

REINFORCING DUTY BEARER ACCOUNTABILITY FOR SOCIO-ECONOMIC RIGHTS IN MALAWI: A CONCEPTUAL ALTERNATIVE?

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1 Introductory remarks

Malawi, like most African countries, faces serious governance and development challenges. While most of these challenges are uniquely Malawian, they are also symptomatic of a general continental trend.¹ These challenges manifest themselves in high levels of illiteracy, prevalence of disease, poverty and poor infrastructure. The multiplicity of the challenges that Malawi and, arguably, most African countries contend with diminishes the state's capacity to effectively realise human rights. This is often to the detriment of rights classified as social, economic and cultural (in this contribution short-handedly referred to as socio-economic rights). This is largely because it is sometimes argued that socio-economic rights require massive expenditure outlays by the state and that priority should thus be given to civil and political rights which do not require such outlays.²

This contribution, accepting that the primary duty bearer in relation to the fulfilment of all human rights is the state, conducts an inquiry into how duty bearer accountability, especially for socio-economic rights, can be reinforced and revitalised in Malawi. The focus on socio-economic rights is justified by the knowledge that socio-economic rights are centrally connected to the citizenry's welfare. The centrality of socio-economic rights to the welfare and development of the people arises from this category of rights' pre-occupation with the creation of societies where everyone has a minimum standard of living consistent with human dignity.³ Socio-economic rights are concerned with the provision of the basic necessities of life that are fundamental to the

¹ J Hatchard, M Ndulo & P Slinn *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (2004) 8.

² For a summary of the arguments on the justiciability of socio-economic rights, see, M Ssenyonjo "Justiciability of Economic and Social Rights in Africa: General Overview, Evaluation and Prospects" (2003) 9 *E Afr Peace & Hum Rts* 1; A An-Naim "To Affirm the Full Human Rights Standing of Economic, Social and Cultural Rights" in Y Ghai & J Cottrell (eds) *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (2004) 7.

³ F Viljoen "The Justiciability of Socio-Economic and Cultural Rights: Experience and Problems" in Y Donders & V Volodin (eds) *Human Rights in Education, Science and Culture: Legal Development and Challenges* (2007) 53 53-54.

attainment of development by a people⁴ and the achievement of social justice and equality.⁵ The full realisation of socio-economic rights would thus provide “a formidable tool for alleviating poverty and marginalisation”.⁶ It must, however, be conceded that the realisation of socio-economic rights alone may not be a panacea for all the development ills of African societies.⁷

Having regard to the centrality of socio-economic rights to societal welfare, this contribution contends that it is of paramount importance to devise measures that can ensure that the state, as the primary duty bearer,⁸ effectively and efficaciously discharges its duties with respect to these rights.⁹ While it behoves the state to institute policies and implement measures that promote socio-economic rights, it is equally important that the citizenry should possess the means to effectively question, compel or supervise the state’s performance of its obligations. This contribution centrally explores how the social trust concept can be used to reinforce the accountability framework for the realisation of socio-economic rights in Malawi. In conceptualising this accountability framework, focus is placed on the role and duties of public functionaries. The focus on public functionaries is justified on the basis that even though the state is the primary duty bearer (it may be argued that the state is the ultimate duty bearer and not necessarily the primary duty bearer), the state acts through public functionaries. Only by properly regulating public functionaries, therefore, can the state be effectively regulated in turn. Enhanced accountability on the part of public functionaries is bound to result in enhanced accountability on the part of the state generally.

2 Development and socio-economic rights in Malawi: A brief profile

Malawi remains one of the poorest countries in the world.¹⁰ In 1993, the United Nations Development Programme (“UNDP”) concluded that poverty

⁴ “Development” as used in this study connotes a comprehensive process of enlarging peoples’ choices and capabilities, see United Nations Development Programme (UNDP) *Human Development Report* (2002) 15-18.

⁵ N Udombana “Interpreting Rights Globally: Courts and Constitutional Rights in Emerging Democracies” (2005) 5 *AHRLJ* 47 52. Socio-economic rights create entitlements to material conditions for human welfare – D Brand “Introduction to Socio-Economic Rights in the South African Constitution” in D Brand & C Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 1 3.

⁶ C Mbazira “Bolstering the Protection of Economic, Social and Cultural Rights under the Malawian Constitution” (2007) 1 *Malawi LJ* 224 225.

⁷ The constitutional protection of socio-economic rights may not be enough for a country’s development but it is a statement of a country’s commitment to the realisation of these rights.

⁸ The dominant role of the state domestically entails that the state bears the primary responsibility for human rights. See F Viljoen *International Human Rights Law in Africa* (2007) 9.

⁹ This is not to suggest that private actors do not bear any responsibility for the protection and promotion of socio-economic rights. See D Chirwa *Towards Binding Economic, Social and Cultural Rights Obligations of Non-State Actors in International and Domestic Law: A Critical Survey of Emerging Norms* LLD thesis UWC (2005) <http://etd.uwc.ac.za/usrfiles/modules/etd/docs/etd_init_8148_1174557113.pdf> (accessed 29-05-2010).

¹⁰ Advameg Inc “Malawi – Poverty and Wealth” (2012) *Encyclopedia of the Nations* <<http://www.nationsencyclopedia.com/economies/Africa/Malawi-POVERTY-AND-WEALTH.html>> (accessed 23-02-2010). As to the dominant causes of poverty, see D Acemoglu “Root Causes: A Historical Approach to Assessing the Role of Institutions in Economic Development” (2003) 40 *Finance and Development* 27.

in Malawi was significant and widespread, encompassing more than half the population.¹¹ In 2000, poverty in the country was described as being “widespread, deep and severe”.¹² A survey conducted between 2004 and 2005 revealed that the incidence of poverty in Malawi had by and large remained stagnant over the fifteen years preceding it.¹³ Presently, over half of the population live below the poverty line. While the factors causing poverty in Malawi remain myriad, poverty is exacerbated by weak institutional capacity. Notably, poverty is more prevalent in rural areas than urban areas.¹⁴ The poor are thus more exposed to the vagaries of life experiences among others, poor food security, abysmal health indicators and very low incomes. Importantly, the quality of life in rural areas is a key indicator of how the state is discharging its obligations to realise human rights.¹⁵

The deep levels of poverty in Malawi entail the prevalence of very poor socio-economic indicators among the populace.¹⁶ The benefits that socio-economic rights embody are thus not realised by a significant segment of the population that is firmly stuck in poverty. While poverty in Malawi is a combination of, among others, the country’s geographical location and the lack of any significant mineral resources,¹⁷ it must be acknowledged that poverty is aggravated by the manner in which the available resources are managed by public functionaries. It is for this reason that the regulation of managers of public resources acquires significance especially for socio-economic rights. The assumption in this connection is that while the lack of resources is critical to the enjoyment of socio-economic rights, the management of the available resources, however meagre, is very important if living conditions have to be ameliorated. Clearly, it is not just the presence or absence of resources that determines the level of enjoyment of socio-economic rights but also the manner in which public functionaries manage the available resources.

3 The constitutional protection of socio-economic rights in Malawi

Socio-economic rights have suffered from a lack of constitutional protection in Malawi since colonial times.¹⁸ The country’s first written Constitution

¹¹ Government of Malawi & UNDP *Situation Analysis of Poverty in Malawi* (2000) 7. According to this analysis 60% and 65% of Malawi’s population living in urban and rural areas respectively live below the poverty line. See also, Government of Malawi *Microfinance Policy and Action* (2002) <<http://www.idlo.int/Microfinance/DOCUMENTS/REGULATIONS/549REG.pdf>> (accessed 17-06-2009).

¹² Government of Malawi *Malawi Poverty Reduction Strategy Paper* (2000) 4-5.

¹³ Government of Malawi *Malawi Growth and Development Strategy: From Poverty to Prosperity 2006-2011* (2005) 7.

¹⁴ A 2005 survey revealed that over 87% of the population reside in rural areas. See the National Statistical Office *Welfare Monitoring Survey 2005* (2005) 14.

¹⁵ G Kamchedzera & C Banda “Dignified Rural Living, the Right to Development, Multiparty Politics and Legislation in Malawi” (2009) 25 *SAJHR* 73.

¹⁶ It is currently estimated that 52.4% of the population live below the poverty line. This translates into about 6.3 million Malawians. Female-headed households are worse off and income inequalities remain very high. Government of Malawi *Poverty Reduction Strategy* 7-8.

¹⁷ I Scholz “Introduction: Malawi’s Development Course on a Knife’s Edge: Do Politicians Care?” in Konrad-Adenauer-Stiftung *Towards the Consolidation of Malawi’s Democracy* (2008) 1.

¹⁸ D Chirwa “A Full Loaf is Better than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi” (2005) 49 *J Afr L* 207 208.

adopted in 1964 did not provide for socio-economic rights. This omission was repeated in the country's Republican Constitution adopted in 1966. This state of affairs was only reversed with the adoption of the Republic of Malawi (Constitution) Act, 1994 ("the Constitution" or "the Constitution of Malawi").¹⁹ The 1994 Constitution entrenches a few socio-economic rights in the Bill of Rights and recognises most of them as Principles of National Policy.²⁰ Among the socio-economic rights recognised in the Bill of Rights are the right to education,²¹ the right to property,²² the right to economic activity,²³ the right to family protection,²⁴ and the right to development.²⁵

Evidently, there is express constitutional recognition of the existence and relevance of socio-economic rights in Malawi. A comprehensive examination of the Constitution, however, reveals that socio-economic rights are accorded inadequate and partial protection.²⁶ As argued, the scheme for the protection of socio-economic rights under the 1994 Constitution does not appear to be the result of a well-reasoned approach and it is a significant let down from the constitutional preambular promise, which avers that the Constitution will seek to guarantee the welfare and development of the people of Malawi.²⁷ 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.²⁸ Such confusion renders meaningless the rationale behind having some socio-economic rights in the Bill of Rights and others in the Principles of National Policy. This is especially apparent when one notes that the Constitution attempts to make a distinction between the values outlined in the Principles of National Policy and those contained in the Bill of Rights.²⁹ This "confusion" in the scheme for the protection of socio-economic rights is largely traceable to the manner in which the current Constitution of Malawi was adopted. Notably, commentators on the Constitution are agreed that the Constitution was hurriedly adopted with insufficient time for public

¹⁹ 208.

²⁰ The Principles of National Policy in s 13 of the Constitution of Malawi are the goals that the state must actively promote in order to improve the welfare and development of the people of Malawi. They include, the attainment of gender equality, adequate nutrition for all, adequate healthcare for all, and the enhancement of the quality of rural life. In s 14, the Constitution of Malawi states that the Principles of National Policy are directory in nature even though courts must have regard to them in interpreting and applying the Constitution or any law or in determining the validity of decisions of the executive.

²¹ S 25 of the Constitution of Malawi.

²² S 28.

²³ S 29.

²⁴ S 22.

²⁵ S 30.

²⁶ For a theoretical argument in favour of justiciable socio-economic rights in Malawi, see Mbazira (2007) *Malawi LJ* 220-231.

²⁷ Chirwa (2005) *J Afr L* 213.

²⁸ This is clear from the way the Principles of National Policy on gender equality (s 13(a) of the Constitution of Malawi) and education (s 13(f) of the Constitution of Malawi) are framed.

²⁹ S 14 of the Constitution of Malawi declares that the Principles of National Policy are only directory even though courts are entitled to have regard to them in interpreting and applying the Constitution.

consultation and reflection on its provisions.³⁰ This lack of reflection on the Constitution's provisions is, arguably, responsible for the lack of clarity with respect to the scheme for socio-economic rights under the Constitution. For socio-economic rights this "confusion" is undesirable.

The overall result is that constitutional discourse in Malawi has largely focused on civil and political rights.³¹ Even judicial enforcement of rights has largely been in the realm of civil and political rights and not socio-economic rights.³² The few cases that have dealt with socio-economic rights have done so only partially.³³ This has entailed partial supervision in relation to the realisation of socio-economic rights in Malawi. The relegation of most socio-economic rights into Principles of National Policy in the Constitution has also compounded the problems for the justiciability and enforcement of socio-economic rights. This is because section 14 of the Constitution asserts that the Principles of National Policy are merely directory in nature even though courts are enjoined to have regard to them in interpreting the Constitution. This calls for innovative approaches that can creatively utilise the Constitution to draw attention to socio-economic rights.³⁴ The social trust concept is offered here as a conceptual basis for understanding duty bearer responsibility for socio-economic rights.

4 Unpacking the concepts: The social trust, public functionaries and leadership roles

4.1 The social trust

Cotterrell has stated that "[b]y 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."³⁵

Interdependence and altruism constitute the foundation of any social trust-based relationship.³⁶ It is arguable that all forms of societal cooperation are founded on trust and thus evoke, at the very least, a moral obligation not

³⁰ See, C Ng'ong'ola "Judicial Mediation in Electoral Politics in Malawi" in H Englund (ed) *A Democracy of Chameleons* (2002) 62-64; J Banda "The Constitutional Change Debate of 1993-1995" in K Phiri & K Ross (eds) *Democratisation in Malawi: A Stocktaking* (1998) 316; D Chirwa "Democratisation in Malawi 1994-2002: Completing the Vicious Circle" (2003) 19 *SAJHR* 316.

³¹ H Englund *Prisoners of Freedom: Human Rights and the African Poor* (2006) 1-10.

³² S Gloppen & F Kanyongolo "Courts and the Poor in Malawi: Economic Marginalisation, Vulnerability and the Law" (2007) 5 *J Con* 258.

³³ A notable exception to this trend is *Gable Masangano v Attorney General, Minister of Home Affairs, Commissioner of Prisons* Constitutional Case No 15 of 2007 in which a convicted prisoner brought a wide ranging challenge against prison conditions in Malawi.

³⁴ Jurisprudence from India could offer exciting examples of innovation in enforcing and protecting socio-economic rights as the Constitution of India also delineates enforceable fundamental rights and non-enforceable Directive Principles of State Policy (DPSP). See S Muralidhar "India: The Expectations and Challenges of Judicial Enforcement of Social Rights" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 102.

³⁵ R Cotterrell "Trusting in the Law: Legal and Moral Concepts of Trust" in MDA Freeman & BA Hepple (eds) *Current Legal Problems 46: Part II - Collected Papers* (1993) 75.

³⁶ See G Kamchedzera *Access to Property, the Social Trust and the Rights of the Child* PhD thesis Cambridge (1996) ch 1.

to betray that trust.³⁷ Notably, the social trust evokes both moral and legal connotations.³⁸ The social trust concept must, however, 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. Arguably, the most well known social trust-based device is the trust concept as developed in the Anglo-American legal tradition.³⁹ Clearly, 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.⁴⁰ 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 performance of certain tasks. The confidence so reposed gives rise to obligations, which the courts aided by equity, and in some cases the legislature, have developed and enforce as legal principles.⁴¹ It is the law’s intervention that transforms what would otherwise have been a moral obligation into a legally enforceable obligation.

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 must perform duties and manage resources principally in the interests of those that have given the confidence. The individual(s) in whom confidence is reposed are 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 “beneficiaries”. 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 arise is practically impossible to devise.⁴² This is partly due to the fact that 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 those situations which are in some respects trusts but not strictly speaking trusts.⁴³ In the light of the overlaps, the term

³⁷ V Held *Rights and Social Goods: Justifying Social Action* (1984) 62.

³⁸ See, generally, Cotterrell “Trusting in the Law” in *Current Legal Problems 46: Part II* 75.

³⁹ Examples of social trust-based devices include the protective trust, the discretionary trust and the constructive trust.

⁴⁰ G Moffat *Trusts Law: Text and Materials* 4 ed (2005) 1.

⁴¹ 1.

⁴² Mason argued that the absence of an all embracing definition actually strengthens the fiduciary concept as it leaves latitude to courts to classify as fiduciaries persons that may hitherto not have been regarded as fiduciary. A Mason “The Place of Equity and Equitable Remedies in the Contemporary Common Law World” (1994) 110 *Law Q Rev* 238 246. For a laudable attempt to construct a comprehensive definition of the term “fiduciary”, see P Finn “The Fiduciary Principle” in T Youdan (ed) *Equity, Fiduciaries and Trusts* (1989) 1.

⁴³ L Sealy “Fiduciary Relationships” (1962) 20 *Cambridge LJ* 69 72.

“trust”, in this contribution, 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.⁴⁴ In this contribution, the terms “trust” and “fiduciary” are used interchangeably unless a contrary intention is expressly stated.

Among the relationships that are formed between individuals in society, there are relationships that are indisputably fiduciary in nature.⁴⁵ 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. Importantly, the categories of relationships giving rise to fiduciary obligations can never be considered as a closed class.⁴⁶ Consequently, in the event that a claim is made that a particular relationship is fiduciary, a 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. It is from this almost infinite elasticity and malleability that fiduciary law draws its strength. The principal device that equity has used to regulate novel situations of fiduciary obligation remains the constructive trust.⁴⁷

The core of the fiduciary concept 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.⁴⁸ The duty of loyalty in a fiduciary relationship is such that the fiduciaries or trustees, however they may be termed, are 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.

In this connection the law recognises a three layered substratum of duties that fiduciaries must observe at all times. The first duty stipulates that no fiduciary must place oneself in a position where duty and personal interest may conflict.⁴⁹ The test here is to determine whether the fiduciaries have entered into engagements in which they can have a personal interest conflicting with the interests of their beneficiaries.⁵⁰ This rule is strictly applied and actual conflict need not be proved for a fiduciary to be censured on this basis.⁵¹ The

⁴⁴ P Birks “The Content of Fiduciary Obligation” (2000) 34 *Israel LR* 3.

⁴⁵ S Dorsett “Comparing Apples and Oranges: The Fiduciary Principle in Australia and Canada after *Breen v Williams*” (1996) 8 *Bond LR* 158 159.

⁴⁶ *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.

⁴⁷ The constructive trust is the residual category of trusts. It covers a variety of relationships having very few common features. The rights and liabilities of constructive trustees vary from one context to the other. It is impossible to make an exhaustive list of situations in which a constructive trust may be said to arise. It is a trust created by equity in the interests of good conscience. See P Pettit *Equity and the Law of Trusts* (2006) ch 8.

⁴⁸ G Moffat *Trusts Law: Text and Materials* 3 ed (1994) 545.

⁴⁹ *Bray v Ford* (1896) AC 44 51; *Boardman v Phipps* (1967) 2 AC 46.

⁵⁰ *Aberdeen Railway Company v Blaikie* [1854] 1 Macq 461 471.

⁵¹ *Keech v Sandford* [1726] Sel Cas Ch 61.

second duty requires the fiduciaries to manage resources under their control prudently. This means that a trustee/fiduciary must “conduct the business [of the trust] in the same manner that an ordinary man of business would conduct his own.”⁵² The third duty requires the fiduciaries to act fairly to those entitled to benefit from their exercise of duty. The effect of this principle is that the fiduciary must hold an even hand among the beneficiaries and not favour one over the other.⁵³

To enforce these duties equity has created a range of remedies that beneficiaries can activate. These remedies are both proprietary and non-proprietary. 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 has created a detailed and well-regulated environment in which reliance and expectation interests can legally be secured.

4 2 Public functionaries and leadership roles

By public functionaries this contribution refers to individuals that have assumed leadership roles in society. Public functionaries could be bureaucrats or politicians but the distinctive feature about their “jobs” is that they are routinely involved in the management of public resources. It is the assumption of a leadership position by an individual that activates leadership roles. By terming them “roles” the emphasis is on the fact that individuals in these positions are bound to fulfil the obligations that these roles generate. Public functionaries invariably assume leadership roles by virtue of the positions that they occupy in society.

It is here contended that public functionaries, especially in Malawi, are fiduciaries. The question of whether or not an individual(s) can appropriately be held to be a fiduciary can only be resolved upon an evaluation of the duties assumed by the individual(s) in society. Importantly, the performance of duties by public functionaries inexorably involves the exercise of considerable discretion on their part. The allowance for discretion in the performance of duties by public functionaries presupposes the existence of terms or conditions upon which such duties must be discharged.⁵⁴ For public functionaries, the basic terms would often be outlined in a country’s constitution or specific statutes.⁵⁵ This means that in Malawi, for example, the Constitution, first and

⁵² *Speight v Gaunt* (1883) 22 Ch D 727 739; *Learoyd v Whitely* (1887) 12 App Cas 727.

⁵³ *Llyods Bank v Duker* [1987] WLR 1324 1330-1331.

⁵⁴ As argued in administrative law, statutory powers conferred for public purposes are conferred on trust and not absolutely. Such powers can thus only be used for the purposes for which they were established. In the exercise of public powers there is no room for unfettered discretion. H Wade & C Forsyth *Administrative Law* 9 ed (2004) 354-355.

⁵⁵ For example, s 12(i) of the Constitution of Malawi states:

“[A]ll 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.”

See also, ss 12(ii), 12(iii) and 13(o) of the Constitution of Malawi.

foremost, spells out the terms on which public functionaries hold and exercise their authority.

As the test laid down in *Frame v Smith*⁵⁶ underscores, three characteristics permeate relationships in which the law recognises a fiduciary obligation. 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 interests and thirdly, the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.⁵⁷ Thus one only needs to evaluate the exercise of authority by public functionaries in the light of the aforementioned principles to determine whether it would be plausible to hold public functionaries accountable as fiduciaries. The fact that the exercise of their functions is largely in what is deemed to be the public law realm should not automatically remove the exercise of their powers from the courts' equitable supervision.⁵⁸

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 would nevertheless involve responsibilities in the private law realm.⁵⁹ As Dickson J aptly stated, "while [the exercise of authority by public functionaries] is not a private law duty in the strict sense ... it is nonetheless in the nature of a private law duty."⁶⁰ The courts thus retain a supervisory jurisdiction in the performance of leadership roles by public functionaries especially if efficiency is to be infused in the performance of public duties. Since each fiduciary relationship is unique in its own light, the courts must be allowed the latitude to determine how fiduciary relationships involving the government should be enforced depending on the facts of each case.

Further, the existence of discretionary power on the part of one party to any relationship implies the existence of an unequal relationship between the parties thereto. This entails that the party deprived of the discretion will be subject to the direction of the other. A relationship evidencing such features is bound to be fiduciary 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."⁶¹ As Weinrib emphasises:

"[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."⁶²

⁵⁶ (1987) 42 DLR (4th) 81.

⁵⁷ 99. It is for the purposes of equitably regulating the obviously unequal relationship between the fiduciary and the beneficiary that the law steps in to empower the beneficiary.

⁵⁸ Equity as a system of law originates from the Chancery Courts in England. The reception of the English common law and doctrines of equity in Malawi was attained on 11 August 1902 by virtue of art 15(2) of the British Central Africa Order in Council of 1902. The applicability of the common law and doctrines of equity was continued by s 15(a) of the Malawi Independence Order, 1964 and further carried on by s 15 of the Republic of Malawi (Constitution) Act, 1966 (Act 23 of 1966). See RE Kapindu "Malawi: Legal System and Research Resources" (01-2009) *Hauser Global Law School Program* <<http://www.nyulawglobal.org/globalex/malawi.htm>> (accessed 01-05-2010).

⁵⁹ The public/private law implications on this contribution's thesis are explored under part 5 herein.

⁶⁰ *Guerin v The Queen* [1984] 2 SCR 335 per Dickson J.

⁶¹ E Weinrib "The Fiduciary Obligation" (1975) 25 *U Toronto LJ* 14.

⁶² 4.

Without doubt, the relationships created between the “governors” (public functionaries) and the “governed” (the citizenry) are inherently unequal thereby making a strong case for fiduciary regulation. Fiduciary regulation of the relationship between the governors and the governed, it is argued, is likely to contribute to greater accountability on the part of public functionaries. In as far as the realisation of socio-economic rights in Malawi is concerned, a fiduciary regulation of public functionaries stands to reinvigorate the accountability of all duty bearers. In the context of Malawi this is particularly important because the legislative framework favours the accountability of public functionaries to their political superiors and not to the right holders.⁶³ For example, the Constitution of Malawi requires Ministers to be accountable to the President without imposing an equal duty with regards to the citizenry.⁶⁴ There is thus an immediate need for a conceptual shift that equally emphasises the accountability of all public functionaries to right holders.

5 Beyond the conceptual quagmire

The argument being presented above reduces itself into an assertion that government is a trust for the governed – that the government stands in a fiduciary relationship in relation to the governed and that public functionaries are in a fiduciary relationship with the citizenry. This argument is not novel. Most social contract theorists, John Locke for example, also proceeded on an assertion that government was a trust for the governed. Notably, almost all social contract theorists were not prepared to attach to this relationship of trust between the governors and the governed the same incidents that characterise the trust as developed in private law. The trust that was recognised between the governors and the governed was reduced to a mere “political metaphor” that could not be judicially enforced.⁶⁵

In spite of the above it is argued here that the relationship between the governors and the governed, especially in Malawi, is predominantly fiduciary in nature and can be regulated by fiduciary principles. The basis of this fiduciary relation lies in the Constitution, but is also supported by provisions in other statutes.⁶⁶ One must recall that section 12 the Constitution avers that “all legal and political authority of the state derives from the people of Malawi” to be “exercised in accordance” with the Constitution “solely to serve and protect their interests”. Section 12 further requires all “persons responsible for the exercise of powers of state” to do so on “trust” to the

⁶³ Kamchedzera & Banda (2009) *SAJHR* 88-89.

⁶⁴ S 97 of the Constitution of Malawi.

⁶⁵ *Tito v Waddell* (1977) Ch 106; *Kinloch v Secretary of State for India* (1882) 7 App Cas 619. Although the Malawian legal system is heavily influenced by English jurisprudence there is no compelling reason why these decisions should be binding on Malawian courts especially in the dispensation brought into being by the 1994 Constitution.

⁶⁶ See C Silungwe “The Rhetoric and Practice in Land Reform in Malawi: A Contextualised Governmentality Analysis” (2009) 3 *Malawi LJ* 26 48:

“[The Constitution] ... proceeds on the fundamental principle that all legal and political authority of the state derives from the people of Malawi and shall be exercised in accordance with the principles of the Constitution; and creates a ‘public’ trust and ‘social’ trust whereby all persons exercising powers of state are accountable to the people of Malawi.”

extent of their lawful authority and in accordance with their responsibilities to the people of Malawi.” The inclusion of the terms “trust”, “accountability”, “good governance” and “transparent” strongly suggest the creation of a social trust between the governors and the governed in Malawi.⁶⁷ This confirms that all public functionaries are in a fiduciary relationship with the public that they serve. It is immaterial that the constitutional provisions being relied on are in sections 12 and 13 of the Constitution which are stated to be “directory” in nature.⁶⁸ As has been pointed out:

“To the extent that the power of the people is devolved upon institutions and officials under our constitutional arrangements those officials and institutions become trustees – the fiduciaries – of that power for the people.”⁶⁹

Since fiduciary relationships vary in intensity, asserting that the state and its functionaries are in a fiduciary relationship towards the citizenry does not mean that this relationship embodies the same incidents that characterise an express private trust.⁷⁰ It merely means that in appropriate instances the state and public functionaries can be regulated using fiduciary standards. It also means that government departments can utilise the fiduciary framework to monitor and control the management of public resources.⁷¹ The fiduciary relationship between state and its citizens provides a unifying moral and conceptual structure that justifies and explains the public obligations which the state undertakes.⁷² Sovereign powers are thus fundamentally fiduciary in nature.⁷³

To properly appreciate the fiduciary regulation of public functionaries one must be prepared to cross the public law/private law divide. Admittedly, fiduciary law is strongly founded in private law. Increasingly, however, fiduciary law has “crossed” and overcome the traditional dichotomisation between public law and private law. Concededly, the relationship between public law and the law of fiduciaries remains largely unexplored.⁷⁴ In accepting a role for fiduciary regulation of public functionaries, two points are worth noting about the public/private law divide. Firstly, in modern societies a neat distinction between public law and private law is difficult to sustain.⁷⁵ This has been

⁶⁷ G Kamchedzera & C Banda *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 (2002) <<http://www.sarpn.org.za/documents/d0001966/index.php>> (accessed 20-05-2008).

⁶⁸ *Minors Oposa v Secretary of the Department of Environment and Natural Resources* (1994) 33 *ILM* 173. See also B de Villiers “Directive Principles of State Policy and Fundamental Rights: The Indian Experience” (1992) 8 *SAJHR* 29.

⁶⁹ P Finn “The Abuse of Public Power in Australia: Making our Governors Our Servants” (1994) 5 *Public Law Review* 43.

⁷⁰ To extend fiduciary regulation into public law would require a modification of the principles of fiduciary regulation as developed in private law. A wholesale transposition of fiduciary principles as developed in private law into public law would be naive.

⁷¹ The principles could be used to boost government efforts against corruption and in enhancing integrity in the management of government resources.

⁷² E Fox-Decent “The Fiduciary Nature of State Legal Authority” (2005) 31 *Queen's LJ* 259.

⁷³ I Salevao *Reinventing Government as a Friend of the People: Common Law and Equity, Legislation and the Constitution* (2003) <<https://digitalcollections.anu.edu.au/bitstream/1885/41091/3/Samoa%20Update%202003-Salevao.pdf>> (accessed 24-05-2008).

⁷⁴ G Dal Pont & D Chalmers *Equity and Trusts in Australia and New Zealand* (1996) 116.

⁷⁵ Salevao *Reinventing Government as a Friend of the People* 14.

because of the increased “corporatisation” of the state. The assumption of roles and duties traditionally reserved for the state, by entities that have very tenuous links to the state has blurred the public/private law divide. Secondly, in countries like Malawi and South Africa with Constitutions containing Bills of Rights that have both a vertical and horizontal application,⁷⁶ it is conceptually difficult to maintain a rigid public/private law divide.⁷⁷ The very notion of a Bill of Rights having a horizontal application flies in the face of any neat distinction between private and public law. The public/private law divide cannot therefore be used as a blanket bar to the extension of fiduciary regulation into the public realm.

It must be borne in mind that fiduciary law possesses inherent public law functions and exists to protect social interests perceived to be valuable by society.⁷⁸ Needless to state that social interests requiring protection are bound to evolve over time. The inherent flexibility surrounding the deployment of fiduciary principles has meant that courts have employed equity and the law of fiduciaries

“to maintain the integrity, credibility and utility of relationships perceived to be of importance in a society. And [the fiduciary principle] is used to protect interests, both personal and economic, which a society is perceived to deem valuable.”⁷⁹

The true nature of the fiduciary principles originates in public policy to maintain the integrity and the utility of those relationships in which the role of one party is perceived to be the service of the interests of the other and it insists upon a fine loyalty in that service.⁸⁰ As the need to preserve integrity and utility in basal societal relations is a continuing and evolving need, the law of fiduciaries has remained aptly positioned to respond to changing needs and demands in society. The continuing prominence and relevance of the law relating to fiduciaries has led to an unprecedented expansion of relationships subject to fiduciary regulation.⁸¹ This expansion has convinced some scholars to assert that human society has generally evolved away from contract-based discourse into one that is predominantly premised on fiduciary principles.⁸²

6 Socio-economic rights, public functionaries and leadership roles: Surveying the interconnectivities

It is arguable that order in organised societies has been achieved because individuals in these societies have agreed to comprise the “governors” and the

⁷⁶ S 15(1) of the Constitution of Malawi affirms both the horizontal and vertical applicability of the Bill of Rights in the country. For South Africa, the horizontal and vertical applicability of the Bill of Rights is confirmed by s 8 of the Constitution of the Republic of South Africa, 1996. See S Banda “Constitutional Mimicry and Common Law Reform in a Rights-Based Post Colonial Setting: The Case of South Africa and Malawi” (2009) 53 *J Afr L* 142 144.

⁷⁷ J van der Walt *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (2005) 3-4.

⁷⁸ S Worthington “Fiduciaries: When is Self-Denial Obligatory?” (1999) 58 *Cambridge LJ* 500; Mason (1994) *Law Q Rev* 246.

⁷⁹ Finn “The Fiduciary Principle” in *Equity, Fiduciaries and Trusts* 26.

⁸⁰ 27.

⁸¹ T Frankel “Fiduciary Law” (1983) 71 *CLR* 795 796.

⁸² 798.

“governed” and ascribed particular roles to the “governors”.⁸³ The exercise of authority by the “governors” is principally in a bid to secure various societal goals. Where individuals cannot agree on a proper distribution and exercise of power, disorder and chaos will ensue. As a result, most societies devise rules which validate and regulate the assumption of leadership positions.⁸⁴

Leadership roles are inherent 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.⁸⁵ 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.⁸⁶ 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. The individuals it acts through must be properly regulated if the state must efficaciously perform its tasks.

It has been correctly argued that any change in the fortunes of Malawi and most African countries hinges on the quality of leadership that African countries can foster.⁸⁷ This is because it is a country’s leadership that drives the formulation and implementation of policy.⁸⁸ It is thus the nature of the policies chosen by the leadership that determine the attention a particular country pays to socio-economic rights. If leadership roles have to be friendly to society’s most vulnerable and marginalised they must be guided by principles of transparency and accountability.⁸⁹ The importance of leadership is such that a nation cannot rely on the chance occurrence of a good leader but must strive to structure institutions that can always regulate the exercise of public power. In this contribution it is argued that social trust-based devices can be utilised in structuring government institutions to make them more responsive to the various rights-holders.

Although accountable governance has been the exception rather than the norm in Africa, it remains crucial that the state must be organised such that there are mechanisms for making the leadership accountable to the citizenry.⁹⁰ Recognising that the assumption of leadership positions in society

⁸³ One of the leading explanations for the constitution of ordered societies is offered by the social contract theory. Some leading exponents of the theory include JJ Rousseau *The Social Contract* (1761); T Hobbes *Leviathan* (1651); and J Locke *Two Treatises of Government* (1690). The social contract’s principles inform most liberal democracies.

⁸⁴ In most liberal democracies this is achieved through periodic elections.

⁸⁵ A Nsibambi *Decentralisation and Civil Society in Uganda: The Quest for Good Governance* (1998) 1-7.

⁸⁶ L Dzimbiri “Competitive Politics and Chameleon-like Leaders” in K Phiri & K Ross (eds) *Democratisation in Malawi: A Stocktaking* (1998) 87.

⁸⁷ 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.

⁸⁹ D Venter *Democracy, Governance and Leadership: Towards an African Renewal* Otto Krause Memorial Fund: Occasional Papers Series 1/2003, Rand Afrikaans University (2003).

⁹⁰ S Adejumbi *Engendering Accountable Governance in Africa* (2000) <http://archive.idea.int/df/2000df/commissioned_papers_5.html> (accessed 12-04-2012).

involves the assumption of particular roles would make it easier to demand accountability from a country's leadership. This is because the assumption of leadership roles in such circumstances would create expectation and reliance interests on the part of the governed and accountability would then be demanded as of right. It must be conceded that accountable and social trust-based leadership roles may not immediately eliminate poverty and guarantee the full implementation of socio-economic rights but this would certainly create a context for empowerment where the poor and vulnerable can organise to challenge governmental excesses without hindrance.⁹¹ It is in relation to generating accountability on the part of the public functionaries that the social trust acquires greater relevance.

It may appear somewhat anomalous to rely on the poor, vulnerable and marginalised to activate the mechanisms for demanding accountability from the various duty bearers. One must, however, note that the various social trust devices can be utilised to foster accountability on the part of public functionaries while at the same time empowering the populace. Social trust-based devices are a tool in the hands of the poor and vulnerable for fostering and enforcing accountability and transparency but at the same time the government can utilise the same mechanisms to infuse vibrancy in its mechanisms and processes. For example, social trust-based devices can be utilised to regulate public resource management and also in the fight against corruption.⁹² In public resource management social trust-based devices can be used by the government, for example, to create more transparent public procurement procedures, while in the fight against corruption they may be utilised to establish standards that all public functionaries must comply with. At the same time, however, social trust-based devices can create enough remedial mechanisms that can be utilised by the citizenry to monitor and regulate all public functionaries. The preceding points are illustrated in parts 8 and 9 of this contribution.

7 Public functionaries and their influence on socio-economic rights

The intricacies of the relationship between leadership roles and socio-economic rights are apparent when one realises, as earlier highlighted, that the well-being of any society centres on the efficacy in the discharge of leadership roles by its public functionaries. It is the action or inaction of the various public functionaries and the regulation of their performance of duties that determines how efficaciously the state and its agencies fulfil their roles. Clearly, it is only effective and efficient regulation of public functionaries that

⁹¹ Adejumobi *Engendering Accountable Governance*.

⁹² For a demonstration of the relevance of social trust-based devices in the fight against corruption and public resource management, see *Reading v The King* (1951) 1 All ER 617; *Attorney General for Hong Kong v Reid* (1994) 1 All ER 1. These decisions may be contrasted with *The State v Sam Mpasu* Criminal Case No 17 of 2005 (unreported); Lilongwe Chief Resident Magistrate's Court Judgment on sentence 08-04-2008; *R v Dennis Kambalame* Criminal Case No 108 of 2002 Judgment on sentence (unreported).

would ensure governance in the interests of the entire society and guarantee the provision of social goods to the citizenry.

As stated earlier, public functionaries, of necessity, are charged with making decisions about how to allocate public resources. Societal welfare hinges on the efficacy of the framework that governs the distribution of public resources particularly in as far as the most vulnerable and disadvantaged are accommodated. The often-mentioned programmatic realisation of socio-economic rights⁹³ entails a degree of coordination in the exercise of authority by public functionaries such that there is coherence in state policy in realising socio-economic rights. This also entails that a scheme for the allocation of societal resources in the interests of the most vulnerable and dependent is consciously devised, implemented and revised as necessity demands. The extent to which such schemes are implemented would directly influence the enjoyment of socio-economic rights in any country.

Agbakwa asserts that any quest for meaningful development in Africa ought to be predicated on the effective protection, enforcement and realisation of socio-economic rights.⁹⁴ This is because socio-economic rights offer “the only means of self defence for millions of impoverished and marginalized individuals and groups all over the world.”⁹⁵ Development in any country, however, is heavily influenced by politics and human agency.⁹⁶ 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.⁹⁷ The lack of an enforceable regime of socio-economic rights affects the enjoyment of these rights because it deprives the system of a mechanism to make duty bearers accountable and justify their adoption of particular socio-economic policies. Notably, the term “politics” as used in this contribution is not restricted 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.”⁹⁸ Understood in this way, the relevance of the various political actors and the mode of their regulation to the securing of societal goals should be self-evident.

Because of prevailing deplorable socio-economic conditions, countries like Malawi ought to take the fore in advocating for the enforcement of socio-economic rights. Securing the welfare and security of the citizenry remains

⁹³ Art 1(2) of the International Covenant on Economic, Social and Cultural Rights (1966) UN Doc A/6316. Malawi acceded to this Covenant on 22-12-1993.

⁹⁴ S Agbakwa “Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights” (2002) 5 *Yale HR & Dev LJ* 177 179.

⁹⁵ R Kunnenmann “A Coherent Approach to Human Rights” (1995) 17 *Hum Rts Q* 323 332.

⁹⁶ G Hyden “Governance and the Study of Politics” in G Hyden & M Bratton (eds) *Governance and Politics in Africa* (1992) 1 8.

⁹⁷ Law and politics are intimately related. It has even been argued that law is simply politics dressed in different garbs. See AC Hutchinson & PJ Monahan “Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought” (1984) 36 *Stan L Rev* 199 206 quoted by M Zamboni *Law and Politics: A Dilemma for Contemporary Legal Theory* (2008) 54.

⁹⁸ W Murphy, H Pritchett & L Epstein *Courts, Judges and Politics: An Introduction to the Judicial Process* (2002) 3.

one of the principal tasks of any government. Governments cannot be passive spectators in events that fundamentally affect their citizens and impact on their ability to lead a meaningful and dignified life.⁹⁹ This realisation highlights the causal link that exists between human rights and stability since individuals who are perpetually denied the enjoyment of their rights are prone to resorting to extra legal mechanisms in a bid to secure the enjoyment of their rights.¹⁰⁰ An effective 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. 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. Uniquely for Malawi, the Constitution can be utilised to support this conceptual shift.

Ultimately, the importance of social trust regulation of public functionaries lies in its potential to address the fundamental causes of underdevelopment in Malawi and most African countries. While African countries are among the world's poorest, the real source of Africa's under-development has been poor administration and kleptomaniac tendencies by its leaders.¹⁰¹ The real problem in Africa "is not [necessarily] scarcity of [resources] which is the first problem, but maldistribution"¹⁰² and inequitable allocation of resources.¹⁰³ The poor economic performance of most African countries largely stems from the mismanagement of resources and not their availability. It is in this connection that the framework created by the social trust offers hope. The social trust framework and the remedies it provides are offered here as a possible solution for the management of public resources in Malawi and in other African countries.

Countries like Malawi ought to concentrate on devising means to securing a better enjoyment of socio-economic rights by creating a framework that rectifies the maldistribution of resources. The social trust concept offers an alternative conceptual foundation for the regulation of societal power with a bias to ameliorating the living conditions of society's most vulnerable.¹⁰⁴ The greatest contribution of a social trust-based conception of leadership roles for socio-economic rights is that it would increase accountability on the part of

⁹⁹ A Momoh & S Adejumbi *The Nigerian Military and the Crisis of Democratic Transition: A Study in the Monopoly of Power* (1999) 211.

¹⁰⁰ Agbakwa (2002) *Yale HR & Dev LJ* 177.

¹⁰¹ N Busia & B Mbaye "Filing Communications on Economic and Social Rights under the African Charter on Human and Peoples' Rights (the Banjul Charter)" (1997) 2 *E Afr Peace & Hum Rts* 188 189.

¹⁰² C Tucker "Regional Human Rights in Europe and Africa: A Comparison" (1983) 10 *Syracuse J Int'l L & Com* 135 162.

¹⁰³ M Haile "Human Rights, Stability, and Development in Africa: Some Observations on Concept and Reality" (1984) 24 *Va J Int'l L* 575 578.

¹⁰⁴ The social trust conceptual framework is here offered as an alternative to liberal democratic constitutionalism that has so far dominated the constitutional discourse in Malawi.

the various duty bearers as the citizenry would have the means to discipline all duty bearers.¹⁰⁵ As Mureinik has argued:

“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.”¹⁰⁶

It is argued that a more stringent regulation of public functionaries, utilising the social trust framework, may precipitate the full realisation of socio-economic rights. This would in turn trigger social justice and the creation of truly democratic societies where the citizenry is fully empowered to participate in governance processes.

8 Reinforcing duty bearer accountability for socio-economic rights using the social trust

The Constitution of Malawi acknowledges the relevance of socio-economic rights to the general human rights scheme. The attention accorded to socio-economic rights in the Constitution, however, is not commensurate to their importance. In Malawi socio-economic rights still suffer from some benign neglect since although constitutionally recognised, their realisation is not taken seriously. It is thus crucial to build upon the partial constitutional recognition of socio-economic rights in agitating for a more vibrant socio-economic rights regime. This would ensure not only that the socio-economic rights guaranteed in the Bill of Rights are fully justiciable but even those that are included in the non-justiciable parts of the Constitution are made equally justiciable. To achieve this, the social trust framework can be used as a basic regulatory framework in monitoring the conduct of public functionaries. All public functionaries involved in the management of the public realm would then be subjected to the principles of fiduciary regulation.¹⁰⁷ Fiduciary principles would become the basis on which all actions by public functionaries would be measured. This, it is argued, would ensure that resources are evenly applied to support the state's obligations towards socio-economic rights.

The case for social trust-based leadership roles in Malawi builds on the fact, earlier established, that public functionaries in Malawi are fiduciaries. It follows from this premise that public functionaries in Malawi can properly be subjected to fiduciary regulation and control. There are several compelling

¹⁰⁵ The social trust framework would operate at two levels. At the one level it can be used in shaping a governing philosophy for the regulation of public functionaries. At the other level, the social trust framework can be utilised to found rights and obligations for both public functionaries and the citizenry. At the second level the social trust framework can be used to support claims pertaining to socio-economic rights and also in crafting remedies for violations.

¹⁰⁶ E Mureinik “Beyond a Charter of Luxuries: Economic Rights in the Constitution” (1992) 8 *SAJHR* 464-471-472.

¹⁰⁷ Fiduciary regulation, concededly, shares some conceptual affinities with administrative law. For example, prerogative remedies like *certiorari* and prohibition attempt to regulate public officers along the fiduciary model. Administrative law, however, is not as expansive as fiduciary law. For example, the language employed in the context of judicial review focuses more on the duties of public officers and procedures than the substantive rights of the citizenry. Fiduciary law, however, emphasises both rights and duties of both the fiduciaries and the beneficiaries.

reasons why Malawi ought to be working towards social trust-based leadership roles.¹⁰⁸ The overall objective would be to enhance duty bearer accountability particularly in relation to obligations raised by socio-economic rights.

Firstly, recognising and enforcing social trust-based leadership roles would go a long way in preventing social and economic injustice that results from mismanagement of public resources. One of the ways in which social and economic injustice is occasioned is when public resources are abused or when benefits derived from public resources are made accruable to the “wrong” individuals. In the management of public resources, the cardinal guiding principle ought to be that the correct benefits should always accrue to the right individuals. In this regard, it is important to recognise that property resources, for example, ordinarily embody four incidents – nominal title, management, control and benefit – that may vest in one or more persons either separately or jointly.¹⁰⁹ Clearly, not all the citizenry in Malawi can be involved in the management of all the four incidents of property resources at the same time.¹¹⁰ Consequently, as a matter of necessity, public functionaries are allowed to manage public resources for two practical reasons. In the first place, it is impracticable nay impossible, for all the citizenry in Malawi to be directly involved in the management of each and every national resource. In the second place, it makes sound economic sense to allow only the most qualified or the most fitting individuals to manage national resources in their area of expertise. Imbuing public resource management with fiduciary principles would guarantee that maximum property benefit is realised from the management of public resources.

The crux of the matter is that irrespective of who has the control or management or even the nominal title to public resources, the beneficial interest must always accrue to the right beneficiaries. The beneficiaries of the interaction between the managers and controllers of public resources need not participate in the management or control to be entitled to the beneficial interest. 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 separation of the various incidents of property resources.¹¹¹ Since resources in most African countries are almost always in short supply, the opportunity to develop a framework for an equitable and objective allocation of such resources using social trust-based mechanisms is worthy of pursuit in a bid to enhance social

¹⁰⁸ See G Kamchedzera *The Law and the Disregard of the Interests of the People of Malawi in the Management of Public Resources* (2004) a paper presented at a symposium on *The Law and the Recovery of Benefits Unjustly Accruing to Public Functionaries: Solutions for Malawi* in Blantyre, Malawi, 29-12-2004 (copy on file with author).

¹⁰⁹ 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) 188 190.

¹¹⁰ Property is a power relationship constituted by legally sanctioned control over access to excludable resources. Property is thus a relationship. See K Gray “Property in Thin Air” (1991) 50 *Cambridge LJ* 252.

¹¹¹ The trust is based on a separation of the legal from the equitable interest in property. In a typical trust relationship, the control, management and sometimes the nominal title are all vested in the trustees while the beneficial interest is made accruable to the beneficiaries even though in some cases the trustees may also be part of the class of beneficiaries – Moffat *Trust Law* (2005) 4-5.

justice and equity.¹¹² Importantly, even though fiduciary regulation has been very prominent in relation to the management of property resources, it is not limited to the management of property and can be extended to cover non-proprietary interests.¹¹³

Secondly, entrusting public resources to public functionaries generates reliance and expectation interests that the law must protect. The reliance interest thus generated is apparent when one appraises the consequences accruing from the act of entrusting the management and control of public resources to public functionaries. Public functionaries are entrusted with management and control of public resources on the implicit, sometimes express, understanding that they have the requisite technical, legal and moral competence to manage the resources on behalf of a larger audience. Where such reliance interests exist there is a strong basis for recognising the existence of a fiduciary relationship in order to protect the interests of the vulnerable party. Further, when the citizenry allows public functionaries to manage public resources the expectation interest thus generated is akin to the expectation interests in express private trusts as the citizenry expects public functionaries to manage the resources for the common benefit. As demonstrated earlier, reliance and expectation interests form the basis of enforceable trust-based relationships. To adequately protect the reliance and expectation interests that are generated when public functionaries manage public resources the law must recognise and enforce the fiduciary obligations generated by the various leadership roles undertaken by public functionaries. Additionally, the assumption of leadership roles by public functionaries endows them with a measure of discretion in the manner in which they can perform their duties. This discretion creates a fiduciary relationship which the law must monitor on behalf of the beneficiaries.¹¹⁴

Thirdly, recognising and enforcing social trust-based leadership roles in Malawi would be doing no more than perpetuating true African values that, arguably, had served pre-colonial Malawian societies for centuries.¹¹⁵ It is prudent to note that the trust concept as known in English common law is not an entirely novel concept in “African customary law”.¹¹⁶ Variants of the

¹¹² A Nsibambi “A Comment on the Functional Relationship between the Three Arms of the State in Uganda” (2001) 7 *E Afr Peace & Hum Rts* 154 156.

¹¹³ *Frame v Smith* [1987] 2 SCR 99 143 held that a divorced and custodial parent owed a fiduciary duty to the non-custodial parent to grant access and visitation to their children.

¹¹⁴ See D Tan “The Fiduciary as an Accordion Term: Can the Crown Play a Different Tune?” (1995) 69 *Australian LJ* 440 441, who states:

“The critical feature of these relationships is that the fiduciary undertakes to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.”

¹¹⁵ Concededly, there is a danger of romanticisation when one talks about reviving values that informed societal organisation in pre-colonial Africa. That aside, the endeavour is not fruitless and it remains true that Africa must look within itself if it must free itself from the shackles of underdevelopment. Africa does not need to reproduce what prevailed in pre-colonial times but merely distil the important values that can be utilised today. See M Nkhata *Constitutionalism and Good Governance in Africa: Rediscovering the Relevance and Viability of Social Trust-Based Governance in Malawi* LLD thesis Pretoria (2010) 153-194.

¹¹⁶ Admittedly, Africa possesses a great tapestry of cultures and traditions and reference to African customary law here is merely a generic reference to the general pattern of customary law.

trust were in existence in Africa long before the establishment of the colonial state.¹¹⁷ Generally, 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.¹¹⁸ For example, Asante writing in 1965 stated that property concepts in Ghanaian customary law were impressed with the trusteeship idea.¹¹⁹ Similar assertions have been made with regard to the land tenure systems prevalent in Malawi before colonialism.¹²⁰ Noticeably, Malawi still recognises the notion of traditional leaders through the institution of chieftaincy.¹²¹ These institutions in the past connoted social trusteeship and operated on the basis of a variant of the social trust. Having regard to the history of Malawi, the revitalisation of social trust-based leadership roles would amount to no more than a revival of values traditionally entrenched in societies across Malawi. Legal recognition and enforcement would merely be giving teeth and strengthening an autochthonous institution.¹²²

9 The further advantages of recognising social trust based leadership roles in Malawi

Although public functionaries can also be regulated through the use of criminal law, constitutional law or administrative law, three specific advantages are discernible from recognising social trust-based leadership roles especially in the management of public resources.¹²³ Fiduciary management of resources implies fiduciary control, which in turn entails the application of the three fiduciary duties earlier mentioned. The three further advantages of recognising social trust-based leadership roles in Malawi correspond to the three principles of fiduciary management.

To start with, the first fiduciary principle would ensure that public functionaries do not place themselves in circumstances where personal interests might conflict with duty.¹²⁴ Insistence on this principle would ensure that personal interests do not override the public 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 matters that hold no benefit for the general public compromise efficiency

¹¹⁷ K Bentsi-Enchill "The Traditional Legal Systems of Africa" in FH Lawson (ed) *International Encyclopedia of Comparative Law VI: Property and Trust* (1980) ch 2.

¹¹⁸ Kamchedzera "Land Tenure Relations" in *Malawi at the Cross-Roads* 196-198.

¹¹⁹ S Asante "Fiduciary Principles in Anglo-American Law and the Customary Law of Ghana - A Comparative Study" (1965) 4 *In'l & Comp LJ* 1144.

¹²⁰ B Pachai *Malawi: The History of the Nation* (1973) ch 6.

¹²¹ Chiefs Act, No 3 of 1967 (Ch 22:03 of the Laws of Malawi).

¹²² Notable in this connection is the fact the Constitution of Malawi recognises customary law as a valid source of law in Malawi. See s 200 of the Constitution of Malawi.

¹²³ As earlier stated, examples of using the criminal law in regulating public functionaries in Malawi can be demonstrated by *The State v Sam Mpasu* Criminal Case No 17 of 2005 (unreported); Lilongwe Chief Resident Magistrate's Court Judgment on sentence 08-04-2008; *R v Dennis Kambalame* Criminal Case No 108 of 2002 Judgment on sentence (unreported). In both cases the Court convicted the accused persons of abusing public office and accepting corrupt gratification but failed to recover any of the benefit that had been misallocated. Concededly, the Corrupt Practices Act, No 18 of 1995 (Ch. 7:04 of the Laws of Malawi) has subsequently been amended to facilitate recovery of unjustly acquired benefits.

¹²⁴ This would supplement and bolster the provisions regulating conflicts of interests on the part of public officers, for example, s 88A of the Constitution of Malawi.

and effectiveness. Recognising a social trust-based conception of leadership roles ensures that public functionaries assume their positions on an express understanding that their personal interests shall not compromise the discharge of public duties. This would ensure that maximum benefit is derived from public resources and would also help in ensuring that the beneficial interest is always allocated equitably.

Secondly, 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 are amenable to censure should they fall short. This requirement would encourage resource multiplication and protection and is a condition normally contained in many statutes on trusts.¹²⁵ By invoking this principle, a reasonable degree of prudence would be infused into all actions concerning the management and control of public resources hence increasing the diligence with which public functionaries handle public resources. This would further secure the public's reliance and expectation interests.

Thirdly, fiduciary regulation of public functionaries would ensure that public functionaries are made to act fairly to all beneficiaries. Since the discharge of leadership roles by public functionaries would entail distribution of some beneficial interest derived from the management of the public resources, enforcing social trust-based leadership roles would ensure that public functionaries equitably allocate the beneficial interest. Equity would become the basis upon which any beneficial interest is allocated. Assumption of leadership roles in society would imply acceptance of this basis for allocating the beneficial interest. An equitable allocation of the beneficial interest among the citizenry would ensure that the needs of everyone are adequately catered for within the limits of society's available resources. This would ensure, for example, that the constitutional provisions on gender equality,¹²⁶ support for the elderly,¹²⁷ support for the disabled¹²⁸ and children¹²⁹ are given adequate attention. If fiduciary regulation 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 a disproportional share of hardships in society.

Additionally, 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 earlier. The first strategy of fiduciary control is that all fiduciaries are accountable to those that are set to

¹²⁵ For example, in Malawi, under the Trustee Incorporation Act, No 24 of 1967 (Ch 5:02 of the Laws of Malawi) trustees have the power to compound liabilities and take control of assets (s 24), power to invest securely as authorised (ss 4-20), and also the power of variation of trusts for the benefit of unborn beneficiaries (s 71).

¹²⁶ Ss 13(a) and 24 of the Constitution of Malawi.

¹²⁷ S 13(j).

¹²⁸ S 13(g).

¹²⁹ S 13(h).

benefit from their exercise of duty. Such a demand for accountability from public functionaries is consistent with the constitutional scheme in Malawi.¹³⁰ Insisting on a more strict and vigilant regime for public functionaries' accountability would not involve the introduction of any novel demands but rather a revitalisation of existing structures in a bid to enhance equity and fairness in the management of public resources.¹³¹

The second strategy for fiduciary control requires fiduciaries to provide a satisfactory account of their management and use of any trust resources. A failure to provide a satisfactory account will be held to be a breach of fiduciary duty. A breach of fiduciary duty, like any other breach of trust, affirms the 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 fiduciaries but also their 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 of public resources becomes liable to disciplining by the citizenry. The first and second strategy of fiduciary control enjoin 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.¹³² Obviously, a fiduciary found to have breached a trust is susceptible to removal.¹³³ Aside from removal from office, any resources distributed by the errant fiduciary in breach of the trust become tainted by his breach of duty. Anyone assuming control over such resources may be held to be a constructive trustee. Further, upon establishing a breach of trust there is still 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 lies in the fact that a personal remedy is enforceable only against the person against whom it was awarded, a proprietary remedy, however, may be granted in relation to specific assets and is therefore enforceable against any holder of the asset(s).¹³⁴ The beneficiaries can,

¹³⁰ S 12. The constitutional demand for accountability is supported by the following statutes, among others: Corrupt Practices Act, No 18 of 1995 (Ch. 7:04 of the Laws of Malawi); Public Finance Management Act, No 7 of 2003 (Ch. 37:02 of the Laws of Malawi) and Public Audit Act, No 6 of 2003 (Ch. 37:01 of the Laws of Malawi).

¹³¹ Importantly a basal premise of the Constitution of Malawi is that the locus of power would shift and be located within the people. See F Kanyongolo "The Limits of Liberal Democratic Constitutionalism" in K Phiri & K Ross (eds) *Democratisation in Malawi: A Stocktaking* (1998) 353.

¹³² Tan (1995) *Australian LJ* 452 puts the point thus:

"Breach of fiduciary duty brings into play a scintillating spectrum of remedies. They include: Injunction, prohibitory and mandatory; rescission of transactions between beneficiary and fiduciary; declaration and enforcement of constructive trust in respect of assets acquired in breach of duty; account of profits wrongly made and equitable compensation for loss inflicted by breach of duty."

¹³³ S 86 of the Constitution of Malawi provides 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. Notably, not all public functionaries are amenable to removal by way of impeachment. This makes fiduciary regulation a very flexible mode of regulating a cross-section of public functionaries. Fiduciary regulation does not seek to wholesale substitute constitutional regulation of public functionaries but merely to bolster it.

¹³⁴ R Pearce & J Stevens *The Law of Trusts and Equitable Remedies* (1995) 515.

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.¹³⁵ The beneficiaries are 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 as a result of the breach. 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.

10 Concluding remarks

Commencing from a discussion about the relevance of socio-economic rights to development in Malawi, specifically, and Africa, generally, this contribution has demonstrated the centrality of public functionaries and leadership roles to the protection, promotion and enjoyment of socio-economic rights. In relation to public functionaries and leadership roles, the contribution has also demonstrated how a social-trust based regulation of public functionaries stands a greater chance of creating and sustaining a vibrant framework for the protection and promotion of socio-economic rights in Malawi. This is because while socio-economic rights are constitutionally recognised in Malawi there is a need to formulate a vibrant framework for their enforcement. Only the presence of such a framework would give meaningful content to the socio-economic rights guarantees in the Constitution. Importantly, it is only a vibrant socio-economic rights regime that can trigger meaningful development in Malawi. Admittedly, notwithstanding the importance of recognising and enforcing social trust-based accountability for all duty bearers, practical challenges may arise. What must be noted is that this contribution has only constructed the conceptual edifice that, hopefully, justifies the move towards social trust-based duty bearer accountability.

SUMMARY

This contribution commences by acknowledging that Malawi, like many African countries, faces serious development challenges which seriously impair the ability of African states to improve the livelihoods of their citizenry. The paper argues that any efforts by Malawi and other African countries to improve the livelihood of their citizenry are centrally connected to efforts undertaken to improve the realisation of socio-economic rights. This is because enhanced socio-economic rights realisation would immediately ameliorate the plight of the citizenry. After identifying public functionaries as central to the performance of obligations generated by human rights the paper argues that the social trust concept can be utilised to enervise the performance of duties triggered by socio-economic rights. The paper argues that the social trust concept and the devices founded on it can be utilised to provide an alternative conceptual foundation for understanding and enforcing the duties that socio-economic rights generate in Malawi. The paper then demonstrates how understanding and enforcing duty-bearer obligations for socio-economic rights within the social trust framework stands a greater chance of revitalising the accountability of duty bearers to rights holders.

¹³⁵ These principles would obviously be a handy supplement to the law dealing with recovery of benefits corruptly obtained by public functionaries.