

CHAPTER 4: DEMOCRATIC GOVERNANCE AND CONSTITUTIONALISM IN MALAWI: IS THERE NEED FOR AN ALTERNATIVE PARADIGM?

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4.1 Introduction

Chapter Two of this study explained the concepts central to this study while Chapter Three provided a profile of governance and constitutionalism in Malawi. In the course of Chapter Three some of the trends that are evident in Malawi, in terms of governance and constitutionalism, were also highlighted. In the light of the trends highlighted in Chapter Three this Chapter will explore whether the emerging lessons call for the consideration of an alternative paradigm in as far as governance and constitutionalism are concerned. The discussion in this Chapter will centrally interrogate the suitability of liberal democracy and liberal democratic constitutionalism in Malawi. It must be noted that the overarching framework for governance and constitutionalism in Malawi, particularly as discerned from the Constitution, is heavily infused with liberal democratic ideals. Further, by referring to the interface between *ubuntu*, the social trust, good governance and constitutionalism that was conceptually constructed in Chapter Two, this Chapter will argue for an articulation of governance and constitutionalism that is expressly informed by norms of African traditions and customs. The articulation of governance and constitutionalism from a perspective that is

expressly informed by African traditions and customs will be offered as an alternative to liberal democracy and liberal democratic constitutionalism. Recourse will be made to *ubuntu* to demonstrate how this alternative approach to governance and constitutionalism can be constructed in Malawi, specifically, and by extension in Africa generally. As may be recalled, it is this alternative that this study terms ‘social trust-based governance and constitutionalism.’

4.2 Rethinking governance and constitutionalism in Malawi: The need for an alternative paradigm

It is this study’s argument that the failures and lapses in governance and constitutionalism in Malawi, especially under the framework constructed by the 1994 Constitution, call for a searching interrogation of the model embodied in the Constitution. As pointed out in Chapters One and Two, Malawi’s Constitution is liberal democratic and any serious interrogation of governance and constitutionalism in Malawi must necessarily analyse the contribution, if any, of this ideological choice for governance and constitutionalism. This study contends that most of the failures with respect to governance and constitutionalism are attributable to the Constitution’s ideological inclination. In the following paragraphs an attempt is made to deduce whether the liberal democratic paradigm best suits Malawi, for purposes of governance and constitutionalism. The discussion begins by analysing liberal democracy in Malawi before attempting to offer an alternative that is based on the African concept of *ubuntu*. It must be recalled, as pointed out in Chapters One and Two, that governance and constitutionalism that articulates itself by express reference to the values underlying *ubuntu* and the trust is what this study refers to as social trust-based governance and constitutionalism. It is important to note that social trust-based governance and constitutionalism is conscious of the need for ‘cross-cultural dialogue’ to bolster itself hence this study’s deliberate attempt to connect the *ubuntu* philosophy with the trust.

4.2.1 Trendy but may be not the best: A critique of liberal democracy in Malawi

The 1994 Constitution is supposed to be a culmination of the divers lessons that emerged in the governance of Malawi since independence. The Constitution is a liberal democratic constitution and it makes Malawi a liberal democracy.¹ The Constitution, for all its progressive elements, still raises questions about how some of the choices and formulations

¹ N Khembo “Political parties in Malawi: From factions to splits, coalitions and alliances” in M Ott & others (eds) *The power of the vote: Malawi’s 2004 Parliamentary and Presidential Elections* (2004) 87-93 and FE Kanyongolo “Courts, elections and democracy: The role of the judiciary” in M Ott & others (eds) (as above) 195-215.

in it were arrived at. One of the choices that has been the subject of scholarly interrogation is the choice of liberal democracy as the supervening framework for constitutionalism and democratisation in Malawi. In seeking to understand some of the problems that have haunted governance and constitutionalism it is important to interrogate the appropriateness of liberal democracy and liberal democratic constitutionalism for governance in Malawi. Besides, as Kanyongolo has noted, the foreign origins of liberal democracy necessarily entail that its appropriateness as a governance paradigm in Africa cannot be assumed.² In interrogating the appropriateness of liberal democracy, it is proposed to briefly discuss the origins and major elements of liberal democracy before analysing the introduction and performance of liberal democracy in Africa, generally, and Malawi, specifically. On the basis of the preceding discussion the study will highlight a possible alternative to liberal democracy in Africa, generally, and Malawi, specifically. The alternative that is being proposed here involves ‘indigenising’ democracy by imbuing it with African traditions and customs. Specifically, the study argues that democratisation and constitutionalism in Africa, generally, and Malawi, specifically, must take advantage of the virtues that *ubuntu* embodies. By utilising the values underlying *ubuntu*, it is further argued, an approach to democracy, governance and constitutionalism may be crafted which adequately reflects and responds to the historicity of Africa. This is what this study earlier referred to as measured autochthony.

4.2.1.1 Understanding liberal democracy

Today, ‘liberal democracy’ refers to the dominant form of political governance that is found in what is often loosely referred to as the ‘West’.³ The ‘West’ in this context generally denotes Western Europe and North America. Because of its connections to the West, liberal democracy is sometimes referred to as ‘Western democracy’. Notably, liberal democracy is now recognised as the dominant political force in the developed world and increasingly in the developing world.⁴ It is striking to note that in modern times political regimes of very different persuasions have claimed to be democracies even though what these regimes say or do is substantially different from one to another.⁵ Very few governments can, today, claim to be undemocratic even though the spectrum of countries claiming to be democratic includes the Democratic Republic of Congo, Democratic Republic of North Korea and other very dubious

² FE Kanyongolo “Limits of liberal democratic constitutionalism in Malawi” in KM Phiri & KR Ross (eds) *Democratisation in Malawi: A stocktaking* (1998) 353 370-371.

³ C Macpherson “The false roots of Western democracy” in F Dallmayr (ed) *From contract to community: Political theory at the cross-roads* (1978) 17.

⁴ A Heywood *Political ideologies: An introduction* (2007) 40.

⁵ D Held “Democracy: From city states to cosmopolitan order?” in D Held (ed) *Prospects for democracy: North, South, East, West* (1993) 13.

democracies.⁶ Aside from the legitimate variation in the practice of democracy, the almost universal claim to the democratic mantle by states is, arguably, as a result of the high degree of legitimacy that democracy generates.⁷ The legitimacy of democracy is evidenced by its widespread endorsement by global and regional organisations and by the paucity of support for anti-democratic movements.⁸ Sen accurately summarises global opinion on democracy when he states that:⁹

In any age and social climate, there are some sweeping beliefs that seem to command respect as a kind of general rule – like a “default” setting in a computer program; they are considered right *unless* their claim is somehow precisely negated. While democracy is not yet universally practised, nor indeed universally accepted, in the general climate of world opinion, democratic governance has now achieved the status of being taken to be generally right.

What must be constantly borne in mind is that modern democracy is liberal democracy and liberal democracy is democracy cast within a framework of social, moral and political claims which taken together may be called liberalism.¹⁰ The liberal underpinnings of current democratic discourse are so pervasive that the liberal component in democracy is routinely overlooked and liberal democracy is, today, referred to simply as ‘democracy.’¹¹ This conflation between ‘liberal democracy’ and ‘democracy’ overlooks the fact that while ‘democracy’ may have a universal appeal, the origins of liberal democracy remain firmly rooted in Western history.¹² In this connection it is important to note that while liberal assumptions are embedded in everyday language and usage and appear non-ideological they should remain debatable.¹³ For example, individualism may be central to liberalism but it is not an expression of common human experiences and must thus remain contestable.

⁶ R Pinkney *The frontiers of democracy: Challenges in the West, the East and the Third World* (2005) 17.

⁷ MF Plattner “Populism, pluralism, and liberal democracy” (2010) 21 (1) *Journal of Democracy* 81-82.

⁸ As above.

⁹ AK Sen “Democracy as a universal value” (1999) 10 (3) *Journal of Democracy* 3-17.

¹⁰ R Talisse *Democracy after liberalism: Pragmatism and deliberative politics* (2005) 5-6 and MF Plattner (note 7 above) 84.

¹¹ R Talisse (as above) 6. It must nevertheless be borne in mind that the discourse on democratisation is inevitably framed from a liberal or neo-liberal perspective, see JS Saul *The next liberation struggle: Capitalism, socialism and democracy in Southern Africa* (2005) 55.

¹² B Parekh “The cultural particularity of liberal democracy” in D Held (ed) (note 5 above) 156-157.

¹³ A Arblaster *The rise and decline of Western liberalism* (1984) 8. As Manning notes, all claims about ideology are and must remain contestable – DJ Manning *Liberalism* (1976) 142.

The term 'liberal democracy' is laden with ambiguities.¹⁴ The existence of regimes that are often referred to as 'liberal democratic' conveys the impression that liberalism and democracy are simplistically interdependent.¹⁵ The relationship between liberalism and democracy, however, is very complex and by no means one of continuity. As Arblaster poignantly notes:¹⁶

"Liberal democracy" is such a common phrase that it is natural to imagine that the coinage denotes a perfectly harmonious marriage between the two constituent principles. In fact the alliance, like many real life marriages, has been an affair of compromises and concessions from the start, and of the partners it was liberalism which was always the more reluctant.

By way of illustration, 'liberalism' in common parlance denotes a conception of the state where the state is conceived as having limited powers and functions. Liberalism is, in this sense, effectively 'the ideology of the industrialised West.'¹⁷ Liberalism was the product of the breakdown of feudalism and the growth in its place, of a market or capitalist society. In its early manifestation liberalism attacked absolutism and feudal privilege while advocating constitutional and later representative government.¹⁸ Liberalism is embodied in a commitment to several core values among which are the following: the supreme importance of the individual, individual freedom or liberty, belief in a rational human being, equality of individuals and toleration.¹⁹ Liberalism, however, is a 'rather diffuse system of ideas and values.'²⁰ Although there are persistent themes within the liberal tradition, it is notable that liberal works present a variety of programmes and principles which sometimes bear no

¹⁴ The ambiguities and tensions in liberal democracy were, arguably, best captured by Orwell. Orwell argued that 'in the case of a word like democracy, not only is there no agreed definition but the attempt to make one is resisted from all sides ... The defenders of any kind of regime claim that it is a democracy' – G Orwell *In front of our nose, 1945-1950: The collected essays, journalism and letters of George Orwell Vol. 4* (1968)132-3.

¹⁵ N Bobbio *Liberalism and democracy* (2005) 1 (Translated by M Ryle & K Soper).

¹⁶ A Arblaster (note 13 above) 75. Wingo also uses the 'marriage analogy' to explain the relationship between liberalism and democracy. He concludes that before the marriage, between liberalism and democracy, there was scepticism as to whether the two could peacefully live together till 'death do us part'. The two have, however, managed to stay together as a result of concessions that have been negotiated over the years – AH Wingo "Fellowship associations as a foundation for liberal democracy in Africa" in K Wiredu (ed) *A companion to African philosophy* (2004) 450 451.

¹⁷ A Heywood *Politics* (2007) 45 and A Heywood (note 4 above) 26.

¹⁸ A Heywood *Politics* 45.

¹⁹ As above 45-46 and A Heywood (note 4 above) 27-39.

²⁰ DE Ingersoll & RK Matthews *The philosophic roots of modern ideology: Liberalism, Communism, Fascism* (1991) 22.

obvious relationship to one another.²¹ For example, although earlier liberal thought was strict in positing the individual as prior to society both as an historical being as well as a philosophical concept, this theme appears pretty muted in later liberal works.²² It is not within the remit of this study to engage in a comprehensive discussion of liberalism. Suffice it to point out that liberalism sketches a picture of political experience, it is not a description of that experience.²³ Liberalism, nevertheless, holds itself out as presenting a coherent and comprehensive view of the world basing itself on a theory of human nature and society.²⁴

In spite of the popularity of ‘democracy’, defining it is not an easy task. For example, Roux states that ‘democracy’ is a noun ‘permanently in search of a qualifying adjective.’²⁵ Udombana asserts that democracy is a fuzzy and fussy concept.²⁶ Wingo states that ‘[t]he word “democracy” is a conceptually vague word and one that is emotively charged.’²⁷ Pinkney sombrely highlights the fact that ‘the concept of democracy is a highly contested one’²⁸ and Plattner asserts that ‘democracy is a term and a concept with a long and convoluted history.’²⁹ The contestation on the meaning of democracy essentially means that there is room for legitimate difference about where democracy ends and where non-democracy begins.³⁰ In spite of all the controversy and contestation democracy denotes any one of the modes of government where power is not vested in a single individual but the majority.³¹ Majority rule by itself, however, does not amount to democracy. The core of democracy is that decisions affecting members of a community must be made by the members themselves or their elected representatives.³² From this perspective, democracy is contrasted from monarchy or oligarchy as a form of governance. Underlying democracy as a system of governance are a set of rules that stipulate who is authorised to make collective

²¹ DJ Manning (note 13 above) 12-13.

²² As above 14.

²³ As above 141

²⁴ A Arblaster (note 13 above) 13.

²⁵ T Roux “Democracy” in S Woolman & others *Constitutional law of South Africa* (2007) 10-1 10-1.

²⁶ NJ Udombana *Human rights and contemporary issues in Africa* (2003) 52.

²⁷ AH Wingo (note 16 above) 451.

²⁸ R Pinkney (note 6 above) 17.

²⁹ MF Plattner (note 7 above) 83.

³⁰ As above.

³¹ N Bobbio (note 15 above) 1.

³² T Roux (note 25 above) 10-1.

decisions and the procedure to be followed in making such decisions.³³ A significant element in all this is reciprocity between the governors and the governed, between those who exercise political leadership in society and those who are led.³⁴ This reciprocity creates the framework for accountability between the governors and the governed.

The current popularity of democracy as a governance paradigm, however, threatens to empty it of any meaningful content as a political concept.³⁵ This is because democracy's current popularity leads it to be employed in varied and disparate contexts which sometimes do not bear the least affinity to any recognised democratic values. On a positive note, however, the popularity of democracy has also contributed to the emergence of a right to democratic governance. While there may still be some controversy on the existence of a right to democratic governance it is notable that this right has been commonly asserted in recent times.³⁶

Defining 'liberal democracy' is thus complicated largely by the different meanings that are attached to the 'liberal' and 'democracy' components of the term.³⁷ As Heywood argues, the hybrid nature of liberal democracy reflects a basic ambivalence within liberalism towards democracy.³⁸ Liberal democracy at once embodies a fear of collective power while at the same time advocating equality of individuals.³⁹ The liberal component in liberal democracy has its focus on the limitation of powers of state while the democratic component has as its central impetus the promotion of majoritarian rule. It is also important to bear in mind that the 'liberal' component in liberal democracy is not and should not be treated as a unity.⁴⁰ One easily notes that there are distinctive liberal traditions which embody varying conceptions of

³³ N Bobbio *The future of democracy* (1987) 24-25 (Translated by R Griffin).

³⁴ NJ Udombana (note 26 above) 52.

³⁵ A Heywood (note 17 above) 72.

³⁶ TM Franck "The emerging right to democratic governance" (1992) 86 (1) *American Journal of International Law* 46.

³⁷ B Holden *Understanding liberal democracy* (1988) 11-14.

³⁸ A Heywood (note 4 above) 41.

³⁹ An early statement against the majoritarian nature of democracy was offered by Socrates in one of his dialogues with Plato in *The Republic*. Socrates concluded that democracy is the worst form of political association as it invests political power in the foolish many, instead of the philosophers (who he assumed would be wise and competent) – see R Talisse (note 10 above) 77-78. The fears about democracy, as the rule by the mob, were also articulated by the American Founding Fathers in devising the Constitution of the United States of America - A Arblaster (note 13 above) 76.

⁴⁰ D Held (note 5 above) 13.

individual agency, autonomy, rights and duties of the individual and the proper nature and form of the community.⁴¹ Clearly, therefore, although there may be overarching central themes that unite liberal thought one must be mindful of the fact that there exist different strands within liberalism and that these strands do not articulate liberal themes in the same manner.⁴² To properly understand liberal democracy, therefore, one must also be willing to explore the contradictions and tensions that exist between the 'liberal' and the 'democratic' components of the concept.⁴³

In understanding liberal democracy, one must also note that as a theory of state, liberalism is modern, whereas democracy as a form of government is of considerable antiquity.⁴⁴ Heywood, however, argues that while liberalism, as a systematic political creed, may not have existed before the nineteenth century it is centrally based on ideas and theories that had been developed during the three hundred years preceding its emergence.⁴⁵ In as far as democracy is concerned, it is argued that the word 'democracy' was first used in the fifth century BC by the Greek historian Herodotus where it was used as a combination of the Greek words *demos*, meaning 'the people' and *kratein*, meaning 'to rule'.⁴⁶ Democracy as a system of government is also reflected in the governance structures of the ancient Greek city states notably Athens. Although Athens is often touted as the fundamental source of inspiration for Western democracy this is not to say that the West has been right to trace all elements of the democratic heritage exclusively to Athens.⁴⁷ Historical and archaeological research have demonstrated that some key political innovations that are paraded as Western in origin, both conceptually and institutionally, are traceable to non-Western civilisations.⁴⁸ As Pinkney argues, there is nothing inherently complicated about a form of government based on achieving consensus or fulfilling the wishes of the majority and some pre-literate African societies were also democratic.⁴⁹ This, importantly, means that there is little cause for the romanticisation of Athenian democracy, and arguably, most pre-colonial

⁴¹ As above 13-14.

⁴² J Waldron "Theoretical foundations of liberalism" 1987 37 No. 147 *The Philosophical Quarterly* 127-150.

⁴³ D Beetham "Liberal democracy and the limits of democratisation" in D Held (ed) (note 5 above) 55-73 and D Held (note 5 above) 14.

⁴⁴ N Bobbio (note 15 above) 25.

⁴⁵ A Heywood (note 4 above) 24.

⁴⁶ B Holden (note 37 above) 5.

⁴⁷ D Held (note 5 above) 16.

⁴⁸ As above.

⁴⁹ R Pinkney (note 6 above) 21.

African democracies, as it has been proven that these democracies also entrenched what were overtly undemocratic tendencies, for example, very restricted suffrage.⁵⁰

In the light of the above exposition it is not surprising to note that liberalism and democracy have, strictly speaking, also been regarded as being antithetical.⁵¹ Even though democracy is currently synonymous with individual rights, the democrats of decades gone by were ignorant of the doctrine of natural rights as well as the need for limitation of the state. The liberals, for their part, were extremely suspicious of all forms of popular government.⁵² As Arblaster notes, liberals were keen to overthrow the old monarchical and aristocratic authorities but were afraid that these would be replaced by a tyranny of the mob.⁵³ The result was that for a long time liberals upheld and defended limited suffrage.⁵⁴ In spite of these tensions three basic variants of democracy are apparent.⁵⁵ Firstly, there is direct or participatory democracy, a system of decision making about public affairs in which citizens are directly involved. It is this form of democracy that was practiced in ancient Athens. Secondly, there is liberal or representative democracy. In this form of democracy elected officers undertake to represent the interests of the citizenry within the framework of the rule of law. Thirdly, there is a variant of democracy based on the one party model (although it is doubtful whether such a system should properly be classified as a democracy). This system is what was practiced in the former Soviet Union and other Third World societies. It is with representative democracy that much of this study is concerned.

⁵⁰ BR Nelson *The making of the modern nation state* (2006) 19. Although the word democracy comes from Greek and is directly linked to the governance system in Athens specifically, it is important to note that while the Athenians may have provided us with the word they did not provide a model. Athenian democracy, it must not be forgotten, was very poorly regarded by leading philosophers of the day like Plato, Aristotle and Thucydides – AH Birch *The concept and theories of modern democracy* (2007) 109. Traditional conceptions of democracy in Africa also need to be revisited in order to do away with some of their oppressive elements K Gyekye *Tradition and modernity: Philosophical reflections on the African experience* (1997) 115-124.

⁵¹ N Bobbio (note 15 above) 31.

⁵² As above 37.

⁵³ According to Weale, modern liberal democracies being heirs of liberalism contain an ambiguity in their institutional structure and principled rationale - A Weale *Democracy* (1999) 167 and A Arblaster (note 13 above) 76.

⁵⁴ B Parekh (note 12 above) 156 163. Perhaps a 'classic' expression of this liberal fear of democracy is JS Mill *Considerations on representative government* (1862) where he argues for a paternal government and limited franchise.

⁵⁵ D Held (note 5 above) 15. Various and differing typologies have been employed to classify democracy. The basic broad distinction seems to be between direct and representative democracy. Beyond this, various forms of representative democracy can be identified and various adjectives can be used to qualify democracy, see T Roux (note 25 above) 10-1 – 10-2 and A Weale (note 53 above) 19.

Paradoxically, serious introspection reveals that modern democracy is not only incompatible with liberalism but can in many respects, if only to a degree, also be regarded as its natural extension.⁵⁶ Liberalism is properly compatible with democracy provided one focuses on democracy not as an egalitarian ideal but as a political formula which agitates for popular sovereignty.⁵⁷ One must be mindful that popular sovereignty can only be effectively exercised if the majority of citizens are granted the right to participate directly or indirectly in collective decision making.⁵⁸ The interdependence between natural rights and liberalism has been such that while it may have been possible in years gone by to have a liberal state that was not democratic, today non-democratic liberal states are inconceivable just as are non-liberal democratic states. The result is that liberal ideals and democratic procedures have gradually become interwoven. This is because the procedures of democracy are necessary to safeguarding those fundamental personal rights on which the liberal state is based and rights must be safeguarded if democratic procedures have to operate.

Admittedly, the coinage 'Western democracy' tends to emphasise the historical origins and development of liberal democracy. This is understandably because, at least from a historical perspective, liberal democracy traces both its origin and name from eighteenth century Europe during the Age of Enlightenment.⁵⁹ The ideas underlying liberal democracy are centrally traced to the works of social contract theorists like Hobbes, Locke and Rousseau.⁶⁰ Such is the centrality of the aforementioned philosophers that Bobbio regards Rousseau as the 'father of modern democracy'⁶¹ while Mutua holds the view that the best foundational

⁵⁶ N Bobbio (note 15 above) 31.

⁵⁷ As above 37-39.

⁵⁸ It is important that emphasis on popular sovereignty must be properly appreciated. Popular sovereignty it must be recalled does not presume, prescribe or dictate a particular form of governance – PD Finn "A sovereign people, a public trust" in PD Finn (ed) *Essays on law and government: Principles and values Volume 1* (1995) 1 4.

⁵⁹ The Age of Enlightenment, sometimes called the Age of Reason, refers to the time of the guiding intellectual movement called The Enlightenment. During The Enlightenment reason was advocated as a means for establishing an authoritative aesthetics, ethics, government and even religion. Reason, it was argued, would allow men to obtain objective truth about reality - <http://www.newworldencyclopedia.org/entry/Age_of_Enlightenment> (Accessed 5 May 2010).

⁶⁰ Hobbes, Locke and Rousseau between them, arguably, made the most significant contribution to the development of liberal thought with the publication of some seminal works on liberalism. These works are T Hobbes *Leviathan*, J Locke *Two treatises on civil government* J Rousseau *The social contract*. These ideas were subsequently further developed by later philosophers like Kant and Rawls. While emphasis has differed from philosopher to philosopher the central idea in the social contract has remained the same.

⁶¹ N Bobbio (note 33 above) 43.

articulation of liberalism and democracy was provided by Locke.⁶² Hobbes' work is revered for marking the point of transition between a commitment to absolutism and the struggle of liberalism against tyranny.⁶³ Liberal democracy was thus born out of an individualistic conception of society, which was at variance with the organic conception that had prevailed in classical times.⁶⁴ The contractarian theories of Hobbes, Locke and Rousseau and their hypotheses about the state of nature are a manifestation of this fact. One must constantly bear in mind the fact that the liberal state and the democratic state are doubly dependent.⁶⁵ The liberal state is not only the historical but also the legal premise of the democratic state. The liberal society predates the liberal democratic society.⁶⁶ This, as this study will demonstrate, has profound implications for the consolidation of democracy in Africa.⁶⁷

In considering the emergence of liberal democracy in the West, one notes that political power in eighteenth century Europe was, almost entirely, held by either a monarchy or an aristocracy. Many of the European monarchs of the time asserted that their power had been ordained by God and to question it was tantamount to blasphemy. The possibility of democracy, a situation where political power ultimately resided with the majority, was seriously frowned upon during this time. These ideas, however, were seriously questioned by leading intellectuals during the Age of Enlightenment. These intellectuals argued that human affairs should be guided by reason and principles of liberty and equality. It was further argued, especially by the social contract theorists, that people are created equal and that political authority could not be justified by a supposed privileged connection to God. For these theorists, governments existed to serve the people, laws in a state were meant to apply to both the governors and the governed – the rule of law – and that ultimately the authority to govern was founded on the consent of the governed.⁶⁸ Liberal democracy thus

⁶² M Mutua "The transformation of Africa: A critique of rights discourse" in F Gomez Isa & K de Feyter (eds) *International human rights law in a global context* (2009) 899 902.

⁶³ D Held *Models of democracy* (1987) 74- 77.

⁶⁴ N Bobbio (note 31 above) 27.

⁶⁵ As above 25-26.

⁶⁶ DE Ingersoll & RK Matthews (note 20 above) 22.

⁶⁷ For example, the absence of a clear bourgeois class in most African societies has made it very difficult to consolidate liberal democracy in Africa. One must recall that the bourgeois class contributed heavily in extracting from the monarchies and aristocrats the concessions on which liberal democracy is founded, see JF Bayart *The state in Africa: The politics of the belly* (1993) Chapter Three: The Bourgeois illusion.

⁶⁸ For an account of the historical development of the rule of law, especially in England, see EP Thompson *Whigs and hunters: The history of the Black Act* (1975) 258-269 and D Hay

combined norms of limitations on a government's authority plus the recognition of popular sovereignty. Constitutionalism, it must be noted, occupies a very central position in any liberal democratic dispensation. It is for its prescriptions about limitations of government authority that constitutionalism assumes importance in liberal democracy.

Reduced to what I may term, the bare minimum, liberal democratic societies are founded on three central pillars.⁶⁹ Firstly, the existence of an independent judiciary to which the citizenry may resort for the enforcement of their rights. Secondly, the separation of the legislative, executive and judicial functions of government to ensure that public policy is based on clearly defined law and that all acts of public policy are amenable to redress through civil or criminal sanction. Thirdly, the limitation of governmental powers vis-à-vis society with regard to protection of fundamental rights. Invariably, all modern liberal democracies are constructed on the above-highlighted ideals and where a country possesses a written constitution such a document will attempt to give expression to these ideals.⁷⁰

To properly appreciate the place and role of liberal democracy especially in so far as is relevant for Africa, one must be mindful that 'democracy' as a political concept remains a heavily contested ideology and vision.⁷¹ As a matter of fact, no perfect democracy has ever existed nor is it probable that such a perfect democracy will ever exist.⁷² It is thus important to allow democracy to exist as such rather than impose a pre-fixed meaning that is loaded with particular values. It is even more fundamental to realise that there still pervades a

"Property, authority and the criminal law" in D Hay & others (eds) *Albion's fatal tree: Crime and society in Eighteenth-Century England* (1975) 17-63.

⁶⁹ O Akiba "Constitutional government and the future of constitutionalism in Africa" in O Akiba (ed) *Constitutionalism and society in Africa* (2004) 1 6-7.

⁷⁰ For example, sections 7, 8 and 9 of the Constitution of the Republic of Malawi outline the fundamental principle of separation of powers between the executive, legislature and judiciary in Malawi.

⁷¹ S Ndlovu-Gatsheni & G Dzinesa "Liberal democracy and the African context: The experience of South Africa" in K Matlosa & others (eds) *The state, democracy and poverty eradication in Africa* (2008) 91 95. However, as Frimpong notes, 'even if we concede and are prepared to allow different interpretations of democracy, there are certain underlying factors which must be consistent with any such interpretation' – K Frimpong "Some pitfalls in Africa's quest for democratic rule and good governance" Paper presented at the 20th Southern African Universities Social Science Conference, University of Zambia, 30 November to 5 December 1997.

⁷² As Rousseau famously remarked only if there were a nation of Gods and not men would a perfect democracy ever exist. The number of conditions that must simultaneously co-exist to create a perfect democracy are unlikely to occur at the same time in any polity - Rousseau *The social contract* quoted by Bobbio (note 33 above) 43.

conceptual disjunction between democracy and liberal democracy.⁷³ This disjunction has been evident throughout the life of liberal democracy. This chasm is, as earlier stated, manifested by the fact that while democracy generally seeks to promote popular sovereignty liberal democracy repudiates popular power. It thus replaces government by the people with government by the consent of the people.⁷⁴ It is for this reason, largely, that most liberal democracies have reduced themselves to multiparty electoral competition with little regard paid to democracy.⁷⁵ While democracy is supposed to aid in the realisation of ‘human potentialities through active participation in rulership,’ liberal democracy only offers protection – supposedly from the state – to the citizenry.⁷⁶ This actually means, as Ake concludes, that ‘liberal democracy is less an expression of democracy than its restriction.’⁷⁷ Clearly, one must always bear in mind that while there are close affinities between democracy and liberal democracy, fundamental differences also exist between the two. The distinct historical trajectory that the development of liberal democracy has taken entails that in Africa’s search for democracy there may be very little in the experiences of the so called established democracies to guide and a great deal to mislead it.⁷⁸ There is thus no need to mimic the Western brand of democracy without taking cognisance of the conditions prevailing in Africa.⁷⁹ In Africa, more than anywhere else, the search for viable democratic governance must acknowledge the heterogeneity which characterises the democratic terrain.⁸⁰

4.2.1.2 The emergence of liberal democracy in Africa and Malawi

Africa’s first flirtation with liberal democracy was experienced during the dawn of what is often shorthandedly referred to as the ‘Independence Era.’⁸¹ Almost uniformly all departing

⁷³ C Ake *The feasibility of democracy in Africa* Chapter 1.

⁷⁴ As above 10.

⁷⁵ Ankersmit argues that Anglo-Saxon and continental European democracies have been reduced to nothing more than plebiscitary democracies. Interaction between the state and the citizen has ceased to exist save for the citizen’s right to pronounce once every four or five years on the state’s most recent behaviour – FR Ankersmit *Political representation* (2002) and C Ake (note 73 above) 12.

⁷⁶ C Ake (note 73 above) 14.

⁷⁷ As above 16.

⁷⁸ As above 31.

⁷⁹ J Teffo “Democracy, kingship, and consensus: A South African perspective” in K Wiredu (ed) (note 16 above) 443 444.

⁸⁰ R Pinkney (note 6 above) 33.

⁸¹ The ‘Independence Era’ refers to the period when most African states got their independence from the colonial powers. It roughly runs from the late 1950s to the 1970s.

colonial powers bequeathed to the newly independent states constitutions that embodied liberal democratic ideals. The newly independent states were thus required to govern according to norms of separation of powers, rule of law, respect for human rights and judicial independence. Ironically, and as pointed out in Chapter Two, this expectation was being entertained on the part of the departing colonialists even though they themselves had never attempted to govern according to the above described norms during the entirety of the colonial era. It was only when independence became imminent that colonial powers attempted to hastily institute democratic reforms in polities that had been structures of exploitation, despotism and degradation.⁸² It does not come as a surprise to note that the foundations of liberal democracy in Africa were very shaky and shallow right from the outset. As Weiland notes, the conditions necessary for the sustenance of liberal democracy had never existed in Africa and where they had been introduced at the end of the colonial period these were quickly scrapped.⁸³

Almost invariably, the liberal democratic paradigm was sought to be introduced into the newly independent African states through the mechanism of a constitution. These independence constitutions, however, were ill-suited for this purpose largely because they suffered from a huge legitimacy deficit. These constitutions were, almost uniformly, drawn up for the independent states by the colonial powers at the time of their withdrawal from the colonial territory.⁸⁴ The involvement of the local populace in the crafting of these constitutions was very limited. The distinctly foreign origins of these constitutions contributed significantly to the quick collapse of constitutional governments in most newly independent states.⁸⁵ Thus even though constitutions in liberal democratic dispensations are supposed to limit and check the authority of government, independence constitutions in Africa dismally failed to perform this function. These constitutions failed to command the loyalty, respect and confidence of both the governors and the governed largely because the people could not identify with them. In the circumstances, the feeling of being bound by a constitution was

⁸² R Fatton "Liberal democracy in Africa" (1990) 105 (3) *Political Science Quarterly* 455-457.

⁸³ H Weiland "Democratisation in Africa: Problems and perspectives" in C Marias & others (eds) *Southern Africa after elections: Towards a culture of democracy* 5.

⁸⁴ B Nwabueze *Constitutionalism in the emergent states* (1973) 23-25.

⁸⁵ Hatchard & others argue that while there were significant similarities, for example, in the constitutions that Britain bequeathed to its colonies this was not achieved through a 'cut and paste' process. There was considerable discussion between nationalists and the British Colonial Office on the detail to be included or omitted – J Hatchard & others *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspective* (2004) 15-19. However, almost uniformly the nationalists representing the African territories did not consult with their citizenry on these constitutions.

largely absent and constitutionalism could not take root. It is a combination of these factors, among others, that led to the creation of African countries which had constitutions but no trace of constitutionalism.⁸⁶

The above described pattern applies with equal measure to Malawi. Malawi's induction to liberal democratic governance was achieved by means of the 1964 Independence Constitution which was negotiated in Great Britain.⁸⁷ This Constitution, however, lasted only two years before being replaced by a Republican Constitution.⁸⁸ During the thirty years that the 1966 Constitution was in force, liberal democratic notions were all but pushed into oblivion.⁸⁹ Governance and constitutionalism did not proceed on any principles that could logically be justified on the basis of any liberal democratic ideals. Governance during the thirty year period was diametrically at odds with any liberal democratic ideals. It is plain heresy to suggest that there was any pretension at maintaining constitutionalism in Malawi during the entirety of Dr Banda's rule. During this period, political activity was extensively regulated, civil liberties were trammelled and judicial independence was but a mirage.⁹⁰

It was only with the re-introduction of multi-party politics subsequent to the Referendum in 1993 that liberal democratic ideals again rose to prominence. This rise to prominence of liberal democratic ideals in Malawi must, as pointed out earlier, be understood in the context of a continental rise to prominence of liberal democracy during the Third Wave of Democratisation.⁹¹ It must also be appreciated within the broader social context of changing global dynamics subsequent to the end of the Cold War. What is noticeable about the rise of

⁸⁶ AM Mangu "Constitutional democracy and constitutionalism in Africa" *Conflict Trends* 3-8 and HWO Okoth-Ogendo "Constitutions without constitutionalism: Reflections on an African paradox" in IG Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 3-25.

⁸⁷ B Pachai *Malawi: The history of the nation* (1973) 244.

⁸⁸ As argued in Chapter Three, the 1966 Republican Constitution was in a sense a reaction to the Cabinet Crisis and was designed to prevent the re-occurrence of any such incidents in future. The 1966 Constitution took away all the liberal democratic safeguards that had been in the Independence Constitution.

⁸⁹ See, M Chigawa "The fundamental values of the Republic of Malawi Constitution of 1994" Concept Paper No. 1 Constitutional Review Conference 2006, Capital Hotel Lilongwe, 28-31 March 2006.

⁹⁰ See the discussion and analysis of the period between 1966 and 1994 in Chapter Three of this study especially parts 3.2.3.2 and 3.4.2.

⁹¹ For the Third Wave of Democratisation, see SP Huntington *The third wave: Democratisation in the late Twentieth century* (1991) and SP Huntington "Democracy's third wave" (1991) 2 (2) *Journal of Democracy* 12-34.

liberal democracy in Malawi, and arguably most of Africa, is the influence of the Bretton Woods institutions and other Western donors and their insistence on good governance which was quickly conflated with a demand for democratisation along liberal democratic tenets.⁹² The result in Malawi is that in 1994 Malawi adopted a Constitution that is hailed as one of the ‘most liberal’ in the world.⁹³ However, in spite of having one of the world’s most liberal constitutions, it is astounding to note that the choice of liberal democracy for the 1994 Constitution was not as a result of a conscious and collective reflection by the people of Malawi. Further and even more striking, as Kanyongolo aptly notes, is the fact that liberal democracy has few, if any, historical or philosophical roots in Malawian society.⁹⁴ Liberalism’s lack of historicity in Malawi, however, seems not to have significantly affected or shaped the formulation of the 1994 Constitution.⁹⁵

The fact that the liberal democratic model has no historical roots in Malawi and that it was not chosen as a result of a conscious introspection by Malawians raises serious questions about its suitability and relevance as a governance paradigm.⁹⁶ These questions can legitimately be extended to liberal democratic constitutionalism which is squarely founded on liberal democracy. In spite of all the questions about liberal democracy one notes its continued rise and ‘entrenchment’ with the passage of time not just in Malawi and Africa but also globally.⁹⁷ In Malawi, for example, one notes that during the transition to multi-partyism almost all incipient opposition parties uncritically aligned themselves with the liberal democratic model.⁹⁸ These parties, seemingly, failed to appreciate that liberal democracy, in the form they were embracing, had evolved out of specific historical, cultural and material contexts in the West.⁹⁹ A big error was, therefore, committed when these parties failed to subject the liberal model to any serious scrutiny or to relate it to the political, historical, traditional and material experiences of Malawians before embracing it. Even more worrying

⁹² B Munslow “Democratisation in Africa” (1993) 46 (4) *Parliamentary Affairs* 478 480 and D Moyo *Dead aid: Why aid is not working and how there is another way for Africa* (2009) 23-24.

⁹³ D Chirwa “Democratisation in Malawi 1994-2002: Completing the vicious circle” (2003) 19 (2) *South African Journal on Human Rights* 316.

⁹⁴ FE Kanyongolo (note 1 above) 206.

⁹⁵ As argued in Chapter Three, the lack of debate on the appropriateness of the liberal democratic paradigm for the Constitution is largely traceable to the hasty manner in which the Constitution was adopted.

⁹⁶ FE Kanyongolo (note 2 above) 370-372.

⁹⁷ See, for example, AK Sen (note 9 above).

⁹⁸ KM Phiri “Party ideologies and programmes” in M Ott & others (eds) (note 1 above) 67 74-75.

⁹⁹ As above 75.

is the fact that almost all major political parties have remained stuck to the liberal democratic paradigm and not one of them has attempted to either offer an alternative vision for governance in the country or conduct a visible interrogation of the liberal paradigm.

It is notable that the rise of liberal democracy not just in Malawi but also globally has had a certain acerbic attribute to it. With the end of the cold war liberal democracy has been parroted by major Western powers as the only viable form of government and countries have literally been pressed to adopt it.¹⁰⁰ The liberal democratic conception of the world has increasingly held itself out as the 'last word' and the only viable framework for conceptualising human relations.¹⁰¹ This, significantly, has been in spite of numerous shortcomings and shortfalls of the liberal democratic model in creating and sustaining an equitable governance framework.¹⁰² It seems to be the case that in spite of the tensions and contradictions within it, liberalism still, quite erroneously in this study's view, assumes the existence of true, immutable, universal, timeless objective values for all men, everywhere and all times.¹⁰³ The preoccupation thus becomes foisting these immutable values on all of humanity.

In spite of the above, the 'developed world's' approach to democratisation in the developing world is full of ambiguities and contradictions and these have affected democratic consolidation in Africa and most of the Third World. The ambiguities stem from, arguably, the 'naivety' of the 'initial premise' on which the 'democratisation crusade' has been conducted. It still seems to be naively and mistakenly assumed, in most of the developing world, that liberal democracy is the final solution to each and every conceivable problem that might confront humanity.¹⁰⁴ This is in spite of the rising disillusionment with democracy in the so called 'mature' democracies themselves.¹⁰⁵ This 'paradox of democracy', as Giddens calls it,

¹⁰⁰ S Chan *Liberalism, democracy and development* (2002) 11.

¹⁰¹ B Fontana *Hegemony and power: On the relation between Gramsci and Machiavelli* (1993) 74-76. See, also, F Fukuyama *The end of history and the last man* (1992).

¹⁰² See, J Gray *Liberalisms: Essays in political philosophy* (1989).

¹⁰³ Cf. Gramsci argued that there is no abstract human nature, fixed and immutable. Human nature is the totality of historically determined social relations hence an historical fact – A Gramsci *Selections from the prison notebooks* Edited and translated by Q Hoare & GN Smith (1971) 133.

¹⁰⁴ FR Ankersmit (note 75 above) 92. Teffo speaks of the Western hegemony that has sought to impose its brand of democracy as the only viable option for human survival and flourishing – J Teffo (note 79 above) 444.

¹⁰⁵ RB Talisse (note 10 above) 3.

has seen significant drops in the levels of trust in politicians, lower voter turn outs and increasing apathy in political processes in the so called ‘mature’ democracies.¹⁰⁶ The paradox of democracy requires that democracy must be seriously rethought at the most fundamental levels.¹⁰⁷ In rethinking democracy an important concession is to move away from the faulty ‘initial premise’ and accept that ‘Western liberal democracy might prove to be not the final destination on the democratic road, but just one of the many possible exits.’¹⁰⁸

4.2.2 The case for re-conceptualising governance and constitutionalism from an Afro-centric perspective

In the paragraphs above, the development of liberal democracy in Africa, generally, and Malawi specifically was traced. In tracing liberal democracy’s development, the study also alluded to some of the limitations and shortfalls of liberal democracy in Malawi, specifically and Africa, generally. This section will make a case for the re-conceptualisation of both governance and constitutionalism from an African perspective. The emphasis on the Afro-centric perspective is motivated by the need to make African experiences and perspectives material in the conceptualisation of governance and constitutionalism. In making the case for the re-conceptualisation, some further shortfalls and deficiencies of the liberal democratic model will again be highlighted. The re-conceptualisation being advocated here is for a move towards social trust-based governance and constitutionalism. It must be recalled that social trust-based governance draws on *ubuntu* and the trust. In terms of the place of liberal democracy in Africa, the social trust-based approach entails making democracy culturally endogenous.¹⁰⁹

The liberal democratic paradigm has failed Africa and is currently failing Malawi as well. The fact that liberal democracy has been failing Africa has been evident for a long time. As Nyamnjoh puts it, the fact that liberal democracy has yet to succeed in Africa cannot be questioned ‘even by the most optimistic and committed of its disciples or evangelists.’¹¹⁰ De Smith postulates that as early as 1964 the failures of liberal democracy in Africa were

¹⁰⁶ A Giddens *Runaway world* (2000) 90.

¹⁰⁷ RB Talisse (note 10 above) 5.

¹⁰⁸ F Zakaria “The rise of illiberal democracy” (1997) *Foreign Affairs* 76 (6) 22 24.

¹⁰⁹ G Malaba “The fostering of attitudes for development in a transition to democracy” in AP Burger (ed) *Ubuntu: Cradles of peace and development* (1996) 65 66.

¹¹⁰ F Nyamnjoh “Liberal democracy in Africa: The need for alternatives” in B Immink & others (eds) *From freedom to empowerment: Ten years of democratisation in Malawi* (2003) 85 86.

already becoming apparent.¹¹¹ In spite of the early manifestations of the failures of liberal democracy in Africa, it was contended that liberal democracy should be given a full run.¹¹² As it turned out, the failures became more apparent when Independence Constitutions were either quickly subverted or repealed paving way for the rise to despotism and authoritarianism that soon characterised Africa. The failure of liberal democracy to take root in Africa years after the Independence Era confirms that liberal democracy should not be regarded as a self-evident truth that is naturally embedded in all human beings including Malawians.¹¹³ Clearly, democratisation along the liberal democratic model is not an inevitable consequence in African countries.¹¹⁴ Democratisation and governance in Africa must thus be implemented with this very important fact constantly in mind.

At the moment, a quick stock-take on the 'democracies' in Southern Africa, for example, reveals massive but disturbing similarities which, this study argues, epitomises the crisis of liberal democracy in Africa. The so called liberal democracies of Southern Africa are all marked by kleptocracy, autocracy, elitism and lack of accountability.¹¹⁵ The practice of democracy itself is centred on electoralism, is hollow and, generally, does not make a lot of difference to ordinary people's lives.¹¹⁶ It is these traits, among others, that have led scholars to conclude that in Africa, at least, there is a discernible reversal and roll-back on some of the achievements that were made during the Third Wave of Democratisation.¹¹⁷ This merely highlights the fact that Africa's democratisation remains incomplete and still faces an uncertain future.¹¹⁸

This study argues, as pointed out earlier, that part of the reasons for the failure of liberal democracy in Africa lie in the manner in which liberal democracy was introduced to most African countries. As earlier highlighted, this was done through the mechanism of Independence Constitutions and the most unique feature about these constitutions was their

¹¹¹ SA de Smith *The new Commonwealth and its constitutions* (1964) 231-234.

¹¹² As above.

¹¹³ FE Kanyongolo (note 2 above) 371.

¹¹⁴ J Herbst "Understanding ambiguity during democratisation in Africa" in J Hollifield & C Jillson (eds) *Pathways to democracy: The political economy of democratic transitions* (2000) 245-247.

¹¹⁵ R Southall *Democracy in Africa: Moving beyond a difficult legacy* (2003) 54.

¹¹⁶ As above 56.

¹¹⁷ R Joseph "Africa, 1990 -1997: From Abertura to closure" (1998) 9 (2) *Journal of Democracy* 3-17 and R Southall (note 115 above) 30.

¹¹⁸ E Gymimah-Boadi "The rebirth of African liberalism" (1998) 9 (2) *Journal of Democracy* 18-31.

palpable lack of autochthony. Such constitutions failed to acquire the status of a basic law in almost all countries and quickly faded into irrelevance.¹¹⁹ The norms that these constitutions stood for thus never got to be accepted and entrenched as part of the governing mores in African societies. It is thus the attempted wholesale importation of the liberal democratic model that created the biggest hurdle for the democratisation of Africa.¹²⁰ There is almost no evidence to demonstrate that the departing colonial powers made a conscious effort to bequeath constitutions that reflected and responded to the conditions that prevailed in the colonies.

One factor glaringly stands out in the history of governance and constitutionalism in Africa. Little, if any, attention was paid to the prevailing local conditions in attempting to transplant liberal democratic norms to newly independent Africa and neither did the colonial administrators test these norms in Africa before bequeathing them. While it was obviously imperative that states emerging from colonial subjugation had to revamp their systems of governance and economic structures, it seemed to have been uncritically assumed that the emerging systems had to be modelled on those of their former colonial masters without further justification.¹²¹ There was no deliberate attempt to craft a governance paradigm in response to the various territories' histories or the prevailing conditions. Surely the colonialists had been in the colonised territories long enough to get an idea of the local governance paradigms! However, it seems that the inclination to adopt what Mamdani refers to as a 'history by analogy'¹²² was obviously a big catalyst in the errors that were committed by the departing colonial powers. History by analogy, as Mamdani demonstrates, has a high propensity for ignoring specificity in favour of an inclination to fit all human experiences within a particular projection.¹²³ In relation to the introduction of liberal democracy in Malawi and most of Africa, the result of a history by analogy was that it was uncritically assumed that liberal democracy was the best form of governance because it had succeeded in Europe without an attempt being made to consider the implications of the specific factors prevailing

¹¹⁹ G Hyden *African politics in comparative perspective* (2006) 105.

¹²⁰ See, AA Mazrui "Who killed democracy in Africa? Clues of the past, concerns of the future" (2007). The liberal society without doubt precedes any liberal-democratic society. This seems to have been forgotten when dealing with Africa – DE Ingersoll & RK Matthews (note 20 above) 22.

¹²¹ B Davidson *The Blackman's burden: Africa and the curse of the nation state* (1992) 18.

¹²² M Mamdani *Citizen and subject: Contemporary Africa and the legacy of late colonialism* (1996) 9 -11.

¹²³ As above.

in Africa.¹²⁴ However, one ought to realise that African societies were not and are not merely ‘pre-liberal’ societies. It is thus plain naivety to hope that the introduction of a liberal constitution would somehow induce a ‘pre-liberal’ society to somehow become a liberal society. It should be apparent that the conditions for the success of a liberal democracy were and are still largely absent in most of Africa. It is important to constantly bear in mind that ‘[i]n Tropical Africa, the shape of democracy is influenced by pre-industrial, rather than post-industrial, conditions.’¹²⁵

Strangely, and in spite of the clarity of the failures of liberal democracy in the post-independence period, the same mistakes of the independence era have largely been replicated in most African countries during the Third Wave of Democratisation. As fittingly summarised by Nyamnjoh:¹²⁶

Far from being innovative ... and turning attention towards more participatory democracy informed by local experiences and world view, Africans in their second liberation attempt, which started in the 1980’s and early 1990’s ... have only compounded their predicaments in a sterile commitment to the simplistic pursuit of liberal democracy.

The liberal democratic hegemony has been such that democratisation during the Third Wave of Democratisation was all conducted on its terms without any concessions being made to alternate perceptions. Malawians, and arguably Africans generally, thus find themselves saddled with a liberal democratic framework that is failing to deliver the numerous promises that the Third Wave of Democratisation supposedly generated.¹²⁷ Contrary to common perceptions, the changes that occurred during the Third Wave of Democratisation have neither translated into greater citizenry empowerment nor improved governance, generally.¹²⁸ Conversely, there is a clear indication that the changes, for their failure to bring

¹²⁴ R Fattou (note 82 above) 457-459.

¹²⁵ R Pinkney (note 6 above) 32.

¹²⁶ F Nyamnjoh (note 110 above) 87.

¹²⁷ There is a general consensus that for all the euphoria that accompanied the Third Wave of Democratisation, it has failed to meet most expectations especially as regards the nature of democratisation in Africa – C Young “The Third Wave of Democratisation in Africa: Ambiguities and contradictions” in R Joseph (ed) *The state, conflict and democracy in Africa* (1999) 15 25. As Mouffe correctly observes, the unchallenged hegemony of neo-liberalism represents a threat to democratic institutions and unjustly seeks to create a uni-dimensional world. It is thus important to come up with ways of dealing with the underlying paradox in liberal democracy and develop innovative ways of dealing with it, see C Mouffe *The democratic paradox* (2005).

¹²⁸ As Joseph notes, part of the problem with democratisation during the Third Wave was that it assumed the existence of the prerequisites of liberal democracy – R Joseph (note 117

about real transformation have actually contributed to the creation of disillusionment with political processes generally.¹²⁹

On a different note, it is rather sobering to note that for all its failures, the liberal democratic framework, as a governing paradigm, remains by and large accepted by all political players in Malawi.¹³⁰ As Mwaungulu notes ‘there is no reason to doubt that, for Africa in general and Malawi in particular, democracy has come to stay.’¹³¹ This it must be stated is not an endorsement of Fukuyama’s ‘end of history thesis’. It is nothing more than a pragmatic concession that democracy is, currently, best suited to meet human expectations in terms of governance and that no viable alternatives are on the horizon yet.¹³² It is also a mere confirmation of the liberal democratic hegemony in the current global political climate.¹³³ For all its shortcomings, democracy remains the most plausible governance alternative.¹³⁴ Liberal democracy is here to stay, at least, for the foreseeable future. Some African scholars have even been speaking of ‘the rebirth of African liberalism.’¹³⁵ Conceding the endurance of liberal democracy, it must be restated, does not amount to asserting its perfectness.

For example, in Malawi, all the major political parties have embraced the tenets of liberalism both in relation to politics and the economy.¹³⁶ It is due to the acceptance of the liberal democratic paradigm that this study does not propose the wholesale rejection and repulsion

above). It is argued that the Third Wave of Democratisation occurred without the basic institutions of the modern state in place i.e. rule of law and civil society, see R Rose & DC Shin “Democratisation backwards: The problem of Third Wave Democracies” (2001) 31 (2) *British Journal of Political Science* 331-354. This resulted in a ‘reverse democratisation process’ and created incomplete democracies.

¹²⁹ F Nyamnjoh (note 110 above) 88-89.

¹³⁰ B Chinsinga “Malawi’s democracy project at the cross-roads” in *Towards the consolidation of Malawi’s democracy* Konrad Adenauer Stiftung Occasional Paper No. 11 Malawi 7.

¹³¹ DF Mwaungulu “Governance, democracy and constitutionalism in Africa: The Malawi experiment” (2006) 32 (2) *Commonwealth Law Bulletin* 267 268.

¹³² R Talisse (note 10 above) 3.

¹³³ As to how hegemony operates in society see A Gramsci (note 103 above). The crucial point is to note how hegemonic forces effect domination and subjugation in ways that seem to convey normalcy. The dominated and subjugated are made to believe that their condition of subjugation is the natural order of things. In relation to liberal democracy the liberal democratic hegemony operated to convey the impression that liberal democracy is the only viable governance paradigm.

¹³⁴ R Southall (note 115 above) 20.

¹³⁵ See, E Gyimah-Boadi (note 118 above).

¹³⁶ H Englund “Introduction” in H Englund (ed) *A democracy of chameleons: Politics and culture in the new Malawi* (2002) 12.

of the model. This study argues that some tenets of liberalism must form part of social trust-based governance and constitutionalism. The major contention in this study is that the liberal democratic model must not be wholesale accepted but remodelled by infusing it with uniquely African traits and thus allowing it to benefit from the values that underlie both *ubuntu* and the trust.¹³⁷ There must be a conscious effort towards the creation of more variegated versions of democracy in response to prevailing local circumstances.¹³⁸ This, it is hoped, will generate legitimacy as well as ensure that there are fair chances of democracy succeeding in Africa.

As Englund has argued in respect of Malawi, there is an acute need to move beyond liberalism and acknowledge that liberal democracy cannot be wholesale imported into a country.¹³⁹ In moving beyond liberal democracy Malawi does not need to unduly strive to conform to standard definitions, precedents and practices of democracy but must focus on the reorganisation of society along lines that will enhance its potential.¹⁴⁰ To achieve this in a viable manner Malawi must look into herself and articulate a relationship between indigenous values and norms that does not simplistically characterise traditional normative systems like customary law, as retrogressive and useless.¹⁴¹ Specifically, in as far as liberal democracy is concerned, Malawians and Africans generally, must embark on the process of reconciling it in an earnest and transparent manner with other forms of democracy indigenous to the continent. In all these processes it must constantly be recalled that democracy as a form of governance is not alien to Africa while liberal democracy is.¹⁴² Importantly, such a process of reconciling liberal democracy with indigenous norms must be

¹³⁷ For example, Southall in reflecting on the inadequacies of the liberal democratic model and the legacy of autocracy in Africa recommends, among others, that the fundamental tenets of liberalism must be recognised while at the same time accepting that that is not sufficient. He further argues that democracy must be based upon a political system that enjoys legitimacy – R Southall (note 115 above) 59-60. Mouffe also argues that there may not be a need to wholesale reject liberal democracy but the critical task is to conduct an ‘immanent critique’ of liberal democracy. There is thus no need to resignedly accept liberal democracy the way it currently is and societies must actively seek ways of, for example, accepting liberal democratic tenets and forcing liberal democracy to ‘live’ according to its ideals – C Mouffe “Democratic politics today” in C Mouffe (ed) *Dimensions of radical democracy: Pluralism, citizenship, community* (1992).

¹³⁸ F Zakaria (note 108 above) 40.

¹³⁹ H Englund “Winning elections, losing legitimacy multi-partyism and the neo-patrimonial state in Malawi” in M Cowen & L Laakso (eds) *Multiparty elections in Africa* (2002) 172-185.

¹⁴⁰ G Chigona *Pitfalls of democracy: A critical essay concerning the political experiment in Malawi since 1994* (2003) 17-18.

¹⁴¹ F Kanyongolo (note 2 above) 373.

¹⁴² C Ake “Rethinking African democracy” (1991) 2 (1) *Journal of Democracy* 32-34.

predicated on enhancing meaningful participation by the populace in the governance process.¹⁴³ Such a process would have to give meaning to, among others, the following values that are hallowed from the African perspective:¹⁴⁴ leaders must remain in office with the consent of the people, policy decisions must not be made in the face of public dissent, decisions affecting the broader community must follow consensus, decisions affecting the whole community must enhance solidarity and public resources must be managed to better the broader society.

It is axiomatic to recognise that democratic forces in any country embody social forces.¹⁴⁵ The process of deconstructing and reconstructing democracy in Africa must, therefore, be both historical and philosophical.¹⁴⁶ To establish functional democracies in Africa, a deliberate effort must be made to root the democratic system in the established culture, traditions and history of the concerned countries while also considering their particular economic circumstances.¹⁴⁷ In this context democracy will succeed if it is able to build upon a foundation in the traditional systems while at the same time being able to challenge any identifiable shortcomings in the traditional form of organisation. It is fundamentally important to always realise that democracy is best 'indigenised.'¹⁴⁸ It succeeds best when it 'wears and acknowledges the specific historical and cultural realities of the society in question.'¹⁴⁹ African imaginations about democracy, governance and constitutionalism must, therefore, be prepared to transcend the world that has been crafted by 'Western hegemonic ideas.'¹⁵⁰ Africans must consciously attempt to rediscover their roots and construct their paradigm of

¹⁴³ P Chihana "Opening space for participation in Malawi" in KAF Occasional Paper No. 11 (note 130 above) 57.

¹⁴⁴ K Mojela "Traditional authorities and local government" in R van der Berg & G van Nierkerk (eds) *New perspectives on origins, foundations and transition* (1999) 145 146; T Metz "Toward an African moral theory" (2007) 15 (3) *The Journal of Political Philosophy* 321 324-326; J Teffo (note 79 above) 445 and E Wamala "Government by consensus: An analysis of a traditional form of democracy" in K Wiredu (ed) (note 16 above) 435-442.

¹⁴⁵ T Lumumba-Kasongo "The problematics of liberal democracy and democratic process: Lessons for deconstructing and building African democracies" in T Lumumba-Kasongo (ed) *Liberal democracy and its critics in Africa: Political dysfunction and the struggle for social progress* (2005) 1 3.

¹⁴⁶ As above.

¹⁴⁷ B Munslow (note 92 above) 487.

¹⁴⁸ KK Prah "Democracy and the African challenge: Does liberal democracy work for Africa" in K Matlosa & others (eds) (note 71 above) 22.

¹⁴⁹ As above.

¹⁵⁰ S Ndlovu-Gatsheni & G Dzinesa (note 71 above) 92.

democracy by reference to their indigenous norms and institutions.¹⁵¹ Clearly, therefore, while there may be external influence and assistance in Africa's democratisation this ought to be very limited and often merely for catalytic purposes.¹⁵² Democratisation and constitutionalism in Africa cannot ignore the 'importance of the role of the traditional political systems in the national governance structures of the state.'¹⁵³ One must thus be constantly mindful of the fact that democracy cannot be dictated into existence.¹⁵⁴ Clearly, in Africa liberal democracy should not be embraced as a finished and perfect product for in its current form it is a product of a specific history and social conditions.¹⁵⁵ It is for this reason that this study calls for a move towards social trust-based governance and constitutionalism.

The call for social trust-based governance and constitutionalism benefits from a long experience, of failure, with democracy, conceptualised predominantly from a liberal perspective, across Africa. As conceded by Pye, while liberal democracy's rise to ascendancy may mean that there are currently no serious alternative theories for governance, the achievement of sustainable and genuinely liberal democracy has been universally difficult to attain.¹⁵⁶ It is also important to note that developing countries face unique problems in the institutionalisation of democracy. Such problems in part revolve around the development of an acceptable balance between their cultural legacies and the imperatives of the modern world culture together with the need for economic development.¹⁵⁷ These challenges and problems cannot be solved by copying solutions that were developed in a different context. Effective social reconstruction requires the development of home grown solutions to stimulate and guide the process.¹⁵⁸

Specifically, in as far as liberal democracy, good governance and constitutionalism are concerned, it is important to note that even in the West, liberal democracy has not been uniformly conceptualised. Acknowledging that there may be different ways of conceptualising liberal democracy, governance and constitutionalism should then pave way

¹⁵¹ See, B Davidson (note 121 above).

¹⁵² KK Prah (note 148 above) 24.

¹⁵³ GK Kieh "Reconstituting the neo-colonial state in Africa" (2009) 26 (1) *Journal of Third World Studies* 41 51.

¹⁵⁴ B Munslow (note 92 above) 483 and C Ake (note 142 above) 38-41.

¹⁵⁵ B Parekh (note 12 above) 168.

¹⁵⁶ L Pye "Democracy and its enemies" in J Hollifield & C Jillson (eds) (note 114 above) 22.

¹⁵⁷ As above 25.

¹⁵⁸ G Chigona (note 140 above) 25.

for the development of approaches that critique the dominant paradigms. In the case of Malawi, for example, it is also important to note that the standard meaning and conceptualisation of democracy does not necessarily resonate with most ordinary Malawians.¹⁵⁹ Clearly, therefore, making democracy work requires the adoption of a flexible, inclusive and open-ended approach that not only takes account of liberal ideals but also ‘African values and institutions’ that can be used to foster a sense of local democracy.¹⁶⁰ The heterogeneity of democracy necessarily means that there is no ‘either or approach’ to democratisation. One cannot rigidly insist on either the strict liberal model or an exclusive African approach to democratisation. As the United Nations has pointed out ‘the ideal of democracy is rooted in philosophies and traditions from many parts of the world.’¹⁶¹ Democratisation must, therefore, deliberately seek to accommodate the different philosophies and traditions. While some of the values that African traditions embody may seem strange when viewed from a Western perspective, it is undoubted that they possess moral and ethical values that can be utilised in democratisation.¹⁶²

4.3 Interrogating the connection between democracy, governance and constitutionalism and African traditions, customs and institutions

Reference to ‘African traditions, customs and institutions’ may justly be criticized for being too broad and incapable of possessing any meaningful content.¹⁶³ Without belabouring the point, the defining feature of what this study refers to as African traditions, customs and institutions is their indigeneity to Africa. By African traditions, customs and institutions is meant social institutions and modes of societal organisation and ordering that owe their origin to the African continent and its peoples. It is their autochthony that sets African

¹⁵⁹ H Englund *Prisoners of freedom: Human rights and the African poor* (2006) 112-114.

¹⁶⁰ D Venter “Elections and electoral systems in emerging democracies: A case for electoral system re-design in Malawi” Constitutional Review Conference 28-31 March 2006, Lilongwe, Malawi and S Ndlovu-Gatsheni & G Dzinesa (note 69 above) 94.

¹⁶¹ United Nations “Guidance note of the Secretary-General on democracy” <http://www.un.org/democracyfund/Docs/UNSG%20Guidance%20Note%20or%20Democracy.pdf> (Accessed 21 April 2010).

¹⁶² Cf. K Creff Exploring ubuntu and the African renaissance: A conceptual study of servant leadership from an African perspective <http://www.regent.edu/acad/global/publications/sl_proceedings/2004/cerff_exploring_ubuntu.pdf> (Accessed 22 June 2010).

¹⁶³ Notably, however, other scholars argue that although there are many diverse African cultures there are commonalities to be found among them such as value systems, beliefs and practices and that these commonalities shape the African world view – Munyaka & M Motlhabi in MF Murove (ed) *African ethics: An anthology of comparative and applied ethics* (2009) 63.

traditions, customs and institutions apart. It must be conceded at the outset that what are currently referred to as African traditions, customs and institutions are a combined derivative of the colonial experience and African cultures.¹⁶⁴ In speaking of African traditions, customs and institutions one must thus be fully mindful of two things. Firstly, the effect that the colonial experience had on the African consciousness. As Mbigi argues, almost invariably, colonial laws and policies sought to undermine and discredit the legitimacy of indigenous African knowledge systems.¹⁶⁵ This affected the way in which they were preserved and transmitted between generations. Secondly, one must be slow and cautious in making generalisations about African traditions, customs and institutions especially in the light of the diversity of traditions, practices and cultures between African peoples.

A further note of caution must be sounded here. The reference in this study to African traditions, customs and institutions is not just a form of intellectual nostalgia about an era that has long gone past. This reference is being made on the basis of an acknowledgement of the value that may be had by infusing the current Westernised discourse on societal organisation with indigenous African norms. This is not a call for the wholesale return of Africa to its pre-colonial systems of governance and organisation. This is impossible. Further, the effects of colonialism are such that it is impossible to concretely determine with precision the norms that prevailed in the pre-colonial period.¹⁶⁶ Nevertheless, there is a very strong case to be made for 're-establishing contacts with familiar landmarks of modernisation under indigenous impetus.'¹⁶⁷ This recourse to indigenous institutions necessitates, not the 'reproduction' of ancient indigenous institutions, but the 'recapturing' of those institutions.¹⁶⁸ Proceeding from an acknowledgment of the value of indigenous African knowledge and its institutions, this study will now demonstrate how African traditions, customs and institutions

¹⁶⁴ L Mbigi *The spirit of African leadership* (2005) v.

¹⁶⁵ As above.

¹⁶⁶ Cf. S Biko "Some African cultural concepts" in A Stubbs (ed) *Steve Biko: I write what I like, Selected writings* (1996) 40-47.

¹⁶⁷ AA Mazrui quoted by JY Mokgoro "Ubuntu and the law in South Africa" <<http://web.archive.org/web/20040928041520/www.puk.ac.za/law/per/documents/98v1mokg.doc>> (Accessed 22 September 2010).

¹⁶⁸ In assessing the grandeur of the Roman Empire Machiavelli argued that if the glory and greatness of the Roman Empire was attained by means of conscious human activity then the conditions of grandeur could be recaptured – but not reproduced. This could be done by a serious enquiry into the factors that had made the original success possible. If, however, fortune was the initial cause the need to transform the present by referring to the past becomes futile. This position was endorsed by Antonio Gramsci – See B Fontana (note 101 above) 85.

are concretely related to governance, constitutionalism and democracy. The demonstration of the interconnectivities shall be achieved by using the concept of *ubuntu* as an example.

4.3.1 *Ubuntu* as a basis for a reconstructed discourse on governance, constitutionalism and democracy in Africa: A tentative direction

It is not enough for Africans to assert that *ubuntu* is their unique governing philosophy. The more important task is to involve *ubuntu* and its ideals in the solving of concrete problems that Africa faces. This study will establish the relevance of *ubuntu* in the resolution of concrete African problems by, firstly, demonstrating that *ubuntu* can be used as a foundational principle of constitutional law in many African countries. By way of illustration, reference will, in this connection, be made to the Malawian and South African Constitutions.¹⁶⁹ Secondly, it will also be demonstrated that *ubuntu* can also be used as a basis for constructing an alternative discourse on constitutionalism that does not foundationally rely on liberal ideals for justification.

In the context of this study, it is important to note that the only explicit acknowledgement of *ubuntu*'s relevance to constitutional law was its inclusion in the post-amble to the Interim Constitution of South Africa. The concept was, surprisingly, not carried over into the Final Constitution.¹⁷⁰ Over the years, however, the South African Constitutional Court has, on several occasions, referred to *ubuntu* to 'justify' its decisions. The incorporation of *ubuntu* into South African jurisprudence has, however, not been easy and uniform.¹⁷¹ Some of the complexities in incorporating *ubuntu* into constitutional jurisprudence stem from the concept's expansiveness and supposed infinite malleability. As may be recalled, *ubuntu* is simultaneously about the individual as well as the universal.¹⁷² But perhaps the biggest impediment to the development of an expansive *ubuntu*-based jurisprudence has been the judges' tendency to treat *ubuntu* as a uni-dimensional value. This has led courts and

¹⁶⁹ The similarities between the Malawian Constitution and its South African counterpart have been harped on for quite a while now. Mwaungulu states that '[t]he Malawi Constitution replicates South African legal and political arrangements ...' DF Mwaungulu (note 131 above) 271.

¹⁷⁰ The omission of *ubuntu* in the Final Constitution, it has been argued, amounted to a de-africanisation of the Constitution and devaluation of the religio-cultural values of Africans – E Moosa "Tensions in legal and religious values in the 1996 South African Constitution" in M Mamdani (ed) *Beyond rights talk and culture talk: Comparative essays on the politics of rights and culture* (2000) 131.

¹⁷¹ M Pieterse "'Traditional' African jurisprudence" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 445-462 and R English "Ubuntu: The quest for an indigenous jurisprudence" (1996) 12 (4) *South African Journal on Human Rights* 641-648.

¹⁷² M Pieterse (as above) 445.

commentators to selectively emphasise those aspects of *ubuntu* which fit the purpose for which it has been invoked.¹⁷³ The South African Constitutional Court, especially in its earlier pronouncements on *ubuntu*, was guilty of using *ubuntu* as ‘a one-size-fits-all, magic word that [could] be appropriated to lend legitimacy to any judicial observation, rather than the intricate philosophy it indeed represents.’¹⁷⁴ This approach, it will be demonstrated, has since ‘somewhat’ changed.

An example of a selective reliance on the values underlying *ubuntu* is offered by the Constitutional Court’s decision in *AZAPO v President of South Africa (AZAPO)*,¹⁷⁵ where the Court used *ubuntu* to justify the amnesty legislation in the immediate aftermath of apartheid. It must be noted that the Court invoked the Interim Constitution’s reference to *ubuntu* in the epilogue to urge forgiveness for the perpetrators of human rights violations during apartheid while at the same time extinguishing the victims’ rights to commence action for the violations. This approach, it is argued, erroneously suggested that *ubuntu* is only about forgiveness while *ubuntu* also does require perpetrators of wrongs to atone for their wrongs in various socially acceptable ways. The decision in *AZAPO* is also a clear manifestation of how the philosophy of *ubuntu* can be appropriated or even misappropriated to serve particular political ends¹⁷⁶ - in this case, *ubuntu* was used to justify the compromise that the amnesty laws embodied.¹⁷⁷ The specificities of how *ubuntu* justified the amnesty legislation were, however, not addressed by the Court beyond a generalised reference to *ubuntu*. Even in *S v Makwanyane (Makwanyane)*,¹⁷⁸ where the Constitutional Court declared the death penalty unconstitutional in South Africa, although several of the judges referred to *ubuntu* in their judgments, there is a palpable variation in the emphases that the judges place on the concept.¹⁷⁹ The Constitutional Court’s approach to *ubuntu* in *Makwanyane*, Van der Walt

¹⁷³ As above.

¹⁷⁴ As above 447.

¹⁷⁵ 1996 (4) SA 671 (CC).

¹⁷⁶ M Pieterse (note 171 above) 447. It must be recalled that the elasticity of the concept of *ubuntu* necessarily entails that it is constantly amenable to abuse and misuse – M Bonn “Children’s understanding of ‘Ubuntu’” (2007) 177 (8) *Early Child Development and Care* 863 871.

¹⁷⁷ The Constitutional Court held that the founding statute of the Truth and Reconciliation Commission was justified in its violation of the right to have justiciable disputes settled in a court of law on the basis of the *ubuntu* vision that the Interim Constitution supported.

¹⁷⁸ 1995 (3) SA 391.

¹⁷⁹ M Pieterse (note 171 above) 446.

argues, evidences a frightening lack of jurisprudential rigour.¹⁸⁰ For all the references to *ubuntu* in the individual judgments none of the judges seriously interrogated what *ubuntu* means and what exactly it portends for the legal system. It seems the judges just opted to adopt a ‘feel-good flavour of a jurisprudence that has done little more than add a local, indigenous and communitarian touch to the Christian, Kantian or Millsian respect for the individual that informs Western jurisprudence.’¹⁸¹

A better direction would be to take seriously the assertion that *ubuntu* is an intricate philosophy and not a one-size-fits-all magic word.¹⁸² However, evidence of the one-size-fits-all approach to *ubuntu* can also be had in the passing reference to *ubuntu* that the Constitutional Court made in *Hoffmann v South African Airways*.¹⁸³ In *Hoffmann v South African Airways* Ngcobo J (as he then was) stated that ‘[p]eople living with HIV must be treated with compassion and understanding. We must show *ubuntu* towards them.’¹⁸⁴ Ngcobo J, however, did not attempt to properly unravel the relevance of *ubuntu* in the light of the dispute that the Court was resolving. These variations and ‘inconsistencies’, this study argues, merely highlight the need for concerted effort in articulating the philosophy of *ubuntu* which has suffered from years of neglect.

The Constitutional Court has also made references to *ubuntu* in the following decisions:¹⁸⁵ *Port Elizabeth Municipality v Various Occupiers (PE Municipality)*;¹⁸⁶ *Bhe v Magistrate, Khayelitha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa (Bhe)*;¹⁸⁷ *Dikoko v Mokhatla (Dikoko)*¹⁸⁸ and *Khosa v Minister of Social Development (Khosa)*.¹⁸⁹ A brief discussion of the manifestation of *ubuntu* in these decisions will now be conducted.

¹⁸⁰ J Van der Walt *Law and sacrifice: Towards a post apartheid theory of law* (2005) 109.

¹⁸¹ As above 111.

¹⁸² M Pieterse (note 171 above) 447.

¹⁸³ 2001 (1) SA 1 (CC).

¹⁸⁴ As above paragraph 38.

¹⁸⁵ For a scholarly analysis of these decisions, see T Bekker “The re-emergence of ubuntu: A critical analysis” and N Bohler-Muller “Some thoughts on the ubuntu jurisprudence of the Constitutional Court” in D Cornell & N Muvangua (eds) *Law in the ubuntu of South Africa* <http://isthisseattaken.co.za/pdf/Papers_Cornell_Muvangua.pdf> (Accessed 24 June 2010).

¹⁸⁶ 2005 (1) SA 217 (CC).

¹⁸⁷ 2005 (1) SA 580 (CC).

¹⁸⁸ 2006 (6) SA 235 (CC).

¹⁸⁹ 2004 (6) SA 505 (CC).

PE Municipality involved the eviction of squatters that had settled on privately owned land within the municipality of Port Elizabeth. The illegality of the squatters' occupation of the land was largely undisputed even though some of them had been in occupation for about eight years. *PE Municipality* is notable because it was the first case in which *ubuntu* as a constitutional value was brought to bear in private law.¹⁹⁰ Sachs J, who delivered the judgment of the Court, stated that *ubuntu*, which is part of the cultural heritage of the majority of South Africans, suffuses the whole constitutional order and combines individual rights with a communitarian philosophy. He further asserted that *ubuntu* is a unifying motif in the South African Bill of Rights.¹⁹¹ However, in spite of the commendable attempt to extend *ubuntu* into private law, the Court in *PE Municipality* is guilty of the same simplistic approach that was adopted in *Makwanyane* and *AZAPO*. It is clear, from the Court's statements on *ubuntu*, that the Court still utilised *ubuntu* as a catch-all phrase to justify conclusions reached without interrogating *ubuntu*.

A similar conclusion can be made in respect of the Constitutional Court's treatment of *ubuntu* in *Bhe*. The applicants in *Bhe* challenged the constitutionality of section 23 of the Black Administration Act (38 of 1927) and the customary law principle of primogeniture. In declaring both section 23 of the Black Administration Act and the principle of primogeniture unconstitutional, both Langa DCJ (as he then was) and Ngcobo J (as he then was) referred to *ubuntu* in their judgments. However, and as Bekker aptly concludes, although reference was made to *ubuntu* in *Bhe*, no new insight into the concept as a constitutional principle was provided.¹⁹²

Similar conclusions can be made of the decision in *Khosa*. In *Khosa* the applicants were Mozambican citizens who were permanent residents of South Africa. The applicants were challenging the Social Assistance Act (59 of 1992) after being excluded from social assistance grants as a result of their citizenship. What is notable is that the judgment in *Khosa* does not make any explicit reference to *ubuntu*. However, as Cornell and Van Marle have argued, a holistic analysis of the decision reveals that the Court's decision reflects a deep sense of an *ubuntu* ethos.¹⁹³ This *ubuntu* ethos is particularly manifested by the

¹⁹⁰ T Bekker (note 185 above) 492.

¹⁹¹ Note 186 above, Paragraph 37.

¹⁹² T Bekker (note 174 above) 495.

¹⁹³ D Cornell & K Van Marle "Exploring ubuntu: Tentative reflections" (2005) 5 (2) *African Human Rights Law Journal* 195.

Court's extension of social grants to permanent residents who would otherwise have been excluded on a literal interpretation of the Social Assistance Act.

With regard to the three decisions discussed above, it is important to note that in spite of the paucity of the jurisprudential interrogation of *ubuntu* specifically, the decisions mark a bold and courageous attempt to move beyond a liberal conception of the human rights discourse.¹⁹⁴ A move beyond the liberal conception of human rights is bound to set the stage for more meaningful intercourse between *ubuntu* and the liberal discourse on rights.

The judgment in *Dikoko* is hailed as a breakthrough with regard to the interpretation of *ubuntu* as a constitutional value.¹⁹⁵ The case came to the Constitutional Court as an appeal against a judgment awarding damages for defamation in favour of Mokhatla. In considering the award of damages by the lower court Mokgoro argued that she would have reduced the lower court's award because of its failure to consider all mitigating circumstances. In Mokgoro's judgment, the constitutional value of dignity is closely related to *ubuntu* and in cases of defamation it is equally important that compensation should be aimed at re-establishing harmonious relations between the parties. A remedy based on *ubuntu*, she argued, could go much further in restoring human dignity than a monetary award.¹⁹⁶ Sachs J, to his credit, although adopting a different approach, largely agreed with Mokgoro J's conclusions and expressly conceded that '*ubuntu-botho* is more than a phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived at.'¹⁹⁷ Sachs J, in his judgment, proposes that the law of defamation should move away from its preoccupation with monetary awards towards a model that encourages reconciliation by the parties, for example, by accepting apologies in settlement of claims.

It must be clear that while progress has been made in developing an *ubuntu*-based jurisprudence, this progress has been slow and laboured. In spite of the problems that have faced the incorporation of *ubuntu* into South African jurisprudence, for example, its ideals remain centrally relevant to constitutional jurisprudence both in Malawi and South Africa. A look at the preambular recitals of the two countries' Constitutions, for example, reveals that the constitutional orders in these countries are founded on the very ideals that *ubuntu* stands

¹⁹⁴ N Bohler-Muller (note 185 above) 484.

¹⁹⁵ T Bekker (note 185 above) 496.

¹⁹⁶ Note 188 above, Paragraph 68.

¹⁹⁷ As above, Paragraph 113.

for.¹⁹⁸ On the one hand, the preamble to the Constitution of Malawi avers that the people of Malawi adopted it in recognition of the ‘sanctity of human life and the unity of all mankind’ and also because they sought ‘to guarantee the welfare and development of all the people of Malawi, national harmony and peaceful international relations.’ On the other hand, the preambular recital to the South African Constitution avers that it was adopted to ‘heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights’ and also to ‘improve the quality of life of all citizens and free the potential of each person.’ Further, the detailed and lengthy Bills of Rights in both Constitutions also point to a desire to preserve and protect the values of *ubuntu* especially, but not exclusively, human dignity.¹⁹⁹ *Ubuntu* thus remains a rich philosophy which if approached as such may prove to be of significant value. *Ubuntu*’s unique contribution in this regard is that:²⁰⁰

Contrary to the often materialistic and individualistic approach of ‘Western’ jurisprudence, *ubuntu* offers a view of society that emphasises social harmony above individual gain, views rights and duties as sides of the same coin, views law ‘not as a tool for personal defence, but as an opportunity given to all to survive under the protection of the order of the communal entity’ and acknowledges human interdependence as an inextricable part of life.

By way of illustrating the points made above, democratic governance is part of the constitutional orders in both Malawi and South Africa.²⁰¹ The founding values of democracy such as human dignity, equality, promotion of human rights and freedoms, accountability, responsiveness and rule of law coincide with key values of *ubuntu* such as human dignity, respect, inclusivity, compassion, concern for others, honesty and conformity.²⁰² A progressive judicial engagement must proactively appropriate the concept of *ubuntu* in constitutional interpretation and all legal discourse.²⁰³ The articulation of *ubuntu* in

¹⁹⁸ One must pay special attention to the context in which these Constitutions were adopted to properly appreciate the *ubuntu* purport.

¹⁹⁹ See Chapter IV Constitution of the Republic of Malawi and Chapter 2 Constitution of the Republic of South Africa.

²⁰⁰ M Pieterse (note 171 above) 448.

²⁰¹ For Malawi see section 12 of the Constitution of the Republic of Malawi and for South Africa see sections 1 and 7(1) of the 1996 Constitution of South Africa.

²⁰² JY Mokgoro (note 167 above).

²⁰³ M Pieterse (note 171 above) 448.

constitutional discourse, it is argued, stands a better chance of developing an enduring and home-grown constitutionalism.²⁰⁴

As pointed out earlier, governance in African countries has almost uniformly but uncritically followed the Western liberal democratic model. This, it is argued, has largely been as a result of a systematic process of disarticulation of African polities from their indigenous institutions of problem solving that begun during colonial times.²⁰⁵ Recourse to *ubuntu*, however, offers a basis for reconceptualising governance and democratisation in a manner that exudes greater symmetry to African traditional norms and customs. It must be noted that even though Western political thought presumes the social contract as the only legitimate constitutive power of a government, the social contract justification is inadequate for countries like Malawi and South Africa with justiciable social and economic rights in the Constitution.²⁰⁶ This is because while the social contract easily lends itself to the vindication of civil and political rights, it has not proved to be equally amenable to the justification of social and economic rights.²⁰⁷ Social contract-based discourse easily justifies civil and political rights because of its pre-occupation with explaining the emergence of civil society and the justification of restraints on government. It is, however, not easily amenable to justifying social and economic rights which require more than restraint on the part of a government to be realised.

Ubuntu offers an opportunity and a basis for understanding most African constitutions and developing a brand of governance that is premised on values that connect more readily with the African consciousness. A full articulation of *ubuntu*-based governance would also serve to highlight the inadequacies of social contract-based discourse in the light of the conditions that prevail in Africa.²⁰⁸ As Cornell and Van Marle argue, *ubuntu* as a foundational principle

²⁰⁴ See, AA Mazrui (note 120 above) where the author argues that democracy's failure in Africa may also be attributed to postcolonial Africa's disdain for the legacy of its ancestors.

²⁰⁵ D Olowu "Governance, institutional reforms and policy processes in Africa: Research and capacity building implications" in D Olowu & S Sako (eds) *Better governance & public policy: Capacity & democratic renewal in Africa* (2002) 53 55.

²⁰⁶ D Cornell "A call for a nuanced constitutional jurisprudence: Ubuntu, dignity and reconciliation" (2004) 19 (1) *SA Public Law* 666 668.

²⁰⁷ It is notable that the only rights that leading liberal philosopher John Locke recognises are the right to property, life and liberty – see *The second treatise of government*. It is poignant, as Hay argues, that Locke distorted natural law arguments to justify the liberation of wealth from all political or moral controls – his conclusion was that the accumulation of money, goods and land was actually sanctioned by nature and implicitly by God – D Hay (note 68 above) 18.

²⁰⁸ It is notable that discussions of the social contract routinely avoid interrogating the status of the social contract in the society it supposedly constitutes. It is argued that in any society

of law would not have the same kind of one-to-one correspondence of right and duty that occurs under the social contract theory.²⁰⁹ Under *ubuntu*, even a legally imposed obligation may have to be construed differently from the manner in which it is normally construed in contractarian theories.²¹⁰ A notable perspective, among others, that would be brought about by *ubuntu* in governance and democratisation would be the recognition and emphasis of interdependence as a primordial societal value – this is often absent in social contract-based discourse. For the law to contribute to the realisation of the benefits of *ubuntu* in governance, constitutionalism and democratisation, there must be the development of what Cornell refers to as a ‘nuanced jurisprudence’.²¹¹ This ‘nuanced jurisprudence’ requires an incisive sublation and reconciliation of ideas of Western liberalism with African traditional norms and institutions.²¹² In all this it must be recalled that *ubuntu* as a philosophy is both conservative and subversive.²¹³ It is conservative in the sense that it requires the perpetuation of values that have proven their worth to Africa but it is also subversive in its resistance to liberal individualism.²¹⁴ To give meaning to *ubuntu*’s resistance to liberal individualism, for example, requires that the values that underlie *ubuntu* be utilised in defining ‘justice’ and the validity of law in African countries.²¹⁵ In this endeavour one must continuously be mindful of the fact

there are three groups of people: those who like the terms of the contract as it is; those who do not like the terms of the contract as it is and seek to renegotiate them and those who appear indifferent to the contract. The citizens who manage the state belong to the first group and these often use the law in the hope of stopping the second group of citizens from renegotiating the contract. The overall objective, however, is to get the third group of citizens to stop being indifferent and join either the first or second group – MS Nzunda “Sedition and the struggle for the social contract” in MS Nzunda & KR Ross (eds) *Church, law and political transition in Malawi 1992-94* (1995) 15. This ‘contestation of the social contract’ must be allowed to happen in Africa and on Africa’s terms.

²⁰⁹ D Cornell & K van Marle (note 193 above) 212. Even the trust concept, would not be understood and applied in the same manner that it has developed in the Anglo-American system. A conscious effort would be made to connect it to the manner in which fiduciary obligations were traditionally understood in Africa, see SKB Asante “Fiduciary principles in Anglo-American law and the customary law of Ghana: A comparative study (1965) 14 (4) *The International and Comparative Law Quarterly* 1144-1188.

²¹⁰ As the decision in *AZAPO* demonstrates, *ubuntu* does not insist on strict legalism where there are pressing societal needs that may be served by a relaxation of strict legalism.

²¹¹ D Cornell (note 194 above) 674-675.

²¹² For a thorough discussion of some of the values that underlie *ubuntu* and how these can be utilised in governance, see J Broodryk “Ubuntu: African life coping skills, theory and practice” Paper delivered at CCEAM Conference 12-17 October 2006, Nicosia, Cyprus.

²¹³ N Bohler-Muller (note 185 above) 480.

²¹⁴ As above.

²¹⁵ MB Ramose “An African perspective on justice and race” <<http://them.polylog.org/3/frm-en.htm>> (Accessed 8 September 2009).

that 'using *ubuntu* to enrich human rights and constitutional discourse should be seen as having both political and ethical dimensions.'²¹⁶

4.4 *Ubuntu* and the social trust: A potent bulwark for governance and constitutionalism in Malawi?

In Chapter Two of this study the social trust concept was explained in detail and the various implications that it generates were also highlighted. It was argued that the social trust concept offers a viable framework through which governance and constitutionalism could be realised. As will be demonstrated below, the strength and viability of the social trust concept in revitalising governance and constitutionalism, especially in Malawi and Africa, generally, lies in its conceptual affinity to traditional norms of governance in Africa. To best appreciate the symmetry that exists between the social trust and traditional norms of governance in Africa, like *ubuntu*, one must be prepared to engage in a process of transculturation.²¹⁷ Transculturation provides a basis for appreciating the other without a measure of contempt for that which is different from the dominant models. As Cornell puts it, 'transculturation demands that we must actually learn each other's ways and grasp underlying competing values in order to even begin to make a judgment'²¹⁸ about the constitutionality or legality of particular customary practices. In addition to transculturation, one must also be willing to engage in the incisive sublation that was discussed in Chapter Two. Resultantly, Western ideas and philosophies must be prepared to engage with the distinctly African concepts without the contempt or disdain that characterised the meeting of cultures at the inception of colonialism. The result of the intercourse must be a synthesis that does not unduly privilege either the African or Western over the other.

One must recall that 'trust', in the moral sense, is the basis of cooperation in all societies.²¹⁹ African societies, especially in pre-colonial times, arguably, more profoundly manifested the 'trust' basis in their inter and intra societal relationships. Concededly, pre-colonial African societies were not homogenous and the generalisations about life in pre-colonial African societies are being made here with a pinch of prudence.²²⁰ There is, however, considerable

²¹⁶ N Bohler-Muller (note 185 above) 480.

²¹⁷ D Cornell "Ubuntu pluralism and the responsibility of legal academics to the new South Africa" (2009) 20 (1) *Law and Critique* 43 55.

²¹⁸ As above.

²¹⁹ V Held *Rights and goods: Justifying social action* (1984) 68-69.

²²⁰ There is a general agreement among scholars that autocratic rule did exist in parts of Africa in pre-colonial times especially in monarchical societies. At the same time, however, there is also considerable evidence that in segmented and non-hierarchical societies government

evidence that leadership, particularly, in pre-colonial African societies was exercised in a principled manner that ensured a high degree of accountability by the governors and participation by the populace.²²¹ It is the essence of the preceding assertion that confirms that democracy itself as a form of governance is not novel in Africa. It is liberal democracy that is foreign to Africa.

It has been convincingly demonstrated that in traditional African societies, political and economic control were premised on human interrelationships governed by an orderly distribution of wealth among the citizens of a community.²²² Under this model of governance, accountability and social justice were the primary governing features and inter and intra generational equity governed the utilisation of all societal resources. It was thus considered to be morally degrading for a leader to reap huge profits from swindling people or hijacking economic development for personal benefit.²²³ Centrally, all decision-making was by consensus.²²⁴ It is because of this that other scholars have gone as far as suggesting that 'African traditional culture, it seems, has an almost infinite capacity for the pursuit of consensus and reconciliation.'²²⁵ Even in societies that had chiefs or kings, decisions were invariably reached after consultation with the citizens in the polity. Governing by consensus, it has been argued, was at the heart of African social and political organisation ethos.²²⁶ The primacy of consensus was premised in a belief that knowledge is ultimately dialogical or social.

usually took the form of a council of elders whose decisions were consensual. The village assembly served as a forum for open discussion on matters affecting the whole community – H Weiland (note 83 above) 10.

²²¹ B wa Mutharika *One Africa, one destiny: Towards democracy, good governance and development* (1995) 61.

²²² As above.

²²³ As above 69-70.

²²⁴ Again this is a complex generalisation. The flip side to the emphasis on consensus in pre-colonial African societies had been ably captured by Louw who argues that it had the potential to generate oppressive conformity and loyalty to the group at the expense of individuality – DJ Louw "Ubuntu: An African assessment of the religious other" <<http://www.bu.edu/wcp/Papers/AfriLouw.htm>> (Accessed 8 September 2009).

²²⁵ J Teffo (1994) 4 Quoted by DJ Louw (as above) - Democracy the African way does not simply boil down to majority rule. Traditional African democracy operates in the form of discussions, sometimes very lengthy, until there is some kind of an agreement, consensus or group cohesion is reached.

²²⁶ E Wamala "Government by consensus: An analysis of a traditional form of democracy" in K Wiredu (ed) (note 16 above) 435 437.

The trust basis of societal relations in pre-colonial Africa, which still persists in some African societies, can more clearly be appreciated by analysing the manner in which traditional African societies have managed resources such as land.²²⁷ For example, writing about land ownership in Malawi, Pachai concluded that²²⁸

[i]n African society, according to customary law, the land does not belong to an individual or group as such. It is there as a gift of the gods to occupy and to cultivate under certain conditions. It is not ownership but useful occupation that is the guiding principle.

Although chiefs and village headmen would be in charge of land in particular localities, these were not regarded as owners of the land. They were mere custodians or wardens. Land was communally owned. 'Ownership', conceived according to the Western sense, was unheard of.²²⁹ Instead of ownership, one ought to use terms such as 'guardianship' or 'trusteeship'.²³⁰ In evaluating land tenure systems of Malawi, Mbalanje echoed Pachai when he stated that 'land was held in trust for all the people forming the community'.²³¹ Mutharika reiterates the same point by stating that 'land was held in trust by the monarchy or chieftaincy for the good of all ... The leadership ensured that subjects had a share of the wealth of the nation each according to his needs'.²³² Land was thus conceived of as a sacred unit of traditional life.²³³ The whole community had an interest in it.²³⁴ The dead chiefs had an interest, the current occupants had an interest and the unborn generations were also recognised as having an

²²⁷ One must recall that land is a very precious resource in African societies. It is argued that land is the basis of African self-respect and creativity. The loss of land by African peoples during colonisation was a factor in the alienation of Africans from their culture and tradition, see M Munyaka & M Motlhabi (note 163 above) 63 79.

²²⁸ B Pachai (note 87 above) 96. See, also, DD Phiri *Malawi: Our future our choice* (2006) 48.

²²⁹ In the West, ownership of property is epitomised by the right of the property-owner to exclude others from the enjoyment of benefits accruing from the object of property – K Gray "Property in thin air" (1991) 50 (2) *Cambridge Law Journal* 252-307.

²³⁰ B Pachai (note 87 above) 96.

²³¹ A Mbalanje "Land law and land policy in Malawi" in J Arntzen & others (eds) *Land policy and agriculture in eastern and southern Africa* (1986) <<http://www.unu.edu/unupress/unupbooks/80604e/80604E09.htm>> (Accessed 20 March 2009).

²³² B wa Mutharika (note 221 above) 72.

²³³ This point is reiterated by G Diallo "The philosophical foundations of African democracy" <<http://www.hollerafrica.com/showArticle.php?artId=237&catId=1>> (Accessed 22 June 2009).

²³⁴ The 'community' in African culture is an ethical entity comprising the living, the living dead and the yet to be born. The critical ethical concern is to recognise and abide by the obligation to maintain and preserve harmonious relations within these three dimensions of the community – MB Ramose "In memoriam: Sovereignty and the 'New' South Africa" (2007) 16 (2) *Griffith Law Review* 310 323. This concern with maintaining harmony between the three categories of people makes African societies inherently social trust-based in orientation.

interest in it.²³⁵ It is sobering to note that customary land in Malawi is still managed along the same principles.

A similar assertion has been made about land ownership in Ghanaian customary law. Writing in 1965 Asante argued that ‘property concepts were traditionally impressed with the “trusteeship idea”’.²³⁶ This trusteeship idea, Asante argued, derived from the fundamental premise that property belonged to the ancestors while the living were but beneficiaries. This meant, just as Pachai had pointed out for Malawi, that property was an ancestral trust committed to the living for the benefit of themselves and generations unborn. This had two principal implications.²³⁷ Firstly, the community interest in property meant that ownership was subject to social obligations that precluded the undue emphasis on individualism. Secondly, these principles constituted all political and social functionaries charged with managing the property into social trustees. This meant that they were strictly enjoined to manage the resources in the primary interests of the group.

Clearly, at least in as far as land ownership in traditional Malawian society is concerned, the concept of the trust has always been the governing motif. Admittedly, the trust as employed to regulate land ownership in Africa did not have the complexity with which it has acquired in Anglo-American legal thought. The trust in African customary law, while it certainly shares some fundamental similarities with the trust in Anglo-American legal thought, also evinces considerable unique features.²³⁸ The point to note, however, is that if the starting point in discourse on governance and constitutionalism is conceived and acknowledged to be located within Africa, it may be possible to generate a greater acceptance for societal relations impressed with the trust concept. By recognising that within African traditions there already exist norms that reflect established legal concepts, it is argued, it may become much easier to enforce a governance model that is premised on African traditions but also draws on mainstream legal devices.

While customary land ownership in Malawi, and arguably across Africa, offers the clearest examples of a social trust-based regulation, such type of regulation is not limited to land

²³⁵ B Pachai (note 87 above) 96.

²³⁶ SKB Asante “Fiduciary principles in Anglo-American law and the customary law of Ghana – A comparative study” (1965) 14 (4) *The International and Comparative Law Quarterly* 1144-1145.

²³⁷ As above.

²³⁸ As above.

ownership. Considerable evidence suggests that Africans, generally, have a common conceptual and analytical framework of participatory governance based on their traditions and cultures.²³⁹ It is to *ubuntu* that one must centrally look to discern the common conceptual and analytical framework that informed governance in pre-colonial Africa. For example, Davidson analysing traditional governance systems of the *Asante* in West Africa concluded as follows:²⁴⁰

Power was exercised by powerful persons but with constitutional checks and balances tending to prevent abuse of power. Despots certainly arose; they were dethroned as soon as could be. Between ruler and the people – one can say between state and the people, there was an acknowledged recognition of ties of mutual obligations and respect.

Specifically in the context of Malawi, Clutton-Brock observed that before making decisions the elders would ‘gather under the big tree and talk until they agree[d]’.²⁴¹ This they would undertake because they believed that only consultation would hold the community together.²⁴² It has been argued that this trend was prevalent across the continent and a high premium was placed on consensus in deliberation before decision making.²⁴³ To say that traditional African communities deliberated until they reached consensus, however, is not to say that there was always unanimity of opinion.²⁴⁴ The deliberations, inevitably, involved compromise, adjustment and accommodation by the community members. As Nyerere put it ‘when a group of 100 equals have sat and talked together until they agreed where to dig a well, (and ‘until they agreed’ implies that they will have produced many conflicting arguments before they did eventually agree)’.²⁴⁵ All this merely highlights the inherent democratic attributes of most African communities which need to be revived in Africa’s drive for good governance and constitutionalism.

By way of further illustration of the point above, it is to be noted that Sindane and Liebenberg have identified several political systems across Africa that manifest what this study terms the

²³⁹ B wa Mutharika (note 221 above) 71.

²⁴⁰ B Davidson (note 121) 61

²⁴¹ G Clutton-Brock *Dawn in Nyasaland* (1959) 13.

²⁴² As above.

²⁴³ K Wiredu “Society and democracy in Africa” in T Kiros (ed) *Explorations in African political thought: Identity, community, ethics* (2001) 173.

²⁴⁴ As above.

²⁴⁵ J Nyerere “One party government” (1961) 2 *Transition* 9.

social trust-based approach to governance.²⁴⁶ For example, among the *Yoruba* of Nigeria there was a concerted attempt to diffuse power rather than concentrate it in one person. Other social institutions among *Yoruba* culture operated to check the power of the *Oba* (King) and could direct that he commit suicide if he was found to be incompetent or developing dictatorial tendencies. Sindane and Liebenberg also refer to the *Kikuyu* of Kenya, the *Somalis* of East Africa and the *Nupe* of Nigeria to demonstrate how African societies have traditionally regulated power in society. What emerges, according to Sindane and Liebenberg, is that power was checked by placing it in the hands of people who were, by virtue of their age, title and kinship, expected to be responsible and representative of the people. In all this, a deliberate attempt was made to ensure a high degree of public participation in all decision making. Ramose confirms the preceding point in his analysis of Kingship in parts of South Africa.²⁴⁷ He argues that the name *iNkosi*, *Kgosi*, translated into 'king' in English has a special significance in the African concept of community. In Ramose's words:²⁴⁸

At its apex, the community of the living had Kgosi who was always subject to the grace of the community that placed him in the position of regal authority. Thus the office of kingship was inconceivable without the people, batho.

Clearly, the social trust basis of societal management that, arguably, permeates all African societies is not limited to the management of property resources. A primordial governing principle of distinctly African origins permeates African societal organisations when they are looked at from a traditional perspective. It is this study's argument that the common conceptual and analytical framework that Africans possess is the *ubuntu* perspective to life. *Ubuntu* is thus the very essence of democracy in Africa and must be centrally utilised in Africa's democratic renewal.²⁴⁹ It is from this common perspective that all efforts at African renewal must seek to draw inspiration.

²⁴⁶ J Sindane & I Liebenberg "Reconstruction and the reciprocal other: The philosophy and practice of Ubuntu and democracy in African society" 2000 19(3) *Politea* 34-36. These examples do not in any way suggest that Africa did not have leaders or societies that manifested non-democratic tendencies. Such societies did exist on Africa. The point being emphasised is the centrality of *ubuntu* and its values to social organisation in Africa – MJ Bhengu *Ubuntu: The essence of democracy* (1996) 23.

²⁴⁷ MB Ramose (note 234 above) 323.

²⁴⁸ As above.

²⁴⁹ MJ Bhengu (note 246 above) 23.

In actualising the potential of African traditions, customs and the social trust for the purposes of improving governance and constitutionalism in Malawi, one must fully comprehend the seismic shift that the Constitution of Malawi embodies. As Gloppen and Kanyongolo correctly acknowledge, the adoption of the 1994 Constitution infused the law with a transformative ambition and, arguably, rendered the legal system more disposed towards the poor, at least on the formal level.²⁵⁰ Conceptually, the most significant but ignored alteration that the Constitution achieved was to move constitutional discourse beyond a strict liberal democratic construction.²⁵¹ Just as is the case with the 1996 South African Constitution, to which Malawi's Constitution borrows heavily,²⁵² the new orders in these countries mark a departure from liberalism and contemplate a move towards an 'empowered' model of democracy.²⁵³ In clear departure from classical liberal postulations both the Constitutions of Malawi and South Africa provide for social redistribution and participation, among others, as fundamental organising premises.²⁵⁴

4.4.1 The role of transformative constitutionalism in social trust-based governance and constitutionalism

To properly harvest the promise of the Constitution in Malawi, it is necessary to, among others, embrace 'transformative constitutionalism.' Although a hard and fast definition of transformative constitutionalism, especially in juridical terms, remains highly elusive, Klare defined it as follows:²⁵⁵

... a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes

²⁵⁰ S Gloppen & FE Kanyongolo "Courts and the poor in Malawi: Economic marginalisation, vulnerability and the law" (2007) 5 (2) *International Journal of Constitutional Law* 258.

²⁵¹ See, K Klare "Legal culture and transformative constitutionalism" (1998) 14 (1) *South African Journal of Human Rights* 146; J Ansah "The 1994 Malawi Constitution and the role of the judiciary" Paper presented at the First National Conference on Review of the Constitution, Capital Hotel, Lilongwe, 28-31 March 2006, 4 and CM Silungwe "The rhetoric and practice in land reform in Malawi: A contextualised governmentality analysis" (2009) 3 (1) *Malawi Law Journal* 26 48.

²⁵² The High Court in Malawi has confirmed the extensive similarities between the Constitutions of Malawi and South Africa – *The State, The Electoral Commission Ex Parte Bakili Muluzi and United Democratic Front* Constitutional Cause No. 2 of 2009.

²⁵³ K Klare (note 251 above) 152-153.

²⁵⁴ See, for example, the preamble, section 1 and Chapter 2 of the South African Constitution and Sections 12, 13 and Chapter 4 of the Constitution of the Republic of Malawi.

²⁵⁵ K Klare (note 251 above) 150.

an enterprise of inducing large-scale social change through non-violent political processes grounded in law.

Transformative constitutionalism is a social and economic revolution in the sense that it is intended to bring about a more egalitarian society.²⁵⁶ While transformative constitutionalism aims at creating a more egalitarian society by, for example, facilitating the creation of a more equal society and guaranteeing basic socio-economic rights, it is also aimed at transforming legal culture.²⁵⁷ At one level, the transformation of legal culture principally involves a re-conceptualisation of the process of judicial adjudication and at another level it involves revamping the nature of legal education.²⁵⁸ In as far as judicial adjudication is concerned, transformative constitutionalism requires discarding the dominant liberal perspective that uncritically asserts that law and politics are separate.²⁵⁹ Once the political nature of judicial adjudication is properly appreciated effort may then be directed at harnessing this to meaningfully transforming society. Specifically, it is important to recognize that constitutional interpretation is inherently a political process. It thus, invariably, involves value judgments and sometimes involves values external to the Constitution itself.²⁶⁰ Clearly, under transformative constitutionalism, judges bear the responsibility of justifying their decisions not just by reference to authority but also by reference to ideas and values that the society prioritises.²⁶¹ *Ubuntu* could form a reservoir to which judicial adjudication could constantly seek inspiration.

²⁵⁶ P Langa “Transformative constitutionalism” Prestige lecture delivered at Stellenbosch University on 9 October 2006.

²⁵⁷ P Langa (as above); *Van Rooyen and others v S and others* 20022 (8) BCLR 810 (CC) at paragraph 50 per Chaskalson CJ – ‘Transformation involves not only changes in the legal order, but also changes in the composition of the institutions of society, which prior to 1994 were largely under the control of whites and, in particular white men.’ See, also, *Minister of Finance and another v Van Heerden* 2004 (11) BCLR 1125 (CC) paragraph 142 per Sach J.

²⁵⁸ Revamping legal education requires abandoning traditional methods of instruction in the law that tend to focus on formalism while ignoring the development of analytical skills. This approach to teaching the law requires that the law be regarded as part of the social fabric of society and that law students must be taught to see it as such and use it to engage everyday societal problems - P Langa (note 256 above). For a critique of the ‘traditional’ means of teaching the law, see D Kennedy “Legal education as training for hierarchy” in D Kairys (ed) *The politics of law: A progressive critique* (1998) 54.

²⁵⁹ For example, in traditional liberal conceptualisations the rule of law ideal is premised on a radical disjunction between law and politics and a sharp distinction in the role of the judges and politicians. To properly attain transformative constitutionalism there is need to soften the bright line that supposedly demarcates law from politics – K Klare (note 251 above) 157-159.

²⁶⁰ Per Mokgoro in *S v Makwanyane* (note 178 above).

²⁶¹ P Langa (note 256 above).

While the above may seem to overemphasize the role of the judiciary in attaining transformative constitutionalism, the truth is that the judiciary's pivotal role in transformative constitutionalism is largely catalytic.²⁶² Through progressive pronouncements the judiciary should set the pace for enabling various other social groups and institutions to emerge and participate in societal processes. Transformative constitutionalism thus provides a basis for a post-liberal reading of the Constitution. Admittedly, a post-liberal reading of the Constitution is not the only 'reading' of the Constitution that transformative constitutionalism supports.²⁶³ This study, however, argues that the best post-liberal reading of the Constitution is the social trust-based reading.

For purposes of governance and constitutionalism the best post-liberal construction of the Constitution is the social trust-based construction especially because the state in Malawi has traditionally assumed fiduciary roles – even though it has never seriously attempted to consistently conduct itself as a fiduciary.²⁶⁴ For example, in several statutes dealing with the management of land and natural resources the state has expressly declared itself as a trustee for the people of Malawi.²⁶⁵ In a host of other legislation the state in Malawi has also assumed obligations that have obvious fiduciary connotations.²⁶⁶ Even more centrally, the state as constituted by the 1994 Constitution has been endowed with 'explicit' fiduciary obligations.²⁶⁷ All this supports the position that the state, which has already assumed

²⁶² A recent example of a proactive approach to judicial adjudication is offered by *In the matter of the Adoption of Children Act and in the matter of the adoption of CJ (An infant)* MSCA Adoption Appeal No. 28 of 2009 where the Malawi Supreme Court of Appeal refused to be bound by a strict interpretation of the meaning of "residence" for the purposes of adoption proceedings.

²⁶³ See, T Roux "Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without difference" (2009) 20 (2) *Stellenbosch Law Review* 258-285.

²⁶⁴ See generally, G Kamchedzera "Land tenure relations, the law and development in Malawi" in G Mhone (ed) *Malawi at the cross roads: The post-colonial political economy* (1992) 188. Kamchedzera argues that it seems the state in Malawi and arguably most common law countries, has accepted the trusteeship idea merely for the purposes of endowing it with a responsible and protective appearance to the people. There is, however, no compelling justification for the existence of this state of affairs.

²⁶⁵ For example, under section 25 of the Land Act, Cap 57:01 Laws of Malawi, customary land is declared to be the lawful and undoubted property of the people of Malawi but vested in perpetuity in the President.

²⁶⁶ For example, the manner in which the state undertakes to manage public funds under the Public Finance Management Act, Act No. 7 of 2003 has clear fiduciary connotations.

²⁶⁷ G Kamchedzera & C Banda " 'We are people too' The right to development, the quality of rural life and the performance of legislative duties during Malawi's first five years of multiparty politics" Research Dissemination Seminar Number Law/2001-2002/001, <<http://www.sarpn.org.za/documents/d0001966/index.php>> (Accessed 20 May 2008).

fiduciary obligations, must finally be treated as the fiduciary that it is and subjected to fiduciary regulation.

In as far as a judicial adjudication is concerned, a transformative approach to the construction of the Constitution should pave way for the judicial recognition of the social trust,²⁶⁸ which as this study has argued, can be founded in Chapter Three of the Constitution. This recognition would give full purport to the provisions of section 12 of the Constitution while at the same time positioning the Constitution to assume greater relevance in the lives of ordinary Malawians. Such transformation, however, ought not to be limited to initiatives emanating from the judiciary for both the legislature and the executive can also undertake social trust-based reforms by recognising the restraints of fiduciary regulation in performing their functions.²⁶⁹ Such recognition of fiduciary regulation need only draw on the principles outlined in Chapter Two of this study to determine the lines of regulation. The greatest strength of the model being proposed here is that while it can seek and get recognition and enforcement in the formal legal system, its ideals have a greater resonance with the populace. This is because its foundational concepts are similar to indigenous norms of Malawian customs and traditions. This similarity, it is argued, confers considerable legitimacy on the social trust-based model. The recourse to the law that this model advocates avails it of a significant boost in the enforcement and entrenchment of its ideals.²⁷⁰ This is a radically different but viable alternative for premising constitutionalism and governance in Malawi and Africa, generally. For even though many a call have been made for the development of autochthonous governance paradigms in Malawi and Africa, no serious attempts have been made beyond suggestions of an abandonment of Western

²⁶⁸ So far no judicial decision has expressly recognised this point.

²⁶⁹ Tengtenga, for example, argues that the legislative process necessarily requires integrity and altruism over partisan interests. Political players must thus realise this - J Tengtenga "A community of character: Constitutionalism in Malawi" National Constitution Review Conference 27-31 March 2006, Lilongwe, Malawi.

²⁷⁰ The boost that the model acquires is the use of the law in the enforcement of its norms but even more importantly is the use of the law in attempting to change societal behaviour to conform to social trust ideals. Admittedly, this is premised on the ability of the law to mould behaviour according to a legislator's or any particular intention – See for example R Cotterrell *The sociology of law* (1992). This, however, is not to discount the limitations that the law inherently possesses when used as an instrument of social change – See for example, K van Marle "Love, law and South African Community: Critical reflections on 'suspect intimacies' and 'immanent subjectivity'" in H Botha & others (eds) *Rights and democracy in a transformative constitution* (2003) 231 and E Christodoulidis *Law and reflexive politics* (1998). Therefore while the law is centrally important for the implementation of this paradigm this study also concedes that the law by itself cannot achieve it all FE Kanyongolo "The rhetoric of human rights in Malawi: Individualisation and judicialisation" in H Englund & F Nyamnjoh (eds) *Rights and politics of recognition in Africa* (2004) 64.

norms and paradigms. The model being proposed in this study offers a concrete manifestation of how the blend between Western norms and traditional African norms can be conceptualised and eventually implemented.

4.5 Conclusion

The discussion in this Chapter began by noting that in adopting a new Constitution Malawians expressed a desire to break with the country's authoritarian past. In breaking with its authoritarian past, it was further noted, Malawi ended up embracing liberal democracy as a governing paradigm. Significantly, this Chapter noted, concurring with other scholars, that the re-introduction of liberal democratic governance in Malawi was not preceded by any serious consultation thus making the framework lacking in legitimacy and autochthony. This lack of legitimacy and autochthony, it has been further argued, is a significant detracting factor in the move towards the promotion of governance and constitutionalism in Malawi.

Following from the recognition of the lack of legitimacy and autochthony of the liberal democratic model, the Chapter then presented an alternative paradigm to liberal democratic governance which is founded in African customs, traditions and institutions. The concept of *ubuntu* was identified, discussed and presented as an alternative basis for conceptualising both governance and constitutionalism not only in Malawi but in Africa more generally. The values that underlie *ubuntu* were also analysed to demonstrate how this African philosophical ideal can be used to entrench governance and constitutionalism. One way in which this can be achieved, it was argued, is by embracing transformative constitutionalism. By way of illustration, the South African Constitutional Court's experiences with utilising *ubuntu* as a constitutional principle were discussed. It was further noted that while the Constitutional Court's initial pronouncements on *ubuntu* as a constitutional principle may have been disappointing there is cause for optimism as evidenced by the Court's later decisions.

By looking specifically at Malawian customs and traditions, the Chapter also demonstrated that there is a basis for *ubuntu*-based societal organisation in Malawi. More importantly, however, was the later recognition that *ubuntu*-based organisation in Malawi actually reflects a long established legal concept – the trust. By relating *ubuntu*-based ideals with trust-based notions, it was argued, a firmer basis for governance and constitutionalism could be constructed. This firmness of the basis for conceiving governance and constitutionalism arises from the fact of utilising an African concept, which arguably has greater resonance and legitimacy with African peoples, with a legal concept of renowned versatility and utility.

To achieve this, the Chapter argued, requires a serious engagement with both transculturation and sublation in order to create a viable synthesis. In the next Chapter this study will endeavour to give an indication of how the conceptual framework so far created is relevant to governance and constitutionalism in Malawi. This will be done in order to demonstrate how social trust-based governance can affect constitutionalism and governance in Malawi under the 1994 Constitution.