CHAPTER 1: INTRODUCTION

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]

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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

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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

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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

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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

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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 Tambulasi & 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 founder[25] 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

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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 Mbao "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/Mbao_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

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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

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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]

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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

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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

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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.

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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.

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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] Marx[79] 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

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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 1July 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]

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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 Constitution[87] and sometimes on the

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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]

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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*.

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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

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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]

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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 governed[113] 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

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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]

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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 Christoudoulidis *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]

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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.

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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.