

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

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2.1 Introduction

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

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

2.2 What is *ubuntu*?

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰ L Mbigi (note 6 above) 69.

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

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

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

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

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

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

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

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

¹⁶ JY Mokgoro (note 1 above).

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

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

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

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

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

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

²⁰ JY Mokgoro (note 1 above).

²¹ E Prinsloo (note 13 above) 43.

²² As above.

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

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

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

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

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

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

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

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

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

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

³⁰ L Mbigi (note 6 above) xv.

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

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

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

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

³¹ As above 72.

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

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

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

³⁵ JY Mokgoro (note 1 above).

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

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

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

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

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

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

⁴⁰ R English (note 15 above) 641.

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

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

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

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

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

⁴³ As above 386.

⁴⁴ As above 379.

⁴⁵ As above 383.

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

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

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

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

2.3 Understanding the social trust

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

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

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

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

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

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

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

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

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

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

⁵² As above.

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

⁵⁴ R Cotterrell (note 50 above) 75.

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

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

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

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

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

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

⁵⁸ R Cotterrell (note 50 above) 77.

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

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

⁶¹ R Cotterrell (note 50 above) 78.

⁶² E Fox-Decent (note 60 above) 303.

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

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

⁶³ R Cotterrell (note 50 above) 78.

⁶⁴ R Cotterrell (note 59 above) 88.

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

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

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

2.3.1 The law and fiduciary relationships

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

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

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

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

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

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

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

⁷³ PD Finn (note 68 above) 1-2.

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

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

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

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

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

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

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

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

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

⁸⁰ AW Scott (note 71 above) 541.

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

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

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

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

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

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

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

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

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

⁸⁸ (1981) 3 All ER 797.

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

2.3.2 Identifying fiduciaries and fiduciary relationships

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

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

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

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

⁹¹ (1802) 7 Ves 137.

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

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

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

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

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

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

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

⁹⁶ J McCamus (note 93 above) 56.

⁹⁷ As above 57.

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

⁹⁹ As above.

¹⁰⁰ PD Finn (note 68 above) 27.

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

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

2.3.3 Fiduciaries and fiduciary relationships in an evolving society

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

¹⁰¹ (1989) 61 DLR (4th) 14 27.

¹⁰² S Dorsett (note 82 above) 61.

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

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

¹⁰⁵ A Mason (note 49 above) 246.

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

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

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

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

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

¹⁰⁷ MJ Nkhata (note 65 above) 12.

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

¹⁰⁹ PD Finn (note 68 above) 26.

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

2.4 Good governance

2.4.1 Emergence of the good governance concept

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

¹¹⁰ As above 27.

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

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

¹¹³ As above 798.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹²³ As above.

¹²⁴ P Ramsamy (note 114 above) 1.

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

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

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

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

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

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

2.4.2 Elements commonly associated with good governance

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

¹²⁹ D Olowu (note 121 above) 53 59.

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

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

¹³² As above.

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

¹³⁴ As above.

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

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

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

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

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

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

¹³⁸ As above.

¹³⁹ Sam Agere (note 120 above) 3.

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

2.4.3 Is good governance important for Africa?

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

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

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

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

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

¹⁴³ V Moharir (note 140 above).

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

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

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

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

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

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

2.5 Constitutionalism

2.5.1 What is meant by constitutionalism?

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

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

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

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

¹⁵⁰ As above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.5.2 Some major aspects of constitutionalism

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

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

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

¹⁶⁷ IG Shivji (note 158 above) 36.

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

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

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

¹⁶⁹ RS Kay (note 154 above) 23.

¹⁷⁰ O Akiba (note 161 above) 3 6.

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

¹⁷² As above.

¹⁷³ A Mazrui (note 119 above) 18 20.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁹⁶ As above 140.

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

¹⁹⁸ I Salevao (note 194 above) 4.

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

²⁰⁰ PD Finn (note 195 above) 132.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁰⁸ As above 227.

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

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

²⁰⁹ I Salevao (note 194 above) 6.

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

²¹¹ PD Finn (note 195 above) 131.

²¹² As above 140.

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

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

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

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

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

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

²¹⁵ PD Finn (note 195 above) 141.

²¹⁶ PD Finn (note 199 above) 14.

²¹⁷ As above.

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

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

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

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

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

²²¹ MB Ramose (note 41 above).

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

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

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

2.7 Impediments to recognising government as an enforceable trust

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

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

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

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

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

²²⁸ I Salevao (note 194 above) 3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²³⁵ MJ Nkhata (note 65 above) 17.

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

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

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

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

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

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

²³⁹ (1977) Ch 106.

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

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

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

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

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

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

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

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

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

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

²⁴⁴ Per Davide Jr. J 187-188.

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

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

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

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

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

²⁴⁶ G Kamchedzera (note 56 above) 39.

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

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

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

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

²⁴⁷ S Dorsett (note 82 above) 159.

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

²⁴⁹ (1943) 318 US 80 85-86.

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

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

²⁵⁰ P Birks (note 66 above).

²⁵¹ I Salevao (note 194 above) 6.

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

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

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

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

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

²⁵⁵ S Worthington (note 103 above).

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

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

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

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

²⁶⁰ I Salevao (note 194 above).

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

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

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

²⁶² G Dal Pont (note 201 above).

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

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

²⁶⁵ I Salevao (note 194 above).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁷⁸ As above 37.

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

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

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

²⁸² A Mason (note 49 above) 238.

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

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

²⁸³ PD Finn (note 195 above) 141.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.10 Conclusion

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

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

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

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