

**THE SOCIAL TRUST AND LEADERSHIP ROLES: REVITALISING DUTY BEARER
ACCOUNTABILITY IN THE PROTECTION OF SOCIAL AND ECONOMIC RIGHTS IN
MALAWI AND UGANDA**

**Submitted in partial fulfilment of the requirements of the degree LLM (Human Rights and
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By

Mwiza Jo Nkhata Jr.

Student Number 25440994

Prepared under the supervision of

Dr. Ben Twinomugisha

At the Faculty of Law, Makerere University, Uganda

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DECLARATION

I, Mwiza Jo Nkhata Jr., declare that the work presented in this dissertation is original. It has never been presented to any other University or institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in Human Rights and Democratisation in Africa.

Signed.....

Date.....

Supervisor: Dr Ben Twinomugisha

Signed.....

Date.....

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It is very difficult nay impossible to make specific mention of everyone that contributed in making this study a reality. I am thus thankful to everybody that helped me gather and organise the thoughts that led to the production of this work. Specific mention goes to Prof. Frans Viljoen who encouraged me to pursue an idea that I thought might be totally unworkable. I am also very grateful to all the assistance rendered by my supervisor Dr. Ben Twinomugisha. All shortcomings in this study remain my own.

DEDICATION

This study is dedicated to the following people: Isaac George Kayira, a person to who no words could ever satisfactorily express my gratitude for everything that he has done for me, Anganile-Kyala, my brother and best friend and, of course, Jo Nkhata Snr. and Isabel Kaonga, for being exemplary and inspirational parents.

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Right
ICESCR	International Covenant on Economic Social and Cultural Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations

ABSTRACT

The relevance of social and economic rights to societal welfare and well-being need not be overemphasised. The quality of life enjoyed by the citizenry is directly related to the level of enjoyment of social and economic rights in any particular country. However, the enjoyment of social and economic rights is, in turn, largely predicated on the manner in which national resources are managed and directed towards obligations raised by social and economic rights. It is axiomatic, therefore, to devise a framework that ensures that managers of public resources operate within an environment where their actions in relation to the management of national resources are governed by transparency and accountability.

In the light of the above, this study explores the relationship that exists between the social trust concept and leadership roles particularly in as far as duty bearer accountability for social and economic rights is concerned. The study argues that social trust based devices can be used to enhance duty bearer accountability in relation to social and economic rights and that such increased duty bearer accountability will automatically serve to better the welfare of the citizenry. The viability of recognising and enforcing social trust based accountability mechanisms is highlighted by exploring its relevance to Malawi and Uganda. The crux of the study is that public functionaries must always be amenable to censure by the citizenry if diligence is to be infused in the performance of their duties and the social trust concept offers adept mechanisms for achieving this.

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CHAPTER ONE: INTRODUCTION

1.1 Background to the study

African countries, though a diverse mix, largely share common problems in relation to governance and development.¹ Admittedly, the preceding statement runs the risk of over-generalising the problems and consequently the solutions applicable to individual African countries. However, it does not require exceptional imagination to notice that African countries top the world charts in as far as problems of illiteracy, disease, poverty and poor infrastructure are concerned.² Malawi and Uganda are hardly any exceptions in this regard. A perusal of the 2004 Human Development Report reveals that Malawi and Uganda occupy the bottom bracket in as far as development indicators are concerned.³

Resultantly, although all African countries face their own unique problems and development challenges, most of these problems and challenges are attributable to similar causes that crosscut national boundaries. It has been suggested, and quite accurately in the opinion of this study, that many of Africa's problems are the result of her inability to create "capable states."⁴ A capable state being one that is characterised by transparency, accountability, the ability to enforce law and order fairly throughout the country, respect for human rights, the effective sharing of resources between the rural and urban populations and the creation of a predictable, open and enlightened policy making environment, among others.⁵ Obviously, it is only a capable state that can effectively perform its role of developing the country by devising and implementing policies aimed at bettering the lives of its citizenry.

¹ J Hatchard and others *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspective* (2004) 8.

² As above.

³ Uganda is ranked 146 in the world on the human development index while Malawi is ranked 165. The human development index measures development in terms of the ability to live a long and healthy life, being educated and having a decent standard of living. UNDP *Human Development Report 2004* < <http://hdr.undp.org> > (accessed 30 August 2005).

⁴ A Nsibambi " The interface among the capable state, the private sector and civil society in acquiring food security" Keynote paper at the conference on building for the capable state in Africa, Institute for African studies, Cornell University, 24 – 8 October 1997 quoted by Hatchard and others (note 1 above) 9.

⁵ As above.

Broadly speaking, it is the category of rights traditionally classified as social and economic that has a more profound effect on the development of a people since they are largely concerned with the creation of societies where everyone has a minimum standard of living consistent with human dignity.⁶ Social and economic rights, therefore, are directly concerned with the provision of the basic necessities of life that are fundamental to the attainment of development by a people⁷ and the achievement of social justice and equality.⁸ It is axiomatic, therefore, to devise mechanisms that will guarantee the full realisation of social and economic rights. In this regard, it is worth noting that in spite of the increasing recognition of other duty bearers in relation to human rights e.g. multinational corporations and other non-state actors, the state remains the primary duty bearer.⁹ Ultimately, it behoves the state to institute and implement policies that will create an environment where everyone fully enjoys their human rights. To ensure that the state fulfils its role in this regard entails that individuals in positions of responsibility in various state and government departments must be imbued with a proper sense of duty. Further, the environment in which these individuals perform their duties ought to be permeated with the means through which those that have failed to efficaciously discharge their responsibilities can be made accountable to the citizenry and by the citizenry.

This study explores how the social trust concept can be used to boost the performance of leadership roles by individuals occupying government and state positions in Malawi and Uganda by utilising social trust based accountability mechanisms. The study focuses on the performance of leadership roles by individuals in government and state positions because it is these individuals' actions or inactions that can determine whether Malawi or Uganda can become fully capable states with better development indicators.

⁶ F Viljoen "The justiciability of socio-economic and cultural rights: Experiences and problems" (2005) (Unpublished).

⁷ "Development" as used in this study connotes a comprehensive process of enlarging peoples' choices and capabilities, see UNDP *World Development Report* (2002) 15-18.

⁸ N Udombana "Interpreting rights globally: Courts and constitutional rights in emerging democracies" (2005) 1 *African Human Rights Law Journal* 47 52.

⁹ C Jochnick "Confronting the impunity of non-state actors: New fields for the promotion of human rights" (1999) 21 *Human Rights Law Quarterly* 56 -79; B Frey "The legal and ethical responsibilities of transnational corporations in the protection of international human rights" (1997) 6 *Minnesota Journal of Global Trade* 153 155.

1.2 Statement of the research problem

Public resources are pivotal to a country's development and the facilitation of well-being because they determine a society's capacity for the attainment of social justice and human rights goals.¹⁰ The centrality of public resources to a country's development means that it is the availability of a proper calibre of managers of public resources and their regulation that will be crucial to the attainment of development goals than the mere availability of the resources themselves.¹¹ It is, therefore, imperative that a proper normative framework should be devised and recognised that directs that managers of public resources prioritise the citizenry's interests in their actions. Further, such a framework ought to provide mechanisms for making managers who have derelicted in the performance of their duties fully accountable. This study is an attempt to extrapolate social trust-based principles, which have normally been applied within the realm of private law, into the realm of public law. It is hoped that in this way the benefits of enforcing social trust based leadership roles, particularly in the management of public resources and the corresponding benefit in the enjoyment of social and economic rights will be highlighted. This study embarks on the quest for the regulation of managers of public resources because, arguably, the poor development indicators for Malawi and Uganda are a reflection of how the managers of public resources have fared in these countries. Inevitably, the transformation of Malawi and Uganda into fully capable states will require an efficacious regulation of those managing and controlling public resources.

1.3 Focus and objectives of the study

This study proposes to explore the nature of leadership roles and obligations inhering in such positions in order to determine whether a fiduciary relationship capable of judicial enforcement is created when individuals accept leadership roles in society.¹² This

¹⁰ G Kamchedzera " The law and the disregard of the interests of the people of Malawi in the management of public resources" Paper presented at a symposium on the law and the recovery of benefits unjustly accruing to public functionaries: solutions for Malawi, Blantyre, Malawi, 29 December 2004.

¹¹ Resources as understood in this study are not confined to monetary resources but extend to human and organisational resources as well.

¹² As demonstrated in chapter two of this study there is an on going debate as to whether fiduciary relationships created in the public law realm can legitimately be judicially enforced.

study's focus on leadership roles is principally motivated by the fact that leadership in societies, not only in Africa but also across the globe, necessarily involves the management of public resources. Evidently, therefore, a society's well-being is largely predicated on the manner in which the management of public resources is regulated. The study's focus on a revitalised duty bearer accountability and its effect on the enjoyment of social and economic rights is, as will be demonstrated, not merely an endorsement of the traditional classification of rights into the three generations.¹³ Rather, this is principally in recognition of the primacy of the state as a duty bearer in the enjoyment of human rights and also the pre-eminence of rights traditionally classified as social and economic to human development generally. It is, therefore, to the regulation of the various state agents that effort must be directed in a bid to bring about equitable administration of public resources. This is not to say that rights traditionally classified as civil and political do not have an effect on human development since such rights may have a hidden social-economic character or may easily be interpreted to realise social and economic benefits.¹⁴ The study specifically focuses on Malawi and Uganda in the hope that the conclusions and recommendations being proposed herein may be used to ameliorate the living conditions of individuals living in these two countries.

1.4 Significance of the study

Generally speaking, the vast majority of people in Africa lead lives of untold misery and deprivation and for such people the existing political relations are unacceptable and in need of drastic reformulation.¹⁵ Again, Malawi and Uganda cannot claim any exception in this regard. In as far as can be deduced from the constitutions in force in most African countries, a great number of these constitutions are heavily premised on liberal

¹³ Human rights are "often" being classified into first generation, (civil and political) second generation (economic, social and cultural) and third generation (solidarity or group rights). Although prevalent, such a classification is unmeritorious – P Alston "Economic and social rights" in L Henkin and another (Eds.) *Human rights: An agenda for the next century* (1994) 137. For a critique of the above classification of rights and an alternative African categorisation of rights into four categories: civil and political, social and survival, economic, developmental and environmental rights and cultural and spiritual rights, see J Mubangizi "Towards a new approach to the classification of rights with specific reference to the African context" (2004) 4 *African Human Rights Law Journal* 93.

¹⁴ F Viljoen (note 6 above).

¹⁵ J Ihonvbere *Towards a new constitutionalism in Africa* (2000) 22.

democratic notions.¹⁶ Resultantly, the power relations encapsulated therein are heavily premised on liberal ideals like equality and the freedom of contract.¹⁷ It is trite, however, that all assertions of formal equality are merely steps towards achieving substantive equality, which as things stand, still eludes most African countries. The significance of articulating a social trust based conception of leadership roles is that it will help guarantee the accountability of all those involved in the management of public resources, for example, by recognising that vulnerability and dependence can be the basis for allocating rights and obligations.¹⁸ It must always be acknowledged that the realities of globalisation and the ubiquity of free market economy ideals clearly bring out the hollowness of allocating rights and obligations on the basis of equality and freedom of contract since the same are unduly exclusionary of the poor and vulnerable who do not have either the desired equality or freedom to contract as equals.¹⁹ This study is, therefore, particularly significant because it advocates for a restructuring of the prevailing power relations in Malawi and Uganda in order to accommodate the needs of the two countries' most vulnerable individuals thereby mitigating some of the adverse effects of globalisation and in the process improving their living conditions. More specifically, this study is significant because it highlights the relevance that improved duty bearer accountability, which should follow from a restructuring of power relations to recognise social trust based leadership roles, can have on the enjoyment of social and economic rights for people living in Malawi and Uganda.

1.5 Hypotheses

This study's major hypothesis is that duty bearer accountability is crucial to the enjoyment of human rights but the prevailing power relations as they are being replicated in Malawi and Uganda are not adequately poised to demand and require accountability from those in position of authority in favour of the most vulnerable e.g.

¹⁶ Examples of such constitutions include the 1994 Constitution of Malawi, the 1995 Constitution of Uganda and the 1996 Constitution of South Africa.

¹⁷ G Kamchedzera and another " ' 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 (unpublished).

¹⁸ As above.

¹⁹ I Shivji " Critical elements of a new democratic consensus in Africa" in H Othman (ed) *Reflections on leadership in Africa forty years after independence* (2000) 25 28.

women, children, persons with disabilities and the poor. This study also proceeds on the hypothesis that the primary duty bearer in relation to human rights remains the state in spite of calls to recognise other non-state actors as duty bearers.²⁰ Consequently, the study further presumes that it falls squarely on the state to ensure that human rights are fully enjoyed by its citizenry. Lastly, this study also presumes that the benefits of infusing and revitalising accountability to leadership roles can more meaningfully be felt when directly related to the enjoyment of social and economic rights as this would directly affect the use and availability of the basic necessities of life among the populace.

1.6 Literature review

Generally speaking, there is no deficiency of literature on social and economic rights within Africa. Oloka-Onyango has written a seminal article that attempts to clarify some conceptual and practical issues involved in the struggle to promote economic and social rights activism in Africa.²¹ In his article Oloka-Onyango also explores the intricacies of activism on social and economic rights within the international, regional and domestic arenas. Agbakwa has also written an enlightened article on economic, social and cultural rights in Africa in which he forcefully argues that social and economic rights are crucial to development and that denying social and economic rights enforceability actually compromises the enjoyment of civil and political rights and that economic and social rights are actually the only means of self defence for the poor and vulnerable.²² In his article on the implementation of economic, social and cultural rights under the African Charter on Human and Peoples' Rights (the Charter), Odinkalu argues that it is feasible, in the light of the drafting history of the charter, for the African Commission on Human and Peoples' Rights (the Commission) to deduce from the integrated nature of the charter that human rights are indeed an interconnected set of obligations such that social and economic rights should not be marginalized in their enjoyment and

²⁰ Note 9 above.

²¹ J Oloka-Onyango "Beyond the rhetoric: Reinvigorating the struggle for economic and social rights in Africa" (1995) 26 *California Western International Law Journal* 1.

²² S Agbakwa "Reclaiming humanity: Economic, social and cultural rights as the cornerstone of African human rights" (2002) *Yale Human Rights and Development Law Journal* 177.

enforcement.²³ Ssenyonjo's contribution on the subject has related to the question of justiciability of economic and social rights in Africa.²⁴ Apart from strongly reaffirming the justiciability of economic and social rights, Ssenyonjo also stresses the fact that the full realisation of economic and social rights ultimately depends on the programmes undertaken by state parties to the Charter within the domestic realm.

Several prominent authors, particularly from common law jurisdictions, have expounded on the fiduciary tangent to the social trust concept. Noticeably, however, almost all of them have tended to limit their discussions to the sphere of equity and thus have inevitably restricted their discussions within private law. Almost uniformly, the preoccupation of most authors has been to explore the common law trust and how it can be applied in various circumstances.²⁵ Cotterrell, however, has written an influential article on the nature of the social trust and how one can identify a social trust relationship between individuals in society and also identifying some of the major consequences flowing from such a relationship.²⁶ Sealy's article on fiduciary relationships largely focuses on tracing the development of the fiduciary principle in English legal history and highlighting some of the situations in which the term has historically been used.²⁷ Importantly, Sealy does concede that English lawyers, from time immemorial, described many relations of confidence as trust whether there was any strict trust of property or not and that the law of fiduciary relations has historically covered more ground than trusts of property as known today.²⁸ While providing a useful insight into the nature of the social trust, Cottrrell does not attempt to explore the relevance of the social trust to human rights particularly in enhancing accountability on the part of duty bearers.

²³ C Odinkalu "Analysis of paralysis or paralysis by analysis? Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights" (2001) 23 *Human Rights Quarterly* 327.

²⁴ M Ssenyonjo "Justiciability of economic and social rights in Africa: General overview, evaluation and prospects" (2003) *East Afr. J. Peace Hum. Rights* 1.

²⁵ J Martin *Hanbury and Martin modern equity* (2001); Meagher and others *Equity doctrines and remedies* (1992); R Pearce and another *The law of trusts and equitable remedies* (1995).

²⁶ R Cotterrell "Trusting in the law: Legal and moral concepts of the trust" in M Freeman and another (eds). (1993) 46 *Current Legal Problems, Part 2* 75.

²⁷ L Sealy "Fiduciary relationships" (1962) *Cambridge Law Journal* 69 70.

²⁸ As above.

Against this background it must be realised, as Oloka-Onyango points out that:²⁹

...the approach to economic and social rights in Africa requires a wholly *novel* approach, which must build on what is already in place and designing appropriate structures and strategies to face what lies ahead.

Further, as Agbakwa concedes, the destiny of a people is firmly tied to the quality of its leadership³⁰ and there is, therefore, a relationship between the degree of enjoyment of social and economic rights in a particular country and the quality of its leadership. Consequently, a significant improvement in the conduct of public leadership is bound to significantly improve the enjoyment of social and economic rights by the citizenry in any country. Conversely, any quest for true development must of necessity be predicated on the effective protection, enforcement and realisation of economic and social rights.³¹ While several authors have articulated the relationship between good governance and human rights, the preoccupation in most literature has been to trace the emergence of the good governance concept in donor-aid literature and sometimes exploring how it can be employed in the enjoyment of human rights.³² The missing link, however, has been the articulation of mechanisms that can ensure accountable leadership, which in turn can contribute to a greater enjoyment of social and economic rights. This study seeks to relate the social trust concept not only to human rights but more specifically to the accountability of duty bearers. The study also seeks to explore and highlight the benefits of recognising the efficacy of using social trust based mechanisms to guarantee the accountability of duty bearers and the effect this can have on social and economic rights.

1.7 Methodology

The research for this study shall be library and desk based but Internet sources shall, where appropriate, also be resorted to. Although the study intends to deduce the benefits of a social trust based conception of leadership roles in relation to social and

²⁹ J Oloka-Onyango (note 21 above).

³⁰ S Agbakwa (note 22 above).

³¹ As above.

³² M Kjoer and another "Good governance: How does it relate to human rights?" and I Koch "Good governance and the implementation of economic, social and cultural rights" in Hans-Otto Sano and another (eds.) *Human rights and good governance: Building bridges* (2002).

economic rights in Malawi and Uganda, reference shall, in appropriate circumstances, be made to developments in other jurisdictions for comparative purposes. To this end, effort shall always be made to analyse particular legal developments before adopting them to illustrate points.

1.8 Limitations of the study

Although both Malawi and Uganda are common law countries, the legal systems obtaining in these two countries are not completely identical. Resultantly, the application of the recommendations being proposed in this study will certainly require appropriate modification to fit specific situations. Again, this study has a limitation on its volume. Consequently, the discussion herein may not delve into depth on all of the issues under discussion but will merely sketch the broad normative framework that the study recommends. This study should, therefore, be understood as sketching the broad framework through which social trust based leadership roles and a revitalised duty bearer accountability mechanism can help in the enjoyment of social and economic rights. Even more importantly, this study is affected by the dearth of literature in Africa on the relevance of the social trust concept to notions of accountability in governance generally and social and economic rights specifically.

1.9 Overview of chapters

This study consists of five chapters. Chapter one provides the context and foundation of the study. Chapter two is devoted to explaining the nature and scope of the social trust concept and how it can validly, if at all, be extended into the public law realm. Chapter two also expounds on some basic concepts employed in the study. Chapter three is aimed at providing an understanding of leadership roles and explaining their relevance to social economic rights. Briefly put, chapter three explores the interface between social economic rights and social trust based leadership roles. Chapter four discusses the benefits of revitalising a social trust based conception of leadership roles particularly by highlighting why Malawi and Uganda need social trust based leadership roles. The Chapter also outlines how the benefits of a revitalised duty bearer accountability can be realised. Chapter five will present the study's conclusions and recommendations.

CHAPTER TWO: UNDERSTANDING THE OPERATION AND SCOPE OF THE SOCIAL TRUST CONCEPT

2.1 Introduction

Having regard to the centrality of the social trust concept to this study's thesis, this chapter explains the meaning and operation of the social trust concept. The chapter also explores the operation of concepts central to the social trust like fiduciary obligations and fiduciary principles. The chapter concludes by discussing the relevance of the distinction between trusts in the higher sense and trusts in the lower sense and also scrutinizes the plausibility of the assertion that public functionaries are fiduciaries.

2.2 What is a social trust?

Cotterrell has stated that:³³

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

As evident from the above definition, interdependence and altruism constitute the foundation of any social trust based relationship.³⁴ The social trust concept, however, must be understood as the broad umbrella under which several trust-based devices are apparent. The various social trust based devices are unified by the fact that they are all governed by the law relating to fiduciary obligations. Probably the most well known social trust based device today is the trust concept as developed in the Anglo-American legal tradition. Arguably, the "trust" as known in the Anglo-American legal tradition is in some measure the translation into legal terms of the word "trust" as used in ordinary speech. This is because the conceptual origins of the "trust" in the Anglo-American legal tradition are premised on the reposition of confidence in some individuals for the

³³ R Cotterrell (note 26 above).

³⁴ G Kamchedzera "Access to property, the social trust and the rights of the child" Ph. D. Thesis: Cambridge University (1996) chapter 1.

performance of certain tasks.³⁵ The confidence so reposed gives rise to obligations, which the courts aided by equity, and in some cases the legislature have purported to develop and enforce legal parallels.³⁶

In a social trust-based relationship confidence is, within the parameters of the relationship, reposed in an individual(s) for the performance of specific duties or for the management of particular resources. The individual in whom the confidence is reposed is supposed to perform duties and manage resources principally in the interests of those that have given him the confidence. The individual(s) in whom confidence is reposed are often termed “trustees” or more generally “fiduciaries” and the individuals that the trustee or fiduciary is supposed to act for are termed *cestui qui trust* or generally “beneficiaries”.³⁷ Altruism, interdependence and confidence all form part of the core of social trust based relationships. Since all social trust based devices are governed and defined by fiduciary principles, all social trust based relationships can also aptly be referred to as fiduciary relationships.

The law of fiduciary obligations, as the phrase suggests, is that body of law that regulates relationships classified as fiduciary and matters related thereto. Admittedly, a general definition of the term “fiduciary” that is sufficiently comprehensive to embrace all cases and situations where fiduciary obligations have been held to arise is practically impossible to devise. As pointed out by Sealy, the term fiduciary is sometimes used in an indefinite and descriptive sense so that it embraces all trust like situations including the trust itself but is also used to contrast with the trusts proper in reference to those situations which are in some respects trusts but not strictly speaking trusts.³⁸ Resultantly, the term “trust”, in this study, will be used to denote not only strict trusts but also “trust-like” situations or “trustee-like” positions, as the basic function of the term fiduciary is to export the incidents of the express trust to new situations.³⁹ In this study,

³⁵ P Todd *An introduction to the law of trusts* (1986) 10.

³⁶ As above.

³⁷ J Mowbray and others *Lewin on trusts* (1964) 3.

³⁸ L Sealy (note 27 above) 72.

³⁹ P Birks “The content of fiduciary obligation” <<http://shelburne.butterworths.co.uk/truststaxes/articles/dataitem.asp?ID=14312&tid=7>> (accessed 7 August 2005).

the terms “trust” and “fiduciary” are largely used interchangeably unless a contrary intention is expressly stated.

2.3 Fiduciary relationships and fiduciary principles

Amongst the relationships that are formed between individuals in society, there are relationships that are indisputably fiduciary in nature.⁴⁰ The archetype of these relationships is the trustee and beneficiary relationship but the following relationships are also indisputably fiduciary: guardians and wards, agents and principals, lawyers to clients, executors and legatees and partners, directors and companies.⁴¹ Importantly, the categories of relationships giving rise to fiduciary obligations can never be considered as a closed class.⁴² Consequently, in the event that a claim is made that a particular relationship is fiduciary, the court merely has to examine the relationship in question in the light of established principles in order to make a determination. New relationships can, therefore, be added to the class of fiduciary relationships if the facts so disclose.

The core of the term fiduciary is that a person in a position described and recognised as fiduciary is under a duty of loyalty to some other person(s) or body.⁴³ Admittedly, the search for a universally precise definition that identifies the characteristics defining a fiduciary relationship will continue to be elusive.⁴⁴ This lack of a universally precise definition, however, far from detracting value from the entire concept has seemingly reinforced and galvanised the law governing fiduciary relationships. As Mason points out:⁴⁵

The absence of a clear definition has enabled the courts to classify as fiduciaries persons who would not have been so regarded at an earlier time. The reason why the

⁴⁰ S Dorsett “Comparing apples and oranges: The fiduciary principle in Australia and Canada after *Breen v Williams* (1996) 8 *Bond Law Review* 158 159.

⁴¹ As above.

⁴² *English v Dedham Vale Properties Ltd* [1978] 1 ALL ER 382 398 per Slade J; *Guerin v The Queen* [1984] 2 SCR 335 per Dickson J.

⁴³ G Moffat *Trusts law: Text and materials* (1994) 545.

⁴⁴ A Mason “ The place of equity and equitable remedies in the contemporary common law world” (1994) 110 *Law Quarterly Review* 238 246.

⁴⁵ As above.

classification has been more extensive is that courts, reflecting higher community standards or values perceive in a wide variety of relationships that one party has a legitimate expectation that the other party will act in the interests of the first party or at least in the joint interests of the parties and not solely self interestedly.

Since community standards and values vary from community to community, the development of the law of fiduciary obligations has demonstrated remarkable flexibility to meet the demands of the various situations in which it has been applied. Resultantly, the global development of the law on fiduciary obligations reflects the modifications that have had to be made when general principles were applied in uniquely different circumstances. This flexibility of the law of fiduciary obligations makes it ideal for application in a multitude of varying circumstances and therein lies its greatest strength.

2.3.1 Identifying a fiduciary relationship

Notably, a fiduciary relationship is not limited to legal and technical relations and it is generally not necessary that the relation and duties involved be legal, they may either be moral, social, domestic or merely personal.⁴⁶ Resultantly, a broad spectrum of relationships can be covered by fiduciary principles and in varying degrees. To determine the existence of a fiduciary relationship, however, a two-limbed test is often adopted.⁴⁷ The first limb of the test consists of a list of prescribed relationships i.e. those relationships considered to be indisputably fiduciary alluded to above. Although there has been a natural reluctance to impose fiduciary obligations, which are equitable and evidently more onerous than contractual obligations, upon parties in a commercial relationship,⁴⁸ it is a fundamental misconception to suggest that fiduciary principles have no role to play in commercial life.⁴⁹ As might be apparent, most of the relationships recognised as being indisputably fiduciary are in essence commercial in nature.⁵⁰

⁴⁶ *Metcalf v Leedy, Wheeler and Company* 191.

⁴⁷ J McCamus “ Fiduciary obligations and commercial law: Four sources of complexity” <www.ciaj-icaj.ca/francis/publications/1997.html> (accessed 12 August 2005).

⁴⁸ As evidenced by decisions like *Manchester Trust v Furness* [1895] 2 Q.B. 539 545 per Lindley J; *In Re Wait* [1927] 1 Ch 606 634 ff per Atkin LJ and *Hospital products Ltd. v United States Surgical Corporation* [1984] 156 C.L.R 41.

⁴⁹ J McCamus (note 47 above) 56; A Mason (note 44 above) 245.

The application of the second limb of the test has not been entirely free of controversy.⁵¹ Briefly put, the second limb of the test identifies as fiduciary those relationships, which on their particular facts, evidence fiduciary traits. Although this limb of the definition is open-textured, at the core of the test is the requirement that a relationship must possess the core fiduciary elements before it can be classified as one. In this regard a fiduciary is generally understood to be:⁵²

... a person who undertakes to act in the interests of another person. It is immaterial whether the undertaking is in the form of a contract. It is immaterial that the undertaking is gratuitous.

Clearly, under the second limb of the test, a minimum threshold requirement is used to determine the existence of a fiduciary relationship. Resultantly, as long as the threshold is met on the facts, it is no defence to a claim for breach of fiduciary duty that the alleged fiduciary did not understand himself to be a fiduciary. The real test is whether “one party could reasonably have expected that the other party would act in the former’s best interests with respect to the subject matter in issue.”⁵³ Additionally, there are several critical indicia that courts have used to identify fiduciary relationships. In *Hodgkinson v Simms* La Forest J identified discretion, influence, vulnerability and trust as non-exhaustive examples of evidential factors to be considered in deducing the existence of a fiduciary relationship.⁵⁴ Further, Finn has suggested that ascendancy, influence, vulnerability, trust, confidence and dependence are also relevant factors in making the identification.⁵⁵ Clearly, there may be different bases for founding different types of fiduciary relationships.⁵⁶ For example, La Forest J. in *LAC Minerals v International Corona Ltd*⁵⁷ identified three different instances in which relationships have been held to

⁵⁰ See page 12 of this study.

⁵¹ J McCamus (note 47 above) 57.

⁵² A Scott “The fiduciary principle” (1949) 37 *California Law Review* 539 540.

⁵³ *Hodgkinson v Simms* [1994] 3 S.C.R. 377 409.

⁵⁴ J McCamus (note 47 above) 57.

⁵⁵ P Finn “The fiduciary principle” in T Youdan (ed) *Equity, fiduciaries and trusts* (1989) 1 27.

⁵⁶ G Moffat (note 43 above) 547.

⁵⁷ (1989) 61 D.L.R. (4th) 14 27.

be fiduciary: first are the traditional categories of fiduciary relationships (the indisputably fiduciary relationships); second are cases of specific fiduciary duty arising on the facts and lastly the remedial or “fictional” fiduciary relationships.

Although different judges and authors may express the wording of the indicia necessary for identifying a fiduciary relationship differently, the distinguishing characteristic of any fiduciary relationship is the loyal securing of a beneficiary’s interest above that of the fiduciary. The fiduciary’s principal task then becomes the advancement of the interests of the beneficiary above his own personal interest.⁵⁸ In this regard, it is also worth noting that the regulatory framework around fiduciary relationships,⁵⁹

...has been used, and is demonstrably used to maintain the integrity, credibility and utility of those relationships perceived to be of importance in a society. And it is used to protect interests, both personal and economic, which a society is perceived to deem valuable.

The duty of loyalty in a fiduciary relationship is such that the fiduciary or trustee, however he/she might be termed, is forbidden from exploiting the relationship and personally profiting from it. Ultimately, although placing reliance on another’s goodwill makes the one who trusts vulnerable, the intervention of the law reverses the balance of power in that the law effectively controls the fiduciaries and reduces the risk of relying on the fiduciaries thereby guaranteeing the terms of the relationship.

2.3.2 Regulating fiduciaries: The operation of fiduciary principles

In a fiduciary relationship equity stipulates the obligations of all the parties to the relationship and also grants the beneficiary the right to activate remedial mechanisms in the event that a fiduciary breaches the terms of the relationship. The fiduciary principles inherent in all social trust based relationships, therefore, provide a sound and solid framework for regulating those individuals entrusted with the management and control of property resources. The law of fiduciary obligations can, therefore, be utilised to

⁵⁸ S Dorsett (note 40 above) 61.

⁵⁹ P Finn (note 55 above) 3.

preserve the operation of those societal institutions perceived to be crucial to the securing of the entire society's good.⁶⁰ This can be achieved by expressly subjecting all those involved in the management of societal resources to fiduciary regulation and strictly enforcing the obligations inhering in such an arrangement.

Since fiduciary principles are doctrines of equity, equitable remedies apply in all relationships found to be fiduciary. The law generally recognises a three substratum of duties that fiduciaries must observe at all times. The first duty stipulates that no fiduciary must place himself/herself in a position where duty and personal interest may conflict.⁶¹ The test here is to determine whether the fiduciary has entered into engagements in which he/she can have a personal interest conflicting with the interests of his/her beneficiaries.⁶² This rule is strictly applied and actual conflict need not be proved for a fiduciary to be censured on this basis.⁶³ The second duty requires the fiduciary to manage resources under his control prudently. In the words of Jessel MR, this requires the fiduciary to "conduct the business [of the trust] in the same manner that an ordinary man of business would conduct his own."⁶⁴ The third duty requires the fiduciary to act fairly to those entitled to benefit from his/her exercise of duty. The effect of this principle is that the fiduciary is bound to hold an even hand among the beneficiaries of the fiduciary relationship and not to favour one as against the other.⁶⁵

To enforce these duties equity has created a range of remedies that the beneficiary can activate and most notable among these is the right of the beneficiary to demand an account from the errant fiduciary and to trace any property that the fiduciary has disposed of in breach of the terms of the relationship. Clearly, apart from arming the beneficiaries of a fiduciary relationship with adequate remedies to deal with any breach of the terms of the relationship, equity creates a detailed and well-regulated environment in which reliance and expectation interests can legally be secured. The extension of

⁶⁰ Cf. P Finn (note 55 above).

⁶¹ *Bray v Ford* (1896) A.C. 44 51; *Boardman v Phipps* (1967) 2 A.C. 46.

⁶² *Aberdeen Railway Company v Blaikie* [1854] 1 Macq. 461 471.

⁶³ *Keech v Sandford* [1726] Sel.Cas. Ch. 61.

⁶⁴ *Speight v Gaunt* (1883) 22 Ch. D. 727 739.

⁶⁵ *Lloyds Bank v Duker* [1987] WLR 1324 1330-31.

such regulatory principles into the realm of public law has, however, been deemed to create trusts in the higher sense, which as the argument goes, are incapable of strict judicial regulation. The debate about trusts in the higher sense and trusts in the lower sense is still on going and this study shall now briefly discuss the issues underlying the debate before proposing the way forward on the debate.

2.4 The debate about trusts in the higher sense and trusts in the lower sense

Social trust based devices whatever their form invariably fall under two broad categories and these are trusts in the higher sense and trusts in the lower sense. The dominant legal thought in English common law has been that trusts in the higher sense involve governmental obligations and are thus not enforceable in courts while trusts in the lower sense, also termed true trusts, are those that occur in private law and are enforceable in the courts.⁶⁶ English courts have, resultantly, demonstrated a marked resistance in enforcing trusts in the higher sense arguing that since the same involve governmental obligations they can only be realised politically.⁶⁷ The practical implication of this distinction is that in English courts, and by extension in most common law countries,⁶⁸ the Crown (the government) can never be sued for breach of fiduciary duties in the same way as private individuals.⁶⁹ Resultantly, the government can never be held to be a fiduciary in the lower sense at the instance of its citizenry. Such a position, in this study's opinion, significantly reduces accountability on the part of government officials making them less diligent and inefficient in the performance of their duties.

Meggary V.C provided a resounding reaffirmation of the distinction between trusts in the higher sense and trusts in the lower sense in *Tito v Waddell*.⁷⁰ The case involved a claim by natives of Ocean Island (also called Banaba) against the British Crown for breach of

⁶⁶ *Kinloch v Secretary of State for India in Council* (1882) 7 App. Cas. 619.

⁶⁷ J Martin (note 25 above) 73.

⁶⁸ Under article 15 of the British Order in Council, 1902, Malawi officially received the English common law and the doctrines of equity as developed in England. The reception year for Uganda is also 1902. This makes the common law as developed before the reception dates directly applicable in the two countries and later developments highly persuasive as authorities.

⁶⁹ As above.

⁷⁰ [1977] Ch. 106.

fiduciary duties. The plaintiffs, mainly former Banaban land owners, claimed that the British Crown was in breach of its fiduciary duties by failing to restore land that had been worked out in mining phosphate contrary to its legislative undertaking. The plaintiffs also alleged that the British Crown was also in breach of its fiduciary duties in its administration of the royalties collected from the mining on Ocean Island. Although the court found that there existed a trustee/beneficiary relationship between the British Crown and the Banabans, the court held that the type of trust that existed between the Crown and the Banabans was a trust in the higher sense and hence judicially unenforceable in the courts.

The almost uniform insistence on the strict distinction between trusts in the higher sense and trusts in the lower sense in English law has, in the opinion of this study, stultified the development of the law on fiduciary obligations in England. The obvious effect of insisting on the distinction is that, in spite of its much-touted flexibility,⁷¹ serious fetters are placed on the law relating to fiduciary obligations particularly when the government or its agencies are concerned. Further, the effect of this is that it allows the government to mellow in the praise of being called a trustee or fiduciary without undertaking the responsibilities that normally attach to the office of a fiduciary or trustee in private law.⁷²

Notably, however, the English insistence on a strict distinction between trusts in the higher sense and trusts in the lower sense and the implications following therefrom has failed to gain universal recognition. As developments in Australia⁷³ and Canada⁷⁴ demonstrate, the progressive trend is to recognise the existence of an enforceable fiduciary relationship even when the government or its agencies are involved should the facts so determine. In this regard, remarkable judicial activism was demonstrated by the Philippines Supreme Court in *Minors Oposa v Secretary of the Department of Environment and Natural Resources*.⁷⁵ This case was brought by a number of Filipino

⁷¹ The English jurist FW Maitland is quoted as having said that the common law trust is the greatest and most distinctive achievement of all Englishmen in the field of jurisprudence because it is an institute of great elasticity and generality- G Moffat (note 23 above) 1.

⁷² 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.

⁷³ *Mabo v Queensland (No. 2)* (1992) 175 C.L.R. 1.

⁷⁴ *Guerin v Canada* (note 42 above).

⁷⁵ (1994) 33 *International Legal Materials* 173.

children for the enforcement of their right to a balanced and healthful ecology, which they claimed was being threatened by the timber logging licences that the government was granting. The children, who were joined by their parents, brought the action on their own behalf and on behalf of their unborn children. The court found in favour of the applicants and held that the applicants' right to a balanced and healthful ecology was indeed threatened and infringed by the timber logging licences being granted by the government. The court also stated that the placement of the right being invoked by the applicants among the state policies and principles in the Philippine Constitution served to highlight the right's continuing importance and the imposition of a solemn obligation on the State to respect the same and not to signify its unenforceability.

A proper analysis of the *Minors Oposa* decision reveals that the court in effect recognised and upheld the fiduciary duties that the government of the Philippines owes its citizenry and particularly in so far as the management of the environment is concerned. In upholding the claim in so far as it related to the petitioners' unborn children, the court effectively affirmed that the state has a duty to ensure that there is intergenerational equity in the management of natural resources thereby affirming a social trust-based interpretation of rights. This is because it is only a social trust based interpretation of rights that acknowledges that vulnerability and dependence can be a relevant basis in allocating rights and responsibilities in society and can hence factor intergenerational equity into the interpretation of rights.⁷⁶

2.5 Whither the distinction between trusts in the higher sense and trusts in the lower sense?

The argument in this study is that it is not meritorious to insist on a rigid distinction between trusts in the higher sense and trusts in the lower sense. In this study's opinion, the existence of fiduciary duties in relationships in society should depend on the specific circumstances of each relationship. The fact that the government or any of its agencies are described as fiduciaries or undertake tasks imposing strict fiduciary duties, in the opinion of this study, does not automatically exclude the possibility that such a relationship can be enforced in the courts. This is because, as the law on fiduciaries

⁷⁶ G Kamchedzera (note 34 above) 39.

acknowledges, there can be different bases for founding a fiduciary relationship and each fiduciary relationship is unique in its own light.⁷⁷ This uniqueness entails that enforcement of particular fiduciary relationships by the courts should take full cognisance of the distinctiveness of each relationship held to be fiduciary. As Frankfurter J put it.⁷⁸

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

A finding that the government is a fiduciary in the lower sense might not, therefore, necessarily import all the incidents of an express trust as known in private law. Enforcement of such fiduciary relationships would, therefore, be fact specific. In preference to the mechanistic and arguably anachronistic position in English common law, this study contends that depending on the purpose, function or reason of a particular relationship the government or its agencies should, in appropriate cases, be made the subject of enforceable fiduciary obligations.⁷⁹

One of the crucial things that would have to be determined is whether in a particular relationship the more vulnerable party would be left without effective remedies for monitoring the relationship if the fiduciary duties inherent in the relationship are made unenforceable.⁸⁰ The most important thing to realise through out is that “ the content of a fiduciary obligation [and hence a fiduciary relationship] will be tailored by the circumstances of the specific relationship from which it arises.”⁸¹ Even more importantly, it must be acknowledged that fiduciary principles are “ capable of protecting not only narrow legal and economic interests, but can also serve to defend fundamental human

⁷⁷ *Re Coomber* [1911] Ch 723 especially 728 –729 per Fletcher Moulton LJ; P Birks (note 39 above).

⁷⁸ *SEC v Cheney Corporation* (1943) 318 US 80, 85 86.

⁷⁹ Chapters three and four outline the circumstances on the basis of which the government can appropriately be held to be a fiduciary in the lower sense and thus amenable to judicial censure.

⁸⁰ S Worthington “Fiduciaries: When is self-denial obligatory?” <<http://eprints/se.ac.uk/archive/00000202/01/CLJfinal.pdf>> (accessed 10 August 2005).

⁸¹ *Mabo v Queensland* (note 73 above)

and personal interests.”⁸² To exclude the application of fiduciary principles to relations formed between the government and its citizenry when such relationships possess all indicia of “fiduciariness” is clearly an undue restriction on the law of fiduciary obligations.

Limiting the enforceability of trusts in the higher sense regardless of the circumstances in which they occur amounts to overlooking the fact that the law of fiduciary obligations is actually founded in equity.⁸³ Equity as a system of law was/is designed to redress specific wrongs rather than following a rigid application of rules of law, for example, to prevent those holding positions of power from abusing their authority and to provide justice rooted in conscience.⁸⁴ It must be recalled that:⁸⁵

The courts of equity have striven to protect the vulnerable from abuse by persons with power over them and ... the potential for such abuse is one of the hallmarks of a fiduciary relationship.

Seemingly the distinction between trusts in the higher sense and trusts in the lower sense is premised on the fact that trusts in the lower sense are a private law creation whose principles are applicable only in the sphere of private law while trusts in the higher sense operate in the public law domain.⁸⁶ This distinction presupposes not only that the government cannot be held to be a fiduciary in the lower sense but also that there is a neat private law/public law divide such that the two realms operate in total isolation to each other. However, the private law/public law divide is no longer as neat and as exclusionary as it might have been many years back.⁸⁷ The distinction between private law and public law has been increasingly difficult to sustain mainly in light of the global acceleration of corporatisation and privatisation of bodies and functions

⁸² *Norberg v Wynrib* (1992) DLR (4th) 449, 499 per McLachlin J.

⁸³ T Hammond “The ‘stolen generation’ – Finding a fiduciary duty” <http://www.murdoch.edu.au/elaw/issues/V52/hammond52_abstract.html> (accessed 12 August 2005).

⁸⁴ I Salevao “Reinventing government as a friend of the people: Common law and equity, legislation and the constitution” <<http://eprints.anu.edu/archive/00002354/01/samoa%20Update%202003-salevao.pdf>> (accessed 10 August 2005).

⁸⁵ D Sweeny “Broken promises: The Crown’s fiduciary duty to aboriginal peoples” (1995) 3 *Aboriginal Law Bulletin* 4 7.

⁸⁶ J Martin (note 25 above).

⁸⁷ H Wade *Administrative Law* (1977) 36.

traditionally viewed as public in many jurisdictions.⁸⁸ Undoubtedly, the public law/ private law divide is currently so blurred and not as significant as it might have been historically.

Time is, therefore, due for societies in common law countries to accept, wholeheartedly, that “ the most fundamental fiduciary relationship in... society is manifestly that which exists between the community (the people) and the state, its agencies and officials.”⁸⁹ Resultantly, it is largely moot to argue whether the notion of government as a trust should remain a mere political notion or whether it should be given legal force. Rather the real issue should be refining fiduciary principles for application in the so called “public law domain”.⁹⁰ In spite of all the apprehension about extending the application of fiduciary principles, such an extension would merely confirm that governmental powers can only be exercised within the regularised framework of constraints that not only confers rights but defines corresponding duties as well.⁹¹ This will help in making the discourse about rights friendlier to society’s most vulnerable members.

Clearly, regulation of the fiduciary relationship created between the government and its citizenry will be largely informed by the principles of the law of fiduciaries as developed in the private law realm. This means that the aggregate of duties required from the various government officials and functionaries will be that they should always act in good faith and in the best interests of the citizenry. In the event that the fiduciary fails to discharge his/her duties according to the terms of the trust, equity would step in and afford the beneficiaries appropriate remedies. The point is aptly summarised by Salevao when he states that:⁹²

... the notion of government as a trust is, to a large extent, informed by the principles of private law of trusts and fiduciaries.... That is to say principles extrapolated from and extended beyond their application in the private law sphere [will be used] to characterise and govern the relationship between the government and the governed...

⁸⁸ I Salevao (note 84 above).

⁸⁹ P Finn “ A sovereign people, a public trust” quoted by Salevao (note 84 above)

⁹⁰ I Salevao (note 84 above).

⁹¹ P Finn (note 89 above).

⁹² I Salevao (note 84 above).

Perhaps the reason why English courts have been reluctant to enforce trusts in the higher sense is because of the doctrine of parliamentary supremacy that obtains in the United Kingdom. Simply put, the doctrine of parliamentary supremacy entails that parliament has supreme law making powers and it can make and unmake any laws and that nobody has a right to override or set aside legislation passed by parliament.⁹³ Under such a setting the English courts require legislative intention to state clearly and expressly that the government is being recognised as a fiduciary in the lower sense before holding that such a trust has been created.⁹⁴ Aside from the fact that such a position makes a bad joke out of the dictates of the rule of law, importantly in countries with constitutional supremacy, like Uganda⁹⁵ and Malawi⁹⁶, the hustles of enforcing trusts in the higher sense are considerably lessened if not eliminated.

2.6 Are public functionaries fiduciaries?

In the light of the above exposition can it legitimately be said that public functionaries are fiduciaries?⁹⁷ This determination must be made because fiduciary regulation is applicable to public functionaries only if it is shown that they are fiduciaries. Without restating the principles outlined earlier in the chapter, suffice it to point out that the question of whether or not an individual(s) can appropriately be held to be fiduciaries can only be resolved upon an evaluation of the duties assumed by the individual(s) in society. Importantly, the performance of public duties by public functionaries inevitably involves the exercise of discretion on their part. The allowance for discretion in the performance of duties by public functionaries of necessity, presupposes the existence of terms or conditions upon which such duties must be discharged. For public

⁹³ For a discussion of the doctrine of parliamentary supremacy as contrasted to constitutional supremacy see G Tumwine-Mukubwa “ Opening the floodgates of the jurisprudence of free expression” (2005) 1 *East Afr. J. Peace Hum. Rights* 21 28-29 & 49.

⁹⁴ *Civilian War Claimants Association Ltd v R* (1932) A.C. 14.

⁹⁵ Article 2 Constitution of the Republic of Uganda.

⁹⁶ Section 5 Constitution of the Republic of Malawi.

⁹⁷ By public functionaries this study refers to individuals that have assumed leadership roles in society. Public functionaries could either be bureaucrats or politicians but the distinctive feature about their “jobs” is that they are involved in the management of public resources.

functionaries, the basic terms are often outlined in a country's constitution or specific statutes.⁹⁸

As the test laid down by Wilson J in *Frame v Smith*⁹⁹ underscores, three characteristics permeate relationships in which the law recognises a fiduciary obligation. These are, firstly, the fiduciary has scope for the exercise of some discretion or power in the discharge of his duties. Secondly, the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests and thirdly, the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.¹⁰⁰ Clearly, one merely needs to evaluate the exercise of authority by public functionaries in the light of the above principles to determine whether it would be plausible to hold public functionaries as fiduciaries. The fact that the exercise of their functions is largely in what is deemed to be the public law realm should not remove the exercise of their powers from the courts' equitable supervision. Admittedly, the duties assumed by public functionaries in such a case might not be strict private law duties but the discharge of authority by public functionaries will nevertheless involve responsibilities in the private law realm. As Dickson J aptly stated, " while [the exercise of authority by public functionaries] is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty."¹⁰¹ It is thus undesirable to oust the courts' supervisory jurisdiction if efficiency is to be infused in the performance of public duties. Rather, the courts must be allowed the latitude to determine how particular fiduciary relationships involving the government should best be enforced depending on the facts of each case.

Further, the existence of discretionary power on the part of one party to any relationship necessarily implies the existence of an unequal relationship between the parties thereto. The possession of discretion entails that the party deprived of the discretion will necessarily be subject to the direction of the other. A relationship evidencing such

⁹⁸ For example, in Malawi section 12(i) states " all legal and political authority of the state derives from the people of Malawi and shall be exercised in accordance with this constitution solely to serve and protect their interests." Article 1(3) of the Ugandan Constitution reiterates the same point. Other relevant provisions in the Constitution of Malawi include section 12(ii), section 12(iii) and section 13(o) and in the Constitution of Uganda Article 1(1), Objective I (ii) and Objective XXVI.

⁹⁹ (1987) 42 D.L.R. (4th) 81.

¹⁰⁰ As above 99.

¹⁰¹ *Guerin v The Queen* (note 42 above).

features is bound to be fiduciary in nature since “the hallmark of a fiduciary relation is that the relative positions [of the parties to a fiduciary relationship] are such that one party is at the mercy of the other’s discretion.”¹⁰² As Weinrib emphasises:¹⁰³

[Where there is a fiduciary obligation]... there is a relation in which the principal’s interest can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law’s blunt tool for the control of this discretion.

Without doubt, the relationships created between the “governors” (public functionaries) and the “governed” (the citizenry) are inherently unequal thereby making a case for fiduciary regulation even stronger. The relationships are thus subject to fiduciary regulation and a strict enforcement of the fiduciary principles will be in the interests of the citizenry, who are the vulnerable and dependent party in this relationship.

2.7 Conclusion

This chapter has demonstrated that the distinction between trusts in the higher sense and trusts in the lower sense is not only wanting in merit but has no practical relevance in a country that recognises constitutional supremacy. The chapter has also demonstrated that public functionaries are fiduciaries and hence subject to fiduciary regulation. The next chapter will explore the interface between leadership roles and social and economic rights.

¹⁰² E Weinrib “The fiduciary obligation” (1975) *University of Toronto Law Journal* 1 4.

CHAPTER THREE: EXPLORING THE INTERFACE BETWEEN LEADERSHIP ROLES AND SOCIAL AND ECONOMIC RIGHTS

3.1 Introduction

This chapter highlights the interface between leadership roles and social and economic rights. This is done principally in order to demonstrate the relevance of the social trust concept and leadership roles to social and economic rights. The chapter also outlines the constitutional protection of social and economic rights in Malawi and Uganda. A discussion of the “controversy” surrounding social and economic rights is also conducted in order to provide a better understanding of this category of rights. The analysis in this chapter is conducted against the background that public functionaries are fiduciaries.

3.2 Social and economic rights in perspective

Contemporary human rights discourse, as has been widely bemoaned, has tended to focus on rights traditionally known as civil and political, often at the expense of those classified as social and economic.¹⁰⁴ This, however, is in spite of continued rhetoric about the indivisibility, universality and interdependence of human rights and repeated assertions countering any hierarchical classification of human rights.¹⁰⁵ In the end, however, as Alston has pointed out “the distinction between civil and political rights and economic, social and cultural rights is ultimately unclear despite widespread assumption that the distinctions are almost self evident and juridically unavoidable.”¹⁰⁶ As pointed out in chapter one of this study,¹⁰⁷ this study’s focus on social and economic rights is merely for convenience of presentation and analysis not as an endorsement of the premise that

¹⁰³ As above.

¹⁰⁴ A An-Naim “To affirm the full human rights standing of economic, social and cultural rights” in Y Ghai and another (eds) *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights* (2004) 7; D Chirwa “ Minister of Health and others v Treatment Action Campaign and others: Its implications for the combat against HIV/AIDS and the protection of economic, social and cultural rights in Africa” (2003) *East Afr. J. Peace Hum. Rights* 174; J Oloka-Onyango (note 21 above).

¹⁰⁵ A An-Naim (as above); J Oloka-Onyango (note 21 above); U.N.Vienna Declaration and Programme of Action, 1993.

¹⁰⁶ P Alston (note 13 above) 139.

¹⁰⁷ See page 4 of this study.

there are different categories and hierarchies of rights.¹⁰⁸ This study subscribes to the view that human rights form one regime that must always be given equal attention.

The dichotomy of human rights into civil and political rights, on the one hand, and economic, social and cultural rights on the other is traceable to the cold war ideological differences between the North American and West European governments and their allies and the Soviet Bloc.¹⁰⁹ The Cold War influence on the categorisation and classification of human rights is highlighted by the fact that the Universal Declaration of Human Rights¹¹⁰ (UDHR) provides for an integrated scheme of rights where all rights are treated the same. Noticeably, the UDHR was passed by the United Nations General Assembly before the Cold War had heated up hence its escape from the ideological wrangles that characterised human rights treaties negotiated during the Cold War period. The fact that two treaties¹¹¹ – apparently catering for two different sets of rights – were later drafted to codify the rights contained in the UDHR merely perpetuated the fallacy that civil and political rights are different and distinct from economic, social and cultural rights.¹¹²

3.2.1 Nature of social and economic rights

Social and economic rights must always be rated equally in comparison to civil and political rights. This is in acknowledgment of the fact that social and economic rights and civil and political rights form part of an indivisible whole, which is the regime of human rights.¹¹³ However, it is important to realise that the demands for enforcement of social and economic rights may, in some key areas, be different to the demands raised by civil

¹⁰⁸ C Odinkalu (note 23 above) 335.

¹⁰⁹ For a discussion of the historical roots of the dichotomy see, D Chirwa (note above) 175-182; C Mbazira "A path to realising economic, social and cultural rights in Africa? A critique of the New Partnership for Africa's Development" (2004) 4 *African Human Rights Law Journal* 34 35-39.

¹¹⁰ UN Universal Declaration of Human Rights adopted on 10 December 1948.

¹¹¹ These are the International Covenant on Civil and Political Rights, adopted by the UN General Assembly on 16 December 1966 and the International Covenant on Economic, Social and Cultural Rights adopted by the UN General Assembly on 16 December 1966.

¹¹² D Chirwa (note 104 above) 182.

¹¹³ S Agbakwa (note 22 above).

and political rights.¹¹⁴ This is largely because in relation to most social and economic rights i.e. right to education, health and housing, although guidelines for the content of the rights exist,¹¹⁵ universal standards by which state compliance can be gauged do not exist.¹¹⁶ Further misunderstanding of social and economic rights seems to have been generated by the fact that most social and economic rights are stated to be attainable through a progressive realisation to the extent of a state's available resources.¹¹⁷ This realisation apart from detracting any value from economic and social rights, should serve to reinforce the assertion that different enforcement mechanisms are suitable for different rights irrespective of whether the rights are classified as civil and political or economic and social.¹¹⁸ Importantly, the Committee on Economic and Social Rights has articulated the concept of the minimum core content which represents the least that a state can do to achieve the progressive realisation of any social and economic right.¹¹⁹ The minimum core content represents an objective but variable test that can be used to determine whether a particular state's steps are congruent to its obligations for the progressive realisation of human rights within its available resources. Determining the minimum core content involves an evaluation of a state's spending priorities rather than the mere availability of resources.¹²⁰

The very nature of social and economic rights is such that their core objective is to ensure access by all human beings to resources, opportunities and services necessary for an adequate standard of living.¹²¹ Resources, whatever form they take, but particularly their management, remain an integral part of any scheme for the enjoyment

¹¹⁴ Y Ghai "An approach to the implementation of economic and social rights" a paper prepared for the INTERIGHTS Advisory Council meeting, London, July 2000.

¹¹⁵ Most authoritative of these guidelines are the General Comments of the UN Committee on Economic, Social and Cultural Rights.

¹¹⁶ Y Ghai (note 114) above.

¹¹⁷ Article 1(2) of the UN International Covenant on Economic Social and Cultural Rights.

¹¹⁸ Lord Lester of Herne Hill and another " The effective protection of social and economic rights" in Y Ghai and another (eds) (note 104 above) 18.

¹¹⁹ UN Committee on Economic, Social and Cultural Rights General Comment 3, 1990.

¹²⁰ J Cottrell and another "The role of the courts in implementing economic, social and cultural rights" in Y Ghai and another (note 104 above) 61.

¹²¹ S Liebenberg and another (eds) *Social-economic rights in South Africa* (2000) 16.

of social and economic rights if society's most vulnerable members are to be beneficiaries. Additionally, social and economic rights are a very potent vehicle for the enjoyment of other civil and political rights¹²² and it is manifestly absurd to talk of serious civil and political freedoms in the face of massive illiteracy, deprivation and poverty.¹²³ Crucially, social and economic rights have immense liberative powers as they have the potential to empower the disadvantaged and vulnerable to challenge conditions of poverty and social-economic inequality.¹²⁴ As pointed out " without securing economic and social, as well as civil and political rights, the most deprived, vulnerable and powerless peoples of the world remain excluded from the enjoyment of their essential human entitlements."¹²⁵ Evidently, a vibrant social and economic rights framework is crucial not just for poverty reduction but also consolidation of democracy,¹²⁶ which can only occur when people are truly empowered.

As will be demonstrated later in this chapter, irrespective of the nomenclature adopted for human rights they all generate three levels of obligations.¹²⁷ The nature of the obligation is always to respect, protect and fulfil the demands being placed on the state by the particular right.¹²⁸ Importantly, the realisation of economic and social rights requires a complex interaction and coordination of policies in a cross section of government sectors and institutions. The complexity of the coordination required is such that different approaches may be adopted for the implementation of these rights in different countries as long as the measures are reasonable in the light of the totality of

¹²² J de Waal and others *The bill of rights handbook* (2000) 398.

¹²³ S Agbakwa (note 22 above).

¹²⁴ S Liebenberg and another (note 121 above).

¹²⁵ Lord Lester of Herne Hill (note 118 above) 17.

¹²⁶ D Chirwa "A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi" (forthcoming publication in *Journal of African Law*).

¹²⁷ This approach has been endorsed by the African Commission on Human and People's Rights in *The Social and Economic Rights Action Centre (SERAC) and another v Nigeria* Communication Number 55/96. For a full discussion of the SERAC case and the nature of obligations generated by social and economic rights see, D Chirwa "Toward revitalising economic, social and cultural rights in Africa: Social and Economic Rights Centre and the Centre for Economic and Social rights v Nigeria (2002) 10 *Human Rights Legal Brief* 14; D Chirwa " A flesh commitment to implementing economic, social and cultural rights in Africa: Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria" (2002) 3 *ESR REV.* 19.

¹²⁸ J Cottrell and another (note 120 above) 64.

the circumstances.¹²⁹ A proper coordination of the various institutions and sectors involved in the implementation of social and economic rights requires a vibrant supervisory mechanism which can be provided by adopting social trust based accountability mechanisms.

3.2.2 Social and economic rights and the justiciability debate

As a result of the categorisation of human rights into civil and political rights and social, economic and cultural rights, a host of consequences have been assumed to accrue to each category of rights that supposedly highlight the distinctness between the two categories of rights. The most harped upon consequence in this regard is that social and economic rights are inherently non-justiciable.¹³⁰ The arguments in this regard are aptly captured by Ssenyonjo when he states that:¹³¹

It has long been contended that [economic, social and cultural rights] ... are inherently 'non-justiciable' meaning ... that they are not suitable for or open to judicial enforcement or handling by courts or similar institutions and should not be constitutionalised since they are dependent on resources (thereby raising issues of public finance and policy) and therefore likely to impose uncontrollable financial burdens upon states. It is argued that to the extent such cases will involve public spending priorities such decisions should remain the exclusive domain of the executive and legislatureIt has been asserted that they are not suitable for justiciability due to general and vague formulation. Others have argued that ... they are only 'ideals' 'endeavours' or 'programmatically guidelines for government policies' as opposed to being human rights.

All arguments about the unjusticiability of social and economic rights presume that human rights can be placed into broad, rigid and watertight categories where civil and political rights will be justiciable and social and economic rights unjusticiable. Such a strict categorisation ignores the important fact that there is a considerable degree of blurring and overlap between the categories of human rights, however they are

¹²⁹ This position was reaffirmed by the Constitutional Court of South Africa in *Government of the Republic of South Africa v Grootboom and others* [2000] 11 BCLR 1169 paragraph 29.

¹³⁰ M Ssenyonjo (note 24 above).

¹³¹ As above 4.

classified, both as regards their nature as well as their enforceability.¹³² Clearly, arguments against the justiciability of social and economic rights are highly overstated and misconceived. It is important to realise that in relation to all human rights, justiciability is actually dependent on the obligation of the state in respect of that particular right rather than exclusively on the nature or classification of the right.¹³³ As alluded to above, in respect of all human rights the obligations of the state are at three levels: the obligation to respect, protect and fulfil.¹³⁴ States must “respect” rights by refraining from interfering with the enjoyment of rights. This obligation can be understood to be negative in the sense that it does not require government intrusion or resource allocation. States must “protect” bearers of rights from intrusions by third parties i.e. by way of legislating or adopting other appropriate policies protecting right bearers. States also have to “fulfil” rights when they are required to take positive measures to ensure the direct enjoyment of a right i.e. by building and equipping clinics and providing medication. A fourth level of obligation is sometimes included which requires the state to “promote” rights.¹³⁵ The duty on the state in this regard is to take steps to enable people to exercise rights on a longer term, for instance, by education and awareness raising.

In as far the justiciability arguments are concerned, it is crucial to take cognisance of the distinction between “justiciability” and “implementation”. Admittedly, the two terms are intimately linked. However, the development of public international law in spite of the numerous arguments about the enforceability and implementation of its sanctions serves to highlight the distinction between justiciability and enforcement. Obviously, rights will not cease to be rights merely because in some circumstances implementation is unsatisfactory. It is trite, however, that any court order recognising the existence of any human rights must be fully implemented or realised but lack of implementation is not a signal of the unenforceability of a particular regime of rights but a signal of a bigger malaise within the system.

¹³² Lord Lester of Herne Hill (note 118 above).

¹³³ F Viljoen (note 6 above) 3.

¹³⁴ H Shue *Basic rights: subsistence, affluence and US foreign policy* (1980) quoted by F Viljoen (note 6 above) 3.

¹³⁵ G Van Hoof “ The legal nature of economic, social and cultural rights: A rebuttal of some traditional views” in P Alston and another (eds.) *The right to food* (1984) 97 106.

Above everything else, it is important to realise that over-emphasis on justiciability actually obviates the fact that enforcement of social and economic rights need not be achieved through litigation only. Admittedly, litigation is an important way of enforcing human rights but in relation to social and economic rights other ways of enforcing them remain largely untried.¹³⁶ Further, justiciability as currently understood overemphasises the role of lawyers and courts in the enforcement of social and economic rights when the rights themselves need a broad based, inclusive and comprehensive approach to their enforcement. A move away from the justiciability debate will pave way for the exploration of other avenues for enforcing social and economic rights like political lobbying.

The nature of the three levels of obligations reiterate the fact that the state remains the primary duty bearer in respect of all human rights and trashes any distinctions in the nature of the state's obligation that are dependent on the category ascribed to particular rights. The level of human rights enjoyment in any country is, therefore, dependent on the willingness of the state and its agencies to create a suitable environment for the same. As posited in chapter one,¹³⁷ social and economic rights are intimately related to the provision of the bare necessities of life in any society. Consequently, the observance of the three levels of obligations will have a more profound effect on the lives of the citizenry if directly linked to social and economic rights.

3.3 The constitutional protection of social and economic rights in Malawi

Economic and social rights have suffered from a lack of constitutional protection in Malawi since colonial times.¹³⁸ The country's first written Constitution adopted at independence in 1964 did not provide for any social and economic rights and when a new constitution, designed to transform the country into a Republic, was passed in 1966 the same omission was repeated. This state of affairs was only reversed with the passing of the 1994 Constitution.¹³⁹ The 1994 Constitution¹⁴⁰ entrenches a few social

¹³⁶ J Cottrell and another (note 120 above) 88.

¹³⁷ See page 2 of this study.

¹³⁸ D Chirwa (note 126 above).

¹³⁹ As above.

¹⁴⁰ Act Number 20 of 1994.

and economic rights in the Bill of Rights and recognises most of them as directive principles of national policy. Some of the social and economic rights recognised in the Bill of Rights are the right to education,¹⁴¹ the right to property,¹⁴² the right to economic activity,¹⁴³ the right to family protection¹⁴⁴ and the right to development.¹⁴⁵

Clearly, therefore, there is constitutional recognition of the existence and relevance of social and economic rights in Malawi. A comprehensive examination of the Constitution, however, reveals that social and economic rights are accorded inadequate and partial protection. As Chirwa has argued, the scheme for the protection of social and economic rights under the 1994 Constitution does not appear to be the result of a well reasoned approach and it is a let down from the constitutional preambular promise which avers that it will seek “to guarantee the welfare and development of all people of Malawi.”¹⁴⁶ The lack of coherence in the approach is manifested by the fact that, for example, although the rights to education and equality are covered in the Bill of Rights aspects of the same rights are also included in the principles of national policy.¹⁴⁷ Such confusion renders meaningless the rationale behind having some social and economic rights in the Bill of Rights and others in the principles of national policy.

Of note in the protection of social and economic rights is the role of international law in Malawian constitutional law. This is important because Malawi is a party to several treaties that provide for a range of social and economic rights like the Convention on the Rights of the Child (CRC),¹⁴⁸ International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁴⁹ the African Charter on Human and Peoples’ Rights (ACHPR)¹⁵⁰ and

¹⁴¹ Section 25.

¹⁴² Section 28.

¹⁴³ Section 29.

¹⁴⁴ Section 22.

¹⁴⁵ Section 30.

¹⁴⁶ D Chirwa (note 126 above).

¹⁴⁷ This is clear from the way the principles of national policy on gender equality in Section 13(a) and education in section 13 (f) are framed.

¹⁴⁸ Acceded 2 January 1991.

¹⁴⁹ Acceded 22 December 1993.

the Covenant on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹⁵¹ A reading of section 11(2)(c) of the Constitution together with section 211(as amended¹⁵²) reveals that international law provides a potent avenue through which the interpretation and understanding of social and economic rights provided in the Constitution can be conducted.¹⁵³ Section 211 of the Constitution stipulates the conditions under which international agreements entered into before or after the commencement of the Constitution must have application in the country. Section 11(2)(c), however, directs Malawian courts to have regard to current norms of public international law and comparative foreign case law in interpreting of the Constitution.

Having regard to the fact that revision of the current constitutional scheme for the protection of social and economic rights is bound to be costly and lengthy,¹⁵⁴ it is apparent that the best course of conduct is to use the existing framework innovatively if the enjoyment of social and economic rights is to be enhanced. This is particularly true because direct reliance on the Bill of Rights, under the current dispensation, will never serve all social and economic rights.

3.4 The constitutional protection of social and economic rights in Uganda

Although Uganda attained independence earlier than Malawi,¹⁵⁵ the constitutional protection of social and economic rights has not enjoyed a less acrimonious existence. The 1962 independence Constitution, save for a passing mention of the right to property, did not provide for any social and economic rights.¹⁵⁶ Arguably, the inclusion of the right

¹⁵⁰ Ratified on 17 November 1989.

¹⁵¹ Ratified on 12 March 1987.

¹⁵² Act Number 13 of 2001.

¹⁵³ D Chirwa (note 126 above).

¹⁵⁴ Amending any provision in the Bill of Rights requires a national referendum in which the majority of the electorate must favour the proposed amendment. The Electoral Commission must then certify to the speaker of parliament that the majority of Malawians have endorsed the proposal for the amendment, only then can parliament pass the Bill proposing the amendment albeit with a simple majority. See, section 196 of the Republic of Malawi Constitution.

¹⁵⁵ Uganda attained its independence in 1962.

¹⁵⁶ J Oloka-Onyango "Economic and social human rights in the aftermath of Uganda's fourth constitution: A critical reconceptualisation" Centre for Basic Research, Working Paper Number 88/2004 11.

to property was for the protection of the property of nationals of the former colonial power and to ensure that prompt and adequate compensation would be had in the event of any expropriation.¹⁵⁷ As Kanyongolo has explained in the case of Malawi,¹⁵⁸ which assertion applies in Uganda as well,¹⁵⁹ the neglect accorded to social and economic rights during the colonial era was a reflection of the larger colonial policy whose principal objective was the extraction of colonial labour for the benefit of the colonial power.

Subsequent Constitutions enacted in 1966 and 1967 did not fare any better as regards the recognition and protection of social and economic rights and, arguably, the 1967 Constitution can only be remembered for its extensive restrictions on fundamental rights and freedoms.¹⁶⁰ It was only with the enactment of the 1995 Constitution that economic and social rights gained constitutional recognition in Uganda. However, just like in Malawi, the Bill of Rights does not exhaustively deal with all social and economic rights and relegates some social and economic rights to the directive principles of state policy. Some of the rights provided for in the Bill of Rights include the right to education,¹⁶¹ the right to a clean and healthy environment¹⁶² and the right to engage in economic activity.¹⁶³ Again, just as in Malawi, aspects of some of the rights covered in the Bill of Rights are contained in the national objectives and directive principles of state policy. For example, the right to education must be read together with Objective XVIII (educational objectives) and the right to a clean and healthy environment must be read with Objective XII (balanced and equitable development).

The decision not to have all social and economic rights in the Bill of Rights was a result of deliberations of the Constituent Assembly where some representatives expressed concern about the difficulties involved in making all social and economic rights

¹⁵⁷ As above.

¹⁵⁸ F Kanyongolo "The limits of liberal democratic constitutionalism" in K Phiri and another (eds.) *Democratisation in Malawi: A stock taking* (1998) 353 354.

¹⁵⁹ J Oloka-Onyango (note 156 above) 10.

¹⁶⁰ As above.

¹⁶¹ Article 30.

¹⁶² Article 39.

¹⁶³ Article 40.

justiciable.¹⁶⁴ Just like in Malawi, therefore, the constitutional recognition and protection of social and economic rights in Uganda is partial and incomplete. Resultantly, the full enjoyment and enforcement of social and economic rights in Uganda will also largely depend on an innovative use of the existing structures rather than a call for a total revision of the existing framework. Again, like in Malawi, international law offers a powerful bulwark in the interpretation and understanding of social and economic rights. Importantly, Uganda has ratified the ICESCR,¹⁶⁵ the CRC,¹⁶⁶ the CEDAW¹⁶⁷ and the ACHPR¹⁶⁸ which have provisions on social and economic rights.

3.5 Social and economic rights and leadership roles: Whence the connection?

Order in modern societies across the globe has been achieved because individuals in these societies have agreed to comprise the “governors” and the “governed” and ascribed particular roles to the “governors”.¹⁶⁹ The exercise of authority by the “governors” is principally to secure various societal goals and order. Where individuals cannot agree on a proper distribution and exercise of power, disorder and chaos will ensue and anarchy will prevail. Resultantly, in almost all societies, rules will be devised by which society sets up a framework through which it validates and regulates the assumption of leadership positions by a clique of individuals from its midst.¹⁷⁰ The assumption of leadership positions, however, also entails the assumption of roles that inhere in such positions. It is these roles that are “undertaken” by individuals upon assuming leadership positions that this study terms leadership roles. By terming them roles this study seeks to emphasise the fact that individuals in positions of leadership are bound to fulfil these roles for as long as they occupy positions of leadership.

¹⁶⁴ See generally J Oloka Onyango (note 156) above.

¹⁶⁵ Ratified 21 January 1987.

¹⁶⁶ Ratified 17 August 1990.

¹⁶⁷ Ratified 22 July 1985.

¹⁶⁸ Ratified 10 May 1986.

¹⁶⁹ These ideas are explained through the social contract theories of Jean Rousseau and John Locke.

¹⁷⁰ This is achieved through periodic elections. In Malawi elections are governed by the Parliamentary and Presidential Elections Act Chapter 2:01 of the Laws of Malawi. In Uganda the Presidential Elections Bill and the Parliamentary Elections Bill when passed will provide the procedure.

Leadership roles inhere in all leadership positions and although they may be conceived and structured differently in different political systems, they invariably involve the management of political structures, public sector management, civil society development and efficiency in service delivery.¹⁷¹ Aside from the mechanistic aspects of efficient service delivery, a proper exercise of leadership roles must focus on qualitative and equity aspects of empowering people.¹⁷² The focus on empowerment and equity would guarantee that individuals have a greater degree of control over their lives in society. This is in recognition of the fact that the state, being an abstract entity, must act through natural persons to fulfil its various tasks and these individuals must be properly regulated if the state must efficaciously perform its tasks.

Any change in the fortunes of African countries hinges on the quality of leadership that African countries can foster. This is because a country's leadership, generally speaking, drives the formulation and implementation of policy.¹⁷³ It is the nature of the policies chosen by a particular leadership that determines the attention a particular country pays to social and economic rights. If leadership roles have to be friendly to society's most vulnerable they must be guided by principles of transparency and accountability.¹⁷⁴

Although accountable governance is often the exception rather than the norm in Africa, the state system must be organised such that there are mechanisms for making the leadership accountable to the citizenry, who are its constituents.¹⁷⁵ Recognising that assumption of leadership positions in society involves the assumption of particular roles will make it easier to demand accountability from a country's leadership. This is because the assumption of leadership roles in such circumstances will create expectation and

¹⁷¹ A Nsibambi *Decentralisation and civil society in Uganda: The quest for good governance* (1998) 1–7.

¹⁷² As above.

¹⁷³ O Adewoye “Leadership and the dynamics of reform in Africa” in H Othman (ed.) *Reflections on leadership in Africa: Forty years after independence* (2000) 39-48.

¹⁷⁴ D Venter “Democracy, governance and leadership: Towards an African renewal” <http://www.foundation-development-africa.org/africa_development/other_africa_issues/africa_general/democracy_governance_leadership.htm> (accessed 15 August 2005).

¹⁷⁵ S Adejumobi “Engendering accountable governance in Africa” <<http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN008475.pdf>> (accessed 15 August 2005).

reliance interests on the part of the governed and accountability can be demanded as of right because the assumption of leadership roles would have been done on the premise that the leadership will maintain accountability. It must be conceded that accountable and social trust based leadership roles may not immediately reduce poverty and guarantee the full implementation of social and economic rights but it will certainly create a context for empowerment where the poor and vulnerable can organise to challenge governmental excesses without hindrance.¹⁷⁶

3.5.1 Public functionaries and their influence on social and economic rights

The intricacies of the relationship between leadership roles and social and economic rights are apparent when one realises that the well being of any society centres on the efficacy in the discharge of leadership roles by public functionaries. It is the action or inaction of the various public functionaries and the regulation of their performance of duties that will determine how efficaciously the state and its agencies fulfil their roles. Clearly, therefore, it is only effective and efficient regulation of public functionaries that will ensure governance in the interests of the entire society and ensure the provision of social goods at all times to all sectors of the citizenry.

Public functionaries, of necessity, are charged with making decisions about how to allocate public resources. As already pointed out, societal welfare hinges on the efficacy of the framework that governs the distribution of such resources particularly in as far as the most vulnerable and disadvantaged are accommodated. The often-mentioned programmatic realisation of economic and social rights¹⁷⁷ necessarily entails a degree of coordination in the exercise of authority by public functionaries such that there is coherence in state policy on the realisation of social and economic rights, even with the passage of time. Even more particularly it entails that a scheme for the allocation of societal resources in the interests of the most vulnerable and dependent is devised and implemented. The extent to which such schemes are implemented will directly influence the enjoyment of social and economic rights in any country.

¹⁷⁶ As above.

¹⁷⁷ Article 1(2) ICESCR.

Agbakwa asserts that any quest for meaningful development in Africa ought of necessity to be predicated on the effective protection, enforcement and realisation of economic and social rights.¹⁷⁸ This is principally because economic and social rights offer “the only means of self defence for millions of impoverished and marginalized individuals and groups all over the world.”¹⁷⁹ Development in any country, however, is heavily influenced by politics and human agency.¹⁸⁰ The manner in which the politics of a particular country are managed will, consequently, determine how resources for the realisation of various rights are secured and made available to the populace. The lack of an enforceable regime of social and economic rights is likely to affect the enjoyment of economic and social rights because it deprives the system of a mechanism to make duty bearers accountable and justify their adoption of particular social-economic policies. Notably, the term “politics” as used in this study does not refer to the partisan conception of politics but to “the authoritative determination of a society’s goals and ideals, mobilisation of its resources to achieve those goals and ideals, and distribution of rights, duties, costs, benefits, rewards and punishments among members of that society.”¹⁸¹ Understood in this way, the relevance of the various political actors and the mode of their regulation to the securing of societal goals must be self-evident.

Because of the prevailing deplorable social-economic conditions,¹⁸² countries like Malawi and Uganda ought to take the fore in advocating for the enforcement of social and economic rights. Importantly, securing the welfare and security of the citizenry remains one of the principal tasks of any government. Modern governments are not passive spectators in events that fundamentally affect their citizens and impact on the citizenry’s ability to lead a meaningful and dignified life.¹⁸³ This realisation highlights the casual link that exists between human rights and stability since individuals who are perpetually

¹⁷⁸ Agbakwa (note 22 above).

¹⁷⁹ R Kunnenmann “ A coherent approach to human rights” (1995) 17 *Human Rights Quarterly* 323 332.

¹⁸⁰ G Hyden “ Governance and the study of politics” in G Hyden and another (eds.) *Good governance and politics in Africa* (1992) 1 8.

¹⁸¹ W Murphy *Courts, judges and politics: An introduction to the judicial process* (1979) 2.

¹⁸² Cf. statistics for Uganda and Malawi in the UNDP *Human Development Report 2004* (note 3 above).

¹⁸³ A Momoh and another “The Nigerian Military and the Crisis of Democratic Transition: A Study in the Monopoly of Power” (1999) 211 as quoted by Agbakwa (note 22 above).

denied the enjoyment of their rights are more prone to resorting to extra legal mechanisms in a bid to secure the enjoyment of their rights.¹⁸⁴ An effective and efficacious human rights system prevents the occurrence of such a scenario by creating a framework imbued with mechanisms for adjudicating violations of human rights in an orderly manner. In this study's opinion, the social trust concept offers a way in which a conception of leadership roles can be adopted that conforms to a regulated and orderly distribution of societal resources and resolution of disputes arising therefrom.

Ultimately, governance and leadership become an empty art in circumstances where deprivation of the basics of life is rampant as a result of the non-enjoyment of economic and social rights. While African countries are, without doubt, among the world's most impoverished states, the real source of Africa's developmental problems has been poor administration and kleptomaniacal tendencies by leaders in Africa.¹⁸⁵ As it has been correctly stated, the real problem in Africa "is not [necessarily] scarcity of [resources] which is the first problem, but maldistribution"¹⁸⁶ or inequitable "allocation of resources ...[and] provision of government controlled benefits"¹⁸⁷ The fact that the economic performance of most African countries, even with their meagre available resources, has often been less than satisfactory merely underscores the fact that the real problem actually lies principally with the management of resources and not their availability.

It is for the above reasons that countries like Malawi and Uganda ought to concentrate on devising means to secure a better enjoyment of economic and social rights primarily by creating a framework that rectifies the maldistribution of resources. The social trust concept offers an alternative mechanism for the regulation of societal power with a bias to ameliorating the living conditions of society's most vulnerable. The greatest contribution of a social trust based conception of leadership roles for social and

¹⁸⁴ Agbakwa (note 22 above).

¹⁸⁵ N Busia and another "Filing communications on economic and social rights under the African Charter on Human and Peoples' Rights (the Banjul Charter) (1997) 2 *East Afr. J. Peace Hum. Rights* 188 189.

¹⁸⁶ C Tucker "Regional human rights in Europe and Africa: A comparison" (1983) 10 *Syracuse J. Int'l L. & Com.* 135, 162.

¹⁸⁷ M Haile "Human rights, stability, and development in Africa: Some observations on concept and reality" (1984) 24 *Va. J. Int'l L.* 575, 578.

economic rights is that it will increase accountability on the part of the various duty bearers as the citizenry will have the means to discipline all duty bearers. As Muerinik has argued:¹⁸⁸

A decision maker who is aware in advance of the risk of being required to justify a decision will always consider it more closely than if there were no risk. A decision maker alive to that risk is under pressure consciously to consider and meet all the objections, consciously to consider and thoughtfully to discard all the alternatives, to the decision contemplated.

The full recognition and protection of economic and social rights is actually one of the ways of ensuring accountability on the part of African governments. This would in turn precipitate social justice and creation of truly democratic societies where the citizenry is fully empowered to participate in governance processes.

3.6 Conclusion

This chapter has striven to demonstrate the inevitability of human agency to leadership and governance. However, as has been emphasised in the chapter, the fact of human agency in leadership and governance calls for the strict regulation of the same to ensure social justice and equity in the exercise of authority. This is particularly important because the degree of enjoyment of economic and social rights in any country is contingent on the quality of leadership and governance available. In this regard, the social trust remains an adept mechanism, for the regulation of leadership roles and the conduct of governance. The next chapter outlines the benefits of a revitalised social trust based conception of leadership roles.

¹⁸⁸ E Mureinik "Beyond a charter of Luxuries: Economic rights in the Constitution" (1992) 8 *South African Journal of Human Rights* 464, 471-2.

CHAPTER FOUR: REALISING THE BENEFITS OF A REVITALISED SOCIAL TRUST BASED CONCEPTION OF LEADERSHIP ROLES.

4.1 Introduction

This chapter seeks to outline the benefits that can be had by recognising and revitalising a social trust based conception of leadership roles to both Malawi and Uganda. The chapter first highlights why Uganda and Malawi must adopt a social trust based conception of leadership roles before attempting to specify how the benefits of social trust based leadership roles can be realised.

4.2 The case for social trust based leadership roles in Malawi and Uganda

As apparent from chapter three, both Malawi and Uganda constitutionally recognise the relevance of social and economic rights to the general human rights scheme. Arguably, however, the attention accorded to social and economic rights in these two countries is not commensurate to the importance that these rights ought to be accorded in the two countries.¹⁸⁹ Seemingly, social and economic rights in these two countries suffer from some form of benign neglect since although they are recognised, their realisation is not taken seriously. It is crucial, therefore, to build upon the partial constitutional recognition of social and economic rights in agitating for a more vibrant social and economic rights regime. This would ensure not only that social and economic rights that are guaranteed in the Bill of Rights are made fully justiciable but even those that are included in the “non-justiciable” parts of the constitutions are made equally justiciable.¹⁹⁰

The case for social trust based leadership roles in Malawi and Uganda builds on the fact, earlier established, that public functionaries can rightly be classified as fiduciaries. It follows from this premise that public functionaries in Malawi and Uganda can properly be subjected to fiduciary regulation and control. There are several compelling reasons why Malawi and Uganda ought to be working towards revitalised and social trust based

¹⁸⁹ Oloka-Onyango asks of Uganda, “ how is it that a country facing severe constraints in meeting goals of social and economic progress not engaged in serious deliberations over how best to achieve these objectives via the constitution?” See Oloka-Onyango (note 156 above) 1. In the light of Malawi’s development indicators the same question is pertinent for the authorities in Malawi.

¹⁹⁰ Particularly those rights covered in the principles of national policy section of the constitution.

leadership roles.¹⁹¹ The overall objective, of course, is to enhance duty bearer accountability particularly in relation to obligations raised by social and economic rights.

Firstly, revitalising social trust based leadership roles will go a long way in preventing social and economic injustice that results from a mismanagement of public resources. One of the surest ways in which social and economic injustice is occasioned in any country is when public resources are abused or when benefits derived from public resources are made accruable to the wrong individuals. In as far as the management of public resources is concerned, the cardinal guiding principle should always be that the correct/ right benefits should always accrue to the right individuals. In this regard, it is important to recognise that property resources ordinarily embody four incidents – nominal title, property management, property control and property benefit – that may vest in one or more persons either separately or jointly.¹⁹² Clearly, therefore, not all the citizenry in either Uganda or Malawi can be involved in the management of all the four incidents of property at the same time. Consequently, as a matter of necessity, public functionaries are allowed to manage public property resources for two practical reasons. In the first place, it is impracticable nay impossible, for all the citizenry in either Malawi or Uganda to be directly involved in the management of each and every national property resource. Chaos would certainly ensue if this were allowed to happen. Secondly, it makes sound economic sense to allow only the most qualified or the most fitting individuals to manage national property resources in their area of expertise. Such a stance would guarantee that maximum property benefit is always realised from the management of national property resources.

The crux of the matter is that irrespective of who has the property control or property management or even the nominal title, the property benefit must always be made available to the right beneficiaries. The beneficiaries of the interaction between property managers and property controllers need not participate in the property management or property control to be entitled to the property benefit. Social trust based mechanisms are, therefore, best suited to regulate and monitor managers and controllers of public resources because the trust concept itself is premised on an express recognition of the

¹⁹¹ See generally, G Kamchedzera (note 10 above).

¹⁹² G Kamchedzera (note 72 above) 190.

separation of the various incidents of property.¹⁹³ Since property resources in most African countries are almost always in short supply, the opportunity to develop a framework for an equitable and objective allocation of property benefit¹⁹⁴ using social trust based mechanisms is worthy pursuing in a bid to enhance social justice and equity.

Secondly, where public resources are entrusted to public functionaries that by itself generates reliance and expectation interests that the law must protect. The reliance interest thus generated becomes apparent when one appraises the consequences accruing from the act of entrusting the management and control of public resources to a public functionary. Clearly, public functionaries are entrusted with management and control of public resources on the implicit, sometimes express, understanding that the individuals so trusted have the requisite technical, legal and moral competence to manage the resources on behalf of a larger audience. As Cottrell demonstrates, where such reliance interests exist there is a strong basis for recognising the existence of a trust relationship principally in a bid to protect the interests of the vulnerable party.¹⁹⁵ Further, when the citizenry allows public functionaries to manage property resources the expectation interest thus generated on the part of the citizenry is akin to the expectation interests in other express private trusts as the citizenry expects public functionaries to manage the resources for their common benefit. As shown in chapter two,¹⁹⁶ reliance and expectation interests form the basis of enforceable trust based relationship irrespective of the “anachronistic” English distinction between trusts in the higher sense and trusts in the lower sense. To adequately protect the reliance and expectation interests that are generated when public functionaries are allowed to manage public resource the law must recognise and enforce the fiduciary obligations generated by the various leadership roles undertaken by public functionaries. One of the surest ways of achieving this is by revitalising a social trust based conception of leadership roles and taking steps to set up structures for the enforcement of these roles.

¹⁹³ In a typical trust relationship, the property control, property management and sometimes the nominal title are all vested in the trustees while the property benefit is made accruable to the beneficiaries even though in some trusts the trustees may also be part of the class of beneficiaries.

¹⁹⁴ A Nsibambi “A comment on the functional relationship between the three arms of the state in Uganda” (2001) 2 *East Afr. J. Peace Human Rights* 154 156.

¹⁹⁵ R Cottrell (note 26 above).

¹⁹⁶ See pages 14-15 of this study.

Thirdly, recognising and enforcing social trust based leadership roles in Malawi and Uganda would be doing no more than perpetuating true African values that, arguably, had served pre-colonial Malawian and Ugandan societies for centuries. It is prudent to note that the trust concept as known in the English common law is not an entirely novel concept in “African customary law”.¹⁹⁷ Variants of the trust concept as known under the English common law were in existence in Africa long before the introduction of the English concept of the trust that came with the establishment of the colonial state.¹⁹⁸ Generally speaking, “African customary law” regarded all bearers of public authority as social trustees who were under an obligation to make and carry out decisions for the benefit of the public.¹⁹⁹ Asante writing in 1965 boldly stated that property concepts in Ghanaian customary law were impressed with the trusteeship idea.²⁰⁰ Similar assertions have been made with regard to the land tenure systems prevalent in Malawi before the inception of colonialism.²⁰¹ Noticeably, both Malawi and Uganda still recognise the notion of traditional leaders through the institution of chieftaincy and kingship.²⁰² These institutions in the past connoted social trusteeship and operated on the basis of a variant of the social trust that one author has argued is better than the English trust concept since it “ ... does not permit such inequality in societal wealth as to lead to hunger, homelessness and depression.”²⁰³ Having regard to the colonial history of both Uganda and Malawi the revitalisation of social trust based leadership roles would actually amount to nothing more than a revival of values traditionally entrenched in societies across Malawi and Uganda. Legal recognition and enforcement would be merely giving teeth and strengthening an autochthonous institution that had become dormant due to the

¹⁹⁷ Admittedly, Africa possesses a great tapestry of cultures and traditions and reference here to African customary law here is merely a generic reference to the general pattern of customary law before the inception of colonialism.

¹⁹⁸ K Bensti-Enchill “The traditional legal systems of Africa” (1980) 6 *International Encyclopedia of Comparative Law* Chapter 2.

¹⁹⁹ G Kamchedzera (note 10 above).

²⁰⁰ S Asante “Fiduciary principles in Anglo-American law and the customary law of Ghana - A comparative study” (1965) 4 *International Comparative and Law Quarterly* 1144.

²⁰¹ B Pachai *Malawi: The history of the nation* (1973) Chapter 6; A Mbalanje “Land law and land policy in Malawi” in J Arantzen and others (eds.) *Land policy and agriculture in Eastern and Southern Africa* <<http://www.unu.edu/unupress/unupbooks/80604e/80604E00.htm#Contents>> (accessed 18 August 2005).

²⁰² Malawi: *Chiefs Act* Number 3 of 1967 (Chapter 22:03 Laws of Malawi), Uganda: article 246 of the Constitution.

²⁰³ O Adigun, *Cases and Texts on Equity and Administration of Estates* (1987).

influences of colonial capitalism and hence its acceptance and credence should not be difficult to develop.

4.3 The advantages of recognising social trust based leadership roles in Malawi and Uganda

Although public functionaries can also be regulated through the use of criminal law, constitutional law or administrative law, three main advantages are discernible from recognising social trust based leadership roles particularly in as far the management of public resources is concerned. It must be realised that fiduciary management of resources of necessity implies fiduciary control, which in turn entails the application of the three fiduciary principles earlier mentioned. The three advantages of recognising social trust based leadership roles in Malawi and Uganda actually correspond to the three principles of fiduciary management.

In the first place, the first fiduciary principle would ensure that public functionaries do not place themselves in circumstances where personal interests might conflict with duty. Insistence on this principle in regulating public functionaries would ensure that personal interests do not override the public good/interests in the management of public resources. It is crucial to realise that in the performance of duties by public functionaries, the public good must always be prioritised lest extraneous matters that hold no benefit for the general public compromise efficiency and effectiveness. Recognising a social trust based conception of leadership roles ensures that public functionaries assume their positions on an express understanding that in the performance of their duties their personal interests shall not compromise or conflict with the discharge of public duties. This would ensure that maximum benefit is derived from particular public resources and would also help in ensuring that the property benefit is always allocated equitably.

Secondly and related to the second principle of fiduciary management, recognition of social trust based leadership roles would ensure that public functionaries are always required to manage public resources with a reasonable degree of prudence and that they be amenable to censure should they fail to prudently manage public resources. This requirement would encourage property resource multiplication and protection and is a

condition normally contained in many statutes on trusts.²⁰⁴ Importantly, by invoking this principle, a reasonable degree of prudence is infused into all actions concerning the management and control of public resources hence increasing the diligence with which public functionaries handle public resources and thereby further securing the public's reliance and expectation interests.

Thirdly, fiduciary regulation of public functionaries, which is a consequence of recognising social trust based leadership roles, would ensure that public functionaries are made to act fairly to all beneficiaries. Since the discharge of leadership roles by public functionaries will necessarily entail distribution of the property benefit deriving from the management of the public resources, enforcing social trust based leadership roles would ensure that public functionaries allocate the property benefit equitably amongst all beneficiaries. Equity would, therefore, become the basis upon which the property benefit is to be allocated and assumption of leadership roles would imply acceptance of this basis for allocating property benefit. An equitable allocation of the property benefit amongst the citizenry would ensure that the wants of everybody with special needs are adequately catered for within the limits of society's available resources. For example, this would ensure that the constitutional provisions on gender equality,²⁰⁵ support for the elderly,²⁰⁶ support for the disabled²⁰⁷ and children²⁰⁸ are given adequate attention. Further, equitable allocation of the property benefit requires that both the capital and income be shared equitably amongst the beneficiaries. If such equity is incorporated into all decisions involving the management and distribution of public resources, social and economic justice is bound to be furthered since no part of the populace will be made to bear an unproportional share of hardships in society. This is

²⁰⁴ For example, in Malawi, under the Trustee Incorporation Act, Number 24 of 1967 (Chapter 5:02 of the Laws of Malawi) trustees have the power to compound liabilities and take control of assets, section 24, power to invest securely as authorised, sections 4 -20 and also the power of variation of trusts for the benefit of unborn beneficiaries, section 71. In Uganda similar provisions are contained in the Trustee Act, Chapter 164 of the Laws of Uganda.

²⁰⁵ Section 13(a) and section 24 Constitution of the Republic of Malawi and article 33 and Objective VI of the Constitution of the Republic of Uganda.

²⁰⁶ Section 13(j) Constitution of the Republic of Malawi and Objective VII of the Constitution of the Republic of Uganda.

²⁰⁷ Section 13(g) and section 20(1) Constitution of the Republic of Malawi and article 35 and Objective XVI of the Constitution of the Republic of Uganda.

²⁰⁸ Section 13(h) and section 22 Constitution of the Republic of Malawi and article 34 and Objective XIX of the Constitution of the Republic of Uganda.

because the advantages and disadvantages incidental to the management of public resources by public functionaries will be equitably shared amongst the citizenry taking into account their unique station in society.

Even more importantly, in spite of the above principles of fiduciary management, in the event of a public functionary abusing his authority and misapplying or misallocating public resources, the benefits obtainable by the errant fiduciary can be recovered by using fiduciary control principles. The principles of fiduciary control build on the demands imposed by the three principles of fiduciary management discussed above. The first strategy of fiduciary control is that all fiduciaries are accountable to those that are set to benefit from their exercise of duty. Such a demand for accountability from public functionaries is consistent with the constitutional scheme in both Malawi and Uganda.²⁰⁹ Insisting on a more strict and vigilant regime for public functionaries' accountability will clearly not involve introduction of any novel demands but rather a revitalisation of existing structures in a bid to enhance equity in the management of public resources.

Relatedly, the second strategy for fiduciary control requires a fiduciary to provide a satisfactory account of his/her management/use of a trust resource and failure to provide a satisfactory account may be held to be a breach of fiduciary duty. A breach of fiduciary duty, like any other breach of trust, affirms the proprietary rights of the person against whom the violation of expectation and reliance interests was perpetrated and these rights can be enforced against, not only the wayward fiduciary but also his accomplices. In the public realm, this means that the citizenry are entitled to ask particular public functionaries to explain how particular public resources have been used. Recalling that fiduciaries are subject to the duty of prudence any public functionary that demonstrates lack of prudence in the management public resources makes himself liable to disciplining by the citizenry. The first and second strategy of fiduciary control enjoins the creation of an environment where transparency governs the management and control of public resources.

The third strategy of fiduciary control reveals the range of remedies available to a beneficiary in the event a breach of duty is established. Obviously, a fiduciary

²⁰⁹ Section 12(iii) of the Constitution of the 1994 Republic of Malawi and Objective XXVI and article 1 of the Constitution of the Republic of Uganda.

responsible for a breach of trust is susceptible to removal.²¹⁰ Aside from removal from office, any resource(s) distributed by the errant fiduciary in breach of the terms of trust become tainted by his breach of duty and any person assuming control over them may be held to be a constructive trustee. Further, upon establishing a breach of trust the beneficiaries have the option of bringing a personal action or a proprietary action against the errant fiduciary. The distinction between a personal remedy and a proprietary remedy is that where as a personal remedy is enforceable only as against the person against whom it was awarded a proprietary remedy is granted in relation to specific assets and is enforceable against any holder of the asset(s) unless for some reason it ceases to exist or the claim is no longer enforceable.²¹¹ The beneficiaries can, therefore, opt to bring an action for equitable damages, injunction and are also entitled to trace the benefits misappropriated by the delinquent fiduciary into the hands of third parties. The beneficiaries are, therefore, empowered to recover not only the resources that were initially misappropriated or misapplied but also all the benefits or any increase in value that has accrued a result of the breach. Clearly, the law of fiduciary obligations offers a viable mechanism for monitoring any breach of fiduciary obligations by public functionaries. This is because it ensures that no fiduciary profits from his wrongdoing and fully empowers the beneficiaries to claim for themselves any profit that the fiduciary might have generated out of his wrongful conduct.

4.4 Conclusion

The inevitable result in the event that fiduciary regulation of public functionaries is implemented is that resources for the fulfilment of the obligations generated by social and economic rights will be readily available. Fiduciary regulation of public functionaries will help eliminate resource abuse and the countries adopting this approach will be better poised to use their resources progressively to realise social and economic rights.

²¹⁰ Section 86 and 107 of the Constitutions of Malawi and Uganda respectively provide for the process through which the president may be removed from office. The process of impeachment is one way through which the president can be disciplined and thus made accountable to the citizenry.

²¹¹ R Pearce and another (note 25 above) 515.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Overall conclusion

The greatest benefit that will be had to both Malawi and Uganda from revitalising social trust based leadership roles is not the immediate attainment of social justice, equity and the full realisation of all social and economic rights but the creation of an environment where the poor and vulnerable are truly empowered to determine their fate. Only an empowered citizenry can be fully cognisant of its rights and what measures to undertake in the event of a perceived breach of duty by some public functionaries. For empowerment to be total and fulfilling, however, a comprehensive and cross-sectoral approach to the issue of regulating public functionaries is required. Clearly, therefore, bringing about complete accountability from duty bearers i.e. public functionaries will not be a preserve of legal practitioners but will require input from various disciplines i.e. political scientists and social scientists. Further, revitalising duty bearer accountability through social trust based accountability mechanisms will create a regulated framework for the resolution of conflicts and competing interests in the public realm. This will reduce resort to extra legal mechanisms of resolving disputes and hence bring about stability in the two countries under study thereby eliminating the need to make mammoth defence spending at the expense of developing welfare institutions in society.

Clearly, the normative and institutional frameworks obtaining in Malawi and Uganda presently are not adequately poised to meet the demands of social trust based accountability for social and economic rights. A restructuring of the institutional structure and a revision of the normative framework to adequately meet the obligations exerted by social and economic rights is clearly in order. This, however, merely highlights the need for the comprehensive and all-inclusive approach in the struggle for the enjoyment of social and economic rights so that existing structures are used to the optimum.

5.2 Recommendations

It is important to enact legislation that expressly recognises that public functionaries are fiduciaries and thus subject to fiduciary regulation and control. Such an express recognition of the fiduciary nature of positions occupied by public functionaries will serve

to further dispel doubt about whether the fiduciary relationship thus being recognised is one in the lower sense or in the higher sense. Further, any such express recognition of the fiduciary nature of leadership roles will serve to infuse a greater deal of diligence in the performance of public duties by public functionaries since the risk of censure will be real and not imaginary.

There is also need to encourage and nurture public interest litigation into all matters concerning the fiduciary control and regulation of public functionaries. This requires making the law on *locus standi* more permissible to ensure that actions can easily be commenced on behalf of concerned members of the public.

At the same time, however, there must be a realisation that litigation is not the only way to ensure the entrenchment of social trust based leadership roles. Admittedly, litigation is an important tool for regulating and controlling public functionaries, however, adequate emphasis must also be placed on alternative means of achieving control over public functionaries like political lobbying and other civil society based initiatives. Effort must be taken to diversify the approaches used in the struggle for the enjoyment of social and economic rights if meaningful change is to be achieved.

It is also crucial that structures for bringing about accountability on the part of public functionaries must be established at the lowest level of society i.e. village level. Clearly, if people at village level can learn to make their leaders accountable, the momentum for making higher ranking public functionaries accountable will be generated and can be easily replicated at the national level.

For these recommendations to be given adequate attention, the leadership in either Malawi or Uganda must be possessed of the requisite political will and determination. It is crucial, therefore, that the necessary political awareness of the relevance and importance of social trust based leadership roles particularly in relation to social and economic rights and development, in the long run, be generated. Clearly, broad based civil society initiatives will be very important in helping generate the required political will.

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