseman (ed) *Democracy and political change in Sub Saharan Africa* (1995) 155.

¹⁷² G Bauer & S Taylor (note 8 above) 2.

Mkwapatira Mhango in 1989.¹⁷³ Cabinet was routinely reshuffled so as to prevent the emergence of any political rivals.¹⁷⁴ The media was heavily censored and used for propaganda purposes. Civil society organisations were proscribed or co-opted into the ruling party.¹⁷⁵ The disdain for dissent was mirrored in the Constitution which stated that the government was founded upon the 'four cornerstones' which were unity, loyalty, obedience and discipline.¹⁷⁶ Mhone has argued that the four cornerstones were an obvious reflection of the paternalistic, authoritarian and fascist intent of the regime.¹⁷⁷ From a governance angle what is worrying, however, is the perpetuation of the values behind the four cornerstones in present day democratic Malawi. It seems to be the case that Malawians, generally, tend to stifle initiative, creativity, tolerance and dissent.¹⁷⁸ Even after fifteen years of a multi-party dispensation dissent, opposition and protest are, seemingly, only grudgingly tolerated.

The third trend that characterised Dr Banda's regime, according to Posner, was the 'crystallising of regional identities.' Just like in most of Southern Africa, ethnic identities have figured prominently in the post-colonial politics of Malawi.¹⁷⁹ Admittedly, the rhetoric during Dr Banda's regime reiterated the promotion of national unity and 'Malawianness' and deeply discouraged regional and ethnic allegiances.¹⁸⁰ However, as a result of colonial policies, ethnicity, if not regionalism, were already firmly established and entrenched facts of life when Dr Banda assumed office in 1964.¹⁸¹ The government was, arguably, fully aware of the

¹⁷³ As above 26.

¹⁷⁴ This was clearly a direct result of the Cabinet Crisis and the insecurity that subsequently seemed to haunt Dr Banda in relation to his Cabinet.

¹⁷⁵ While it cannot be said that civil society was non-existent during Dr Banda's era, it was the co-opting of civil society into the party structures that effectively neutralised the potential of civil society in Malawi. According to Chipeta, the affiliation of most civil society organisations with the nationalist movement was actually their death-knell. In the aftermath of the Cabinet Crisis, the Government used every pretext to stifle civil society organisations and some organisations, by their affiliation to the nationalists, found themselves incapable of constructively criticising the Government – M Chipeta (note 109) 36 -38. See, also, B Muluzi & others (note 125 above) 96.

¹⁷⁶ Section 2(1)(i) Constitution of the Republic of Malawi, 1966.

¹⁷⁷ GCZ Mhone (note 115 above) 9.

¹⁷⁸ D Booth & others (note 116 above).

¹⁷⁹ D Posner (note 150 above).

¹⁸⁰ MJ Nkhata & AWA Mwenifumbo "Ethnicity, politics and the right to development in latently polarised societies: The Malawian experience" (Forthcoming publication).

¹⁸¹ WC Chirwa "Democracy, ethnicity and regionalism: The Malawian experience, 1992 – 1996" in KM Phiri & KR Ross (note 41 above) 52 57.

problem. The most notable feature of Dr Banda's regime was, however, the constant and repeated attempts to deny the prevalence of regionalistic or tribalistic tendencies by means of state propaganda vindicating national unity.¹⁸² Commentators on the dynamics of ethnicity, regionalism and tribalism in post-independence Malawi are agreed that in the period after independence, contrary to the official rhetoric on national unity, Dr Banda's regime actively pursued policies that were ethnically biased.¹⁸³ Specifically, it is noticeable that in the period between 1964 and 1994, interests and aspirations of the *Chewa* peoples were actively nurtured and promoted at the expense of those classified as non-*Chewa*.¹⁸⁴ The Banda regime also deliberately conflated *Chewa* identity with the national identity.¹⁸⁵ *Chewa*-ness was deliberately equated with 'Malawianness' and numerous steps were undertaken by the state towards the realisation of this goal.¹⁸⁶ Perhaps the most important fact in this regard is that Dr Banda did not only privilege his own *Chewa* ethnic group but his regime also discriminated against those classified as non-*chewa*.¹⁸⁷ Ironically, it is this very marginalisation that ensured that a viable opposition to Dr Banda's regime was present in the country when the winds of change blew across Malawi.¹⁸⁸

¹⁸² It is perhaps comical that while Dr Banda's regime was clearly cognisant of the ethnic currents in Malawi it went to great lengths to portray the impression of ethnic homogeneity. Dr Banda's public speeches provide a poignant illustration of this. Dr Banda constantly harped on his *Chewa* roots while at the same time mouthing the mantra of national unity. See, L Vail 'Ethnicity, language and national unity: The case of Malawi' in P Bonner *Working papers in Southern African studies* (1981) 121.

¹⁸³ See, for example, D Kaspin (note 55 above); WC Chirwa (note 181 above) and B Osei-Hwedie, 'The role of ethnicity in multiparty politics in Malawi and Zambia' (1998) 16(2) *Journal of Contemporary African Studies* 227. For a slightly different take on ethnicity during Dr Banda's rule, see H Englund *Whither Malawi: Competing discourses on the post-colony* Working Paper 3/95 Institute of Development Studies, University of Helsinki.

¹⁸⁴ WC Chirwa (note 181 above) 59-63. A more comprehensive account on the point is offered by L Vail & L White in L Vail (ed) (note 52 above) 151.

¹⁸⁵ D Kaspin (note 55 above) 608.

¹⁸⁶ The declaration of *Chichewa* as the national language was only one of the many steps undertaken in this regard. The emphasis during Dr Banda's era was to use language as a unifying agent in an ethnically and linguistically divided country – P Kishindo "Politics of language in contemporary Malawi" in KM Phiri & KR Ross (eds) (note 41 above) 252.

¹⁸⁷ G Bauer & S Taylor (note 8 above) 28.

¹⁸⁸ The clamour for change was not even across the country's three regions as the results of the referendum in 1993 showed. While the Northern and Southern regions voted overwhelmingly for change the Central region, where Dr Banda hailed from, voted to maintain the status quo – D Cammack (note 78 above) 191.

In as far as governance and constitutionalism are concerned; one notes that the prevailing paradigms did not leave room for the exercise of state authority on the basis of set constitutional principles. The exigencies of maintaining the patronage networks invariably superseded principled governance and the development of constitutionalism in the country. As earlier pointed out, there was thus no room for the development of constitutionalism and good governance in the country during the entirety of Dr Banda's reign. The executive's overbearing influence constantly subordinated the other branches of government to its whims and there were no means of exercising any checks on its authority. The 1966 Constitution, it must be stated, was a strong factor in negating constitutionalism and good governance in Malawi for the entirety of Dr Banda's reign. Structurally, the 1966 Constitution did not even attempt to construct an edifice on which constitutionalism could be based. The practice of government itself, especially after 1966, was diametrically at odds with the demands of both constitutionalism and good governance. Further, the justification for the adoption of the 1966 Constitution also manifested a 'perverted' recourse to supposed norms of African traditions which must be avoided at all times. This is because the Constitutional Committee alleged that African tradition justified the creation of a strong executive and an 'all powerful' presidency.¹⁸⁹ What was conveniently ignored was the overwhelming evidence that strongly pointed to how African traditions checked the exercise of societal power to prevent tyranny and insisted on consultation and consensus in decision making.¹⁹⁰

3.4 An evaluation of governance and constitutionalism in post-colonial Malawi: The Second Republic (1994 to date)

In evaluating governance and constitutionalism during the Second Republic it is prudent to conduct the evaluation under two separate but related subheadings. Although Dr Banda's rule was formally ended in 1994, the process of transition had been afoot for almost two years before that. Having regard to the origins of some of the governance complications that have manifested themselves in the country, it is proposed to first dwell specifically on the transition from the one-party state to the multi-party dispensation (the transition) and then separately look at the emerging trends from the time the first democratically elected

¹⁸⁹ Government of Malawi (note 62 above).

¹⁹⁰ See, for example, G Clutton-Brock (note 19 above) 13; K Wiredu "Society and democracy in Africa" in T Kiros (ed) *Explorations in African political thought: Identity, community, ethics* (2001) 173; G Mwakikagile *Africa and the West* (2000) 33; J Nyerere "One party government" (1961) 2 *Transition* 9 and E Anyaoku "Democracy in Africa: The challenges and the opportunities" Speech to the South African Parliament, 1 June 1998 <http://www.thecommonwealth.org/speech/34293/35178/35200/democracy_in_africa_the_challenges_and_the_opportu.htm> (Accessed 20 June 2010).

president took office. In this way, it is hoped, the sources of some of the current problems in governance and constitutionalism, in so far as they are related to the manner in which the transition was managed, will become apparent.

3.4.1 Managing the transition to multi-partyism in Malawi

Dr Banda's defeat during the Referendum of 1993 signalled the end of the one-party state and the re-introduction of multi-party politics after a hiatus of about thirty years.¹⁹¹ Unfortunately, even with Dr Banda's defeat in the Referendum it was not immediately clear what should happen subsequently.¹⁹² No schedule of measures to be undertaken in the event of a vote in favour of multi-party rule had been drawn up. One month after the Referendum, the Public Affairs Committee (PAC)¹⁹³ and the Government agreed to form a body to oversee the transition to democratic rule.¹⁹⁴ This body was called the National Consultative Council (NCC). The composition and the role of the NCC in managing the transition has already been discussed under part 3.2.3.3 above. As earlier pointed out, in November 1993 the NCC initiated debate on changing the 1966 Constitution and it was agreed not just to amend the 1966 Constitution but to draft a new Constitution altogether. Subsequently, the NCC convened a Constitutional Drafting Conference in February 1994 which resulted in the production of an Interim Constitution on the basis of which the General Elections of 1994 were conducted.¹⁹⁵ In a bid to refine the Interim Constitution, a Constitutional Review Conference was convened in February 1995. This conference reviewed the Interim Constitution and made recommendations to parliament for

¹⁹¹ Contrary to common perceptions, the 1994 General Elections were not the first multi-party elections in Malawi, the first multiparty elections were held in 1961 – AS Muula & ET Chanika *Malawi's lost decade 1994-2004* (2005) 21.

¹⁹² D Cammack (note 78 above) 191.

¹⁹³ The Public Affairs Committee (PAC) was a 'pressure group' formed in 1992 to, among other things, pressure the government to look into national grievances and also to enter into dialogue with the government for the resolution of the grievances. PAC was initially composed of faith-based organisations though its membership subsequently included the Malawi Law Society and the Associated Chamber of Commerce and Industry in Malawi – B Muluze & others (note 125 above) 143-146.

¹⁹⁴ As above 170 -172.

¹⁹⁵ J Banda (note 50 above) 321-322.

improvement of the document.¹⁹⁶ The Final Constitution was adopted by parliament in May 1995.¹⁹⁷

Several notable points are evident about the manner in which the transition was managed. It is this study's contention that the manner in which the transition was managed has had serious repercussions for governance and constitutionalism in Malawi.¹⁹⁸ This study, however, does not only take issue with the process leading to the adoption of the Constitution but also the final product itself. Firstly, the period in which the Constitution was negotiated is remarkable for its brevity. The process of drafting the Constitution, as Banda has pointed out, was a 'hurried affair, conceived at the end of 1993 and executed at the beginning of 1994.'¹⁹⁹ The Constitution was negotiated, drafted and adopted within a space of four months.²⁰⁰ Even though the Constitution was allowed a one year interim period of operation, it still, according to one commentator, holds the 'dubious distinction, among constitutions, of being enacted in one day.'²⁰¹ All parliamentary processes were completed and the presidential approval given on 16 May 1994. As a matter of fact, the disbanded one-party parliament had to be recalled solely for the purpose of enacting the Constitution.

Clearly, the haste with which the Constitution was adopted entails that there was insufficient time for proper and broad-based societal consultation and negotiation on the terms of the Constitution.²⁰² Additionally, the transition was occurring at a time when many other activities were taking place, foremost among these activities being the preparations for the General Elections. This necessarily meant that inadequate focus was paid to the process of drafting the new Constitution.²⁰³ This lack of thorough consultation before the adoption of the

¹⁹⁶ For a comprehensive summary of resolutions of the National Constitutional Conference on the Provisional Constitution, see J Banda (as above) 329-333.

¹⁹⁷ Constitution of the Republic of Malawi Act, Act No. 7 of 1995.

¹⁹⁸ This is because constitutions derive their legitimacy principally from the historical-political act that precedes their adoption. What commands obedience to a constitution is not the way the text is framed or the words used but the intentional historical-political act that creates constitutions – RS Kay "American constitutionalism" in L Alexander (ed) *Constitutionalism: Philosophical foundations* (1998) 16 29-33.

¹⁹⁹ J Banda (note 50 above) 321.

²⁰⁰ D Chirwa (note 86 above) 317.

²⁰¹ C Ng'ong'ola (note 48 above) 64-65.

²⁰² D Chirwa (note 86 above) 317.

²⁰³ The political climate prevailing at the time, argues Mutharika, was such that the Banda regime was in the decline while the NCC was in the ascendancy. The result was that various

Constitution, among others, has certainly detracted from the document's popular legitimacy and made it problematic for the Constitution to act as a sound basis for democratisation.²⁰⁴ The implications of this lack of consultation, Chirwa argues, are very easy to identify in the Malawian Constitution.²⁰⁵ For example, the Constitution makes no commitment to addressing regionalism which remains a major concern to the country. Further, the Constitution treats social and economic rights in a very disappointing manner in spite of their centrality to achieving social justice and alleviating poverty. The manner in which the Constitution was adopted was oblivious to the fact that, to be viable and acceptable, a constitution must be the product of consultation and consensus.²⁰⁶ Consultation and consensus does not mean that everyone's view will take the day but rather ensures that 'everyone' is involved in the process of coming up with a constitution. Involvement allows for easy acceptance and identification with the final product.

The circumstances surrounding the adoption of the Constitution have operated to detract from the Constitution's role in governance and constitutionalism. It is arguable that public functionaries' unwillingness to voluntarily and consistently abide by the terms of the Constitution is, in part, traceable to a failure to identify with the principles embodied in the Constitution. Relatedly, one also notes that the Constitution is a very detailed document.²⁰⁷ While the extensive detail in the Constitution may be explained as an attempt to provide for all conceivable situations and prevent a repeat of the excesses of Dr Banda's regime, the detail also creates fertile ground for avoidable litigation.²⁰⁸ It is patent that some of the issues that the Constitution provides for could have better been addressed in separate and specific legislative enactments.²⁰⁹ A more thorough and deliberate reflection during the negotiation of the Constitution would easily have brought this to light.

opposition parties attempted to push for inclusion in the Constitution of provisions that would promote their interests – See AP Mutharika “The 1995 Democratic Constitution of the Republic of Malawi” (1996) 40 (2) *Journal of African Law* 205 206.

²⁰⁴ D Chirwa (note 86 above) 318.

²⁰⁵ As above 319-320.

²⁰⁶ T Maseko “Constitution-making in Swaziland: The cattle-byre Constitution Act 001 of 2005” <http://www.publiclaw.uct.za/usr/publi_law/Nairobi/Maseko_ConstitutionalismMakingInSwazil and.doc> (Accessed 23 March 2010).

²⁰⁷ AP Mutharika (note 203 above) 205-206.

²⁰⁸ As above.

²⁰⁹ This includes the provisions on local government, the Malawi Police Service and the Malawi Defence Force which could have easily been incorporated in legislation on local governance, the police and the defence force, respectively.

Secondly, it is important to reflect on the players that actually influenced the basic content of the Constitution. The Constitution was, in essence, drafted by the NCC, which, as stated earlier, was made up of representatives of the various political parties. What is notable is that the NCC engaged in the process of drafting the Constitution even though none of its members were in the NCC by virtue of a popular election.²¹⁰ The entire NCC thus lacked any direct and popular mandate from the people to determine ‘even the most basic framework of the Constitution.’²¹¹ Commenting on the process, Hara concludes that ‘there can be no valid claim to popular involvement in the Constitution-making process [in Malawi].’²¹² Clearly, and as pointed out in respect of the 1964 Independence Constitution, there still remains a legitimacy gap in relation to the Constitution of Malawi.²¹³ Such a gap makes the entrenchment of constitutionalism and good governance problematic as the citizenry are wont to find it difficult to identify with such a document and its stipulations. This merely highlights the need for full citizen participation in the adoption of constitutions if meaningful progress for governance and constitutionalism is to be attained across Africa.

It may be argued that the lack of proper consultation and participation in drafting the Constitution was cured by the one year interim period of operation that the Constitution was subjected to and the subsequent National Constitutional Review Conference that was convened in February 1995.²¹⁴ It is this study’s argument, however, that the February Constitutional Review Conference did not redress the lack of consultation, participation and representation that has been identified above. Admittedly, others have argued that the Constitutional Review Conference was ‘unique in the extent to which it accommodated democratic impulses’ and how it was attended by a cross-section of Malawi’s population.²¹⁵

²¹⁰ FE Kanyongolo (note 41 above) 364.

²¹¹ As above.

²¹² MH Hara “Popular involvement in constitution-making: The experience of Malawi” Paper presented at the World Congress of Constitutional Law, Athens, 11-15 June 2007, at <<http://www.enelsyn.gr/papers/w1/Paper%20by%20Mabvuto%20Herbert%20Hara.pdf>> (Accessed 22 April 2010).

²¹³ According to Ng’ong’ola, the transition was entrusted to institutions which, strictly speaking, had no legal mandate to manage it - C Ng’ong’ola (note 84 above) 98.

²¹⁴ By virtue of section 212(1) of the Constitution, the Constitution came into provisional operation on 18 May 1994 for a period of 12 months. During the period of provisional operation a Constitution Committee was given the task of canvassing views on the document and also convening a National Constitutional Conference to review the Constitution.

²¹⁵ J Banda (note 50 above) 322.

There are, however, other subtle but equally crucial issues surrounding the Constitutional Review Conference that one must also appreciate. In the first place, in spite of the attempt to include a cross-section of Malawi's population, one notices an obvious urban bias in the list of participants.²¹⁶ This urban bias ignored the fact that the majority of Malawians live in rural areas. The Conference thus retained an elitist composition. In the second place, the Conference was convened for four days only.²¹⁷ This was, in the light of the enormity of the task before the Conference, far inadequate for a proper and thorough discussion of the issues. Lastly, subsequent events clearly undermined whatever valuable contribution that the Conference may have attained. Most importantly, one notices that parliament subsequently ignored or overruled explicit recommendations from the Conference.²¹⁸ This, clearly, defeated the popular participation that the Conference had intended to achieve.²¹⁹ This merely reinforces the earlier assertion that the Constitution suffers from a serious popular legitimacy deficit.

Thirdly, in terms of the product of the transition, one notes that the transition bequeathed a liberal democratic Constitution to the country.²²⁰ Rather disturbing, however, is the fact that there was virtually no ideological debate on the appropriateness of the liberal democratic

²¹⁶ J Lwanda *Promises, power, politics and poverty: Democratic transition in Malawi, 1961 – 1999* (1997) 192 -195. Lwanda argues that some of the resolutions of the Conference were explicitly influenced by this urban bias. He states that 'This conference, for example, allowed only 51 chiefs, 10 trade unionists, 8 women's delegates, 3 smallholder farmer delegates and 3 disabled as opposed to 60 MPs, 17 political party delegates and 10 big business delegates. When we examine the rest of the list, the urban bias is even more obvious and this together with the political inexperience of most of the delegates showed how politicians were able to be so influential at the conference: the church 7, lawyers 2, university 5, journalists 3, professionals 8, Asians 3, Europeans 2, human rights bodies 5. Even more telling was the lack of briefing given to the chiefs at the constitutional conference. Chief Mchilamwera of Thyolo admitted on the MBC [Malawi Broadcasting Corporation] that he had only been given the draft of the constitution when he arrived at the conference.'

²¹⁷ The National Constitutional Conference on the Provisional Constitution was held in Lilongwe from 20 to 24 February 1995.

²¹⁸ According to Hara 'It is important to note that when the Constitution came before Parliament the UDF/AFORD majority in Parliament ignored all the decisions of the Conference on which the Conference had voted against their positions, and pushed through their own amendment proposals' – MH Hara (note 203 above).

²¹⁹ For example, the Constitutional Conference recommended the retention of section 64 of the Constitution which allowed constituents to recall their parliamentarians in appropriate cases. However, the repeal of section 64 (repealed by Act No. 6 of 1995) was one of the first things parliament did after convening to consider the Conference's recommendations.

²²⁰ FE Kanyongolo (note 41 above) 364.

model for Malawi during the drafting process.²²¹ It seems to be the case that it was assumed, without consideration of the alternatives, that liberal democracy was not just the best but also the only sound ideological basis on which to premise the Constitution. The result is that Malawi has, arguably, one of the world's most liberal constitutions even though this seems to be more by accident than deliberate choice. This lack of debate on the ideological basis of the Constitution ignored, among others, the fact that liberal democracy never historically developed as a part of the indigenous Malawian political culture and that liberal democracy is not a self evident truth.²²² It seems, however, that the lack of sufficient time to consider the proposals for the Constitution also contributed to the absence of an informed debate on the form that the Constitution was supposed to take. While all politicians were agreed on the need to adopt a new Constitution, there was a marked absence of an informed motivation to drive the entire process.²²³ As Phiri and Ross accurately observe, the lack of reflection on the form and content of the transition immediately reveals the limitations of the entire transition.²²⁴ It is now clear that the pro-multiparty movement had no definite policy agenda for the country, aside from replacing Dr Banda and his MCP. Overall, one notes glaring omissions in the manner in which the transition, especially the process of drafting the Constitution, was handled. Without doubt some of the current shortcomings with respect to governance and constitutionalism are traceable to the processes that took place between 1992 and 1994.

3.4.2 Governance and constitutionalism in Malawi beyond the transition

The 1994 Constitution forms the overarching framework for both governance and constitutionalism in Malawi. The fact that the Constitution should be central to governance and constitutionalism was, clearly, one of the strong motivating factors in the adoption of the Constitution rather than the mere amendment of the 1966 Constitution. It must be recalled that the adoption of a new Constitution was seen as a key instrument for the negation of Dr

²²¹ As above.

²²² As above 370- 371. These points are discussed at greater length in Chapter 4 of this study.

²²³ K Bampton in J Lewis & others (eds) *Human rights and the making of Constitutions: Malawi, Kenya, Uganda* (1995) 57-58. In Bampton's words 'There simply was no education. This was the fundamental flaw of the Malawi Constitution. There was no consultation. ...There was simply a political will among the Malawi politicians to form a new political structure: a political motivation to embody human rights but a weak motivation. For it was not an informed motivation, not informed on the nature of human rights nor the problems of implementing human rights in the context of an actual working democracy.'

²²⁴ KM Phiri & KR Ross (note 66 above) 12.

Banda's autocracy and the creation of a new political and socio-economic order.²²⁵ The Constitution was thus designed to lay a foundation for the protection of human rights, making those in power accountable, upholding the rule of law and maintaining checks and balances between the different arms of government. In the words of Kanyongolo:²²⁶

The 1994 Constitution was a direct product of the popular demand for a democratic order to replace autocratic political system which had developed with the blessings of the Constitution of 1966. The 1994 Constitution was therefore intended to be the basic framework for facilitating the democratisation process in Malawi.

In constructing the above-referred to framework, the framers had the delicate task of coming up with a document that gave the democratically elected government enough powers to discharge its duties while at this same time checking the emergence of any excesses comparable to the Dr Banda regime.²²⁷ In evaluating the trends in governance and constitutionalism from 1994 to date focus will, in this study, be placed on the following areas: the relationships between the branches of government, public resource management and accountability of public functionaries and citizenry empowerment. These thematic areas have been chosen for their overt connection to governance and constitutionalism and are used merely for illustrative purposes without in any way suggesting that governance and constitutionalism is exhaustively about these thematic areas. It is hoped that analysing developments under the chosen themes will centrally shed light on governance and constitutionalism in Malawi. It is in connection to these same thematic areas that Chapter Five will demonstrate the relevance and viability of social trust-based governance and constitutionalism in Malawi.

3.4.3 The relations between the branches of government

The basic structure of government under the Constitution is neither presidential nor parliamentary.²²⁸ The Constitution creates a hybrid system which provides for a directly elected president who has power to appoint his own ministers while legislative powers are vested in parliament. Needless to state that the Constitution recognises three branches of government; the executive, legislature and judiciary. In the following sections an attempt is

²²⁵ J Banda (note 50 above) 320.

²²⁶ FE Kanyongolo "The constitution and the democratisation process in Malawi" in O Sichone (ed) *The state and constitutionalism in Southern Africa* (1998) 1.

²²⁷ AP Mutharika (note 203 above) 209.

²²⁸ As above 206.

made to explore how each of the three branches of government has related with the other branches from the perspective of governance and constitutionalism.

3.4.3.1 The executive

Section 7 of the Constitution establishes the executive as the entity responsible for the initiation of policies and legislation and ‘for the implementation of all laws which embody the express wishes of the people of Malawi.’ A full elaboration of the powers of the executive is provided in Chapter VIII of the Constitution. It is not this study’s intention to dwell on a description of the powers vested in the executive under the Constitution but the focus will be on how the executive has conducted itself since 1994. Suffice it to point out that the executive is headed by a President, who is also the Head of State. The President is assisted in his constitutional duties by a cabinet which he must appoint.²²⁹ The Constitution does not spell out a limit to the size of the cabinet. Under Malawi’s hybrid system, the President may appoint sitting Members of Parliament (MPs) as cabinet ministers.²³⁰ The President is elected directly by the electorate but must, at the time of his nomination, declare who shall be the Vice-President should he/she be elected.²³¹ The President may also appoint a Second Vice-President if he/she considers it in the national interest to do so.²³²

A number of incidents involving the executive give an indication of its commitment to governance and constitutionalism. An early test in constitutionalism was offered in May 1994, just a week after the democratically elected government of Bakili Muluzi took office. On 24 May 1994, the new President verbally informed Mr Lunguzi, who was then the Inspector General of Police, that he was being removed from his position as head of the Malawi Police Force. Mr Lunguzi was also told that he was being appointed a diplomat to be accredited to Canada. No reasons were given by the President for removing Mr Lunguzi from his post as is required by section 43 of the Constitution. In a subsequent suit commenced by Mr Lunguzi contesting the constitutionality of his removal from office, the High Court held that Mr Lunguzi’s removal from his post was unconstitutional.²³³ On appeal

²²⁹ Section 92 of the Constitution of the Republic of Malawi.

²³⁰ *Mponda Mkandawire and others v Attorney General* (note 90 above) confirmed that the President can appoint opposition Members of Parliament into his cabinet. This is in spite of section 65 of the Constitution which bars ‘floor crossing’ by parliamentarians.

²³¹ Section 80 of the Constitution of the Republic of Malawi.

²³² Section 80(5) of the Constitution of the Republic of Malawi.

²³³ *In the matter of the Constitution of the Republic of Malawi and in the matter of the removal of Mac William Lunguzi as Inspector General of Police* Misc. Appl. No. 55 of 1994.

by the Attorney-General, the Malawi Supreme Court of Appeal upheld the High Court's decision, holding that the President had acted unconstitutionally in dismissing Mr Lunguzi.²³⁴ This decision unequivocally signified the end of an era in which the President was considered to be above the law and the commencement of an era marked by the rule of law and accountability.

Further, one may also wish to dwell on the conduct of President Bakili Muluzi towards the conclusion of his second term in office. As pointed out earlier, by virtue of section 83(3) of the Constitution, the President is not allowed to serve more than two consecutive terms in office. In spite of this clear stipulation, Bakili Muluzi attempted to extend his time in office by supporting a bill that proposed to remove term limits altogether and when this failed he 'initiated' a bill purporting to extend the limit to three terms.²³⁵ Relatedly, one may also reflect on the presidential directive that banned 'all forms of public demonstrations' while the bill proposing the abolition of presidential term limits was pending in parliament. Faced with growing public unrest on the question of the extension of term limits, Bakili Muluzi, while addressing a public rally, announced that that no-one would be allowed to hold demonstrations on the term limits issue. This directive was subsequently challenged and the High Court declared it unconstitutional.²³⁶ The High Court held that the directive did not pass the constitutionality prescriptions in section 44(2) because it was unreasonable and unduly wide such as to be incapable of enforcement.²³⁷

It is evident that the attempts to amend section 83(3) were motivated by interests that could not be said to be in synchrony with constitutionalism and governance.²³⁸ Accepting that the Constitution represents a compact amongst Malawians (albeit an imperfect one in the light of the facts presented earlier) as to governance and constitutionalism, the attempts at amending section 83(3) were an attempt by a select group of people to circumvent the compact. Important to note is the fact that the proposed amendment would have directly

²³⁴ *Attorney General v Lunguzi et al* MSCA Civil Appeal Cause No. 23 of 1994.

²³⁵ G Bauer & S Taylor (note 8 above) 32.

²³⁶ *Malawi Law Society and others v The State and the President of Malawi and others* Misc. Civil Cause No.78 of 2002 Per Twea J.

²³⁷ Section 44(2) provides: 'Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society.'

²³⁸ See B de Klerk (note 99 above).

undermined the accountability of former presidents that the Constitution seeks to guarantee.²³⁹ The fact that an attempt at amending the Constitution to alter the provision on term limits was undertaken also reveals the continuity of traits that were prevalent during Dr Banda's rule. It is arguable that the proponents of the amendment were, effectively, promoting another entrenched presidency and also one that would not be fully accountable to the populace. The ban on demonstrations on the Third/Open Terms Bills was also reminiscent of Dr Banda's regime when the President would routinely rule by decree. These are some manifestations of failures in governance and constitutionalism in Malawi.

More recently, one may also reflect on the decision by President Bingu wa Mutharika to 'suspend' the Vice-President Cassim Chilumpha. In as far as can be discerned, in February 2006 the Vice-President received a letter from the President which indicated that the President had accepted the constructive resignation of the Vice-President. In an application for judicial review by the Vice-President contesting his purported constructive resignation, the High Court, in affirming the supremacy of the rule of law in Malawi granted an injunction restraining the President from 'accepting' the 'resignation'.²⁴⁰ What is notable, however, is that the executive did not immediately comply with the court's decision on the matter. It took a further application seeking the enforcement of the initial orders made by the High Court before the executive attempted to comply with some of the court's directives.²⁴¹ The executive's disregard of court orders, where it perceives the same to be unfavourable to its interests, is deplorable.²⁴² Even more crucially this undermines the integrity of the judiciary and denigrates the rule of law. A more encouraging situation would be where the executive takes the lead in complying with judicial pronouncements even where these are not exactly congruent with its immediate interests.

The institutional set up of the executive under the Constitution seems to have explicitly acknowledged that the executive remains the institution most likely to overstep its

²³⁹ FE Kanyongolo (note 93 above) 64-65. Notable in this regard is section 91 of the Constitution which provides immunity from all suits to a sitting President.

²⁴⁰ *Ex Parte Chilumpha* Misc. Civil Cause No. 22 of 2006 HC.

²⁴¹ Part of the initial decision had directed the executive to restore all the privileges that the Vice-President ordinarily enjoyed prior to the purported 'constructive resignation.' No attempt by the executive to restore the privileges was made until the second application.

²⁴² For further examples of instances in which the executive has demonstrated reluctance to follow court orders, see FE Kanyongolo (note 79 above) 51-57.

boundaries hence the elaborate mechanisms to keep it in check.²⁴³ In spite of the constitutional mechanisms for checking excesses on the part of the executive, experience has already shown that checking the executive is not easy. On several occasions, it has taken the intervention of the judiciary to rein in the executive. With a written constitution that expressly spells the ambits of powers conferred on the executive it is rather unfortunate that the executive has recalcitrantly demonstrated a tendency to overstep its limits. It would be a measure of the entrenchment of constitutionalism if the executive, of its own accord, began to consciously recognise and implement constitutional limits on its authority.

In as far as the management of activities of the state on a day to day basis (governance), the executive has fared pretty miserably since the transition.²⁴⁴ For example, the ten years, corresponding with Bakili Muluzi's two terms in office, witnessed serious mismanagement of the public realm, high levels of corruption and a decline in the capacity of the state to consistently formulate and implement policies.²⁴⁵ The result was that household incomes fell considerably²⁴⁶ while access to the state was largely conceived as a means of obtaining and accumulating wealth.²⁴⁷ While some effort was made to reverse some of the excesses of Bakili Muluzi regime by President Bingu wa Mutharika during his first term in office, Malawi still remains on the edge of an 'economic and governance abyss'.²⁴⁸ It remains to be seen what President Bingu wa Mutharika's second term in office will bequeath to the country in terms of governance and constitutionalism. Importantly, as will constantly be alluded to in this study, changes of leadership in Malawi have, surprisingly, not engendered significant discontinuities. The state has thus, since independence, functioned in a predominantly similar manner in spite of regime changes. Changes, for governance, have often been

²⁴³ Malawi Law Commission "The Constitution and the executive branch of government" Discussion paper No. 4, 43.

²⁴⁴ For an in-depth analysis of the performance of the post transition state up to 2005 see D Booth & others (note 116 above).

²⁴⁵ Remarkably, former President Muluzi is embroiled in a corruption trial the charges of which relate to the time when he was President. See, "Former president of Malawi arrested to face corruption charges" <<http://africanpress.wordpress.com/2009/02/28/former-president-of-Malawi-arrested-to-face-corruption-charges/>> (Accessed 7 August 2010).

²⁴⁶ Writing in 2003, Breytenbach and Peters-Berries noted that Malawians were ' ... worse off than in 1994, as the average per capita income has remained the same, but purchasing power has dropped, social and extension services crumbled and the HIV/Aids epidemic reached alarming proportions ' - Breytenbach & Peters-Berries (note 59 above) 73.

²⁴⁷ P Von Doepp "The Kingdom beyond zasintha: Churches and political life in Malawi's post authoritarian" era in KM Phiri & KR Ross (eds) (note 41 above) 102 106-10.

²⁴⁸ D Booth & others (note 116 above) 6.

farcical and motivated by exigencies rather than outcomes of consciously thought out interventions.

3.4.3.2 The legislature

Under the original scheme devised by the Constitution, parliament was made up of a directly elected National Assembly, and an indirectly elected senate and the President as Head of State.²⁴⁹ By an ‘amendment’ to the Constitution, the National Assembly abolished the senate.²⁵⁰ Parliament is now the National Assembly and the President as Head of State. All legislative powers of the Republic are vested in parliament.²⁵¹ In its deliberations parliament is enjoined to ‘reflect the interests of all the people of Malawi’ and also further the values explicit or implicit in the Constitution.²⁵² Members of Parliament (MPs) are elected directly representing constituencies demarcated by the Electoral Commission²⁵³ and they are liable to losing their seats should they be deemed to have crossed the floor.²⁵⁴ At the outset one must note that parliament, as constituted under the Constitution, is significantly different from the manner in which it was conceptualised under the 1966 Constitution. For example, the President can no longer appoint MPs and presidential powers in relation to parliament are very circumscribed.²⁵⁵ Even more significant is the ascendancy of the concept of

²⁴⁹ Section 49(1) of the Constitution of the Republic of Malawi.

²⁵⁰ Act No. 4 of 2001. There is still ‘controversy’ about the propriety of the abolition of the senate. Aside from the merits or demerits of a two-chambered parliament there is the question of the constitutional competence of the National Assembly to dissolve an organ established by the Constitution especially in the light of section 45(8) – M Chigawa “The Senate as the second chamber of parliament in Malawi: Its relevance, composition and powers” Paper for Presentation at the Malawi Law Journal Launch Conference 16-17 July 2008, Blantyre, Malawi. Section 45(8) provides; ‘Under no circumstance shall it be possible to suspend this Constitution or any part thereof or dissolve any of its organs, save as is consistent with the provisions of this Constitution.’ Although a number of reasons were cited in support of the senate’s repeal, the dominant reason was stated to be the lack of funds to manage a second chamber of the National Assembly.

²⁵¹ Section 48(1) of the Constitution of the Republic of Malawi.

²⁵² Section 8 of the Constitution of the Republic of Malawi.

²⁵³ Section 76(2) of the Constitution of the Republic of Malawi.

²⁵⁴ Section 65 of the Constitution of the Republic of Malawi. This provision has been the subject of extensive litigation in the country. For a scholarly expose of the issues underlying crossing the floor in Malawian constitutional law, see M Chigawa “The concept of crossing the floor under Malawian constitutional law” (2008) 2 (2) *Malawi Law Journal* 185.

²⁵⁵ For example, although the President has power to prorogue parliament, this is a power that must be exercised in consultation with the Speaker of the National Assembly – section 59 of the Constitution of the Republic of Malawi.

constitutional supremacy in place of parliamentary supremacy which had held sway for almost 30 years.²⁵⁶

In its relations with the other branches of government, two examples may well illustrate how parliament has conducted itself. The first major incident occurred in 2001 when the majority of the MPs signed a petition for the removal of three High Court judges allegedly on the grounds of misconduct and incompetence.²⁵⁷ Close scrutiny, however, revealed that the move to impeach the judges was actually instigated by politicians who had not taken favourably to some of the pronouncements made by the judges concerned.²⁵⁸ After much local and international condemnation the purported impeachment was abandoned. Secondly, one may also wish to reflect on the generally acrimonious relationship between parliament and the executive between 2004 and 2009. As a result of political differences between the President and the majority of the MPs, parliament routinely refused to approve nominations forwarded by the President for crucial public positions.²⁵⁹ This effectively hamstrung the operations of several crucial government departments during the first term of Bingu wa Mutharika.²⁶⁰

The above illustrates several worrying trends. In the first place, the move to impeach judges on what were plainly flimsy grounds was a direct attempt by the legislature to interfere with the operations of the judiciary. In spite of the fact that the petition was withdrawn, by showing its hand, the legislature demonstrated its propensity for interfering with the operations of

²⁵⁶ Malawi Law Commission “The character of the legislature under the Constitution of the Republic of Malawi 1994” Constitutional Review Programme Discussion Paper No. 2, 1.

²⁵⁷ N Patel & others *Consolidating democratic governance in Southern Africa: Malawi* (2006) EISA Research Report No. 33, 45.

²⁵⁸ Under section 119 of the Constitution, the President may remove from office any judge but he must consult the Judicial Service Commission and a motion for the particular judge’s removal must have been debated and passed by a majority vote in parliament.

²⁵⁹ The Constitution requires that the President must seek parliamentary approval for appointments to several senior public positions; for example, the Auditor General (section 184(3)) and the Inspector General of Police (section 154(2)). It is clear that the rejections had nothing to do with the competence of the persons concerned – See B Chinsinga “Malawi’s democracy project at the cross roads” in *Towards the consolidation of Malawi’s democracy* (2008) 7 12 Konrad Adenauer Occasional Paper No. 11.

²⁶⁰ The crux of the disagreement between the DPP and the UDF stemmed from President Bingu wa Mutharika’s decision to resign from the UDF which sponsored his presidential nomination and form his own party, the DPP. The result was that the President and his DPP had a perpetual parliamentary minority during the President’s first term in office and had to rely on alliances to pass legislation through parliament.

another branch of government in an improper way. In the second place, the above also illustrates the incapability of parliament, thus far, to make a distinction between national issues and party issues in spite of the explicit direction in section 8 of the Constitution. The failure by parliament to approve most appointments by Bingu wa Mutharika to public office was largely a spill over of the dispute between the UDF and the DPP as a result of Bingu wa Mutharika's resignation from the UDF. This manifests a failure by parliament to prioritise the interests of the entire nation in its deliberations.

An area in which the role of parliament has remained prominent in relation to governance and constitutionalism relates to the manner in which it has discharged its power to amend the Constitution. Admittedly, the Constitution has conferred on parliament powers to amend it when appropriate conditions are met.²⁶¹ Aside from the fact that the Constitution of Malawi has been amended on numerous occasions,²⁶² it is worrying to note that most of the amendments seem to have been motivated by political expedience rather than principled necessity.²⁶³ As Chirwa posits, the number of amendments to the Constitution has been such that the current text is significantly different from the one that was adopted in 1994.²⁶⁴ The frequency of the constitutional amendments confirms the two points that were earlier highlighted. Firstly, the spate of amendments confirms that the Constitution was indeed adopted in too short a period of time to enable a sufficient agreement by the populace on its terms. Secondly, the flurry of amendments also point to a more fundamental problem and this is the absence of a commitment to constitutionalism in the country. Clearly, a commitment to constitutionalism would have allowed for a proper and meaningful renegotiation of some of the terms of the Constitution where necessary as contrasted to

²⁶¹ The powers of amendment are outlined in Chapter XXI of the Constitution. The Constitution has entrenched some of its provisions making them more difficult to amend. Chapter XXI creates two broad avenues for amendment; for the entrenched provisions, parliament can only amend these provisions if the proposed amendment has been put to a referendum and the majority of those voting have approved the amendment – section 196. For the non-entrenched provisions, parliament can effect an amendment if the bill proposing the amendment is passed by two-thirds of the total number of MPs entitled to vote – section 197.

²⁶² For an early audit on constitutional amendments in Malawi, see W Kita & C Chiphwanya "Constitutional amendment or disbandment" (2003) 7 (1) *UNIMA Students Law Journal* 19..

²⁶³ See A Kamanga "Amendments to the Constitution since 18th May 1994" Constitutional Review Conference 28-31 March 2006, Capital Hotel Lilongwe and Malawi Law Commission "Amendments to the Constitution and preservation of its sanctity" Constitutional Review Programme Discussion Paper No. 7.

²⁶⁴ D Chirwa (note 86 above) 321-322.

what has been happening so far.²⁶⁵ The lack of commitment to constitutionalism, this study argues, is, in part, related to the lack of autochthony of the liberal democratic model in Malawi. The lack of autochthony, it is further argued, deprives the Constitution of legitimacy in the perception of most people. In Chapters Four and Five, this study thus argues for a re-conceptualisation of constitutionalism and governance to adequately factor in traditional norms and institutions. The expectation is that such a blended framework will generate greater fidelity by reason of its identifying with values that are indigenous to Malawi and in some cases Africa generally.

By way of illustration, one of the most ‘contested’ amendments that parliament has effected in Malawi pertains to the repeal of section 64 of the Constitution.²⁶⁶ Section 64 had made provision for constituents to recall parliamentarians that they felt were not performing their duties satisfactorily. The National Constitutional Conference of February 1995 recommended the retention of the provision in the Constitution. In spite of this clear recommendation from the people, the repeal of section 64 was amongst the first amendments that the democratically elected parliament effected. Aside from the fact that the amendment was not preceded by consultation with the citizenry, the repeal significantly watered down the accountability of MPs and also diluted their role in representing their constituents.²⁶⁷

In relation to the manner in which parliament has exercised its powers to amend the Constitution, it is important to note that a constitution which is not amended willy-nilly has the potential to generate greater public confidence in the entire constitutional set up.²⁶⁸ Public confidence in a constitution allows the constitution to be used as a legitimating tool for the actions of a cross-section of public functionaries. Parliament’s conduct has thus denied the assumption of centrality by the Constitution in relation to validation of conduct in the public realm. Frequent amendments have also, arguably, detracted from the sanctity of the Constitution as the basic law in the country. Parliament has, seemingly, forgotten the

²⁶⁵ As above 321. Most amendments have been made without sufficient public consultation and in some cases in the face of massive public criticism. Examples of such amendments include the amendment to section 80 creating the office of the second vice president and the amendment abolishing the senate.

²⁶⁶ Repealed by Act No. 6 of 1995.

²⁶⁷ R Kapindu “Malawi: Legal system and research resources” <<http://www.nyulawglobal.org/globalex/Malawi.htm>> (Accessed 20 April 2009) and FE Kanyongolo (note 226 above) 6.

²⁶⁸ B Dulani “A comparative study of the executive under the Constitution and five other constitutions” Constitutional Review Conference 28-31 March 2006, Lilongwe, Malawi, 4.

imperative of preserving the sanctity of the Constitution.²⁶⁹ The inescapable conclusion here is that parliament's, and by derivation Malawi's, commitment to constitutionalism and good governance remains feeble.

3.4.3.3 The judiciary

Section 9 of the Constitution provides that the judiciary has the responsibility of interpreting, protecting and enforcing the Constitution and all laws in an independent and impartial manner. Chapter IX of the Constitution provides the parameters within which the judiciary must operate. One notes that the Constitution pays considerable attention to the judiciary and this, arguably, is meant to reverse and banish the subversion of judicial independence that prevailed during Dr Banda's era.²⁷⁰ As earlier highlighted,²⁷¹ during Dr Banda's rule the judiciary was subservient to the executive and the powers of the High Court were effectively negated by the creation of the traditional courts. The Constitution, aside from guaranteeing the independence of all persons presiding in the courts, also prohibits the establishment of courts of concurrent or superior jurisdiction to the High Court.²⁷² The Chief Justice is appointed by the President subject to confirmation by two thirds of the MPs present and voting.²⁷³ All other judges are appointed by the President on the recommendation of the Judicial Service Commission.²⁷⁴ Remuneration of all judicial offices is determined not by the executive but by parliament and it cannot be reduced during a period of service without the consent of the person concerned.²⁷⁵

²⁶⁹ 'It is imperative to preserve the sanctity of constitutions. The solemnity with which constitutions are adopted and expressed makes this imperative' - Malawi Law Commission (note 263 above) 12.

²⁷⁰ AP Mutharika (note 203 above) 215.

²⁷¹ Under part 3.4.2 above.

²⁷² Section 103 of the Constitution of the Republic of Malawi.

²⁷³ Section 111(1) of the Constitution of the Republic of Malawi.

²⁷⁴ Section 111(2) of the Constitution of the Republic of Malawi. The Judicial Service Commission is composed of the Chief Justice, the Chairman of the Civil Service Commission or his delegate, a Justice of Appeal or Judge designated by the President acting in consultation with the Chief Justice and a legal practitioner or magistrate designated by the President acting in consultation with the Chief Justice – section 117 of the Constitution of the Republic of Malawi.

²⁷⁵ Section 114 of the Constitution of the Republic of Malawi. See also *The State and The President of the Republic of Malawi, Minister of Finance, Secretary to the Treasury Ex Parte Malawi Law Society Constitutional Cause No. 6 of 2006* (Being Misc. Civil Cause No. 165 of 2006).

In stark contrast to what obtained during Dr Banda's regime, the judiciary has been very active in the period after the transition to multi-partyism.²⁷⁶ It has delivered numerous judgments affirming and vindicating the rights guaranteed in the Constitution. Perhaps to the judiciary's chagrin, in the new dispensation the judiciary has also emerged as a primary locus of political activity routinely being seised of cases with overt political overtones.²⁷⁷ For example, in the aftermath of the 1999 Parliamentary and Presidential Elections opposition politicians approached the courts to nullify the results.²⁷⁸ Further, on numerous occasions Members of Parliament have had to ask the courts to reinstate them in parliament on the occasion of their seats being declared vacant by the Speaker of the National Assembly under the crossing the floor provision.²⁷⁹ Even the executive has had to make referrals on the construction of what were essentially political questions.²⁸⁰

In spite of everything, the judiciary has commendably discharged its constitutional mandate.²⁸¹ Unsurprisingly, some of the greatest challenges to the judiciary have emerged

²⁷⁶ D Chirwa (note 86 above) 330.

²⁷⁷ As to the factors that often lead to 'political' questions being increasingly resolved through judicial adjudication, see RU Yepes "The judicialisation of politics in Colombia: Cases, merits and risks" (2007) 6 (4) *SUR International Journal on Human Rights* 49. See, also, FE Kanyongolo (note 16 above) 205-208.

²⁷⁸ *Chakuamba and others v Attorney General and others* Civil Cause No. 1B of 1999, heard on appeal as *Chakuamba and others v Attorney General and others* MSCA Civil Appeal No. 20 of 2000.

²⁷⁹ One of the first cases was *Fred Nseula v Attorney General and Malawi Congress Party* Civil Cause No. 63 of 1996 (High Court), heard on appeal as *Nseula v Attorney General and Malawi Congress Party* MSCA Civil Appeal No. 32 of 1997. Others include *Mpinganjira and others v Speaker of the National Assembly and Attorney General* Misc. Civil Cause No. 3140 of 2001.

²⁸⁰ For example, *In the matter of a presidential reference of a dispute of a constitutional nature under section 89(1)(h) of the Constitution and in the matter of section 65 of the Constitution and in the matter of the question of the crossing of the floor by members of the National Assembly*, Presidential Reference No. 2 of 2005, Heard on appeal in the Malawi Supreme Court of Appeal as Presidential reference Appeal No. 44 of 2006. One notes that at the core of these referrals was the very survival of the DPP regime in office. Since the DPP did not contest the 2004 General Elections it was governing with the aid of Members of Parliament that has 'defected' from other parties. If the Speaker of the National Assembly had declared the seats of the Members of Parliament who supported the DPP vacant, under section 65 of the Constitution, the DPP regime, already facing a hostile opposition in parliament, would have collapsed.

²⁸¹ For an early treatise paying homage to the increasingly vibrant role of the judiciary, see M Nzunda "The quickening of judicial control of administrative action in Malawi 1992-1994" in KM Phiri & KR Ross (note 41 above) 283.

in its relationship with the executive and the legislature. The attempt to impeach some judges of the High Court, earlier discussed, remains one of the most blatant ways in which the legislature attempted to interfere with the judiciary. On another occasion, the Speaker of the National Assembly publicly questioned the competence and integrity of a High Court judge after he had made a ruling that did not favour the National Assembly.²⁸² In relation to the judiciary's relations with the executive, the powers that section 119(7) of the Constitution confers on the President are a constant source of worry for judicial independence. Under this provision the President may reassign a serving judge to any other position in the civil service.²⁸³ Although such a reassignment can only be made with the consent of the person concerned, it is arguable that an approach by the President to a particular judge may put the judge under unnecessary pressure to accept the appointment.²⁸⁴

In spite of the challenges, the judiciary's assumption of its place in the country's constitutional structure is a commendable development. This entails that the judiciary is adequately poised to participate in the entrenchment of both good governance and constitutionalism. Only a judiciary that properly appreciates its role in the constitutional structure can, when called upon, enforce the standards and principles on which a constitution is founded.

3.4.4 The approach to public resource management

Public resources are pivotal to a country's development and the facilitation of well-being because they determine a society's capacity for the attainment of social justice and human rights goals.²⁸⁵ The centrality of public resources to a country's development entails that it is the availability of a proper calibre of managers of public resources and their regulation that is crucial to the attainment of development goals than the mere availability of the resources themselves.²⁸⁶ It is, therefore, imperative that a proper normative framework should be devised and recognised that directs that managers of public resources prioritise the

²⁸² WC Chirwa & others (note 20 above) 23.

²⁸³ For example, President Bingu wa Mutharika reassigned a sitting judge of the High Court, Justice Jane Ansah, to the position of Attorney General in July 2006.

²⁸⁴ N Patel & others (note 257 above) 44.

²⁸⁵ G Kamchedzera "The law and the disregard of the interests of the people of Malawi in the management of public resources" Paper presented at a symposium on the law and the recovery of benefits unjustly accruing to public functionaries: solutions for Malawi, Blantyre, Malawi, 29 December 2004.

²⁸⁶ Resources as understood in this study are not confined to monetary resources but extend to human and organisational resources as well.

citizenry's interests in their actions. It is a truism that a society's well-being is largely predicated on the manner in which the management of public resources is regulated.²⁸⁷

Several constitutional provisions provide the basis on which public resources, in all their diverse forms, must be managed in Malawi.²⁸⁸ The constitutional provisions are supported by several pieces of legislation that are specifically aimed at enhancing accountability and integrity in the management of public resources. The Constitution contains various guidelines directed at public functionaries detailing the manner in which they must exercise their powers. At the outset, the Constitution directs that all legal and political authority must be exercised to serve and promote the interests of the people of Malawi.²⁸⁹ Further, such authority can only be exercised to the extent of its lawful authority and only in accordance with the responsibilities that public functionaries owe the people of Malawi.²⁹⁰ Additionally, an open, accountable and transparent government and informed democratic choice are stipulated as the basis on which the continued exercise of state authority is premised.²⁹¹ Among the principal pieces of legislation aimed at contributing to an efficacious management of public resources in Malawi are the Public Finance Management Act,²⁹² Public Procurement Act,²⁹³ Public Audit Act²⁹⁴ and the Corrupt Practices Act.²⁹⁵

²⁸⁷ MJ Nkhata *The social trust and leadership roles: Revitalising duty bearer accountability in the protection of social and economic rights in Malawi and Uganda* LLM Thesis: University of Pretoria (2005) 4. <http://repository.up.ac.za/dspace/bitstream/2263/1153/1/nkhata_mw_1.pdf> (Accessed 21 September 2009).

²⁸⁸ For example, Chapter XVIII of the Constitution detailedly outlines how public funds must be managed.

²⁸⁹ Section 12(i) of the Constitution of the Republic of Malawi.

²⁹⁰ Section 12(ii) of the Constitution of the Republic of Malawi.

²⁹¹ Section 12(iii) of the Constitution of the Republic of Malawi.

²⁹² Act No. 7 of 2003.

²⁹³ Act No. 8 of 2003. The Office of the Director of Public Procurement is established under section 4 of this Act.

²⁹⁴ Act No. 6 of 2003.

²⁹⁵ Chapter 7:04 Laws of Malawi. The Anti-Corruption Bureau is established under section 4 of this Act.

In the post-1994 period, corruption has remained the greatest challenge to public resource management and in the main to governance and constitutionalism in Malawi.²⁹⁶ Although there is evidence of corrupt practices during Dr Banda's rule, it seems to be the case that during Bakili Muluzi's presidency corruption was 'democratised' to sustain the huge patronage network that the regime had spawned.²⁹⁷ Generally, therefore, there was an increase in the number of incidents in which public functionaries routinely but corruptly utilised public resources to serve their personal needs.²⁹⁸ Widespread corruption and general abuse of public offices have thus contributed to a steady decline of public confidence in the government generally.²⁹⁹

Perhaps more worrying has been the increasing incidence of political corruption in the post-1994 period.³⁰⁰ Political corruption has largely been manifested by the use of public resources to serve the interests of certain societal groups to the exclusion of other similarly placed groups. Prime examples in this connection have been the 'buying' of opposition parliamentarians in order to allow the government of the day to have the requisite majority in parliament.³⁰¹ This has also been extended to courting traditional leaders to support particular parties. On the whole, a culture of political corruption has steadily infiltrated Malawian society to the extent that some politicians, arguably, believe they can buy the public mandate and vote.³⁰² This, as may be obvious, completely negates democratic accountability. For how can a politician who is convinced his wealth brought him into office realise that he has a duty to be accountable to his constituents? Corruption has thus steadily eaten away at the foundations on which democratic governance and constitutionalism can be built. Needless to add that corruption diverts resources that would otherwise be used to support better governance and constitutionalism. It also further marginalises the poor and

²⁹⁶ This is not to suggest that corruption is the only hindrance to constitutionalism and governance in Malawi but merely that it is one of the biggest hindrances. Corruption is thus used merely as an example.

²⁹⁷ D Booth & others (note 116 above) 13.

²⁹⁸ G Kamchedzera & C Banda "We are people too': The right to development, the quality of rural life, and the performance of legislative duties during Malawi's first five years of multiparty politics" 35 Research Dissemination Seminar Number Law/2001-2002/001, <<http://www.sarpn.org.za/documents/d0001966/index.php>> (Accessed 20 May 2008).

²⁹⁹ WC Chirwa (note 20 above) 76.

³⁰⁰ Transparency International *Country study report: Malawi 2004* (2004) 17-18.

³⁰¹ As above, for further examples.

³⁰² N Khembo "The multiparty promise betrayed: The failure of neo-liberalism in Malawi" (2004) 29 (2) *Africa Development* 80 96.

entrenches their deprivation since resources meant for their well-being invariably do not reach them. Public resources thus rarely get used for their designated purposes.

In Malawi, some forms of corruption involve pure preying on public resources by public functionaries and manifest an outright betrayal of public trust. Even with the existence of a specialised agency, the Anti Corruption Bureau,³⁰³ to deal with cases of corruption it has been difficult to charge and try most high ranking politicians for corruption.³⁰⁴ The few cases that have been tried, however, reveal the magnitude and proliferation of the problem. For example, in one case a high-ranking official of the UDF (Mr John Chikakwiya) was charged with theft and abuse of public funds when he was in charge of the Blantyre City Assembly as a Mayor. On 12 December 2005, the Supreme Court of Appeal upheld his conviction, relating to abuse of office and imposed upon him a sentence of nine months imprisonment.³⁰⁵ This was an affirmation of the need for accountability and financial probity on the part of public officials. In another case, Mr Yusuf Mwawa, a former Minister of Education was on 3 February 2006 found guilty of misusing funds from the Special Clients Account in the Ministry of Education.³⁰⁶ He was found to have used this money to pay for a private wedding reception at a hotel in Blantyre. More recently, another former Minister of Education and Speaker of the National Assembly, Mr Sam Mpasu, was also convicted and sentenced to a long jail term for his role in corruptly breaching procurement procedures when he was Minister.³⁰⁷

While the above prosecutions should offer hope in the fight against corruption, it is important to be cautiously optimistic as all regimes after 1994 have held very ambivalent attitudes on the eradication of corruption. The ambivalent attitude to combating corruption is best illustrated by the manner in which Mr Sam Mpasu's case was prosecuted. While the allegations of corruption surfaced as early as 1994, his trial was only commenced around 2005 and concluded in 2008.³⁰⁸ It is arguable that the reason why the matter lay dormant for the ten years of Bakili Muluzi's rule was simply because of Mr Mpasu's close personal

³⁰³ Established under section 4 of the Corrupt Practices Act, Chapter 7:04 of the Laws of Malawi.

³⁰⁴ Transparency International (note 300 above).

³⁰⁵ See, *Daily Times*, 2 January 2006, at p. 7.

³⁰⁶ See, *Malawi News*, 4-10 February 2006, at p. 1.

³⁰⁷ *The Republic v Sam Mpasu*, Lilongwe Chief Resident Magistrate's Court.

³⁰⁸ *The State v Sam Mpasu* Lilongwe Chief Resident Magistrate's Court Criminal Case No.17 of 2005 (Sentencing ruling) Delivered on the 8th day of April 2008.

relationship with Bakili Muluzi. Only a change of leadership finally managed to bring some movement on the matter. This palpable lack of political will in pursuing matters of corruption continues to haunt the work of the Anti-Corruption Bureau to this date.

3.4.5 Accountability of public functionaries and the empowerment of the citizenry

Ultimately the cliché that ‘power resides with the people’ assumes concrete meaning where the holders of public power properly account for their exercise of the power to their constituents. Importantly though, only an enlightened and empowered citizenry can demand, where appropriate, accountability from public functionaries. Proper accountability thus goes hand in hand with citizen empowerment.

Again, one must look to the Constitution to appreciate the accountability framework that public functionaries are expected to conform to in Malawi. The basic premise that cuts across the Constitution is that public power is conferred on trust by the citizenry and it must be exercised solely to protect and promote the interests of the citizenry.³⁰⁹ The corollary of this constitutional stipulation is that public functionaries must be accountable for the exercise of all public power. At this level, the aim of the law is to ensure that public officials and public institutions continue to command and enjoy the trust and confidence of the people of Malawi.³¹⁰ It is also the clear aim of the law to ensure that public officials should not use their positions for personal gain. They should, as much as possible avoid any conflict of interests between their private and official undertakings. The government is also enjoined to adopt policies that would promote accountability and transparency and thereby strengthening public confidence in public institutions.³¹¹

Noticeably, the dominant accountability mechanism in most liberal democracies remains elections. The underlying presupposition is that through regular and periodic elections the citizenry will have an opportunity to express their confidence or lack thereof in the various public functionaries. Thus, supposedly, the electorate will not return candidates in whom they have lost their confidence replacing them with new ones. This assertion, however, is fraught with dangerous assumptions. It, for example, presumes the presence of a sufficiently empowered and enlightened electorate that would uniformly recognise breaches of a

³⁰⁹ Section 12 and Section 13(o) of the Constitution of the Republic of Malawi.

³¹⁰ M Chigawa (note 28 above).

³¹¹ Section 13(o) of the Constitution of the Republic of Malawi.

constitution and unite in the effort to remove particular public functionaries from office.³¹² This is hardly ever the case and especially in most Third World countries.³¹³ Notably, the engendering of citizen empowerment is often left to civil society organisations. Needless to state that diverse factors necessarily affect the rate at which empowerment occurs in a particular society.³¹⁴ Clearly, while elections remain a powerful accountability and empowerment mechanism, one must be mindful of the limitations that elections have in enhancing accountability and empowerment of the citizenry.³¹⁵ As reiterated by various scholars, the holding of regular multi-party elections by itself is not a sufficient indicator of democratisation and good governance.³¹⁶

Accountability of public functionaries and citizen empowerment are matters on which Malawi has performed discouragingly. This can be illustrated by focussing on three areas, by way of illustration. Firstly, and in relation to citizen empowerment, one may get the initial impression that the increased level of civil society activity in the post-1994 period is evidence of higher citizen empowerment in Malawi. Concededly, there has been a proliferation of civil society organisations with the opening up of political space subsequent to the 1993 Referendum. Notably, however, while civil society organisations were very instrumental during the transition, this initial momentum was soon lost with the advent of pluralism.³¹⁷ Currently, civil

³¹² This presumption also ignores the influence that local conditionalities may have on election. In Africa, for example, ethnicity and patrimonialism have proven crucial in determining electoral outcomes.

³¹³ As eloquently put by Tribe 'Power may be accountable to the people and to the Constitution both by voting out of office those who abuse their power and by punishing them for specific offences. The first of these sanctions, enforced directly by the voters at election time, obviously provides only a limited check on executive abuses ... Moreover there are the intrinsic limitations that an electoral check has no impact on a Chief Executive's second term ... In any event, the electorate may choose not to punish office holders who commit offences against groups or persons disfavoured by a majority of the electorate itself' – LH Tribe *American constitutional law* (1988) 268.

³¹⁴ The level of education and general political awareness are obvious crucial factors here.

³¹⁵ It is also quite poignant to note that elections as an accountability mechanism only affect elected public functionaries and do not affect the appointed functionaries.

³¹⁶ This is commonly referred to as the electoral fallacy, see ES Herron "The electoral fallacy revisited: A comparative analysis of election quality" <http://www.allacademic.com/meta/p_mla_apa_research_citation/1/9/9/3/9/pages199394/p199394-2.php> (Accessed 12 November 2009).

³¹⁷ For a deeper interrogation see WC Chirwa "Civil society in Malawi's democratic transition" in M Ott & others (eds) (note 16 above) 87. Some of the reasons for the lack of dynamism among civil society have been the co-opting of civil society leaders into government, lack of

society by and large remains peripherally involved in the democratisation process. The irony here is that while civil society in Malawi remains ill-positioned to help in both citizen empowerment and demanding accountability from public functionaries, it remains the only entity that can, if it actualises its potential, meaningfully help in both empowerment and accountability.³¹⁸

Secondly, although the Constitution requires that the President and cabinet ministers to declare their assets within three months of being elected or appointed, actual practice has shown a flagrant disregard of this stipulation.³¹⁹ The situation has been rendered more dismal by the fact that the law does not prescribe any penalties for failure to declare assets. More fundamental though is the erosion of accountability on the part of public functionaries that the current situation engenders. Without getting a clear idea of the wealth of senior public functionaries before they assume office it is practically impossible to accurately determine if any unjust enrichment has occurred in the course of them holding a particular office.

Thirdly, and arguably the biggest dent on accountability and empowerment in Malawi was the repeal of section 64 of the Constitution which, as earlier stated, provided for the recall of parliamentarians by their constituents. Needless to state that section 64 remained a potent tool in the hands of the citizenry in as far as ensuring accountability of their parliamentarians was concerned.³²⁰ What is more worrying is the discernible disinclination on the part of parliament to re-enact section 64 in spite of clear popular agitation in favour of the

financial support and the lack of experience and amateurism on the part of some civil society leaders.

³¹⁸ For, arguably, the most incisive analysis on the role of civil society organisations in the empowerment of the populace in Malawi, see H Englund *Prisoners of freedom: Human rights and the African poor* (2006). Englund's analysis offers some illuminating insights into the hollowness of civic education as conducted by most civil society organisations in Malawi.

³¹⁹ Section 88A(1) of the Constitution. Additionally section 213 of the Constitution also requires senior public officers to declare their assets as well. Section 213, however, requires parliament to draw up a list of senior grade public officers that are liable to asset disclosure. Parliament has yet to come up with this list.

³²⁰ Kanyongolo posits that "The accountability of the government to the people through parliament is also limited by the constitution which does not empower constituents to recall a member of parliament during his or her term of office regardless of whether he or she ceased to command their trust and confidence as a representative." – FE Kanyongolo (note 226 above) 5.

provision's reintroduction.³²¹ This manifests a lack of willingness by parliamentarians to subject themselves to accountability mechanisms.

The above are obvious signals of very worrying developments in Malawi in as far as governance and constitutionalism are concerned. This entails that in spite of the transition to multi-partyism there has been little attempt to properly institutionalise accountability and establish meaningful participation mechanisms. In a relatively young democracy, the floundering of civil society does not augur well with the need for consolidation of democracy in the country. Civil society remains an integral component of any democratisation process³²² and this is even particularly true in Malawi with a history of civil society repression. The mobilisation of the citizenry, so essential in the democratisation process, cannot be achieved without a vibrant civil society. It is also clear that the values of accountability and transparency have yet to be internalised by both the public and private sector in Malawi.³²³ As a survey by scholars from the University of Malawi established, political and bureaucratic functionaries in Malawi do not account to their constituents.³²⁴ It has also been established that 'the principles of separation of powers and procedures to ensure governmental accountability are yet to become firmly entrenched and institutions of government do not adhere strictly to set norms and procedures in the conduct of their affairs.'³²⁵ It is in relation to the entrenchment of these principles, not just among public functionaries but also the citizenry, generally, that civil society acquires heightened importance. It is incumbent on civil society to assist in the generation of the necessary degree of awareness among the populace to allow them meaningfully participate in the governance of their country.

³²¹ The Malawi Law Commission has received numerous submissions calling for the re-enactment of section 64. The only notable opposition against the re-enactment seems to be coming from parliamentarians themselves – Malawi Law Commission *Report of the Law Commission on the review of the Constitution* (2007) 47-50 and Malawi Law Commission *Report of the proceedings of the second national constitution conference* 17-19 April 2007 21.

³²² JR Minnis "Prospects and problems for civil society in Malawi" in KM Phiri & KR Ross (eds) (note 41 above) 127 129-130.

³²³ Transparency International (note 300 above) 24.

³²⁴ G Kamchedzera & C Banda (note 298 above) 3.

³²⁵ N Patel & H Meinhardt *Malawi's process of democratic transition: An analysis of political developments between 1990 and 2003* Konrad Adenauer Occasional Papers, November 2003 22.

3.5 Conclusion

This Chapter has presented and analysed the trends that have emerged in Malawi in as far as governance and constitutionalism are concerned – beginning with the pre-colonial period, of which very little is recorded through the colonial period to the present. The discussion in this Chapter has demonstrated the existence of some important continuities in the regime structures between the colonial and post-colonial periods in Malawi. The most important continuity in this regard is the manner in which the state, in the immediate post-colonial period, ‘quickly’ entrenched the despotic attributes that had characterised the colonial state. The entrenchment of despotism in Malawi created an environment in which governance and constitutionalism were not prioritised. Governance and constitutionalism were sacrificed in order to ensure the survival of the regime in power. Notably, the state in Malawi still retains some of the attributes that characterised the post-independent state even though the adoption of the Constitution was motivated by a desire to break with that past.

Significant changes in governance and constitutionalism occurred in Malawi as a result of the transition to multi-partyism in 1994. These were also discussed in this Chapter. Principal among the changes during the transition was the adoption of a new Constitution spelling out a new framework for governance and constitutionalism. With regard to the new Constitution, this Chapter highlighted several shortfalls with the processes that culminated in the adoption of the Constitution. Aside from the shortfalls in the processes, the Chapter also highlighted some deficiencies in the final product – the Constitution. It was also argued that the deficiencies in both the processes preceding the adoption of the Constitution and in the Constitution itself have had a strong influence on governance and constitutionalism in the country.

In the later part of the Chapter an attempt was made to decipher how successive regimes, after 1994, have performed when compared to the stipulations in the Constitution. The emerging picture, while inspiring hope in some respects, remains mixed and outright discouraging in other respects. The reasons for some of the failures of governance and constitutionalism even under the 1994 Constitution were also discussed. The Chapter argued that these failures stem directly from the ‘flawed’ process for the adoption of the Constitution which processes bequeathed a ‘defective’ Constitution on the nation – the Constitution, it must be conceded, is only part of the problem. These failures, it is argued, centrally beg the question whether or not it is proper to think of alternatives in terms of both governance and constitutionalism. In Chapter Four the study interrogates the question of alternatives for governance and constitutionalism in Malawi. Noting that the current

Constitution is heavily influenced by liberal democratic theory, Chapter Four considers the case for an alternative paradigm for constitutionalism and governance in Malawi. By dwelling on some of the lessons in governance and constitutionalism that have emerged especially since 1994, Chapter Four attempts to explain how an alternative paradigm can be constructed and on what basis it is to be founded.

CHAPTER 4: DEMOCRATIC GOVERNANCE AND CONSTITUTIONALISM IN MALAWI: IS THERE NEED FOR AN ALTERNATIVE PARADIGM?

- 4.1 Introduction
- 4.2 Rethinking constitutionalism and governance in Malawi: The need for an alternative paradigm
 - 4.2.1 Trendy but may be not the best: A critique of liberal democracy in Malawi
 - 4.2.1.1 Understanding liberal democracy
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 - 4.2.2 The case for reconceptualising governance and constitutionalism from an Afro-centric perspective
- 4.3 Interrogating the connection between democracy, governance and constitutionalism and African traditions, customs and institutions
 - 4.3.1 *Ubuntu* as a basis for a reconstructed discourse on governance, constitutionalism and democracy in Africa: A tentative direction
- 4.4 *Ubuntu* and the social trust: A potent bulwark for governance and constitutionalism in Malawi?
 - 4.4.1 The role of transformative constitutionalism in social trust-based governance and constitutionalism
- 4.5 Conclusion

4.1 Introduction

Chapter Two of this study explained the concepts central to this study while Chapter Three provided a profile of governance and constitutionalism in Malawi. In the course of Chapter Three some of the trends that are evident in Malawi, in terms of governance and constitutionalism, were also highlighted. In the light of the trends highlighted in Chapter Three this Chapter will explore whether the emerging lessons call for the consideration of an alternative paradigm in as far as governance and constitutionalism are concerned. The discussion in this Chapter will centrally interrogate the suitability of liberal democracy and liberal democratic constitutionalism in Malawi. It must be noted that the overarching framework for governance and constitutionalism in Malawi, particularly as discerned from the Constitution, is heavily infused with liberal democratic ideals. Further, by referring to the interface between *ubuntu*, the social trust, good governance and constitutionalism that was conceptually constructed in Chapter Two, this Chapter will argue for an articulation of governance and constitutionalism that is expressly informed by norms of African traditions and customs. The articulation of governance and constitutionalism from a perspective that is

expressly informed by African traditions and customs will be offered as an alternative to liberal democracy and liberal democratic constitutionalism. Recourse will be made to *ubuntu* to demonstrate how this alternative approach to governance and constitutionalism can be constructed in Malawi, specifically, and by extension in Africa generally. As may be recalled, it is this alternative that this study terms ‘social trust-based governance and constitutionalism.’

4.2 Rethinking governance and constitutionalism in Malawi: The need for an alternative paradigm

It is this study’s argument that the failures and lapses in governance and constitutionalism in Malawi, especially under the framework constructed by the 1994 Constitution, call for a searching interrogation of the model embodied in the Constitution. As pointed out in Chapters One and Two, Malawi’s Constitution is liberal democratic and any serious interrogation of governance and constitutionalism in Malawi must necessarily analyse the contribution, if any, of this ideological choice for governance and constitutionalism. This study contends that most of the failures with respect to governance and constitutionalism are attributable to the Constitution’s ideological inclination. In the following paragraphs an attempt is made to deduce whether the liberal democratic paradigm best suits Malawi, for purposes of governance and constitutionalism. The discussion begins by analysing liberal democracy in Malawi before attempting to offer an alternative that is based on the African concept of *ubuntu*. It must be recalled, as pointed out in Chapters One and Two, that governance and constitutionalism that articulates itself by express reference to the values underlying *ubuntu* and the trust is what this study refers to as social trust-based governance and constitutionalism. It is important to note that social trust-based governance and constitutionalism is conscious of the need for ‘cross-cultural dialogue’ to bolster itself hence this study’s deliberate attempt to connect the *ubuntu* philosophy with the trust.

4.2.1 Trendy but may be not the best: A critique of liberal democracy in Malawi

The 1994 Constitution is supposed to be a culmination of the divers lessons that emerged in the governance of Malawi since independence. The Constitution is a liberal democratic constitution and it makes Malawi a liberal democracy.¹ The Constitution, for all its progressive elements, still raises questions about how some of the choices and formulations

¹ N Khembo “Political parties in Malawi: From factions to splits, coalitions and alliances” in M Ott & others (eds) *The power of the vote: Malawi’s 2004 Parliamentary and Presidential Elections* (2004) 87-93 and FE Kanyongolo “Courts, elections and democracy: The role of the judiciary” in M Ott & others (eds) (as above) 195-215.

in it were arrived at. One of the choices that has been the subject of scholarly interrogation is the choice of liberal democracy as the supervening framework for constitutionalism and democratisation in Malawi. In seeking to understand some of the problems that have haunted governance and constitutionalism it is important to interrogate the appropriateness of liberal democracy and liberal democratic constitutionalism for governance in Malawi. Besides, as Kanyongolo has noted, the foreign origins of liberal democracy necessarily entail that its appropriateness as a governance paradigm in Africa cannot be assumed.² In interrogating the appropriateness of liberal democracy, it is proposed to briefly discuss the origins and major elements of liberal democracy before analysing the introduction and performance of liberal democracy in Africa, generally, and Malawi, specifically. On the basis of the preceding discussion the study will highlight a possible alternative to liberal democracy in Africa, generally, and Malawi, specifically. The alternative that is being proposed here involves 'indigenising' democracy by imbuing it with African traditions and customs. Specifically, the study argues that democratisation and constitutionalism in Africa, generally, and Malawi, specifically, must take advantage of the virtues that *ubuntu* embodies. By utilising the values underlying *ubuntu*, it is further argued, an approach to democracy, governance and constitutionalism may be crafted which adequately reflects and responds to the historicity of Africa. This is what this study earlier referred to as measured autochthony.

4.2.1.1 Understanding liberal democracy

Today, 'liberal democracy' refers to the dominant form of political governance that is found in what is often loosely referred to as the 'West'.³ The 'West' in this context generally denotes Western Europe and North America. Because of its connections to the West, liberal democracy is sometimes referred to as 'Western democracy'. Notably, liberal democracy is now recognised as the dominant political force in the developed world and increasingly in the developing world.⁴ It is striking to note that in modern times political regimes of very different persuasions have claimed to be democracies even though what these regimes say or do is substantially different from one to another.⁵ Very few governments can, today, claim to be undemocratic even though the spectrum of countries claiming to be democratic includes the Democratic Republic of Congo, Democratic Republic of North Korea and other very dubious

² FE Kanyongolo "Limits of liberal democratic constitutionalism in Malawi" in KM Phiri & KR Ross (eds) *Democratisation in Malawi: A stocktaking* (1998) 353-370-371.

³ C Macpherson "The false roots of Western democracy" in F Dallmayr (ed) *From contract to community: Political theory at the cross-roads* (1978) 17.

⁴ A Heywood *Political ideologies: An introduction* (2007) 40.

⁵ D Held "Democracy: From city states to cosmopolitan order?" in D Held (ed) *Prospects for democracy: North, South, East, West* (1993) 13.

democracies.⁶ Aside from the legitimate variation in the practice of democracy, the almost universal claim to the democratic mantle by states is, arguably, as a result of the high degree of legitimacy that democracy generates.⁷ The legitimacy of democracy is evidenced by its widespread endorsement by global and regional organisations and by the paucity of support for anti-democratic movements.⁸ Sen accurately summarises global opinion on democracy when he states that:⁹

In any age and social climate, there are some sweeping beliefs that seem to command respect as a kind of general rule – like a “default” setting in a computer program; they are considered right *unless* their claim is somehow precisely negated. While democracy is not yet universally practised, nor indeed universally accepted, in the general climate of world opinion, democratic governance has now achieved the status of being taken to be generally right.

What must be constantly borne in mind is that modern democracy is liberal democracy and liberal democracy is democracy cast within a framework of social, moral and political claims which taken together may be called liberalism.¹⁰ The liberal underpinnings of current democratic discourse are so pervasive that the liberal component in democracy is routinely overlooked and liberal democracy is, today, referred to simply as ‘democracy.’¹¹ This conflation between ‘liberal democracy’ and ‘democracy’ overlooks the fact that while ‘democracy’ may have a universal appeal, the origins of liberal democracy remain firmly rooted in Western history.¹² In this connection it is important to note that while liberal assumptions are embedded in everyday language and usage and appear non-ideological they should remain debatable.¹³ For example, individualism may be central to liberalism but it is not an expression of common human experiences and must thus remain contestable.

⁶ R Pinkney *The frontiers of democracy: Challenges in the West, the East and the Third World* (2005) 17.

⁷ MF Plattner “Populism, pluralism, and liberal democracy” (2010) 21 (1) *Journal of Democracy* 81-82.

⁸ As above.

⁹ AK Sen “Democracy as a universal value” (1999) 10 (3) *Journal of Democracy* 3-17.

¹⁰ R Talisse *Democracy after liberalism: Pragmatism and deliberative politics* (2005) 5-6 and MF Plattner (note 7 above) 84.

¹¹ R Talisse (as above) 6. It must nevertheless be borne in mind that the discourse on democratisation is inevitably framed from a liberal or neo-liberal perspective, see JS Saul *The next liberation struggle: Capitalism, socialism and democracy in Southern Africa* (2005) 55.

¹² B Parekh “The cultural particularity of liberal democracy” in D Held (ed) (note 5 above) 156-157.

¹³ A Arblaster *The rise and decline of Western liberalism* (1984) 8. As Manning notes, all claims about ideology are and must remain contestable – DJ Manning *Liberalism* (1976) 142.

The term 'liberal democracy' is laden with ambiguities.¹⁴ The existence of regimes that are often referred to as 'liberal democratic' conveys the impression that liberalism and democracy are simplistically interdependent.¹⁵ The relationship between liberalism and democracy, however, is very complex and by no means one of continuity. As Arblaster poignantly notes:¹⁶

"Liberal democracy" is such a common phrase that it is natural to imagine that the coinage denotes a perfectly harmonious marriage between the two constituent principles. In fact the alliance, like many real life marriages, has been an affair of compromises and concessions from the start, and of the partners it was liberalism which was always the more reluctant.

By way of illustration, 'liberalism' in common parlance denotes a conception of the state where the state is conceived as having limited powers and functions. Liberalism is, in this sense, effectively 'the ideology of the industrialised West.'¹⁷ Liberalism was the product of the breakdown of feudalism and the growth in its place, of a market or capitalist society. In its early manifestation liberalism attacked absolutism and feudal privilege while advocating constitutional and later representative government.¹⁸ Liberalism is embodied in a commitment to several core values among which are the following: the supreme importance of the individual, individual freedom or liberty, belief in a rational human being, equality of individuals and toleration.¹⁹ Liberalism, however, is a 'rather diffuse system of ideas and values.'²⁰ Although there are persistent themes within the liberal tradition, it is notable that liberal works present a variety of programmes and principles which sometimes bear no

¹⁴ The ambiguities and tensions in liberal democracy were, arguably, best captured by Orwell. Orwell argued that 'in the case of a word like democracy, not only is there no agreed definition but the attempt to make one is resisted from all sides ... The defenders of any kind of regime claim that it is a democracy' – G Orwell *In front of our nose, 1945-1950: The collected essays, journalism and letters of George Orwell Vol. 4* (1968)132-3.

¹⁵ N Bobbio *Liberalism and democracy* (2005) 1 (Translated by M Ryle & K Soper).

¹⁶ A Arblaster (note 13 above) 75. Wingo also uses the 'marriage analogy' to explain the relationship between liberalism and democracy. He concludes that before the marriage, between liberalism and democracy, there was scepticism as to whether the two could peacefully live together till 'death do us part'. The two have, however, managed to stay together as a result of concessions that have been negotiated over the years – AH Wingo "Fellowship associations as a foundation for liberal democracy in Africa" in K Wiredu (ed) *A companion to African philosophy* (2004) 450 451.

¹⁷ A Heywood *Politics* (2007) 45 and A Heywood (note 4 above) 26.

¹⁸ A Heywood *Politics* 45.

¹⁹ As above 45-46 and A Heywood (note 4 above) 27-39.

²⁰ DE Ingersoll & RK Matthews *The philosophic roots of modern ideology: Liberalism, Communism, Fascism* (1991) 22.

obvious relationship to one another.²¹ For example, although earlier liberal thought was strict in positing the individual as prior to society both as an historical being as well as a philosophical concept, this theme appears pretty muted in later liberal works.²² It is not within the remit of this study to engage in a comprehensive discussion of liberalism. Suffice it to point out that liberalism sketches a picture of political experience, it is not a description of that experience.²³ Liberalism, nevertheless, holds itself out as presenting a coherent and comprehensive view of the world basing itself on a theory of human nature and society.²⁴

In spite of the popularity of ‘democracy’, defining it is not an easy task. For example, Roux states that ‘democracy’ is a noun ‘permanently in search of a qualifying adjective.’²⁵ Udombana asserts that democracy is a fuzzy and fussy concept.²⁶ Wingo states that ‘[t]he word “democracy” is a conceptually vague word and one that is emotively charged.’²⁷ Pinkney sombrely highlights the fact that ‘the concept of democracy is a highly contested one’²⁸ and Plattner asserts that ‘democracy is a term and a concept with a long and convoluted history.’²⁹ The contestation on the meaning of democracy essentially means that there is room for legitimate difference about where democracy ends and where non-democracy begins.³⁰ In spite of all the controversy and contestation democracy denotes any one of the modes of government where power is not vested in a single individual but the majority.³¹ Majority rule by itself, however, does not amount to democracy. The core of democracy is that decisions affecting members of a community must be made by the members themselves or their elected representatives.³² From this perspective, democracy is contrasted from monarchy or oligarchy as a form of governance. Underlying democracy as a system of governance are a set of rules that stipulate who is authorised to make collective

²¹ DJ Manning (note 13 above) 12-13.

²² As above 14.

²³ As above 141

²⁴ A Arblaster (note 13 above) 13.

²⁵ T Roux “Democracy” in S Woolman & others *Constitutional law of South Africa* (2007) 10-1 10-1.

²⁶ NJ Udombana *Human rights and contemporary issues in Africa* (2003) 52.

²⁷ AH Wingo (note 16 above) 451.

²⁸ R Pinkney (note 6 above) 17.

²⁹ MF Plattner (note 7 above) 83.

³⁰ As above.

³¹ N Bobbio (note 15 above) 1.

³² T Roux (note 25 above) 10-1.

decisions and the procedure to be followed in making such decisions.³³ A significant element in all this is reciprocity between the governors and the governed, between those who exercise political leadership in society and those who are led.³⁴ This reciprocity creates the framework for accountability between the governors and the governed.

The current popularity of democracy as a governance paradigm, however, threatens to empty it of any meaningful content as a political concept.³⁵ This is because democracy's current popularity leads it to be employed in varied and disparate contexts which sometimes do not bear the least affinity to any recognised democratic values. On a positive note, however, the popularity of democracy has also contributed to the emergence of a right to democratic governance. While there may still be some controversy on the existence of a right to democratic governance it is notable that this right has been commonly asserted in recent times.³⁶

Defining 'liberal democracy' is thus complicated largely by the different meanings that are attached to the 'liberal' and 'democracy' components of the term.³⁷ As Heywood argues, the hybrid nature of liberal democracy reflects a basic ambivalence within liberalism towards democracy.³⁸ Liberal democracy at once embodies a fear of collective power while at the same time advocating equality of individuals.³⁹ The liberal component in liberal democracy has its focus on the limitation of powers of state while the democratic component has as its central impetus the promotion of majoritarian rule. It is also important to bear in mind that the 'liberal' component in liberal democracy is not and should not be treated as a unity.⁴⁰ One easily notes that there are distinctive liberal traditions which embody varying conceptions of

³³ N Bobbio *The future of democracy* (1987) 24-25 (Translated by R Griffin).

³⁴ NJ Udombana (note 26 above) 52.

³⁵ A Heywood (note 17 above) 72.

³⁶ TM Franck "The emerging right to democratic governance" (1992) 86 (1) *American Journal of International Law* 46.

³⁷ B Holden *Understanding liberal democracy* (1988) 11-14.

³⁸ A Heywood (note 4 above) 41.

³⁹ An early statement against the majoritarian nature of democracy was offered by Socrates in one of his dialogues with Plato in *The Republic*. Socrates concluded that democracy is the worst form of political association as it invests political power in the foolish many, instead of the philosophers (who he assumed would be wise and competent) – see R Talisse (note 10 above) 77-78. The fears about democracy, as the rule by the mob, were also articulated by the American Founding Fathers in devising the Constitution of the United States of America - A Arblaster (note 13 above) 76.

⁴⁰ D Held (note 5 above) 13.

individual agency, autonomy, rights and duties of the individual and the proper nature and form of the community.⁴¹ Clearly, therefore, although there may be overarching central themes that unite liberal thought one must be mindful of the fact that there exist different strands within liberalism and that these strands do not articulate liberal themes in the same manner.⁴² To properly understand liberal democracy, therefore, one must also be willing to explore the contradictions and tensions that exist between the 'liberal' and the 'democratic' components of the concept.⁴³

In understanding liberal democracy, one must also note that as a theory of state, liberalism is modern, whereas democracy as a form of government is of considerable antiquity.⁴⁴ Heywood, however, argues that while liberalism, as a systematic political creed, may not have existed before the nineteenth century it is centrally based on ideas and theories that had been developed during the three hundred years preceding its emergence.⁴⁵ In as far as democracy is concerned, it is argued that the word 'democracy' was first used in the fifth century BC by the Greek historian Herodotus where it was used as a combination of the Greek words *demos*, meaning 'the people' and *kratein*, meaning 'to rule'.⁴⁶ Democracy as a system of government is also reflected in the governance structures of the ancient Greek city states notably Athens. Although Athens is often touted as the fundamental source of inspiration for Western democracy this is not to say that the West has been right to trace all elements of the democratic heritage exclusively to Athens.⁴⁷ Historical and archaeological research have demonstrated that some key political innovations that are paraded as Western in origin, both conceptually and institutionally, are traceable to non-Western civilisations.⁴⁸ As Pinkney argues, there is nothing inherently complicated about a form of government based on achieving consensus or fulfilling the wishes of the majority and some pre-literate African societies were also democratic.⁴⁹ This, importantly, means that there is little cause for the romanticisation of Athenian democracy, and arguably, most pre-colonial

⁴¹ As above 13-14.

⁴² J Waldron "Theoretical foundations of liberalism" 1987 37 No. 147 *The Philosophical Quarterly* 127-150.

⁴³ D Beetham "Liberal democracy and the limits of democratisation" in D Held (ed) (note 5 above) 55-73 and D Held (note 5 above) 14.

⁴⁴ N Bobbio (note 15 above) 25.

⁴⁵ A Heywood (note 4 above) 24.

⁴⁶ B Holden (note 37 above) 5.

⁴⁷ D Held (note 5 above) 16.

⁴⁸ As above.

⁴⁹ R Pinkney (note 6 above) 21.

African democracies, as it has been proven that these democracies also entrenched what were overtly undemocratic tendencies, for example, very restricted suffrage.⁵⁰

In the light of the above exposition it is not surprising to note that liberalism and democracy have, strictly speaking, also been regarded as being antithetical.⁵¹ Even though democracy is currently synonymous with individual rights, the democrats of decades gone by were ignorant of the doctrine of natural rights as well as the need for limitation of the state. The liberals, for their part, were extremely suspicious of all forms of popular government.⁵² As Arblaster notes, liberals were keen to overthrow the old monarchical and aristocratic authorities but were afraid that these would be replaced by a tyranny of the mob.⁵³ The result was that for a long time liberals upheld and defended limited suffrage.⁵⁴ In spite of these tensions three basic variants of democracy are apparent.⁵⁵ Firstly, there is direct or participatory democracy, a system of decision making about public affairs in which citizens are directly involved. It is this form of democracy that was practiced in ancient Athens. Secondly, there is liberal or representative democracy. In this form of democracy elected officers undertake to represent the interests of the citizenry within the framework of the rule of law. Thirdly, there is a variant of democracy based on the one party model (although it is doubtful whether such a system should properly be classified as a democracy). This system is what was practiced in the former Soviet Union and other Third World societies. It is with representative democracy that much of this study is concerned.

⁵⁰ BR Nelson *The making of the modern nation state* (2006) 19. Although the word democracy comes from Greek and is directly linked to the governance system in Athens specifically, it is important to note that while the Athenians may have provided us with the word they did not provide a model. Athenian democracy, it must not be forgotten, was very poorly regarded by leading philosophers of the day like Plato, Aristotle and Thucydides – AH Birch *The concept and theories of modern democracy* (2007) 109. Traditional conceptions of democracy in Africa also need to be revisited in order to do away with some of their oppressive elements K Gyekye *Tradition and modernity: Philosophical reflections on the African experience* (1997) 115-124.

⁵¹ N Bobbio (note 15 above) 31.

⁵² As above 37.

⁵³ According to Weale, modern liberal democracies being heirs of liberalism contain an ambiguity in their institutional structure and principled rationale - A Weale *Democracy* (1999) 167 and A Arblaster (note 13 above) 76.

⁵⁴ B Parekh (note 12 above) 156 163. Perhaps a 'classic' expression of this liberal fear of democracy is JS Mill *Considerations on representative government* (1862) where he argues for a paternal government and limited franchise.

⁵⁵ D Held (note 5 above) 15. Various and differing typologies have been employed to classify democracy. The basic broad distinction seems to be between direct and representative democracy. Beyond this, various forms of representative democracy can be identified and various adjectives can be used to qualify democracy, see T Roux (note 25 above) 10-1 – 10-2 and A Weale (note 53 above) 19.

Paradoxically, serious introspection reveals that modern democracy is not only incompatible with liberalism but can in many respects, if only to a degree, also be regarded as its natural extension.⁵⁶ Liberalism is properly compatible with democracy provided one focuses on democracy not as an egalitarian ideal but as a political formula which agitates for popular sovereignty.⁵⁷ One must be mindful that popular sovereignty can only be effectively exercised if the majority of citizens are granted the right to participate directly or indirectly in collective decision making.⁵⁸ The interdependence between natural rights and liberalism has been such that while it may have been possible in years gone by to have a liberal state that was not democratic, today non-democratic liberal states are inconceivable just as are non-liberal democratic states. The result is that liberal ideals and democratic procedures have gradually become interwoven. This is because the procedures of democracy are necessary to safeguarding those fundamental personal rights on which the liberal state is based and rights must be safeguarded if democratic procedures have to operate.

Admittedly, the coinage 'Western democracy' tends to emphasise the historical origins and development of liberal democracy. This is understandably because, at least from a historical perspective, liberal democracy traces both its origin and name from eighteenth century Europe during the Age of Enlightenment.⁵⁹ The ideas underlying liberal democracy are centrally traced to the works of social contract theorists like Hobbes, Locke and Rousseau.⁶⁰ Such is the centrality of the aforementioned philosophers that Bobbio regards Rousseau as the 'father of modern democracy'⁶¹ while Mutua holds the view that the best foundational

⁵⁶ N Bobbio (note 15 above) 31.

⁵⁷ As above 37-39.

⁵⁸ It is important that emphasis on popular sovereignty must be properly appreciated. Popular sovereignty it must be recalled does not presume, prescribe or dictate a particular form of governance – PD Finn "A sovereign people, a public trust" in PD Finn (ed) *Essays on law and government: Principles and values Volume 1* (1995) 1 4.

⁵⁹ The Age of Enlightenment, sometimes called the Age of Reason, refers to the time of the guiding intellectual movement called The Enlightenment. During The Enlightenment reason was advocated as a means for establishing an authoritative aesthetics, ethics, government and even religion. Reason, it was argued, would allow men to obtain objective truth about reality - <http://www.newworldencyclopedia.org/entry/Age_of_Enlightenment> (Accessed 5 May 2010).

⁶⁰ Hobbes, Locke and Rousseau between them, arguably, made the most significant contribution to the development of liberal thought with the publication of some seminal works on liberalism. These works are T Hobbes *Leviathan*, J Locke *Two treatises on civil government* J Rousseau *The social contract*. These ideas were subsequently further developed by later philosophers like Kant and Rawls. While emphasis has differed from philosopher to philosopher the central idea in the social contract has remained the same.

⁶¹ N Bobbio (note 33 above) 43.

articulation of liberalism and democracy was provided by Locke.⁶² Hobbes' work is revered for marking the point of transition between a commitment to absolutism and the struggle of liberalism against tyranny.⁶³ Liberal democracy was thus born out of an individualistic conception of society, which was at variance with the organic conception that had prevailed in classical times.⁶⁴ The contractarian theories of Hobbes, Locke and Rousseau and their hypotheses about the state of nature are a manifestation of this fact. One must constantly bear in mind the fact that the liberal state and the democratic state are doubly dependent.⁶⁵ The liberal state is not only the historical but also the legal premise of the democratic state. The liberal society predates the liberal democratic society.⁶⁶ This, as this study will demonstrate, has profound implications for the consolidation of democracy in Africa.⁶⁷

In considering the emergence of liberal democracy in the West, one notes that political power in eighteenth century Europe was, almost entirely, held by either a monarchy or an aristocracy. Many of the European monarchs of the time asserted that their power had been ordained by God and to question it was tantamount to blasphemy. The possibility of democracy, a situation where political power ultimately resided with the majority, was seriously frowned upon during this time. These ideas, however, were seriously questioned by leading intellectuals during the Age of Enlightenment. These intellectuals argued that human affairs should be guided by reason and principles of liberty and equality. It was further argued, especially by the social contract theorists, that people are created equal and that political authority could not be justified by a supposed privileged connection to God. For these theorists, governments existed to serve the people, laws in a state were meant to apply to both the governors and the governed – the rule of law – and that ultimately the authority to govern was founded on the consent of the governed.⁶⁸ Liberal democracy thus

⁶² M Mutua "The transformation of Africa: A critique of rights discourse" in F Gomez Isa & K de Feyter (eds) *International human rights law in a global context* (2009) 899 902.

⁶³ D Held *Models of democracy* (1987) 74- 77.

⁶⁴ N Bobbio (note 31 above) 27.

⁶⁵ As above 25-26.

⁶⁶ DE Ingersoll & RK Matthews (note 20 above) 22.

⁶⁷ For example, the absence of a clear bourgeois class in most African societies has made it very difficult to consolidate liberal democracy in Africa. One must recall that the bourgeois class contributed heavily in extracting from the monarchies and aristocrats the concessions on which liberal democracy is founded, see JF Bayart *The state in Africa: The politics of the belly* (1993) Chapter Three: The Bourgeois illusion.

⁶⁸ For an account of the historical development of the rule of law, especially in England, see EP Thompson *Whigs and hunters: The history of the Black Act* (1975) 258-269 and D Hay

combined norms of limitations on a government's authority plus the recognition of popular sovereignty. Constitutionalism, it must be noted, occupies a very central position in any liberal democratic dispensation. It is for its prescriptions about limitations of government authority that constitutionalism assumes importance in liberal democracy.

Reduced to what I may term, the bare minimum, liberal democratic societies are founded on three central pillars.⁶⁹ Firstly, the existence of an independent judiciary to which the citizenry may resort for the enforcement of their rights. Secondly, the separation of the legislative, executive and judicial functions of government to ensure that public policy is based on clearly defined law and that all acts of public policy are amenable to redress through civil or criminal sanction. Thirdly, the limitation of governmental powers vis-à-vis society with regard to protection of fundamental rights. Invariably, all modern liberal democracies are constructed on the above-highlighted ideals and where a country possesses a written constitution such a document will attempt to give expression to these ideals.⁷⁰

To properly appreciate the place and role of liberal democracy especially in so far as is relevant for Africa, one must be mindful that 'democracy' as a political concept remains a heavily contested ideology and vision.⁷¹ As a matter of fact, no perfect democracy has ever existed nor is it probable that such a perfect democracy will ever exist.⁷² It is thus important to allow democracy to exist as such rather than impose a pre-fixed meaning that is loaded with particular values. It is even more fundamental to realise that there still pervades a

"Property, authority and the criminal law" in D Hay & others (eds) *Albion's fatal tree: Crime and society in Eighteenth-Century England* (1975) 17-63.

⁶⁹ O Akiba "Constitutional government and the future of constitutionalism in Africa" in O Akiba (ed) *Constitutionalism and society in Africa* (2004) 1 6-7.

⁷⁰ For example, sections 7, 8 and 9 of the Constitution of the Republic of Malawi outline the fundamental principle of separation of powers between the executive, legislature and judiciary in Malawi.

⁷¹ S Ndlovu-Gatsheni & G Dzinesa "Liberal democracy and the African context: The experience of South Africa" in K Matlosa & others (eds) *The state, democracy and poverty eradication in Africa* (2008) 91 95. However, as Frimpong notes, 'even if we concede and are prepared to allow different interpretations of democracy, there are certain underlying factors which must be consistent with any such interpretation' – K Frimpong "Some pitfalls in Africa's quest for democratic rule and good governance" Paper presented at the 20th Southern African Universities Social Science Conference, University of Zambia, 30 November to 5 December 1997.

⁷² As Rousseau famously remarked only if there were a nation of Gods and not men would a perfect democracy ever exist. The number of conditions that must simultaneously co-exist to create a perfect democracy are unlikely to occur at the same time in any polity - Rousseau *The social contract* quoted by Bobbio (note 33 above) 43.

conceptual disjunction between democracy and liberal democracy.⁷³ This disjunction has been evident throughout the life of liberal democracy. This chasm is, as earlier stated, manifested by the fact that while democracy generally seeks to promote popular sovereignty liberal democracy repudiates popular power. It thus replaces government by the people with government by the consent of the people.⁷⁴ It is for this reason, largely, that most liberal democracies have reduced themselves to multiparty electoral competition with little regard paid to democracy.⁷⁵ While democracy is supposed to aid in the realisation of ‘human potentialities through active participation in rulership,’ liberal democracy only offers protection – supposedly from the state – to the citizenry.⁷⁶ This actually means, as Ake concludes, that ‘liberal democracy is less an expression of democracy than its restriction.’⁷⁷ Clearly, one must always bear in mind that while there are close affinities between democracy and liberal democracy, fundamental differences also exist between the two. The distinct historical trajectory that the development of liberal democracy has taken entails that in Africa’s search for democracy there may be very little in the experiences of the so called established democracies to guide and a great deal to mislead it.⁷⁸ There is thus no need to mimic the Western brand of democracy without taking cognisance of the conditions prevailing in Africa.⁷⁹ In Africa, more than anywhere else, the search for viable democratic governance must acknowledge the heterogeneity which characterises the democratic terrain.⁸⁰

4.2.1.2 The emergence of liberal democracy in Africa and Malawi

Africa’s first flirtation with liberal democracy was experienced during the dawn of what is often shorthandly referred to as the ‘Independence Era.’⁸¹ Almost uniformly all departing

⁷³ C Ake *The feasibility of democracy in Africa* Chapter 1.

⁷⁴ As above 10.

⁷⁵ Ankersmit argues that Anglo-Saxon and continental European democracies have been reduced to nothing more than plebiscitary democracies. Interaction between the state and the citizen has ceased to exist save for the citizen’s right to pronounce once every four or five years on the state’s most recent behaviour – FR Ankersmit *Political representation* (2002) and C Ake (note 73 above) 12.

⁷⁶ C Ake (note 73 above) 14.

⁷⁷ As above 16.

⁷⁸ As above 31.

⁷⁹ J Teffo “Democracy, kingship, and consensus: A South African perspective” in K Wiredu (ed) (note 16 above) 443 444.

⁸⁰ R Pinkney (note 6 above) 33.

⁸¹ The ‘Independence Era’ refers to the period when most African states got their independence from the colonial powers. It roughly runs from the late 1950s to the 1970s.

colonial powers bequeathed to the newly independent states constitutions that embodied liberal democratic ideals. The newly independent states were thus required to govern according to norms of separation of powers, rule of law, respect for human rights and judicial independence. Ironically, and as pointed out in Chapter Two, this expectation was being entertained on the part of the departing colonialists even though they themselves had never attempted to govern according to the above described norms during the entirety of the colonial era. It was only when independence became imminent that colonial powers attempted to hastily institute democratic reforms in polities that had been structures of exploitation, despotism and degradation.⁸² It does not come as a surprise to note that the foundations of liberal democracy in Africa were very shaky and shallow right from the outset. As Weiland notes, the conditions necessary for the sustenance of liberal democracy had never existed in Africa and where they had been introduced at the end of the colonial period these were quickly scrapped.⁸³

Almost invariably, the liberal democratic paradigm was sought to be introduced into the newly independent African states through the mechanism of a constitution. These independence constitutions, however, were ill-suited for this purpose largely because they suffered from a huge legitimacy deficit. These constitutions were, almost uniformly, drawn up for the independent states by the colonial powers at the time of their withdrawal from the colonial territory.⁸⁴ The involvement of the local populace in the crafting of these constitutions was very limited. The distinctly foreign origins of these constitutions contributed significantly to the quick collapse of constitutional governments in most newly independent states.⁸⁵ Thus even though constitutions in liberal democratic dispensations are supposed to limit and check the authority of government, independence constitutions in Africa dismally failed to perform this function. These constitutions failed to command the loyalty, respect and confidence of both the governors and the governed largely because the people could not identify with them. In the circumstances, the feeling of being bound by a constitution was

⁸² R Fatton "Liberal democracy in Africa" (1990) 105 (3) *Political Science Quarterly* 455-457.

⁸³ H Weiland "Democratisation in Africa: Problems and perspectives" in C Marias & others (eds) *Southern Africa after elections: Towards a culture of democracy* 5.

⁸⁴ B Nwabueze *Constitutionalism in the emergent states* (1973) 23-25.

⁸⁵ Hatchard & others argue that while there were significant similarities, for example, in the constitutions that Britain bequeathed to its colonies this was not achieved through a 'cut and paste' process. There was considerable discussion between nationalists and the British Colonial Office on the detail to be included or omitted – J Hatchard & others *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspective* (2004) 15-19. However, almost uniformly the nationalists representing the African territories did not consult with their citizenry on these constitutions.

largely absent and constitutionalism could not take root. It is a combination of these factors, among others, that led to the creation of African countries which had constitutions but no trace of constitutionalism.⁸⁶

The above described pattern applies with equal measure to Malawi. Malawi's induction to liberal democratic governance was achieved by means of the 1964 Independence Constitution which was negotiated in Great Britain.⁸⁷ This Constitution, however, lasted only two years before being replaced by a Republican Constitution.⁸⁸ During the thirty years that the 1966 Constitution was in force, liberal democratic notions were all but pushed into oblivion.⁸⁹ Governance and constitutionalism did not proceed on any principles that could logically be justified on the basis of any liberal democratic ideals. Governance during the thirty year period was diametrically at odds with any liberal democratic ideals. It is plain heresy to suggest that there was any pretension at maintaining constitutionalism in Malawi during the entirety of Dr Banda's rule. During this period, political activity was extensively regulated, civil liberties were trammelled and judicial independence was but a mirage.⁹⁰

It was only with the re-introduction of multi-party politics subsequent to the Referendum in 1993 that liberal democratic ideals again rose to prominence. This rise to prominence of liberal democratic ideals in Malawi must, as pointed out earlier, be understood in the context of a continental rise to prominence of liberal democracy during the Third Wave of Democratisation.⁹¹ It must also be appreciated within the broader social context of changing global dynamics subsequent to the end of the Cold War. What is noticeable about the rise of

⁸⁶ AM Mangu "Constitutional democracy and constitutionalism in Africa" *Conflict Trends* 3-8 and HWO Okoth-Ogendo "Constitutions without constitutionalism: Reflections on an African paradox" in IG Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 3-25.

⁸⁷ B Pachai *Malawi: The history of the nation* (1973) 244.

⁸⁸ As argued in Chapter Three, the 1966 Republican Constitution was in a sense a reaction to the Cabinet Crisis and was designed to prevent the re-occurrence of any such incidents in future. The 1966 Constitution took away all the liberal democratic safeguards that had been in the Independence Constitution.

⁸⁹ See, M Chigawa "The fundamental values of the Republic of Malawi Constitution of 1994" Concept Paper No. 1 Constitutional Review Conference 2006, Capital Hotel Lilongwe, 28-31 March 2006.

⁹⁰ See the discussion and analysis of the period between 1966 and 1994 in Chapter Three of this study especially parts 3.2.3.2 and 3.4.2.

⁹¹ For the Third Wave of Democratisation, see SP Huntington *The third wave: Democratisation in the late Twentieth century* (1991) and SP Huntington "Democracy's third wave" (1991) 2 (2) *Journal of Democracy* 12-34.

liberal democracy in Malawi, and arguably most of Africa, is the influence of the Bretton Woods institutions and other Western donors and their insistence on good governance which was quickly conflated with a demand for democratisation along liberal democratic tenets.⁹² The result in Malawi is that in 1994 Malawi adopted a Constitution that is hailed as one of the ‘most liberal’ in the world.⁹³ However, in spite of having one of the world’s most liberal constitutions, it is astounding to note that the choice of liberal democracy for the 1994 Constitution was not as a result of a conscious and collective reflection by the people of Malawi. Further and even more striking, as Kanyongolo aptly notes, is the fact that liberal democracy has few, if any, historical or philosophical roots in Malawian society.⁹⁴ Liberalism’s lack of historicity in Malawi, however, seems not to have significantly affected or shaped the formulation of the 1994 Constitution.⁹⁵

The fact that the liberal democratic model has no historical roots in Malawi and that it was not chosen as a result of a conscious introspection by Malawians raises serious questions about its suitability and relevance as a governance paradigm.⁹⁶ These questions can legitimately be extended to liberal democratic constitutionalism which is squarely founded on liberal democracy. In spite of all the questions about liberal democracy one notes its continued rise and ‘entrenchment’ with the passage of time not just in Malawi and Africa but also globally.⁹⁷ In Malawi, for example, one notes that during the transition to multi-partyism almost all incipient opposition parties uncritically aligned themselves with the liberal democratic model.⁹⁸ These parties, seemingly, failed to appreciate that liberal democracy, in the form they were embracing, had evolved out of specific historical, cultural and material contexts in the West.⁹⁹ A big error was, therefore, committed when these parties failed to subject the liberal model to any serious scrutiny or to relate it to the political, historical, traditional and material experiences of Malawians before embracing it. Even more worrying

⁹² B Munslow “Democratisation in Africa” (1993) 46 (4) *Parliamentary Affairs* 478 480 and D Moyo *Dead aid: Why aid is not working and how there is another way for Africa* (2009) 23-24.

⁹³ D Chirwa “Democratisation in Malawi 1994-2002: Completing the vicious circle” (2003) 19 (2) *South African Journal on Human Rights* 316.

⁹⁴ FE Kanyongolo (note 1 above) 206.

⁹⁵ As argued in Chapter Three, the lack of debate on the appropriateness of the liberal democratic paradigm for the Constitution is largely traceable to the hasty manner in which the Constitution was adopted.

⁹⁶ FE Kanyongolo (note 2 above) 370-372.

⁹⁷ See, for example, AK Sen (note 9 above).

⁹⁸ KM Phiri “Party ideologies and programmes” in M Ott & others (eds) (note 1 above) 67 74-75.

⁹⁹ As above 75.

is the fact that almost all major political parties have remained stuck to the liberal democratic paradigm and not one of them has attempted to either offer an alternative vision for governance in the country or conduct a visible interrogation of the liberal paradigm.

It is notable that the rise of liberal democracy not just in Malawi but also globally has had a certain acerbic attribute to it. With the end of the cold war liberal democracy has been parroted by major Western powers as the only viable form of government and countries have literally been pressed to adopt it.¹⁰⁰ The liberal democratic conception of the world has increasingly held itself out as the 'last word' and the only viable framework for conceptualising human relations.¹⁰¹ This, significantly, has been in spite of numerous shortcomings and shortfalls of the liberal democratic model in creating and sustaining an equitable governance framework.¹⁰² It seems to be the case that in spite of the tensions and contradictions within it, liberalism still, quite erroneously in this study's view, assumes the existence of true, immutable, universal, timeless objective values for all men, everywhere and all times.¹⁰³ The preoccupation thus becomes foisting these immutable values on all of humanity.

In spite of the above, the 'developed world's' approach to democratisation in the developing world is full of ambiguities and contradictions and these have affected democratic consolidation in Africa and most of the Third World. The ambiguities stem from, arguably, the 'naivety' of the 'initial premise' on which the 'democratisation crusade' has been conducted. It still seems to be naively and mistakenly assumed, in most of the developing world, that liberal democracy is the final solution to each and every conceivable problem that might confront humanity.¹⁰⁴ This is in spite of the rising disillusionment with democracy in the so called 'mature' democracies themselves.¹⁰⁵ This 'paradox of democracy', as Giddens calls it,

¹⁰⁰ S Chan *Liberalism, democracy and development* (2002) 11.

¹⁰¹ B Fontana *Hegemony and power: On the relation between Gramsci and Machiavelli* (1993) 74-76. See, also, F Fukuyama *The end of history and the last man* (1992).

¹⁰² See, J Gray *Liberalisms: Essays in political philosophy* (1989).

¹⁰³ Cf. Gramsci argued that there is no abstract human nature, fixed and immutable. Human nature is the totality of historically determined social relations hence an historical fact – A Gramsci *Selections from the prison notebooks* Edited and translated by Q Hoare & GN Smith (1971) 133.

¹⁰⁴ FR Ankersmit (note 75 above) 92. Teffo speaks of the Western hegemony that has sought to impose its brand of democracy as the only viable option for human survival and flourishing – J Teffo (note 79 above) 444.

¹⁰⁵ RB Talisse (note 10 above) 3.

has seen significant drops in the levels of trust in politicians, lower voter turn outs and increasing apathy in political processes in the so called ‘mature’ democracies.¹⁰⁶ The paradox of democracy requires that democracy must be seriously rethought at the most fundamental levels.¹⁰⁷ In rethinking democracy an important concession is to move away from the faulty ‘initial premise’ and accept that ‘Western liberal democracy might prove to be not the final destination on the democratic road, but just one of the many possible exits.’¹⁰⁸

4.2.2 The case for re-conceptualising governance and constitutionalism from an Afro-centric perspective

In the paragraphs above, the development of liberal democracy in Africa, generally, and Malawi specifically was traced. In tracing liberal democracy’s development, the study also alluded to some of the limitations and shortfalls of liberal democracy in Malawi, specifically and Africa, generally. This section will make a case for the re-conceptualisation of both governance and constitutionalism from an African perspective. The emphasis on the Afro-centric perspective is motivated by the need to make African experiences and perspectives material in the conceptualisation of governance and constitutionalism. In making the case for the re-conceptualisation, some further shortfalls and deficiencies of the liberal democratic model will again be highlighted. The re-conceptualisation being advocated here is for a move towards social trust-based governance and constitutionalism. It must be recalled that social trust-based governance draws on *ubuntu* and the trust. In terms of the place of liberal democracy in Africa, the social trust-based approach entails making democracy culturally endogenous.¹⁰⁹

The liberal democratic paradigm has failed Africa and is currently failing Malawi as well. The fact that liberal democracy has been failing Africa has been evident for a long time. As Nyamnjoh puts it, the fact that liberal democracy has yet to succeed in Africa cannot be questioned ‘even by the most optimistic and committed of its disciples or evangelists.’¹¹⁰ De Smith postulates that as early as 1964 the failures of liberal democracy in Africa were

¹⁰⁶ A Giddens *Runaway world* (2000) 90.

¹⁰⁷ RB Talisse (note 10 above) 5.

¹⁰⁸ F Zakaria “The rise of illiberal democracy” (1997) *Foreign Affairs* 76 (6) 22 24.

¹⁰⁹ G Malaba “The fostering of attitudes for development in a transition to democracy” in AP Burger (ed) *Ubuntu: Cradles of peace and development* (1996) 65 66.

¹¹⁰ F Nyamnjoh “Liberal democracy in Africa: The need for alternatives” in B Immink & others (eds) *From freedom to empowerment: Ten years of democratisation in Malawi* (2003) 85 86.

already becoming apparent.¹¹¹ In spite of the early manifestations of the failures of liberal democracy in Africa, it was contended that liberal democracy should be given a full run.¹¹² As it turned out, the failures became more apparent when Independence Constitutions were either quickly subverted or repealed paving way for the rise to despotism and authoritarianism that soon characterised Africa. The failure of liberal democracy to take root in Africa years after the Independence Era confirms that liberal democracy should not be regarded as a self-evident truth that is naturally embedded in all human beings including Malawians.¹¹³ Clearly, democratisation along the liberal democratic model is not an inevitable consequence in African countries.¹¹⁴ Democratisation and governance in Africa must thus be implemented with this very important fact constantly in mind.

At the moment, a quick stock-take on the 'democracies' in Southern Africa, for example, reveals massive but disturbing similarities which, this study argues, epitomises the crisis of liberal democracy in Africa. The so called liberal democracies of Southern Africa are all marked by kleptocracy, autocracy, elitism and lack of accountability.¹¹⁵ The practice of democracy itself is centred on electoralism, is hollow and, generally, does not make a lot of difference to ordinary people's lives.¹¹⁶ It is these traits, among others, that have led scholars to conclude that in Africa, at least, there is a discernible reversal and roll-back on some of the achievements that were made during the Third Wave of Democratisation.¹¹⁷ This merely highlights the fact that Africa's democratisation remains incomplete and still faces an uncertain future.¹¹⁸

This study argues, as pointed out earlier, that part of the reasons for the failure of liberal democracy in Africa lie in the manner in which liberal democracy was introduced to most African countries. As earlier highlighted, this was done through the mechanism of Independence Constitutions and the most unique feature about these constitutions was their

¹¹¹ SA de Smith *The new Commonwealth and its constitutions* (1964) 231-234.

¹¹² As above.

¹¹³ FE Kanyongolo (note 2 above) 371.

¹¹⁴ J Herbst "Understanding ambiguity during democratisation in Africa" in J Hollifield & C Jillson (eds) *Pathways to democracy: The political economy of democratic transitions* (2000) 245-247.

¹¹⁵ R Southall *Democracy in Africa: Moving beyond a difficult legacy* (2003) 54.

¹¹⁶ As above 56.

¹¹⁷ R Joseph "Africa, 1990 -1997: From Abertura to closure" (1998) 9 (2) *Journal of Democracy* 3-17 and R Southall (note 115 above) 30.

¹¹⁸ E Gymimah-Boadi "The rebirth of African liberalism" (1998) 9 (2) *Journal of Democracy* 18-31.

palpable lack of autochthony. Such constitutions failed to acquire the status of a basic law in almost all countries and quickly faded into irrelevance.¹¹⁹ The norms that these constitutions stood for thus never got to be accepted and entrenched as part of the governing mores in African societies. It is thus the attempted wholesale importation of the liberal democratic model that created the biggest hurdle for the democratisation of Africa.¹²⁰ There is almost no evidence to demonstrate that the departing colonial powers made a conscious effort to bequeath constitutions that reflected and responded to the conditions that prevailed in the colonies.

One factor glaringly stands out in the history of governance and constitutionalism in Africa. Little, if any, attention was paid to the prevailing local conditions in attempting to transplant liberal democratic norms to newly independent Africa and neither did the colonial administrators test these norms in Africa before bequeathing them. While it was obviously imperative that states emerging from colonial subjugation had to revamp their systems of governance and economic structures, it seemed to have been uncritically assumed that the emerging systems had to be modelled on those of their former colonial masters without further justification.¹²¹ There was no deliberate attempt to craft a governance paradigm in response to the various territories' histories or the prevailing conditions. Surely the colonialists had been in the colonised territories long enough to get an idea of the local governance paradigms! However, it seems that the inclination to adopt what Mamdani refers to as a 'history by analogy'¹²² was obviously a big catalyst in the errors that were committed by the departing colonial powers. History by analogy, as Mamdani demonstrates, has a high propensity for ignoring specificity in favour of an inclination to fit all human experiences within a particular projection.¹²³ In relation to the introduction of liberal democracy in Malawi and most of Africa, the result of a history by analogy was that it was uncritically assumed that liberal democracy was the best form of governance because it had succeeded in Europe without an attempt being made to consider the implications of the specific factors prevailing

¹¹⁹ G Hyden *African politics in comparative perspective* (2006) 105.

¹²⁰ See, AA Mazrui "Who killed democracy in Africa? Clues of the past, concerns of the future" (2007). The liberal society without doubt precedes any liberal-democratic society. This seems to have been forgotten when dealing with Africa – DE Ingersoll & RK Matthews (note 20 above) 22.

¹²¹ B Davidson *The Blackman's burden: Africa and the curse of the nation state* (1992) 18.

¹²² M Mamdani *Citizen and subject: Contemporary Africa and the legacy of late colonialism* (1996) 9 -11.

¹²³ As above.

in Africa.¹²⁴ However, one ought to realise that African societies were not and are not merely ‘pre-liberal’ societies. It is thus plain naivety to hope that the introduction of a liberal constitution would somehow induce a ‘pre-liberal’ society to somehow become a liberal society. It should be apparent that the conditions for the success of a liberal democracy were and are still largely absent in most of Africa. It is important to constantly bear in mind that ‘[i]n Tropical Africa, the shape of democracy is influenced by pre-industrial, rather than post-industrial, conditions.’¹²⁵

Strangely, and in spite of the clarity of the failures of liberal democracy in the post-independence period, the same mistakes of the independence era have largely been replicated in most African countries during the Third Wave of Democratisation. As fittingly summarised by Nyamnjoh:¹²⁶

Far from being innovative ... and turning attention towards more participatory democracy informed by local experiences and world view, Africans in their second liberation attempt, which started in the 1980’s and early 1990’s ... have only compounded their predicaments in a sterile commitment to the simplistic pursuit of liberal democracy.

The liberal democratic hegemony has been such that democratisation during the Third Wave of Democratisation was all conducted on its terms without any concessions being made to alternate perceptions. Malawians, and arguably Africans generally, thus find themselves saddled with a liberal democratic framework that is failing to deliver the numerous promises that the Third Wave of Democratisation supposedly generated.¹²⁷ Contrary to common perceptions, the changes that occurred during the Third Wave of Democratisation have neither translated into greater citizenry empowerment nor improved governance, generally.¹²⁸ Conversely, there is a clear indication that the changes, for their failure to bring

¹²⁴ R Fatton (note 82 above) 457-459.

¹²⁵ R Pinkney (note 6 above) 32.

¹²⁶ F Nyamnjoh (note 110 above) 87.

¹²⁷ There is a general consensus that for all the euphoria that accompanied the Third Wave of Democratisation, it has failed to meet most expectations especially as regards the nature of democratisation in Africa – C Young “The Third Wave of Democratisation in Africa: Ambiguities and contradictions” in R Joseph (ed) *The state, conflict and democracy in Africa* (1999) 15 25. As Mouffe correctly observes, the unchallenged hegemony of neo-liberalism represents a threat to democratic institutions and unjustly seeks to create a uni-dimensional world. It is thus important to come up with ways of dealing with the underlying paradox in liberal democracy and develop innovative ways of dealing with it, see C Mouffe *The democratic paradox* (2005).

¹²⁸ As Joseph notes, part of the problem with democratisation during the Third Wave was that it assumed the existence of the prerequisites of liberal democracy – R Joseph (note 117

about real transformation have actually contributed to the creation of disillusionment with political processes generally.¹²⁹

On a different note, it is rather sobering to note that for all its failures, the liberal democratic framework, as a governing paradigm, remains by and large accepted by all political players in Malawi.¹³⁰ As Mwaungulu notes ‘there is no reason to doubt that, for Africa in general and Malawi in particular, democracy has come to stay.’¹³¹ This it must be stated is not an endorsement of Fukuyama’s ‘end of history thesis’. It is nothing more than a pragmatic concession that democracy is, currently, best suited to meet human expectations in terms of governance and that no viable alternatives are on the horizon yet.¹³² It is also a mere confirmation of the liberal democratic hegemony in the current global political climate.¹³³ For all its shortcomings, democracy remains the most plausible governance alternative.¹³⁴ Liberal democracy is here to stay, at least, for the foreseeable future. Some African scholars have even been speaking of ‘the rebirth of African liberalism.’¹³⁵ Conceding the endurance of liberal democracy, it must be restated, does not amount to asserting its perfectness.

For example, in Malawi, all the major political parties have embraced the tenets of liberalism both in relation to politics and the economy.¹³⁶ It is due to the acceptance of the liberal democratic paradigm that this study does not propose the wholesale rejection and repulsion

above). It is argued that the Third Wave of Democratisation occurred without the basic institutions of the modern state in place i.e. rule of law and civil society, see R Rose & DC Shin “Democratisation backwards: The problem of Third Wave Democracies” (2001) 31 (2) *British Journal of Political Science* 331-354. This resulted in a ‘reverse democratisation process’ and created incomplete democracies.

¹²⁹ F Nyamnjoh (note 110 above) 88-89.

¹³⁰ B Chinsinga “Malawi’s democracy project at the cross-roads” in *Towards the consolidation of Malawi’s democracy* Konrad Adenauer Stiftung Occasional Paper No. 11 Malawi 7.

¹³¹ DF Mwaungulu “Governance, democracy and constitutionalism in Africa: The Malawi experiment” (2006) 32 (2) *Commonwealth Law Bulletin* 267 268.

¹³² R Talisse (note 10 above) 3.

¹³³ As to how hegemony operates in society see A Gramsci (note 103 above). The crucial point is to note how hegemonic forces effect domination and subjugation in ways that seem to convey normalcy. The dominated and subjugated are made to believe that their condition of subjugation is the natural order of things. In relation to liberal democracy the liberal democratic hegemony operated to convey the impression that liberal democracy is the only viable governance paradigm.

¹³⁴ R Southall (note 115 above) 20.

¹³⁵ See, E Gyimah-Boadi (note 118 above).

¹³⁶ H Englund “Introduction” in H Englund (ed) *A democracy of chameleons: Politics and culture in the new Malawi* (2002) 12.

of the model. This study argues that some tenets of liberalism must form part of social trust-based governance and constitutionalism. The major contention in this study is that the liberal democratic model must not be wholesale accepted but remodelled by infusing it with uniquely African traits and thus allowing it to benefit from the values that underlie both *ubuntu* and the trust.¹³⁷ There must be a conscious effort towards the creation of more variegated versions of democracy in response to prevailing local circumstances.¹³⁸ This, it is hoped, will generate legitimacy as well as ensure that there are fair chances of democracy succeeding in Africa.

As Englund has argued in respect of Malawi, there is an acute need to move beyond liberalism and acknowledge that liberal democracy cannot be wholesale imported into a country.¹³⁹ In moving beyond liberal democracy Malawi does not need to unduly strive to conform to standard definitions, precedents and practices of democracy but must focus on the reorganisation of society along lines that will enhance its potential.¹⁴⁰ To achieve this in a viable manner Malawi must look into herself and articulate a relationship between indigenous values and norms that does not simplistically characterise traditional normative systems like customary law, as retrogressive and useless.¹⁴¹ Specifically, in as far as liberal democracy is concerned, Malawians and Africans generally, must embark on the process of reconciling it in an earnest and transparent manner with other forms of democracy indigenous to the continent. In all these processes it must constantly be recalled that democracy as a form of governance is not alien to Africa while liberal democracy is.¹⁴² Importantly, such a process of reconciling liberal democracy with indigenous norms must be

¹³⁷ For example, Southall in reflecting on the inadequacies of the liberal democratic model and the legacy of autocracy in Africa recommends, among others, that the fundamental tenets of liberalism must be recognised while at the same time accepting that that is not sufficient. He further argues that democracy must be based upon a political system that enjoys legitimacy – R Southall (note 115 above) 59-60. Mouffe also argues that there may not be a need to wholesale reject liberal democracy but the critical task is to conduct an ‘immanent critique’ of liberal democracy. There is thus no need to resignedly accept liberal democracy the way it currently is and societies must actively seek ways of, for example, accepting liberal democratic tenets and forcing liberal democracy to ‘live’ according to its ideals – C Mouffe “Democratic politics today” in C Mouffe (ed) *Dimensions of radical democracy: Pluralism, citizenship, community* (1992).

¹³⁸ F Zakaria (note 108 above) 40.

¹³⁹ H Englund “Winning elections, losing legitimacy multi-partyism and the neo-patrimonial state in Malawi” in M Cowen & L Laakso (eds) *Multiparty elections in Africa* (2002) 172-185.

¹⁴⁰ G Chigona *Pitfalls of democracy: A critical essay concerning the political experiment in Malawi since 1994* (2003) 17-18.

¹⁴¹ F Kanyongolo (note 2 above) 373.

¹⁴² C Ake “Rethinking African democracy” (1991) 2 (1) *Journal of Democracy* 32-34.

predicated on enhancing meaningful participation by the populace in the governance process.¹⁴³ Such a process would have to give meaning to, among others, the following values that are hallowed from the African perspective:¹⁴⁴ leaders must remain in office with the consent of the people, policy decisions must not be made in the face of public dissent, decisions affecting the broader community must follow consensus, decisions affecting the whole community must enhance solidarity and public resources must be managed to better the broader society.

It is axiomatic to recognise that democratic forces in any country embody social forces.¹⁴⁵ The process of deconstructing and reconstructing democracy in Africa must, therefore, be both historical and philosophical.¹⁴⁶ To establish functional democracies in Africa, a deliberate effort must be made to root the democratic system in the established culture, traditions and history of the concerned countries while also considering their particular economic circumstances.¹⁴⁷ In this context democracy will succeed if it is able to build upon a foundation in the traditional systems while at the same time being able to challenge any identifiable shortcomings in the traditional form of organisation. It is fundamentally important to always realise that democracy is best 'indigenised.'¹⁴⁸ It succeeds best when it 'wears and acknowledges the specific historical and cultural realities of the society in question.'¹⁴⁹ African imaginations about democracy, governance and constitutionalism must, therefore, be prepared to transcend the world that has been crafted by 'Western hegemonic ideas.'¹⁵⁰ Africans must consciously attempt to rediscover their roots and construct their paradigm of

¹⁴³ P Chihana "Opening space for participation in Malawi" in KAF Occasional Paper No. 11 (note 130 above) 57.

¹⁴⁴ K Mojela "Traditional authorities and local government" in R van der Berg & G van Nierkerk (eds) *New perspectives on origins, foundations and transition* (1999) 145 146; T Metz "Toward an African moral theory" (2007) 15 (3) *The Journal of Political Philosophy* 321 324-326; J Teffo (note 79 above) 445 and E Wamala "Government by consensus: An analysis of a traditional form of democracy" in K Wiredu (ed) (note 16 above) 435-442.

¹⁴⁵ T Lumumba-Kasongo "The problematics of liberal democracy and democratic process: Lessons for deconstructing and building African democracies" in T Lumumba-Kasongo (ed) *Liberal democracy and its critics in Africa: Political dysfunction and the struggle for social progress* (2005) 1 3.

¹⁴⁶ As above.

¹⁴⁷ B Munslow (note 92 above) 487.

¹⁴⁸ KK Prah "Democracy and the African challenge: Does liberal democracy work for Africa" in K Matlosa & others (eds) (note 71 above) 22.

¹⁴⁹ As above.

¹⁵⁰ S Ndlovu-Gatsheni & G Dzinesa (note 71 above) 92.

democracy by reference to their indigenous norms and institutions.¹⁵¹ Clearly, therefore, while there may be external influence and assistance in Africa's democratisation this ought to be very limited and often merely for catalytic purposes.¹⁵² Democratisation and constitutionalism in Africa cannot ignore the 'importance of the role of the traditional political systems in the national governance structures of the state.'¹⁵³ One must thus be constantly mindful of the fact that democracy cannot be dictated into existence.¹⁵⁴ Clearly, in Africa liberal democracy should not be embraced as a finished and perfect product for in its current form it is a product of a specific history and social conditions.¹⁵⁵ It is for this reason that this study calls for a move towards social trust-based governance and constitutionalism.

The call for social trust-based governance and constitutionalism benefits from a long experience, of failure, with democracy, conceptualised predominantly from a liberal perspective, across Africa. As conceded by Pye, while liberal democracy's rise to ascendancy may mean that there are currently no serious alternative theories for governance, the achievement of sustainable and genuinely liberal democracy has been universally difficult to attain.¹⁵⁶ It is also important to note that developing countries face unique problems in the institutionalisation of democracy. Such problems in part revolve around the development of an acceptable balance between their cultural legacies and the imperatives of the modern world culture together with the need for economic development.¹⁵⁷ These challenges and problems cannot be solved by copying solutions that were developed in a different context. Effective social reconstruction requires the development of home grown solutions to stimulate and guide the process.¹⁵⁸

Specifically, in as far as liberal democracy, good governance and constitutionalism are concerned, it is important to note that even in the West, liberal democracy has not been uniformly conceptualised. Acknowledging that there may be different ways of conceptualising liberal democracy, governance and constitutionalism should then pave way

¹⁵¹ See, B Davidson (note 121 above).

¹⁵² KK Prah (note 148 above) 24.

¹⁵³ GK Kieh "Reconstituting the neo-colonial state in Africa" (2009) 26 (1) *Journal of Third World Studies* 41 51.

¹⁵⁴ B Munslow (note 92 above) 483 and C Ake (note 142 above) 38-41.

¹⁵⁵ B Parekh (note 12 above) 168.

¹⁵⁶ L Pye "Democracy and its enemies" in J Hollifield & C Jillson (eds) (note 114 above) 22.

¹⁵⁷ As above 25.

¹⁵⁸ G Chigona (note 140 above) 25.

for the development of approaches that critique the dominant paradigms. In the case of Malawi, for example, it is also important to note that the standard meaning and conceptualisation of democracy does not necessarily resonate with most ordinary Malawians.¹⁵⁹ Clearly, therefore, making democracy work requires the adoption of a flexible, inclusive and open-ended approach that not only takes account of liberal ideals but also 'African values and institutions' that can be used to foster a sense of local democracy.¹⁶⁰ The heterogeneity of democracy necessarily means that there is no 'either or approach' to democratisation. One cannot rigidly insist on either the strict liberal model or an exclusive African approach to democratisation. As the United Nations has pointed out 'the ideal of democracy is rooted in philosophies and traditions from many parts of the world.'¹⁶¹ Democratisation must, therefore, deliberately seek to accommodate the different philosophies and traditions. While some of the values that African traditions embody may seem strange when viewed from a Western perspective, it is undoubted that they possess moral and ethical values that can be utilised in democratisation.¹⁶²

4.3 Interrogating the connection between democracy, governance and constitutionalism and African traditions, customs and institutions

Reference to 'African traditions, customs and institutions' may justly be criticized for being too broad and incapable of possessing any meaningful content.¹⁶³ Without belabouring the point, the defining feature of what this study refers to as African traditions, customs and institutions is their indigeneity to Africa. By African traditions, customs and institutions is meant social institutions and modes of societal organisation and ordering that owe their origin to the African continent and its peoples. It is their autochthony that sets African

¹⁵⁹ H Englund *Prisoners of freedom: Human rights and the African poor* (2006) 112-114.

¹⁶⁰ D Venter "Elections and electoral systems in emerging democracies: A case for electoral system re-design in Malawi" Constitutional Review Conference 28-31 March 2006, Lilongwe, Malawi and S Ndlovu-Gatsheni & G Dzinesa (note 69 above) 94.

¹⁶¹ United Nations "Guidance note of the Secretary-General on democracy" <http://www.un.org/democracyfund/Docs/UNSG%20Guidance%20Note%20or%20Democracy.pdf> (Accessed 21 April 2010).

¹⁶² Cf. K Creff Exploring ubuntu and the African renaissance: A conceptual study of servant leadership from an African perspective <http://www.regent.edu/acad/global/publications/sl_proceedings/2004/creff_exploring_ubuntu.pdf> (Accessed 22 June 2010).

¹⁶³ Notably, however, other scholars argue that although there are many diverse African cultures there are commonalities to be found among them such as value systems, beliefs and practices and that these commonalities shape the African world view – Munyaka & M Motlhabi in MF Murove (ed) *African ethics: An anthology of comparative and applied ethics* (2009) 63.

traditions, customs and institutions apart. It must be conceded at the outset that what are currently referred to as African traditions, customs and institutions are a combined derivative of the colonial experience and African cultures.¹⁶⁴ In speaking of African traditions, customs and institutions one must thus be fully mindful of two things. Firstly, the effect that the colonial experience had on the African consciousness. As Mbigi argues, almost invariably, colonial laws and policies sought to undermine and discredit the legitimacy of indigenous African knowledge systems.¹⁶⁵ This affected the way in which they were preserved and transmitted between generations. Secondly, one must be slow and cautious in making generalisations about African traditions, customs and institutions especially in the light of the diversity of traditions, practices and cultures between African peoples.

A further note of caution must be sounded here. The reference in this study to African traditions, customs and institutions is not just a form of intellectual nostalgia about an era that has long gone past. This reference is being made on the basis of an acknowledgement of the value that may be had by infusing the current Westernised discourse on societal organisation with indigenous African norms. This is not a call for the wholesale return of Africa to its pre-colonial systems of governance and organisation. This is impossible. Further, the effects of colonialism are such that it is impossible to concretely determine with precision the norms that prevailed in the pre-colonial period.¹⁶⁶ Nevertheless, there is a very strong case to be made for 're-establishing contacts with familiar landmarks of modernisation under indigenous impetus.'¹⁶⁷ This recourse to indigenous institutions necessitates, not the 'reproduction' of ancient indigenous institutions, but the 'recapturing' of those institutions.¹⁶⁸ Proceeding from an acknowledgment of the value of indigenous African knowledge and its institutions, this study will now demonstrate how African traditions, customs and institutions

¹⁶⁴ L Mbigi *The spirit of African leadership* (2005) v.

¹⁶⁵ As above.

¹⁶⁶ Cf. S Biko "Some African cultural concepts" in A Stubbs (ed) *Steve Biko: I write what I like, Selected writings* (1996) 40-47.

¹⁶⁷ AA Mazrui quoted by JY Mokgoro "Ubuntu and the law in South Africa" <<http://web.archive.org/web/20040928041520/www.puk.ac.za/law/per/documents/98v1mokg.doc>> (Accessed 22 September 2010).

¹⁶⁸ In assessing the grandeur of the Roman Empire Machiavelli argued that if the glory and greatness of the Roman Empire was attained by means of conscious human activity then the conditions of grandeur could be recaptured – but not reproduced. This could be done by a serious enquiry into the factors that had made the original success possible. If, however, fortune was the initial cause the need to transform the present by referring to the past becomes futile. This position was endorsed by Antonio Gramsci – See B Fontana (note 101 above) 85.

are concretely related to governance, constitutionalism and democracy. The demonstration of the interconnectivities shall be achieved by using the concept of *ubuntu* as an example.

4.3.1 *Ubuntu* as a basis for a reconstructed discourse on governance, constitutionalism and democracy in Africa: A tentative direction

It is not enough for Africans to assert that *ubuntu* is their unique governing philosophy. The more important task is to involve *ubuntu* and its ideals in the solving of concrete problems that Africa faces. This study will establish the relevance of *ubuntu* in the resolution of concrete African problems by, firstly, demonstrating that *ubuntu* can be used as a foundational principle of constitutional law in many African countries. By way of illustration, reference will, in this connection, be made to the Malawian and South African Constitutions.¹⁶⁹ Secondly, it will also be demonstrated that *ubuntu* can also be used as a basis for constructing an alternative discourse on constitutionalism that does not foundationally rely on liberal ideals for justification.

In the context of this study, it is important to note that the only explicit acknowledgement of *ubuntu*'s relevance to constitutional law was its inclusion in the post-amble to the Interim Constitution of South Africa. The concept was, surprisingly, not carried over into the Final Constitution.¹⁷⁰ Over the years, however, the South African Constitutional Court has, on several occasions, referred to *ubuntu* to 'justify' its decisions. The incorporation of *ubuntu* into South African jurisprudence has, however, not been easy and uniform.¹⁷¹ Some of the complexities in incorporating *ubuntu* into constitutional jurisprudence stem from the concept's expansiveness and supposed infinite malleability. As may be recalled, *ubuntu* is simultaneously about the individual as well as the universal.¹⁷² But perhaps the biggest impediment to the development of an expansive *ubuntu*-based jurisprudence has been the judges' tendency to treat *ubuntu* as a uni-dimensional value. This has led courts and

¹⁶⁹ The similarities between the Malawian Constitution and its South African counterpart have been harped on for quite a while now. Mwaungulu states that '[t]he Malawi Constitution replicates South African legal and political arrangements ...' DF Mwaungulu (note 131 above) 271.

¹⁷⁰ The omission of *ubuntu* in the Final Constitution, it has been argued, amounted to a de-africanisation of the Constitution and devaluation of the religio-cultural values of Africans – E Moosa "Tensions in legal and religious values in the 1996 South African Constitution" in M Mamdani (ed) *Beyond rights talk and culture talk: Comparative essays on the politics of rights and culture* (2000) 131.

¹⁷¹ M Pieterse "'Traditional' African jurisprudence" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 445-462 and R English "Ubuntu: The quest for an indigenous jurisprudence" (1996) 12 (4) *South African Journal on Human Rights* 641-648.

¹⁷² M Pieterse (as above) 445.

commentators to selectively emphasise those aspects of *ubuntu* which fit the purpose for which it has been invoked.¹⁷³ The South African Constitutional Court, especially in its earlier pronouncements on *ubuntu*, was guilty of using *ubuntu* as ‘a one-size-fits-all, magic word that [could] be appropriated to lend legitimacy to any judicial observation, rather than the intricate philosophy it indeed represents.’¹⁷⁴ This approach, it will be demonstrated, has since ‘somewhat’ changed.

An example of a selective reliance on the values underlying *ubuntu* is offered by the Constitutional Court’s decision in *AZAPO v President of South Africa (AZAPO)*,¹⁷⁵ where the Court used *ubuntu* to justify the amnesty legislation in the immediate aftermath of apartheid. It must be noted that the Court invoked the Interim Constitution’s reference to *ubuntu* in the epilogue to urge forgiveness for the perpetrators of human rights violations during apartheid while at the same time extinguishing the victims’ rights to commence action for the violations. This approach, it is argued, erroneously suggested that *ubuntu* is only about forgiveness while *ubuntu* also does require perpetrators of wrongs to atone for their wrongs in various socially acceptable ways. The decision in *AZAPO* is also a clear manifestation of how the philosophy of *ubuntu* can be appropriated or even misappropriated to serve particular political ends¹⁷⁶ - in this case, *ubuntu* was used to justify the compromise that the amnesty laws embodied.¹⁷⁷ The specificities of how *ubuntu* justified the amnesty legislation were, however, not addressed by the Court beyond a generalised reference to *ubuntu*. Even in *S v Makwanyane (Makwanyane)*,¹⁷⁸ where the Constitutional Court declared the death penalty unconstitutional in South Africa, although several of the judges referred to *ubuntu* in their judgments, there is a palpable variation in the emphases that the judges place on the concept.¹⁷⁹ The Constitutional Court’s approach to *ubuntu* in *Makwanyane*, Van der Walt

¹⁷³ As above.

¹⁷⁴ As above 447.

¹⁷⁵ 1996 (4) SA 671 (CC).

¹⁷⁶ M Pieterse (note 171 above) 447. It must be recalled that the elasticity of the concept of *ubuntu* necessarily entails that it is constantly amenable to abuse and misuse – M Bonn “Children’s understanding of ‘Ubuntu’” (2007) 177 (8) *Early Child Development and Care* 863 871.

¹⁷⁷ The Constitutional Court held that the founding statute of the Truth and Reconciliation Commission was justified in its violation of the right to have justiciable disputes settled in a court of law on the basis of the *ubuntu* vision that the Interim Constitution supported.

¹⁷⁸ 1995 (3) SA 391.

¹⁷⁹ M Pieterse (note 171 above) 446.

argues, evidences a frightening lack of jurisprudential rigour.¹⁸⁰ For all the references to *ubuntu* in the individual judgments none of the judges seriously interrogated what *ubuntu* means and what exactly it portends for the legal system. It seems the judges just opted to adopt a ‘feel-good flavour of a jurisprudence that has done little more than add a local, indigenous and communitarian touch to the Christian, Kantian or Millsian respect for the individual that informs Western jurisprudence.’¹⁸¹

A better direction would be to take seriously the assertion that *ubuntu* is an intricate philosophy and not a one-size-fits-all magic word.¹⁸² However, evidence of the one-size-fits-all approach to *ubuntu* can also be had in the passing reference to *ubuntu* that the Constitutional Court made in *Hoffmann v South African Airways*.¹⁸³ In *Hoffmann v South African Airways* Ngcobo J (as he then was) stated that ‘[p]eople living with HIV must be treated with compassion and understanding. We must show *ubuntu* towards them.’¹⁸⁴ Ngcobo J, however, did not attempt to properly unravel the relevance of *ubuntu* in the light of the dispute that the Court was resolving. These variations and ‘inconsistencies’, this study argues, merely highlight the need for concerted effort in articulating the philosophy of *ubuntu* which has suffered from years of neglect.

The Constitutional Court has also made references to *ubuntu* in the following decisions:¹⁸⁵ *Port Elizabeth Municipality v Various Occupiers (PE Municipality)*;¹⁸⁶ *Bhe v Magistrate, Khayelitha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa (Bhe)*;¹⁸⁷ *Dikoko v Mokhatla (Dikoko)*¹⁸⁸ and *Khosa v Minister of Social Development (Khosa)*.¹⁸⁹ A brief discussion of the manifestation of *ubuntu* in these decisions will now be conducted.

¹⁸⁰ J Van der Walt *Law and sacrifice: Towards a post apartheid theory of law* (2005) 109.

¹⁸¹ As above 111.

¹⁸² M Pieterse (note 171 above) 447.

¹⁸³ 2001 (1) SA 1 (CC).

¹⁸⁴ As above paragraph 38.

¹⁸⁵ For a scholarly analysis of these decisions, see T Bekker “The re-emergence of ubuntu: A critical analysis” and N Bohler-Muller “Some thoughts on the ubuntu jurisprudence of the Constitutional Court” in D Cornell & N Muvangua (eds) *Law in the ubuntu of South Africa* <http://isthisseattaken.co.za/pdf/Papers_Cornell_Muvangua.pdf> (Accessed 24 June 2010).

¹⁸⁶ 2005 (1) SA 217 (CC).

¹⁸⁷ 2005 (1) SA 580 (CC).

¹⁸⁸ 2006 (6) SA 235 (CC).

¹⁸⁹ 2004 (6) SA 505 (CC).

PE Municipality involved the eviction of squatters that had settled on privately owned land within the municipality of Port Elizabeth. The illegality of the squatters' occupation of the land was largely undisputed even though some of them had been in occupation for about eight years. *PE Municipality* is notable because it was the first case in which *ubuntu* as a constitutional value was brought to bear in private law.¹⁹⁰ Sachs J, who delivered the judgment of the Court, stated that *ubuntu*, which is part of the cultural heritage of the majority of South Africans, suffuses the whole constitutional order and combines individual rights with a communitarian philosophy. He further asserted that *ubuntu* is a unifying motif in the South African Bill of Rights.¹⁹¹ However, in spite of the commendable attempt to extend *ubuntu* into private law, the Court in *PE Municipality* is guilty of the same simplistic approach that was adopted in *Makwanyane* and *AZAPO*. It is clear, from the Court's statements on *ubuntu*, that the Court still utilised *ubuntu* as a catch-all phrase to justify conclusions reached without interrogating *ubuntu*.

A similar conclusion can be made in respect of the Constitutional Court's treatment of *ubuntu* in *Bhe*. The applicants in *Bhe* challenged the constitutionality of section 23 of the Black Administration Act (38 of 1927) and the customary law principle of primogeniture. In declaring both section 23 of the Black Administration Act and the principle of primogeniture unconstitutional, both Langa DCJ (as he then was) and Ngcobo J (as he then was) referred to *ubuntu* in their judgments. However, and as Bekker aptly concludes, although reference was made to *ubuntu* in *Bhe*, no new insight into the concept as a constitutional principle was provided.¹⁹²

Similar conclusions can be made of the decision in *Khosa*. In *Khosa* the applicants were Mozambican citizens who were permanent residents of South Africa. The applicants were challenging the Social Assistance Act (59 of 1992) after being excluded from social assistance grants as a result of their citizenship. What is notable is that the judgment in *Khosa* does not make any explicit reference to *ubuntu*. However, as Cornell and Van Marle have argued, a holistic analysis of the decision reveals that the Court's decision reflects a deep sense of an *ubuntu* ethos.¹⁹³ This *ubuntu* ethos is particularly manifested by the

¹⁹⁰ T Bekker (note 185 above) 492.

¹⁹¹ Note 186 above, Paragraph 37.

¹⁹² T Bekker (note 174 above) 495.

¹⁹³ D Cornell & K Van Marle "Exploring ubuntu: Tentative reflections" (2005) 5 (2) *African Human Rights Law Journal* 195.

Court's extension of social grants to permanent residents who would otherwise have been excluded on a literal interpretation of the Social Assistance Act.

With regard to the three decisions discussed above, it is important to note that in spite of the paucity of the jurisprudential interrogation of *ubuntu* specifically, the decisions mark a bold and courageous attempt to move beyond a liberal conception of the human rights discourse.¹⁹⁴ A move beyond the liberal conception of human rights is bound to set the stage for more meaningful intercourse between *ubuntu* and the liberal discourse on rights.

The judgment in *Dikoko* is hailed as a breakthrough with regard to the interpretation of *ubuntu* as a constitutional value.¹⁹⁵ The case came to the Constitutional Court as an appeal against a judgment awarding damages for defamation in favour of Mokhatla. In considering the award of damages by the lower court Mokgoro argued that she would have reduced the lower court's award because of its failure to consider all mitigating circumstances. In Mokgoro's judgment, the constitutional value of dignity is closely related to *ubuntu* and in cases of defamation it is equally important that compensation should be aimed at re-establishing harmonious relations between the parties. A remedy based on *ubuntu*, she argued, could go much further in restoring human dignity than a monetary award.¹⁹⁶ Sachs J, to his credit, although adopting a different approach, largely agreed with Mokgoro J's conclusions and expressly conceded that '*ubuntu-botho* is more than a phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived at.'¹⁹⁷ Sachs J, in his judgment, proposes that the law of defamation should move away from its preoccupation with monetary awards towards a model that encourages reconciliation by the parties, for example, by accepting apologies in settlement of claims.

It must be clear that while progress has been made in developing an *ubuntu*-based jurisprudence, this progress has been slow and laboured. In spite of the problems that have faced the incorporation of *ubuntu* into South African jurisprudence, for example, its ideals remain centrally relevant to constitutional jurisprudence both in Malawi and South Africa. A look at the preambular recitals of the two countries' Constitutions, for example, reveals that the constitutional orders in these countries are founded on the very ideals that *ubuntu* stands

¹⁹⁴ N Bohler-Muller (note 185 above) 484.

¹⁹⁵ T Bekker (note 185 above) 496.

¹⁹⁶ Note 188 above, Paragraph 68.

¹⁹⁷ As above, Paragraph 113.

for.¹⁹⁸ On the one hand, the preamble to the Constitution of Malawi avers that the people of Malawi adopted it in recognition of the ‘sanctity of human life and the unity of all mankind’ and also because they sought ‘to guarantee the welfare and development of all the people of Malawi, national harmony and peaceful international relations.’ On the other hand, the preambular recital to the South African Constitution avers that it was adopted to ‘heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights’ and also to ‘improve the quality of life of all citizens and free the potential of each person.’ Further, the detailed and lengthy Bills of Rights in both Constitutions also point to a desire to preserve and protect the values of *ubuntu* especially, but not exclusively, human dignity.¹⁹⁹ *Ubuntu* thus remains a rich philosophy which if approached as such may prove to be of significant value. *Ubuntu*’s unique contribution in this regard is that:²⁰⁰

Contrary to the often materialistic and individualistic approach of ‘Western’ jurisprudence, *ubuntu* offers a view of society that emphasises social harmony above individual gain, views rights and duties as sides of the same coin, views law ‘not as a tool for personal defence, but as an opportunity given to all to survive under the protection of the order of the communal entity’ and acknowledges human interdependence as an inextricable part of life.

By way of illustrating the points made above, democratic governance is part of the constitutional orders in both Malawi and South Africa.²⁰¹ The founding values of democracy such as human dignity, equality, promotion of human rights and freedoms, accountability, responsiveness and rule of law coincide with key values of *ubuntu* such as human dignity, respect, inclusivity, compassion, concern for others, honesty and conformity.²⁰² A progressive judicial engagement must proactively appropriate the concept of *ubuntu* in constitutional interpretation and all legal discourse.²⁰³ The articulation of *ubuntu* in

¹⁹⁸ One must pay special attention to the context in which these Constitutions were adopted to properly appreciate the *ubuntu* purport.

¹⁹⁹ See Chapter IV Constitution of the Republic of Malawi and Chapter 2 Constitution of the Republic of South Africa.

²⁰⁰ M Pieterse (note 171 above) 448.

²⁰¹ For Malawi see section 12 of the Constitution of the Republic of Malawi and for South Africa see sections 1 and 7(1) of the 1996 Constitution of South Africa.

²⁰² JY Mokgoro (note 167 above).

²⁰³ M Pieterse (note 171 above) 448.

constitutional discourse, it is argued, stands a better chance of developing an enduring and home-grown constitutionalism.²⁰⁴

As pointed out earlier, governance in African countries has almost uniformly but uncritically followed the Western liberal democratic model. This, it is argued, has largely been as a result of a systematic process of disarticulation of African polities from their indigenous institutions of problem solving that begun during colonial times.²⁰⁵ Recourse to *ubuntu*, however, offers a basis for reconceptualising governance and democratisation in a manner that exudes greater symmetry to African traditional norms and customs. It must be noted that even though Western political thought presumes the social contract as the only legitimate constitutive power of a government, the social contract justification is inadequate for countries like Malawi and South Africa with justiciable social and economic rights in the Constitution.²⁰⁶ This is because while the social contract easily lends itself to the vindication of civil and political rights, it has not proved to be equally amenable to the justification of social and economic rights.²⁰⁷ Social contract-based discourse easily justifies civil and political rights because of its pre-occupation with explaining the emergence of civil society and the justification of restraints on government. It is, however, not easily amenable to justifying social and economic rights which require more than restraint on the part of a government to be realised.

Ubuntu offers an opportunity and a basis for understanding most African constitutions and developing a brand of governance that is premised on values that connect more readily with the African consciousness. A full articulation of *ubuntu*-based governance would also serve to highlight the inadequacies of social contract-based discourse in the light of the conditions that prevail in Africa.²⁰⁸ As Cornell and Van Marle argue, *ubuntu* as a foundational principle

²⁰⁴ See, AA Mazrui (note 120 above) where the author argues that democracy's failure in Africa may also be attributed to postcolonial Africa's disdain for the legacy of its ancestors.

²⁰⁵ D Olowu "Governance, institutional reforms and policy processes in Africa: Research and capacity building implications" in D Olowu & S Sako (eds) *Better governance & public policy: Capacity & democratic renewal in Africa* (2002) 53 55.

²⁰⁶ D Cornell "A call for a nuanced constitutional jurisprudence: Ubuntu, dignity and reconciliation" (2004) 19 (1) *SA Public Law* 666 668.

²⁰⁷ It is notable that the only rights that leading liberal philosopher John Locke recognises are the right to property, life and liberty – see *The second treatise of government*. It is poignant, as Hay argues, that Locke distorted natural law arguments to justify the liberation of wealth from all political or moral controls – his conclusion was that the accumulation of money, goods and land was actually sanctioned by nature and implicitly by God – D Hay (note 68 above) 18.

²⁰⁸ It is notable that discussions of the social contract routinely avoid interrogating the status of the social contract in the society it supposedly constitutes. It is argued that in any society

of law would not have the same kind of one-to-one correspondence of right and duty that occurs under the social contract theory.²⁰⁹ Under *ubuntu*, even a legally imposed obligation may have to be construed differently from the manner in which it is normally construed in contractarian theories.²¹⁰ A notable perspective, among others, that would be brought about by *ubuntu* in governance and democratisation would be the recognition and emphasis of interdependence as a primordial societal value – this is often absent in social contract-based discourse. For the law to contribute to the realisation of the benefits of *ubuntu* in governance, constitutionalism and democratisation, there must be the development of what Cornell refers to as a ‘nuanced jurisprudence’.²¹¹ This ‘nuanced jurisprudence’ requires an incisive sublation and reconciliation of ideas of Western liberalism with African traditional norms and institutions.²¹² In all this it must be recalled that *ubuntu* as a philosophy is both conservative and subversive.²¹³ It is conservative in the sense that it requires the perpetuation of values that have proven their worth to Africa but it is also subversive in its resistance to liberal individualism.²¹⁴ To give meaning to *ubuntu*’s resistance to liberal individualism, for example, requires that the values that underlie *ubuntu* be utilised in defining ‘justice’ and the validity of law in African countries.²¹⁵ In this endeavour one must continuously be mindful of the fact

there are three groups of people: those who like the terms of the contract as it is; those who do not like the terms of the contract as it is and seek to renegotiate them and those who appear indifferent to the contract. The citizens who manage the state belong to the first group and these often use the law in the hope of stopping the second group of citizens from renegotiating the contract. The overall objective, however, is to get the third group of citizens to stop being indifferent and join either the first or second group – MS Nzunda “Sedition and the struggle for the social contract” in MS Nzunda & KR Ross (eds) *Church, law and political transition in Malawi 1992-94* (1995) 15. This ‘contestation of the social contract’ must be allowed to happen in Africa and on Africa’s terms.

²⁰⁹ D Cornell & K van Marle (note 193 above) 212. Even the trust concept, would not be understood and applied in the same manner that it has developed in the Anglo-American system. A conscious effort would be made to connect it to the manner in which fiduciary obligations were traditionally understood in Africa, see SKB Asante “Fiduciary principles in Anglo-American law and the customary law of Ghana: A comparative study (1965) 14 (4) *The International and Comparative Law Quarterly* 1144-1188.

²¹⁰ As the decision in *AZAPO* demonstrates, *ubuntu* does not insist on strict legalism where there are pressing societal needs that may be served by a relaxation of strict legalism.

²¹¹ D Cornell (note 194 above) 674-675.

²¹² For a thorough discussion of some of the values that underlie *ubuntu* and how these can be utilised in governance, see J Broodryk “Ubuntu: African life coping skills, theory and practice” Paper delivered at CCEAM Conference 12-17 October 2006, Nicosia, Cyprus.

²¹³ N Bohler-Muller (note 185 above) 480.

²¹⁴ As above.

²¹⁵ MB Ramose “An African perspective on justice and race” <<http://them.polylog.org/3/frm-en.htm>> (Accessed 8 September 2009).

that 'using *ubuntu* to enrich human rights and constitutional discourse should be seen as having both political and ethical dimensions.'²¹⁶

4.4 *Ubuntu* and the social trust: A potent bulwark for governance and constitutionalism in Malawi?

In Chapter Two of this study the social trust concept was explained in detail and the various implications that it generates were also highlighted. It was argued that the social trust concept offers a viable framework through which governance and constitutionalism could be realised. As will be demonstrated below, the strength and viability of the social trust concept in revitalising governance and constitutionalism, especially in Malawi and Africa, generally, lies in its conceptual affinity to traditional norms of governance in Africa. To best appreciate the symmetry that exists between the social trust and traditional norms of governance in Africa, like *ubuntu*, one must be prepared to engage in a process of transculturation.²¹⁷ Transculturation provides a basis for appreciating the other without a measure of contempt for that which is different from the dominant models. As Cornell puts it, 'transculturation demands that we must actually learn each other's ways and grasp underlying competing values in order to even begin to make a judgment'²¹⁸ about the constitutionality or legality of particular customary practices. In addition to transculturation, one must also be willing to engage in the incisive sublation that was discussed in Chapter Two. Resultantly, Western ideas and philosophies must be prepared to engage with the distinctly African concepts without the contempt or disdain that characterised the meeting of cultures at the inception of colonialism. The result of the intercourse must be a synthesis that does not unduly privilege either the African or Western over the other.

One must recall that 'trust', in the moral sense, is the basis of cooperation in all societies.²¹⁹ African societies, especially in pre-colonial times, arguably, more profoundly manifested the 'trust' basis in their inter and intra societal relationships. Concededly, pre-colonial African societies were not homogenous and the generalisations about life in pre-colonial African societies are being made here with a pinch of prudence.²²⁰ There is, however, considerable

²¹⁶ N Bohler-Muller (note 185 above) 480.

²¹⁷ D Cornell "Ubuntu pluralism and the responsibility of legal academics to the new South Africa" (2009) 20 (1) *Law and Critique* 43 55.

²¹⁸ As above.

²¹⁹ V Held *Rights and goods: Justifying social action* (1984) 68-69.

²²⁰ There is a general agreement among scholars that autocratic rule did exist in parts of Africa in pre-colonial times especially in monarchical societies. At the same time, however, there is also considerable evidence that in segmented and non-hierarchical societies government

evidence that leadership, particularly, in pre-colonial African societies was exercised in a principled manner that ensured a high degree of accountability by the governors and participation by the populace.²²¹ It is the essence of the preceding assertion that confirms that democracy itself as a form of governance is not novel in Africa. It is liberal democracy that is foreign to Africa.

It has been convincingly demonstrated that in traditional African societies, political and economic control were premised on human interrelationships governed by an orderly distribution of wealth among the citizens of a community.²²² Under this model of governance, accountability and social justice were the primary governing features and inter and intra generational equity governed the utilisation of all societal resources. It was thus considered to be morally degrading for a leader to reap huge profits from swindling people or hijacking economic development for personal benefit.²²³ Centrally, all decision-making was by consensus.²²⁴ It is because of this that other scholars have gone as far as suggesting that 'African traditional culture, it seems, has an almost infinite capacity for the pursuit of consensus and reconciliation.'²²⁵ Even in societies that had chiefs or kings, decisions were invariably reached after consultation with the citizens in the polity. Governing by consensus, it has been argued, was at the heart of African social and political organisation ethos.²²⁶ The primacy of consensus was premised in a belief that knowledge is ultimately dialogical or social.

usually took the form of a council of elders whose decisions were consensual. The village assembly served as a forum for open discussion on matters affecting the whole community – H Weiland (note 83 above) 10.

²²¹ B wa Mutharika *One Africa, one destiny: Towards democracy, good governance and development* (1995) 61.

²²² As above.

²²³ As above 69-70.

²²⁴ Again this is a complex generalisation. The flip side to the emphasis on consensus in pre-colonial African societies had been ably captured by Louw who argues that it had the potential to generate oppressive conformity and loyalty to the group at the expense of individuality – DJ Louw "Ubuntu: An African assessment of the religious other" <<http://www.bu.edu/wcp/Papers/AfriLouw.htm>> (Accessed 8 September 2009).

²²⁵ J Teffo (1994) 4 Quoted by DJ Louw (as above) - Democracy the African way does not simply boil down to majority rule. Traditional African democracy operates in the form of discussions, sometimes very lengthy, until there is some kind of an agreement, consensus or group cohesion is reached.

²²⁶ E Wamala "Government by consensus: An analysis of a traditional form of democracy" in K Wiredu (ed) (note 16 above) 435 437.

The trust basis of societal relations in pre-colonial Africa, which still persists in some African societies, can more clearly be appreciated by analysing the manner in which traditional African societies have managed resources such as land.²²⁷ For example, writing about land ownership in Malawi, Pachai concluded that²²⁸

[i]n African society, according to customary law, the land does not belong to an individual or group as such. It is there as a gift of the gods to occupy and to cultivate under certain conditions. It is not ownership but useful occupation that is the guiding principle.

Although chiefs and village headmen would be in charge of land in particular localities, these were not regarded as owners of the land. They were mere custodians or wardens. Land was communally owned. 'Ownership', conceived according to the Western sense, was unheard of.²²⁹ Instead of ownership, one ought to use terms such as 'guardianship' or 'trusteeship'.²³⁰ In evaluating land tenure systems of Malawi, Mbalanje echoed Pachai when he stated that 'land was held in trust for all the people forming the community'.²³¹ Mutharika reiterates the same point by stating that 'land was held in trust by the monarchy or chieftaincy for the good of all ... The leadership ensured that subjects had a share of the wealth of the nation each according to his needs'.²³² Land was thus conceived of as a sacred unit of traditional life.²³³ The whole community had an interest in it.²³⁴ The dead chiefs had an interest, the current occupants had an interest and the unborn generations were also recognised as having an

²²⁷ One must recall that land is a very precious resource in African societies. It is argued that land is the basis of African self-respect and creativity. The loss of land by African peoples during colonisation was a factor in the alienation of Africans from their culture and tradition, see M Munyaka & M Motlhabi (note 163 above) 63 79.

²²⁸ B Pachai (note 87 above) 96. See, also, DD Phiri *Malawi: Our future our choice* (2006) 48.

²²⁹ In the West, ownership of property is epitomised by the right of the property-owner to exclude others from the enjoyment of benefits accruing from the object of property – K Gray "Property in thin air" (1991) 50 (2) *Cambridge Law Journal* 252-307.

²³⁰ B Pachai (note 87 above) 96.

²³¹ A Mbalanje "Land law and land policy in Malawi" in J Arntzen & others (eds) *Land policy and agriculture in eastern and southern Africa* (1986) <<http://www.unu.edu/unupress/unupbooks/80604e/80604E09.htm>> (Accessed 20 March 2009).

²³² B wa Mutharika (note 221 above) 72.

²³³ This point is reiterated by G Diallo "The philosophical foundations of African democracy" <<http://www.hollerafrica.com/showArticle.php?artId=237&catId=1>> (Accessed 22 June 2009).

²³⁴ The 'community' in African culture is an ethical entity comprising the living, the living dead and the yet to be born. The critical ethical concern is to recognise and abide by the obligation to maintain and preserve harmonious relations within these three dimensions of the community – MB Ramose "In memoriam: Sovereignty and the 'New' South Africa" (2007) 16 (2) *Griffith Law Review* 310 323. This concern with maintaining harmony between the three categories of people makes African societies inherently social trust-based in orientation.

interest in it.²³⁵ It is sobering to note that customary land in Malawi is still managed along the same principles.

A similar assertion has been made about land ownership in Ghanaian customary law. Writing in 1965 Asante argued that ‘property concepts were traditionally impressed with the “trusteeship idea”.’²³⁶ This trusteeship idea, Asante argued, derived from the fundamental premise that property belonged to the ancestors while the living were but beneficiaries. This meant, just as Pachai had pointed out for Malawi, that property was an ancestral trust committed to the living for the benefit of themselves and generations unborn. This had two principal implications.²³⁷ Firstly, the community interest in property meant that ownership was subject to social obligations that precluded the undue emphasis on individualism. Secondly, these principles constituted all political and social functionaries charged with managing the property into social trustees. This meant that they were strictly enjoined to manage the resources in the primary interests of the group.

Clearly, at least in as far as land ownership in traditional Malawian society is concerned, the concept of the trust has always been the governing motif. Admittedly, the trust as employed to regulate land ownership in Africa did not have the complexity with which it has acquired in Anglo-American legal thought. The trust in African customary law, while it certainly shares some fundamental similarities with the trust in Anglo-American legal thought, also evinces considerable unique features.²³⁸ The point to note, however, is that if the starting point in discourse on governance and constitutionalism is conceived and acknowledged to be located within Africa, it may be possible to generate a greater acceptance for societal relations impressed with the trust concept. By recognising that within African traditions there already exist norms that reflect established legal concepts, it is argued, it may become much easier to enforce a governance model that is premised on African traditions but also draws on mainstream legal devices.

While customary land ownership in Malawi, and arguably across Africa, offers the clearest examples of a social trust-based regulation, such type of regulation is not limited to land

²³⁵ B Pachai (note 87 above) 96.

²³⁶ SKB Asante “Fiduciary principles in Anglo-American law and the customary law of Ghana – A comparative study” (1965) 14 (4) *The International and Comparative Law Quarterly* 1144-1145.

²³⁷ As above.

²³⁸ As above.

ownership. Considerable evidence suggests that Africans, generally, have a common conceptual and analytical framework of participatory governance based on their traditions and cultures.²³⁹ It is to *ubuntu* that one must centrally look to discern the common conceptual and analytical framework that informed governance in pre-colonial Africa. For example, Davidson analysing traditional governance systems of the *Asante* in West Africa concluded as follows:²⁴⁰

Power was exercised by powerful persons but with constitutional checks and balances tending to prevent abuse of power. Despots certainly arose; they were dethroned as soon as could be. Between ruler and the people – one can say between state and the people, there was an acknowledged recognition of ties of mutual obligations and respect.

Specifically in the context of Malawi, Clutton-Brock observed that before making decisions the elders would ‘gather under the big tree and talk until they agree[d]’.²⁴¹ This they would undertake because they believed that only consultation would hold the community together.²⁴² It has been argued that this trend was prevalent across the continent and a high premium was placed on consensus in deliberation before decision making.²⁴³ To say that traditional African communities deliberated until they reached consensus, however, is not to say that there was always unanimity of opinion.²⁴⁴ The deliberations, inevitably, involved compromise, adjustment and accommodation by the community members. As Nyerere put it ‘when a group of 100 equals have sat and talked together until they agreed where to dig a well, (and ‘until they agreed’ implies that they will have produced many conflicting arguments before they did eventually agree)’.²⁴⁵ All this merely highlights the inherent democratic attributes of most African communities which need to be revived in Africa’s drive for good governance and constitutionalism.

By way of further illustration of the point above, it is to be noted that Sindane and Liebenberg have identified several political systems across Africa that manifest what this study terms the

²³⁹ B wa Mutharika (note 221 above) 71.

²⁴⁰ B Davidson (note 121) 61

²⁴¹ G Clutton-Brock *Dawn in Nyasaland* (1959) 13.

²⁴² As above.

²⁴³ K Wiredu “Society and democracy in Africa” in T Kiros (ed) *Explorations in African political thought: Identity, community, ethics* (2001) 173.

²⁴⁴ As above.

²⁴⁵ J Nyerere “One party government” (1961) 2 *Transition* 9.

social trust-based approach to governance.²⁴⁶ For example, among the *Yoruba* of Nigeria there was a concerted attempt to diffuse power rather than concentrate it in one person. Other social institutions among *Yoruba* culture operated to check the power of the *Oba* (King) and could direct that he commit suicide if he was found to be incompetent or developing dictatorial tendencies. Sindane and Liebenberg also refer to the *Kikuyu* of Kenya, the *Somalis* of East Africa and the *Nupe* of Nigeria to demonstrate how African societies have traditionally regulated power in society. What emerges, according to Sindane and Liebenberg, is that power was checked by placing it in the hands of people who were, by virtue of their age, title and kinship, expected to be responsible and representative of the people. In all this, a deliberate attempt was made to ensure a high degree of public participation in all decision making. Ramose confirms the preceding point in his analysis of Kingship in parts of South Africa.²⁴⁷ He argues that the name *iNkosi*, *Kgosi*, translated into 'king' in English has a special significance in the African concept of community. In Ramose's words:²⁴⁸

At its apex, the community of the living had Kgosi who was always subject to the grace of the community that placed him in the position of regal authority. Thus the office of kingship was inconceivable without the people, batho.

Clearly, the social trust basis of societal management that, arguably, permeates all African societies is not limited to the management of property resources. A primordial governing principle of distinctly African origins permeates African societal organisations when they are looked at from a traditional perspective. It is this study's argument that the common conceptual and analytical framework that Africans possess is the *ubuntu* perspective to life. *Ubuntu* is thus the very essence of democracy in Africa and must be centrally utilised in Africa's democratic renewal.²⁴⁹ It is from this common perspective that all efforts at African renewal must seek to draw inspiration.

²⁴⁶ J Sindane & I Liebenberg "Reconstruction and the reciprocal other: The philosophy and practice of Ubuntu and democracy in African society" 2000 19(3) *Politea* 34-36. These examples do not in any way suggest that Africa did not have leaders or societies that manifested non-democratic tendencies. Such societies did exist on Africa. The point being emphasised is the centrality of *ubuntu* and its values to social organisation in Africa – MJ Bhengu *Ubuntu: The essence of democracy* (1996) 23.

²⁴⁷ MB Ramose (note 234 above) 323.

²⁴⁸ As above.

²⁴⁹ MJ Bhengu (note 246 above) 23.

In actualising the potential of African traditions, customs and the social trust for the purposes of improving governance and constitutionalism in Malawi, one must fully comprehend the seismic shift that the Constitution of Malawi embodies. As Gloppen and Kanyongolo correctly acknowledge, the adoption of the 1994 Constitution infused the law with a transformative ambition and, arguably, rendered the legal system more disposed towards the poor, at least on the formal level.²⁵⁰ Conceptually, the most significant but ignored alteration that the Constitution achieved was to move constitutional discourse beyond a strict liberal democratic construction.²⁵¹ Just as is the case with the 1996 South African Constitution, to which Malawi's Constitution borrows heavily,²⁵² the new orders in these countries mark a departure from liberalism and contemplate a move towards an 'empowered' model of democracy.²⁵³ In clear departure from classical liberal postulations both the Constitutions of Malawi and South Africa provide for social redistribution and participation, among others, as fundamental organising premises.²⁵⁴

4.4.1 The role of transformative constitutionalism in social trust-based governance and constitutionalism

To properly harvest the promise of the Constitution in Malawi, it is necessary to, among others, embrace 'transformative constitutionalism.' Although a hard and fast definition of transformative constitutionalism, especially in juridical terms, remains highly elusive, Klare defined it as follows:²⁵⁵

... a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes

²⁵⁰ S Gloppen & FE Kanyongolo "Courts and the poor in Malawi: Economic marginalisation, vulnerability and the law" (2007) 5 (2) *International Journal of Constitutional Law* 258.

²⁵¹ See, K Klare "Legal culture and transformative constitutionalism" (1998) 14 (1) *South African Journal of Human Rights* 146; J Ansah "The 1994 Malawi Constitution and the role of the judiciary" Paper presented at the First National Conference on Review of the Constitution, Capital Hotel, Lilongwe, 28-31 March 2006, 4 and CM Silungwe "The rhetoric and practice in land reform in Malawi: A contextualised governmentality analysis" (2009) 3 (1) *Malawi Law Journal* 26 48.

²⁵² The High Court in Malawi has confirmed the extensive similarities between the Constitutions of Malawi and South Africa – *The State, The Electoral Commission Ex Parte Bakili Muluzi and United Democratic Front* Constitutional Cause No. 2 of 2009.

²⁵³ K Klare (note 251 above) 152-153.

²⁵⁴ See, for example, the preamble, section 1 and Chapter 2 of the South African Constitution and Sections 12, 13 and Chapter 4 of the Constitution of the Republic of Malawi.

²⁵⁵ K Klare (note 251 above) 150.

an enterprise of inducing large-scale social change through non-violent political processes grounded in law.

Transformative constitutionalism is a social and economic revolution in the sense that it is intended to bring about a more egalitarian society.²⁵⁶ While transformative constitutionalism aims at creating a more egalitarian society by, for example, facilitating the creation of a more equal society and guaranteeing basic socio-economic rights, it is also aimed at transforming legal culture.²⁵⁷ At one level, the transformation of legal culture principally involves a re-conceptualisation of the process of judicial adjudication and at another level it involves revamping the nature of legal education.²⁵⁸ In as far as judicial adjudication is concerned, transformative constitutionalism requires discarding the dominant liberal perspective that uncritically asserts that law and politics are separate.²⁵⁹ Once the political nature of judicial adjudication is properly appreciated effort may then be directed at harnessing this to meaningfully transforming society. Specifically, it is important to recognize that constitutional interpretation is inherently a political process. It thus, invariably, involves value judgments and sometimes involves values external to the Constitution itself.²⁶⁰ Clearly, under transformative constitutionalism, judges bear the responsibility of justifying their decisions not just by reference to authority but also by reference to ideas and values that the society prioritises.²⁶¹ *Ubuntu* could form a reservoir to which judicial adjudication could constantly seek inspiration.

²⁵⁶ P Langa “Transformative constitutionalism” Prestige lecture delivered at Stellenbosch University on 9 October 2006.

²⁵⁷ P Langa (as above); *Van Rooyen and others v S and others* 20022 (8) BCLR 810 (CC) at paragraph 50 per Chaskalson CJ – ‘Transformation involves not only changes in the legal order, but also changes in the composition of the institutions of society, which prior to 1994 were largely under the control of whites and, in particular white men.’ See, also, *Minister of Finance and another v Van Heerden* 2004 (11) BCLR 1125 (CC) paragraph 142 per Sach J.

²⁵⁸ Revamping legal education requires abandoning traditional methods of instruction in the law that tend to focus on formalism while ignoring the development of analytical skills. This approach to teaching the law requires that the law be regarded as part of the social fabric of society and that law students must be taught to see it as such and use it to engage everyday societal problems - P Langa (note 256 above). For a critique of the ‘traditional’ means of teaching the law, see D Kennedy “Legal education as training for hierarchy” in D Kairys (ed) *The politics of law: A progressive critique* (1998) 54.

²⁵⁹ For example, in traditional liberal conceptualisations the rule of law ideal is premised on a radical disjunction between law and politics and a sharp distinction in the role of the judges and politicians. To properly attain transformative constitutionalism there is need to soften the bright line that supposedly demarcates law from politics – K Klare (note 251 above) 157-159.

²⁶⁰ Per Mokgoro in *S v Makwanyane* (note 178 above).

²⁶¹ P Langa (note 256 above).

While the above may seem to overemphasize the role of the judiciary in attaining transformative constitutionalism, the truth is that the judiciary's pivotal role in transformative constitutionalism is largely catalytic.²⁶² Through progressive pronouncements the judiciary should set the pace for enabling various other social groups and institutions to emerge and participate in societal processes. Transformative constitutionalism thus provides a basis for a post-liberal reading of the Constitution. Admittedly, a post-liberal reading of the Constitution is not the only 'reading' of the Constitution that transformative constitutionalism supports.²⁶³ This study, however, argues that the best post-liberal reading of the Constitution is the social trust-based reading.

For purposes of governance and constitutionalism the best post-liberal construction of the Constitution is the social trust-based construction especially because the state in Malawi has traditionally assumed fiduciary roles – even though it has never seriously attempted to consistently conduct itself as a fiduciary.²⁶⁴ For example, in several statutes dealing with the management of land and natural resources the state has expressly declared itself as a trustee for the people of Malawi.²⁶⁵ In a host of other legislation the state in Malawi has also assumed obligations that have obvious fiduciary connotations.²⁶⁶ Even more centrally, the state as constituted by the 1994 Constitution has been endowed with 'explicit' fiduciary obligations.²⁶⁷ All this supports the position that the state, which has already assumed

²⁶² A recent example of a proactive approach to judicial adjudication is offered by *In the matter of the Adoption of Children Act and in the matter of the adoption of CJ (An infant)* MSCA Adoption Appeal No. 28 of 2009 where the Malawi Supreme Court of Appeal refused to be bound by a strict interpretation of the meaning of "residence" for the purposes of adoption proceedings.

²⁶³ See, T Roux "Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without difference" (2009) 20 (2) *Stellenbosch Law Review* 258-285.

²⁶⁴ See generally, G Kamchedzera "Land tenure relations, the law and development in Malawi" in G Mhone (ed) *Malawi at the cross roads: The post-colonial political economy* (1992) 188. Kamchedzera argues that it seems the state in Malawi and arguably most common law countries, has accepted the trusteeship idea merely for the purposes of endowing it with a responsible and protective appearance to the people. There is, however, no compelling justification for the existence of this state of affairs.

²⁶⁵ For example, under section 25 of the Land Act, Cap 57:01 Laws of Malawi, customary land is declared to be the lawful and undoubted property of the people of Malawi but vested in perpetuity in the President.

²⁶⁶ For example, the manner in which the state undertakes to manage public funds under the Public Finance Management Act, Act No. 7 of 2003 has clear fiduciary connotations.

²⁶⁷ G Kamchedzera & C Banda " 'We are people too' The right to development, the quality of rural life and the performance of legislative duties during Malawi's first five years of multiparty politics" Research Dissemination Seminar Number Law/2001-2002/001, <<http://www.sarpn.org.za/documents/d0001966/index.php>> (Accessed 20 May 2008).

fiduciary obligations, must finally be treated as the fiduciary that it is and subjected to fiduciary regulation.

In as far as a judicial adjudication is concerned, a transformative approach to the construction of the Constitution should pave way for the judicial recognition of the social trust,²⁶⁸ which as this study has argued, can be founded in Chapter Three of the Constitution. This recognition would give full purport to the provisions of section 12 of the Constitution while at the same time positioning the Constitution to assume greater relevance in the lives of ordinary Malawians. Such transformation, however, ought not to be limited to initiatives emanating from the judiciary for both the legislature and the executive can also undertake social trust-based reforms by recognising the restraints of fiduciary regulation in performing their functions.²⁶⁹ Such recognition of fiduciary regulation need only draw on the principles outlined in Chapter Two of this study to determine the lines of regulation. The greatest strength of the model being proposed here is that while it can seek and get recognition and enforcement in the formal legal system, its ideals have a greater resonance with the populace. This is because its foundational concepts are similar to indigenous norms of Malawian customs and traditions. This similarity, it is argued, confers considerable legitimacy on the social trust-based model. The recourse to the law that this model advocates avails it of a significant boost in the enforcement and entrenchment of its ideals.²⁷⁰ This is a radically different but viable alternative for premising constitutionalism and governance in Malawi and Africa, generally. For even though many a call have been made for the development of autochthonous governance paradigms in Malawi and Africa, no serious attempts have been made beyond suggestions of an abandonment of Western

²⁶⁸ So far no judicial decision has expressly recognised this point.

²⁶⁹ Tengaenga, for example, argues that the legislative process necessarily requires integrity and altruism over partisan interests. Political players must thus realise this - J Tengaenga "A community of character: Constitutionalism in Malawi" National Constitution Review Conference 27-31 March 2006, Lilongwe, Malawi.

²⁷⁰ The boost that the model acquires is the use of the law in the enforcement of its norms but even more importantly is the use of the law in attempting to change societal behaviour to conform to social trust ideals. Admittedly, this is premised on the ability of the law to mould behaviour according to a legislator's or any particular intention – See for example R Cotterrell *The sociology of law* (1992). This, however, is not to discount the limitations that the law inherently possesses when used as an instrument of social change – See for example, K van Marle "Love, law and South African Community: Critical reflections on 'suspect intimacies' and 'immanent subjectivity'" in H Botha & others (eds) *Rights and democracy in a transformative constitution* (2003) 231 and E Christodoulidis *Law and reflexive politics* (1998). Therefore while the law is centrally important for the implementation of this paradigm this study also concedes that the law by itself cannot achieve it all FE Kanyongolo "The rhetoric of human rights in Malawi: Individualisation and judicialisation" in H Englund & F Nyamnjoh (eds) *Rights and politics of recognition in Africa* (2004) 64.

norms and paradigms. The model being proposed in this study offers a concrete manifestation of how the blend between Western norms and traditional African norms can be conceptualised and eventually implemented.

4.5 Conclusion

The discussion in this Chapter began by noting that in adopting a new Constitution Malawians expressed a desire to break with the country's authoritarian past. In breaking with its authoritarian past, it was further noted, Malawi ended up embracing liberal democracy as a governing paradigm. Significantly, this Chapter noted, concurring with other scholars, that the re-introduction of liberal democratic governance in Malawi was not preceded by any serious consultation thus making the framework lacking in legitimacy and autochthony. This lack of legitimacy and autochthony, it has been further argued, is a significant detracting factor in the move towards the promotion of governance and constitutionalism in Malawi.

Following from the recognition of the lack of legitimacy and autochthony of the liberal democratic model, the Chapter then presented an alternative paradigm to liberal democratic governance which is founded in African customs, traditions and institutions. The concept of *ubuntu* was identified, discussed and presented as an alternative basis for conceptualising both governance and constitutionalism not only in Malawi but in Africa more generally. The values that underlie *ubuntu* were also analysed to demonstrate how this African philosophical ideal can be used to entrench governance and constitutionalism. One way in which this can be achieved, it was argued, is by embracing transformative constitutionalism. By way of illustration, the South African Constitutional Court's experiences with utilising *ubuntu* as a constitutional principle were discussed. It was further noted that while the Constitutional Court's initial pronouncements on *ubuntu* as a constitutional principle may have been disappointing there is cause for optimism as evidenced by the Court's later decisions.

By looking specifically at Malawian customs and traditions, the Chapter also demonstrated that there is a basis for *ubuntu*-based societal organisation in Malawi. More importantly, however, was the later recognition that *ubuntu*-based organisation in Malawi actually reflects a long established legal concept – the trust. By relating *ubuntu*-based ideals with trust-based notions, it was argued, a firmer basis for governance and constitutionalism could be constructed. This firmness of the basis for conceiving governance and constitutionalism arises from the fact of utilising an African concept, which arguably has greater resonance and legitimacy with African peoples, with a legal concept of renowned versatility and utility.

To achieve this, the Chapter argued, requires a serious engagement with both transculturation and sublation in order to create a viable synthesis. In the next Chapter this study will endeavour to give an indication of how the conceptual framework so far created is relevant to governance and constitutionalism in Malawi. This will be done in order to demonstrate how social trust-based governance can affect constitutionalism and governance in Malawi under the 1994 Constitution.

CHAPTER 5: (RE)DISCOVERING AND REVITALISING SOCIAL TRUST-BASED GOVERNANCE AND CONSTITUTIONALISM IN MALAWI: THE WAY FORWARD

- 5.1 Introduction
- 5.2 Recapturing the foundation: The law, public functionaries and social trust-based governance and constitutionalism in Malawi
- 5.3 The relationship between the branches of government in Malawi
 - 5.3.1 The executive in Malawi
 - 5.3.1.1 The supervisory role of the executive
 - 5.3.1.2 Accountability and transparency
 - 5.3.1.3 Management of the budget process
 - 5.3.2 The legislature
 - 5.3.2.1 Oversight over the executive
 - 5.3.2.2 Representational role
 - 5.3.2.3 Budgetary supervision
 - 5.3.3 The judiciary
 - 5.3.3.1 The judiciary as a vehicle for social transformation
 - 5.3.3.2 The judiciary as the ultimate adjudicator and bulwark against executive and legislative excesses
- 5.4 Public resource management
 - 5.4.1 Interrogating public resource management in Malawi
 - 5.4.2 The social trust-based framework and public resource management in Malawi
- 5.5 Accountability of public functionaries and citizenry empowerment
 - 5.5.1 The role and place of civil society
 - 5.5.2 Political parties and citizen participation in political processes
 - 5.5.3 The place and role of local government
- 5.6 Conclusion

5.1 Introduction

As stated in Chapter Two, governance and constitutionalism in line with the social trust-based framework is distinct because it draws its inspiration from both *ubuntu* and the trust concept. It is because of the affinities between the principles underlying the social trust and some norms of governance and organisation indigenous to African societies that social trust-based governance and constitutionalism pays proper homage to historicity and local conditions. Crucial to the understanding of social trust-based governance and constitutionalism is an appreciation of the place and role of public functionaries in society. In this Chapter an attempt will be made to demonstrate how social trust-based governance and

constitutionalism can acquire practical significance in Malawi. In demonstrating the relevance and viability of social trust-based governance and constitutionalism the discussion will again focus on the following areas: the relationship between the various branches of government; public resource management; accountability of public functionaries; and citizenry empowerment. These thematic areas have been chosen merely to highlight the areas in which focus ought to be directed in order to improve governance and constitutionalism in Malawi. The choice is in no way to suggest that an exclusive focus on these areas is the panacea for governance and constitutionalism in Malawi.

In thinking about the relevance and practicability of social trust-based governance and constitutionalism it is important to keep in mind the direction provided in Chapter One of this study. In Chapter One, it was specifically highlighted that social trust-based governance and constitutionalism must be understood at two levels – which are not necessarily exclusionary. At the first level, this study presents the social trust-based model as an ‘animating metaphor’ for governance and constitutionalism. At this level the social trust-based model must be understood as providing the philosophical inspiration and conceptual basis for understanding governance and constitutionalism. At the second level, the study contends that the social trust-based model can be utilised as a workable framework for governance and constitutionalism. This means that the social trust-based framework can be utilised in shaping and structuring governance and constitutionalism at the practical level. Understood from the second level, the social trust-based framework can be used as a source of rights and obligations for both the governors and the governed. The framework can thus be utilised to base claims against public functionaries and also to ground remedies for particular breaches of the law. To achieve the preceding largely requires a creative understanding and interpretation of existing laws in Malawi. For both approaches to the social trust-based framework, however, the applicable principles and overall framework remain as highlighted in Chapters Two and Four. It must be borne in mind that this study’s recourse to social trust-based governance is distinct from asserting that either *ubuntu* or the trust applied in isolation is the solution to governance and constitutionalism in Malawi. It is to the synthesis emerging through sublation and transculturation that the study relies on. This synthesis stands on two limbs; the one is informed by principles of the law of trust and the other is informed by values underlying the *ubuntu* philosophy.

In this Chapter, while postulating what can be done for governance and constitutionalism to improve in Malawi, examples from Malawi’s past will be used to highlight some missed opportunities. By demonstrating the applicability and relevance of social trust-based

governance and constitutionalism to the selected areas a broader case for the revitalisation of social trust-based governance and constitutionalism will also be made.

5.2 Recapturing the foundation: The law, public functionaries and social trust-based governance and constitutionalism in Malawi

Underlying the discussion in this Chapter is the desire to actualise the potential and hope embodied in the 1994 Constitution.¹ Although the Constitution asserts its relevance to the needs of the poor and vulnerable, there is need to take steps that can help actualise the promises in the Constitution. One must recall that the basal premise of the 1994 Constitution is that the locus of power would shift and be located within the people.² In the new constitutional order the state is supposed to exercise its power as a trustee, implying that it is bound to follow the same pattern of regulation and guidance as that which ordinarily influences a trustee's exercise of power.³ The Constitution remains key to the creation of a new political and social order.⁴

Connected to the above, it is apt to note that the empowerment of the populace is a recurrent theme under the Constitution. The creation of a framework where meaningful empowerment of the populace can take place, however, remains a challenge. This study has so far argued that a strict adherence to the liberal democratic framework will not help in the fulfilment of the empowerment promise in the Constitution. This is why there is need to

¹ The transition to multi-partyism and the adoption of a new Constitution in Malawi, it is argued, came with the expectation of a new political dispensation based on the rule of law, respect for human rights, democracy, good governance and transparency and accountability – Malawi Law Commission “Constitutional institutions and other oversight bodies” (2006) 4 Discussion Paper No. 5. The drafters of the Constitution, it is also argued, envisaged a government whose central focus would not be controlling people but discharging its functions for the benefit of the people of Malawi in accordance with section 12 of the Constitution which is based on both the social contract and social trust – J Ansah “The 1994 Malawi Constitution and the role of the judiciary” 4 Paper presented at the First National Conference on Review of the Constitution, Capital Hotel, Lilongwe, Malawi 28-31 March 2006.

² FE Kanyongolo “The limits of liberal democratic constitutionalism in Malawi” in KM Phiri & KR Ross (eds) *Democratisation in Malawi: A stocktaking* (1998) 353.

³ Section 12 Constitution of the Republic of Malawi. See, also, R Kasambara “Constitutionalism and democratic accountability during the multiparty decade in Malawi: Challenges and opportunities for the civil society” Paper presented at a workshop on *Constitutionalism and democratic accountability in Malawi and South Africa: Ten years after change* Blantyre 12-13 July 2003 and G Kamchedzera & CMU Banda “‘We are people too’: The right to development, the quality of rural life, and the performance of legislative duties during Malawi’s first five years of multiparty politics” Research Dissemination Seminar Number Law/2001-2002/001, <<http://www.sarpn.org.za/documents/d0001966/index.php>> (Accessed 20 May 2008).

⁴ J Banda “The constitutional change debate of 1993-1995” in KM Phiri & KR Ross (eds) (note 2 above) 320.

infuse the liberal framework with norms from indigenous Malawian traditions. In spite of the dominance of liberal democratic ideals in the Constitution, social contract-based discourse has proven incapable of bringing about a better society in Malawi.⁵ The way forward, it is argued, is to head the entreaties for a post-liberal, transformative and imaginative reading of the Constitution.⁶ It is important to bear in mind that a timorous and unimaginative approach to understanding a constitution renders it a stale and sterile document.⁷

The way forward, therefore, involves the re-imagination and reconstruction of the framework for constitutionalism in Malawi and, arguably, other African countries, if constitutionalism and governance are to take root.⁸ It is acutely important to remember that constitutionalism is often the end product of social, economic, cultural and political progress and can only become an established tradition if it forms part of a shared history of the people.⁹ It is thus important in attempting to garner constitutionalism and good governance to build on values that are commonly accepted in particular societies. The pursuit of democratic governance and constitutionalism must remain a priority in any polity because the progress that may be achieved over a few years is not irreversible.¹⁰ There must be vigilance to preserve and consolidate the gains that are achieved along the way. A willingness to learn from past failures remains a central premise in the discussion below.

5.3 The relationship between the branches of government in Malawi

It is important to note that the executive, judiciary and legislature are all creations of the Constitution. All these organs, therefore, must be regulated and governed by the authority of the Constitution.¹¹ As was noted earlier, all persons engaged in discharging duties in any of the three branches of government are fiduciaries. The intensity of the fiduciary obligations

⁵ G Kamchedzera in J Lewis & others (eds) *Human rights and the making of constitutions: Malawi, Kenya, Uganda* (1995) 28 29.

⁶ K Klare "Legal culture and transformative constitutionalism" (1998) 14 (1) *South African Journal on Human Rights* 146. This can be based on sections 12 and 13 Constitution of the Republic of Malawi.

⁷ *Julius Ishengoma Francis Ndyababo v Attorney-General* Per Samatta CJ (quoting Justice EO Ayoola former Chief Justice of The Gambia) (2002) AHRLR 243 249 (Tz 2002).

⁸ IG Shivji "State and constitutionalism: A new democratic perspective" in IG Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 27 33.

⁹ HWO Okoth-Ogendo "Constitutions without constitutionalism: Reflections on an African Paradox" in IG Shivji (ed) (as above) 3 21.

¹⁰ J Hatchard & others *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspective* (2004) 26.

¹¹ Section 4 Constitution of the Republic of Malawi.

relevant to a particular public functionary, however, will vary depending on the position that one occupies and the duties that the position creates.¹² As a matter of fact, some positions in government may be fiduciary only as to some but not all of their aspects.¹³ It is important to note that while all fiduciaries are not compelled to serve against their will, once they have assumed a position of trust the law will not consciously lower the obligations that they owe their beneficiaries.¹⁴ It is from this perspective that the assessment of the relationship between the branches of government is conducted in this Chapter. This study accepts that the most fundamental fiduciary relationship is that which exists between the citizenry and the state and its agencies.¹⁵

The central purpose of a constitution must be the facilitation of good governance.¹⁶ While this is the case, it must be conceded that constitutions are, generally, very susceptible to abuse. This is because the very people that are entrusted with the responsibility for protecting the constitution have the greatest motivation for breaching it. It thus behoves everyone in a country to safeguard the principles that the constitution stands for even though the branches of government bear a special responsibility in ensuring that a constitution is observed and respected. As Erasmus put it:¹⁷

It is up to a nation to protect the fundamental principles and institutions in terms of which it wants to be governed. This requires care and a sober and honest assessment of all facets of political life. It also brings special responsibilities for all branches of government and those institutions tasked with the duty to implement specific rules against abuse of power.

In considering the relationship between the branches of government in Malawi, one notes that the Constitution embodies the concept of separation of powers.¹⁸ The overriding theme

¹² AW Scott "The fiduciary principle" (1949) 37 (4) *California Law Review* 539 541 and *NZ Netherlands Society Oranje Inc v Kuys* (1973) 2 All ER 1222; (1973) 1 WLR 1126.

¹³ This means that labelling public functionaries as fiduciaries does not necessarily import all the incidents of a private trust and such classification should not generate apprehension. One cannot thus use the 'trust in a higher sense' label to shield all public functionaries from fiduciary regulation.

¹⁴ *Meinhard v Salmon* (1928) 249 N.Y 458, Per Cardozo.

¹⁵ PD Finn "The forgotten 'trust': The people and the state" in M Cope (ed) *Equity: Issues and trends* (1995) 131.

¹⁶ AP Mutharika "Towards a more manageable constitution" 3-4 Remarks made at the National Constitutional Review Conference, Capital Hotel, Lilongwe, 28-31 March 2006.

¹⁷ G Erasmus "The bill of rights: Human rights under the Malawi Constitution" Constitution Review Conference, Capital Hotel, Lilongwe, 28-31 March 2006.

¹⁸ Sections 7, 8 and 9 Constitution of the Republic of Malawi provide for the separate status, duty and functions of the executive, legislature and judiciary respectively. The Malawi

that underlies the Constitution, however, is that of constitutional supremacy.¹⁹ The Constitution also harps on the need for accountability on the part of the state in the performance of its duties.²⁰ Although the Constitution recognises the concept of separation of powers, the very essence of checks and balances is such that the branches of government cannot be perceived as operating in isolation from each other. A considerable degree of overlap is necessarily present in the practical operation of the branches of government. The courts in Malawi have accepted that the relationship between the branches of government is one of co-equal entities whose powers are separate and independent of each other at the operational level.²¹

It is important to note that the basic institutions for democratisation and constitutionalism are mostly in place in Malawi.²² It is the degree to which these institutions actually function which requires re-examination. Available evidence suggests that the real problem lies with a majority of the public functionaries in the country who seem determined to circumvent and subvert the rules on which the system is supposed to operate.²³ While, at this level, the problem may not be with the law itself, this study contends that the law can play a central role in rectifying this situation. As argued in Chapter Four, the desire to circumvent constitutionally established principles could be attributable, in part, to the failure by the public functionaries to identify with the stipulations in the Constitution. It is as a result of the glaring divergences between the constitutional stipulations and the governance practice that attention ought to be paid to the relationship between the branches of government. It is hoped that a heightened scrutiny, aside from identifying weaknesses in the system, can form

Supreme Court of Appeal has affirmed the fact that the concept of separation of powers underlies Malawi's democracy – *Attorney General v Fred Nseula and others* MSCA Civil Appeal No. 18 of 1996.

¹⁹ *The State and the Speaker of the National Assembly and others Ex Parte Mary Nangwale* Misc. Civil Cause No. 1 of 2005 8-9 and *Maggie Nathebe v The Republic* Misc. Criminal Application No. 90 of 1997 Per Mwaungulu J.

²⁰ Sections 12 and 13 Constitution of the Republic of Malawi and G Kamchedzera & CMU Banda "Dignified rural living, the right to development, multiparty politics and legislation in Malawi" (2009) 25 (1) *South African Journal on Human Rights* 73 75.

²¹ L Chikopa "The role of the judiciary in promoting constitutionalism, democracy, economic growth and development in Sub-Saharan Africa: The Malawi experience" <http://www.kas.de/proj/home/events/104/5/veranstaltung_id-26377/index.html> (Accessed 9 July 2009). See, also, *Attorney General v Masauli (representing himself and members of MCP)* MSCA Civil Appeal No. 28 of 1998 (Being High Court Civil Cause No.36 of 1997).

²² R Ellett *Emerging judicial power in transitional democracies: Malawi, Tanzania, Uganda* (2008) Doctor of Philosophy Dissertation, North Eastern University 279-280.

²³ N Patel & A Tostensen "Parliamentary-Executive relations in Malawi 1994-2004" 16 CMI Working Paper 2006:10.

a basis for generating appropriate interventions. It must be recalled that a constitution is merely an enabling framework and its ideals must be imbued to the management of government structures if its promises are to be translated into reality. The law could, if judiciously developed and applied, provide the prodding required to transform constitutional ideals into reality.

5.3.1 The executive in Malawi

Although the term ‘government’ is often conflated with the executive, it is proper to acknowledge that ‘government’ more aptly refers to the three branches of government working together.²⁴ The interrelationship between the three branches is fundamentally important for governance and constitutionalism. That said, one immediately notes that the executive is given very extensive powers by the Constitution. It is arguable that the common conflation of the ‘government’ with the executive may be as a result of the heightened visibility of the powers of the executive as compared to the other branches. It is not the purpose of the discussion here to dissect the functions that the Constitution confers on the executive. Suffice it to point out that the powers vested in the executive create opportunities for the executive to stultify the other branches of government.²⁵ The discussion here will focus on three aspects and these are: the supervisory role of the executive; accountability and transparency; and the management of the budget process. A discussion along these lines should shed light on the opportunities for improving governance and constitutionalism in Malawi especially by utilising the social trust-based framework.

5.3.1.1 The supervisory role of the executive

The executive is charged with the initiation of policies and legislation and the implementation of all laws which embody the express wishes of the people of Malawi and which promote the principles contained in the Constitution.²⁶ This confers a solemn obligation that the executive must consciously bear in all its activities. Centrally, this obligation requires that the executive adequately embody the wishes of the people of Malawi and also work to further the

²⁴ See, for example, the following comments “It is therefore trite to observe, that the term Government refers to the Executive arm or organ of the State whose functions are defined in s. 7 of the Constitution” - Per Justice Twea *Malawi Law Society and others v The State and the President and others* Misc. Civil Cause No. 78 of 2002 .

²⁵ J Hatchard (note 10 above) 57-58 and R Hajat “Enhancing the sanctity of the Constitution in Malawi” Constitution Review Conference, Capital Hotel, Lilongwe 28-31 March 2006.

²⁶ Section 7 Constitution of the Republic of Malawi. A recent study has, however, demonstrated that the State has not been consistent in discharging its duty to initiate legislation that is designed to improve the quality of life in Malawi – G Kamchedzera & CMU Banda (note 20 above) 73.

principles on which the Constitution is founded. All acts of the executive, as well as the legislature and the judiciary, are subject to the dictates of the Constitution.²⁷ The fact that the executive is entrusted with the implementation of all laws that embody the express wishes of the people, together with the enormous powers that the Constitution confers on the executive, places the executive in a unique position to supervise the implementation of all laws and policies. This supervisory function necessarily involves the executive discharging oversight functions over agencies that directly fall under it but also, where legal competence allows, agencies that may fall within the ambit of the legislature and judiciary. The express reference in section 8 of the Constitution to the wishes of the Malawian people and the need to further the principles of the Constitution highlights the fiduciary nature of the powers that are conferred on the executive. The power that is conferred on the executive is conferred with clear conditionalities and these are most manifest in sections 12 and 13 of the Constitution,²⁸ as a starting point. In the exercise of these powers, therefore, the executive must bear in mind the rules of fiduciary regulation. The social trust-based model can thus, at this level, be utilised to provide the conceptual foundation for determining the manner in which governmental authority must be used. The social trust-based framework can be utilised in constructing the philosophy that determines the way in which powers of government must be utilised in Malawi.

The Constitution makes the President the head of the executive with the duty to lead the observance of the Constitution.²⁹ The office of the President comes with enormous responsibility especially in the light of the extensive powers that the Constitution invests in the Presidency. By way of a quick demonstration of the expansiveness of the powers of the presidency, one notes that the Presidency is given the power to determine the tenure of several constitutional and statutory offices. Among such offices are, the Office of the Director of Public Procurement,³⁰ the Director of Public Prosecutions,³¹ the Attorney

²⁷ For example “In this respect we accept the arguments and the views of both the applicants and the respondent that the Constitution is supreme and sets the standard against which all acts and actions of government must be tested and judged.” - Per Justice Twea *The State and the Electoral Commission Ex Parte Bakili Muluzi* Constitutional Civil Cause No. 2 of 2009 (Being Miscellaneous Civil Cause No. 36 of 2009).

²⁸ See, Chapters One and Two of this study on how and why sections 12 and 13 make the government a fiduciary.

²⁹ See, section 88(1) of the Constitution and per Justice Twea *Malawi Law Society and others v The State and the President and others* (note 24 above).

³⁰ See, for example, section 6 of the Public Procurement Act, No. 8 of 2003.

³¹ See, section 102 Constitution of the Republic of Malawi.

General³² and the Director of the Anti-Corruption Bureau.³³ Holders of all these offices may be removed from office by presidential directive if, for example, the President deems the incumbent to be incompetent or incapable of performing the duties of the office.³⁴ In the exercise of these very wide powers the presidency could benefit from social trust-based regulation.³⁵ The result would be, for example, in terms of removal of people from office, the presidency would have to forfeit political expediency and genuinely factor the interests of the citizenry into the decision making process. The social trust-based framework would support such a position by the President in the same manner that fiduciary law obligates a fiduciary to prioritise the interests of the beneficiaries over all other interests. It must be recalled, from Chapter Four, that even though rulers in traditional Africa, nominally, had extensive powers, these were, generally, never used to oppress their people. Such rulers still consulted before making decisions and strove to use their powers to further the interests of their people.

The strong presidency in Malawi urges a serious and deliberate respect for the constitutional boundaries between the branches of government especially on the part of the executive. As the Malawi Law Commission has noted, the executive retains the greatest propensity to overstep its constitutional boundaries.³⁶ A critical analysis of the Constitution also reveals a decidedly clear tilt in favour of the executive in its relations with the other branches of government especially the legislature.³⁷ This has resulted in a subordination of the legislature to the executive and has significant implications for governance and constitutionalism one of which is the stultification of parliamentary oversight of the executive. While actual experiences in the executive/legislative relations in Malawi are a real source of concern,³⁸ such concerns would significantly be reduced if the executive discharged its

³² See, section 98(6) Constitution of the Republic of Malawi.

³³ Section 6 Corrupt Practices Act Chapter 7:04 Laws of Malawi.

³⁴ Examples of previous office holders who have been removed on a presidential directive include former Attorney General, Ralph Kasambara; former Director of Public Prosecution, Ishmael Wadi and former Director of the Anti Corruption Bureau, Gustave Kaliwo.

³⁵ An initial starting point would be to recognise, as a supervening principle, that no power is absolute especially in the public realm. See, *Rookes Case* (1598) 5 Co Rep 99b 100a.

³⁶ Malawi Law Commission "The Constitution and the executive branch of government" (2006) 43 Discussion Paper No. 4. Hajat notes that "The Executive arm of Government, through overt and covert means, tends to infringe upon and abrogate the powers of the other two organs." – R Hajat (note 25 above). See, also, S Brown "Malawi: The trouble with democracy" (2000) 15 (4) *Southern Africa Report* 19 <<http://www.africafiles.org/article.asp?ID=3640>> (Accessed 3 May 2010.)

³⁷ N Patel & A Tostensen (note 23 above) 2.

³⁸ To properly appreciate the tension and dynamics of legislative-executive relations in Malawi see B Dulani & J Van Donge "A decade of legislative-executive squabble in Malawi, 1994 - 2004" in M Salih (ed) *African parliaments: Between government and governance* (2006) 201-

functions within its competence while being mindful and respectful of the competence of the other branches of government. To achieve this requires, at the least, an executive that is headed by a President who is mindful of the obligations in sections 12 and 13 of the Constitution, among others, and willing to govern according to the Constitution's stipulations.³⁹ This also requires the presence of an empowered populace that can demand that the executive always govern according to constitutional stipulations.

In its supervisory role the executive must act in an exemplary manner if it is to foster greater constitutional compliance among other government departments. One area in which the executive in Malawi could improve is its compliance with judicial decisions, especially those that seem to be adverse to its interests. While overall there has been remarkable compliance with judicial decisions by the executive it is also clear that in a number of significant instances the executive's non-compliance with judicial pronouncements was not due to excusable lapses but premeditated conduct.⁴⁰ It must be noted that an executive that leads the way in disobeying decisions that uphold the rule of law and other constitutional stipulations creates a lee-way for a constitutional and governance crisis. The importance of complying with judicial decisions by the executive is that it becomes a factor in fostering democratisation and constitutionalism.⁴¹ This would give the executive the moral and legal credibility for it to properly supervise other branches' compliance with the Constitution.

224 and N Patel & A Tostensen (note 23 above). The tension between the branches of government remains a constant threat to democratisation in Malawi – W Breytenbach & C Peters-Berries "Malawi has the struggle for democratic endurance just begun?" (2003) 33 (4) *Africa Insight* 71 72.

³⁹ The *ubuntu* inspired approach to governance requires that the President, like a good traditional leader, must act as a role model for the people. Leaders must thus be exemplary in their manifestation of *ubuntu* values – B Bujo "Springboards for modern African constitutions and development in African cultural traditions" in MF Murove (ed) *African ethics: An anthology of comparative and applied ethics* (2009) 391 394.

⁴⁰ FE Kanyongolo *Malawi: Justice sector and the rule of law* (2006) 52. See also *Malawi Law Society and others v The State and the President and others* (note 24 above) where police violently broke up a public demonstration in spite of a High Court order preventing them from doing so. This point was recently illustrated by the executive's non-compliance with the decision in *The State v The Speaker of the National Assembly Ex Parte JZU Tembo* Misc. Civil Cause No. 565 of 2009.

⁴¹ R Ellett (note 22 above) 335.

5.3.1.2 Accountability and transparency

The demand for accountability and transparency in the running of the government is very high among Malawians.⁴² It is thus important that the executive must always exude transparency and accountability in the performance of its duties. The need for transparency and accountability, it is argued, is more acute in countries like Malawi where the Constitution has created a very strong presidency. In such situations the likelihood of executive abuse is a real possibility. Principles of fiduciary management, which are reflected in some constitutional and statutory provisions, provide a unique basis for conceptualising and understanding accountability on the part of the executive. This is because fiduciary principles have as their central preoccupation the regulation of those individuals that have been entrusted with the performance of functions on behalf of others. To properly appreciate the need for accountability on the part of the executive one must bear in mind the fact that powers of public functionaries are distinct from powers of private persons.⁴³ This distinctness entails that while the discharge of private powers need not follow any specific principles and cannot be questioned, the discharge of public powers must always follow clear principles and must be imbued with transparency and accountability. Any use public powers that does not comply with the stipulations of law is liable to be questioned. Fidelity to the fiduciary principles and the framework outlined in Chapter Two would bring about greater transparency and accountability in the way powers of government are used. The social trust-based framework can centrally be utilised in monitoring all public functionaries thus subjecting them to very exacting standards in the discharge of their duties.

The Constitution and some statutes, while not couched in strict fiduciary language, already support the fiduciary regulation of public functionaries in Malawi. To enhance the transparency and accountability of the executive, therefore, the concern must be the activation of these existing avenues. For example, section 88A(1) of the Constitution requires that President and members of cabinet disclose all their assets, liabilities and business interests and also those of their spouses or any assets that are held on their behalf upon election or appointment. Such a declaration is supposed to be made in writing to the Speaker of the National Assembly within three months of election or appointment. Section 213 of the Constitution extends this obligation to Members of Parliament (MPs) and such other senior public officers as may be designated by an Act of parliament. The President and

⁴² S Khaila & C Chibwana "Ten years of democracy in Malawi: Are Malawians getting what they voted for?" Afrobarometer Working Paper No. 46 (2005) 13.

⁴³ W Wade & C Forsyth *Administrative law* (2004) 355.

members of cabinet are also prohibited from utilising their offices for personal gain or from placing themselves in positions where their interests may conflict with their duties.⁴⁴

The principles espoused in sections 88A(1) and 213 of the Constitution reflect a clear intention to subject the President, ministers, MPs and other public officers to fiduciary regulation. As in many other instances, the Malawian challenge has been to convert these constitutional principles into practically binding principles that are observed by the people concerned. Perhaps unsurprisingly, the requirement on declaration of assets has been more ignored than observed. The fact that there is no prescribed penalty for failure to disclose assets has also made the requirement largely redundant. Even more disheartening is the fact that parliament has yet to pass the legislation that was supposed to specify the further categories of public functionaries liable to disclosing their assets upon appointment or election into office.⁴⁵ Clearly, while there is a framework that is designed to enhance accountability on the part of members of the executive, this framework has no visible practical significance. It is important to note, in this connection, that the lack of discernible progress on declaration of assets is, arguably, not a reflection of the citizenry's position on the matter. One notes that the National Constitutional Conference of 1995⁴⁶ recommended the retention of provisions for declaration of assets and a similar sentiment was expressed during both the First National Constitution Conference in March 2006 and the Second National Constitution Conference in April 2007.⁴⁷ It is thus not farfetched to posit that the citizenry in Malawi expect their public functionaries to be constantly transparent and accountable in the performance of their duties.⁴⁸

Accountability and transparency on the part of the executive, however, extends beyond the declaration of assets by public functionaries. As earlier noted, corruption remains the most

⁴⁴ Section 88A (3) Constitution of the Republic of Malawi.

⁴⁵ Both section 88A and 213 of the Constitution proceed on the assumption that parliament will, at a later date, pass legislation expounding on the framework for asset declaration in Malawi. The Malawi Law Commission has since started work on legislation for asset declaration.

⁴⁶ Government of Malawi "Report of the Constitution Committee to the National Assembly on the National Constitutional Conference on the Provisional Constitution" held in Lilongwe' 20-24 February 1995, 62

⁴⁷ Malawi Law Commission "The report of the law commission on the review of the Constitution" (2007) 120-124. In reference to the debates preceding the adoption of the Constitution and debates during the constitutional review processes I am mindful of the fact that the Malawi Supreme Court of Appeal has urged caution in consulting external aids to constitutional interpretation – *Gwanda Chakuamba and others* Civil Appeal No. 20 of 2000 and *The State and Electoral Commission Ex Parte Bakili Muluzi and UDF* (note 27 above).

⁴⁸ This was confirmed by, for example, S Khaila & C Chibwana (note 42 above) 13.

significant blight on government business in Malawi⁴⁹ – again, this is not to suggest that corruption is the only blot on governance and constitutionalism in Malawi.⁵⁰ Lack of transparency and accountability on the part of the executive creates an environment in which corruption thrives.⁵¹ While the causes of corruption in Malawi remain numerous, Englund has convincingly argued that most of the executive’s excesses are a manifestation of the failure of the ‘paraphernalia of liberal democracy’ to curb neo-patrimonialism and greed.⁵² Part of the problem with the executive’s accountability and transparency arises from the fact that most public functionaries seem to have prioritised their accountability to their political and bureaucratic superiors and not the citizenry.⁵³ This seems to be the case even over matters that directly affect the citizenry. As Kamchedzera and Banda note, public functionaries’ accountability to rights holders remains weak, neglected and a missing link in Malawi’s democracy.⁵⁴ For example, the Constitution speaks of accountability of ministers to the President and neglects to make any mention of their accountability to right holders.⁵⁵ Fiduciary regulation, however, demands that public functionaries must be fully accountable to the citizenry who are the beneficiaries of the fiduciary relationship. Public functionaries must thus primarily be accountable to their constituents and not their political superiors. More worrying, however, have been accusations about the executive instigating the perpetration of corrupt practices especially in the context of canvassing votes for elections.⁵⁶ This practice, unfortunately, stifles Malawi’s democracy by distorting electoral competition.

⁴⁹ See, Chapter Three of this study.

⁵⁰ See, for example, Millennium Consulting Group *Malawi: Governance and corruption baseline survey* (2006) 5-6.

⁵¹ As to some persistent challenges in the fight against corruption, see D Madise “Challenges in the fight against corruption in Malawi” <<http://www.uneca.org/dpmd/events/corruption/Malawi.pdf>> (Accessed 31 May 2010) and I Kamanga “Combating corruption: Challenges in the Malawi legal system” <http://www.unafei.or.jp/english/pdf/PDF_rms/no76/18_p153-159.pdf> (Accessed 9 August 2010).

⁵² H Englund “Winning elections, losing legitimacy: Multipartyism and the neo-patrimonial state in Malawi” in M Cowen & L Laakso (eds) *Multiparty elections in Africa* (2002) 172 175. For comments on neo-patrimonialism see footnote 127 in Chapter One of this study.

⁵³ G Kamchedzera & CMU Banda (note 3 above) 31. Finn argues that this anomaly is recurrent in most liberal democracies and it often distorts proper understanding of the constitutional position and obligation of public servant – P Finn “Public trust and public accountability” (1994) 3 (2) *Griffith Law Review* 224 242.

⁵⁴ G Kamchedzera & CMU Banda (note 20 above) 98.

⁵⁵ Section 97 of the Constitution directs that ministers shall be responsible to the President. An immediate contrast is section 51 of the Constitution of Zambia, as amended by Act No. 18 of 1996 which requires ministers to be accountable to the National Assembly.

⁵⁶ R Ellett (note 22 above) 272.

Strictly speaking, therefore, the failures with regard to accountability and transparency on the part of the executive are not as a result of the total non-existence of regulatory standards. While the existing standards may not cover all situations in which shortcomings are apparent, it is arguable that a more committed observance of the existing rules may generate more accountability and transparency.⁵⁷ For example, the Corrupt Practices Act⁵⁸ makes provisions for combating corruption along terms that are styled on the fiduciary model that this study supports. The underlying theme of the Corrupt Practices Act is that a person should not utilise one's office to acquire a personal benefit. For example, under section 24 it is an offence for a public officer to, among others, corruptly solicit, accept or obtain any advantage or inducement for doing or forbearing to do anything that relates to a public office. Under section 25C public officers who disclose information relating to public contracts before such information is in the public domain are also guilty of an offence.⁵⁹ As recognised in *The State v Sam Mpasu*,⁶⁰ public functionaries who abuse the powers vested in their offices fundamentally breach section 12 of the Constitution which confers authority to public officers on trust for the citizenry. A breach of the fiduciary obligations inherent in section 12 of the Constitution and other laws should activate the whole range of fiduciary remedies and in the process enhance transparency and accountability.

The need to ensure accountability on the part of the executive is also evident in the procedures for removal of a President by way of impeachment under section 86 of the Constitution. It is arguable that the unanimity of opinion on the retention of provisions pertaining to the impeachment of the President has been motivated by the desire to preserve a mechanism for ensuring accountability of the President.⁶¹ The removal of a President by way of impeachment is a direct parallel of the removal of a trustee for breach of trust and it allows the citizenry to hold the President accountable where the President has been guilty of

⁵⁷ As to why it is in interests of the executive to ensure a more committed observance of the Constitution and other legal rules, see EP Thompson *Whigs and hunters: The origin of the Black Act* (1975) 258-269 and D Hay "Property, authority and the criminal law" in D Hay & others (eds) *Albion's fatal tree: Crime and society in Eighteenth-Century England* (1975) 17-63.

⁵⁸ Chapter 7:04 Laws of Malawi.

⁵⁹ The Corrupt Practices (Prohibition of abuse of information obtained in official capacity) Regulations provide further detail to the restriction.

⁶⁰ *The State v Sam Mpasu* Criminal Case No. 17 of 2005, Lilongwe Chief Resident Magistrate's Court Judgment on sentence 8 April 2008

⁶¹ The 1995 Constitution Review Conference recommended the retention of impeachment provisions (note 46 above) 10. A similar recommendation was reiterated during the 2007 consultations for the review of the Constitution – see (note 47 above) 86 87.

serious violations of the Constitution. It is also similar to the practice that traditional African societies used to discipline rulers that consistently made decisions inimical to the community's interests.⁶² It thus remains important for the National Assembly to develop guidelines for the proper utilisation of the procedure under section 86 of the Constitution.⁶³ The presence of provisions embodying a clear procedure for impeachment would act as a spur in generating a more diligent discharge of duties by the President. The overwhelming opinion, in so far as can be discerned from the Constitution review process, strongly suggests that Malawians are aware and want the President to remain accountable to the populace.⁶⁴

5.3.1.3 Management of the budget process⁶⁵

Government expenditure is principally controlled by the executive. It is the executive, primarily, that determines how the various government departments must be funded in a specific year.⁶⁶ The executive allocates funds by presenting an Appropriation Bill to the National Assembly, which may either pass it as proposed by the executive or after making amendments. The Appropriation Act, which the executive must ensure is passed every year, is also known as the national budget or simply the budget. It is said that⁶⁷

[b]udget processes across the world share four common purposes: To review past performance; mobilise and allocate resources; provide for financial management and accountability; and to act as a platform for introducing new policies. The budget process should determine the distribution of – and who benefits from - limited resources. The budget is, therefore, inherently a political process determined by political power, both formal and informal with winners and losers.

⁶² See the discussion in Chapter Four of this study.

⁶³ While section 86 of the Constitution allows for the impeachment of the President it is notable that the provision does not provide detail as to how this must be effected. This lack of detail contributed very much to the confusion and eventual stalling of the attempt to impeach Bingu wa Mutharika in 2005.

⁶⁴ See, Government of Malawi (note 45 above) 10 and Malawi Law Commission (note 46 above) 86.

⁶⁵ The discussion under this heading is connected to the discussion on public resource management under Part 5.4 in this Chapter.

⁶⁶ This duty is discharged in close conjunction with parliament – See Chapter XVIII of the Constitution. Chapter XVIII is supplemented by the Public Finance Management Act, No. 7 of 2003.

⁶⁷ CMI “The budget as theatre – the formal and informal institutional makings of the budget process in Malawi” Final Report July 2004 <<http://www.cmi.no/publications/publication/?1928=the-budget-as-theatre-the-formal-and-informal>> (Accessed 9 July 2009)

The budget can give a clear indication of a particular government's priorities by looking at the manner in which national resources have been allocated, both in the past and in terms of future expenditure projections. Importantly, it is the processes that are followed by the executive in formulating the Appropriation Act that remain centrally important if the budget must reflect and address the real needs of the citizenry.

The executive owes the citizenry two principal duties in relation to the Appropriation Act.⁶⁸ Firstly, it must fully involve the citizenry in the formulation of the Appropriation Act. In Malawi, in spite of statutory safeguards to ensure citizenry participation in the formulation of the budget, the citizenry remains marginalised in the budget formulation process.⁶⁹ Notably, there is a general lack of transparency in the pre-budget consultations especially in so far as it involves the ordinary citizens.⁷⁰ The forms of pre-budget consultation that are currently legally recognised seem to be designed to facilitate conversation between government departments rather than with the citizenry.⁷¹ One also notes that parliament has extended the practice of waiving the notice period before a bill is debated to the Appropriation Act.⁷² While parliament can legitimately waive the period of notice before a bill is actually debated under Standing Order 117, it is the frequency of resort to such waivers that is worrying. Even more, such waivers are often at the instance of the executive and where what is at issue is as complex as the national budget it is doubtful whether full consultation over the budget is facilitated during the abridged period. It must constantly be borne in mind that for a legislature to be effective in checking the executive adequate time is needed to study policy proposals and bills and to prepare for debate.⁷³ The overall result in this regard is that the budget making process is routinely compromised by informal factors that sometimes run

⁶⁸ These duties foundationally stem from the terms of section 7 Constitution of the Republic of Malawi.

⁶⁹ The statutory safeguards are contained in the Public Finance Management Act, Public Audit Act, No. 6 of 2003 and Public Procurement Act. These statutes were enacted in 2003 following recommendations by the World Bank-led Country Financial Accountability Assessment – CMI (note 65 above).

⁷⁰ Malawi Economic Justice Network *The peoples manifesto: Elections 2009*.

⁷¹ See, for example, section 21 of the Public Finance Act which directs the minister of finance to present estimates to cabinet at least 14 days before presenting them to the National Assembly.

⁷² N Patel & A Tostensen (note 23 above) 13.

⁷³ As above. Parliamentarians interviewed took the view that while some waivers were acceptable in a democratic dispensation other waivers seemed to be 'sinister'. It was suspected that the executive deliberately created situations of urgency so that bills could be passed through parliament without adequate scrutiny and proper debate.

counter to the formal requirements.⁷⁴ To change this situation does not require monumental interventions. For example, the executive merely need create more avenues for consultations in drawing up the budget. Avenues that move the consultation beyond the inter-departmental consultation that dominates the process at the moment. This amounts to no more than reviving the process of consultation, which this study has already demonstrated, permeated and still permeates traditional Malawian societies.

The second duty that the executive owes is to create sufficient mechanisms for the citizenry to monitor the implementation of the budget. Once the Appropriation Act is passed, the executive must ensure that the citizenry have sufficient means to monitor its implementation. Monitoring helps to ensure that the government spends funds in line with the approval given by parliament. Again, one notes that the safeguards contained in the Public Finance Management Act,⁷⁵ for example, are designed more to facilitate intra-governmental monitoring than monitoring by the populace. At the same time it is axiomatic to note that the inclusion of an item in the Appropriation Act creates an obligation on the executive to disburse the funds allocated to such an activity.⁷⁶ Clearly, to ensure that there is sufficient transparency, full citizenry participation and clear mechanisms for monitoring the budget process, there is need to work on ways to enable the bureaucrats in the executive to recast their roles from bureaucrats to trustees.⁷⁷ Hopefully, when their conception of their job changes, and with it their understanding of the duty and trust their position holds, the bureaucrats may carry out their duties in a revised manner. Such a change in perception is likely to improve the performance of the executive not only in relation to the budget process but also to the performance of its various constitutional duties.

In relation to the failures by the executive to facilitate public involvement in the formulation of the national budget and also in the supervision of its implementation, research suggests that this may be as a result of the manner in which the 'new' standards in public finance management were developed.⁷⁸ While the Public Finance Management Act, the Public Audit Act and the Public Procurement Act clearly evidence a shift of perspective in relation to the

⁷⁴ CMI (note 67 above) 5.

⁷⁵ Act No. 7 of 2003.

⁷⁶ *The State and The Minister of Finance Ex Parte Bazuka Mhango and others* Misc. Civil Cause No. 163 of 2008 (HC) (Mzuzu District Registry) 22-25

⁷⁷ MC Wood "Advancing the sovereign trust of government to safeguard the environment for present and future generations (Part II): Instilling a fiduciary obligation in governance" (2009) *Environmental Law* 91 130.

⁷⁸ CMI (note 67 above).

management of public finances in Malawi, the government has been very slow in giving effect to these enactments. It is notable that the revised framework on public finance in Malawi was driven by donor influence. The ‘donor-ownership’ of the public finance reform initiative has, unwittingly, deprived it of legitimacy and credibility. As has been noted ‘[w]hile technically sound and feasible ... these donor initiatives are not seen as legitimate by the government.’⁷⁹ The government signs up to the various reform agendas merely because it is under pressure to identify new sources of funding but with no ingrained commitment to abide by the reform agenda. This reiterates the need to have reform that is truly owned by the populace and driven from the base upwards, as this study has emphasized through-out. It would be much easier to generate acceptance for standards in the public finance realm where these standards can be identified as having been established under local impetus.

5.3.2 The legislature

The legislature is a crucial component in any democratic society and it is essential in ensuring the rule of law and protection of human rights.⁸⁰ Barker argues that by virtue of the doctrine of separation of powers, the legislature is the body that is intended to curb the excesses of executive power, call public officers to account and also prevent the enactment of unjust laws.⁸¹ Where a parliament fails to discharge these responsibilities corruption and misconduct among government officials thrive.⁸² Evidently, among the principal tasks of a legislature are the conversion of peoples’ will into law and also controlling the executive and the public administration, generally.⁸³ The legislature is uniquely positioned to allow citizenry participation in government business as it is composed of peoples’ representatives.⁸⁴ Through parliaments, the citizenry can have a say in the manner in which government exercises its powers and thus actualise the promise of democratic participation. In modern day societies, it must be stated, parliament comes closest to embodying a forum for

⁷⁹ As above.

⁸⁰ *Parliament: Guardian of human rights international parliamentary union* (1993) 5. For attributes that a parliament must possess to be legitimate, see Inter-Parliamentary Symposium “Parliament: Guardian of human rights” Budapest, Hungary, 19-22 May 1993 <<http://www.ipu.org/splz-e/budapest.htm>> (Accessed 7 July 2010).

⁸¹ ML Barker “Accountability to the public: Travelling beyond the myth” in PD Finn (ed) *Essays on law and government: Principles and Values* (1995) 228 239.

⁸² As above.

⁸³ CMI (note 67 above).

⁸⁴ *The State and the President of the Republic of Malawi and others Ex Parte Malawi Law Society* (note 24 above) 16-17. Concededly the representatives in parliament represent different constituencies in the country. However, a proper discharge of the representational function should allow parliamentarians to know when to prioritise the national interest.

consultation over matters of national interest in the same way that traditional societies would hold council to deliberate communal issues. In the discharge of its functions, therefore, parliament could also look to the values underlying *ubuntu* for inspiration. While parliament's roles in relation to governance and constitutionalism are diverse, the discussion herein will focus on the following areas:⁸⁵ parliament's oversight of the executive; parliament's representational role; and the role of parliament in budgetary supervision.

5.3.2.1 Oversight over the executive

Parliament's oversight role with regard to the executive's activities covers diverse areas. It may, for example, relate to oversight over public spending or oversight in relation to the passage of legislation.⁸⁶ Various mechanisms may also be employed to achieve the oversight. Parliament's oversight with regard to public spending is discussed separately under 5.3.2.3 and this section will focus on other forms of oversight over the executive.

The Constitution confers all legislative powers on the National Assembly.⁸⁷ With respect to its powers to pass legislation the National Assembly cannot effect an illegal delegation of its powers.⁸⁸ This means that while the executive has the responsibility of initiating laws and policy, it must invariably seek parliamentary approval before its proposals can acquire the imprimatur of legality. It is during this process of validating executive proposals that parliament acquires relevance for the purposes of overseeing the executive. Legislative oversight over the executive can be achieved in three ways: parliamentary questions, parliamentary debates and parliamentary committees.⁸⁹ Importantly, section 8 of the Constitution directs that the legislature must, in enacting laws and conducting its deliberations, reflect the interests of all the people of Malawi and further the values explicit or

⁸⁵ These areas are chosen merely by way of illustration. De Klerk, for example, sums up the problems with parliament in Malawi thus: 'Parliament has been criticised for its failure to perform its parliamentary functions. It has also been criticised for failing to maintain democratic structures amid allegations of a limited separation of powers. A lack of transparency and accountability, a failure to reinstate the senate, and the removal of the recall provision...' B de Klerk "Is the face of democracy changing in Malawi?" (2002) 4 *Conflict Trends* 15 16.

⁸⁶ J Hatchard & others (note 10 above) 130-138.

⁸⁷ Section 48 Constitution of the Republic of Malawi. Technically, it is the National Assembly and the President as Head of State that make up parliament – section 49 Constitution of the Republic of Malawi.

⁸⁸ A permissible exception is the power to pass subsidiary legislation which may be delegated to the judiciary or the executive - Section 58(2) Constitution of the Republic of Malawi. See also *The State and the President of the Republic of Malawi and others Ex Parte Malawi Law Society* (note 24 above) 8.

⁸⁹ J Hatchard & others (note 10 above) 131-133.

implicit in the Constitution. The effect of section 8, this study contends, is to confer a solemn fiduciary obligation on the legislature in the way in which it performs its functions. The powers that the Constitution has conferred on the legislature must thus be exercised to preserve and promote the interests of the people of Malawi.

While it is evident that parliament in Malawi does engage in parliamentary questions, parliamentary debates and also has parliamentary committees, the dominance of the executive tends to dilute the oversight role of parliament.⁹⁰ The constitutional scheme obtaining in Malawi necessarily means that parliament is often overshadowed by the executive.⁹¹ This, however, does not mean that parliament should abdicate its oversight functions. At the same time, however, it must be noted that in spite of the available opportunities ‘the two democratic parliaments [have] not distinguished themselves in legislative initiatives or penetrating oversight of the executive.’⁹² The same is true of the Third Democratic Parliament which seemed to be more preoccupied with partisan squabbling than overseeing the executive. While it is still early to pass judgment on the Fourth Democratic Parliament it is clear that the ruling party’s overwhelming dominance in parliament is working to negate parliamentary scrutiny of executive action.⁹³

Parliament’s oversight role has also been perpetually hamstrung by parliamentarians’ prioritisation of partisan interests over the national interest.⁹⁴ The machinations of party politics within the National Assembly have constantly undermined any democratic credentials that the National Assembly may otherwise have claimed. The prioritisation of partisan interests over national interests was recently manifested by parliament’s refusal to

⁹⁰ For parliamentary committees, see Part XXXI of the Standing Orders and section 56(7) Constitution of the Republic of Malawi and for parliamentary question time see Part XXI Standing Orders and section 89(4) Constitution of the Republic of Malawi.

⁹¹ N Patel & A Tostensen (note 23 above) 4.

⁹² B Dulani & J Van Donge (note 38 above) 203.

⁹³ In the 2009 General Elections the Democratic Progressive Party (DPP) secured 113 seats out of the 192 available seats. The largest opposition party, the Malawi Congress Party (MCP) secured 27 seats. The DPP’s presidential candidate got 66.17% of the national votes and his closest rival got 30.49% - <<http://www.eisa.org.za/WEP/mal2009results2.htm>> (Accessed 25 May 2010). This the first time since 1994 that a political party has managed to secure such an overwhelming majority in parliament as well as for a presidential candidate to secure almost two-thirds of the national vote.

⁹⁴ See, NS Khembo “The constitution, constitutionalism and democracy in Malawi: The reign of a parliamentary oligarchy” in AG Nhlema (ed) *The quest for peace in Africa: Transformations, democracy and public policy* (2004) 269. This dilemma also brings to the fore the complexities of the concept of representation especially the question of mandate independence – HF Pitkin *The concept of representation* (1967).

pass the national budget on time in two successive years.⁹⁵ It is notable that the reason for the stalemate in parliament was the disagreement between the political parties on whether the Speaker of the National Assembly should declare vacant seats of certain members that had purportedly crossed the floor. On the two occasions earlier referred to, parliament remained unmoved even in the face of widespread public protests for it to convene and discuss the national budget. The position adopted by the majority of the parliamentarians on this occasion clearly did not accord with the direction provided in section 8 of the Constitution for it disregarded the fact that parliament exists to promote the interests of the citizenry. The parliamentarians' conduct clearly undermined the fiduciary core of their positions.⁹⁶

In spite of the factionalism that has largely negated parliament's potential with respect to its oversight role, it is important to note that there still exist several opportunities that may be utilised to develop parliament's oversight role. Firstly, parliament is mandated to summon the President to answer questions about the performance of the executive.⁹⁷ This is an avenue through which the peoples' representatives can question and interrogate government policy. Secondly, parliament is uniquely empowered to oversee executive spending through the avenues created by the Public Audit Act⁹⁸ and the office of the Auditor General.⁹⁹ The Public Audit Act was passed to 'give effect to the principle of the accountability of the Government to the public through the National Assembly.'¹⁰⁰ The Auditor General is given extensive powers under the Public Audit Act to conduct audits of public institutions and report to the National Assembly.¹⁰¹ Ideally, the National Assembly should, by reference to the reports of the Auditor General, be better placed to query the executive on the manner in which government resources are being utilised.

⁹⁵ See, "Stalemate between Malawi ruler, parliament intensifies" <<http://www.polity.org.za/print-version/stalemate-between-Malawi-ruler-parliament-intensifies-2008-02-20>> (Accessed 24 May 2010) and Malawi finance minister defies parliament <http://www.namibian.com.na/index.php?id=28&tx_ttnews%5Btt_news%5D=31920&no_cache=1> (Accessed 24 May 2010).

⁹⁶ Cf. *The State and Speaker of the National Assembly and others Ex Parte Titus Divala* Misc. Civil Cause No. 225 of 2007.

⁹⁷ Section 89(4) Constitution of the Republic of Malawi.

⁹⁸ Act No. 6 of 2003.

⁹⁹ Created under section 184 Constitution of the Republic of Malawi.

¹⁰⁰ Section 3 of the Public Audit Act.

¹⁰¹ See, for example, section 15 of the Public Audit Act.

Thirdly, parliament can improve the exercise of its oversight functions through the committee system. It must be recalled that parliament in Malawi, like in most other countries, conducts its business in a plenary and through a committee system.¹⁰² It is arguable that much of a parliament's most effective work is conducted through the committees which are normally all-party group of members who oversee a specific area of government activity.¹⁰³ The Constitution establishes four committees¹⁰⁴ and others have been set up by parliament under licence given by the Constitution.¹⁰⁵ The value of the committee system is that it allows the development of specific expertise by members within their areas of competence and thus gives the members better ability in overseeing the executive.¹⁰⁶ Sadly, except for the Public Accounts Committee, lack of funding has effectively negated the potential of the committee system in Malawi.¹⁰⁷ Under the prevailing conditions, therefore, oversight through the committee system is compromised. If Malawi's commitment to democratic governance is genuine it is important to revive the committee system in the national assembly principally by allocating sufficient funds for their operation.

While parliament has struggled to exert its oversight role over the executive, there are some notable instances that are a source of hope for the future. Parliamentary rejection of the proposal by former President Muluzi to amend the Constitution and remove the clause on limitation of presidential terms remains a strong reminder of the potential that parliament possesses.¹⁰⁸ It is also notable that parliament's rejection of the proposed amendment coincided with the view that was manifestly supported by the majority of Malawians as manifested by public demonstrations on the issue. Overall, the executive/legislative relations up to 2009 have largely been strained and tense. This has been manifested, for example, in

¹⁰² Malawi National Assembly "Challenges for Parliament in 2008" *The Daily Times* 7 January 2009.

¹⁰³ J Hatchard & others (note 10 above) 132-133.

¹⁰⁴ The Constitution establishes the following committees; Budget and Finance Committee, Legal Affairs Committee, Public Appointments Committee and Defence and Security Committee, See sections 56(7) and 162 of the Constitution. See, part XXXI of the National Assembly Standing Orders for the other parliamentary committees.

¹⁰⁵ Section 56(6) Constitution of the Republic of Malawi allows the National Assembly to set up parliamentary committees.

¹⁰⁶ J Hatchard & others (note 10 above) 133.

¹⁰⁷ B Dulani & J Van Donge (note 38 above) 203-222. See also, N Lawton "Report on indicators for monitoring good governance in Malawi" (2002) 73-75 Centre for Social Research, University of Malawi and United Nations Economic Commission for Africa.

¹⁰⁸ N Patel & A Tostensen (note 23 above) 10-11 and B Dulani & J van Donge (note 38 above) 210-213.

the duration and number of sittings that parliament has had over the years.¹⁰⁹ The duration and number of sittings have also contributed to lessen the oversight that parliament would ordinarily have exercised over the executive.¹¹⁰ It is a fact that parliament in Malawi has far fewer sittings than other parliaments within the region.¹¹¹ In order to have more robust parliamentary oversight over the executive and the public administration generally, an increase in the number and duration of parliamentary sittings would be in order.

5.3.2.2 Representational role

Representation in a democratic context is a complex phenomenon and may entail different things to different people at different times. It is beyond the scope of this study to explore the various facets to representation. Suffice it to point out that representation may entail 'standing for' in a descriptive sense, 'standing for' in a symbolic sense or 'acting for.'¹¹² In spite of the conceptual complexities around 'representation' available research suggests that Malawian constituents largely think of their parliamentarians as acting for them in the sense of representing their interests in the National Assembly.¹¹³ As researchers found out:¹¹⁴

With regard to the role of a member of parliament, the majority of the respondents had a clear view as to what they are elected for: as a voice of the people in front of the government. Nearly two-thirds considered the most important task of an MP as bringing the opinion of the population closer to the government ... which reflects the results obtained from another and much more qualitative study: 'participants throughout the country have an extremely well defined and remarkably consistent perception of what the role of their Member of Parliament should be. The MP should be a messenger rather than a leader or a boss. His or her duty is to meet with constituents, hear their problems and take these problems to parliament or the government where they can be addressed.'

¹⁰⁹ In this regard it is worth noting that meetings of the National Assembly are called by the Speaker of the National Assembly in consultation with the President – section 59(1) Constitution of the Republic of Malawi.

¹¹⁰ In the past 15 years this has been further constrained by an opposition parliamentary boycott and a presidential prorogation of the National Assembly.

¹¹¹ N Patel & A Tostensen (note 23 above) 12-13.

¹¹² See, H Pitkin (note 94 above) and FR Ankersmit *Political representation* (2002).

¹¹³ C Mthinda & S Khaila "Responsiveness and accountability in Malawi" Afrobarometer Briefing Paper No. 31 (2006). The only High Court decision to have attempted to explore the question of representation in Malawi, in this study's opinion, horrendously misconstrued the matter and made no clarification on the precise relationship between parliamentarians and their constituents in Malawi – *Chakuamba v Ching'oma* Misc Civil Cause No. 99 of 1996 .

¹¹⁴ G Erdmann & others "Political attitudes: How democratic are Malawi's citizens? Results from a 1998 opinion survey" (2000) 28-29.

This version of representation makes it even more important for parliamentarians to adequately reflect the interests of their constituents in all parliamentary business.¹¹⁵ The parliamentarian is the umbilical cord that connects the people with the legislature and government generally. Clearly, parliament in Malawi, because of its broad based membership and the manner in which it operates, possesses great potential to contribute towards democratisation and constitutionalism.¹¹⁶ The expectations of the populace from their parliamentarians establish the parliamentarians in a fiduciary position where, like trustees,¹¹⁷ they must act to promote the interests of their constituents first and foremost. This expectation interest also places parliamentarians in a position similar to traditional leaders of years gone by who, in all their actions, were enjoined to protect and promote societal interests before their personal interests.¹¹⁸

In as far as parliament's representational role is concerned; three issues adequately highlight the challenges and prospects that have faced parliament in Malawi. The first relates to the question of members crossing the floor, the second concerns the recall provision and the third is about the provision for the senate in the Constitution. These issues will now be briefly discussed separately. These issues also provide an indication of the areas in which action must be taken if the social trust-based framework is to take root.

In the legislative context, crossing the floor or floor crossing occurs when a sitting MP leaves a party under the colours that he or she was elected to join another party or to sit as an independent.¹¹⁹ In Malawi, crossing the floor is regulated by section 65 of the Constitution.¹²⁰

¹¹⁵ This study agrees with Burke that even though parliamentarians are elected by specific constituencies, parliament itself must work to promote the national interest. Parliament should not operate as a congress of representatives with divergent interests – E Burke “On representative democracy” Speech at the conclusion of the poll Bristol, 3 November 1774 <<http://www.tarn.org/burke.html>> (Accessed 21 June 2010).

¹¹⁶ B Chinsinga “Malawi’s democracy project at the cross roads” in *Towards the consolidation of Malawi’s democracy* (2008) 7 11 Konrad Adenauer Occasional Paper No. 11.

¹¹⁷ Expectation and reliance interest, as demonstrated in Chapter Two, are crucial indicators of fiduciary relationships.

¹¹⁸ The fact that there may be competing societal interests does not diminish the fiduciary core of such positions. As Finn has noted, where a fiduciary serves classes of beneficiaries possessing different rights, though obliged to act in the interests of the beneficiaries as a whole, the fiduciary must nonetheless act fairly as between different classes of beneficiaries in taking decisions which affect the rights and interests of the classes between themselves – PD Finn (note 15 above) 131 138.

¹¹⁹ J Hatchard & others (note 10 above) 142.

Apart from sustaining a barrage of litigation this provision has, in its life time, also been subject to a constitutional amendment that was clearly improperly motivated – the amendment being designed to ‘deal’ with parliamentarians that had resigned from the then ruling party. Because of the often strong partisan sentiments that have surrounded section 65, its interpretation and application by successive Speakers of the National Assembly has also constantly been mired in controversy.¹²¹ The zenith of the controversy surrounding section 65 was, in all probability, reached when a presidential referral on the constitutionality of the section was forwarded to the judiciary.¹²²

Section 65, in its original formulation, was largely in line with the Westminster understanding of crossing the floor and sought to regulate MP’s movement within the National Assembly.¹²³ As a result of a 2001 amendment, however, the provision was extended to regulate membership of organisations that were not represented in the National Assembly as long as these organisations or association had objectives that were political in nature.¹²⁴ By virtue of the amendment, an MP could be deemed to have crossed the floor if one resigned from a political party represented in parliament and joined an organisation or another political party whether these were represented in parliament or not. The 2001 amendment to section 65 was subsequently declared unconstitutional by the High Court.¹²⁵ On the occasion of the presidential referral, the High Court, sitting as a Constitutional Court, upheld the validity of section 65.¹²⁶ On appeal to the Malawi Supreme Court of Appeal, the High Court’s finding was upheld. The Malawi Supreme Court of Appeal held that section 65 is constitutional and

¹²⁰ The original section 65(1) provided thus: ‘The Speaker shall declare vacant the seat of any member of the National Assembly who was, at the time of his or her election, a member of one political party represented in the National Assembly, other than by that member alone but who has voluntarily ceased to be a member of that party and has joined another political party represented in the National Assembly.’

¹²¹ Former Speaker of the National Assembly, Sam Mpasu, clearly applied the provision in a discriminatory manner targeting opposition politicians, see N Patel & A Tostensen (note 23 above) 11.

¹²² *In the matter of a Presidential Reference of a dispute of a constitutional nature under section 89(1)(h) of the Constitution and In the matter of section 65 of the Constitution and In the matter of the question of crossing the floor by Members of the National Assembly* Presidential Reference No. 2 of 2005. Argued on appeal as Presidential Reference Appeal No. 44 of 2006.

¹²³ M Chigawa “The concept of crossing the floor under Malawian constitutional law” (2008) 2 (2) *Malawi Law Journal* 185.

¹²⁴ The amended section 65 had the following addition to the original provision: ‘... or has joined any other political party, or association or organisation whose objectives or activities are political in nature’.

¹²⁵ *The Registered Trustees of the Public Affairs Committee v The Attorney General and The Speaker of the National Assembly* Civil Cause No. 1861 of 2003.

¹²⁶ Note 122 above.

does not infringe the political rights in Chapter Four of the Constitution. The effect is that the Constitution prevents MPs from changing their party allegiance once they have joined parliament on a particular party ticket. MPs that change their allegiance run the risk of having their seats declared vacant by the Speaker of the National Assembly. It is worth noting that public consultations on floor crossing have unanimously endorsed the retention of the provision in the Constitution.¹²⁷

Recall of parliamentarians in Malawi was regulated by section 64 of the Constitution. Section 64 provided that constituents could petition for the recall of a parliamentarian from the National Assembly by submitting a petition to the Electoral Commission. This provision was repealed from the Constitution during the first sitting of the First Democratic Parliament. Ever since the provision's repeal, however, there has been constant clamouring for the reintroduction of the provision as evidenced by the recommendations of the Malawi Law Commission in the Constitution Review process.¹²⁸ It seems to be the case that there is unanimity of opinion in favour of the reintroduction of the recall provision and that, as contrasted to the original section 64, an improved version of the provision should also clarify the conditions and the manner in which the recall should be performed.

Under the original section 49(1) of the Constitution, parliament consisted of the National Assembly, senate and the President as Head of State. Under the current section 49(1) parliament consists of the National Assembly and the President as Head of State. This is because in 2001 the National Assembly repealed all provisions relating to the senate.¹²⁹ Under the original scheme parliament was bi-cameral and the National Assembly was the lower house with directly elected representatives. The senate was the upper house and it was designed to be composed of chiefs and other indirectly elected members appointed to represent specific interest groups.¹³⁰ The senate shared some functions with the National Assembly but also possessed some powers that were specific to it. For example, the senate was empowered to debate motions for the indictment or conviction of the President or Vice

¹²⁷ Government of Malawi (note 46 above) 9 and Malawi Law Commission (note 46 above)50-52.

¹²⁸ Malawi Law Commission (note 47 above) 47-50; G Erdman & others (note 114 above) 30 and Government of Malawi (note 46 above) 25-66.

¹²⁹ Act No. 4 of 2001. The legality and propriety of the repeal of the senate provisions has been discussed by M Chigawa "The Senate as the second chamber of parliament in Malawi: Its relevance, composition and powers" Paper for Presentation at the Malawi Law Journal Launch Conference 16-17 July 2008, Blantyre, Malawi.

¹³⁰ See, repealed section 68 Constitution of the Republic of Malawi.

President by impeachment.¹³¹ It is mainly in its composition that the senate was distinctly different from the lower house.

The above outlined issues exemplify the dilemmas that parliament has faced in achieving its representational role but also highlight the areas in which parliament could improve on in a bid to enhance governance and constitutionalism. In the first place, the repeal of section 64 greatly undermined the accountability of the peoples' representatives to their constituents. As Kanyongolo has argued:¹³²

The accountability of the government to the people through parliament is also limited by the Constitution which does not empower constituents to recall a member of parliament during his or her term of office regardless of whether he or she has ceased to command their trust and confidence as a representative.

Without doubt the ability of constituents to recall their parliamentarians generated a strong connection and fidelity between the representatives and their constituents. Parliamentarians who are discharging their functions fully mindful that aberrations on their part may result in a recall are better placed to articulate and prioritise the interests of their constituents. It is striking that the recall is, in its nature, akin to beneficiaries of a trust removing a trustee for breach of trust. The provisions enabling constituents to recall parliamentarians, it must be noted, are very much within the philosophy informing the social trust-based framework and would work to enhance accountability of parliamentarians. The ability to recall parliamentarians must be an integral part of the democratic process in Malawi if governance has to be responsive and accountable.

In the second place, the debacle over floor crossing reveals both opportunities and challenges in relation to parliament and its representation role. The amendment to section 65 in 2001 was especially worrying for it was legislation aimed at specific individuals.¹³³ Partisan interests clearly motivated the adoption of the amendment and one easily notes that this violated the principle barring legislation targeting specific individuals.¹³⁴ It must also be noted that regulating the movement of parliamentarians within the National Assembly contributes to ensuring fidelity of parliamentarians to their constituents. Clearly, a non-

¹³¹ Repealed section 70(c) Constitution of the Republic of Malawi.

¹³² FE Kanyongolo "The constitution and the democratisation process in Malawi" in O Sichone (ed) *The state and constitutionalism in Southern Africa* (1998) 1 6.

¹³³ B Dulani & J van Donge (note 38 above) 214.

¹³⁴ Cf. *Liyanage v The Queen* (1967) 1 AC 259.

partisan implementation of section 65 may contribute towards the entrenchment of democratic governance and constitutionalism. It is, arguably, as a result of the values that the provision embodies that the provision's validity and necessity has been affirmed.¹³⁵

Lastly, the abolition of the senate, aside from questions about the constitutional propriety of parliament's action, resulted in over-strengthening the executive in a context in which the executive is already too strong.¹³⁶ This was achieved at the expense of the value contribution that bicameralism would have added to Malawi's system of governance. As Chigawa has argued, it is beyond doubt, especially in the light of the performance of the unicameral parliament over the past fifteen years that the senate would have contributed to enhancing the rule of law and general accountability of parliamentarians.¹³⁷ Even more, as a result of its distinct membership it would have greatly enhanced representation of the people especially by allowing the vulnerable groups to have a voice in parliament. The inclusion of traditional leaders in the membership of the senate would have given traditional leadership a unique opportunity to contribute to governance and constitutionalism in Malawi. As it stands, parliament took away the clearest opportunity that would have allowed traditional leadership to influence governance and constitutionalism in Malawi. A reinstatement of the constitutional provisions on the senate is clearly in order.

The travails of the National Assembly along the above lines confirm some very important facts about governance and constitutionalism in Malawi. In the first place, it must be apparent that for optimal progress the decision-making process in matters of governance has to be shared and it must be conducted in a framework that is broad-based and consultative.¹³⁸ This framework would also allow the leadership to obtain the necessary feedback from the grassroots and the feedback must be used to shape policy. Equally important in this connection is the fact that democratic governance requires that decision making should always be grounded in sufficient consensus. Parliamentarians must thus be enjoined to engage in visible consultations and allow for cogent participation by their constituents in decisions affecting their interests. In the second place, it is amazing how the National Assembly continues to ride roughshod over public opinion on very crucial issues. For example, it is manifestly clear that the populace want the recall provision (section 64)

¹³⁵ Note 122 above.

¹³⁶ N Patel & A Tostensen (note 23 above) 9.

¹³⁷ M Chigawa (note 129 above). See, also, PD Finn (note 53 above) 240.

¹³⁸ B wa Mutharika *One Africa, one destiny: Towards democracy, good governance and development* (1995) 67.

and the provisions on the senate to be reintroduced in the Constitution.¹³⁹ Parliament though, in clear abdication of its responsibilities to the people of Malawi, has consistently decided not to take meaningful action on the matter. This is a clear betrayal of the trust that the populace invests in parliament. In the third place, as Mutharika accurately posits, the core responsibility of leadership in a truly democratic society is to decide where personal interests end and where national interests begin.¹⁴⁰ Responsible and responsive leadership, therefore, ought to prioritise national interests over both personal and partisan interests.¹⁴¹ It is predominantly from this perspective that one can easily see the fiduciary role that parliamentarians have in representing their constituents. Like a trustee who is enjoined to act on behalf and in the interests of beneficiaries, it is incumbent on parliamentarians to automatically prioritise the national interest in all deliberations.¹⁴² The Constitution itself enjoins all parliamentarians to act in the national interest.¹⁴³

In as far as passing of legislation is concerned, it is also important for parliamentarians to reach out to their constituents and their traditional forms of governance and organisation and the values on which these are founded and harness them in law reform.¹⁴⁴ While political perceptions often colour views about what the law can achieve, parliament may benefit from enacting laws or tailoring law reform by drawing strength from commonly accepted social mores.¹⁴⁵ In the context of Malawi, parliament ought to deliberately engage with tradition in order to source values that may inform legislation – it is in this connection that the senate would significantly simplify the process of consultation. I must hasten to add that this does not mean that legislation crafted along commonly accepted social mores would solve all problems but only that such legislation stands a better chance of succeeding in its

¹³⁹ See, Malawi Law Commission (note 47 above) 47-49 and Government of Malawi (note 46 above) 9, 20, 21-22, 23; Malawi Law Commission “Report on the proceedings of the second national constitution conference” 17-19 April 2007, 41-43, 45.

¹⁴⁰ B wa Mutharika (note 138 above) 64-65.

¹⁴¹ D Venter “Elections and electoral systems in emerging democracies: A case for electoral system re-design in Malawi” Paper presented at the Malawi Constitutional Review Conference, Lilongwe, 28-31 March 2006.

¹⁴² Cf. E Burke (note 115 above).

¹⁴³ Section 8 Constitution of the Republic of Malawi.

¹⁴⁴ For examples of the values within ubuntu that may be harnessed see JY Mokgoro “Ubuntu and the law in South Africa” <<http://web.archive.org/web/20040928041520/www.puk.ac.za/law/per/documents/98v1mokg.doc>> (Accessed 22 September 2010).

¹⁴⁵ R Cotterrell *Sociology of the law* (1992) 45 50.

implementation.¹⁴⁶ The manner in which the Malawian populace generally views parliamentarians as being tasked with representing their interests in the National Assembly strongly suggests that they are perceived as fiduciaries or social trustees and it is imperative that they must be regulated as such.

5.3.2.3 Budgetary supervision

While the budgetary supervision role of the legislature falls under the broad umbrella of legislative oversight it is as a result of the importance of the budget to national welfare that parliamentary budgetary supervision merits a separate, albeit brief, discussion here.¹⁴⁷ While various government departments and their officers may routinely circumvent the legislature and other accounting mechanisms, the executive cannot avoid seeking the annual parliamentary approval for the Appropriation Act. The scheme evident in Chapter XVIII of the Constitution emphasises the principle that the executive cannot and should not spend public funds without parliamentary approval.¹⁴⁸ The importance of this approval, as Hatchard and others note is that:¹⁴⁹

... a rigorous and well informed scrutinising exercise of government financial management systems is a most effective method for parliament to exercise its oversight role and ensure that the public obtains as clear and detailed information as possible about government spending.

Although there are indications of improvement, parliamentary oversight of the budget has been feeble for a greater part of the past fifteen years.¹⁵⁰ The frailty of parliament's supervision has in part been attributed to the lack of a functional committee system in the National Assembly. The frailty of the committee system, however, is no excuse for the executive to draw up the budget and parliament to enact it without proper consultation with the populace. This is because parliament remains bound to act within the strictures of the

¹⁴⁶ Some of the limitations of the law are inherent in the law itself as medium of social regulation. See, A Allot, *The limits of the law* (1980).

¹⁴⁷ The discussion hereunder is connected to the discussion under 5.3.1.3 and public resource management generally, which is discussed under 5.4.

¹⁴⁸ For example, no tax, rate, duty or levy can be raised or imposed except under authority of law (section 171 of the Constitution), withdrawals from the Consolidated Fund can only be in the manner prescribed by parliament (section 173 (3) of the Constitution) and an Appropriation Bill must be approved by parliament before withdrawals from the Consolidated Fund can be made (section 176 of the Constitution).

¹⁴⁹ J Hatchard & others (note 10 above) 135.

¹⁵⁰ CMI (note 67 above) 11.

Constitution and it is not even allowed to shield its own irregularities by reference to parliamentary privilege.¹⁵¹

A system of government in which the executive is answerable to the parliament is clearly favoured by most Malawians.¹⁵² Parliament's supervision of the executive in the budget process gives meaning to this system of governance. Proper and effective parliamentary scrutiny of the budget process 'compels the executive to justify publicly the reasons for its choices and is a major contribution towards fiscal transparency.'¹⁵³ In a context where the executive is closely monitored in the budget process, the executive, invariably, 'takes the greatest care both with its budget preparation and presentation and with its public spending proposals.'¹⁵⁴ It requires no stretch of imagination to realise that the National Assembly can best perform its supervisory role over the executive in budget formulation and other areas when its members expressly recognise the fiduciary nature of the authority that the law vests in them. Such a change of approach would enable parliamentarians to prioritise, where appropriate, the interests of their constituents in all budget processes. To achieve this, at the one level, requires nothing more than a discernible perspective shift among parliamentarians i.e. from imagining themselves as bureaucrats to recognising themselves as fiduciaries. At the other level this requires giving concrete legal recognition to the fiduciary duties of all public functionaries and enforcing them as such.

In chapter Four this study highlighted the emphasis that Malawian tradition placed and still places on consultation and consensus in decision making. The same ethic of thorough consultation must be imported to the operations of the legislature in order to make it more efficacious in its operations and also to confer legitimacy on its decisions. This would also mean, for example, that parliamentarians need not instigate unnecessary waivers of the notice period that bills must endure before they are debated in the National Assembly. Again, as pointed out earlier, this would also entail deliberate action to increase the number of sittings that the National Assembly has in Malawi. Where parliament is not in session for lengthy periods of time the opportunity to discuss, consult and generate consensus on matters of national interests evaporates.

¹⁵¹ *The State and the Speaker of the National Assembly and others Ex Parte Mary Nangwale* (note 19 above) 9 12.

¹⁵² G Erdmann & others (note 111 above) 31.

¹⁵³ J Hatchard & others (note 10 above) 135.

¹⁵⁴ As above.

5.3.3 The judiciary

Section 9 of the Constitution tasks the judiciary with the interpretation, protection and enforcement of the Constitution and all laws in accordance with the Constitution in an independent and impartial manner bearing in mind only legally relevant facts and prescriptions of law. This means that the judiciary alone has the responsibility of interpreting and where necessary, enforcing the Constitution.¹⁵⁵ The independence of all courts and persons presiding in them is also constitutionally recognised.¹⁵⁶ The fact the Constitution reserves the task of constitutional interpretation to the judiciary entails that ‘judges are the co-architects in the building of a society based on the rule of law and respect for fundamental rights.’¹⁵⁷ To properly fulfil its role the judiciary needs to be receptive to what may appear on the face of it as unconventional jurisprudence.¹⁵⁸ The common law, for example, must be creatively interpreted to advance the Constitution’s underlying values.

Hatchard and others posit several reasons why judiciaries in most African states remain the ultimate bulwark in safeguarding good governance, constitutionalism and human rights.¹⁵⁹ Firstly, most constitutions, like that of Malawi, expressly confer on the judiciary the constitutional duty to interpret the Constitution. This ensures a jurisdictional monopoly for the judiciary which cannot be questioned.¹⁶⁰ Secondly, the weaknesses of most legislatures in Africa necessarily entails that, in truth, it is on the judiciary that the responsibility of checking the executive primarily rests. The judiciary is best placed to achieve this because most constitutions constitute it as the custodian of the constitution and judges are, by their oath of office, sworn to uphold and defend the constitution. Thirdly, executive lawlessness remains a fact of life in Africa’s emerging democracies. It is not uncommon to see executive domination of the legislature result in a very compliant legislature. It is thus on the judiciary that the duty to protect the basic structure of the constitution falls. Fourthly, the manner in which judges are appointed and trained as well as their accountability regime often leads to the generation

¹⁵⁵ *The State and the President of Malawi and others Ex Parte Malawi Law Society* (note 24 above) 6-7.

¹⁵⁶ Section 103 Constitution of the Republic of Malawi.

¹⁵⁷ J Hatchard & others (note 10 above) 177.

¹⁵⁸ S Banda “Constitutional mimicry and common law reform in a rights-based post colonial setting: The case of South Africa and Malawi” (2009) 53 (1) *Journal of African Law* 142 170.

¹⁵⁹ J Hatchard & others (note 10 above) 178.

¹⁶⁰ RR Mzikamanda “The place of the independence of the judiciary and the rule of law in democratic sub-Saharan Africa” <http://www.saifac.org.za/docs/res_papers/RPS%20No.%2043.pdf> (Accessed 31 May 2010).

of public trust in their competence. Such public trust lends support and legitimacy to the judicial function in interpreting a constitution. A combination of these factors, which are all relevant in Malawi, place the judiciary in a unique position in as far as the promotion of governance and constitutionalism is concerned.

One concept that can be utilised by the judiciary to achieve social trust-based governance and constitutionalism is the rule of law.¹⁶¹ Although the rule of law is a complex concept, its values can be used as the necessary framework within which the fiduciary relationship between the government and the governed can be understood. Several specific values can be highlighted in which the rule of law can contribute to the entrenchment of fiduciary regulation of government.¹⁶² Firstly, the rule of law connotes a state of affairs where law and order prevail. Additionally, the rule of law by insisting on the dominance of regular law as opposed to arbitrary rule operates as a vital mechanism to check government powers and discretion. Importantly, the rule of law also entails equality before the law or the equal subjection of all citizens (both private citizens and public officers) to the law of the land administered by the ordinary courts.¹⁶³ In this connection the rule of law ensures that there is no preferential treatment for anyone. Lastly, the rule of law also entails that the government must always act in accordance with the law in everything it does. Practically this means that the law of the land binds not only the governed but the government as well. The judiciary can harness the values upon which the rule of law is founded to foster a fiduciary regulation of the government. While there may be many ways in which this can be achieved, below I demonstrate two possible ways in which the judiciary can help in fostering social trust-based governance and constitutionalism. The two avenues under discussion are: firstly, the judiciary as a vehicle for social transformation and secondly, the judiciary as the ultimate adjudicator and bulwark against executive and legislative excesses.

¹⁶¹ I Salevao "Reinventing government as a friend of the people: Common law and equity, legislation and the constitution" 8-10 <<http://eprints.anu.edu/archive/00002354/01/samoa%20Update%202003-salevao.pdf>> (Accessed 24 June 2008). This study's recourse to the rule of law reinforces its earlier position that it does not advocate for a wholesale rejection of liberal ideals. The study merely seeks to re-examine liberal ideals and connect them in a more meaningful way to values that are indigenous to Africa.

¹⁶² As above.

¹⁶³ Judicial independence remains crucial for the rule of law – RR Mzikamanda (note 160 above) 16.

5.3.3.1 The judiciary as a vehicle for social transformation¹⁶⁴

The judiciary in Malawi has established itself as a principal player in the consolidation of democracy and the rule of law.¹⁶⁵ The nature of the transition to multi-partyism between 1993 and 1995 favoured the judiciary which did not have to institutionally-reorganise when most institutions were undergoing significant transformation.¹⁶⁶ In this context the judiciary was able to assert and expand its authority considerably. Although, as earlier pointed out, the judiciary may have toned down the activism that characterised the first few years after the transition it has remained pivotal to democratisation in Malawi.

In connection to the attainment of social trust-based governance and constitutionalism in Malawi, the judiciary can contribute significantly if it utilises its potential for stimulating and sustaining social transformation.¹⁶⁷ Gloppen, who has explored the role of courts in social transformation, defines social transformation as¹⁶⁸

... the altering of structured inequalities and power relations in society in ways that reduce the weight of morally irrelevant circumstances, such as socio-economic status/class, gender, race, religion or sexual orientation.

Courts contribute to social transformation by rendering their effort in the alteration of structured inequalities and power relations in society and they achieve this by giving an institutional voice to the poor and vulnerable thereby contributing to their inclusion in society.¹⁶⁹ This is particularly true in those instances where there are not many ways through which the poor and vulnerable can express their concerns. Gloppen identifies three ways in which courts can directly contribute to social transformation in society.¹⁷⁰ Firstly, by providing

¹⁶⁴ This is not to suggest that the executive or the legislature have no role to play in social transformation but merely to highlight the unique role that the judiciary can play in social transformation.

¹⁶⁵ It has been noted that 'Within [the context] of dwindling trust in the political institutions and processes, the judiciary has, however, established itself as reasonably robust and politically significant, with considerable public confidence' - S Gloppen & FE Kanyongolo "Malawi" in *The judicial institution in Southern Africa: A comparative study of common law jurisdictions* (2006) 73 75 and N Lawton (note 107 above) 79.

¹⁶⁶ R Ellett (note 22 above) 283.

¹⁶⁷ It must be recalled that social trust-based governance and constitutionalism is transformatory in nature because it aims at a redress of inequalities in society.

¹⁶⁸ S Gloppen "Courts and social transformation: An analytical framework" in R Gargarella & others (eds) *Courts and social transformation in new democracies: An institutional voice for the poor?* (2006) 35 37-38

¹⁶⁹ As above.

¹⁷⁰ As above.

a forum in which the concerns of the poor and marginalised can be framed and resolved as legal disputes. Legal resolution of the poor's concerns in this context can have direct implications on law, policy and administrative action. Secondly, courts can also contribute to social transformation by acting as a bulwark against erosion of existing pro-poor institutional protections and guarantees. Lastly, courts can contribute to social transformation by bolstering pro-poor state policies in the face of competing societal interests.

Admittedly, the idea of courts engaging in social transformation is not without conceptual controversies. The most harped on controversy relates to the competence of judicial authorities to intervene in matters that may not be neatly amenable to judicial resolution.¹⁷¹ This concern is addressed herein below. Suffice it to mention that this study takes the view that this concern is invariably exaggerated. The truth is that, institutionally speaking, the judiciary represents the main channel that disadvantaged groups have for being heard especially when the political branches refuse to hear or unduly dismiss their claims.¹⁷²

The judiciary possesses a great deal of potential in generating the impetus required for entrenching social trust-based governance and constitutionalism. Contrary to common perceptions, one must recall that judicial adjudication, as Klare asserts, is invariably a site for law making activity.¹⁷³ However, and vitally, adjudication, as contrasted to other forms of law making, is the 'most reflective and self-conscious, the most grounded in reasoned argument and justification and the most constrained and structured by text, rule and principle.'¹⁷⁴ It is perfectly legitimate, therefore, to expect adjudication to innovate and model intellectual and institutional practices appropriate to a culture of justification and constitutionalism.¹⁷⁵ By using the concept of the rule of law, for example, courts in Malawi can take the lead in articulating social trust-based governance.¹⁷⁶ In the light of the potential for social transformation that the Constitution represents the judiciary must be careful to avoid being

¹⁷¹ D Moseneke "Transformative adjudication" (2002) 18 (3) *South African Journal on Human Rights* 309 315-316.

¹⁷² R Gargarella "Theories of democracy, the judiciary and social rights" in R Gargarella & others (eds) (note 168 above) 13 28.

¹⁷³ K Klare (note 6 above) 147.

¹⁷⁴ As above.

¹⁷⁵ Cf. S Banda (note 158 above).

¹⁷⁶ Judicial recognition of the fiduciary position that government occupies would be a strong boost here. Cf. *President of Malawi and another v RB Kachere and others* MSCA Civil Appeal No. 20 of 1995 (Being High Court Civil Case No.2187 of 1994).

its own enemy, for example, by insisting on narrow and legalistic interpretations of the Constitution.¹⁷⁷

It should be apparent that how courts interpret the law is centrally important to the judiciary's responsiveness to the needs of the poor and vulnerable.¹⁷⁸ It is this study's argument that sections 12 and 13 of the Constitution primarily urge a social trust-based approach to constitutional discourse in Malawi.¹⁷⁹ Section 12 of the Constitution marks a conceptual shift from social contract to fiduciary relationship between the governed and the governors.¹⁸⁰ As noted, in Malawi, 'the requirement for trusted and good governance-based leadership is compatible with the Constitution's principles.'¹⁸¹ Following from the earlier point highlighting adjudication as a site for law making activity, courts have almost boundless resources that they can consult in adjudication. Courts in Malawi may, for example, legitimately consult customary law in resolving disputes before them.¹⁸² From customary law courts would find symmetries with social trust-based governance that can be utilised.¹⁸³ These symmetries could be utilised to garner legitimacy for the Constitution, generally, but specifically for social trust-based governance and constitutionalism. It must be borne in mind that the Constitution, like its South African counterpart, 'invites a new imagination and self reflection about legal method, analysis and reasoning consistent with its transformative goals'.¹⁸⁴ It is thus perfectly within the competencies of the judiciary to innovatively have recourse to indigenous systems of organisation in the realisation of the Constitution's transformative potential.

The concept of separation of powers has often been raised as a bar against transformative adjudication.¹⁸⁵ The argument in this regard posits that transformative adjudication necessarily involves the judiciary encroaching into areas that are best left for executive or

¹⁷⁷ RR Mzikamanda (note 160 above). An example of a self imposed restriction in Malawi is the judiciary's current construction of the rules on standing to sue.

¹⁷⁸ S Gloppen (note 168 above) 50.

¹⁷⁹ CM Silungwe "The courts power of review, composition of the National Assembly and the presidential reference on section 65" (2007) 1 (2) *Malawi Law Journal* 235 236; J Ansah (note 1 above) 4 and G Kamchedzera & CMU Banda (note 3 above) 5.

¹⁸⁰ CM Silungwe "The rhetoric and practice in land reform in Malawi: A contextualised governmentality analysis" (2009) 3 (1) *Malawi Law Journal* 26 48.

¹⁸¹ G Kamchedzera & CMU Banda (note 20 above) 93.

¹⁸² Section 200 Constitution of the Republic of Malawi.

¹⁸³ The symmetries in mind here are the ones highlighted in Chapter Four of this study.

¹⁸⁴ K Klare (note 6 above) 156.

¹⁸⁵ D Moseneke (note 171 above).

legislative action. Underlying this argument is the assumption that in engaging in transformative adjudication the courts are likely to engage in politics which is the preserve of politicians. The argument further avers that once the judiciary starts encroaching into the other branches' domains it may make decisions, for example, affecting resource allocation which decisions it is not ideally positioned to make.¹⁸⁶ This argument is largely premised on a presumed conceptual and practical separation of law from politics. The truth, however, is that law and politics are inseparably intertwined.¹⁸⁷ This essentially entails that judiciaries the world over routinely engage in politics.¹⁸⁸ As scholars in the Critical Legal Studies movement have asserted, maybe rather bluntly, law is simply politics dressed in different garbs.¹⁸⁹

Admittedly, the legal system in Malawi also seems to proceed on the basis that law and politics are separate even though the Constitution brings out the hollowness of this assumption.¹⁹⁰ Evidence of the judiciary's role in politics is manifested by the numerous overtly political cases that the judiciary has handled since 1994.¹⁹¹ As Kanyongolo has demonstrated, the Constitution makes judicial intervention in political matters inevitable.¹⁹² For example, section 11(2)(a) requires the judiciary to make value decisions in so far as it enjoins it to promote the values that underlie an open and democratic society in constitutional interpretation. Additionally, section 44(2) directs that in determining limitations on rights courts must also consider whether the limitation is necessary in an open and democratic society. Clearly, since there is no ideal exemplar of an open and democratic society, the construction of such a society is essentially left to the value judgments of

¹⁸⁶ See, for example, *The State and The Minister of Finance, Secretary to the Treasury Ex Parte Bazuka Mhango and others* (note 76 above).

¹⁸⁷ Law cannot avoid being an expression or embodiment of politics. Every legal decision ultimately represents some political point of view - J van der Walt *Law and sacrifice: Towards a post-apartheid theory of law* (2005) 6.

¹⁸⁸ Cf. WF Murphy & others *Courts, judges and politics: An introduction to the judicial process* (2002) 3.

¹⁸⁹ AC Hutchinson & PJ Monahan "Law, politics and the critical legal scholars: The unfolding drama of American legal thought" (1984) 36 (1/2) *Stanford Law Review* 206 quoted by M Zamoni *Law and politics: A dilemma for contemporary legal theory* (2008) 54.

¹⁹⁰ FE Kanyongolo "Regionalism and the politics of human rights jurisprudence in Malawi" (2000) 6 (1) *UNIMA Students Law Journal* 19 30-32.

¹⁹¹ For examples, see R Ellett (note 22 above) Chapter 6.

¹⁹² FE Kanyongolo "Courts, elections and democracy: The role of the judiciary" in M Ott & others (eds) *The power of the vote: Malawi's 2004 parliamentary and presidential elections* (2004) 198-199.

individual judges.¹⁹³ Strikingly, the Constitution appoints itself as the supreme arbiter in the interpretation of all laws and in the resolution of all political disputes.¹⁹⁴ Clearly, judicial intervention in politics in Malawi, however one understands ‘politics,’ is inevitable.¹⁹⁵

It is important to recognise the interconnectedness of law and politics. The interconnectedness of law and politics also brings to light the truism that there cannot be a complete separation of powers between the branches of government.¹⁹⁶ From this recognition the judiciary becomes adequately positioned to pursue its role in social transformation. As earlier highlighted, through social transformative processes the judiciary would allow various social voices to be heard on matters of national concern. This is likely to benefit the vulnerable and marginalised. In as far as the courts in Malawi are concerned, there will be no novelty when they involve themselves in ‘politically-tainted’ adjudication as they have done this on numerous other occasions. Importantly, this study is not proposing that the judiciary should disregard the doctrine of separation of powers and assume duties that the Constitution confers on the executive or the legislature. The study is merely proposing that the courts make better use of the opportunities that exist within the Constitution and other laws to actualise the transformative potential that the Constitution contains. Where the matter at issue intimately involves questions that are better resolved by the executive or the legislature, the judiciary must be cautious in intervening in such matters.¹⁹⁷ In this connection it is argued that courts in Malawi could borrow a leaf from the ‘reasonableness test’ that has been developed by the South African Constitutional Court in

¹⁹³ See, FE Kanyongolo “The rhetoric of human rights in Malawi: Individualisation and judicialisation” in H Englund & F Nyamnjoh (eds) *Rights and politics of recognition in Africa* (2004) 77-78. Quite revealing is Justice Mokgoro concession in *State v Makwanyane* 1995 (6) BCLR 665 (CC) at paragraphs 302-304 – ‘[T]he interpretive task frequently involves making constitutional choices by balancing competing fundamental rights and freedoms. This can often only be done by reference to a system of values extraneous to the constitutional text itself.... To achieve the required balance will of necessity involve value judgments. This is the nature of constitutional interpretation.’

¹⁹⁴ ‘In the interpretation of all laws and in the resolution of political disputes the provisions of this constitution shall be regarded as the supreme arbiter and ultimate source of authority’-section 10(1) Constitution of the Republic of Malawi.

¹⁹⁵ In spite of this, courts seem to balk at the idea, see *Hassan Hilale Ajinga v United Democratic Front* Civil Cause No. 2466 of 2008 and *Wallace Chiumia and others v AFORD and others* Civil Cause No. 108 of 2005 .

¹⁹⁶ K Klare (note 6 above) 157-158.

¹⁹⁷ Per Chikopa J *The State and The Minister of Finance, Secretary to the Treasury Ex Parte Bazuka Mhango and others* (note 74 above) 10 and Per Mwaungulu J *In the matter of the Ministry of Finance Ex parte SGS* Misc. Civil Application No. 40 of 2003 15.

its adjudication on social and economic rights.¹⁹⁸ The ‘reasonableness test’, it must be recalled, has allowed the South African Constitutional Court to scrutinise the South African Government’s efforts in fulfilling its obligations for social and economic rights without breaching the separation of powers doctrine or in any way usurping the functions of the other branches of government.¹⁹⁹ Using the ‘reasonableness test’, the judiciary in Malawi can review, for example, the manner in which the executive is spending public funds without necessarily substituting its own preferred spending option for the executive’s. All that the judiciary would be required to do would be to assess whether the manner in which the executive is spending the funds is reasonably capable of supporting the Constitution’s vision bearing in mind that there would be numerous ways in which the executive could reasonably spend public funds.

An innovative and expansive approach to adjudication would adequately factor in sections 12 and 13 of the Constitution which also more clearly expound the social trust basis of governance and constitutionalism in Malawi.²⁰⁰ In this endeavour courts may do well to appreciate that legal restraint in the judicial process is often culturally constructed and not imposed from without.²⁰¹ There is thus no bar for a candid re-examination of past constitutional practises in order to align constitutional interpretation with the more egalitarian promises of the 1994 Constitution.²⁰²

¹⁹⁸ S Liebenberg “South Africa: Adjudicating social rights under a transformative constitution” in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 75 83-86.

¹⁹⁹ See, for example, *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696; *Government of the Republic of South Africa v Grootboom and others* 2000 (11) BCLR 1169 (CC) and *Minister of Health and others v Treatment Action Campaign and others* (1) 2002 (10) BCLR 1033.

²⁰⁰ Cf. FE Kanyongolo (note 192 above) 199.

²⁰¹ K Klare (note 6 above) 161. An example of self imposed restraint on judicial activism in Malawi is the judiciary’s construction of the rules on standing (*locus standi*). The Malawi Supreme Court has essentially held that ‘sufficient interest’ requires proof of some personal harm over and above the common harm that may be suffered by everyone – *Civil Liberties Committee v The Minister of Justice and another* MSCA Civil Appeal No. 12 of 1999.

²⁰² K Klare (note 6 above) 171. A necessary change in position in Malawi ought to be with regard to the position on *locus standi*. See MJ Nkhata “Public interest litigation and locus standi in Malawian constitutional law: Have the courts unduly fettered access to justice and legal remedies?” (2008) 2 (2) *Malawi Law Journal* 209 -225.

5.3.3.2 The judiciary as the ultimate adjudicator and bulwark against executive and legislative excesses

Arguably, the most prominent role that the judiciary plays is ‘refereeing’ disputes between litigants. This study’s concern, however, is specifically with how the judiciary has ‘refereed’ disputes between the branches of government and how this has either contributed or negated the development of constitutionalism and good governance. It is important to recall that courts remain pivotal in ensuring the accountability of the other branches of government.²⁰³ The interrogation in this connection is also to try and unearth the judiciary’s potential in the attainment of social trust-based governance and constitutionalism. In Malawi, the judiciary has been utilised to rein in abuse of power by the branches of government where such abuses threatened democratic governance.²⁰⁴

The judiciary’s performance since 1994 offers important insights. As earlier noted, the judicial activism that accompanied the multiparty transition between 1993 and 1996 quickly gave way to a more cautious approach to the resolution of all disputes with a political tenor.²⁰⁵ With the passage of time the judiciary seems to have opted for paths of legal reasoning that are likely to cause the least controversy.²⁰⁶ In spite of the somewhat overly cautious approach that has subsequently dominated judicial adjudication, one notes that the judiciary has a strong basis on which it can proceed in adjudication. This is because, for example, in popular perception, judicial legitimacy in Malawi remains very high.²⁰⁷ The judiciary has admirably maintained its independence in a politically volatile context hence its high credibility ratings.²⁰⁸

Constitutionalism and good governance can only take root if the judiciary properly acknowledges its place and role in a democratic dispensation.²⁰⁹ In as far as constitutional interpretation is concerned, the judiciary, at the very least, should not take away from the

²⁰³ PD Finn “A sovereign people, a public trust” in PD Finn (ed) (note 81 above) 29.

²⁰⁴ L Chikopa (note 21 above).

²⁰⁵ For a treatise on the activism, See M Nzunda “The quickening of judicial control of administrative action in Malawi 1992-1994” in KM Phiri & KR Ross (eds) (note 2 above) 283.

²⁰⁶ R Ellett (note 22 above) 299.

²⁰⁷ S Gloppen & FE Kanyongolo (note 165 above) 75 and N Lawton (note 107 above) 79.

²⁰⁸ R Ellett (note 22 above) 282.

²⁰⁹ AP Mutharika “Towards a more manageable constitution” 9 Constitution Review Conference 28-31 March 2006, Capital Hotel, Lilongwe.

people that which the Constitution has conferred on them.²¹⁰ The judiciary must take the promises that the Constitution makes seriously and recognise them as beacons of hope for the nation.²¹¹ The judiciary's role is to translate the promises into reality. For example, the Constitution clearly declares the people to be sovereign and that governmental powers are all derived from the people to be used to promote their interests.²¹² In all judicial adjudication, therefore, the courts must strive to give concrete meaning to this stipulation.²¹³ In as far as the construction of specific constitutional provisions is concerned, the courts are urged to be cautious and slow before deciding to ignore a word or phrase that appears in the Constitution.²¹⁴ At the same time they must strive to be broad and generous by giving full meaning to the words used.²¹⁵

Fears of the emergence of a 'dikastocracy' in Malawi as a result of the judicial involvement in the resolution of political disputes are, in this study's view, unfounded.²¹⁶ Firstly, as earlier pointed out, there is no inherent restriction under the Constitution of Malawi barring judicial involvement in political matters. Secondly, the judiciary as the principal guardian of the Constitution must necessarily be involved in all controversies that hinge on the Constitution.²¹⁷ On a positive note, the constant resort to the judicial process for the resolution of political disputes also demonstrates the trust that various political players have in the judicial system.²¹⁸ The judiciary needs to utilise this public confidence to engender transformative change in Malawi. Thirdly, if courts constantly recused themselves from the resolution of disputes that had a political tenor there is a risk that lawlessness may set in. This may create a situation where no-one respects and follows laws which is not good for democratic governance and constitutionalism.

²¹⁰ Per Nyirenda J in *Malawi Human Rights Commission v Attorney General* Miscellaneous Civil Cause No. 1119 of 2000 (HC) (LL).

²¹¹ As above.

²¹² Cf. Section 12 Constitution of the Republic of Malawi.

²¹³ *Njoya and others v Attorney General and others* (2004) AHRLR 157 (Ke HC 2004) 171-172.

²¹⁴ *Ex Parte Muluzi* (note 27 above) 12 -14.

²¹⁵ *Fred Nseula v Attorney General* MSCA Civil Appeal No. 32 of 1997.

²¹⁶ Chilenga defines a dikastocracy as a system of rule by judges which he further contends is inimical to democratic governance – M Chilenga "Dikastocracy: Is it undermining democracy in Malawi" in Konrad Adenauer Occasional Paper No. 11 (note 116 above).

²¹⁷ J Ansah (note 1 above) 3.

²¹⁸ As to why courts end up resolving political disputes, see RU Yepes "The judicialisation of politics in Colombia" (2007) 6 (4) *SUR International Journal on Human Rights* 49. See, also, FE Kanyongolo (note 192 above) 203.

Even more important is the imperative that the judiciary places on the constitutional principles in sections 12 and 13 as it conducts its adjudication. Section 14 stipulates that courts are entitled to have regard to the constitutional principles in interpreting and applying the Constitution or in determining the validity of decisions of the executive. The constitutional principles are a ready source of justification for a wide range of activity that the judiciary may choose to engage in. The constitutional principles must be thought of as laying down the path for the country's progress while provisions in the Bill of Rights, among others, can be seen as prescribing boundaries to the path.²¹⁹ As Ansah J. has argued, the spirit and tenor of the Constitution as expressed in the fundamental principles and principles of national policy must permeate all judicial adjudication to bring out the aspirations of the drafters of the Constitution.²²⁰ It should be manifest that the 'directive principles are the embodiment of a national spirit and consensus on social, economic and cultural issues which have to be addressed by the state.'²²¹

The judiciary has on several occasions referred to the constitutional principles to articulate the imperatives that inform the Constitution.²²² In considering how the judiciary can utilise the constitutional principles, courts must seriously reflect on their role in the democratisation of Malawi. In this reflection courts ought to discover that, apart from the obvious roles, there are other avenues in which they can make themselves relevant to the democratisation process. For example, as Poeschke and Chirwa have demonstrated, traditional dispute resolution mechanisms in most parts of Malawi reflects some of central values upon which mainstream dispute resolution mechanisms are founded.²²³ By utilising the guiding authority of the constitutional principles, it is argued, the judiciary should be able to create a jurisprudence that addresses Malawian problems from a 'Malawi-centric' perspective. There is thus a case for deliberate judicial recourse to indigenous systems of societal organisation in Malawi.

²¹⁹ *Kesavanandra Bharati v State of Kerala* (1973) AIR 1461.

²²⁰ J Ansah (note 1 above) 11.

²²¹ B De Villiers "Directive principles of state policy and fundamental rights: The Indian experience South African Journal on Human Rights" (1992) 8 (1) *South African Journal on Human Rights* 29.

²²² *The State and the President of Malawi and others Ex Parte Malawi Law Society* (note 24 above) 511; *The State and The Minister of Finance, Secretary to the Treasury Ex Parte Bazuka Mhango and others* (note 76 above) 9 11 and *R v Sam Mpasu* (note 60 above).

²²³ R Poeschke & W Chirwa "The challenge of democracy in Malawi: Socio-anthropological conditions: Study report and recommendations" (1998) 69.

In judicial review of administrative action,²²⁴ for example, the judiciary possesses a potent avenue through which it can exert its authority on the decision-making processes of both the executive and legislature. As courts in Malawi have recognised, judicial review is a process by which the courts' review the process that a public authority adopted in reaching a particular position.²²⁵ In this process courts do not examine the merits or lack thereof of a particular decision. The ultimate value of this remedy is the ability it has of instilling, among government officials, the need to operate in a procedurally regular manner. In the remedies that the court may award in a judicial review application one notes a distinct equitable origin to the remedies.²²⁶ The potential in judicial review of administrative action is almost boundless.²²⁷

5.4 Public resource management²²⁸

Public resources remain pivotal to the amelioration of the welfare of the citizenry in any country. The development of a country is intimately linked to the manner in which public resources are managed. Although the relationship between democracy and development is very complex and not susceptible to a simplistic uni-linear extrapolation, it is often argued that democratic governance is likely to take root in Africa among conditions of greater development than impoverishment.²²⁹ This highlights the role of good, efficient and capable governance in the economic and social development of any country.²³⁰ According to Goldenhuys, the ultimate goal of a modern government must be the creation of a good quality

²²⁴ The affinities between judicial review as understood in administrative law and the law of fiduciary obligations were already discussed in Chapter Two of this study.

²²⁵ This position accords with the position in England and English decisions have been relied on heavily, for example, *Chief Constable of North Wales Police v Evans* (1982) 1 WLR 155 and *Council for Civil Service Unions and others v Minister for the Civil Service (GCHQ)* (1985) 1 AC 374.

²²⁶ See, for example, *The State and the Attorney General Ex Parte Abdul Pillane* Constitutional Case No. 6 of 2005 Per Chipeta J.

²²⁷ See, *The State and Speaker of the National Assembly and others Ex Parte Titus Divala* Misc. Civil Cause No. 225 of 2007 where a student of the University of Malawi applied for and got an order for the judicial review of the decision of the Speaker of the National Assembly for adjourning parliament without first making provision for the Minister of Finance to withdraw money from the Consolidated fund.

²²⁸ Aspects of the discussion here are connected to the discussion under the executive and the management of the budget process and the legislature and budgetary supervision.

²²⁹ A Adedeji "Democracy and development: A complex relationship" in K Matlosa & others (eds) *Challenges of conflict, democracy and development in Africa* (2007) 19 26-28. The connection between wealth and democracy, however, remains very complex and not susceptible to easy generalisations.

²³⁰ J Hatchard (note 10 above) 8-9.

life for each and every citizen.²³¹ Ultimately, the attainment of a good quality life for all citizens depends on how public resources are managed by public functionaries.

It is impossible in a representative democracy to have every citizen directly involved in the management of public resources.²³² This means that, of necessity, there is a division of labour between public functionaries and the citizenry. The task of managing public resources is conferred on the public functionaries while the citizens are the designated beneficiaries. Public functionaries are thus placed in a fiduciary position under an obligation to act in the interests of the citizenry. As a result of the principles of political responsibility and accountability, public functionaries must manage public resources in the interests of the citizenry and not in the exclusive interests of some defined groups or in their own personal interests. Concededly, in all societies there will be, as a matter of course, competing interests that must be satisfied by the limited resources that a government has.²³³ Government decision making on public resources, however, must be aimed at obtaining a satisfactory reconciliation of the competing demands on public resources in an equitable manner. As happens in the case of large discretionary trusts, the role of the public functionary in such a case is to act fairly as between the different classes of beneficiaries and not to favour one group as against another. The public functionary, in this context, need not treat all beneficiaries equally as long as fairness is the governing norm.

Gildenhuis lists several principles which public functionaries must always follow in the management of public resources.²³⁴ It is argued that these principles are equally applicable to public resource management in Malawi and are reflected in several statutes dealing with the management of public resources.²³⁵ The first principle is that funds in possession of the government do not belong to the government but the citizenry from whence they have been sourced, often in form of taxes. The corollary of this principle is that government must deal with the funds in a responsible manner that sufficiently considers the interests of the

²³¹ JSH Gildenhuis *Ethics and professionalism: The battle against public corruption* (2004) 28.

²³² JSH Gildenhuis *Introduction to the management of public finance: A South African perspective* (1997) 33

²³³ The presence of competing interests, it was argued in Chapter Two, does not diminish the trust basis of the social trust-based approach but highlights the close parallels with the discretionary trust.

²³⁴ JSH Gildenhuis (note 231 above) 34-35.

²³⁵ As earlier pointed out the principal statutes in this regard are; The Public Finance Management Act, No. 7 of 2003; Public Audit Act, No. 6 of 2003 and the Public Procurement Act, No. 8 of 2003. The principles informing these enactments are also mirrored in Chapter XVIII of the Constitution of the Republic of Malawi.

citizenry. Secondly, financial decision making by the government must always aim at the most reasonable and equitable way in which public financial resources can be allocated and also at the most efficient and effective way in which financial resources can be applied to the satisfaction of collective needs. Thirdly, the utilisation of public resources must satisfy the collective public needs in an optimal fashion. This entails that the utilisation must satisfy the collective needs at the lowest possible cost. Fourthly, in all actions pertaining to public resource management avenues must be created for either direct or indirect participation by the citizenry in decisions relating to the allocation of public resources. It is this participation which legitimises government spending. The fifth principle requires sensitivity and responsiveness in all decisions pertaining to public resource management. This means that public functionaries must be sensitive to and respond to the collective needs of the citizenry. The last principle requires that all managers of public resources must be responsible and accountable to the citizenry in their management of public resources.

5.4.1 Interrogating public resource management in Malawi

The above highlighted principles are sufficiently reflected in Malawian legislation dealing with the management of public resources.²³⁶ The shortfalls in the management of public resources in Malawi are largely as a result of a failure to properly implement the existing framework rather than the absence of a regulatory framework.²³⁷ Notably, the entire framework for public resource management is directly founded upon provisions in the Constitution. For example, section 184 of the Constitution establishes the office of the Auditor General who is tasked with auditing and reporting on all public accounts in Malawi and submitting reports of the audits to the National Assembly. The Public Audit Act details out the functions of the office of the Auditor General and also provides guidelines for audits of government departments. Ideally, the Office should ensure that public resources are spent according to the electoral and administrative mandate and that corruption is easily exposed and rooted out. In the main, however, the provisions on auditing government departments all draw their inspiration from section 12 of the Constitution which requires, among others, that powers of state be exercised only to the extent of the lawful authority.

²³⁶ The legal and institutional framework for public finance management in Malawi is relatively well designed and provides a good starting point for sound management of public finances - S Leiderer & others *Public financial management for PRSP implementation in Malawi: Formal and informal PFM institutions in a decentralising system* (2007) 5.

²³⁷ It is also arguable that the failures in the implementation of the public resource management framework, in part, stem from the manner in which the framework was constructed. Of the 'Integrity Legislation', one notes that it was all adopted in 2003 following recommendations made by a World Bank team. Local involvement on the form and structure of this framework was minimal – CMI (note 67 above).

Further, while Chapter XVIII of the Constitution outlines the general manner in which government finances must be managed, generally, the Public Finance Management Act provides greater detail as to how this must be achieved. The Public Finance Management Act is meant to promote effective and responsible financial management and enhance accountability and fiscal discipline by the government. Numerous avenues are created in the Act to ensure fiscal transparency and accountability. For example, under section 17 the Minister of Finance must provide economic and fiscal updates every year before 30 June and under section 23 no public funds must be spent unless there was authorisation by an Appropriation Act. Further, all public borrowing by the government is subject to authorisation by the National Assembly and must, among others, be in the public interest.²³⁸

Additional safeguards in relation to the management of public resources are provided by the Public Procurement Act and the Corrupt Practices Act. The Public Procurement Act is a comprehensive set of principles and procedures to be applied in the procurement of goods, work and services using public funds. The Act establishes the Office of the Director of Public Procurement²³⁹ and sets up procedures that are meant to ensure transparency in all procurement involving public funds. These procedures include the establishment of standing Internal Procurement Committees in all government ministries, departments and parastatals²⁴⁰ and the minimum criteria that must be considered for a bidder to qualify.²⁴¹ Under the Act all procurement must follow an open tendering process²⁴² and all persons with an interest in a particular procurement process must declare their interest and recuse themselves.²⁴³ The Act also subjects all procurement activities to auditing by the Auditor General.²⁴⁴

While the legislative framework for public resource management in Malawi is fairly commendable its implementation leaves a lot to be desired. For example, at a normative level, the Auditor General's office lacks autonomy in relation to appointments, dismissals,

²³⁸ Section 56 Public Finance Management Act.

²³⁹ Section 4 Public Procurement Act.

²⁴⁰ Section 8 Public Procurement Act.

²⁴¹ Section 13 Public Procurement Act.

²⁴² Part VI Public Procurement Act.

²⁴³ Section 19 Public Procurement Act.

²⁴⁴ Section 39 Public Procurement Act.

financial matters, human resource management and access to information.²⁴⁵ Worryingly, the President has the ability to exert undue influence on the office of the Auditor General.²⁴⁶ Lack of resources and capacity are also factors that negate the potential of the Auditor General's office. Prevailing perceptions about the office of the Auditor General have also worked to undermine its efficacy. For example, government ministries routinely submit their reports very late making the work of the Auditor General difficult.²⁴⁷ This in turn handicaps parliament's supervisory role as it proceeds on the basis of incomplete reports or no reports at all. These weaknesses, among others, mean that the Auditor General's office cannot ensure that public funds are spent in line with the electoral and administrative mandate.²⁴⁸ At an institutional level, therefore, there is need to allow for a vibrant Auditor General's office. Achieving this may, as a starting point, require no more than that the executive and the legislature do not exert their overbearing influence in the work of the Auditor General.

An assessment of how public resource management has been conducted in Malawi evinces a palpable failure by successive governments to adopt a principled approach. It is arguable that this failure largely originates in the pervasive failure by public functionaries and Malawians, generally, to distinguish between the government and the ruling political party.²⁴⁹ Public functionaries, in spite of being fiduciaries, have routinely failed to distinguish between their obligations to the nation and their political parties. Admittedly, this conflation is directly traceable to Dr Banda's era when there was no attempt to keep the ruling Malawi Congress Party (MCP) different from the government. This conflation, between the government and the ruling political party, is one of those significant but nefarious attributes that survived the demise of the Dr Banda regime.²⁵⁰ The pervasiveness of this perception is demonstrated by the fact that the management of public resources has continuously not been subjected to the principles that exist in the Constitution and other legislation. It is arguable that the failures in

²⁴⁵ V Wang & L Rakner "The accountability function of supreme audit institutions in Malawi, Uganda and Tanzania" 3 CMI Report 2005:4.

²⁴⁶ As above 17-18. The President can remove an Auditor General from office under section 184(6) of the Constitution if he deems, among others, that the office-holder has become incompetent in the exercise of his duties, become incapacitated or compromised in the discharge of his duties.

²⁴⁷ V Wang & L Rakner (note 245 above) 20.

²⁴⁸ As above 35.

²⁴⁹ R Poeschke & W Chirwa (note 223 above) vii.

²⁵⁰ D Booth & others *Drivers of change and development in Malawi* ODI Working Paper 261 (2006) viii, 10 <<http://www.odi.org.uk/resources/download/1318.pdf>> (Accessed 20 September 2009). For a more comprehensive discussion of perceptions, attributes that survived the Dr Banda regime and influence politics in Malawi see MG Tsoka *Public opinion and the consolidation of democracy in Malawi* (2002) Afrobarometer Paper No. 6 3.

this regard are often as a result of the erroneous perception by most elites which equates access to power as a means for self aggrandisement.²⁵¹ From this perspective public funds are easily viewed as an extension of the personal realm. Public funds are thus readily and without remorse utilised to support patrimonial networks contrary to constitutional and statutory provisions.

Manifestations of the above phenomena abound. For example, in the ten years that Bakili Muluzi was President of Malawi, he routinely distributed cash to political supporters during public rallies.²⁵² The source of this money has never been conclusively determined. Suffice it to point out that there remains a great likelihood that some of the money that President Bakili Muluzi distributed may have been sourced from public coffers. While Bakili Muluzi's successor, Bingu wa Mutharika, may not have engaged in the distribution of money with the same extravagance and gusto as his predecessor, there are still instances in which he has also distributed money in public. In all this, no attempt has been made to properly explain the sources of the money or account for its spending. Having regard to the fact that the office of the President has serious fiduciary obligations attaching to it, it is worrying that no attempt to comply with fiduciary principles has been made by successive Malawian presidents. Again, the use of state resources in political party activities continues to haunt the country. Allegations of use of state resources in, for example, running party campaigns have regularly surfaced.²⁵³ This has by and large become an established routine which picks up in intensity as General Elections approach.²⁵⁴ In the same context of elections, allegations of 'voter buying' have also been incessant.²⁵⁵ Aside from the moral and legal propriety of 'voter buying' there is the question of the source of the funds that are used to buy voters. While protestation has been made that, for example, it is in line with Malawian culture for politicians to distribute money and other merchandise to political supporters, Tambulasi and Kayuni

²⁵¹ M Nxumalo "Democracy and development: The problem of Africa" in D Milazi & others (eds) *Democracy, human rights and regional cooperation in Southern Africa* (2002) 65 66. Generally, see JF Bayart *The state in Africa: Politics of the belly* (1993).

²⁵² See, R Tambulasi & H Kayuni "Can African feet divorce Western shoes? The case of 'Ubuntu' and democratic governance in Malawi" (2005) 14 (2) *Nordic Journal of African Studies* 147.

²⁵³ B Dulani "Consolidating Malawi's democracy: An analysis of the 2004 Malawi general elections" in KG Adar & others (eds) *Electoral process and the prospects for democracy consolidation: Contextualising the African multiparty elections of 2004* (2008) 71 76.

²⁵⁴ See, *Charles Kafumba and others v The Electoral Commission* Misc. Cause No. 35 of 1999. Judicial intervention into issues of abuse of public resources, however, remains very meek – L Chikopa (note 21 above) 4.

²⁵⁵ J Lwanda "Changes in Malawi's political landscape between 1999 and 2004: Nkhope ya Agalatia" in M Ott & others (eds) (note 192 above) 49 55 58.

have ably demonstrated how this assertion is based on a perversion of Malawian tradition.²⁵⁶ Without proper accountability mechanisms in place for these activities it is arguable that these activities represent black holes in which public funds will keep disappearing.

5.4.2 The social trust-based framework and public resource management in Malawi

There are at least two ways in which the social trust-based framework can be utilised to boost public resource management in Malawi. Constitutionally, these two ways derive their validity from sections 12 and 13 of the Constitution. They are also based on fiduciary principles and equity. Conceptually, one can also connect these two avenues to the demands for accountability and transparency that centrally inform the *ubuntu* philosophy. Firstly, the social trust-based framework can be used in the recovery of resources unjustly obtained by public functionaries. Under the current regime, where a person has been convicted of an offence under the Corrupt Practices Act the court may order that money or other pecuniary resource under his control be forfeited to the government.²⁵⁷ A principal may also recover any advantage that an agent has corruptly obtained in the performance of his duties.²⁵⁸ The provisions for the recovery of corruptly obtained benefits by public functionaries are commendable even though they have not been extensively utilised and were only added to the Corrupt Practices Act in 2004.²⁵⁹

Two cases may help illustrate the direction which fiduciary regulation has, for decades, followed in this area and also the direction that Malawi ought to be heading for. In *Reading v Attorney General*,²⁶⁰ the appellant was a British army sergeant who had been stationed in Cairo. The appellant had on several occasions, while in uniform, boarded private lorries and escorted them through police checkpoints in Cairo. In all cases the lorries had been loaded with contraband material and the sergeant had been paid large sums of money for his service by unknown persons. In an action against the appellant for the recovery of the monies that the appellant had acquired, the Court of Appeal held that a fiduciary relationship existed between the Crown and the appellant regarding the use of the uniform which the Crown had issued to the appellant. This fiduciary relationship required the appellant to use

²⁵⁶ R Tambulasi & H Kayuni (note 252 above).

²⁵⁷ Section 37 Corrupt Practices Act.

²⁵⁸ Section 39 Corrupt Practice Act.

²⁵⁹ The Corrupt Practices Act itself was passed in 1995.

²⁶⁰ (1951) 1 All ER 617.

the uniform²⁶¹ only for the benefit of the Crown. Any other use was a breach of the fiduciary relationship and in this case since the appellant had obtained the money through a breach of duty he could not retain it. On appeal, the House of Lords held that any position which enabled a servant to earn money by its use gave the master a right to receive the money so earned even where the money was obtained by a criminal act.

The other case is *Attorney General for Hong Kong v Reid and others*.²⁶² Reid, who was a public prosecutor in Hong Kong, had been convicted of accepting bribes from criminals in return for him not having to prosecute them. He was sentenced to eight years imprisonment and also ordered to pay the Crown the sum of \$HK12.4 million which was the value of assets then controlled by him and which assets he could only have acquired by using the bribes he had received. The Privy Council held that where a fiduciary accepted a bribe as an inducement to betray his trust he held the bribe in trust for the person to whom he owed the duty as fiduciary. The Privy Council further held that a bribe was a secret profit which a person in a fiduciary position acquired by reason of his position and he was thus accountable for it under a constructive trust. In the event where the bribe was invested and thus increased in value, the fiduciary was liable to account not only for the original bribe but for all the increased value.

The approach in the above two cases can be contrasted with that adopted in two Malawian cases: *The State v Sam Mpasu*²⁶³ and *The State v Kambalame*.²⁶⁴ In both these cases, the accused persons were convicted of soliciting and accepting rewards in the discharge of public functions. Admittedly, these cases concerned events that had occurred before the provisions for the recovery of corruptly obtained proceeds were added to the Corrupt Practices Act.²⁶⁵ In both cases the government did not recover anything even though there was conclusive evidence that the accused persons had personally benefitted from their abuse of public office. The failure to recover anything is, supposedly, justified by the then absence of express provisions in the Corrupt Practices Act sanctioning this course of

²⁶¹ It argued that one can place a broad interpretation on 'uniform' here to include all paraphernalia of office. The duty on the part of the office holder, therefore, is not to use any *indicia* of office in contravention of the stipulations of one's office.

²⁶² (1994) 1 All ER 1; (1994) 1 AC 324.

²⁶³ Criminal Case No. 17 of 2005 (Lilongwe Chief Magistrate's Court) Judgment of 8 April 2008.

²⁶⁴ Criminal Case No. 108 of 2002

²⁶⁵ The current Part V of the CPA was thus inapplicable under the general principle which bars retrospectivity in application of laws. The Corrupt Practices Act was passed in 1995 but was amended in 2004 to include provisions on forfeiture of corruptly obtained benefit.

conduct. It is argued that this excuse is not valid. The courts, in both cases, could have easily justified recovery of the corrupt benefits by reference to the principles of equity as outlined, for example, in the English cases referred to above. There was no need to wait for statutory enactment to effectuate an equitable recovery of corruptly obtained benefits especially as the cases involved public officers and principles of equity have been applicable in Malawi since 1902.²⁶⁶ As noted in *The State v Sam Mpasu*.²⁶⁷

According to section 12 (i) of our Constitution ‘All legal and POLITICAL authority of the State derives from the people of Malawi and shall be exercised in accordance with this Constitution SOLELY TO SERVE AND PROTECT THEIR INTERESTS.’ (Emphasis supplied). On the authority of such clear Constitutional provisions and for a party that was ushering in a new era of accountable government would we say the accused person’s conduct complied with such tenets? The answer must be a resounding ‘No!’ The accused seemed to be operating under a misguided notion that his political party interests were paramount to the economic interests of the very people he purported to serve

On the above basis the trial magistrate would have been within his legal competence to order the recovery of the benefit that he had found the accused to have unlawfully acquired. This would have been so because the magistrate had clearly discerned the fiduciary nature of the accused person’s position which necessarily required him to account for all the benefit that he may have acquired by virtue of his position. The trial magistrate’s observations in the course of the accused’s sentencing lend further credence to this position. The magistrate stated as follows:²⁶⁸

Actually in the context of the political accountability enshrined in section 12(i) of the Constitution [the accused] betrayed the trust of the people of Malawi by advancing the interests of another and himself at their expense. Thus contrary to his suggestion, his political office renders him liable to sterner disapproval of the law than if it had been a lower ranking person employed in the public service

²⁶⁶ The reception of English law in Malawi took place under the British Central Africa Order in Council of 1902 which in article 15(2) extended the application of ‘the common law, doctrines of equity, and statutes of general application in force in England on the eleventh day of august, 1902’ to British Central Africa (later renamed Nyasaland and now known as Malawi). The applicability of the common law and doctrines of equity was continued by section 15(a) of the Malawi Independence Order, 1964 and further carried on by section 15 of the Republic of Malawi (Constitution) Act, 1966 (Act No. 23 of 1966) – See J Finnis “Plain speaking about some existing laws” (1981) 3 *UNIMA Students Law Journal* 38.

²⁶⁷ Page 58 of the judgment.

²⁶⁸ *The State v Sam Mpasu* (Judgment on sentence, 8 April 2008) Criminal Case No. 17 of 2005.

Similarly, it is contended that the court could have easily ordered and justified a recovery of the money that was unjustly acquired by the accused in *The State v Kambalame*. In delivering its sentence the court, interestingly, stated thus:²⁶⁹

Firstly, I wish to point out that the convict did not only attempt to receive gratification. He actually accepted and received gratification. Secondly, it is important to remember that the Defendant was a public officer who enriched himself from the public coffers. Further, the amount involved is not a small sum. Indeed, this Court is alive to the fact that when funds, especially those originating from the public purse, is siphoned off into private bank accounts of public officials, there is mistrust that arises in the members of the public.(sic)

Finally, and more importantly, the Court would like to observe that corruption is morally repugnant and has the effect of economically disempowering a nation and its people. Furthermore, corruption has the undesirable consequence of distorting the faith that people have in their public officials. Indeed, corruption undermines trust and credibility in institutions and procedures. Additionally, corruption, if not punished adequately, has the tendency of creating a bad impression on a country especially a developing country like ours. Indeed, experts have said, and this Court accepts that analysis, that corruption effects a country's economy by undermining growth and development in that it hinders or deters foreign or local investment. (sic)

It is argued that the judge ably summarised the basis and justification for recovering benefits that public functionaries obtain unjustly. Again a quick reference to the principles of equitable regulation could have easily facilitated a recovery of the benefits that the accused had acquired together with any attendant increase in value of the assets. It is the bane of Malawian law that such avenues have yet to be utilised. It is this study's contention that no justification exists for the continuance of such a state of affairs.

Secondly, the social trust-based framework can be utilised to boost public resource management by bringing the principles of fiduciary management to bear in the management of the various funds that the government has created. Various pieces of legislation in Malawi create funds wherein, supposedly, the revenue generated from the administration of the particular Act may be deposited.²⁷⁰ Arguably, the most important of these funds is the

²⁶⁹ *The State v Dennis Kambalame* Criminal Case No. 108 of 2002 Judgment on sentence 3-4.

²⁷⁰ See, for example, section 29 Public Finance Management Act.

Consolidated Fund created under section 172 of the Constitution. All revenues raised or received for the purposes of the Government are supposed to be paid into the Consolidated Fund. Notably, while there is a proliferation of funds under various pieces of legislation the management of these funds, with the exception of the Consolidated Fund, is not expressly articulated.

It must be noted that, in equity, the concept of 'the fund' is central to the operation of a trust. The fund allows diverse title holders to pool their resources into a common holding and thereby not only increase their resource base but also open possibilities for professional management of property resources.²⁷¹ The fund thus enables title owners to do that which they could not achieve individually. Additionally, because funds are automatically subject to fiduciary regulation, the title holders are guaranteed the protection and possible increase in value of their proprietary interests.

The principles for the management of funds from a fiduciary perspective as developed in private law could be extended and modified to have relevance in the management of public funds. With regard to the public funds that are created by the various statutes in Malawi, recourse to fiduciary regulation would impose greater scrutiny in their management. The managers of these funds would be required to provide proper accounts of their management of the funds, always operate with business prudence and continuously avoid conflicts of interest. Where a delinquent fund manager is found, such a manager may then be subjected to the criminal law, for example, outlined in the Corrupt Practices Act. Where the provisions of the Corrupt Practices Act do not make adequate provision for the recovery of the unjustly acquired benefits, recourse may then be had to principles of equity. This would contribute towards equitable, transparent and depoliticised management of public resources.²⁷²

For example, the Corrupt Practices Act may be used to convict fund managers and public officers if they are found to be in possession of unexplained property or maintaining a standard of living which is not commensurate to their official emoluments.²⁷³ In determining

²⁷¹ It must constantly be borne in mind that the public trust embraces more than property management.

²⁷² Malawi Economic Justice Network (note 70 above).

²⁷³ Section 32 of the Corrupt Practices Act. It must also be pointed out that the amended section 25B(3) of the Corrupt Practices Act was declared unconstitutional by the High Court in *Friday Jumbe and another v The Attorney General Constitutional Cases Nos. 1 and 2 (HC)*. The Court found the provision to be in violation of an accused person's right to fair trial especially the rights to be presumed innocent and to remain silent.

whether or not a public officer is in possession of unexplained property, principles of unjust enrichment and restitution may offer an important fountain of reference. Under unjust enrichment, for example, equity disentitles anyone from retaining a benefit that has been acquired in an unconscionable manner. The principles of unjust enrichment could also be used in negating defences that one may set up for offences under the Corrupt Practices Act.²⁷⁴ Clearly, principles of fiduciary management retain great potential that can be utilised in the management of public resources in a manner that conforms to the stipulations in the Constitution. To fully benefit from this potential, Malawi must, at the least, seriously attempt to comply with its own existing public resource management framework while creatively supplementing some of the legislative gaps by a resource to the law of fiduciary obligation.

5.5 Accountability of public functionaries and citizenry empowerment

Democracy thrives on the active participation of the citizenry in governance processes.²⁷⁵ It must be recalled that democracy as a form of governance has been overwhelmingly endorsed in Malawi and there is immense optimism on what it can achieve.²⁷⁶ Participation in a democracy, however, may take diverse forms.²⁷⁷ For example, participation could be achieved through voting in elections, through membership of political parties and other organisations or through participation in public demonstrations.²⁷⁸ It is important to realise that democratisation flourishes on quality participation by the citizenry. As Doig has argued, the purpose of democratisation is to engage the participation of the public in the activities of the state.²⁷⁹ Quality participation in turn requires 'knowledge, integrity and respect of morals and human dignity among the participants.'²⁸⁰ Quality participation clearly requires a citizenry that is empowered and aware of the political processes in the country.²⁸¹ Participation in the activities of government also confers legitimacy on a government's actions and gives real

²⁷⁴ Cf. Section 33 Corrupt Practices Act.

²⁷⁵ B Dulani (note 253) 89.

²⁷⁶ S Khaila & M Tsoka "Attitudes and consolidation of democracy in Malawi" Centre for Social Research, University of Malawi (2002).

²⁷⁷ M Chilambo "Participation in democracy – a challenge" in M Chilambo (ed) *Learning democracy: A resource book* (2007) 171.

²⁷⁸ G Erdmann & others (note 114 above) 23.

²⁷⁹ A Doig "In the state we trust? Democratisation, corruption and development" (1999) 37 (3) *Commonwealth and Comparative Politics* 13 14.

²⁸⁰ M Chilambo (as 277 above).

²⁸¹ Education may be an important component in engendering quality political participation but low levels of education are not necessarily a bar to political consciousness or participation – G Evans & P Rose "Support for democracy in Malawi: Does schooling matter" (2007) 35 (5) *World Development* 904-919.

meaning to the concept of people's sovereignty.²⁸² Even more importantly, the existence of avenues for participation fosters citizenry compliance with governmental rules and orders.²⁸³

Hand in hand with the question of participation is the accountability of public functionaries to the citizenry. It must be noted that demands for the accountability of public functionaries are not meant to hinder a government from governing. The purpose of such demands is to hold governments, public officials and their agencies to account for their stewardship.²⁸⁴ Accountability provides the test and measure of a government's trusteeship.²⁸⁵ In a democracy, every citizen has the right to be informed about official actions, to hear justifications for them and to judge how well or poorly they were carried out.²⁸⁶ Measuring accountability is, however, very difficult. In liberal democracies, the complexity is heightened by the fact that citizens have to rely on representatives, who are supposed to be their agents but who also act as principals when trying to ensure the accountability of public functionaries.²⁸⁷ The double roles of the representatives make it difficult for citizens to monitor their performance. Importantly, accountability as a political virtue is fully recognised by the Malawian populace.²⁸⁸

There is evidence of an overwhelming interest among the Malawian populace to participate and influence the political processes in the country.²⁸⁹ There is also considerable optimism about democracy as a system of governance.²⁹⁰ In spite of this there are significant challenges facing political participation in Malawi and marginalisation is one these challenges.²⁹¹ This marginalisation, it is argued, is partly as a result of the persistent neglect

²⁸² *Njoya and others v Attorney General and others* 2004 AHRLR 157 (Ke HC 2004) 171-172 Per Ringera J.

²⁸³ AH Birch *The concepts and theories of modern democracy* (2007) 145-146. As to the problems of participation in Malawi, generally, see B Chinsinga "The participatory development approach under a microscope: The case of the poverty alleviation programme in Malawi" (2003) 18 (1) *Journal of Social Development in Africa* 129-144.

²⁸⁴ PD Finn (note 53 above) 234.

²⁸⁵ As above.

²⁸⁶ PC Schmitter "The ambiguous virtues of accountability" (2004) 15 (4) *Journal of Democracy* 47 48.

²⁸⁷ As above.

²⁸⁸ C Mthinda & S Khaila (note 113 above).

²⁸⁹ G Erdmann & others (note 114 above) 23-31.

²⁹⁰ C Mthinda & S Khaila (note 113 above).

²⁹¹ B Chinsinga (note 283 above) 129.

of the constitutional principles in the management of the country. Political participation is also tempered by poverty and general poor socio-economic conditions and mistaken perceptions about the workings of democratic governance.²⁹² The need to create and maintain avenues for meaningful participation thus remains a pressing exigency.²⁹³ To immediately address the deficit in participation in Malawi, the state must take the lead and introduce programmes that support participation over a wide range of issues including constitutionalism, corruption, separation of powers and local governance.²⁹⁴ Mindful of the fact that there are various avenues to achieving participation, accountability and empowerment, the discussion hereunder focuses on three aspects: the role and place of civil society, political parties and political participation and the place of local government. By exploring these three areas it is hoped to highlight the opportunities and challenges for social trust-based governance and constitutionalism in Malawi.

5.5.1 The role and place of civil society

Defining civil society has never been easy. The result is that there is no single view of the phenomenon.²⁹⁵ It means different things to different people. In spite of this, civil society is often understood to connote ‘the realm of organised social life standing between the individual and the state’.²⁹⁶ It is ‘the arena of social engagement which exists above the individual yet below the state ... It is that part of society that connects individual citizens with the public realm and the state ... [it] is the political side of society’.²⁹⁷ As Sachikonye puts it, civil society may be defined as:²⁹⁸

An aggregate of institutions whose members are engaged primarily in a complex of non-state activities – economic and cultural production, voluntary associations and household life – and

²⁹² MG Tsoka (note 250) 5.

²⁹³ P Chihana “Opening space for participation in Malawi” 61 in *Towards the consolidation of Malawi’s democracy* (note 116 above).

²⁹⁴ Malawi Economic Justice Network (note 70 above).

²⁹⁵ G Hyden “The challenge of analysing and building civil society” (1996) 26 (2) *Africa Insight* 97 100.

²⁹⁶ As above.

²⁹⁷ As above.

²⁹⁸ L Sachikonye “Democracy, civil society and social movements in Southern Africa” in L Sachikonye (ed) *Democracy, civil society and the state: Social movements in Southern Africa* (1995) 7.

who in this way preserve and transform their identity by exercising all sorts of pressures or controls upon state institutions.²⁹⁹

It is generally agreed that there are linkages between civil society and democracy.³⁰⁰ The most important link is that civil society strengthens democracy. This is because civil society can contain the power of the state through public scrutiny, stimulating political participation by citizens and developing democratic norms such as tolerance and compromise.³⁰¹ It also creates ways for articulating, aggregating and representing interests outside of political parties especially at local levels, mitigating conflicts through crosscutting or overlapping interests, questioning or reforming existing democratic institutions and procedures and disseminating information.³⁰²

The relevance and importance of civil society to democratisation in Malawi was amply demonstrated during the transition to multi-partyism. It is remarkable that the transition process was centrally managed by the civil society led by the Public Affairs Committee (PAC).³⁰³ Sadly, civil society in Malawi has failed to sustain the momentum that it had generated during the transition and has largely faltered into obscurity.³⁰⁴ As has been the case elsewhere in Africa, the weaknesses of civil society have reduced the level of participation by the citizenry in political processes.³⁰⁵ The failures of civil society in Malawi have resulted in the alienation of the public from participation in political processes as prominently manifested by the citizenry's shunning of electoral processes in Malawi.³⁰⁶ This has also lessened public scrutiny of public functionaries for accountability purposes.

²⁹⁹ It is obviously this type of definitions of civil society that Englund criticises as being unduly Eurocentric and thus focusing on establishing civil society as being distinct and separate from the state – H Englund “Introduction: Recognising identities, imagining alternatives” in H Englund & F Nyamnjoh (eds) *Rights and politics of recognition in Africa* (2004) 1 3. For another critical perspective on civil society one must consult the work of Antonio Gramsci. Gramsci argued that in some instances what masquerades as civil society is no more than an extension of the state which moderates state/citizenry relations with a view to maintaining hegemony – A Gramsci *Selections from the prison notebooks* Edited and Translated by Q Hoare & GN Smith (1971).

³⁰⁰ WC Chirwa “Civil society in Malawi’s democratic transition” in M Ott & others (eds) (note 192 above) 87 91.

³⁰¹ As above.

³⁰² As above

³⁰³ As above 100-103.

³⁰⁴ As above 103 -105.

³⁰⁵ K Matlosa “Introduction” in K Matlosa & others (eds) (note 229 above) 1 3.

³⁰⁶ WC Chirwa (note 300 above) 114-116.

For governance and constitutionalism to take root in Malawi deliberate effort must be made to create a stable balance between the state and society, between the government and its citizens and this can be achieved by engendering a vibrant civil society.³⁰⁷ As has been recognised, the government of Malawi cannot address the governance and democratic challenges without stakeholder participation especially from civil society.³⁰⁸ Civil society remains crucial to democratic governance in Malawi and, arguably, is the only vibrant mechanism by which the citizenry can articulate their interests and participate in the process of national development.³⁰⁹

In a nascent democracy like Malawi, it is essential that deliberate effort be taken to cement the place and role of civil society. While the institutionalisation of constitutionalism and democratic governance is a pressing necessity, it is important to note that this requires more than institutional requirements. It also requires that people should share certain attitudes and values that are consistent with the democracy.³¹⁰ The creation and sustenance of common democratic-compatible attitudes is a task that is uniquely suited for civil society organisations operating, as they often do, from the grassroots. A common avenue that is utilised by civil society to generate perceptions about particular issues is civic education.³¹¹ Civic education, if properly utilised, can contribute to the creation of the civic culture that is necessary for citizenry empowerment and democratisation.³¹² If, however, civic education in Malawi must contribute to the creation of a civic culture, it must be crafted so as to challenge the existing power arrangements in Malawi.³¹³ Importantly, civic education must aim at a move away from the pervasive neo-liberal visions of democracy and empowerment which have proved to have very little relevance to the situation in Malawi.³¹⁴ One way of challenging neo-liberal visions of society is to emphasise the trust basis of organisation that is apparent in the Constitution and other pieces of legislation. Civic education must thus be utilised as part of a

³⁰⁷ L Pye "Democracy and its enemies" in JF Hollifield & C Jillson (eds) *Pathways to democracy* (2000) 21 30-31.

³⁰⁸ Malawi Economic Justice Network (note 70 above).

³⁰⁹ B Dulani "The status of decentralisation in Malawi" Research Report (2003) 20.

³¹⁰ L Pye (note 307 above) 21 24.

³¹¹ As to the dangers of civic education that is approached with a predetermined perspective, see H Englund *Prisoners of freedom: Human rights and the African poor* (2006).

³¹² R Kasambara "Civic education in Malawi since 1992: An appraisal" in KM Phiri & KR Ross (eds) (note 2 above) 237.

³¹³ H Englund (note 311 above) 104-105.

³¹⁴ As above 117-118.

calculated and comprehensive effort aimed at achieving clearly discernible objectives in a manner that is consistent with democratisation while acknowledging local conditionalities.³¹⁵

In considering how civil society can best contribute to democratic governance and constitutionalism different approaches may be suitable for different places. In Malawi, however, there is need to combine the development of nationwide institutions with community based institutions to foster democratisation.³¹⁶ It is of no use to focus on the development of civil society mechanisms and institutions at the national level while ignoring the grassroots. The development of a vibrant and functional civil society must commence with the grassroots. In the process of developing Malawian civil society from the grassroots adequate concession must be made of the role that traditional leaders can play in the development of democratic values at the grassroots.³¹⁷ This is particularly because traditional leaders have been proven to be a persistent component in the lives of rural Malawians especially.³¹⁸ Traditional leaders and traditional systems can be harnessed for them to make a consistent contribution to democratic governance in the country. Notably, it has been proved that the 'village society' in most parts of Malawi has adequately allowed rurally residing Malawian to form common opinions on important issues.³¹⁹ It is in the light of some of these points that parliament ought to seriously consider the proposal from the Malawi Law Commission for the constitutional recognition of the institution of chieftaincy.³²⁰ Such a constitutional recognition would enable the various traditional leaders to openly and transparently contribute to democratic governance.

Civil society in Malawi must take the lead in articulating social trust-based governance and constitutionalism. This would involve, for example, using the social trust-based framework in civic education on the roles and functions of government. The principal resources in this

³¹⁵ Most civic education projects have failed to make significant contributions to governance and democratisation because they are often erratic, have an uneven coverage and are uncritically donor driven – D Booth & others (note 250 above) 59.

³¹⁶ D Olowu "Governance, institutional reforms and policy processes in Africa: Research and capacity building implications" in D Olowu & S Sako (eds) *Better governance and public policy: Capacity and democratic renewal in Africa* (2002) 53 61.

³¹⁷ Traditional leaders, especially in the rural areas, are first port of call for Malawians if a social problem arises - S Khaila & C Mthinda (note 113 above) 6.

³¹⁸ National Democratic Institute for International Affairs "Traditional authority and democratic governance in Malawi" A Report on NDI programme activities with Malawian chiefs in preparation for the National Constitutional Conference (1995) 2-3.

³¹⁹ As above.

³²⁰ Government of Malawi (note 47 above) 118-119.

endeavour can be sourced from the Constitution and norms of Malawian traditions. For example, in heeding the call to move away from neo-liberal visions of democracy, civil society should deliberately attempt to construct and relate to the Constitution a governance paradigm that is rooted within Malawi's indigenous systems of societal organisation. Government's performance can then be assessed on the basis of this paradigm's values. This would include, for example, the deliberate involvement of traditional leaders in governance processes.³²¹ Emphasis could also be placed on the construction of purposeful parallels between governance norms from traditional Malawi with those from the 'mainstream' where possible. The recognition of parallels would, it is argued, make it easy to entrench some of the norms that are common to both systems.³²² In this connection it is sobering to note that *ubuntu* sees political power as being accorded by the people as a whole to the few to exercise over them and create conditions for community growth.³²³ This perspective could be utilised by civil society in generating public consciousness on how government must be perceived.

5.5.2 Political parties and citizen participation in political processes

Political parties are a dominant feature in all liberal democracies. They remain the crucial apparatus through which the citizenry participate in political processes. Political parties are supposed to provide the link between the state and the citizenry.³²⁴ Hug has defined a political party as 'an organisation that appoints candidates at general elections to the

³²¹ 'Deliberate involvement' of traditional leaders requires a cautious and measured involvement of traditional leaders in democratisation. Historically, traditional leaders have played contrasting roles in governance in Malawi, see AL Chiweza "The ambivalent role of chiefs: Rural decentralisation initiatives in Malawi" in L Buur & HM Kyed (eds) *State recognition and democratisation in Sub-Saharan Africa* (2007) 53-78. As earlier stated, the re-instatement of the senate would be an example of traditional leaders being involved in the governance of the country. As is demonstrated later in this Chapter, local governance is another area in which traditional leadership must be allowed to contribute.

³²² For example, indigenous systems of organisation in Malawi clearly value accountability as a virtue. Accountability of public functionaries is also harped on in the good governance paradigm promoted by the Bretton Woods institutions and most donor agencies. However, the emphasis should not be on accountability as demanded by donor institutions but on accountability as a virtue recognised within Malawian society and what it connotes. It must be conceded that the past few years have witnessed efforts towards a social trust-based governance and constitutionalism in civic education in Malawi especially under the Democracy Consolidation Programme.

³²³ A Shutte "Politics and the ethic of ubuntu" in MF Murove (ed) (note 39 above) 375 386.

³²⁴ FR Ankersmit *Political representation* (2002) 128.

system's representative assembly.³²⁵ While this definition may be criticised for being narrow, it is the attribute of presenting candidates at elections that distinguishes political parties from other organisations. While the act of presenting candidates during elections is not an exhaustive criterion for defining political parties it is undoubtedly the definitive attribute in the categorisation of an organisation as a political party or not.³²⁶

Political parties have had an unhappy and chequered history in Malawi. At independence, in 1964, Malawi was a multiparty state but the country became a one-party state not long after that.³²⁷ Although Malawi became a *de jure* one-party state only in 1966, it is arguable that Malawi was a *de facto* one party state from 1964 following the MCP's landslide victory in the General Elections. It was only with the Referendum of 1993 that political parties were reintroduced. Since then numerous political parties have been formed.³²⁸

Political parties are 'important institutions for democratic consolidation and governance.'³²⁹ It has even been asserted that 'democracy is unthinkable, save in terms of political parties.'³³⁰ In a liberal democratic dispensation, access to the political system is an integral part of good governance.³³¹ 'Access', however, raises several crucial constitutional issues.³³² These include, among others, the freedom to organise political parties and to participate in the political process including ensuring fair access for women and minorities. Access also entails the freedom of political expression and the right to campaign free from undue influence or intimidation and the right of the adult population to vote at regular intervals in free and fair elections. Political parties play a crucial role in all these processes and are widely regarded as a lynchpin to the functioning of a democracy.³³³

³²⁵ S Hug *Altering party systems* (2001) 12.

³²⁶ N Khembo "Political parties in Malawi: From factions to splits, coalitions and alliances" in M Ott & others (eds) (note 192 above) 87.

³²⁷ As above 88 -89.

³²⁸ In spite of the prevalence of political parties in Malawi, it is perhaps ironic that the Constitution mentions political parties only twice – in section 40 in relation to party funding and section 65 on crossing the floor.

³²⁹ N Khembo (note 326 above) 89.

³³⁰ As above.

³³¹ J Hatchard & others (note 10 above) 99.

³³² As above.

³³³ As above 100.

Generally, political parties play a key role in articulating the interests of the citizenry in a democracy.³³⁴ Specifically, political parties play the following four crucial functions in a democracy:³³⁵ firstly, political parties act as agencies for the articulation and aggregation of different views and interests; secondly, political parties serve as the vehicle through which leaders for government positions are selected; thirdly, political parties are a mechanism for organising personnel around the formulation and implementation of public policy and fourthly, political parties serve in a mediating role between individuals and the government.

In spite of the crucial roles that political parties play it is important to concede that the existence of political parties does not necessarily guarantee the existence of a functioning democratic system. In Africa especially, a host of underlying factors inhibit the proper functioning of political parties negating or completely eliminating their contribution to democratic governance.³³⁶ While the problems faced by political parties in Malawi are numerous, this study will highlight only three such problems. Firstly, political parties in Malawi, almost uniformly, demonstrate a serious lack of intra-party democracy. The lack of intra-party democracy has often been manifested by parties' imposition of particular candidates on some constituencies. The lack of free and fair selection criteria for candidates, especially with respect to parliamentary elections, has significantly destabilised most political parties. Resultantly, most political parties are beset by perennial leadership crises, destructive power struggles and are dominated by a single leader.³³⁷ As a further manifestation of lack of democratic credentials within political parties most of them have failed to resolve intra-party disputes within party mechanisms.³³⁸ The result of this has been that most intra-party disputes have had to be resolved by the courts.³³⁹

³³⁴ N Patel & N Tostensen (note 23 above) 4.

³³⁵ J Hatchard & others (note 10 above) 100.

³³⁶ See, for example, B Chinsinga "Lack of alternative leadership in democratic Malawi: Some reflections ahead of the 2004 General Elections" (2003) 12 (1) *Nordic Journal of African Studies* 1-22.

³³⁷ B Chinsinga (note 116 above) 14.

³³⁸ FE Kanyongolo "Courts, elections and democracy: The role of the judiciary" in M Ott & others (eds) (as note 192 above) 195 203.

³³⁹ Examples of intraparty disputes ending up in courts include: *Ndomondo v UDF* Civil Cause No. 484 of 2004 ; *Lapken v Katsonga & UDF* Civil Cause 436 of 2004 (both of which involved disputed primary elections conducted by the United Democratic Front) and *Gwanda Chakuamba v John Tembo* Civil Cause No. 2509 of 2001.

Secondly, political parties in Malawi are almost uniformly ‘top-heavy.’³⁴⁰ This means that authority within most political parties is almost exclusively held by a limited circle of elitists who dominate the entire party. This is manifested by the fact that while most political parties have prominent national executive committees there is very little indication of how parties organise their grassroots support.³⁴¹ The ‘top-heavy’ political parties in Malawi are a big clog in the citizenry’s participation in the political process. As Patel argues:³⁴²

The top heavy approach of the party is also due to the common notion of power in the government being equated with the executive branch and not with the legislature. If the legislature were truly seen as the organ of the people and therefore the real powerhouse in a democracy, then party structures would also change to reflect the new paradigm and adopt a bottom-up approach.

Thirdly, there is a palpable lack of ideological affiliation and distinction between the political parties that have existed in Malawi since 1994.³⁴³ Political parties in Malawi cannot easily be connected with a particular ideology or worldview.³⁴⁴ As a matter of fact, there are, as Patel points out, political leaders in Malawi who openly assert the irrelevance of ideologies supposedly as a result of the manifestly common problems that African countries face.³⁴⁵ Others point to the ‘end of ideology’ debate as justifying the lack of proper attention to ideology by political parties in Malawi.³⁴⁶ In spite of these protestations, it is clear that political party ideology remains crucial to the democratisation process in Malawi. As Phiri has argued, without clearly defined ideologies, political parties become redundant and the

³⁴⁰ N Patel “Troublemakers and bridge builders: Conflict management and conflict resolutions” in M Ott & others (note 192 above) 28.

³⁴¹ No political party in Malawi can give an accurate indication of its membership as none of the parties has a proper system for registering and tracking its members.

³⁴² N Patel (note 340 above).

³⁴³ Olowu asserts that the problem of party ideology is not uniquely Malawian but a general trend across Africa. He argues that very few African political parties are effective in mobilising the grassroots and almost all of them suffer from weak ideological differentiation – D Olowu “Governance, institutional reforms and policy processes in Africa: Research and capacity building implications” in D Olowu & S Sako (eds) (note 262 above) 65.

³⁴⁴ KM Phiri “Reflections on party ideologies and programmes” in M Ott & others (eds) *Malawi’s second democratic elections: Process, problems and prospects* (2000) 67-86.

³⁴⁵ N Patel (note 340 above) 227.

³⁴⁶ The development of human society is underpinned and guided by a set of goals. These goals reflect the values of society and are reflected and expressed through the concept of ideology. The existence of a functioning society presupposes some consensus on the values that govern a society. Ideology is clearly very much alive – K Gyekye *Tradition and modernity: Philosophical reflections on the African experience* (1997) 163-170.

electorate is easily enticed by parochial and primordial criteria in making political choices.³⁴⁷ The lack of a clear ideological basis for political parties in Malawi has meant that, in practice, there is very little to distinguish between the political parties.³⁴⁸ The universal preoccupation by all political parties seems to be to gain access to political power but beyond this no political party has so far offered a cogent alternative.³⁴⁹ This uniformity between the parties is manifested by, for example, the fact that party manifestos in Malawi are by and large identical.³⁵⁰ The ideological deficiencies of political parties, however, have provided incentives for power mongering generally and personality clashes in particular between party leaders thereby causing and fuelling intra-party and inter-party conflicts and political violence.³⁵¹ Parties thus generate support not because of the positions that they stand for but principally because of the personalities of their leaders.

Unsurprisingly, political parties in Malawi have made a very minimal contribution to democratisation and in some cases they have even clogged the process of democratisation. The failures of political parties have, among others, generated a distrust of politicians and the political processes generally.³⁵² This distrust has been manifested by the growing voter apathy in elections and a general disengagement from political processes by the populace.³⁵³ If, as appears to be the case in Malawi, political parties are part of the problem in democratisation, the solution lies not in getting rid of political parties but in harnessing the advantages that they bring to the system while blunting their denigrative effects.³⁵⁴ Clearly, if parties have to claim to be genuinely representative of their membership they must not only enhance their internal democracy but also create proper channels for their presence at the grassroots. Enhancing internal democracy, at the very least, requires that political parties set up clear rules for their own governance and undertake to act in accordance with the rules at all times. This would facilitate consultation and enhance participation among the citizenry. Additionally, the Political Parties (Registration and Regulation) Act³⁵⁵ could also be reviewed and amended. It is striking that this legislation, which regulates political parties in Malawi,

³⁴⁷ KM Phiri (note 344 above) 67 68.

³⁴⁸ G Evans & P Rose (note 281 above) 906.

³⁴⁹ S Brown (note 36 above).

³⁵⁰ N Khembo (note 326 above).

³⁵¹ As above 94.

³⁵² G Bauer & S Taylor *Politics in Southern Africa: State and society in transition* (2005) 34.

³⁵³ B Chinsinga (note 116 above).

³⁵⁴ PD Finn (note 53) 239.

³⁵⁵ Act No. 15 of 1993.

only regulates the registration and de-registration of political parties. It may be important to include in this legislation a scheme for the regulation of political party leadership especially in relation to their membership. A possible direction would be to create mechanisms for ensuring the accountability of political leaders to their membership which is currently lacking. Political party leadership accountability to its membership could be made a statutory obligation by detailing out a minimum accountability mechanisms that all political parties must adhere to.³⁵⁶

In as far as the lack of ideology among the parties is concerned, it is ironic to note that political parties in Malawi have always had several ideological resources at their disposal which they could tap if they wished.³⁵⁷ A convenient starting point in this regard is for Malawian political parties to shift away from the liberal democratic tradition which most of them uncritically adopted during the transition to multi-partyism.³⁵⁸ As noted, political parties that start from a liberal-democratic perspective often suffer from being poor carbon copies of systems and structures that have evolved in the context of the Western world.³⁵⁹ The way forward for political parties is to also look inside and utilise indigenous resources in crafting ideologies that inform their policies.³⁶⁰ In this inward gazing, social trust-based governance and constitutionalism offers possibilities that can be utilised without the veneer of cultural imperialism. Its framework may be utilised to inform political party ideologies and shape political party organisation as well. The social trust-based framework is offered here as an intellectual resource that parties can have recourse to in crafting their ideologies.

5.5.3 The place and role of local government³⁶¹

As earlier pointed out, a functional democracy cannot exist without participation by the citizenry.³⁶² Local government structures are among the most potent avenues for

³⁵⁶ The balance to be struck here is between allowing political parties to operate freely, on the one hand and ensuring that they operate in a manner that fully respects democratic principles, on the other hand. The law could be used as a stimulus to prod parties to comply with democratic principles in their organisation.

³⁵⁷ KM Phiri (note 344 above) 69.

³⁵⁸ As above 84.

³⁵⁹ MC Musambachime "The weight of history and its contribution to democracy and democratisation process in Africa" Windhoek, University of Namibia Inaugural Lecture No. 5 1997 23 quoted by KM Phiri (note 344 above) 84.

³⁶⁰ See, N Patel (note 340 above) 225.

³⁶¹ While the role and place of local government could very well have been discussed under the section dealing with the executive it is because of the emphasis on participation in governance processes that it is discussed in this section.

participation by the grassroots in a political system. In Malawi, local governance has a long but uneasy history especially as a result of the extensive centralisation of the state that took place during the thirty years of the Malawi Congress Party (MCP) rule.³⁶³ It was only in the twilight of its time in power that the MCP government commenced a process of reviewing local governance in Malawi.³⁶⁴ These processes were, however, overtaken by the transition to multi-partyism and the adoption of the new Constitution in 1994. The Constitution recognises and regulates local government under Chapter XIV. Chapter XIV of the Constitution is supplemented by the Local Government Act³⁶⁵ which outlines how local governance must be practiced in Malawi. Local governments are responsible for, among others, the representation of the people over whom they have jurisdiction.³⁶⁶ It is, however, through the process of decentralisation that most countries, Malawi included, achieve a viable system of local governance.

Decentralisation emphasises the attribution of central government functions to lower levels of government to which may then be granted a sphere of autonomy protected against the supremacy of national government.³⁶⁷ Chiweza accurately summarises the essence of decentralisation when she asserts as follows:³⁶⁸

Decentralisation implies the sharing and transfer of power from the top to the lower levels. It is taken to mean the redistribution of power or sharing of part of governmental power by the central authority with other levels of authority such as regional, district or local authorities. It relates to the institutional framework for administration and political governance in a country, as well as the roles the institutions play.

The emphasis on decentralisation is a reflection of the political evolution towards more democratic and participatory forms of government that aim at improving responsiveness and

³⁶² G Erdmann & others (note 114 above) 23.

³⁶³ For a fuller perspective on the history of local governance in Malawi see B Dulani (note 307 above). See, also, J Kaunda "The state and society in Malawi" (1998) 36(1) *Commonwealth and Comparative Politics* 48 52-52.

³⁶⁴ B Dulani (note 309 above) 6.

³⁶⁵ Local Government Act, Chapter 22:01 Laws of Malawi.

³⁶⁶ Section 146(2) Constitution of the Republic of Malawi.

³⁶⁷ J Hatchard & others (note 10 above) 184.

³⁶⁸ AL Chiweza 'Is the centre willing to share power?: The role of local government in a democracy' in M Tsoka & C Hickey (eds) *Democracy, decentralisation and human development: Bwalo, Issue 2* (1998) 93.

accountability of political leaders to their electorates.³⁶⁹ Decentralisation is premised on the ‘fundamental belief that once they are entrusted with their own destiny through the medium of popular local democratic institutions, human beings can govern themselves in peace and dignity in the pursuit of their collective well-being.’³⁷⁰ Decentralisation of government is thus a way of strengthening democracy and a way of bringing decisions closer to the people that are affected by the decisions.³⁷¹ It is also a way of enhancing participation by the citizenry. Decentralisation, according to Wingo, is the first step towards the attainment of democratic governance.³⁷² As many state functions as possible need to be located at the local level. Specifically in the context of Africa, Wingo asserts that there are two compelling reasons why African countries must focus on decentralisation.³⁷³ Firstly, at the local level African countries are replete with local institutions and associations where responsibility, reciprocity and accountability are more evident.³⁷⁴ Secondly, legitimate politics in Africa are largely a local affair. People are motivated to participate on matters that are closest to them.

Two prominent advantages of decentralisation are noticeable. Firstly, at the political level, decentralisation can enhance good governance.³⁷⁵ The creation of ‘sub-governments’ under the central government increases the opportunities for political participation and fosters the creation of a democratic culture in a country. Invariably, locally elected leaders would know their constituents better than the central government and would thus be ideally positioned to provide the services that their constituents need. Conversely, if there is a problem with governance at the local level it is easier for the constituents to access the governors and communicate the problems that they are experiencing. This also creates potential for the populace to make their governors accountable. Overall, decentralisation reduces the over-concentration of authority in the central government and thus reduces the potential for arbitrary use of authority.³⁷⁶ Secondly, at the economic level, decentralisation allows for the

³⁶⁹ J Hatchard & others (note 10 above) 185.

³⁷⁰ As above.

³⁷¹ AL Chiweza (note 366 above).

³⁷² AH Wingo “Fellowship associations as a foundation for liberal democracy” in K Wiredu (ed) *A companion to African philosophy* (2004) 450 457.

³⁷³ As above 457-458.

³⁷⁴ Decentralisation thus provides for an avenue for localised notions of governance to influence a country democratisation.

³⁷⁵ J Hatchard & others (note 10 above) 186.

³⁷⁶ As above 187.

formulation and implementation of localised economic development plans within the context of national goals.³⁷⁷ Decentralisation thus allows for the development of strategies that can accurately be targeted at specific needs within communities. Decentralisation can also play a role in creating conditions for a balanced growth within the different areas of the country.³⁷⁸

The importance of decentralisation in Malawi is clearly recognised. This aside, the process of decentralisation itself has proceeded in fits and starts.³⁷⁹ Several problems have dogged decentralisation in Malawi but I shall only focus on three. Firstly, at the normative level, are the complexities that stem from the incompatibility between the provisions of the Local Government Act and several other statutes.³⁸⁰ Decentralisation has been significantly hindered by the government's failure to amend a number of laws and bring them in line with the demands of decentralisation. Secondly, there is a general lack of awareness of the decentralisation processes that have so far taken place in the country. In most instances the majority of the people still do not fully understand the functions or roles of their local assemblies.³⁸¹ As Poeschke and Chirwa have summarised:³⁸²

The data collected indicate that the structures for local government are not well known to local people in most districts. In some areas knowledge of these structures exists, but what comes out clearly is the inability of the informants to link the concept of local government to the structures available on the ground – such as district/town assembly, community centre, office of the chief, and others

This lack of awareness of local governance structures negatively affects the viability of decentralisation initiatives in the country. This, arguably, explains why popular participation in these processes remains very low. There is a crucial need to raise awareness about decentralisation. Thirdly, decentralisation in Malawi has been sabotaged by a lack of political will to support the process. While decentralisation generally involves the shifting of decision making authority from the centre to the peripheries, there is discernible evidence that the

³⁷⁷ As above.

³⁷⁸ As above 188.

³⁷⁹ For an illustration, see B Chinsinga "District assemblies in a fix: The perils of the politics of capacity in the political and administrative reforms in Malawi" (2005) 22(4) *Development Southern Africa* 529-548. A breakdown of some of the challenges that have been faced in relation to decentralisation are offered by AL Chiweza (note 368 above) 103-105.

³⁸⁰ For a full list of laws that have been recommended for review to make them compatible with the Local Government Act, see B Dulani (note 309 above) 8.

³⁸¹ Malawi Economic Justice Network *Service delivery satisfaction survey (SDSS III) Report*

³⁸² Poeschke and Chirwa (note 223 above) 48-49.

centre is still resisting the devolution of authority.³⁸³ Perhaps the starkest manifestation of the lack of political will has been the repeated failure to hold local government elections in the country.³⁸⁴ It is poignant to note that only one set of local government elections have been held since 1994.³⁸⁵ During the first term of president Bingu wa Mutharika no steps were taken towards the holding of local government elections.³⁸⁶ It remains to be seen whether local government elections will be allowed to proceed before the lapse of Bingu wa Mutharika's second term in office.³⁸⁷ Notably, the local governance vacuum that has resulted has largely been filled by traditional leaders.³⁸⁸

Against the above background, one ought to recall the fact that in spite of the widespread rhetoric on participation and empowerment that accompanied the democratic transition and the adoption of the Constitution, participation by the populace in the political processes remains very low.³⁸⁹ Local governance thus remains a crucial component if participation and empowerment are to be given full purport in Malawi. The democratisation process itself is largely hinged on 'whether and to what extent people participate in local-level decision-making.'³⁹⁰ Where, as has largely been the case, there is a failure to allow people to participate and influence decisions the internalisation of democratic values is jeopardised.³⁹¹ In as far as the inculcation of democratic values at the local level is concerned there is a fair degree of consensus that traditional leaders and traditional structures could be utilised in inculcating and entrenching democratic values.³⁹² Traditional leaders remain very visible

³⁸³ B Dulani (note 309) 9.

³⁸⁴ These were held in 2000. Under section 147(5) of the Constitution local government elections must be held in the third week of May in the year following the General Elections. Section 147 has since been amended and local government elections will now be held on a date to be determined by the President in consultation with the Electoral Commission.

³⁸⁵ The failure to hold local government elections has stalled the process of citizenry empowerment in the country – N Patel "Malawi's 2009 elections: A critical evaluation" <<http://www.cmi.no/file/?1014>> (Accessed 31 May 2010).

³⁸⁶ See, "Pressure Mounts on local polls" Nation Online <http://www.nationmw.net/newsdetail.asp?article_id=214> (Accessed 31 May 2010).

³⁸⁷ Current indications suggest that the next local government elections may be held in November 2010.

³⁸⁸ RL Muriaas "Local perspectives on the 'neutrality' of traditional authorities in Malawi, South Africa and Uganda" (2009) 47 (1) *Commonwealth and Comparative Politics* 28 37.

³⁸⁹ H Englund (note 311 above) 6.

³⁹⁰ R Poeschke & W Chirwa (note 223 above) 14.

³⁹¹ As above.

³⁹² R Poeschke & W Chirwa (note 223 above) 26-28 64 and J Lwanda (note 255 above) 49 64-65.

components of governance especially in rural areas.³⁹³ It is strange that in spite of the pervasiveness of traditional leaders in Malawi, the Local Government Act does not explicitly spell out their role in decentralisation.³⁹⁴ The challenge is to engage in a critical reflection of the roles that traditional leaders can play in democratisation and properly exploit this role.³⁹⁵ Such a reflection must result in the creation of a structure that allows traditional leadership and local government to work together towards democratisation.³⁹⁶

Local governance and decentralisation can also benefit from the social trust-based framework. In conceptualising the devolution of power from the central government, the trust concept offers a viable model. The trust model can be utilised to properly place the citizenry as beneficiaries of a trust. Public functionaries, to whom the power is devolved, be they councillors, would then be understood to be fiduciaries. This would mean that the Local Government Act and the Constitution, for example, would contain the terms on which the power that has been devolved would be utilised. Violations of the terms of the Local Government Act and the Constitution could then be addressed as breaches of trust triggering the same range of remedies that equity uses to regulate fiduciaries. Regulation along this model would, as argued in Chapters Two and Three, be better positioned to take root because of the numerous conceptual affinities that it shares with traditional forms of organisation in Malawi. This would also give more meaning to decentralisation and the attribution of functions of government to decentralised structures.

5.6 Conclusion

As demonstrated in this Chapter, the problems in governance and constitutionalism in Malawi largely revolve around the uneasy relations between the branches of government, poor public resource management and a failure to properly empower and involve the citizenry in governance. The social trust-based approach to governance and constitutionalism relies, as has been demonstrated in this Chapter, on an innovative sublation of liberal democratic constitutionalism with principles of societal organisation that are indigenous to Malawi. It does not wholesale condemn liberal democratic constitutionalism but emphasises the need to be critical in practising liberal democratic

³⁹³ R Poeschke & W Chirwa (note 223 above) 50.

³⁹⁴ AL Chiweza (note 321 above) 64.

³⁹⁵ G Erdman & others (note 114 above) 11-12.

³⁹⁶ K Mojela "Traditional authority and local government" in R van der Berg & G van Nierkerk (eds) *New perspectives on origins, foundations and transition* (1999) 145.

constitutionalism in African contexts. Social trust-based governance and constitutionalism is thus acutely mindful of the need to properly factor local conditionalities in devising governance paradigms. It is for this reason that it was argued in this Chapter that a deliberate need to infuse governance and constitutionalism with indigenous norms should be undertaken in Malawi. It was also argued that the *ubuntu* philosophy offers a basis for anchoring governance and constitutionalism.

The approach that was demonstrated in this Chapter operates at two levels. Firstly, this Chapter demonstrated that the social trust-based framework can be used a governing philosophy to inform governance and constitutionalism in Malawi. This entails a philosophical shift in the way governance and constitutionalism is approached in Malawi. Secondly, the social trust-based framework can be utilised as an alternative framework for understanding the roles and responsibilities of public functionaries. On the basis of this understanding the social trust-based framework can be used as a basis for claiming particular rights, obligations and remedies in relation to governance and constitutionalism. These two approaches are not necessarily exclusive of each other. However, as the discussion in this Chapter demonstrated, applying this approach in specific contexts requires a variation in emphasis. For example, in dealing with public resource management, recourse to the social trust-based framework will demonstrate the benefits that the framework can confer if used as a source of rights and obligations but also as a governing philosophy for the management of public resources. The emphasis in this connection is on the fiduciary core to social trust-based framework. On the other hand, in dealing with citizenry empowerment, accountability and political participation, the social trust-based framework seeks to heavily draw on the latent potential in African societies. It is in this connection that *ubuntu* acquires relevance. In all instances, however, the emphasis is on a creative application of the synthesis between *ubuntu* and the trust to governance and constitutionalism in Malawi.

CHAPTER 6: WHICH WAY MALAWI?

A central problem identified at the beginning of the enquiry in this study was the conduct of public functionaries in Malawi and, by extension, most African countries. The attainment of good governance and constitutionalism, it has been argued, is strongly connected to the conduct of public functionaries. Very important in this regard is the manner in which society regulates and monitors all public functionaries but also the legitimacy of the framework that is used for this purpose. The framework for regulating public functionaries, therefore, is largely predictive of the manner in which public functionaries perform their duties.¹ However, the success of such a framework depends, to a large extent, on its legitimacy in the perceptions of the concerned people. It is mainly for the preceding reasons that this study proposed the social trust-based framework as the paradigm that must be used in regulating and monitoring public functionaries in Malawi. The values underlying the social trust-based framework, which draw from *ubuntu* and the trust concept, can be utilised in shaping governance and constitutionalism in a manner that enhances responsiveness and accountability on the part of public functionaries.

It must be recalled, as pointed out in Chapters One and Five, that the social trust-based framework is presented in this study at two levels. Firstly, as the ‘animating metaphor’ for governance and constitutionalism in Malawi. At this level, the study proposed the social trust-based framework as the philosophy that must conceptually ground governance and constitutionalism in Malawi. Secondly, the social trust-based framework, it was argued, can be utilised to source rights and obligations as between public functionaries and the citizenry through a creative interpretation of the Constitution and other statutes in Malawi. Understanding the legal system from a social trust-based perspective, it was argued, would imbue transparency, responsiveness and accountability in the way public functionaries conduct themselves in Malawi. The infusion of *ubuntu*, it was also argued, would enhance the legitimacy of the social trust-based framework for governance and constitutionalism.

Central to the argument in this study is the need to re-imagine democracy, governance and constitutionalism in Malawi. It must be pointed out that Malawi, and many African countries, are confronted by the failures of the liberal democratic paradigm while at the same time

¹ As this study has also demonstrated the framework by itself can never be the solution. The existence of an appropriate framework, however, can spur governance and constitutionalism in line with a preferred vision.

being urged to implement more liberally inclined reforms.² Liberal scholarship, unfortunately, tends to envisage African predicaments predominantly through analogies drawn from Euro-American experiences.³ An uncritical recourse to Euro-American experiences for inspiration, however, obfuscates African experiences and concerns.⁴ It is because of such tendencies that this study made a deliberate call for the re-imagination of democracy, governance and constitutionalism along the lines of the social trust-based framework. This call is a concession of the fact that the failures of the liberal democratic paradigm require solutions that are either outside the paradigm or solutions that creatively and sensitively adapt the liberal democratic paradigm.⁵ It is in the need for a creative but sensitive approach to governance and constitutionalism that *ubuntu* and the trust acquired importance to this study's argument. It is important to note that the value of *ubuntu* and other African paradigms does not lie at the level of specific practices as these are often culture specific and vary from one locality to the other.⁶ The strength of *ubuntu* and other African paradigms for societal organisation lies in their social legitimacy as they are grounded in community involvement and established traditions.⁷ It is to this legitimacy that this study appeals. This study has argued that by connecting mainstream legal discourse to *ubuntu* and the trust, for example, there is immense potential for fostering compliance and acceptance with norms pertaining to governance and constitutionalism. The compliance and acceptance would be built on the legitimacy that concepts like *ubuntu* already possess in African societies.

In assessing this study's overall contribution one may do well to bear in mind some of Held's insights.⁸ Writing about theories in ethics and morality, Held argued that the search for a

² H Englund "Introduction: Recognising identities, imagining alternatives" in H Englund & F Nyamnjoh (eds) *Rights and politics of recognition in Africa* (2004) 1 2.

³ As above.

⁴ This study concedes that Euro-American experience may be relevant and important for governance and constitutionalism in Africa but these experiences need to take adequate cognisance of the situation prevailing in Africa. Such experiences may thus have to be modified to properly respond to the African situation

⁵ UJ van Beek "Editor's introduction" in UJ van Beek (ed) *Democracy under construction: Patterns from four continents* (2006) 21 36.

⁶ C Villa-Vicencio "Transitional justice and human rights in Africa" in A Bosl & J Diescho (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* (2009) 33 39.

⁷ As above.

⁸ V Held *Rights and goods: Justifying social action* (1984) 3-4.

theory that answers all questions is illusory. According to Held, a theory that answers some questions but not others should be acceptable and not discredited on the basis of its failure to answer all questions. As she further argued, attempts to devise a theory or system that can answer all problems often suffer from indeterminacy, vagueness, unclarity and grandiosity. Held's conclusion is that we must be prepared to accept the suitability of partial views for partial contexts. Notably, however, Held's argument is not referred to as a way of excusing the shortcomings, if there be any, in this study. Rather, I have referred to her argument as a way of reminding the reader that the social trust-based framework is not offered here in the belief that it would solve all manner of problems that afflict Malawi or African countries, generally. It is prudent to acknowledge that in dealing with complex problems like governance and constitutionalism in Africa, 'modest' approaches are inevitable.⁹ A 'modest' approach is not necessarily a weak approach but it is a 'responsible' approach that acknowledges the limitations of human faculties to deduce comprehensive solutions to complex problems.¹⁰ Importantly, a 'modest' approach is a crucial factor in the development and acquisition of knowledge for problem-solving.¹¹

The analysis in this study focused on the regulation and monitoring of public functionaries along the social trust-based model and it is within this realm that the enquiry herein has contributed. It would be erroneous, therefore, to regard this study as an architectural blue print for governance and constitutionalism in Malawi or Africa, generally. Some of the major conclusions in this study are presented below.

6.1 Towards social trust-based governance and constitutionalism in Malawi

To go back to the questions that this study set out to answer: It is clear that the social trust-based approach to governance and constitutionalism can overcome most of the shortfalls of the liberal democratic approach in Malawi. Because of its connections to *ubuntu*, the social trust-based approach stands a better chance of garnering legitimacy among the Malawian

⁹ Cf. P Cilliers "Complexity, deconstruction and relativism" (2005) 22 (5) *Theory, Culture & Society* 255 263.

¹⁰ As above 256 & 263-264.

¹¹ This means that we must be slow and deliberate in appreciating the complexities of the problems we seek to solve, in this study, the problem of entrenching governance and constitutionalism in Malawi. We must also be slow in dismissing proposed solutions. – Cf. K van Marle "Jurisprudence, friendship and the university as heterogeneous public space" <http://www.up.ac.za/dspace/bitstream/2263/13735/1/vonmarle_paper_2009.pdf> (Accessed 6 September 2010).

people. This legitimacy, it has been argued, would be a strong factor in ensuring that public functionaries exercise their powers in line with the stipulations of the social trust-based approach. As Chapter Two demonstrated, the legal foundation for social trust-based governance and constitutionalism in Malawi stems, primarily, from the Constitution, especially sections 12 and 13 which establish government in a fiduciary position vis-à-vis the citizenry. Sections 12 and 13 of the Constitution are supported by provisions of other statutes, for example, the Corrupt Practices Act and the Public Finance Management Act. In spite of the fact that the Constitution supports the social trust-based approach to governance and constitutionalism, past experiences in Malawi demonstrate that there has been no effort at implementing the social trust-based approach to governance and constitutionalism. While this may have been excusable under the 1966 Constitution, which did not support social trust-based governance and constitutionalism, it is no longer excusable under the current dispensation in Malawi. Further, while the 1994 Constitution is heavily underlain by liberal democratic notions, it is notable that most of these ideals have yet to take root in Malawi. As this study has argued, part of the solution lies in concretely relating the liberal democratic framework to African values and principles. The philosophy of *ubuntu* offers a helpful reservoir of values that can be utilised in relating the liberal democratic framework to African values in a bid to improve governance and constitutionalism.

In considering the question of constitutionalism and good governance in Malawi, it is apt to recall, in the words of Kay, that '[w]ith respect to constitutionalism it may be that our very capacity to live in safety depends on the a priori creation of abstract limits, on an honest effort by our public actors to stay within those limits, and on an ordinarily uncritical trust by the rest of us that they will – more or less – succeed.'¹² Kay's position should not be taken to suggest that social trust-based governance and constitutionalism cannot be attained in Malawi. It merely highlights the fact that its attainment will not be a simplistic uni-linear process that materialises overnight. As Kay further argued, while constitutionalism, for example, is centrally concerned with a proper limitation of state authority, the most difficult component of any such exercise is the translation of abstract rules into discernible human

¹² RS Kay "American constitutionalism" in L Alexander (ed) *Constitutionalism: Philosophical foundations* (1998) 16 50. It is here argued that Kay's postulation accords with what this study has done especially when considers the two levels at which it has been argued the social trust-based framework must be understood. The creation of a priori abstract limits can be equated to the elucidation of an appropriate philosophy for governance and constitutionalism – which this study has done. The other level involves attempts at making public functionaries govern in line with the identified philosophy.

conduct.¹³ In order to create a viable framework for governance and constitutionalism, therefore, one must start with conceptualising a particular vision for governance and constitutionalism. This conceptual exercise should centrally revolve around how public functionaries must be monitored and regulated. It is important, however, to conceptualise a vision of governance that is likely to be socially legitimate. Social legitimacy can be achieved by connecting such a vision directly to values and ideals that a particular people already subscribe to – it is for this reason that this study made recourse to the *ubuntu* philosophy. The law has a very crucial role in this. The achievement of all this depends, in part, on the trust that society reposes in the ability of human beings to change their behaviour in response to legal prodding. Trust, in the moral sense is not, however, sufficient and it is for this reason that this study alluded to the trust concept as developed in equity which would guarantee and protect the societal expectation and reliance interests in instances involving public functionaries.

The attainment of social trust-based governance and constitutionalism requires deliberate action in several critical areas, as demonstrated in Chapter Five of this study. In moving towards the attainment of social trust-based governance and constitutionalism there is need to get a clear conceptual appreciation of the limitations that will operate on all public functionaries. Some of the critical interventions that may be undertaken are briefly highlighted hereunder. The discussion below follows the same thematic areas that were identified in Chapter Five.

6.2 The relationship between the branches of government

It requires no stretch of imagination to appreciate the necessity that government branches should operate within their constitutional limits. The branches of government have special roles to play in engendering governance and constitutionalism particularly as a result of the positions they occupy in the constitutional structure. Two concessions are important in appreciating how the branches of government can be made to operate within their constitutional mandates. Firstly, the path towards good governance and constitutionalism is not a uni-linear one.¹⁴ It is not a mere technical process with predetermined means and ends that must mechanically be executed.¹⁵ Secondly, the consolidation of democracy, good

¹³ As above 17.

¹⁴ H Englund (note 2 above) 3.

¹⁵ As above.

governance and constitutionalism encompasses social processes that have both formal and informal aspects.¹⁶ This means that time must obviously be a factor in any evaluation. Consolidation of constitutionalism, governance and democracy, of necessity will require changes in attitudes and values and this cannot be an overnight process. However, the recognition of a framework based on particular ideals, in this case the social trust-based framework, would help provide direction in terms of which attitudes must change. The starting point in attaining governance and constitutionalism, therefore, is to have a clear conceptual understanding of the norms that would regulate the exercise of public power.

6.2.1 The executive

As earlier pointed out, the executive remains the branch of government with the greatest potential for overstepping its constitutional boundaries.¹⁷ While this is a legitimate cause of concern, out of this very situation great potential is evident. The executive can utilise its heightened visibility to stimulate greater compliance with the Constitution. By way of illustration, one of the areas in which the executive was found to be dithering was compliance with judicial decisions perceived to be inimical to its interests.¹⁸ A change in perspective on this matter would set an ideal example for the purposes of consolidating the rule of law in the country. This illustration, however, highlights the point made earlier on. To achieve ideal executive compliance with judicial decisions requires an ‘enlightened’ executive that appreciates its place and role within the constitutional structure.¹⁹ This also requires an ‘enlightened’ citizenry and civil society that can properly monitor the executive’s performance of its constitutional obligations. While this cannot be an overnight achievement concrete steps must be taken towards the attainment of this objective. One of the ways which this study has explored is the ‘repackaging’ of the Constitution in such a way that it resonates much easier with most public functionaries in Malawi. This entails relating concepts like the rule of law, for example, to values that can be identified within *ubuntu*-based systems of organisation. One must, however, be cautious in this repackaging process. To use the example earlier given, while the study urges the connection of *ubuntu* to constitutional governance in Malawi, it would be naive to look for the direct equivalent of the

¹⁶ E Wnuk-Lipinski & S Fuchs “Theoretical framework and methodology” in UJ van Beek (ed) (note 5 above) 39-54. This means that the prevailing socio-political economy also plays a role in the entrenchment of governance and constitutionalism.

¹⁷ Cf. Chapter 3 of this study especially part 3.5.3.1.

¹⁸ Cf. As above.

¹⁹ See the discussion in Chapter Five part 5.3.1.1.

rule of law within the *ubuntu* framework. A more reasonable search would be to look for values in *ubuntu* that can be said to embody aspirations similar to the rule of law. Recourse to the values underlying *ubuntu* in ‘repackaging’ the Constitution may, in the long run, allow Malawian public functionaries connect with the Constitution much easier. This would flow from the legitimacy that *ubuntu* has a philosophy for societal organisation in Africa.

Specifically, in terms of enhancing the accountability of the President, for example, it was earlier demonstrated that traditional Malawian societies still perceive traditional leaders as social trustees who are amenable to removal from office if they are found wanting.²⁰ To give practical meaning to this stipulation, it is important to review and clarify the impeachment procedure in section 86 of the Constitution. This is because while the Constitution does provide room for removal of a sitting President by way of impeachment, the procedure for achieving this has yet to be settled. The possibility of removal from office for grave breaches of the Constitution would be a significant factor in fostering constitutionalism and good governance. As matters stand, it is practically impossible to remove a sitting President from office by way of impeachment even though the Constitution allows for this – the Constitution merely stipulates that the President can be impeached without detailing the procedure to be followed. The two points discussed above give an indication of the possible direction to be taken in order to enhance the accountability of the executive in Malawi. It must be emphasised that this is merely a direction and not an exhaustive compilation of what must be done by the executive in order to enhance governance and constitutionalism.

6.2.2 The legislature

The legislature possesses immense potential for activating the involvement of the populace in the governance processes. It must be recalled that *ubuntu*-governed societies insist on the participation of the populace in all decision making. A deeper involvement by the populace in the working of the legislature is bound to enhance governance and constitutionalism. This would also go a long way in realising the vision of participation in the governance of the country. Some of the steps that need to be taken in order for the legislature to achieve its potential are quite straight forward. Two steps are immediately relevant here. Firstly, the legislature needs to re-enact section 64 of the Constitution that allowed constituents to recall parliamentarians. Admittedly, the original section 64 did not provide sufficient detail to allow a meaningful implementation of the recall. However, having regard to the centrality of the recall, especially in guaranteeing the accountability of

²⁰ Cf. Chapter 4 of this study especially part 4.4.

parliamentarians, the recall provision needs to be reintroduced in the Constitution. The specific details about how the recall must be effected should be left for the legislature to expound in a separate statute.²¹ As pointed out earlier in this study, the implementation of the recall resonates with the manner in which beneficiaries of a trust can remove an errant fiduciary and also with the way traditional African societies disciplined social trustees.²² The reintroduction of the recall provision would enhance the connection between the democratically elected representatives and their constituents thereby making the representatives more accountable and responsive. It is this accountability and responsiveness that would be the bedrock for a culture of constitutionalism and good governance.

The second immediate step that can be taken to make the legislature more vibrant is to reintroduce the senate. The senate, as part of the National Assembly in Malawi, was a crucial component in enhancing the representativity of parliament as well as in terms of enhancing accountability. Even though the senate never demonstrated what it could achieve in practice,²³ the presence of the provisions for the senate in the Constitution was a sufficient reminder of the representation and accountability that the Constitution envisaged. By removing the provisions for the senate the legislature banished the ideal of representation that framers of the Constitution had envisaged. The composition of the senate, if it were reinstated, would increase the cross-section of the citizenry that is involved in making decisions affecting the nation. In the context of this study, the re-introduction of the senate would create an avenue for traditional leaders to influence governance and constitutionalism in Malawi.²⁴ The increased diversity of people involved in legislative decision making would also work to increase the legitimacy and acceptability of legislative decisions. Needless to

²¹ The Malawi Law Commission has already worked on the text of a revised section 64 that parliament could re-enact.

²² See, Chapter 4 of this study, part 4.4.

²³ By the time the provisions for the senate were being repealed from the Constitution in 2001, no upper house, senate, had ever been constituted in Malawi.

²⁴ To reiterate a caveat made throughout this study, the involvement of traditional leaders in the legislative process would not by itself solve Malawi's problems in governance and constitutionalism. As earlier pointed out, the institution of traditional leadership itself has, over the years, suffered from a 'corruption' that has eroded its traditional position in Malawian society. In spite of this, this study contends that there remains a benevolent role that traditional leaders can play in governance and constitutionalism. Besides, since the 'corruption' is acknowledged this means that there must be a cautious engagement with traditional leaders so that only the positive roles are utilised.

state that constitutionalism and governance are more likely to thrive on a foundation infused with legitimacy.

6.2.3 The judiciary

The judiciary in Malawi is uniquely poised to contribute towards the attainment of social trust-based governance and constitutionalism. As earlier pointed out, public confidence in the judiciary remains very high.²⁵ This puts the judiciary in a unique position to initiate changes that can significantly transform Malawian society.²⁶ It is important to bear in mind, as Klare noted, that judicial decision-making is a site for law making.²⁷ However, as contrasted to other sites of law making, the legislature for example, the judicial site is more grounded in reason and reflection. It is fair, therefore, to expect judicial adjudication to innovate and model intellectual and institutional practices in line with the Constitution's transformative potential.²⁸ The judiciary can utilise this potential to assist in the entrenchment of the social trust-based framework for governance and constitutionalism. The realisation of this potential, it must be pointed out, builds on the ability of the law to model human conduct in line with a particular preferred vision – the preferred vision in this case is the social trust-based framework. Crucial to the judiciary's role in this regard would be the move away from rigid common law perspectives towards an approach that embraces the transformative potential of the Constitution.²⁹

This study has argued that the judiciary is aptly positioned to take the lead in articulating transformative constitutionalism in Malawi.³⁰ This would make the judiciary a central vehicle for the attainment of social transformation in Malawi. However, it is submitted that in engineering social transformation in Malawi the judiciary should have recourse to the social trust-based framework which, as demonstrated in this study, is poised to be adequately responsive to the needs of Malawians. For example, in checking legislative or executive

²⁵ See, Chapter 5 of this study especially part 5.3.3.2.

²⁶ Both the executive and the legislature also retain some important roles in achieving societal transformation.

²⁷ K Klare "Legal culture and transformative constitutionalism" (1998) 14 (1) *South African Journal on Human Rights* 146 147.

²⁸ As above.

²⁹ Cf. S Banda "Constitutional mimicry and common law reform in a rights-based post colonial setting: The case of South Africa and Malawi" (2009) 53 (1) *Journal of African Law* 142.

³⁰ Cf. Chapter 5 of this study especially part 5.3.3.1.

excesses the judiciary's censure may be framed in such a way that it deliberately draws from the values that inform and shape the social trust-based framework. Acting along these lines, it is argued, would slowly but significantly sow the seeds for social trust-based regulation of public functionaries in Malawi. This would set the pace for the utilisation of social trust-based standards for monitoring public functionaries. Restraining and regulating both the executive and the legislature could thus be deliberately connected to ideals that inform *ubuntu* and the trust.

6.3 Public resource management

Public resources, as reiterated in this study, are crucial to the development of any country. The social trust-based framework possesses considerable potential for improving management of public resources in Malawi. In this connection one must concede that the existing statutory framework for public resource management possesses substantial potential which merely needs to be revitalised if public resources are to be utilised in line with the dictates of the Constitution. The social trust-based framework can be employed to boost public resource management in Malawi by utilising the principles of social-trust based regulation in directing the management of public resources and remedying the mismanagement of public resources.

By way of illustration, corruption was identified as a major problem with regard to public resource management in Malawi.³¹ If significant progress in dealing with corruption can be achieved, this would have significant repercussions in the country's political economy. As earlier demonstrated, the social trust-based framework can be utilised in boosting the anti-corruption drive in Malawi.³² This can be attained at two levels. Firstly, by utilising the standards in the social trust-based framework in articulating the duties that all public functionaries must observe. Secondly, by strictly enforcing the social trust-based duties that inhere in all leadership roles. This, it is submitted, would help in creating a regulatory framework that more closely monitors public functionaries but such a framework would also be sufficiently responsive in terms of granting effective remedies for abuse of trust by public functionaries. To attain the above stated goals would not necessarily require the passage of new pieces of legislation but would require a creative recourse to the existing laws.

³¹ See, for example, Chapter 3 of this study especially part 3.5.3.1.

³² Cf. Chapter 5 of this study especially part 5.3.1.2.

While the Malawi Law Commission has, for example, been working on legislation regulating the declaration of assets by public functionaries, it is important that this legislation be finalised. To properly enforce and monitor, for example, the duty to avoid conflicts of interest on the part of public functionaries it is important to have a prior indication of their wealth before they assume their positions. It is for this reason that concerted action must be undertaken to ensure the adoption of legislation regulating the declaration of assets. This legislation would be critical in determining instances of unjust enrichment as well as in the activation of mechanisms for remedying unjust enrichment. It is thus crucial that the Malawi Law Commission finalises the consultations on the asset-declaration legislation and also that the legislature promptly adopt this legislation.

6.4 Accountability of public functionaries and citizenry empowerment

Notions of accountability or representation are not alien in Malawi. As Englund has argued 'the local notions of representation and accountability are ... variations on the wider notions of morality and personhood.'³³ The challenge remains the extent to which local notions of accountability or representation, for example, are allowed to critique and influence political processes in the country. It is thus important to reverse this situation and allow more room for a critique of participation and accountability from an indigenous Malawian perspective. To achieve this several things could be done. For example, although the role of political parties in liberal democracies is largely uncontested, a thorough critique of their role in Malawi's democracy needs to be conducted. From such a critique it ought to be apparent, for example, that political parties in Malawi need to be transformed from being 'top heavy' to a point where significant 'bottom' involvement is discernible. To achieve this some statutory catalysis may be necessary. This could be in the form of a review and amendment of the Political Parties (Registration and Regulation) Act.³⁴ The shortfalls of this piece of legislation were already highlighted.³⁵ Suffice it to point that in the current dispensation it may be necessary to create a legislative obligation on parties to involve their membership in all their activities. The review of the Political Parties (Registration and Regulation Act), for example, ought to make it mandatory for political parties to hold regular conventions for the purposes of electing leaders and transacting other party business. The review could also introduce provisions requiring parties to maintain membership rolls without necessarily re-introducing

³³ H Englund *Hybrid democracy: From patronage to corruption in Malawi* Working Paper 4/97 3.

³⁴ Act No. 15 of 1993.

³⁵ Cf. Chapter 5 of this study especially part 5.5.2.

the oppression that party membership brought during the Malawi Congress Party (MCP) rule. Generally, it is submitted that the review would be aimed at making political party leaders accountable to their members while at the same time increasing the avenues for participation in the parties by their membership. This would serve to reduce the elitism that defines almost all political parties in Malawi.

This study has also argued that traditional leaders in Malawi still have a significant role in consolidating governance and constitutionalism. As earlier noted, the ‘village society’³⁶ remains the most prominent in Malawi by reason of the fact that the majority of Malawians live in rural areas. Traditional leaders, as was also pointed out,³⁷ are consistently the first port of call for most Malawians in the event there is a social problem or a societal issue needing resolution. Traditional leaders in Malawi still wield significant influence.³⁸ To properly allow indigenous versions of accountability and representation to influence the country’s governance, a greater role for traditional leaders in the governance of the country must be facilitated. One of the ways, as earlier pointed out, is the re-enacting of the provisions relating to the senate which would allow a selection of traditional leaders to sit as part of the upper house of the National Assembly in Malawi. This would, it is submitted, create an avenue for traditional norms of governance to influence decisions that affect the country.

Further, there is a need to review and amend both the Chiefs Act³⁹ and the Local Government Act⁴⁰ in order to expressly acknowledge and frame the role of traditional leaders in Malawi especially for decentralisation.⁴¹ It is a fact that Malawi’s decentralisation project,

³⁶ National Democratic Institute for International Affairs “Traditional authority and democratic governance in Malawi” A Report on NDI programme activities with Malawian chiefs in preparation for the National Constitutional Conference (1995) 2-3.

³⁷ Cf. Chapter 5 of this study especially part 5.5.1.

³⁸ AL Chiweza “The ambivalent role of chiefs: Rural decentralisation in Malawi” in L Buur & HM Kyed (eds) *State recognition and democratisation in Sub-Saharan Africa: A new dawn for traditional authorities?* (2007) 53 71.

³⁹ Cap 22:03 Laws of Malawi.

⁴⁰ Cap 22:01 Laws of Malawi.

⁴¹ Admittedly the Local Government Act in section 5(1) makes senior traditional leaders i.e. Traditional Authorities or Sub-Traditional Authorities members of the local government assembly within their areas as *ex-officio* members. Two things are notable here, being *ex-officio* members entails that the traditional leaders do not have significant influence in the local assemblies. Secondly, membership is restricted to the high echelons of traditional leadership and thus excludes a significant number of lower ranking traditional leaders.

as demonstrated,⁴² has proceeded in fits and starts. The process of decentralisation, however, remains a very potent avenue in which the citizenry can involve themselves in the governance of the country. For example, while traditional leaders have, especially in the continued absence of counsellors,⁴³ increasingly assumed central roles in the management of rural Malawi this has not been with legislative imprimatur. The Chiefs Act is an antiquated piece of legislation that was adopted in 1967 largely in order to harness the authority of traditional leaders in line with the MCP vision.⁴⁴ The Local Government Act itself does not seem to envisage any serious role for traditional leaders in the decentralisation of Malawi. This needs to be changed in order to reflect the reality on the ground where traditional leaders are already informally involved in many decentralisation processes. The involvement of traditional leaders in decentralisation, specifically, and governance, generally, is likely to enhance the public's involvement in the running of the country. The increased participation that may result is bound to generate legitimacy and contribute towards the consolidation of governance and constitutionalism.

6.5 Final remarks

Malawi may be poor but this is not a permanent bar towards the attainment of good governance, democratic consolidation and constitutionalism. While most of the countries that can put a credible claim to good governance, constitutionalism or democratic consolidation are fairly affluent, it is clear that democracy can still thrive amidst poverty. A crucial point to realise in this regard is that democracy, good governance and constitutionalism are bound to take root much easier if they are readily identified with the values prevailing in the concerned localities. Democracy, for example, must be deliberately connected to similar values in indigenous traditions, for it to take easy root. In achieving this, various avenues can be and should be utilised. There is no one-size fits all approach here. In this study, the social trust-based framework has been offered as a way in which governance and constitutionalism can be related more closely to the situation obtaining in Malawi and thereby enhancing chances of consolidation.

⁴² Cf. Chapter 5 of this study especially part 5.5.3.

⁴³ There have only been one set of local government elections since 1994.

⁴⁴ RL Muriaas "Local perspectives on the 'neutrality' of traditional authorities in Malawi, South Africa and Uganda" (2009) 47 (1) *Commonwealth and Comparative Politics* 28.

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