

## CHAPTER 5: (RE)DISCOVERING AND REVITALISING SOCIAL TRUST-BASED GOVERNANCE AND CONSTITUTIONALISM IN MALAWI: THE WAY FORWARD

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### 5.1 Introduction

As stated in Chapter Two, governance and constitutionalism in line with the social trust-based framework is distinct because it draws its inspiration from both *ubuntu* and the trust concept. It is because of the affinities between the principles underlying the social trust and some norms of governance and organisation indigenous to African societies that social trust-based governance and constitutionalism pays proper homage to historicity and local conditions. Crucial to the understanding of social trust-based governance and constitutionalism is an appreciation of the place and role of public functionaries in society. In this Chapter an attempt will be made to demonstrate how social trust-based governance and

constitutionalism can acquire practical significance in Malawi. In demonstrating the relevance and viability of social trust-based governance and constitutionalism the discussion will again focus on the following areas: the relationship between the various branches of government; public resource management; accountability of public functionaries; and citizenry empowerment. These thematic areas have been chosen merely to highlight the areas in which focus ought to be directed in order to improve governance and constitutionalism in Malawi. The choice is in no way to suggest that an exclusive focus on these areas is the panacea for governance and constitutionalism in Malawi.

In thinking about the relevance and practicability of social trust-based governance and constitutionalism it is important to keep in mind the direction provided in Chapter One of this study. In Chapter One, it was specifically highlighted that social trust-based governance and constitutionalism must be understood at two levels – which are not necessarily exclusionary. At the first level, this study presents the social trust-based model as an ‘animating metaphor’ for governance and constitutionalism. At this level the social trust-based model must be understood as providing the philosophical inspiration and conceptual basis for understanding governance and constitutionalism. At the second level, the study contends that the social trust-based model can be utilised as a workable framework for governance and constitutionalism. This means that the social trust-based framework can be utilised in shaping and structuring governance and constitutionalism at the practical level. Understood from the second level, the social trust-based framework can be used as a source of rights and obligations for both the governors and the governed. The framework can thus be utilised to base claims against public functionaries and also to ground remedies for particular breaches of the law. To achieve the preceding largely requires a creative understanding and interpretation of existing laws in Malawi. For both approaches to the social trust-based framework, however, the applicable principles and overall framework remain as highlighted in Chapters Two and Four. It must be borne in mind that this study’s recourse to social trust-based governance is distinct from asserting that either *ubuntu* or the trust applied in isolation is the solution to governance and constitutionalism in Malawi. It is to the synthesis emerging through sublation and transculturation that the study relies on. This synthesis stands on two limbs; the one is informed by principles of the law of trust and the other is informed by values underlying the *ubuntu* philosophy.

In this Chapter, while postulating what can be done for governance and constitutionalism to improve in Malawi, examples from Malawi’s past will be used to highlight some missed opportunities. By demonstrating the applicability and relevance of social trust-based

governance and constitutionalism to the selected areas a broader case for the revitalisation of social trust-based governance and constitutionalism will also be made.

## 5.2 Recapturing the foundation: The law, public functionaries and social trust-based governance and constitutionalism in Malawi

Underlying the discussion in this Chapter is the desire to actualise the potential and hope embodied in the 1994 Constitution.<sup>1</sup> Although the Constitution asserts its relevance to the needs of the poor and vulnerable, there is need to take steps that can help actualise the promises in the Constitution. One must recall that the basal premise of the 1994 Constitution is that the locus of power would shift and be located within the people.<sup>2</sup> In the new constitutional order the state is supposed to exercise its power as a trustee, implying that it is bound to follow the same pattern of regulation and guidance as that which ordinarily influences a trustee's exercise of power.<sup>3</sup> The Constitution remains key to the creation of a new political and social order.<sup>4</sup>

Connected to the above, it is apt to note that the empowerment of the populace is a recurrent theme under the Constitution. The creation of a framework where meaningful empowerment of the populace can take place, however, remains a challenge. This study has so far argued that a strict adherence to the liberal democratic framework will not help in the fulfilment of the empowerment promise in the Constitution. This is why there is need to

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<sup>1</sup> The transition to multi-partyism and the adoption of a new Constitution in Malawi, it is argued, came with the expectation of a new political dispensation based on the rule of law, respect for human rights, democracy, good governance and transparency and accountability – Malawi Law Commission “Constitutional institutions and other oversight bodies” (2006) 4 Discussion Paper No. 5. The drafters of the Constitution, it is also argued, envisaged a government whose central focus would not be controlling people but discharging its functions for the benefit of the people of Malawi in accordance with section 12 of the Constitution which is based on both the social contract and social trust – J Ansah “The 1994 Malawi Constitution and the role of the judiciary” 4 Paper presented at the First National Conference on Review of the Constitution, Capital Hotel, Lilongwe, Malawi 28-31 March 2006.

<sup>2</sup> FE Kanyongolo “The limits of liberal democratic constitutionalism in Malawi” in KM Phiri & KR Ross (eds) *Democratisation in Malawi: A stocktaking* (1998) 353.

<sup>3</sup> Section 12 Constitution of the Republic of Malawi. See, also, R Kasambara “Constitutionalism and democratic accountability during the multiparty decade in Malawi: Challenges and opportunities for the civil society” Paper presented at a workshop on *Constitutionalism and democratic accountability in Malawi and South Africa: Ten years after change* Blantyre 12-13 July 2003 and G Kamchedzera & CMU Banda “‘We are people too’: The right to development, the quality of rural life, and the performance of legislative duties during Malawi’s first five years of multiparty politics” Research Dissemination Seminar Number Law/2001-2002/001, <<http://www.sarpn.org.za/documents/d0001966/index.php>> (Accessed 20 May 2008).

<sup>4</sup> J Banda “The constitutional change debate of 1993-1995” in KM Phiri & KR Ross (eds) (note 2 above) 320.

infuse the liberal framework with norms from indigenous Malawian traditions. In spite of the dominance of liberal democratic ideals in the Constitution, social contract-based discourse has proven incapable of bringing about a better society in Malawi.<sup>5</sup> The way forward, it is argued, is to head the entreaties for a post-liberal, transformative and imaginative reading of the Constitution.<sup>6</sup> It is important to bear in mind that a timorous and unimaginative approach to understanding a constitution renders it a stale and sterile document.<sup>7</sup>

The way forward, therefore, involves the re-imagination and reconstruction of the framework for constitutionalism in Malawi and, arguably, other African countries, if constitutionalism and governance are to take root.<sup>8</sup> It is acutely important to remember that constitutionalism is often the end product of social, economic, cultural and political progress and can only become an established tradition if it forms part of a shared history of the people.<sup>9</sup> It is thus important in attempting to garner constitutionalism and good governance to build on values that are commonly accepted in particular societies. The pursuit of democratic governance and constitutionalism must remain a priority in any polity because the progress that may be achieved over a few years is not irreversible.<sup>10</sup> There must be vigilance to preserve and consolidate the gains that are achieved along the way. A willingness to learn from past failures remains a central premise in the discussion below.

### 5.3 The relationship between the branches of government in Malawi

It is important to note that the executive, judiciary and legislature are all creations of the Constitution. All these organs, therefore, must be regulated and governed by the authority of the Constitution.<sup>11</sup> As was noted earlier, all persons engaged in discharging duties in any of the three branches of government are fiduciaries. The intensity of the fiduciary obligations

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<sup>5</sup> G Kamchedzera in J Lewis & others (eds) *Human rights and the making of constitutions: Malawi, Kenya, Uganda* (1995) 28 29.

<sup>6</sup> K Klare "Legal culture and transformative constitutionalism" (1998) 14 (1) *South African Journal on Human Rights* 146. This can be based on sections 12 and 13 Constitution of the Republic of Malawi.

<sup>7</sup> *Julius Ishengoma Francis Ndyababo v Attorney-General* Per Samatta CJ (quoting Justice EO Ayoola former Chief Justice of The Gambia) (2002) AHRLR 243 249 (Tz 2002).

<sup>8</sup> IG Shivji "State and constitutionalism: A new democratic perspective" in IG Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 27 33.

<sup>9</sup> HWO Okoth-Ogendo "Constitutions without constitutionalism: Reflections on an African Paradox" in IG Shivji (ed) (as above) 3 21.

<sup>10</sup> J Hatchard & others *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspective* (2004) 26.

<sup>11</sup> Section 4 Constitution of the Republic of Malawi.

relevant to a particular public functionary, however, will vary depending on the position that one occupies and the duties that the position creates.<sup>12</sup> As a matter of fact, some positions in government may be fiduciary only as to some but not all of their aspects.<sup>13</sup> It is important to note that while all fiduciaries are not compelled to serve against their will, once they have assumed a position of trust the law will not consciously lower the obligations that they owe their beneficiaries.<sup>14</sup> It is from this perspective that the assessment of the relationship between the branches of government is conducted in this Chapter. This study accepts that the most fundamental fiduciary relationship is that which exists between the citizenry and the state and its agencies.<sup>15</sup>

The central purpose of a constitution must be the facilitation of good governance.<sup>16</sup> While this is the case, it must be conceded that constitutions are, generally, very susceptible to abuse. This is because the very people that are entrusted with the responsibility for protecting the constitution have the greatest motivation for breaching it. It thus behoves everyone in a country to safeguard the principles that the constitution stands for even though the branches of government bear a special responsibility in ensuring that a constitution is observed and respected. As Erasmus put it:<sup>17</sup>

It is up to a nation to protect the fundamental principles and institutions in terms of which it wants to be governed. This requires care and a sober and honest assessment of all facets of political life. It also brings special responsibilities for all branches of government and those institutions tasked with the duty to implement specific rules against abuse of power.

In considering the relationship between the branches of government in Malawi, one notes that the Constitution embodies the concept of separation of powers.<sup>18</sup> The overriding theme

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<sup>12</sup> AW Scott "The fiduciary principle" (1949) 37 (4) *California Law Review* 539 541 and *NZ Netherlands Society Oranje Inc v Kuys* (1973) 2 All ER 1222; (1973) 1 WLR 1126.

<sup>13</sup> This means that labelling public functionaries as fiduciaries does not necessarily import all the incidents of a private trust and such classification should not generate apprehension. One cannot thus use the 'trust in a higher sense' label to shield all public functionaries from fiduciary regulation.

<sup>14</sup> *Meinhard v Salmon* (1928) 249 N.Y 458, Per Cardozo.

<sup>15</sup> PD Finn "The forgotten 'trust': The people and the state" in M Cope (ed) *Equity: Issues and trends* (1995) 131.

<sup>16</sup> AP Mutharika "Towards a more manageable constitution" 3-4 Remarks made at the National Constitutional Review Conference, Capital Hotel, Lilongwe, 28-31 March 2006.

<sup>17</sup> G Erasmus "The bill of rights: Human rights under the Malawi Constitution" Constitution Review Conference, Capital Hotel, Lilongwe, 28-31 March 2006.

<sup>18</sup> Sections 7, 8 and 9 Constitution of the Republic of Malawi provide for the separate status, duty and functions of the executive, legislature and judiciary respectively. The Malawi

that underlies the Constitution, however, is that of constitutional supremacy.<sup>19</sup> The Constitution also harps on the need for accountability on the part of the state in the performance of its duties.<sup>20</sup> Although the Constitution recognises the concept of separation of powers, the very essence of checks and balances is such that the branches of government cannot be perceived as operating in isolation from each other. A considerable degree of overlap is necessarily present in the practical operation of the branches of government. The courts in Malawi have accepted that the relationship between the branches of government is one of co-equal entities whose powers are separate and independent of each other at the operational level.<sup>21</sup>

It is important to note that the basic institutions for democratisation and constitutionalism are mostly in place in Malawi.<sup>22</sup> It is the degree to which these institutions actually function which requires re-examination. Available evidence suggests that the real problem lies with a majority of the public functionaries in the country who seem determined to circumvent and subvert the rules on which the system is supposed to operate.<sup>23</sup> While, at this level, the problem may not be with the law itself, this study contends that the law can play a central role in rectifying this situation. As argued in Chapter Four, the desire to circumvent constitutionally established principles could be attributable, in part, to the failure by the public functionaries to identify with the stipulations in the Constitution. It is as a result of the glaring divergences between the constitutional stipulations and the governance practice that attention ought to be paid to the relationship between the branches of government. It is hoped that a heightened scrutiny, aside from identifying weaknesses in the system, can form

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Supreme Court of Appeal has affirmed the fact that the concept of separation of powers underlies Malawi's democracy – *Attorney General v Fred Nseula and others* MSCA Civil Appeal No. 18 of 1996.

<sup>19</sup> *The State and the Speaker of the National Assembly and others Ex Parte Mary Nangwale* Misc. Civil Cause No. 1 of 2005 8-9 and *Maggie Nathebe v The Republic* Misc. Criminal Application No. 90 of 1997 Per Mwaungulu J.

<sup>20</sup> Sections 12 and 13 Constitution of the Republic of Malawi and G Kamchedzera & CMU Banda "Dignified rural living, the right to development, multiparty politics and legislation in Malawi" (2009) 25 (1) *South African Journal on Human Rights* 73 75.

<sup>21</sup> L Chikopa "The role of the judiciary in promoting constitutionalism, democracy, economic growth and development in Sub-Saharan Africa: The Malawi experience" <[http://www.kas.de/proj/home/events/104/5/veranstaltung\\_id-26377/index.html](http://www.kas.de/proj/home/events/104/5/veranstaltung_id-26377/index.html)> (Accessed 9 July 2009). See, also, *Attorney General v Masauli (representing himself and members of MCP)* MSCA Civil Appeal No. 28 of 1998 (Being High Court Civil Cause No.36 of 1997).

<sup>22</sup> R Ellett *Emerging judicial power in transitional democracies: Malawi, Tanzania, Uganda* (2008) Doctor of Philosophy Dissertation, North Eastern University 279-280.

<sup>23</sup> N Patel & A Tostensen "Parliamentary-Executive relations in Malawi 1994-2004" 16 CMI Working Paper 2006:10.

a basis for generating appropriate interventions. It must be recalled that a constitution is merely an enabling framework and its ideals must be imbued to the management of government structures if its promises are to be translated into reality. The law could, if judiciously developed and applied, provide the prodding required to transform constitutional ideals into reality.

### 5.3.1 The executive in Malawi

Although the term ‘government’ is often conflated with the executive, it is proper to acknowledge that ‘government’ more aptly refers to the three branches of government working together.<sup>24</sup> The interrelationship between the three branches is fundamentally important for governance and constitutionalism. That said, one immediately notes that the executive is given very extensive powers by the Constitution. It is arguable that the common conflation of the ‘government’ with the executive may be as a result of the heightened visibility of the powers of the executive as compared to the other branches. It is not the purpose of the discussion here to dissect the functions that the Constitution confers on the executive. Suffice it to point out that the powers vested in the executive create opportunities for the executive to stultify the other branches of government.<sup>25</sup> The discussion here will focus on three aspects and these are: the supervisory role of the executive; accountability and transparency; and the management of the budget process. A discussion along these lines should shed light on the opportunities for improving governance and constitutionalism in Malawi especially by utilising the social trust-based framework.

#### 5.3.1.1 The supervisory role of the executive

The executive is charged with the initiation of policies and legislation and the implementation of all laws which embody the express wishes of the people of Malawi and which promote the principles contained in the Constitution.<sup>26</sup> This confers a solemn obligation that the executive must consciously bear in all its activities. Centrally, this obligation requires that the executive adequately embody the wishes of the people of Malawi and also work to further the

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<sup>24</sup> See, for example, the following comments “It is therefore trite to observe, that the term Government refers to the Executive arm or organ of the State whose functions are defined in s. 7 of the Constitution” - Per Justice Twea *Malawi Law Society and others v The State and the President and others* Misc. Civil Cause No. 78 of 2002 .

<sup>25</sup> J Hatchard (note 10 above) 57-58 and R Hajat “Enhancing the sanctity of the Constitution in Malawi” Constitution Review Conference, Capital Hotel, Lilongwe 28-31 March 2006.

<sup>26</sup> Section 7 Constitution of the Republic of Malawi. A recent study has, however, demonstrated that the State has not been consistent in discharging its duty to initiate legislation that is designed to improve the quality of life in Malawi – G Kamchedzera & CMU Banda (note 20 above) 73.

principles on which the Constitution is founded. All acts of the executive, as well as the legislature and the judiciary, are subject to the dictates of the Constitution.<sup>27</sup> The fact that the executive is entrusted with the implementation of all laws that embody the express wishes of the people, together with the enormous powers that the Constitution confers on the executive, places the executive in a unique position to supervise the implementation of all laws and policies. This supervisory function necessarily involves the executive discharging oversight functions over agencies that directly fall under it but also, where legal competence allows, agencies that may fall within the ambit of the legislature and judiciary. The express reference in section 8 of the Constitution to the wishes of the Malawian people and the need to further the principles of the Constitution highlights the fiduciary nature of the powers that are conferred on the executive. The power that is conferred on the executive is conferred with clear conditionalities and these are most manifest in sections 12 and 13 of the Constitution,<sup>28</sup> as a starting point. In the exercise of these powers, therefore, the executive must bear in mind the rules of fiduciary regulation. The social trust-based model can thus, at this level, be utilised to provide the conceptual foundation for determining the manner in which governmental authority must be used. The social trust-based framework can be utilised in constructing the philosophy that determines the way in which powers of government must be utilised in Malawi.

The Constitution makes the President the head of the executive with the duty to lead the observance of the Constitution.<sup>29</sup> The office of the President comes with enormous responsibility especially in the light of the extensive powers that the Constitution invests in the Presidency. By way of a quick demonstration of the expansiveness of the powers of the presidency, one notes that the Presidency is given the power to determine the tenure of several constitutional and statutory offices. Among such offices are, the Office of the Director of Public Procurement,<sup>30</sup> the Director of Public Prosecutions,<sup>31</sup> the Attorney

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<sup>27</sup> For example “In this respect we accept the arguments and the views of both the applicants and the respondent that the Constitution is supreme and sets the standard against which all acts and actions of government must be tested and judged.” - Per Justice Twea *The State and the Electoral Commission Ex Parte Bakili Muluzi* Constitutional Civil Cause No. 2 of 2009 (Being Miscellaneous Civil Cause No. 36 of 2009).

<sup>28</sup> See, Chapters One and Two of this study on how and why sections 12 and 13 make the government a fiduciary.

<sup>29</sup> See, section 88(1) of the Constitution and per Justice Twea *Malawi Law Society and others v The State and the President and others* (note 24 above).

<sup>30</sup> See, for example, section 6 of the Public Procurement Act, No. 8 of 2003.

<sup>31</sup> See, section 102 Constitution of the Republic of Malawi.

General<sup>32</sup> and the Director of the Anti-Corruption Bureau.<sup>33</sup> Holders of all these offices may be removed from office by presidential directive if, for example, the President deems the incumbent to be incompetent or incapable of performing the duties of the office.<sup>34</sup> In the exercise of these very wide powers the presidency could benefit from social trust-based regulation.<sup>35</sup> The result would be, for example, in terms of removal of people from office, the presidency would have to forfeit political expediency and genuinely factor the interests of the citizenry into the decision making process. The social trust-based framework would support such a position by the President in the same manner that fiduciary law obligates a fiduciary to prioritise the interests of the beneficiaries over all other interests. It must be recalled, from Chapter Four, that even though rulers in traditional Africa, nominally, had extensive powers, these were, generally, never used to oppress their people. Such rulers still consulted before making decisions and strove to use their powers to further the interests of their people.

The strong presidency in Malawi urges a serious and deliberate respect for the constitutional boundaries between the branches of government especially on the part of the executive. As the Malawi Law Commission has noted, the executive retains the greatest propensity to overstep its constitutional boundaries.<sup>36</sup> A critical analysis of the Constitution also reveals a decidedly clear tilt in favour of the executive in its relations with the other branches of government especially the legislature.<sup>37</sup> This has resulted in a subordination of the legislature to the executive and has significant implications for governance and constitutionalism one of which is the stultification of parliamentary oversight of the executive. While actual experiences in the executive/legislative relations in Malawi are a real source of concern,<sup>38</sup> such concerns would significantly be reduced if the executive discharged its

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<sup>32</sup> See, section 98(6) Constitution of the Republic of Malawi.

<sup>33</sup> Section 6 Corrupt Practices Act Chapter 7:04 Laws of Malawi.

<sup>34</sup> Examples of previous office holders who have been removed on a presidential directive include former Attorney General, Ralph Kasambara; former Director of Public Prosecution, Ishmael Wadi and former Director of the Anti Corruption Bureau, Gustave Kaliwo.

<sup>35</sup> An initial starting point would be to recognise, as a supervening principle, that no power is absolute especially in the public realm. See, *Rookes Case* (1598) 5 Co Rep 99b 100a.

<sup>36</sup> Malawi Law Commission "The Constitution and the executive branch of government" (2006) 43 Discussion Paper No. 4. Hajat notes that "The Executive arm of Government, through overt and covert means, tends to infringe upon and abrogate the powers of the other two organs." – R Hajat (note 25 above). See, also, S Brown "Malawi: The trouble with democracy" (2000) 15 (4) *Southern Africa Report* 19 <<http://www.africafiles.org/article.asp?ID=3640>> (Accessed 3 May 2010.)

<sup>37</sup> N Patel & A Tostensen (note 23 above) 2.

<sup>38</sup> To properly appreciate the tension and dynamics of legislative-executive relations in Malawi see B Dulani & J Van Donge "A decade of legislative-executive squabble in Malawi, 1994 - 2004" in M Salih (ed) *African parliaments: Between government and governance* (2006) 201-

functions within its competence while being mindful and respectful of the competence of the other branches of government. To achieve this requires, at the least, an executive that is headed by a President who is mindful of the obligations in sections 12 and 13 of the Constitution, among others, and willing to govern according to the Constitution's stipulations.<sup>39</sup> This also requires the presence of an empowered populace that can demand that the executive always govern according to constitutional stipulations.

In its supervisory role the executive must act in an exemplary manner if it is to foster greater constitutional compliance among other government departments. One area in which the executive in Malawi could improve is its compliance with judicial decisions, especially those that seem to be adverse to its interests. While overall there has been remarkable compliance with judicial decisions by the executive it is also clear that in a number of significant instances the executive's non-compliance with judicial pronouncements was not due to excusable lapses but premeditated conduct.<sup>40</sup> It must be noted that an executive that leads the way in disobeying decisions that uphold the rule of law and other constitutional stipulations creates a lee-way for a constitutional and governance crisis. The importance of complying with judicial decisions by the executive is that it becomes a factor in fostering democratisation and constitutionalism.<sup>41</sup> This would give the executive the moral and legal credibility for it to properly supervise other branches' compliance with the Constitution.

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224 and N Patel & A Tostensen (note 23 above). The tension between the branches of government remains a constant threat to democratisation in Malawi – W Breytenbach & C Peters-Berries "Malawi has the struggle for democratic endurance just begun?" (2003) 33 (4) *Africa Insight* 71 72.

<sup>39</sup> The *ubuntu* inspired approach to governance requires that the President, like a good traditional leader, must act as a role model for the people. Leaders must thus be exemplary in their manifestation of *ubuntu* values – B Bujo "Springboards for modern African constitutions and development in African cultural traditions" in MF Murove (ed) *African ethics: An anthology of comparative and applied ethics* (2009) 391 394.

<sup>40</sup> FE Kanyongolo *Malawi: Justice sector and the rule of law* (2006) 52. See also *Malawi Law Society and others v The State and the President and others* (note 24 above) where police violently broke up a public demonstration in spite of a High Court order preventing them from doing so. This point was recently illustrated by the executive's non-compliance with the decision in *The State v The Speaker of the National Assembly Ex Parte JZU Tembo* Misc. Civil Cause No. 565 of 2009.

<sup>41</sup> R Ellett (note 22 above) 335.

### 5.3.1.2 Accountability and transparency

The demand for accountability and transparency in the running of the government is very high among Malawians.<sup>42</sup> It is thus important that the executive must always exude transparency and accountability in the performance of its duties. The need for transparency and accountability, it is argued, is more acute in countries like Malawi where the Constitution has created a very strong presidency. In such situations the likelihood of executive abuse is a real possibility. Principles of fiduciary management, which are reflected in some constitutional and statutory provisions, provide a unique basis for conceptualising and understanding accountability on the part of the executive. This is because fiduciary principles have as their central preoccupation the regulation of those individuals that have been entrusted with the performance of functions on behalf of others. To properly appreciate the need for accountability on the part of the executive one must bear in mind the fact that powers of public functionaries are distinct from powers of private persons.<sup>43</sup> This distinctness entails that while the discharge of private powers need not follow any specific principles and cannot be questioned, the discharge of public powers must always follow clear principles and must be imbued with transparency and accountability. Any use public powers that does not comply with the stipulations of law is liable to be questioned. Fidelity to the fiduciary principles and the framework outlined in Chapter Two would bring about greater transparency and accountability in the way powers of government are used. The social trust-based framework can centrally be utilised in monitoring all public functionaries thus subjecting them to very exacting standards in the discharge of their duties.

The Constitution and some statutes, while not couched in strict fiduciary language, already support the fiduciary regulation of public functionaries in Malawi. To enhance the transparency and accountability of the executive, therefore, the concern must be the activation of these existing avenues. For example, section 88A(1) of the Constitution requires that President and members of cabinet disclose all their assets, liabilities and business interests and also those of their spouses or any assets that are held on their behalf upon election or appointment. Such a declaration is supposed to be made in writing to the Speaker of the National Assembly within three months of election or appointment. Section 213 of the Constitution extends this obligation to Members of Parliament (MPs) and such other senior public officers as may be designated by an Act of parliament. The President and

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<sup>42</sup> S Khaila & C Chibwana "Ten years of democracy in Malawi: Are Malawians getting what they voted for?" Afrobarometer Working Paper No. 46 (2005) 13.

<sup>43</sup> W Wade & C Forsyth *Administrative law* (2004) 355.

members of cabinet are also prohibited from utilising their offices for personal gain or from placing themselves in positions where their interests may conflict with their duties.<sup>44</sup>

The principles espoused in sections 88A(1) and 213 of the Constitution reflect a clear intention to subject the President, ministers, MPs and other public officers to fiduciary regulation. As in many other instances, the Malawian challenge has been to convert these constitutional principles into practically binding principles that are observed by the people concerned. Perhaps unsurprisingly, the requirement on declaration of assets has been more ignored than observed. The fact that there is no prescribed penalty for failure to disclose assets has also made the requirement largely redundant. Even more disheartening is the fact that parliament has yet to pass the legislation that was supposed to specify the further categories of public functionaries liable to disclosing their assets upon appointment or election into office.<sup>45</sup> Clearly, while there is a framework that is designed to enhance accountability on the part of members of the executive, this framework has no visible practical significance. It is important to note, in this connection, that the lack of discernible progress on declaration of assets is, arguably, not a reflection of the citizenry's position on the matter. One notes that the National Constitutional Conference of 1995<sup>46</sup> recommended the retention of provisions for declaration of assets and a similar sentiment was expressed during both the First National Constitution Conference in March 2006 and the Second National Constitution Conference in April 2007.<sup>47</sup> It is thus not farfetched to posit that the citizenry in Malawi expect their public functionaries to be constantly transparent and accountable in the performance of their duties.<sup>48</sup>

Accountability and transparency on the part of the executive, however, extends beyond the declaration of assets by public functionaries. As earlier noted, corruption remains the most

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<sup>44</sup> Section 88A (3) Constitution of the Republic of Malawi.

<sup>45</sup> Both section 88A and 213 of the Constitution proceed on the assumption that parliament will, at a later date, pass legislation expounding on the framework for asset declaration in Malawi. The Malawi Law Commission has since started work on legislation for asset declaration.

<sup>46</sup> Government of Malawi "Report of the Constitution Committee to the National Assembly on the National Constitutional Conference on the Provisional Constitution" held in Lilongwe' 20-24 February 1995, 62

<sup>47</sup> Malawi Law Commission "The report of the law commission on the review of the Constitution" (2007) 120-124. In reference to the debates preceding the adoption of the Constitution and debates during the constitutional review processes I am mindful of the fact that the Malawi Supreme Court of Appeal has urged caution in consulting external aids to constitutional interpretation – *Gwanda Chakuamba and others* Civil Appeal No. 20 of 2000 and *The State and Electoral Commission Ex Parte Bakili Muluzi and UDF* (note 27 above).

<sup>48</sup> This was confirmed by, for example, S Khaila & C Chibwana (note 42 above) 13.

significant blight on government business in Malawi<sup>49</sup> – again, this is not to suggest that corruption is the only blot on governance and constitutionalism in Malawi.<sup>50</sup> Lack of transparency and accountability on the part of the executive creates an environment in which corruption thrives.<sup>51</sup> While the causes of corruption in Malawi remain numerous, Englund has convincingly argued that most of the executive’s excesses are a manifestation of the failure of the ‘paraphernalia of liberal democracy’ to curb neo-patrimonialism and greed.<sup>52</sup> Part of the problem with the executive’s accountability and transparency arises from the fact that most public functionaries seem to have prioritised their accountability to their political and bureaucratic superiors and not the citizenry.<sup>53</sup> This seems to be the case even over matters that directly affect the citizenry. As Kamchedzera and Banda note, public functionaries’ accountability to rights holders remains weak, neglected and a missing link in Malawi’s democracy.<sup>54</sup> For example, the Constitution speaks of accountability of ministers to the President and neglects to make any mention of their accountability to right holders.<sup>55</sup> Fiduciary regulation, however, demands that public functionaries must be fully accountable to the citizenry who are the beneficiaries of the fiduciary relationship. Public functionaries must thus primarily be accountable to their constituents and not their political superiors. More worrying, however, have been accusations about the executive instigating the perpetration of corrupt practices especially in the context of canvassing votes for elections.<sup>56</sup> This practice, unfortunately, stifles Malawi’s democracy by distorting electoral competition.

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<sup>49</sup> See, Chapter Three of this study.

<sup>50</sup> See, for example, Millennium Consulting Group *Malawi: Governance and corruption baseline survey* (2006) 5-6.

<sup>51</sup> As to some persistent challenges in the fight against corruption, see D Madise “Challenges in the fight against corruption in Malawi” <<http://www.uneca.org/dpmd/events/corruption/Malawi.pdf>> (Accessed 31 May 2010) and I Kamanga “Combating corruption: Challenges in the Malawi legal system” <[http://www.unafei.or.jp/english/pdf/PDF\\_rms/no76/18\\_p153-159.pdf](http://www.unafei.or.jp/english/pdf/PDF_rms/no76/18_p153-159.pdf)> (Accessed 9 August 2010).

<sup>52</sup> H Englund “Winning elections, losing legitimacy: Multipartyism and the neo-patrimonial state in Malawi” in M Cowen & L Laakso (eds) *Multiparty elections in Africa* (2002) 172 175. For comments on neo-patrimonialism see footnote 127 in Chapter One of this study.

<sup>53</sup> G Kamchedzera & CMU Banda (note 3 above) 31. Finn argues that this anomaly is recurrent in most liberal democracies and it often distorts proper understanding of the constitutional position and obligation of public servant – P Finn “Public trust and public accountability” (1994) 3 (2) *Griffith Law Review* 224 242.

<sup>54</sup> G Kamchedzera & CMU Banda (note 20 above) 98.

<sup>55</sup> Section 97 of the Constitution directs that ministers shall be responsible to the President. An immediate contrast is section 51 of the Constitution of Zambia, as amended by Act No. 18 of 1996 which requires ministers to be accountable to the National Assembly.

<sup>56</sup> R Ellett (note 22 above) 272.

Strictly speaking, therefore, the failures with regard to accountability and transparency on the part of the executive are not as a result of the total non-existence of regulatory standards. While the existing standards may not cover all situations in which shortcomings are apparent, it is arguable that a more committed observance of the existing rules may generate more accountability and transparency.<sup>57</sup> For example, the Corrupt Practices Act<sup>58</sup> makes provisions for combating corruption along terms that are styled on the fiduciary model that this study supports. The underlying theme of the Corrupt Practices Act is that a person should not utilise one's office to acquire a personal benefit. For example, under section 24 it is an offence for a public officer to, among others, corruptly solicit, accept or obtain any advantage or inducement for doing or forbearing to do anything that relates to a public office. Under section 25C public officers who disclose information relating to public contracts before such information is in the public domain are also guilty of an offence.<sup>59</sup> As recognised in *The State v Sam Mpasu*,<sup>60</sup> public functionaries who abuse the powers vested in their offices fundamentally breach section 12 of the Constitution which confers authority to public officers on trust for the citizenry. A breach of the fiduciary obligations inherent in section 12 of the Constitution and other laws should activate the whole range of fiduciary remedies and in the process enhance transparency and accountability.

The need to ensure accountability on the part of the executive is also evident in the procedures for removal of a President by way of impeachment under section 86 of the Constitution. It is arguable that the unanimity of opinion on the retention of provisions pertaining to the impeachment of the President has been motivated by the desire to preserve a mechanism for ensuring accountability of the President.<sup>61</sup> The removal of a President by way of impeachment is a direct parallel of the removal of a trustee for breach of trust and it allows the citizenry to hold the President accountable where the President has been guilty of

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<sup>57</sup> As to why it is in interests of the executive to ensure a more committed observance of the Constitution and other legal rules, see EP Thompson *Whigs and hunters: The origin of the Black Act* (1975) 258-269 and D Hay "Property, authority and the criminal law" in D Hay & others (eds) *Albion's fatal tree: Crime and society in Eighteenth-Century England* (1975) 17-63.

<sup>58</sup> Chapter 7:04 Laws of Malawi.

<sup>59</sup> The Corrupt Practices (Prohibition of abuse of information obtained in official capacity) Regulations provide further detail to the restriction.

<sup>60</sup> *The State v Sam Mpasu* Criminal Case No. 17 of 2005, Lilongwe Chief Resident Magistrate's Court Judgment on sentence 8 April 2008

<sup>61</sup> The 1995 Constitution Review Conference recommended the retention of impeachment provisions (note 46 above) 10. A similar recommendation was reiterated during the 2007 consultations for the review of the Constitution – see (note 47 above) 86 87.

serious violations of the Constitution. It is also similar to the practice that traditional African societies used to discipline rulers that consistently made decisions inimical to the community's interests.<sup>62</sup> It thus remains important for the National Assembly to develop guidelines for the proper utilisation of the procedure under section 86 of the Constitution.<sup>63</sup> The presence of provisions embodying a clear procedure for impeachment would act as a spur in generating a more diligent discharge of duties by the President. The overwhelming opinion, in so far as can be discerned from the Constitution review process, strongly suggests that Malawians are aware and want the President to remain accountable to the populace.<sup>64</sup>

### 5.3.1.3 Management of the budget process<sup>65</sup>

Government expenditure is principally controlled by the executive. It is the executive, primarily, that determines how the various government departments must be funded in a specific year.<sup>66</sup> The executive allocates funds by presenting an Appropriation Bill to the National Assembly, which may either pass it as proposed by the executive or after making amendments. The Appropriation Act, which the executive must ensure is passed every year, is also known as the national budget or simply the budget. It is said that<sup>67</sup>

[b]udget processes across the world share four common purposes: To review past performance; mobilise and allocate resources; provide for financial management and accountability; and to act as a platform for introducing new policies. The budget process should determine the distribution of – and who benefits from - limited resources. The budget is, therefore, inherently a political process determined by political power, both formal and informal with winners and losers.

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<sup>62</sup> See the discussion in Chapter Four of this study.

<sup>63</sup> While section 86 of the Constitution allows for the impeachment of the President it is notable that the provision does not provide detail as to how this must be effected. This lack of detail contributed very much to the confusion and eventual stalling of the attempt to impeach Bingu wa Mutharika in 2005.

<sup>64</sup> See, Government of Malawi (note 45 above) 10 and Malawi Law Commission (note 46 above) 86.

<sup>65</sup> The discussion under this heading is connected to the discussion on public resource management under Part 5.4 in this Chapter.

<sup>66</sup> This duty is discharged in close conjunction with parliament – See Chapter XVIII of the Constitution. Chapter XVIII is supplemented by the Public Finance Management Act, No. 7 of 2003.

<sup>67</sup> CMI “The budget as theatre – the formal and informal institutional makings of the budget process in Malawi” Final Report July 2004 <<http://www.cmi.no/publications/publication/?1928=the-budget-as-theatre-the-formal-and-informal>> (Accessed 9 July 2009)

The budget can give a clear indication of a particular government's priorities by looking at the manner in which national resources have been allocated, both in the past and in terms of future expenditure projections. Importantly, it is the processes that are followed by the executive in formulating the Appropriation Act that remain centrally important if the budget must reflect and address the real needs of the citizenry.

The executive owes the citizenry two principal duties in relation to the Appropriation Act.<sup>68</sup> Firstly, it must fully involve the citizenry in the formulation of the Appropriation Act. In Malawi, in spite of statutory safeguards to ensure citizenry participation in the formulation of the budget, the citizenry remains marginalised in the budget formulation process.<sup>69</sup> Notably, there is a general lack of transparency in the pre-budget consultations especially in so far as it involves the ordinary citizens.<sup>70</sup> The forms of pre-budget consultation that are currently legally recognised seem to be designed to facilitate conversation between government departments rather than with the citizenry.<sup>71</sup> One also notes that parliament has extended the practice of waiving the notice period before a bill is debated to the Appropriation Act.<sup>72</sup> While parliament can legitimately waive the period of notice before a bill is actually debated under Standing Order 117, it is the frequency of resort to such waivers that is worrying. Even more, such waivers are often at the instance of the executive and where what is at issue is as complex as the national budget it is doubtful whether full consultation over the budget is facilitated during the abridged period. It must constantly be borne in mind that for a legislature to be effective in checking the executive adequate time is needed to study policy proposals and bills and to prepare for debate.<sup>73</sup> The overall result in this regard is that the budget making process is routinely compromised by informal factors that sometimes run

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<sup>68</sup> These duties foundationally stem from the terms of section 7 Constitution of the Republic of Malawi.

<sup>69</sup> The statutory safeguards are contained in the Public Finance Management Act, Public Audit Act, No. 6 of 2003 and Public Procurement Act. These statutes were enacted in 2003 following recommendations by the World Bank-led Country Financial Accountability Assessment – CMI (note 65 above).

<sup>70</sup> Malawi Economic Justice Network *The peoples manifesto: Elections 2009*.

<sup>71</sup> See, for example, section 21 of the Public Finance Act which directs the minister of finance to present estimates to cabinet at least 14 days before presenting them to the National Assembly.

<sup>72</sup> N Patel & A Tostensen (note 23 above) 13.

<sup>73</sup> As above. Parliamentarians interviewed took the view that while some waivers were acceptable in a democratic dispensation other waivers seemed to be 'sinister'. It was suspected that the executive deliberately created situations of urgency so that bills could be passed through parliament without adequate scrutiny and proper debate.

counter to the formal requirements.<sup>74</sup> To change this situation does not require monumental interventions. For example, the executive merely need create more avenues for consultations in drawing up the budget. Avenues that move the consultation beyond the inter-departmental consultation that dominates the process at the moment. This amounts to no more than reviving the process of consultation, which this study has already demonstrated, permeated and still permeates traditional Malawian societies.

The second duty that the executive owes is to create sufficient mechanisms for the citizenry to monitor the implementation of the budget. Once the Appropriation Act is passed, the executive must ensure that the citizenry have sufficient means to monitor its implementation. Monitoring helps to ensure that the government spends funds in line with the approval given by parliament. Again, one notes that the safeguards contained in the Public Finance Management Act,<sup>75</sup> for example, are designed more to facilitate intra-governmental monitoring than monitoring by the populace. At the same time it is axiomatic to note that the inclusion of an item in the Appropriation Act creates an obligation on the executive to disburse the funds allocated to such an activity.<sup>76</sup> Clearly, to ensure that there is sufficient transparency, full citizenry participation and clear mechanisms for monitoring the budget process, there is need to work on ways to enable the bureaucrats in the executive to recast their roles from bureaucrats to trustees.<sup>77</sup> Hopefully, when their conception of their job changes, and with it their understanding of the duty and trust their position holds, the bureaucrats may carry out their duties in a revised manner. Such a change in perception is likely to improve the performance of the executive not only in relation to the budget process but also to the performance of its various constitutional duties.

In relation to the failures by the executive to facilitate public involvement in the formulation of the national budget and also in the supervision of its implementation, research suggests that this may be as a result of the manner in which the 'new' standards in public finance management were developed.<sup>78</sup> While the Public Finance Management Act, the Public Audit Act and the Public Procurement Act clearly evidence a shift of perspective in relation to the

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<sup>74</sup> CMI (note 67 above) 5.

<sup>75</sup> Act No. 7 of 2003.

<sup>76</sup> *The State and The Minister of Finance Ex Parte Bazuka Mhango and others* Misc. Civil Cause No. 163 of 2008 (HC) (Mzuzu District Registry) 22-25

<sup>77</sup> MC Wood "Advancing the sovereign trust of government to safeguard the environment for present and future generations (Part II): Instilling a fiduciary obligation in governance" (2009) *Environmental Law* 91 130.

<sup>78</sup> CMI (note 67 above).

management of public finances in Malawi, the government has been very slow in giving effect to these enactments. It is notable that the revised framework on public finance in Malawi was driven by donor influence. The ‘donor-ownership’ of the public finance reform initiative has, unwittingly, deprived it of legitimacy and credibility. As has been noted ‘[w]hile technically sound and feasible ... these donor initiatives are not seen as legitimate by the government.’<sup>79</sup> The government signs up to the various reform agendas merely because it is under pressure to identify new sources of funding but with no ingrained commitment to abide by the reform agenda. This reiterates the need to have reform that is truly owned by the populace and driven from the base upwards, as this study has emphasized through-out. It would be much easier to generate acceptance for standards in the public finance realm where these standards can be identified as having been established under local impetus.

### 5.3.2 The legislature

The legislature is a crucial component in any democratic society and it is essential in ensuring the rule of law and protection of human rights.<sup>80</sup> Barker argues that by virtue of the doctrine of separation of powers, the legislature is the body that is intended to curb the excesses of executive power, call public officers to account and also prevent the enactment of unjust laws.<sup>81</sup> Where a parliament fails to discharge these responsibilities corruption and misconduct among government officials thrive.<sup>82</sup> Evidently, among the principal tasks of a legislature are the conversion of peoples’ will into law and also controlling the executive and the public administration, generally.<sup>83</sup> The legislature is uniquely positioned to allow citizenry participation in government business as it is composed of peoples’ representatives.<sup>84</sup> Through parliaments, the citizenry can have a say in the manner in which government exercises its powers and thus actualise the promise of democratic participation. In modern day societies, it must stated, parliament comes closest to embodying a forum for

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<sup>79</sup> As above.

<sup>80</sup> *Parliament: Guardian of human rights international parliamentary union* (1993) 5. For attributes that a parliament must possess to be legitimate, see Inter-Parliamentary Symposium “Parliament: Guardian of human rights” Budapest, Hungary, 19-22 May 1993 <<http://www.ipu.org/splz-e/budapest.htm>> (Accessed 7 July 2010).

<sup>81</sup> ML Barker “Accountability to the public: Travelling beyond the myth” in PD Finn (ed) *Essays on law and government: Principles and Values* (1995) 228 239.

<sup>82</sup> As above.

<sup>83</sup> CMI (note 67 above).

<sup>84</sup> *The State and the President of the Republic of Malawi and others Ex Parte Malawi Law Society* (note 24 above) 16-17. Concededly the representatives in parliament represent different constituencies in the country. However, a proper discharge of the representational function should allow parliamentarians to know when to prioritise the national interest.

consultation over matters of national interest in the same way that traditional societies would hold council to deliberate communal issues. In the discharge of its functions, therefore, parliament could also look to the values underlying *ubuntu* for inspiration. While parliament's roles in relation to governance and constitutionalism are diverse, the discussion herein will focus on the following areas:<sup>85</sup> parliament's oversight of the executive; parliament's representational role; and the role of parliament in budgetary supervision.

### 5.3.2.1 Oversight over the executive

Parliament's oversight role with regard to the executive's activities covers diverse areas. It may, for example, relate to oversight over public spending or oversight in relation to the passage of legislation.<sup>86</sup> Various mechanisms may also be employed to achieve the oversight. Parliament's oversight with regard to public spending is discussed separately under 5.3.2.3 and this section will focus on other forms of oversight over the executive.

The Constitution confers all legislative powers on the National Assembly.<sup>87</sup> With respect to its powers to pass legislation the National Assembly cannot effect an illegal delegation of its powers.<sup>88</sup> This means that while the executive has the responsibility of initiating laws and policy, it must invariably seek parliamentary approval before its proposals can acquire the imprimatur of legality. It is during this process of validating executive proposals that parliament acquires relevance for the purposes of overseeing the executive. Legislative oversight over the executive can be achieved in three ways: parliamentary questions, parliamentary debates and parliamentary committees.<sup>89</sup> Importantly, section 8 of the Constitution directs that the legislature must, in enacting laws and conducting its deliberations, reflect the interests of all the people of Malawi and further the values explicit or

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<sup>85</sup> These areas are chosen merely by way of illustration. De Klerk, for example, sums up the problems with parliament in Malawi thus: 'Parliament has been criticised for its failure to perform its parliamentary functions. It has also been criticised for failing to maintain democratic structures amid allegations of a limited separation of powers. A lack of transparency and accountability, a failure to reinstate the senate, and the removal of the recall provision...' B de Klerk "Is the face of democracy changing in Malawi?" (2002) 4 *Conflict Trends* 15 16.

<sup>86</sup> J Hatchard & others (note 10 above) 130-138.

<sup>87</sup> Section 48 Constitution of the Republic of Malawi. Technically, it is the National Assembly and the President as Head of State that make up parliament – section 49 Constitution of the Republic of Malawi.

<sup>88</sup> A permissible exception is the power to pass subsidiary legislation which may be delegated to the judiciary or the executive - Section 58(2) Constitution of the Republic of Malawi. See also *The State and the President of the Republic of Malawi and others Ex Parte Malawi Law Society* (note 24 above) 8.

<sup>89</sup> J Hatchard & others (note 10 above) 131-133.

implicit in the Constitution. The effect of section 8, this study contends, is to confer a solemn fiduciary obligation on the legislature in the way in which it performs its functions. The powers that the Constitution has conferred on the legislature must thus be exercised to preserve and promote the interests of the people of Malawi.

While it is evident that parliament in Malawi does engage in parliamentary questions, parliamentary debates and also has parliamentary committees, the dominance of the executive tends to dilute the oversight role of parliament.<sup>90</sup> The constitutional scheme obtaining in Malawi necessarily means that parliament is often overshadowed by the executive.<sup>91</sup> This, however, does not mean that parliament should abdicate its oversight functions. At the same time, however, it must be noted that in spite of the available opportunities ‘the two democratic parliaments [have] not distinguished themselves in legislative initiatives or penetrating oversight of the executive.’<sup>92</sup> The same is true of the Third Democratic Parliament which seemed to be more preoccupied with partisan squabbling than overseeing the executive. While it is still early to pass judgment on the Fourth Democratic Parliament it is clear that the ruling party’s overwhelming dominance in parliament is working to negate parliamentary scrutiny of executive action.<sup>93</sup>

Parliament’s oversight role has also been perpetually hamstrung by parliamentarians’ prioritisation of partisan interests over the national interest.<sup>94</sup> The machinations of party politics within the National Assembly have constantly undermined any democratic credentials that the National Assembly may otherwise have claimed. The prioritisation of partisan interests over national interests was recently manifested by parliament’s refusal to

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<sup>90</sup> For parliamentary committees, see Part XXXI of the Standing Orders and section 56(7) Constitution of the Republic of Malawi and for parliamentary question time see Part XXI Standing Orders and section 89(4) Constitution of the Republic of Malawi.

<sup>91</sup> N Patel & A Tostensen (note 23 above) 4.

<sup>92</sup> B Dulani & J Van Donge (note 38 above) 203.

<sup>93</sup> In the 2009 General Elections the Democratic Progressive Party (DPP) secured 113 seats out of the 192 available seats. The largest opposition party, the Malawi Congress Party (MCP) secured 27 seats. The DPP’s presidential candidate got 66.17% of the national votes and his closest rival got 30.49% - <<http://www.eisa.org.za/WEP/mal2009results2.htm>> (Accessed 25 May 2010). This the first time since 1994 that a political party has managed to secure such an overwhelming majority in parliament as well as for a presidential candidate to secure almost two-thirds of the national vote.

<sup>94</sup> See, NS Khembo “The constitution, constitutionalism and democracy in Malawi: The reign of a parliamentary oligarchy” in AG Nhlema (ed) *The quest for peace in Africa: Transformations, democracy and public policy* (2004) 269. This dilemma also brings to the fore the complexities of the concept of representation especially the question of mandate independence – HF Pitkin *The concept of representation* (1967).

pass the national budget on time in two successive years.<sup>95</sup> It is notable that the reason for the stalemate in parliament was the disagreement between the political parties on whether the Speaker of the National Assembly should declare vacant seats of certain members that had purportedly crossed the floor. On the two occasions earlier referred to, parliament remained unmoved even in the face of widespread public protests for it to convene and discuss the national budget. The position adopted by the majority of the parliamentarians on this occasion clearly did not accord with the direction provided in section 8 of the Constitution for it disregarded the fact that parliament exists to promote the interests of the citizenry. The parliamentarians' conduct clearly undermined the fiduciary core of their positions.<sup>96</sup>

In spite of the factionalism that has largely negated parliament's potential with respect to its oversight role, it is important to note that there still exist several opportunities that may be utilised to develop parliament's oversight role. Firstly, parliament is mandated to summon the President to answer questions about the performance of the executive.<sup>97</sup> This is an avenue through which the peoples' representatives can question and interrogate government policy. Secondly, parliament is uniquely empowered to oversee executive spending through the avenues created by the Public Audit Act<sup>98</sup> and the office of the Auditor General.<sup>99</sup> The Public Audit Act was passed to 'give effect to the principle of the accountability of the Government to the public through the National Assembly.'<sup>100</sup> The Auditor General is given extensive powers under the Public Audit Act to conduct audits of public institutions and report to the National Assembly.<sup>101</sup> Ideally, the National Assembly should, by reference to the reports of the Auditor General, be better placed to query the executive on the manner in which government resources are being utilised.

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<sup>95</sup> See, "Stalemate between Malawi ruler, parliament intensifies" <<http://www.polity.org.za/print-version/stalemate-between-Malawi-ruler-parliament-intensifies-2008-02-20>> (Accessed 24 May 2010) and Malawi finance minister defies parliament <[http://www.namibian.com.na/index.php?id=28&tx\\_ttnews%5Btt\\_news%5D=31920&no\\_cache=1](http://www.namibian.com.na/index.php?id=28&tx_ttnews%5Btt_news%5D=31920&no_cache=1)> (Accessed 24 May 2010).

<sup>96</sup> Cf. *The State and Speaker of the National Assembly and others Ex Parte Titus Divala* Misc. Civil Cause No. 225 of 2007.

<sup>97</sup> Section 89(4) Constitution of the Republic of Malawi.

<sup>98</sup> Act No. 6 of 2003.

<sup>99</sup> Created under section 184 Constitution of the Republic of Malawi.

<sup>100</sup> Section 3 of the Public Audit Act.

<sup>101</sup> See, for example, section 15 of the Public Audit Act.

Thirdly, parliament can improve the exercise of its oversight functions through the committee system. It must be recalled that parliament in Malawi, like in most other countries, conducts its business in a plenary and through a committee system.<sup>102</sup> It is arguable that much of a parliament's most effective work is conducted through the committees which are normally all-party group of members who oversee a specific area of government activity.<sup>103</sup> The Constitution establishes four committees<sup>104</sup> and others have been set up by parliament under licence given by the Constitution.<sup>105</sup> The value of the committee system is that it allows the development of specific expertise by members within their areas of competence and thus gives the members better ability in overseeing the executive.<sup>106</sup> Sadly, except for the Public Accounts Committee, lack of funding has effectively negated the potential of the committee system in Malawi.<sup>107</sup> Under the prevailing conditions, therefore, oversight through the committee system is compromised. If Malawi's commitment to democratic governance is genuine it is important to revive the committee system in the national assembly principally by allocating sufficient funds for their operation.

While parliament has struggled to exert its oversight role over the executive, there are some notable instances that are a source of hope for the future. Parliamentary rejection of the proposal by former President Muluzi to amend the Constitution and remove the clause on limitation of presidential terms remains a strong reminder of the potential that parliament possesses.<sup>108</sup> It is also notable that parliament's rejection of the proposed amendment coincided with the view that was manifestly supported by the majority of Malawians as manifested by public demonstrations on the issue. Overall, the executive/legislative relations up to 2009 have largely been strained and tense. This has been manifested, for example, in

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<sup>102</sup> Malawi National Assembly "Challenges for Parliament in 2008" *The Daily Times* 7 January 2009.

<sup>103</sup> J Hatchard & others (note 10 above) 132-133.

<sup>104</sup> The Constitution establishes the following committees; Budget and Finance Committee, Legal Affairs Committee, Public Appointments Committee and Defence and Security Committee, See sections 56(7) and 162 of the Constitution. See, part XXXI of the National Assembly Standing Orders for the other parliamentary committees.

<sup>105</sup> Section 56(6) Constitution of the Republic of Malawi allows the National Assembly to set up parliamentary committees.

<sup>106</sup> J Hatchard & others (note 10 above) 133.

<sup>107</sup> B Dulani & J Van Donge (note 38 above) 203-222. See also, N Lawton "Report on indicators for monitoring good governance in Malawi" (2002) 73-75 Centre for Social Research, University of Malawi and United Nations Economic Commission for Africa.

<sup>108</sup> N Patel & A Tostensen (note 23 above) 10-11 and B Dulani & J van Donge (note 38 above) 210-213.

the duration and number of sittings that parliament has had over the years.<sup>109</sup> The duration and number of sittings have also contributed to lessen the oversight that parliament would ordinarily have exercised over the executive.<sup>110</sup> It is a fact that parliament in Malawi has far fewer sittings than other parliaments within the region.<sup>111</sup> In order to have more robust parliamentary oversight over the executive and the public administration generally, an increase in the number and duration of parliamentary sittings would be in order.

### 5.3.2.2 Representational role

Representation in a democratic context is a complex phenomenon and may entail different things to different people at different times. It is beyond the scope of this study to explore the various facets to representation. Suffice it to point out that representation may entail ‘standing for’ in a descriptive sense, ‘standing for’ in a symbolic sense or ‘acting for.’<sup>112</sup> In spite of the conceptual complexities around ‘representation’ available research suggests that Malawian constituents largely think of their parliamentarians as acting for them in the sense of representing their interests in the National Assembly.<sup>113</sup> As researchers found out:<sup>114</sup>

With regard to the role of a member of parliament, the majority of the respondents had a clear view as to what they are elected for: as a voice of the people in front of the government. Nearly two-thirds considered the most important task of an MP as bringing the opinion of the population closer to the government ... which reflects the results obtained from another and much more qualitative study: ‘participants throughout the country have an extremely well defined and remarkably consistent perception of what the role of their Member of Parliament should be. The MP should be a messenger rather than a leader or a boss. His or her duty is to meet with constituents, hear their problems and take these problems to parliament or the government where they can be addressed.’

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<sup>109</sup> In this regard it is worth noting that meetings of the National Assembly are called by the Speaker of the National Assembly in consultation with the President – section 59(1) Constitution of the Republic of Malawi.

<sup>110</sup> In the past 15 years this has been further constrained by an opposition parliamentary boycott and a presidential prorogation of the National Assembly.

<sup>111</sup> N Patel & A Tostensen (note 23 above) 12-13.

<sup>112</sup> See, H Pitkin (note 94 above) and FR Ankersmit *Political representation* (2002).

<sup>113</sup> C Mthinda & S Khaila “Responsiveness and accountability in Malawi” Afrobarometer Briefing Paper No. 31 (2006). The only High Court decision to have attempted to explore the question of representation in Malawi, in this study’s opinion, horrendously misconstrued the matter and made no clarification on the precise relationship between parliamentarians and their constituents in Malawi – *Chakuamba v Ching’oma* Misc Civil Cause No. 99 of 1996 .

<sup>114</sup> G Erdmann & others “Political attitudes: How democratic are Malawi’s citizens? Results from a 1998 opinion survey” (2000) 28-29.

This version of representation makes it even more important for parliamentarians to adequately reflect the interests of their constituents in all parliamentary business.<sup>115</sup> The parliamentarian is the umbilical cord that connects the people with the legislature and government generally. Clearly, parliament in Malawi, because of its broad based membership and the manner in which it operates, possesses great potential to contribute towards democratisation and constitutionalism.<sup>116</sup> The expectations of the populace from their parliamentarians establish the parliamentarians in a fiduciary position where, like trustees,<sup>117</sup> they must act to promote the interests of their constituents first and foremost. This expectation interest also places parliamentarians in a position similar to traditional leaders of years gone by who, in all their actions, were enjoined to protect and promote societal interests before their personal interests.<sup>118</sup>

In as far as parliament's representational role is concerned; three issues adequately highlight the challenges and prospects that have faced parliament in Malawi. The first relates to the question of members crossing the floor, the second concerns the recall provision and the third is about the provision for the senate in the Constitution. These issues will now be briefly discussed separately. These issues also provide an indication of the areas in which action must be taken if the social trust-based framework is to take root.

In the legislative context, crossing the floor or floor crossing occurs when a sitting MP leaves a party under the colours that he or she was elected to join another party or to sit as an independent.<sup>119</sup> In Malawi, crossing the floor is regulated by section 65 of the Constitution.<sup>120</sup>

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<sup>115</sup> This study agrees with Burke that even though parliamentarians are elected by specific constituencies, parliament itself must work to promote the national interest. Parliament should not operate as a congress of representatives with divergent interests – E Burke “On representative democracy” Speech at the conclusion of the poll Bristol, 3 November 1774 <<http://www.tarn.org/burke.html>> (Accessed 21 June 2010).

<sup>116</sup> B Chinsinga “Malawi’s democracy project at the cross roads” in *Towards the consolidation of Malawi’s democracy* (2008) 7 11 Konrad Adenauer Occasional Paper No. 11.

<sup>117</sup> Expectation and reliance interest, as demonstrated in Chapter Two, are crucial indicators of fiduciary relationships.

<sup>118</sup> The fact that there may be competing societal interests does not diminish the fiduciary core of such positions. As Finn has noted, where a fiduciary serves classes of beneficiaries possessing different rights, though obliged to act in the interests of the beneficiaries as a whole, the fiduciary must nonetheless act fairly as between different classes of beneficiaries in taking decisions which affect the rights and interests of the classes between themselves – PD Finn (note 15 above) 131 138.

<sup>119</sup> J Hatchard & others (note 10 above) 142.

Apart from sustaining a barrage of litigation this provision has, in its life time, also been subject to a constitutional amendment that was clearly improperly motivated – the amendment being designed to ‘deal’ with parliamentarians that had resigned from the then ruling party. Because of the often strong partisan sentiments that have surrounded section 65, its interpretation and application by successive Speakers of the National Assembly has also constantly been mired in controversy.<sup>121</sup> The zenith of the controversy surrounding section 65 was, in all probability, reached when a presidential referral on the constitutionality of the section was forwarded to the judiciary.<sup>122</sup>

Section 65, in its original formulation, was largely in line with the Westminster understanding of crossing the floor and sought to regulate MP’s movement within the National Assembly.<sup>123</sup> As a result of a 2001 amendment, however, the provision was extended to regulate membership of organisations that were not represented in the National Assembly as long as these organisations or association had objectives that were political in nature.<sup>124</sup> By virtue of the amendment, an MP could be deemed to have crossed the floor if one resigned from a political party represented in parliament and joined an organisation or another political party whether these were represented in parliament or not. The 2001 amendment to section 65 was subsequently declared unconstitutional by the High Court.<sup>125</sup> On the occasion of the presidential referral, the High Court, sitting as a Constitutional Court, upheld the validity of section 65.<sup>126</sup> On appeal to the Malawi Supreme Court of Appeal, the High Court’s finding was upheld. The Malawi Supreme Court of Appeal held that section 65 is constitutional and

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<sup>120</sup> The original section 65(1) provided thus: ‘The Speaker shall declare vacant the seat of any member of the National Assembly who was, at the time of his or her election, a member of one political party represented in the National Assembly, other than by that member alone but who has voluntarily ceased to be a member of that party and has joined another political party represented in the National Assembly.’

<sup>121</sup> Former Speaker of the National Assembly, Sam Mpasu, clearly applied the provision in a discriminatory manner targeting opposition politicians, see N Patel & A Tostensen (note 23 above) 11.

<sup>122</sup> *In the matter of a Presidential Reference of a dispute of a constitutional nature under section 89(1)(h) of the Constitution and In the matter of section 65 of the Constitution and In the matter of the question of crossing the floor by Members of the National Assembly* Presidential Reference No. 2 of 2005. Argued on appeal as Presidential Reference Appeal No. 44 of 2006.

<sup>123</sup> M Chigawa “The concept of crossing the floor under Malawian constitutional law” (2008) 2 (2) *Malawi Law Journal* 185.

<sup>124</sup> The amended section 65 had the following addition to the original provision: ‘... or has joined any other political party, or association or organisation whose objectives or activities are political in nature’.

<sup>125</sup> *The Registered Trustees of the Public Affairs Committee v The Attorney General and The Speaker of the National Assembly* Civil Cause No. 1861 of 2003.

<sup>126</sup> Note 122 above.

does not infringe the political rights in Chapter Four of the Constitution. The effect is that the Constitution prevents MPs from changing their party allegiance once they have joined parliament on a particular party ticket. MPs that change their allegiance run the risk of having their seats declared vacant by the Speaker of the National Assembly. It is worth noting that public consultations on floor crossing have unanimously endorsed the retention of the provision in the Constitution.<sup>127</sup>

Recall of parliamentarians in Malawi was regulated by section 64 of the Constitution. Section 64 provided that constituents could petition for the recall of a parliamentarian from the National Assembly by submitting a petition to the Electoral Commission. This provision was repealed from the Constitution during the first sitting of the First Democratic Parliament. Ever since the provision's repeal, however, there has been constant clamouring for the reintroduction of the provision as evidenced by the recommendations of the Malawi Law Commission in the Constitution Review process.<sup>128</sup> It seems to be the case that there is unanimity of opinion in favour of the reintroduction of the recall provision and that, as contrasted to the original section 64, an improved version of the provision should also clarify the conditions and the manner in which the recall should be performed.

Under the original section 49(1) of the Constitution, parliament consisted of the National Assembly, senate and the President as Head of State. Under the current section 49(1) parliament consists of the National Assembly and the President as Head of State. This is because in 2001 the National Assembly repealed all provisions relating to the senate.<sup>129</sup> Under the original scheme parliament was bi-cameral and the National Assembly was the lower house with directly elected representatives. The senate was the upper house and it was designed to be composed of chiefs and other indirectly elected members appointed to represent specific interest groups.<sup>130</sup> The senate shared some functions with the National Assembly but also possessed some powers that were specific to it. For example, the senate was empowered to debate motions for the indictment or conviction of the President or Vice

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<sup>127</sup> Government of Malawi (note 46 above) 9 and Malawi Law Commission (note 46 above)50-52.

<sup>128</sup> Malawi Law Commission (note 47 above) 47-50; G Erdman & others (note 114 above) 30 and Government of Malawi (note 46 above) 25-66.

<sup>129</sup> Act No. 4 of 2001. The legality and propriety of the repeal of the senate provisions has been discussed by M Chigawa "The Senate as the second chamber of parliament in Malawi: Its relevance, composition and powers" Paper for Presentation at the Malawi Law Journal Launch Conference 16-17 July 2008, Blantyre, Malawi.

<sup>130</sup> See, repealed section 68 Constitution of the Republic of Malawi.

President by impeachment.<sup>131</sup> It is mainly in its composition that the senate was distinctly different from the lower house.

The above outlined issues exemplify the dilemmas that parliament has faced in achieving its representational role but also highlight the areas in which parliament could improve on in a bid to enhance governance and constitutionalism. In the first place, the repeal of section 64 greatly undermined the accountability of the peoples' representatives to their constituents. As Kanyongolo has argued:<sup>132</sup>

The accountability of the government to the people through parliament is also limited by the Constitution which does not empower constituents to recall a member of parliament during his or her term of office regardless of whether he or she has ceased to command their trust and confidence as a representative.

Without doubt the ability of constituents to recall their parliamentarians generated a strong connection and fidelity between the representatives and their constituents. Parliamentarians who are discharging their functions fully mindful that aberrations on their part may result in a recall are better placed to articulate and prioritise the interests of their constituents. It is striking that the recall is, in its nature, akin to beneficiaries of a trust removing a trustee for breach of trust. The provisions enabling constituents to recall parliamentarians, it must be noted, are very much within the philosophy informing the social trust-based framework and would work to enhance accountability of parliamentarians. The ability to recall parliamentarians must be an integral part of the democratic process in Malawi if governance has to be responsive and accountable.

In the second place, the debacle over floor crossing reveals both opportunities and challenges in relation to parliament and its representation role. The amendment to section 65 in 2001 was especially worrying for it was legislation aimed at specific individuals.<sup>133</sup> Partisan interests clearly motivated the adoption of the amendment and one easily notes that this violated the principle barring legislation targeting specific individuals.<sup>134</sup> It must also be noted that regulating the movement of parliamentarians within the National Assembly contributes to ensuring fidelity of parliamentarians to their constituents. Clearly, a non-

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<sup>131</sup> Repealed section 70(c) Constitution of the Republic of Malawi.

<sup>132</sup> FE Kanyongolo "The constitution and the democratisation process in Malawi" in O Sichone (ed) *The state and constitutionalism in Southern Africa* (1998) 1 6.

<sup>133</sup> B Dulani & J van Donge (note 38 above) 214.

<sup>134</sup> Cf. *Liyanage v The Queen* (1967) 1 AC 259.

partisan implementation of section 65 may contribute towards the entrenchment of democratic governance and constitutionalism. It is, arguably, as a result of the values that the provision embodies that the provision's validity and necessity has been affirmed.<sup>135</sup>

Lastly, the abolition of the senate, aside from questions about the constitutional propriety of parliament's action, resulted in over-strengthening the executive in a context in which the executive is already too strong.<sup>136</sup> This was achieved at the expense of the value contribution that bicameralism would have added to Malawi's system of governance. As Chigawa has argued, it is beyond doubt, especially in the light of the performance of the unicameral parliament over the past fifteen years that the senate would have contributed to enhancing the rule of law and general accountability of parliamentarians.<sup>137</sup> Even more, as a result of its distinct membership it would have greatly enhanced representation of the people especially by allowing the vulnerable groups to have a voice in parliament. The inclusion of traditional leaders in the membership of the senate would have given traditional leadership a unique opportunity to contribute to governance and constitutionalism in Malawi. As it stands, parliament took away the clearest opportunity that would have allowed traditional leadership to influence governance and constitutionalism in Malawi. A reinstatement of the constitutional provisions on the senate is clearly in order.

The travails of the National Assembly along the above lines confirm some very important facts about governance and constitutionalism in Malawi. In the first place, it must be apparent that for optimal progress the decision-making process in matters of governance has to be shared and it must be conducted in a framework that is broad-based and consultative.<sup>138</sup> This framework would also allow the leadership to obtain the necessary feedback from the grassroots and the feedback must be used to shape policy. Equally important in this connection is the fact that democratic governance requires that decision making should always be grounded in sufficient consensus. Parliamentarians must thus be enjoined to engage in visible consultations and allow for cogent participation by their constituents in decisions affecting their interests. In the second place, it is amazing how the National Assembly continues to ride roughshod over public opinion on very crucial issues. For example, it is manifestly clear that the populace want the recall provision (section 64)

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<sup>135</sup> Note 122 above.

<sup>136</sup> N Patel & A Tostensen (note 23 above) 9.

<sup>137</sup> M Chigawa (note 129 above). See, also, PD Finn (note 53 above) 240.

<sup>138</sup> B wa Mutharika *One Africa, one destiny: Towards democracy, good governance and development* (1995) 67.

and the provisions on the senate to be reintroduced in the Constitution.<sup>139</sup> Parliament though, in clear abdication of its responsibilities to the people of Malawi, has consistently decided not to take meaningful action on the matter. This is a clear betrayal of the trust that the populace invests in parliament. In the third place, as Mutharika accurately posits, the core responsibility of leadership in a truly democratic society is to decide where personal interests end and where national interests begin.<sup>140</sup> Responsible and responsive leadership, therefore, ought to prioritise national interests over both personal and partisan interests.<sup>141</sup> It is predominantly from this perspective that one can easily see the fiduciary role that parliamentarians have in representing their constituents. Like a trustee who is enjoined to act on behalf and in the interests of beneficiaries, it is incumbent on parliamentarians to automatically prioritise the national interest in all deliberations.<sup>142</sup> The Constitution itself enjoins all parliamentarians to act in the national interest.<sup>143</sup>

In as far as passing of legislation is concerned, it is also important for parliamentarians to reach out to their constituents and their traditional forms of governance and organisation and the values on which these are founded and harness them in law reform.<sup>144</sup> While political perceptions often colour views about what the law can achieve, parliament may benefit from enacting laws or tailoring law reform by drawing strength from commonly accepted social mores.<sup>145</sup> In the context of Malawi, parliament ought to deliberately engage with tradition in order to source values that may inform legislation – it is in this connection that the senate would significantly simplify the process of consultation. I must hasten to add that this does not mean that legislation crafted along commonly accepted social mores would solve all problems but only that such legislation stands a better chance of succeeding in its

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<sup>139</sup> See, Malawi Law Commission (note 47 above) 47-49 and Government of Malawi (note 46 above) 9, 20, 21-22, 23; Malawi Law Commission “Report on the proceedings of the second national constitution conference” 17-19 April 2007, 41-43, 45.

<sup>140</sup> B wa Mutharika (note 138 above) 64-65.

<sup>141</sup> D Venter “Elections and electoral systems in emerging democracies: A case for electoral system re-design in Malawi” Paper presented at the Malawi Constitutional Review Conference, Lilongwe, 28-31 March 2006.

<sup>142</sup> Cf. E Burke (note 115 above).

<sup>143</sup> Section 8 Constitution of the Republic of Malawi.

<sup>144</sup> For examples of the values within ubuntu that may be harnessed see JY Mokgoro “Ubuntu and the law in South Africa” <<http://web.archive.org/web/20040928041520/www.puk.ac.za/law/per/documents/98v1mokg.doc>> (Accessed 22 September 2010).

<sup>145</sup> R Cotterrell *Sociology of the law* (1992) 45 50.

implementation.<sup>146</sup> The manner in which the Malawian populace generally views parliamentarians as being tasked with representing their interests in the National Assembly strongly suggests that they are perceived as fiduciaries or social trustees and it is imperative that they must be regulated as such.

### 5.3.2.3 Budgetary supervision

While the budgetary supervision role of the legislature falls under the broad umbrella of legislative oversight it is as a result of the importance of the budget to national welfare that parliamentary budgetary supervision merits a separate, albeit brief, discussion here.<sup>147</sup> While various government departments and their officers may routinely circumvent the legislature and other accounting mechanisms, the executive cannot avoid seeking the annual parliamentary approval for the Appropriation Act. The scheme evident in Chapter XVIII of the Constitution emphasises the principle that the executive cannot and should not spend public funds without parliamentary approval.<sup>148</sup> The importance of this approval, as Hatchard and others note is that:<sup>149</sup>

... a rigorous and well informed scrutinising exercise of government financial management systems is a most effective method for parliament to exercise its oversight role and ensure that the public obtains as clear and detailed information as possible about government spending.

Although there are indications of improvement, parliamentary oversight of the budget has been feeble for a greater part of the past fifteen years.<sup>150</sup> The frailty of parliament's supervision has in part been attributed to the lack of a functional committee system in the National Assembly. The frailty of the committee system, however, is no excuse for the executive to draw up the budget and parliament to enact it without proper consultation with the populace. This is because parliament remains bound to act within the strictures of the

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<sup>146</sup> Some of the limitations of the law are inherent in the law itself as medium of social regulation. See, A Allot, *The limits of the law* (1980).

<sup>147</sup> The discussion hereunder is connected to the discussion under 5.3.1.3 and public resource management generally, which is discussed under 5.4.

<sup>148</sup> For example, no tax, rate, duty or levy can be raised or imposed except under authority of law (section 171 of the Constitution), withdrawals from the Consolidated Fund can only be in the manner prescribed by parliament (section 173 (3) of the Constitution) and an Appropriation Bill must be approved by parliament before withdrawals from the Consolidated Fund can be made (section 176 of the Constitution).

<sup>149</sup> J Hatchard & others (note 10 above) 135.

<sup>150</sup> CMI (note 67 above) 11.

Constitution and it is not even allowed to shield its own irregularities by reference to parliamentary privilege.<sup>151</sup>

A system of government in which the executive is answerable to the parliament is clearly favoured by most Malawians.<sup>152</sup> Parliament's supervision of the executive in the budget process gives meaning to this system of governance. Proper and effective parliamentary scrutiny of the budget process 'compels the executive to justify publicly the reasons for its choices and is a major contribution towards fiscal transparency.'<sup>153</sup> In a context where the executive is closely monitored in the budget process, the executive, invariably, 'takes the greatest care both with its budget preparation and presentation and with its public spending proposals.'<sup>154</sup> It requires no stretch of imagination to realise that the National Assembly can best perform its supervisory role over the executive in budget formulation and other areas when its members expressly recognise the fiduciary nature of the authority that the law vests in them. Such a change of approach would enable parliamentarians to prioritise, where appropriate, the interests of their constituents in all budget processes. To achieve this, at the one level, requires nothing more than a discernible perspective shift among parliamentarians i.e. from imagining themselves as bureaucrats to recognising themselves as fiduciaries. At the other level this requires giving concrete legal recognition to the fiduciary duties of all public functionaries and enforcing them as such.

In chapter Four this study highlighted the emphasis that Malawian tradition placed and still places on consultation and consensus in decision making. The same ethic of thorough consultation must be imported to the operations of the legislature in order to make it more efficacious in its operations and also to confer legitimacy on its decisions. This would also mean, for example, that parliamentarians need not instigate unnecessary waivers of the notice period that bills must endure before they are debated in the National Assembly. Again, as pointed out earlier, this would also entail deliberate action to increase the number of sittings that the National Assembly has in Malawi. Where parliament is not in session for lengthy periods of time the opportunity to discuss, consult and generate consensus on matters of national interests evaporates.

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<sup>151</sup> *The State and the Speaker of the National Assembly and others Ex Parte Mary Nangwale* (note 19 above) 9 12.

<sup>152</sup> G Erdmann & others (note 111 above) 31.

<sup>153</sup> J Hatchard & others (note 10 above) 135.

<sup>154</sup> As above.

### 5.3.3 The judiciary

Section 9 of the Constitution tasks the judiciary with the interpretation, protection and enforcement of the Constitution and all laws in accordance with the Constitution in an independent and impartial manner bearing in mind only legally relevant facts and prescriptions of law. This means that the judiciary alone has the responsibility of interpreting and where necessary, enforcing the Constitution.<sup>155</sup> The independence of all courts and persons presiding in them is also constitutionally recognised.<sup>156</sup> The fact the Constitution reserves the task of constitutional interpretation to the judiciary entails that ‘judges are the co-architects in the building of a society based on the rule of law and respect for fundamental rights.’<sup>157</sup> To properly fulfil its role the judiciary needs to be receptive to what may appear on the face of it as unconventional jurisprudence.<sup>158</sup> The common law, for example, must be creatively interpreted to advance the Constitution’s underlying values.

Hatchard and others posit several reasons why judiciaries in most African states remain the ultimate bulwark in safeguarding good governance, constitutionalism and human rights.<sup>159</sup> Firstly, most constitutions, like that of Malawi, expressly confer on the judiciary the constitutional duty to interpret the Constitution. This ensures a jurisdictional monopoly for the judiciary which cannot be questioned.<sup>160</sup> Secondly, the weaknesses of most legislatures in Africa necessarily entails that, in truth, it is on the judiciary that the responsibility of checking the executive primarily rests. The judiciary is best placed to achieve this because most constitutions constitute it as the custodian of the constitution and judges are, by their oath of office, sworn to uphold and defend the constitution. Thirdly, executive lawlessness remains a fact of life in Africa’s emerging democracies. It is not uncommon to see executive domination of the legislature result in a very compliant legislature. It is thus on the judiciary that the duty to protect the basic structure of the constitution falls. Fourthly, the manner in which judges are appointed and trained as well as their accountability regime often leads to the generation

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<sup>155</sup> *The State and the President of Malawi and others Ex Parte Malawi Law Society* (note 24 above) 6-7.

<sup>156</sup> Section 103 Constitution of the Republic of Malawi.

<sup>157</sup> J Hatchard & others (note 10 above) 177.

<sup>158</sup> S Banda “Constitutional mimicry and common law reform in a rights-based post colonial setting: The case of South Africa and Malawi” (2009) 53 (1) *Journal of African Law* 142 170.

<sup>159</sup> J Hatchard & others (note 10 above) 178.

<sup>160</sup> RR Mzikamanda “The place of the independence of the judiciary and the rule of law in democratic sub-Saharan Africa” <[http://www.saifac.org.za/docs/res\\_papers/RPS%20No.%2043.pdf](http://www.saifac.org.za/docs/res_papers/RPS%20No.%2043.pdf)> (Accessed 31 May 2010).

of public trust in their competence. Such public trust lends support and legitimacy to the judicial function in interpreting a constitution. A combination of these factors, which are all relevant in Malawi, place the judiciary in a unique position in as far as the promotion of governance and constitutionalism is concerned.

One concept that can be utilised by the judiciary to achieve social trust-based governance and constitutionalism is the rule of law.<sup>161</sup> Although the rule of law is a complex concept, its values can be used as the necessary framework within which the fiduciary relationship between the government and the governed can be understood. Several specific values can be highlighted in which the rule of law can contribute to the entrenchment of fiduciary regulation of government.<sup>162</sup> Firstly, the rule of law connotes a state of affairs where law and order prevail. Additionally, the rule of law by insisting on the dominance of regular law as opposed to arbitrary rule operates as a vital mechanism to check government powers and discretion. Importantly, the rule of law also entails equality before the law or the equal subjection of all citizens (both private citizens and public officers) to the law of the land administered by the ordinary courts.<sup>163</sup> In this connection the rule of law ensures that there is no preferential treatment for anyone. Lastly, the rule of law also entails that the government must always act in accordance with the law in everything it does. Practically this means that the law of the land binds not only the governed but the government as well. The judiciary can harness the values upon which the rule of law is founded to foster a fiduciary regulation of the government. While there may be many ways in which this can be achieved, below I demonstrate two possible ways in which the judiciary can help in fostering social trust-based governance and constitutionalism. The two avenues under discussion are: firstly, the judiciary as a vehicle for social transformation and secondly, the judiciary as the ultimate adjudicator and bulwark against executive and legislative excesses.

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<sup>161</sup> I Salevao “Reinventing government as a friend of the people: Common law and equity, legislation and the constitution” 8-10 <<http://eprints.anu.edu/archive/00002354/01/samoa%20Update%202003-salevao.pdf>> (Accessed 24 June 2008). This study’s recourse to the rule of law reinforces its earlier position that it does not advocate for a wholesale rejection of liberal ideals. The study merely seeks to re-examine liberal ideals and connect them in a more meaningful way to values that are indigenous to Africa.

<sup>162</sup> As above.

<sup>163</sup> Judicial independence remains crucial for the rule of law – RR Mzikamanda (note 160 above) 16.

### 5.3.3.1 The judiciary as a vehicle for social transformation<sup>164</sup>

The judiciary in Malawi has established itself as a principal player in the consolidation of democracy and the rule of law.<sup>165</sup> The nature of the transition to multi-partyism between 1993 and 1995 favoured the judiciary which did not have to institutionally-reorganise when most institutions were undergoing significant transformation.<sup>166</sup> In this context the judiciary was able to assert and expand its authority considerably. Although, as earlier pointed out, the judiciary may have toned down the activism that characterised the first few years after the transition it has remained pivotal to democratisation in Malawi.

In connection to the attainment of social trust-based governance and constitutionalism in Malawi, the judiciary can contribute significantly if it utilises its potential for stimulating and sustaining social transformation.<sup>167</sup> Gloppen, who has explored the role of courts in social transformation, defines social transformation as<sup>168</sup>

... the altering of structured inequalities and power relations in society in ways that reduce the weight of morally irrelevant circumstances, such as socio-economic status/class, gender, race, religion or sexual orientation.

Courts contribute to social transformation by rendering their effort in the alteration of structured inequalities and power relations in society and they achieve this by giving an institutional voice to the poor and vulnerable thereby contributing to their inclusion in society.<sup>169</sup> This is particularly true in those instances where there are not many ways through which the poor and vulnerable can express their concerns. Gloppen identifies three ways in which courts can directly contribute to social transformation in society.<sup>170</sup> Firstly, by providing

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<sup>164</sup> This is not to suggest that the executive or the legislature have no role to play in social transformation but merely to highlight the unique role that the judiciary can play in social transformation.

<sup>165</sup> It has been noted that 'Within [the context] of dwindling trust in the political institutions and processes, the judiciary has, however, established itself as reasonably robust and politically significant, with considerable public confidence' - S Gloppen & FE Kanyongolo "Malawi" in *The judicial institution in Southern Africa: A comparative study of common law jurisdictions* (2006) 73 75 and N Lawton (note 107 above) 79.

<sup>166</sup> R Ellett (note 22 above) 283.

<sup>167</sup> It must be recalled that social trust-based governance and constitutionalism is transformatory in nature because it aims at a redress of inequalities in society.

<sup>168</sup> S Gloppen "Courts and social transformation: An analytical framework" in R Gargarella & others (eds) *Courts and social transformation in new democracies: An institutional voice for the poor?* (2006) 35 37-38

<sup>169</sup> As above.

<sup>170</sup> As above.

a forum in which the concerns of the poor and marginalised can be framed and resolved as legal disputes. Legal resolution of the poor's concerns in this context can have direct implications on law, policy and administrative action. Secondly, courts can also contribute to social transformation by acting as a bulwark against erosion of existing pro-poor institutional protections and guarantees. Lastly, courts can contribute to social transformation by bolstering pro-poor state policies in the face of competing societal interests.

Admittedly, the idea of courts engaging in social transformation is not without conceptual controversies. The most harped on controversy relates to the competence of judicial authorities to intervene in matters that may not be neatly amenable to judicial resolution.<sup>171</sup> This concern is addressed herein below. Suffice it to mention that this study takes the view that this concern is invariably exaggerated. The truth is that, institutionally speaking, the judiciary represents the main channel that disadvantaged groups have for being heard especially when the political branches refuse to hear or unduly dismiss their claims.<sup>172</sup>

The judiciary possesses a great deal of potential in generating the impetus required for entrenching social trust-based governance and constitutionalism. Contrary to common perceptions, one must recall that judicial adjudication, as Klare asserts, is invariably a site for law making activity.<sup>173</sup> However, and vitally, adjudication, as contrasted to other forms of law making, is the 'most reflective and self-conscious, the most grounded in reasoned argument and justification and the most constrained and structured by text, rule and principle.'<sup>174</sup> It is perfectly legitimate, therefore, to expect adjudication to innovate and model intellectual and institutional practices appropriate to a culture of justification and constitutionalism.<sup>175</sup> By using the concept of the rule of law, for example, courts in Malawi can take the lead in articulating social trust-based governance.<sup>176</sup> In the light of the potential for social transformation that the Constitution represents the judiciary must be careful to avoid being

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<sup>171</sup> D Moseneke "Transformative adjudication" (2002) 18 (3) *South African Journal on Human Rights* 309 315-316.

<sup>172</sup> R Gargarella "Theories of democracy, the judiciary and social rights" in R Gargarella & others (eds) (note 168 above) 13 28.

<sup>173</sup> K Klare (note 6 above) 147.

<sup>174</sup> As above.

<sup>175</sup> Cf. S Banda (note 158 above).

<sup>176</sup> Judicial recognition of the fiduciary position that government occupies would be a strong boost here. Cf. *President of Malawi and another v RB Kachere and others* MSCA Civil Appeal No. 20 of 1995 (Being High Court Civil Case No.2187 of 1994).

its own enemy, for example, by insisting on narrow and legalistic interpretations of the Constitution.<sup>177</sup>

It should be apparent that how courts interpret the law is centrally important to the judiciary's responsiveness to the needs of the poor and vulnerable.<sup>178</sup> It is this study's argument that sections 12 and 13 of the Constitution primarily urge a social trust-based approach to constitutional discourse in Malawi.<sup>179</sup> Section 12 of the Constitution marks a conceptual shift from social contract to fiduciary relationship between the governed and the governors.<sup>180</sup> As noted, in Malawi, 'the requirement for trusted and good governance-based leadership is compatible with the Constitution's principles.'<sup>181</sup> Following from the earlier point highlighting adjudication as a site for law making activity, courts have almost boundless resources that they can consult in adjudication. Courts in Malawi may, for example, legitimately consult customary law in resolving disputes before them.<sup>182</sup> From customary law courts would find symmetries with social trust-based governance that can be utilised.<sup>183</sup> These symmetries could be utilised to garner legitimacy for the Constitution, generally, but specifically for social trust-based governance and constitutionalism. It must be borne in mind that the Constitution, like its South African counterpart, 'invites a new imagination and self reflection about legal method, analysis and reasoning consistent with its transformative goals'.<sup>184</sup> It is thus perfectly within the competencies of the judiciary to innovatively have recourse to indigenous systems of organisation in the realisation of the Constitution's transformative potential.

The concept of separation of powers has often been raised as a bar against transformative adjudication.<sup>185</sup> The argument in this regard posits that transformative adjudication necessarily involves the judiciary encroaching into areas that are best left for executive or

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<sup>177</sup> RR Mzikamanda (note 160 above). An example of a self imposed restriction in Malawi is the judiciary's current construction of the rules on standing to sue.

<sup>178</sup> S Gloppen (note 168 above) 50.

<sup>179</sup> CM Silungwe "The courts power of review, composition of the National Assembly and the presidential reference on section 65" (2007) 1 (2) *Malawi Law Journal* 235 236; J Ansah (note 1 above) 4 and G Kamchedzera & CMU Banda (note 3 above) 5.

<sup>180</sup> CM Silungwe "The rhetoric and practice in land reform in Malawi: A contextualised governmentality analysis" (2009) 3 (1) *Malawi Law Journal* 26 48.

<sup>181</sup> G Kamchedzera & CMU Banda (note 20 above) 93.

<sup>182</sup> Section 200 Constitution of the Republic of Malawi.

<sup>183</sup> The symmetries in mind here are the ones highlighted in Chapter Four of this study.

<sup>184</sup> K Klare (note 6 above) 156.

<sup>185</sup> D Moseneke (note 171 above).

legislative action. Underlying this argument is the assumption that in engaging in transformative adjudication the courts are likely to engage in politics which is the preserve of politicians. The argument further avers that once the judiciary starts encroaching into the other branches' domains it may make decisions, for example, affecting resource allocation which decisions it is not ideally positioned to make.<sup>186</sup> This argument is largely premised on a presumed conceptual and practical separation of law from politics. The truth, however, is that law and politics are inseparably intertwined.<sup>187</sup> This essentially entails that judiciaries the world over routinely engage in politics.<sup>188</sup> As scholars in the Critical Legal Studies movement have asserted, maybe rather bluntly, law is simply politics dressed in different garbs.<sup>189</sup>

Admittedly, the legal system in Malawi also seems to proceed on the basis that law and politics are separate even though the Constitution brings out the hollowness of this assumption.<sup>190</sup> Evidence of the judiciary's role in politics is manifested by the numerous overtly political cases that the judiciary has handled since 1994.<sup>191</sup> As Kanyongolo has demonstrated, the Constitution makes judicial intervention in political matters inevitable.<sup>192</sup> For example, section 11(2)(a) requires the judiciary to make value decisions in so far as it enjoins it to promote the values that underlie an open and democratic society in constitutional interpretation. Additionally, section 44(2) directs that in determining limitations on rights courts must also consider whether the limitation is necessary in an open and democratic society. Clearly, since there is no ideal exemplar of an open and democratic society, the construction of such a society is essentially left to the value judgments of

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<sup>186</sup> See, for example, *The State and The Minister of Finance, Secretary to the Treasury Ex Parte Bazuka Mhango and others* (note 76 above).

<sup>187</sup> Law cannot avoid being an expression or embodiment of politics. Every legal decision ultimately represents some political point of view - J van der Walt *Law and sacrifice: Towards a post-apartheid theory of law* (2005) 6.

<sup>188</sup> Cf. WF Murphy & others *Courts, judges and politics: An introduction to the judicial process* (2002) 3.

<sup>189</sup> AC Hutchinson & PJ Monahan "Law, politics and the critical legal scholars: The unfolding drama of American legal thought" (1984) 36 (1/2) *Stanford Law Review* 206 quoted by M Zamoni *Law and politics: A dilemma for contemporary legal theory* (2008) 54.

<sup>190</sup> FE Kanyongolo "Regionalism and the politics of human rights jurisprudence in Malawi" (2000) 6 (1) *UNIMA Students Law Journal* 19 30-32.

<sup>191</sup> For examples, see R Ellett (note 22 above) Chapter 6.

<sup>192</sup> FE Kanyongolo "Courts, elections and democracy: The role of the judiciary" in M Ott & others (eds) *The power of the vote: Malawi's 2004 parliamentary and presidential elections* (2004) 198-199.

individual judges.<sup>193</sup> Strikingly, the Constitution appoints itself as the supreme arbiter in the interpretation of all laws and in the resolution of all political disputes.<sup>194</sup> Clearly, judicial intervention in politics in Malawi, however one understands ‘politics,’ is inevitable.<sup>195</sup>

It is important to recognise the interconnectedness of law and politics. The interconnectedness of law and politics also brings to light the truism that there cannot be a complete separation of powers between the branches of government.<sup>196</sup> From this recognition the judiciary becomes adequately positioned to pursue its role in social transformation. As earlier highlighted, through social transformative processes the judiciary would allow various social voices to be heard on matters of national concern. This is likely to benefit the vulnerable and marginalised. In as far as the courts in Malawi are concerned, there will be no novelty when they involve themselves in ‘politically-tainted’ adjudication as they have done this on numerous other occasions. Importantly, this study is not proposing that the judiciary should disregard the doctrine of separation of powers and assume duties that the Constitution confers on the executive or the legislature. The study is merely proposing that the courts make better use of the opportunities that exist within the Constitution and other laws to actualise the transformative potential that the Constitution contains. Where the matter at issue intimately involves questions that are better resolved by the executive or the legislature, the judiciary must be cautious in intervening in such matters.<sup>197</sup> In this connection it is argued that courts in Malawi could borrow a leaf from the ‘reasonableness test’ that has been developed by the South African Constitutional Court in

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<sup>193</sup> See, FE Kanyongolo “The rhetoric of human rights in Malawi: Individualisation and judicialisation” in H Englund & F Nyamnjoh (eds) *Rights and politics of recognition in Africa* (2004) 77-78. Quite revealing is Justice Mokgoro concession in *State v Makwanyane* 1995 (6) BCLR 665 (CC) at paragraphs 302-304 – ‘[T]he interpretive task frequently involves making constitutional choices by balancing competing fundamental rights and freedoms. This can often only be done by reference to a system of values extraneous to the constitutional text itself.... To achieve the required balance will of necessity involve value judgments. This is the nature of constitutional interpretation.’

<sup>194</sup> ‘In the interpretation of all laws and in the resolution of political disputes the provisions of this constitution shall be regarded as the supreme arbiter and ultimate source of authority’-section 10(1) Constitution of the Republic of Malawi.

<sup>195</sup> In spite of this, courts seem to balk at the idea, see *Hassan Hilale Ajinga v United Democratic Front* Civil Cause No. 2466 of 2008 and *Wallace Chiumia and others v AFORD and others* Civil Cause No. 108 of 2005 .

<sup>196</sup> K Klare (note 6 above) 157-158.

<sup>197</sup> Per Chikopa J *The State and The Minister of Finance, Secretary to the Treasury Ex Parte Bazuka Mhango and others* (note 74 above) 10 and Per Mwaungulu J *In the matter of the Ministry of Finance Ex parte SGS* Misc. Civil Application No. 40 of 2003 15.

its adjudication on social and economic rights.<sup>198</sup> The ‘reasonableness test’, it must be recalled, has allowed the South African Constitutional Court to scrutinise the South African Government’s efforts in fulfilling its obligations for social and economic rights without breaching the separation of powers doctrine or in any way usurping the functions of the other branches of government.<sup>199</sup> Using the ‘reasonableness test’, the judiciary in Malawi can review, for example, the manner in which the executive is spending public funds without necessarily substituting its own preferred spending option for the executive’s. All that the judiciary would be required to do would be to assess whether the manner in which the executive is spending the funds is reasonably capable of supporting the Constitution’s vision bearing in mind that there would be numerous ways in which the executive could reasonably spend public funds.

An innovative and expansive approach to adjudication would adequately factor in sections 12 and 13 of the Constitution which also more clearly expound the social trust basis of governance and constitutionalism in Malawi.<sup>200</sup> In this endeavour courts may do well to appreciate that legal restraint in the judicial process is often culturally constructed and not imposed from without.<sup>201</sup> There is thus no bar for a candid re-examination of past constitutional practises in order to align constitutional interpretation with the more egalitarian promises of the 1994 Constitution.<sup>202</sup>

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<sup>198</sup> S Liebenberg “South Africa: Adjudicating social rights under a transformative constitution” in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 75 83-86.

<sup>199</sup> See, for example, *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696; *Government of the Republic of South Africa v Grootboom and others* 2000 (11) BCLR 1169 (CC) and *Minister of Health and others v Treatment Action Campaign and others* (1) 2002 (10) BCLR 1033.

<sup>200</sup> Cf. FE Kanyongolo (note 192 above) 199.

<sup>201</sup> K Klare (note 6 above) 161. An example of self imposed restraint on judicial activism in Malawi is the judiciary’s construction of the rules on standing (*locus standi*). The Malawi Supreme Court has essentially held that ‘sufficient interest’ requires proof of some personal harm over and above the common harm that may be suffered by everyone – *Civil Liberties Committee v The Minister of Justice and another* MSCA Civil Appeal No. 12 of 1999.

<sup>202</sup> K Klare (note 6 above) 171. A necessary change in position in Malawi ought to be with regard to the position on *locus standi*. See MJ Nkhata “Public interest litigation and locus standi in Malawian constitutional law: Have the courts unduly fettered access to justice and legal remedies?” (2008) 2 (2) *Malawi Law Journal* 209 -225.

### 5.3.3.2 The judiciary as the ultimate adjudicator and bulwark against executive and legislative excesses

Arguably, the most prominent role that the judiciary plays is ‘refereeing’ disputes between litigants. This study’s concern, however, is specifically with how the judiciary has ‘refereed’ disputes between the branches of government and how this has either contributed or negated the development of constitutionalism and good governance. It is important to recall that courts remain pivotal in ensuring the accountability of the other branches of government.<sup>203</sup> The interrogation in this connection is also to try and unearth the judiciary’s potential in the attainment of social trust-based governance and constitutionalism. In Malawi, the judiciary has been utilised to rein in abuse of power by the branches of government where such abuses threatened democratic governance.<sup>204</sup>

The judiciary’s performance since 1994 offers important insights. As earlier noted, the judicial activism that accompanied the multiparty transition between 1993 and 1996 quickly gave way to a more cautious approach to the resolution of all disputes with a political tenor.<sup>205</sup> With the passage of time the judiciary seems to have opted for paths of legal reasoning that are likely to cause the least controversy.<sup>206</sup> In spite of the somewhat overly cautious approach that has subsequently dominated judicial adjudication, one notes that the judiciary has a strong basis on which it can proceed in adjudication. This is because, for example, in popular perception, judicial legitimacy in Malawi remains very high.<sup>207</sup> The judiciary has admirably maintained its independence in a politically volatile context hence its high credibility ratings.<sup>208</sup>

Constitutionalism and good governance can only take root if the judiciary properly acknowledges its place and role in a democratic dispensation.<sup>209</sup> In as far as constitutional interpretation is concerned, the judiciary, at the very least, should not take away from the

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<sup>203</sup> PD Finn “A sovereign people, a public trust” in PD Finn (ed) (note 81 above) 29.

<sup>204</sup> L Chikopa (note 21 above).

<sup>205</sup> For a treatise on the activism, See M Nzunda “The quickening of judicial control of administrative action in Malawi 1992-1994” in KM Phiri & KR Ross (eds) (note 2 above) 283.

<sup>206</sup> R Ellett (note 22 above) 299.

<sup>207</sup> S Gloppen & FE Kanyongolo (note 165 above) 75 and N Lawton (note 107 above) 79.

<sup>208</sup> R Ellett (note 22 above) 282.

<sup>209</sup> AP Mutharika “Towards a more manageable constitution” 9 Constitution Review Conference 28-31 March 2006, Capital Hotel, Lilongwe.

people that which the Constitution has conferred on them.<sup>210</sup> The judiciary must take the promises that the Constitution makes seriously and recognise them as beacons of hope for the nation.<sup>211</sup> The judiciary's role is to translate the promises into reality. For example, the Constitution clearly declares the people to be sovereign and that governmental powers are all derived from the people to be used to promote their interests.<sup>212</sup> In all judicial adjudication, therefore, the courts must strive to give concrete meaning to this stipulation.<sup>213</sup> In as far as the construction of specific constitutional provisions is concerned, the courts are urged to be cautious and slow before deciding to ignore a word or phrase that appears in the Constitution.<sup>214</sup> At the same time they must strive to be broad and generous by giving full meaning to the words used.<sup>215</sup>

Fears of the emergence of a 'dikastocracy' in Malawi as a result of the judicial involvement in the resolution of political disputes are, in this study's view, unfounded.<sup>216</sup> Firstly, as earlier pointed out, there is no inherent restriction under the Constitution of Malawi barring judicial involvement in political matters. Secondly, the judiciary as the principal guardian of the Constitution must necessarily be involved in all controversies that hinge on the Constitution.<sup>217</sup> On a positive note, the constant resort to the judicial process for the resolution of political disputes also demonstrates the trust that various political players have in the judicial system.<sup>218</sup> The judiciary needs to utilise this public confidence to engender transformative change in Malawi. Thirdly, if courts constantly recused themselves from the resolution of disputes that had a political tenor there is a risk that lawlessness may set in. This may create a situation where no-one respects and follows laws which is not good for democratic governance and constitutionalism.

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<sup>210</sup> Per Nyirenda J in *Malawi Human Rights Commission v Attorney General* Miscellaneous Civil Cause No. 1119 of 2000 (HC) (LL).

<sup>211</sup> As above.

<sup>212</sup> Cf. Section 12 Constitution of the Republic of Malawi.

<sup>213</sup> *Njoya and others v Attorney General and others* (2004) AHRLR 157 (Ke HC 2004) 171-172.

<sup>214</sup> *Ex Parte Muluzi* (note 27 above) 12 -14.

<sup>215</sup> *Fred Nseula v Attorney General* MSCA Civil Appeal No. 32 of 1997.

<sup>216</sup> Chilenga defines a dikastocracy as a system of rule by judges which he further contends is inimical to democratic governance – M Chilenga "Dikastocracy: Is it undermining democracy in Malawi" in Konrad Adenauer Occasional Paper No. 11 (note 116 above).

<sup>217</sup> J Ansah (note 1 above) 3.

<sup>218</sup> As to why courts end up resolving political disputes, see RU Yepes "The judicialisation of politics in Colombia" (2007) 6 (4) *SUR International Journal on Human Rights* 49. See, also, FE Kanyongolo (note 192 above) 203.

Even more important is the imperative that the judiciary places on the constitutional principles in sections 12 and 13 as it conducts its adjudication. Section 14 stipulates that courts are entitled to have regard to the constitutional principles in interpreting and applying the Constitution or in determining the validity of decisions of the executive. The constitutional principles are a ready source of justification for a wide range of activity that the judiciary may choose to engage in. The constitutional principles must be thought of as laying down the path for the country's progress while provisions in the Bill of Rights, among others, can be seen as prescribing boundaries to the path.<sup>219</sup> As Ansah J. has argued, the spirit and tenor of the Constitution as expressed in the fundamental principles and principles of national policy must permeate all judicial adjudication to bring out the aspirations of the drafters of the Constitution.<sup>220</sup> It should be manifest that the 'directive principles are the embodiment of a national spirit and consensus on social, economic and cultural issues which have to be addressed by the state.'<sup>221</sup>

The judiciary has on several occasions referred to the constitutional principles to articulate the imperatives that inform the Constitution.<sup>222</sup> In considering how the judiciary can utilise the constitutional principles, courts must seriously reflect on their role in the democratisation of Malawi. In this reflection courts ought to discover that, apart from the obvious roles, there are other avenues in which they can make themselves relevant to the democratisation process. For example, as Poeschke and Chirwa have demonstrated, traditional dispute resolution mechanisms in most parts of Malawi reflects some of central values upon which mainstream dispute resolution mechanisms are founded.<sup>223</sup> By utilising the guiding authority of the constitutional principles, it is argued, the judiciary should be able to create a jurisprudence that addresses Malawian problems from a 'Malawi-centric' perspective. There is thus a case for deliberate judicial recourse to indigenous systems of societal organisation in Malawi.

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<sup>219</sup> *Kesavanandra Bharati v State of Kerala* (1973) AIR 1461.

<sup>220</sup> J Ansah (note 1 above) 11.

<sup>221</sup> B De Villiers "Directive principles of state policy and fundamental rights: The Indian experience South African Journal on Human Rights" (1992) 8 (1) *South African Journal on Human Rights* 29.

<sup>222</sup> *The State and the President of Malawi and others Ex Parte Malawi Law Society* (note 24 above) 511; *The State and The Minister of Finance, Secretary to the Treasury Ex Parte Bazuka Mhango and others* (note 76 above) 9 11 and *R v Sam Mpasu* (note 60 above).

<sup>223</sup> R Poeschke & W Chirwa "The challenge of democracy in Malawi: Socio-anthropological conditions: Study report and recommendations" (1998) 69.

In judicial review of administrative action,<sup>224</sup> for example, the judiciary possesses a potent avenue through which it can exert its authority on the decision-making processes of both the executive and legislature. As courts in Malawi have recognised, judicial review is a process by which the courts' review the process that a public authority adopted in reaching a particular position.<sup>225</sup> In this process courts do not examine the merits or lack thereof of a particular decision. The ultimate value of this remedy is the ability it has of instilling, among government officials, the need to operate in a procedurally regular manner. In the remedies that the court may award in a judicial review application one notes a distinct equitable origin to the remedies.<sup>226</sup> The potential in judicial review of administrative action is almost boundless.<sup>227</sup>

#### 5.4 Public resource management<sup>228</sup>

Public resources remain pivotal to the amelioration of the welfare of the citizenry in any country. The development of a country is intimately linked to the manner in which public resources are managed. Although the relationship between democracy and development is very complex and not susceptible to a simplistic uni-linear extrapolation, it is often argued that democratic governance is likely to take root in Africa among conditions of greater development than impoverishment.<sup>229</sup> This highlights the role of good, efficient and capable governance in the economic and social development of any country.<sup>230</sup> According to Goldenhuys, the ultimate goal of a modern government must be the creation of a good quality

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<sup>224</sup> The affinities between judicial review as understood in administrative law and the law of fiduciary obligations were already discussed in Chapter Two of this study.

<sup>225</sup> This position accords with the position in England and English decisions have been relied on heavily, for example, *Chief Constable of North Wales Police v Evans* (1982) 1 WLR 155 and *Council for Civil Service Unions and others v Minister for the Civil Service (GCHQ)* (1985) 1 AC 374.

<sup>226</sup> See, for example, *The State and the Attorney General Ex Parte Abdul Pillane* Constitutional Case No. 6 of 2005 Per Chipeta J.

<sup>227</sup> See, *The State and Speaker of the National Assembly and others Ex Parte Titus Divala* Misc. Civil Cause No. 225 of 2007 where a student of the University of Malawi applied for and got an order for the judicial review of the decision of the Speaker of the National Assembly for adjourning parliament without first making provision for the Minister of Finance to withdraw money from the Consolidated fund.

<sup>228</sup> Aspects of the discussion here are connected to the discussion under the executive and the management of the budget process and the legislature and budgetary supervision.

<sup>229</sup> A Adedeji "Democracy and development: A complex relationship" in K Matlosa & others (eds) *Challenges of conflict, democracy and development in Africa* (2007) 19 26-28. The connection between wealth and democracy, however, remains very complex and not susceptible to easy generalisations.

<sup>230</sup> J Hatchard (note 10 above) 8-9.

life for each and every citizen.<sup>231</sup> Ultimately, the attainment of a good quality life for all citizens depends on how public resources are managed by public functionaries.

It is impossible in a representative democracy to have every citizen directly involved in the management of public resources.<sup>232</sup> This means that, of necessity, there is a division of labour between public functionaries and the citizenry. The task of managing public resources is conferred on the public functionaries while the citizens are the designated beneficiaries. Public functionaries are thus placed in a fiduciary position under an obligation to act in the interests of the citizenry. As a result of the principles of political responsibility and accountability, public functionaries must manage public resources in the interests of the citizenry and not in the exclusive interests of some defined groups or in their own personal interests. Concededly, in all societies there will be, as a matter of course, competing interests that must be satisfied by the limited resources that a government has.<sup>233</sup> Government decision making on public resources, however, must be aimed at obtaining a satisfactory reconciliation of the competing demands on public resources in an equitable manner. As happens in the case of large discretionary trusts, the role of the public functionary in such a case is to act fairly as between the different classes of beneficiaries and not to favour one group as against another. The public functionary, in this context, need not treat all beneficiaries equally as long as fairness is the governing norm.

Gildenhuis lists several principles which public functionaries must always follow in the management of public resources.<sup>234</sup> It is argued that these principles are equally applicable to public resource management in Malawi and are reflected in several statutes dealing with the management of public resources.<sup>235</sup> The first principle is that funds in possession of the government do not belong to the government but the citizenry from whence they have been sourced, often in form of taxes. The corollary of this principle is that government must deal with the funds in a responsible manner that sufficiently considers the interests of the

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<sup>231</sup> JSH Gildenhuis *Ethics and professionalism: The battle against public corruption* (2004) 28.

<sup>232</sup> JSH Gildenhuis *Introduction to the management of public finance: A South African perspective* (1997) 33

<sup>233</sup> The presence of competing interests, it was argued in Chapter Two, does not diminish the trust basis of the social trust-based approach but highlights the close parallels with the discretionary trust.

<sup>234</sup> JSH Gildenhuis (note 231 above) 34-35.

<sup>235</sup> As earlier pointed out the principal statutes in this regard are; The Public Finance Management Act, No. 7 of 2003; Public Audit Act, No. 6 of 2003 and the Public Procurement Act, No. 8 of 2003. The principles informing these enactments are also mirrored in Chapter XVIII of the Constitution of the Republic of Malawi.

citizenry. Secondly, financial decision making by the government must always aim at the most reasonable and equitable way in which public financial resources can be allocated and also at the most efficient and effective way in which financial resources can be applied to the satisfaction of collective needs. Thirdly, the utilisation of public resources must satisfy the collective public needs in an optimal fashion. This entails that the utilisation must satisfy the collective needs at the lowest possible cost. Fourthly, in all actions pertaining to public resource management avenues must be created for either direct or indirect participation by the citizenry in decisions relating to the allocation of public resources. It is this participation which legitimises government spending. The fifth principle requires sensitivity and responsiveness in all decisions pertaining to public resource management. This means that public functionaries must be sensitive to and respond to the collective needs of the citizenry. The last principle requires that all managers of public resources must be responsible and accountable to the citizenry in their management of public resources.

#### **5.4.1 Interrogating public resource management in Malawi**

The above highlighted principles are sufficiently reflected in Malawian legislation dealing with the management of public resources.<sup>236</sup> The shortfalls in the management of public resources in Malawi are largely as a result of a failure to properly implement the existing framework rather than the absence of a regulatory framework.<sup>237</sup> Notably, the entire framework for public resource management is directly founded upon provisions in the Constitution. For example, section 184 of the Constitution establishes the office of the Auditor General who is tasked with auditing and reporting on all public accounts in Malawi and submitting reports of the audits to the National Assembly. The Public Audit Act details out the functions of the office of the Auditor General and also provides guidelines for audits of government departments. Ideally, the Office should ensure that public resources are spent according to the electoral and administrative mandate and that corruption is easily exposed and rooted out. In the main, however, the provisions on auditing government departments all draw their inspiration from section 12 of the Constitution which requires, among others, that powers of state be exercised only to the extent of the lawful authority.

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<sup>236</sup> The legal and institutional framework for public finance management in Malawi is relatively well designed and provides a good starting point for sound management of public finances - S Leiderer & others *Public financial management for PRSP implementation in Malawi: Formal and informal PFM institutions in a decentralising system* (2007) 5.

<sup>237</sup> It is also arguable that the failures in the implementation of the public resource management framework, in part, stem from the manner in which the framework was constructed. Of the 'Integrity Legislation', one notes that it was all adopted in 2003 following recommendations made by a World Bank team. Local involvement on the form and structure of this framework was minimal – CMI (note 67 above).

Further, while Chapter XVIII of the Constitution outlines the general manner in which government finances must be managed, generally, the Public Finance Management Act provides greater detail as to how this must be achieved. The Public Finance Management Act is meant to promote effective and responsible financial management and enhance accountability and fiscal discipline by the government. Numerous avenues are created in the Act to ensure fiscal transparency and accountability. For example, under section 17 the Minister of Finance must provide economic and fiscal updates every year before 30 June and under section 23 no public funds must be spent unless there was authorisation by an Appropriation Act. Further, all public borrowing by the government is subject to authorisation by the National Assembly and must, among others, be in the public interest.<sup>238</sup>

Additional safeguards in relation to the management of public resources are provided by the Public Procurement Act and the Corrupt Practices Act. The Public Procurement Act is a comprehensive set of principles and procedures to be applied in the procurement of goods, work and services using public funds. The Act establishes the Office of the Director of Public Procurement<sup>239</sup> and sets up procedures that are meant to ensure transparency in all procurement involving public funds. These procedures include the establishment of standing Internal Procurement Committees in all government ministries, departments and parastatals<sup>240</sup> and the minimum criteria that must be considered for a bidder to qualify.<sup>241</sup> Under the Act all procurement must follow an open tendering process<sup>242</sup> and all persons with an interest in a particular procurement process must declare their interest and recuse themselves.<sup>243</sup> The Act also subjects all procurement activities to auditing by the Auditor General.<sup>244</sup>

While the legislative framework for public resource management in Malawi is fairly commendable its implementation leaves a lot to be desired. For example, at a normative level, the Auditor General's office lacks autonomy in relation to appointments, dismissals,

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<sup>238</sup> Section 56 Public Finance Management Act.

<sup>239</sup> Section 4 Public Procurement Act.

<sup>240</sup> Section 8 Public Procurement Act.

<sup>241</sup> Section 13 Public Procurement Act.

<sup>242</sup> Part VI Public Procurement Act.

<sup>243</sup> Section 19 Public Procurement Act.

<sup>244</sup> Section 39 Public Procurement Act.

financial matters, human resource management and access to information.<sup>245</sup> Worryingly, the President has the ability to exert undue influence on the office of the Auditor General.<sup>246</sup> Lack of resources and capacity are also factors that negate the potential of the Auditor General's office. Prevailing perceptions about the office of the Auditor General have also worked to undermine its efficacy. For example, government ministries routinely submit their reports very late making the work of the Auditor General difficult.<sup>247</sup> This in turn handicaps parliament's supervisory role as it proceeds on the basis of incomplete reports or no reports at all. These weaknesses, among others, mean that the Auditor General's office cannot ensure that public funds are spent in line with the electoral and administrative mandate.<sup>248</sup> At an institutional level, therefore, there is need to allow for a vibrant Auditor General's office. Achieving this may, as a starting point, require no more than that the executive and the legislature do not exert their overbearing influence in the work of the Auditor General.

An assessment of how public resource management has been conducted in Malawi evinces a palpable failure by successive governments to adopt a principled approach. It is arguable that this failure largely originates in the pervasive failure by public functionaries and Malawians, generally, to distinguish between the government and the ruling political party.<sup>249</sup> Public functionaries, in spite of being fiduciaries, have routinely failed to distinguish between their obligations to the nation and their political parties. Admittedly, this conflation is directly traceable to Dr Banda's era when there was no attempt to keep the ruling Malawi Congress Party (MCP) different from the government. This conflation, between the government and the ruling political party, is one of those significant but nefarious attributes that survived the demise of the Dr Banda regime.<sup>250</sup> The pervasiveness of this perception is demonstrated by the fact that the management of public resources has continuously not been subjected to the principles that exist in the Constitution and other legislation. It is arguable that the failures in

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<sup>245</sup> V Wang & L Rakner "The accountability function of supreme audit institutions in Malawi, Uganda and Tanzania" 3 CMI Report 2005:4.

<sup>246</sup> As above 17-18. The President can remove an Auditor General from office under section 184(6) of the Constitution if he deems, among others, that the office-holder has become incompetent in the exercise of his duties, become incapacitated or compromised in the discharge of his duties.

<sup>247</sup> V Wang & L Rakner (note 245 above) 20.

<sup>248</sup> As above 35.

<sup>249</sup> R Poeschke & W Chirwa (note 223 above) vii.

<sup>250</sup> D Booth & others *Drivers of change and development in Malawi* ODI Working Paper 261 (2006) viii, 10 <<http://www.odi.org.uk/resources/download/1318.pdf>> (Accessed 20 September 2009). For a more comprehensive discussion of perceptions, attributes that survived the Dr Banda regime and influence politics in Malawi see MG Tsoka *Public opinion and the consolidation of democracy in Malawi* (2002) Afrobarometer Paper No. 6 3.

this regard are often as a result of the erroneous perception by most elites which equates access to power as a means for self aggrandisement.<sup>251</sup> From this perspective public funds are easily viewed as an extension of the personal realm. Public funds are thus readily and without remorse utilised to support patrimonial networks contrary to constitutional and statutory provisions.

Manifestations of the above phenomena abound. For example, in the ten years that Bakili Muluzi was President of Malawi, he routinely distributed cash to political supporters during public rallies.<sup>252</sup> The source of this money has never been conclusively determined. Suffice it to point out that there remains a great likelihood that some of the money that President Bakili Muluzi distributed may have been sourced from public coffers. While Bakili Muluzi's successor, Bingu wa Mutharika, may not have engaged in the distribution of money with the same extravagance and gusto as his predecessor, there are still instances in which he has also distributed money in public. In all this, no attempt has been made to properly explain the sources of the money or account for its spending. Having regard to the fact that the office of the President has serious fiduciary obligations attaching to it, it is worrying that no attempt to comply with fiduciary principles has been made by successive Malawian presidents. Again, the use of state resources in political party activities continues to haunt the country. Allegations of use of state resources in, for example, running party campaigns have regularly surfaced.<sup>253</sup> This has by and large become an established routine which picks up in intensity as General Elections approach.<sup>254</sup> In the same context of elections, allegations of 'voter buying' have also been incessant.<sup>255</sup> Aside from the moral and legal propriety of 'voter buying' there is the question of the source of the funds that are used to buy voters. While protestation has been made that, for example, it is in line with Malawian culture for politicians to distribute money and other merchandise to political supporters, Tambulasi and Kayuni

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<sup>251</sup> M Nxumalo "Democracy and development: The problem of Africa" in D Milazi & others (eds) *Democracy, human rights and regional cooperation in Southern Africa* (2002) 65 66. Generally, see JF Bayart *The state in Africa: Politics of the belly* (1993).

<sup>252</sup> See, R Tambulasi & H Kayuni "Can African feet divorce Western shoes? The case of 'Ubuntu' and democratic governance in Malawi" (2005) 14 (2) *Nordic Journal of African Studies* 147.

<sup>253</sup> B Dulani "Consolidating Malawi's democracy: An analysis of the 2004 Malawi general elections" in KG Adar & others (eds) *Electoral process and the prospects for democracy consolidation: Contextualising the African multiparty elections of 2004* (2008) 71 76.

<sup>254</sup> See, *Charles Kafumba and others v The Electoral Commission* Misc. Cause No. 35 of 1999. Judicial intervention into issues of abuse of public resources, however, remains very meek – L Chikopa (note 21 above) 4.

<sup>255</sup> J Lwanda "Changes in Malawi's political landscape between 1999 and 2004: Nkhope ya Agalatia" in M Ott & others (eds) (note 192 above) 49 55 58.

have ably demonstrated how this assertion is based on a perversion of Malawian tradition.<sup>256</sup> Without proper accountability mechanisms in place for these activities it is arguable that these activities represent black holes in which public funds will keep disappearing.

#### **5.4.2 The social trust-based framework and public resource management in Malawi**

There are at least two ways in which the social trust-based framework can be utilised to boost public resource management in Malawi. Constitutionally, these two ways derive their validity from sections 12 and 13 of the Constitution. They are also based on fiduciary principles and equity. Conceptually, one can also connect these two avenues to the demands for accountability and transparency that centrally inform the *ubuntu* philosophy. Firstly, the social trust-based framework can be used in the recovery of resources unjustly obtained by public functionaries. Under the current regime, where a person has been convicted of an offence under the Corrupt Practices Act the court may order that money or other pecuniary resource under his control be forfeited to the government.<sup>257</sup> A principal may also recover any advantage that an agent has corruptly obtained in the performance of his duties.<sup>258</sup> The provisions for the recovery of corruptly obtained benefits by public functionaries are commendable even though they have not been extensively utilised and were only added to the Corrupt Practices Act in 2004.<sup>259</sup>

Two cases may help illustrate the direction which fiduciary regulation has, for decades, followed in this area and also the direction that Malawi ought to be heading for. In *Reading v Attorney General*,<sup>260</sup> the appellant was a British army sergeant who had been stationed in Cairo. The appellant had on several occasions, while in uniform, boarded private lorries and escorted them through police checkpoints in Cairo. In all cases the lorries had been loaded with contraband material and the sergeant had been paid large sums of money for his service by unknown persons. In an action against the appellant for the recovery of the monies that the appellant had acquired, the Court of Appeal held that a fiduciary relationship existed between the Crown and the appellant regarding the use of the uniform which the Crown had issued to the appellant. This fiduciary relationship required the appellant to use

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<sup>256</sup> R Tambulasi & H Kayuni (note 252 above).

<sup>257</sup> Section 37 Corrupt Practices Act.

<sup>258</sup> Section 39 Corrupt Practice Act.

<sup>259</sup> The Corrupt Practices Act itself was passed in 1995.

<sup>260</sup> (1951) 1 All ER 617.

the uniform<sup>261</sup> only for the benefit of the Crown. Any other use was a breach of the fiduciary relationship and in this case since the appellant had obtained the money through a breach of duty he could not retain it. On appeal, the House of Lords held that any position which enabled a servant to earn money by its use gave the master a right to receive the money so earned even where the money was obtained by a criminal act.

The other case is *Attorney General for Hong Kong v Reid and others*.<sup>262</sup> Reid, who was a public prosecutor in Hong Kong, had been convicted of accepting bribes from criminals in return for him not having to prosecute them. He was sentenced to eight years imprisonment and also ordered to pay the Crown the sum of \$HK12.4 million which was the value of assets then controlled by him and which assets he could only have acquired by using the bribes he had received. The Privy Council held that where a fiduciary accepted a bribe as an inducement to betray his trust he held the bribe in trust for the person to whom he owed the duty as fiduciary. The Privy Council further held that a bribe was a secret profit which a person in a fiduciary position acquired by reason of his position and he was thus accountable for it under a constructive trust. In the event where the bribe was invested and thus increased in value, the fiduciary was liable to account not only for the original bribe but for all the increased value.

The approach in the above two cases can be contrasted with that adopted in two Malawian cases: *The State v Sam Mpasu*<sup>263</sup> and *The State v Kambalame*.<sup>264</sup> In both these cases, the accused persons were convicted of soliciting and accepting rewards in the discharge of public functions. Admittedly, these cases concerned events that had occurred before the provisions for the recovery of corruptly obtained proceeds were added to the Corrupt Practices Act.<sup>265</sup> In both cases the government did not recover anything even though there was conclusive evidence that the accused persons had personally benefitted from their abuse of public office. The failure to recover anything is, supposedly, justified by the then absence of express provisions in the Corrupt Practices Act sanctioning this course of

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<sup>261</sup> It argued that one can place a broad interpretation on 'uniform' here to include all paraphernalia of office. The duty on the part of the office holder, therefore, is not to use any *indicia* of office in contravention of the stipulations of one's office.

<sup>262</sup> (1994) 1 All ER 1; (1994) 1 AC 324.

<sup>263</sup> Criminal Case No. 17 of 2005 (Lilongwe Chief Magistrate's Court) Judgment of 8 April 2008.

<sup>264</sup> Criminal Case No. 108 of 2002

<sup>265</sup> The current Part V of the CPA was thus inapplicable under the general principle which bars retrospectivity in application of laws. The Corrupt Practices Act was passed in 1995 but was amended in 2004 to include provisions on forfeiture of corruptly obtained benefit.

conduct. It is argued that this excuse is not valid. The courts, in both cases, could have easily justified recovery of the corrupt benefits by reference to the principles of equity as outlined, for example, in the English cases referred to above. There was no need to wait for statutory enactment to effectuate an equitable recovery of corruptly obtained benefits especially as the cases involved public officers and principles of equity have been applicable in Malawi since 1902.<sup>266</sup> As noted in *The State v Sam Mpasu*.<sup>267</sup>

According to section 12 (i) of our Constitution ‘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.’ (Emphasis supplied). On the authority of such clear Constitutional provisions and for a party that was ushering in a new era of accountable government would we say the accused person’s conduct complied with such tenets? The answer must be a resounding ‘No!’ The accused seemed to be operating under a misguided notion that his political party interests were paramount to the economic interests of the very people he purported to serve

On the above basis the trial magistrate would have been within his legal competence to order the recovery of the benefit that he had found the accused to have unlawfully acquired. This would have been so because the magistrate had clearly discerned the fiduciary nature of the accused person’s position which necessarily required him to account for all the benefit that he may have acquired by virtue of his position. The trial magistrate’s observations in the course of the accused’s sentencing lend further credence to this position. The magistrate stated as follows:<sup>268</sup>

Actually in the context of the political accountability enshrined in section 12(i) of the Constitution [the accused] betrayed the trust of the people of Malawi by advancing the interests of another and himself at their expense. Thus contrary to his suggestion, his political office renders him liable to sterner disapproval of the law than if it had been a lower ranking person employed in the public service

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<sup>266</sup> The reception of English law in Malawi took place under the British Central Africa Order in Council of 1902 which in article 15(2) extended the application of ‘the common law, doctrines of equity, and statutes of general application in force in England on the eleventh day of august, 1902’ to British Central Africa (later renamed Nyasaland and now known as Malawi). The applicability of the common law and doctrines of equity was continued by section 15(a) of the Malawi Independence Order, 1964 and further carried on by section 15 of the Republic of Malawi (Constitution) Act, 1966 (Act No. 23 of 1966) – See J Finnis “Plain speaking about some existing laws” (1981) 3 *UNIMA Students Law Journal* 38.

<sup>267</sup> Page 58 of the judgment.

<sup>268</sup> *The State v Sam Mpasu* (Judgment on sentence, 8 April 2008) Criminal Case No. 17 of 2005.

Similarly, it is contended that the court could have easily ordered and justified a recovery of the money that was unjustly acquired by the accused in *The State v Kambalame*. In delivering its sentence the court, interestingly, stated thus.<sup>269</sup>

Firstly, I wish to point out that the convict did not only attempt to receive gratification. He actually accepted and received gratification. Secondly, it is important to remember that the Defendant was a public officer who enriched himself from the public coffers. Further, the amount involved is not a small sum. Indeed, this Court is alive to the fact that when funds, especially those originating from the public purse, is siphoned off into private bank accounts of public officials, there is mistrust that arises in the members of the public.(sic)

Finally, and more importantly, the Court would like to observe that corruption is morally repugnant and has the effect of economically disempowering a nation and its people. Furthermore, corruption has the undesirable consequence of distorting the faith that people have in their public officials. Indeed, corruption undermines trust and credibility in institutions and procedures. Additionally, corruption, if not punished adequately, has the tendency of creating a bad impression on a country especially a developing country like ours. Indeed, experts have said, and this Court accepts that analysis, that corruption effects a country's economy by undermining growth and development in that it hinders or deters foreign or local investment. (sic)

It is argued that the judge ably summarised the basis and justification for recovering benefits that public functionaries obtain unjustly. Again a quick reference to the principles of equitable regulation could have easily facilitated a recovery of the benefits that the accused had acquired together with any attendant increase in value of the assets. It is the bane of Malawian law that such avenues have yet to be utilised. It is this study's contention that no justification exists for the continuance of such a state of affairs.

Secondly, the social trust-based framework can be utilised to boost public resource management by bringing the principles of fiduciary management to bear in the management of the various funds that the government has created. Various pieces of legislation in Malawi create funds wherein, supposedly, the revenue generated from the administration of the particular Act may be deposited.<sup>270</sup> Arguably, the most important of these funds is the

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<sup>269</sup> *The State v Dennis Kambalame* Criminal Case No. 108 of 2002 Judgment on sentence 3-4.

<sup>270</sup> See, for example, section 29 Public Finance Management Act.

Consolidated Fund created under section 172 of the Constitution. All revenues raised or received for the purposes of the Government are supposed to be paid into the Consolidated Fund. Notably, while there is a proliferation of funds under various pieces of legislation the management of these funds, with the exception of the Consolidated Fund, is not expressly articulated.

It must be noted that, in equity, the concept of ‘the fund’ is central to the operation of a trust. The fund allows diverse title holders to pool their resources into a common holding and thereby not only increase their resource base but also open possibilities for professional management of property resources.<sup>271</sup> The fund thus enables title owners to do that which they could not achieve individually. Additionally, because funds are automatically subject to fiduciary regulation, the title holders are guaranteed the protection and possible increase in value of their proprietary interests.

The principles for the management of funds from a fiduciary perspective as developed in private law could be extended and modified to have relevance in the management of public funds. With regard to the public funds that are created by the various statutes in Malawi, recourse to fiduciary regulation would impose greater scrutiny in their management. The managers of these funds would be required to provide proper accounts of their management of the funds, always operate with business prudence and continuously avoid conflicts of interest. Where a delinquent fund manager is found, such a manager may then be subjected to the criminal law, for example, outlined in the Corrupt Practices Act. Where the provisions of the Corrupt Practices Act do not make adequate provision for the recovery of the unjustly acquired benefits, recourse may then be had to principles of equity. This would contribute towards equitable, transparent and depoliticised management of public resources.<sup>272</sup>

For example, the Corrupt Practices Act may be used to convict fund managers and public officers if they are found to be in possession of unexplained property or maintaining a standard of living which is not commensurate to their official emoluments.<sup>273</sup> In determining

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<sup>271</sup> It must constantly be borne in mind that the public trust embraces more than property management.

<sup>272</sup> Malawi Economic Justice Network (note 70 above).

<sup>273</sup> Section 32 of the Corrupt Practices Act. It must also be pointed out that the amended section 25B(3) of the Corrupt Practices Act was declared unconstitutional by the High Court in *Friday Jumbe and another v The Attorney General Constitutional Cases Nos. 1 and 2 (HC)*. The Court found the provision to be in violation of an accused person’s right to fair trial especially the rights to be presumed innocent and to remain silent.

whether or not a public officer is in possession of unexplained property, principles of unjust enrichment and restitution may offer an important fountain of reference. Under unjust enrichment, for example, equity disentitles anyone from retaining a benefit that has been acquired in an unconscionable manner. The principles of unjust enrichment could also be used in negating defences that one may set up for offences under the Corrupt Practices Act.<sup>274</sup> Clearly, principles of fiduciary management retain great potential that can be utilised in the management of public resources in a manner that conforms to the stipulations in the Constitution. To fully benefit from this potential, Malawi must, at the least, seriously attempt to comply with its own existing public resource management framework while creatively supplementing some of the legislative gaps by a resource to the law of fiduciary obligation.

### 5.5 Accountability of public functionaries and citizenry empowerment

Democracy thrives on the active participation of the citizenry in governance processes.<sup>275</sup> It must be recalled that democracy as a form of governance has been overwhelmingly endorsed in Malawi and there is immense optimism on what it can achieve.<sup>276</sup> Participation in a democracy, however, may take diverse forms.<sup>277</sup> For example, participation could be achieved through voting in elections, through membership of political parties and other organisations or through participation in public demonstrations.<sup>278</sup> It is important to realise that democratisation flourishes on quality participation by the citizenry. As Doig has argued, the purpose of democratisation is to engage the participation of the public in the activities of the state.<sup>279</sup> Quality participation in turn requires ‘knowledge, integrity and respect of morals and human dignity among the participants.’<sup>280</sup> Quality participation clearly requires a citizenry that is empowered and aware of the political processes in the country.<sup>281</sup> Participation in the activities of government also confers legitimacy on a government’s actions and gives real

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<sup>274</sup> Cf. Section 33 Corrupt Practices Act.

<sup>275</sup> B Dulani (note 253) 89.

<sup>276</sup> S Khaila & M Tsoka “Attitudes and consolidation of democracy in Malawi” Centre for Social Research, University of Malawi (2002).

<sup>277</sup> M Chilambo “Participation in democracy – a challenge” in M Chilambo (ed) *Learning democracy: A resource book* (2007) 171.

<sup>278</sup> G Erdmann & others (note 114 above) 23.

<sup>279</sup> A Doig “In the state we trust? Democratisation, corruption and development” (1999) 37 (3) *Commonwealth and Comparative Politics* 13 14.

<sup>280</sup> M Chilambo (as 277 above).

<sup>281</sup> Education may be an important component in engendering quality political participation but low levels of education are not necessarily a bar to political consciousness or participation – G Evans & P Rose “Support for democracy in Malawi: Does schooling matter” (2007) 35 (5) *World Development* 904-919.

meaning to the concept of people's sovereignty.<sup>282</sup> Even more importantly, the existence of avenues for participation fosters citizenry compliance with governmental rules and orders.<sup>283</sup>

Hand in hand with the question of participation is the accountability of public functionaries to the citizenry. It must be noted that demands for the accountability of public functionaries are not meant to hinder a government from governing. The purpose of such demands is to hold governments, public officials and their agencies to account for their stewardship.<sup>284</sup> Accountability provides the test and measure of a government's trusteeship.<sup>285</sup> In a democracy, every citizen has the right to be informed about official actions, to hear justifications for them and to judge how well or poorly they were carried out.<sup>286</sup> Measuring accountability is, however, very difficult. In liberal democracies, the complexity is heightened by the fact that citizens have to rely on representatives, who are supposed to be their agents but who also act as principals when trying to ensure the accountability of public functionaries.<sup>287</sup> The double roles of the representatives make it difficult for citizens to monitor their performance. Importantly, accountability as a political virtue is fully recognised by the Malawian populace.<sup>288</sup>

There is evidence of an overwhelming interest among the Malawian populace to participate and influence the political processes in the country.<sup>289</sup> There is also considerable optimism about democracy as a system of governance.<sup>290</sup> In spite of this there are significant challenges facing political participation in Malawi and marginalisation is one these challenges.<sup>291</sup> This marginalisation, it is argued, is partly as a result of the persistent neglect

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<sup>282</sup> *Njoya and others v Attorney General and others* 2004 AHRLR 157 (Ke HC 2004) 171-172 Per Ringera J.

<sup>283</sup> AH Birch *The concepts and theories of modern democracy* (2007) 145-146. As to the problems of participation in Malawi, generally, see B Chinsinga "The participatory development approach under a microscope: The case of the poverty alleviation programme in Malawi" (2003) 18 (1) *Journal of Social Development in Africa* 129-144.

<sup>284</sup> PD Finn (note 53 above) 234.

<sup>285</sup> As above.

<sup>286</sup> PC Schmitter "The ambiguous virtues of accountability" (2004) 15 (4) *Journal of Democracy* 47-48.

<sup>287</sup> As above.

<sup>288</sup> C Mthinda & S Khaila (note 113 above).

<sup>289</sup> G Erdmann & others (note 114 above) 23-31.

<sup>290</sup> C Mthinda & S Khaila (note 113 above).

<sup>291</sup> B Chinsinga (note 283 above) 129.

of the constitutional principles in the management of the country. Political participation is also tempered by poverty and general poor socio-economic conditions and mistaken perceptions about the workings of democratic governance.<sup>292</sup> The need to create and maintain avenues for meaningful participation thus remains a pressing exigency.<sup>293</sup> To immediately address the deficit in participation in Malawi, the state must take the lead and introduce programmes that support participation over a wide range of issues including constitutionalism, corruption, separation of powers and local governance.<sup>294</sup> Mindful of the fact that there are various avenues to achieving participation, accountability and empowerment, the discussion hereunder focuses on three aspects: the role and place of civil society, political parties and political participation and the place of local government. By exploring these three areas it is hoped to highlight the opportunities and challenges for social trust-based governance and constitutionalism in Malawi.

### 5.5.1 The role and place of civil society

Defining civil society has never been easy. The result is that there is no single view of the phenomenon.<sup>295</sup> It means different things to different people. In spite of this, civil society is often understood to connote ‘the realm of organised social life standing between the individual and the state’.<sup>296</sup> It is ‘the arena of social engagement which exists above the individual yet below the state ... It is that part of society that connects individual citizens with the public realm and the state ... [it] is the political side of society’.<sup>297</sup> As Sachikonye puts it, civil society may be defined as:<sup>298</sup>

An aggregate of institutions whose members are engaged primarily in a complex of non-state activities – economic and cultural production, voluntary associations and household life – and

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<sup>292</sup> MG Tsoka (note 250) 5.

<sup>293</sup> P Chihana “Opening space for participation in Malawi” 61 in *Towards the consolidation of Malawi’s democracy* (note 116 above).

<sup>294</sup> Malawi Economic Justice Network (note 70 above).

<sup>295</sup> G Hyden “The challenge of analysing and building civil society” (1996) 26 (2) *Africa Insight* 97 100.

<sup>296</sup> As above.

<sup>297</sup> As above.

<sup>298</sup> L Sachikonye “Democracy, civil society and social movements in Southern Africa” in L Sachikonye (ed) *Democracy, civil society and the state: Social movements in Southern Africa* (1995) 7.

who in this way preserve and transform their identity by exercising all sorts of pressures or controls upon state institutions.<sup>299</sup>

It is generally agreed that there are linkages between civil society and democracy.<sup>300</sup> The most important link is that civil society strengthens democracy. This is because civil society can contain the power of the state through public scrutiny, stimulating political participation by citizens and developing democratic norms such as tolerance and compromise.<sup>301</sup> It also creates ways for articulating, aggregating and representing interests outside of political parties especially at local levels, mitigating conflicts through crosscutting or overlapping interests, questioning or reforming existing democratic institutions and procedures and disseminating information.<sup>302</sup>

The relevance and importance of civil society to democratisation in Malawi was amply demonstrated during the transition to multi-partyism. It is remarkable that the transition process was centrally managed by the civil society led by the Public Affairs Committee (PAC).<sup>303</sup> Sadly, civil society in Malawi has failed to sustain the momentum that it had generated during the transition and has largely faltered into obscurity.<sup>304</sup> As has been the case elsewhere in Africa, the weaknesses of civil society have reduced the level of participation by the citizenry in political processes.<sup>305</sup> The failures of civil society in Malawi have resulted in the alienation of the public from participation in political processes as prominently manifested by the citizenry's shunning of electoral processes in Malawi.<sup>306</sup> This has also lessened public scrutiny of public functionaries for accountability purposes.

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<sup>299</sup> It is obviously this type of definitions of civil society that Englund criticises as being unduly Eurocentric and thus focusing on establishing civil society as being distinct and separate from the state – H Englund “Introduction: Recognising identities, imagining alternatives” in H Englund & F Nyamnjoh (eds) *Rights and politics of recognition in Africa* (2004) 1 3. For another critical perspective on civil society one must consult the work of Antonio Gramsci. Gramsci argued that in some instances what masquerades as civil society is no more than an extension of the state which moderates state/citizenry relations with a view to maintaining hegemony – A Gramsci *Selections from the prison notebooks* Edited and Translated by Q Hoare & GN Smith (1971).

<sup>300</sup> WC Chirwa “Civil society in Malawi’s democratic transition” in M Ott & others (eds) (note 192 above) 87 91.

<sup>301</sup> As above.

<sup>302</sup> As above

<sup>303</sup> As above 100-103.

<sup>304</sup> As above 103 -105.

<sup>305</sup> K Matlosa “Introduction” in K Matlosa & others (eds) (note 229 above) 1 3.

<sup>306</sup> WC Chirwa (note 300 above) 114-116.

For governance and constitutionalism to take root in Malawi deliberate effort must be made to create a stable balance between the state and society, between the government and its citizens and this can be achieved by engendering a vibrant civil society.<sup>307</sup> As has been recognised, the government of Malawi cannot address the governance and democratic challenges without stakeholder participation especially from civil society.<sup>308</sup> Civil society remains crucial to democratic governance in Malawi and, arguably, is the only vibrant mechanism by which the citizenry can articulate their interests and participate in the process of national development.<sup>309</sup>

In a nascent democracy like Malawi, it is essential that deliberate effort be taken to cement the place and role of civil society. While the institutionalisation of constitutionalism and democratic governance is a pressing necessity, it is important to note that this requires more than institutional requirements. It also requires that people should share certain attitudes and values that are consistent with the democracy.<sup>310</sup> The creation and sustenance of common democratic-compatible attitudes is a task that is uniquely suited for civil society organisations operating, as they often do, from the grassroots. A common avenue that is utilised by civil society to generate perceptions about particular issues is civic education.<sup>311</sup> Civic education, if properly utilised, can contribute to the creation of the civic culture that is necessary for citizenry empowerment and democratisation.<sup>312</sup> If, however, civic education in Malawi must contribute to the creation of a civic culture, it must be crafted so as to challenge the existing power arrangements in Malawi.<sup>313</sup> Importantly, civic education must aim at a move away from the pervasive neo-liberal visions of democracy and empowerment which have proved to have very little relevance to the situation in Malawi.<sup>314</sup> One way of challenging neo-liberal visions of society is to emphasise the trust basis of organisation that is apparent in the Constitution and other pieces of legislation. Civic education must thus be utilised as part of a

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<sup>307</sup> L Pye "Democracy and its enemies" in JF Hollifield & C Jillson (eds) *Pathways to democracy* (2000) 21 30-31.

<sup>308</sup> Malawi Economic Justice Network (note 70 above).

<sup>309</sup> B Dulani "The status of decentralisation in Malawi" Research Report (2003) 20.

<sup>310</sup> L Pye (note 307 above) 21 24.

<sup>311</sup> As to the dangers of civic education that is approached with a predetermined perspective, see H Englund *Prisoners of freedom: Human rights and the African poor* (2006).

<sup>312</sup> R Kasambara "Civic education in Malawi since 1992: An appraisal" in KM Phiri & KR Ross (eds) (note 2 above) 237.

<sup>313</sup> H Englund (note 311 above) 104-105.

<sup>314</sup> As above 117-118.

calculated and comprehensive effort aimed at achieving clearly discernible objectives in a manner that is consistent with democratisation while acknowledging local conditionalities.<sup>315</sup>

In considering how civil society can best contribute to democratic governance and constitutionalism different approaches may be suitable for different places. In Malawi, however, there is need to combine the development of nationwide institutions with community based institutions to foster democratisation.<sup>316</sup> It is of no use to focus on the development of civil society mechanisms and institutions at the national level while ignoring the grassroots. The development of a vibrant and functional civil society must commence with the grassroots. In the process of developing Malawian civil society from the grassroots adequate concession must be made of the role that traditional leaders can play in the development of democratic values at the grassroots.<sup>317</sup> This is particularly because traditional leaders have been proven to be a persistent component in the lives of rural Malawians especially.<sup>318</sup> Traditional leaders and traditional systems can be harnessed for them to make a consistent contribution to democratic governance in the country. Notably, it has been proved that the 'village society' in most parts of Malawi has adequately allowed rurally residing Malawian to form common opinions on important issues.<sup>319</sup> It is in the light of some of these points that parliament ought to seriously consider the proposal from the Malawi Law Commission for the constitutional recognition of the institution of chieftaincy.<sup>320</sup> Such a constitutional recognition would enable the various traditional leaders to openly and transparently contribute to democratic governance.

Civil society in Malawi must take the lead in articulating social trust-based governance and constitutionalism. This would involve, for example, using the social trust-based framework in civic education on the roles and functions of government. The principal resources in this

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<sup>315</sup> Most civic education projects have failed to make significant contributions to governance and democratisation because they are often erratic, have an uneven coverage and are uncritically donor driven – D Booth & others (note 250 above) 59.

<sup>316</sup> D Olowu "Governance, institutional reforms and policy processes in Africa: Research and capacity building implications" in D Olowu & S Sako (eds) *Better governance and public policy: Capacity and democratic renewal in Africa* (2002) 53 61.

<sup>317</sup> Traditional leaders, especially in the rural areas, are first port of call for Malawians if a social problem arises - S Khaila & C Mthinda (note 113 above) 6.

<sup>318</sup> National Democratic Institute for International Affairs "Traditional authority and democratic governance in Malawi" A Report on NDI programme activities with Malawian chiefs in preparation for the National Constitutional Conference (1995) 2-3.

<sup>319</sup> As above.

<sup>320</sup> Government of Malawi (note 47 above) 118-119.

endeavour can be sourced from the Constitution and norms of Malawian traditions. For example, in heeding the call to move away from neo-liberal visions of democracy, civil society should deliberately attempt to construct and relate to the Constitution a governance paradigm that is rooted within Malawi's indigenous systems of societal organisation. Government's performance can then be assessed on the basis of this paradigm's values. This would include, for example, the deliberate involvement of traditional leaders in governance processes.<sup>321</sup> Emphasis could also be placed on the construction of purposeful parallels between governance norms from traditional Malawi with those from the 'mainstream' where possible. The recognition of parallels would, it is argued, make it easy to entrench some of the norms that are common to both systems.<sup>322</sup> In this connection it is sobering to note that *ubuntu* sees political power as being accorded by the people as a whole to the few to exercise over them and create conditions for community growth.<sup>323</sup> This perspective could be utilised by civil society in generating public consciousness on how government must be perceived.

### 5.5.2 Political parties and citizen participation in political processes

Political parties are a dominant feature in all liberal democracies. They remain the crucial apparatus through which the citizenry participate in political processes. Political parties are supposed to provide the link between the state and the citizenry.<sup>324</sup> Hug has defined a political party as 'an organisation that appoints candidates at general elections to the

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<sup>321</sup> 'Deliberate involvement' of traditional leaders requires a cautious and measured involvement of traditional leaders in democratisation. Historically, traditional leaders have played contrasting roles in governance in Malawi, see AL Chiweza "The ambivalent role of chiefs: Rural decentralisation initiatives in Malawi" in L Buur & HM Kyed (eds) *State recognition and democratisation in Sub-Saharan Africa* (2007) 53-78. As earlier stated, the re-instatement of the senate would be an example of traditional leaders being involved in the governance of the country. As is demonstrated later in this Chapter, local governance is another area in which traditional leadership must be allowed to contribute.

<sup>322</sup> For example, indigenous systems of organisation in Malawi clearly value accountability as a virtue. Accountability of public functionaries is also harped on in the good governance paradigm promoted by the Bretton Woods institutions and most donor agencies. However, the emphasis should not be on accountability as demanded by donor institutions but on accountability as a virtue recognised within Malawian society and what it connotes. It must be conceded that the past few years have witnessed efforts towards a social trust-based governance and constitutionalism in civic education in Malawi especially under the Democracy Consolidation Programme.

<sup>323</sup> A Shutte "Politics and the ethic of ubuntu" in MF Murove (ed) (note 39 above) 375 386.

<sup>324</sup> FR Ankersmit *Political representation* (2002) 128.

system's representative assembly.<sup>325</sup> While this definition may be criticised for being narrow, it is the attribute of presenting candidates at elections that distinguishes political parties from other organisations. While the act of presenting candidates during elections is not an exhaustive criterion for defining political parties it is undoubtedly the definitive attribute in the categorisation of an organisation as a political party or not.<sup>326</sup>

Political parties have had an unhappy and chequered history in Malawi. At independence, in 1964, Malawi was a multiparty state but the country became a one-party state not long after that.<sup>327</sup> Although Malawi became a *de jure* one-party state only in 1966, it is arguable that Malawi was a *de facto* one party state from 1964 following the MCP's landslide victory in the General Elections. It was only with the Referendum of 1993 that political parties were reintroduced. Since then numerous political parties have been formed.<sup>328</sup>

Political parties are 'important institutions for democratic consolidation and governance.'<sup>329</sup> It has even been asserted that 'democracy is unthinkable, save in terms of political parties.'<sup>330</sup> In a liberal democratic dispensation, access to the political system is an integral part of good governance.<sup>331</sup> 'Access', however, raises several crucial constitutional issues.<sup>332</sup> These include, among others, the freedom to organise political parties and to participate in the political process including ensuring fair access for women and minorities. Access also entails the freedom of political expression and the right to campaign free from undue influence or intimidation and the right of the adult population to vote at regular intervals in free and fair elections. Political parties play a crucial role in all these processes and are widely regarded as a lynchpin to the functioning of a democracy.<sup>333</sup>

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<sup>325</sup> S Hug *Altering party systems* (2001) 12.

<sup>326</sup> N Khembo "Political parties in Malawi: From factions to splits, coalitions and alliances" in M Ott & others (eds) (note 192 above) 87.

<sup>327</sup> As above 88 -89.

<sup>328</sup> In spite of the prevalence of political parties in Malawi, it is perhaps ironic that the Constitution mentions political parties only twice – in section 40 in relation to party funding and section 65 on crossing the floor.

<sup>329</sup> N Khembo (note 326 above) 89.

<sup>330</sup> As above.

<sup>331</sup> J Hatchard & others (note 10 above) 99.

<sup>332</sup> As above.

<sup>333</sup> As above 100.

Generally, political parties play a key role in articulating the interests of the citizenry in a democracy.<sup>334</sup> Specifically, political parties play the following four crucial functions in a democracy:<sup>335</sup> firstly, political parties act as agencies for the articulation and aggregation of different views and interests; secondly, political parties serve as the vehicle through which leaders for government positions are selected; thirdly, political parties are a mechanism for organising personnel around the formulation and implementation of public policy and fourthly, political parties serve in a mediating role between individuals and the government.

In spite of the crucial roles that political parties play it is important to concede that the existence of political parties does not necessarily guarantee the existence of a functioning democratic system. In Africa especially, a host of underlying factors inhibit the proper functioning of political parties negating or completely eliminating their contribution to democratic governance.<sup>336</sup> While the problems faced by political parties in Malawi are numerous, this study will highlight only three such problems. Firstly, political parties in Malawi, almost uniformly, demonstrate a serious lack of intra-party democracy. The lack of intra-party democracy has often been manifested by parties' imposition of particular candidates on some constituencies. The lack of free and fair selection criteria for candidates, especially with respect to parliamentary elections, has significantly destabilised most political parties. Resultantly, most political parties are beset by perennial leadership crises, destructive power struggles and are dominated by a single leader.<sup>337</sup> As a further manifestation of lack of democratic credentials within political parties most of them have failed to resolve intra-party disputes within party mechanisms.<sup>338</sup> The result of this has been that most intra-party disputes have had to be resolved by the courts.<sup>339</sup>

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<sup>334</sup> N Patel & N Tostensen (note 23 above) 4.

<sup>335</sup> J Hatchard & others (note 10 above) 100.

<sup>336</sup> See, for example, B Chinsinga "Lack of alternative leadership in democratic Malawi: Some reflections ahead of the 2004 General Elections" (2003) 12 (1) *Nordic Journal of African Studies* 1-22.

<sup>337</sup> B Chinsinga (note 116 above) 14.

<sup>338</sup> FE Kanyongolo "Courts, elections and democracy: The role of the judiciary" in M Ott & others (eds) (as note 192 above) 195 203.

<sup>339</sup> Examples of intraparty disputes ending up in courts include: *Ndomondo v UDF* Civil Cause No. 484 of 2004 ; *Lapken v Katsonga & UDF* Civil Cause 436 of 2004 (both of which involved disputed primary elections conducted by the United Democratic Front) and *Gwanda Chakuamba v John Tembo* Civil Cause No. 2509 of 2001.

Secondly, political parties in Malawi are almost uniformly ‘top-heavy.’<sup>340</sup> This means that authority within most political parties is almost exclusively held by a limited circle of elitists who dominate the entire party. This is manifested by the fact that while most political parties have prominent national executive committees there is very little indication of how parties organise their grassroots support.<sup>341</sup> The ‘top-heavy’ political parties in Malawi are a big clog in the citizenry’s participation in the political process. As Patel argues:<sup>342</sup>

The top heavy approach of the party is also due to the common notion of power in the government being equated with the executive branch and not with the legislature. If the legislature were truly seen as the organ of the people and therefore the real powerhouse in a democracy, then party structures would also change to reflect the new paradigm and adopt a bottom-up approach.

Thirdly, there is a palpable lack of ideological affiliation and distinction between the political parties that have existed in Malawi since 1994.<sup>343</sup> Political parties in Malawi cannot easily be connected with a particular ideology or worldview.<sup>344</sup> As a matter of fact, there are, as Patel points out, political leaders in Malawi who openly assert the irrelevance of ideologies supposedly as a result of the manifestly common problems that African countries face.<sup>345</sup> Others point to the ‘end of ideology’ debate as justifying the lack of proper attention to ideology by political parties in Malawi.<sup>346</sup> In spite of these protestations, it is clear that political party ideology remains crucial to the democratisation process in Malawi. As Phiri has argued, without clearly defined ideologies, political parties become redundant and the

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<sup>340</sup> N Patel “Troublemakers and bridge builders: Conflict management and conflict resolutions” in M Ott & others (note 192 above) 28.

<sup>341</sup> No political party in Malawi can give an accurate indication of its membership as none of the parties has a proper system for registering and tracking its members.

<sup>342</sup> N Patel (note 340 above).

<sup>343</sup> Olowu asserts that the problem of party ideology is not uniquely Malawian but a general trend across Africa. He argues that very few African political parties are effective in mobilising the grassroots and almost all of them suffer from weak ideological differentiation – D Olowu “Governance, institutional reforms and policy processes in Africa: Research and capacity building implications” in D Olowu & S Sako (eds) (note 262 above) 65.

<sup>344</sup> KM Phiri “Reflections on party ideologies and programmes” in M Ott & others (eds) *Malawi’s second democratic elections: Process, problems and prospects* (2000) 67-86.

<sup>345</sup> N Patel (note 340 above) 227.

<sup>346</sup> The development of human society is underpinned and guided by a set of goals. These goals reflect the values of society and are reflected and expressed through the concept of ideology. The existence of a functioning society presupposes some consensus on the values that govern a society. Ideology is clearly very much alive – K Gyekye *Tradition and modernity: Philosophical reflections on the African experience* (1997) 163-170.

electorate is easily enticed by parochial and primordial criteria in making political choices.<sup>347</sup> The lack of a clear ideological basis for political parties in Malawi has meant that, in practice, there is very little to distinguish between the political parties.<sup>348</sup> The universal preoccupation by all political parties seems to be to gain access to political power but beyond this no political party has so far offered a cogent alternative.<sup>349</sup> This uniformity between the parties is manifested by, for example, the fact that party manifestos in Malawi are by and large identical.<sup>350</sup> The ideological deficiencies of political parties, however, have provided incentives for power mongering generally and personality clashes in particular between party leaders thereby causing and fuelling intra-party and inter-party conflicts and political violence.<sup>351</sup> Parties thus generate support not because of the positions that they stand for but principally because of the personalities of their leaders.

Unsurprisingly, political parties in Malawi have made a very minimal contribution to democratisation and in some cases they have even clogged the process of democratisation. The failures of political parties have, among others, generated a distrust of politicians and the political processes generally.<sup>352</sup> This distrust has been manifested by the growing voter apathy in elections and a general disengagement from political processes by the populace.<sup>353</sup> If, as appears to be the case in Malawi, political parties are part of the problem in democratisation, the solution lies not in getting rid of political parties but in harnessing the advantages that they bring to the system while blunting their denigrative effects.<sup>354</sup> Clearly, if parties have to claim to be genuinely representative of their membership they must not only enhance their internal democracy but also create proper channels for their presence at the grassroots. Enhancing internal democracy, at the very least, requires that political parties set up clear rules for their own governance and undertake to act in accordance with the rules at all times. This would facilitate consultation and enhance participation among the citizenry. Additionally, the Political Parties (Registration and Regulation) Act<sup>355</sup> could also be reviewed and amended. It is striking that this legislation, which regulates political parties in Malawi,

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<sup>347</sup> KM Phiri (note 344 above) 67 68.

<sup>348</sup> G Evans & P Rose (note 281 above) 906.

<sup>349</sup> S Brown (note 36 above).

<sup>350</sup> N Khembo (note 326 above).

<sup>351</sup> As above 94.

<sup>352</sup> G Bauer & S Taylor *Politics in Southern Africa: State and society in transition* (2005) 34.

<sup>353</sup> B Chinsinga (note 116 above).

<sup>354</sup> PD Finn (note 53) 239.

<sup>355</sup> Act No. 15 of 1993.

only regulates the registration and de-registration of political parties. It may be important to include in this legislation a scheme for the regulation of political party leadership especially in relation to their membership. A possible direction would be to create mechanisms for ensuring the accountability of political leaders to their membership which is currently lacking. Political party leadership accountability to its membership could be made a statutory obligation by detailing out a minimum accountability mechanisms that all political parties must adhere to.<sup>356</sup>

In as far as the lack of ideology among the parties is concerned, it is ironic to note that political parties in Malawi have always had several ideological resources at their disposal which they could tap if they wished.<sup>357</sup> A convenient starting point in this regard is for Malawian political parties to shift away from the liberal democratic tradition which most of them uncritically adopted during the transition to multi-partyism.<sup>358</sup> As noted, political parties that start from a liberal-democratic perspective often suffer from being poor carbon copies of systems and structures that have evolved in the context of the Western world.<sup>359</sup> The way forward for political parties is to also look inside and utilise indigenous resources in crafting ideologies that inform their policies.<sup>360</sup> In this inward gazing, social trust-based governance and constitutionalism offers possibilities that can be utilised without the veneer of cultural imperialism. Its framework may be utilised to inform political party ideologies and shape political party organisation as well. The social trust-based framework is offered here as an intellectual resource that parties can have recourse to in crafting their ideologies.

### **5.5.3 The place and role of local government<sup>361</sup>**

As earlier pointed out, a functional democracy cannot exist without participation by the citizenry.<sup>362</sup> Local government structures are among the most potent avenues for

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<sup>356</sup> The balance to be struck here is between allowing political parties to operate freely, on the one hand and ensuring that they operate in a manner that fully respects democratic principles, on the other hand. The law could be used as a stimulus to prod parties to comply with democratic principles in their organisation.

<sup>357</sup> KM Phiri (note 344 above) 69.

<sup>358</sup> As above 84.

<sup>359</sup> MC Musambachime "The weight of history and its contribution to democracy and democratisation process in Africa" Windhoek, University of Namibia Inaugural Lecture No. 5 1997 23 quoted by KM Phiri (note 344 above) 84.

<sup>360</sup> See, N Patel (note 340 above) 225.

<sup>361</sup> While the role and place of local government could very well have been discussed under the section dealing with the executive it is because of the emphasis on participation in governance processes that it is discussed in this section.

participation by the grassroots in a political system. In Malawi, local governance has a long but uneasy history especially as a result of the extensive centralisation of the state that took place during the thirty years of the Malawi Congress Party (MCP) rule.<sup>363</sup> It was only in the twilight of its time in power that the MCP government commenced a process of reviewing local governance in Malawi.<sup>364</sup> These processes were, however, overtaken by the transition to multi-partyism and the adoption of the new Constitution in 1994. The Constitution recognises and regulates local government under Chapter XIV. Chapter XIV of the Constitution is supplemented by the Local Government Act<sup>365</sup> which outlines how local governance must be practiced in Malawi. Local governments are responsible for, among others, the representation of the people over whom they have jurisdiction.<sup>366</sup> It is, however, through the process of decentralisation that most countries, Malawi included, achieve a viable system of local governance.

Decentralisation emphasises the attribution of central government functions to lower levels of government to which may then be granted a sphere of autonomy protected against the supremacy of national government.<sup>367</sup> Chiweza accurately summarises the essence of decentralisation when she asserts as follows:<sup>368</sup>

Decentralisation implies the sharing and transfer of power from the top to the lower levels. It is taken to mean the redistribution of power or sharing of part of governmental power by the central authority with other levels of authority such as regional, district or local authorities. It relates to the institutional framework for administration and political governance in a country, as well as the roles the institutions play.

The emphasis on decentralisation is a reflection of the political evolution towards more democratic and participatory forms of government that aim at improving responsiveness and

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<sup>362</sup> G Erdmann & others (note 114 above) 23.

<sup>363</sup> For a fuller perspective on the history of local governance in Malawi see B Dulani (note 307 above). See, also, J Kaunda "The state and society in Malawi" (1998) 36(1) *Commonwealth and Comparative Politics* 48 52-52.

<sup>364</sup> B Dulani (note 309 above) 6.

<sup>365</sup> Local Government Act, Chapter 22:01 Laws of Malawi.

<sup>366</sup> Section 146(2) Constitution of the Republic of Malawi.

<sup>367</sup> J Hatchard & others (note 10 above) 184.

<sup>368</sup> AL Chiweza 'Is the centre willing to share power?: The role of local government in a democracy' in M Tsoka & C Hickey (eds) *Democracy, decentralisation and human development: Bwalo, Issue 2* (1998) 93.

accountability of political leaders to their electorates.<sup>369</sup> Decentralisation is premised on the ‘fundamental belief that once they are entrusted with their own destiny through the medium of popular local democratic institutions, human beings can govern themselves in peace and dignity in the pursuit of their collective well-being.’<sup>370</sup> Decentralisation of government is thus a way of strengthening democracy and a way of bringing decisions closer to the people that are affected by the decisions.<sup>371</sup> It is also a way of enhancing participation by the citizenry. Decentralisation, according to Wingo, is the first step towards the attainment of democratic governance.<sup>372</sup> As many state functions as possible need to be located at the local level. Specifically in the context of Africa, Wingo asserts that there are two compelling reasons why African countries must focus on decentralisation.<sup>373</sup> Firstly, at the local level African countries are replete with local institutions and associations where responsibility, reciprocity and accountability are more evident.<sup>374</sup> Secondly, legitimate politics in Africa are largely a local affair. People are motivated to participate on matters that are closest to them.

Two prominent advantages of decentralisation are noticeable. Firstly, at the political level, decentralisation can enhance good governance.<sup>375</sup> The creation of ‘sub-governments’ under the central government increases the opportunities for political participation and fosters the creation of a democratic culture in a country. Invariably, locally elected leaders would know their constituents better than the central government and would thus be ideally positioned to provide the services that their constituents need. Conversely, if there is a problem with governance at the local level it is easier for the constituents to access the governors and communicate the problems that they are experiencing. This also creates potential for the populace to make their governors accountable. Overall, decentralisation reduces the over-concentration of authority in the central government and thus reduces the potential for arbitrary use of authority.<sup>376</sup> Secondly, at the economic level, decentralisation allows for the

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<sup>369</sup> J Hatchard & others (note 10 above) 185.

<sup>370</sup> As above.

<sup>371</sup> AL Chiweza (note 366 above).

<sup>372</sup> AH Wingo “Fellowship associations as a foundation for liberal democracy” in K Wiredu (ed) *A companion to African philosophy* (2004) 450 457.

<sup>373</sup> As above 457-458.

<sup>374</sup> Decentralisation thus provides for an avenue for localised notions of governance to influence a country democratisation.

<sup>375</sup> J Hatchard & others (note 10 above) 186.

<sup>376</sup> As above 187.

formulation and implementation of localised economic development plans within the context of national goals.<sup>377</sup> Decentralisation thus allows for the development of strategies that can accurately be targeted at specific needs within communities. Decentralisation can also play a role in creating conditions for a balanced growth within the different areas of the country.<sup>378</sup>

The importance of decentralisation in Malawi is clearly recognised. This aside, the process of decentralisation itself has proceeded in fits and starts.<sup>379</sup> Several problems have dogged decentralisation in Malawi but I shall only focus on three. Firstly, at the normative level, are the complexities that stem from the incompatibility between the provisions of the Local Government Act and several other statutes.<sup>380</sup> Decentralisation has been significantly hindered by the government's failure to amend a number of laws and bring them in line with the demands of decentralisation. Secondly, there is a general lack of awareness of the decentralisation processes that have so far taken place in the country. In most instances the majority of the people still do not fully understand the functions or roles of their local assemblies.<sup>381</sup> As Poeschke and Chirwa have summarised:<sup>382</sup>

The data collected indicate that the structures for local government are not well known to local people in most districts. In some areas knowledge of these structures exists, but what comes out clearly is the inability of the informants to link the concept of local government to the structures available on the ground – such as district/town assembly, community centre, office of the chief, and others

This lack of awareness of local governance structures negatively affects the viability of decentralisation initiatives in the country. This, arguably, explains why popular participation in these processes remains very low. There is a crucial need to raise awareness about decentralisation. Thirdly, decentralisation in Malawi has been sabotaged by a lack of political will to support the process. While decentralisation generally involves the shifting of decision making authority from the centre to the peripheries, there is discernible evidence that the

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<sup>377</sup> As above.

<sup>378</sup> As above 188.

<sup>379</sup> For an illustration, see B Chinsinga "District assemblies in a fix: The perils of the politics of capacity in the political and administrative reforms in Malawi" (2005) 22(4) *Development Southern Africa* 529-548. A breakdown of some of the challenges that have been faced in relation to decentralisation are offered by AL Chiweza (note 368 above) 103-105.

<sup>380</sup> For a full list of laws that have been recommended for review to make them compatible with the Local Government Act, see B Dulani (note 309 above) 8.

<sup>381</sup> Malawi Economic Justice Network *Service delivery satisfaction survey (SDSS III) Report*

<sup>382</sup> Poeschke and Chirwa (note 223 above) 48-49.

centre is still resisting the devolution of authority.<sup>383</sup> Perhaps the starkest manifestation of the lack of political will has been the repeated failure to hold local government elections in the country.<sup>384</sup> It is poignant to note that only one set of local government elections have been held since 1994.<sup>385</sup> During the first term of president Bingu wa Mutharika no steps were taken towards the holding of local government elections.<sup>386</sup> It remains to be seen whether local government elections will be allowed to proceed before the lapse of Bingu wa Mutharika's second term in office.<sup>387</sup> Notably, the local governance vacuum that has resulted has largely been filled by traditional leaders.<sup>388</sup>

Against the above background, one ought to recall the fact that in spite of the widespread rhetoric on participation and empowerment that accompanied the democratic transition and the adoption of the Constitution, participation by the populace in the political processes remains very low.<sup>389</sup> Local governance thus remains a crucial component if participation and empowerment are to be given full purport in Malawi. The democratisation process itself is largely hinged on 'whether and to what extent people participate in local-level decision-making.'<sup>390</sup> Where, as has largely been the case, there is a failure to allow people to participate and influence decisions the internalisation of democratic values is jeopardised.<sup>391</sup> In as far as the inculcation of democratic values at the local level is concerned there is a fair degree of consensus that traditional leaders and traditional structures could be utilised in inculcating and entrenching democratic values.<sup>392</sup> Traditional leaders remain very visible

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<sup>383</sup> B Dulani (note 309) 9.

<sup>384</sup> These were held in 2000. Under section 147(5) of the Constitution local government elections must be held in the third week of May in the year following the General Elections. Section 147 has since been amended and local government elections will now be held on a date to be determined by the President in consultation with the Electoral Commission.

<sup>385</sup> The failure to hold local government elections has stalled the process of citizenry empowerment in the country – N Patel "Malawi's 2009 elections: A critical evaluation" <<http://www.cmi.no/file/?1014>> (Accessed 31 May 2010).

<sup>386</sup> See, "Pressure Mounts on local polls" Nation Online <[http://www.nationmw.net/newsdetail.asp?article\\_id=214](http://www.nationmw.net/newsdetail.asp?article_id=214)> (Accessed 31 May 2010).

<sup>387</sup> Current indications suggest that the next local government elections may be held in November 2010.

<sup>388</sup> RL Muriaas "Local perspectives on the 'neutrality' of traditional authorities in Malawi, South Africa and Uganda" (2009) 47 (1) *Commonwealth and Comparative Politics* 28 37.

<sup>389</sup> H Englund (note 311 above) 6.

<sup>390</sup> R Poeschke & W Chirwa (note 223 above) 14.

<sup>391</sup> As above.

<sup>392</sup> R Poeschke & W Chirwa (note 223 above) 26-28 64 and J Lwanda (note 255 above) 49 64-65.

components of governance especially in rural areas.<sup>393</sup> It is strange that in spite of the pervasiveness of traditional leaders in Malawi, the Local Government Act does not explicitly spell out their role in decentralisation.<sup>394</sup> The challenge is to engage in a critical reflection of the roles that traditional leaders can play in democratisation and properly exploit this role.<sup>395</sup> Such a reflection must result in the creation of a structure that allows traditional leadership and local government to work together towards democratisation.<sup>396</sup>

Local governance and decentralisation can also benefit from the social trust-based framework. In conceptualising the devolution of power from the central government, the trust concept offers a viable model. The trust model can be utilised to properly place the citizenry as beneficiaries of a trust. Public functionaries, to whom the power is devolved, be they councillors, would then be understood to be fiduciaries. This would mean that the Local Government Act and the Constitution, for example, would contain the terms on which the power that has been devolved would be utilised. Violations of the terms of the Local Government Act and the Constitution could then be addressed as breaches of trust triggering the same range of remedies that equity uses to regulate fiduciaries. Regulation along this model would, as argued in Chapters Two and Three, be better positioned to take root because of the numerous conceptual affinities that it shares with traditional forms of organisation in Malawi. This would also give more meaning to decentralisation and the attribution of functions of government to decentralised structures.

## 5.6 Conclusion

As demonstrated in this Chapter, the problems in governance and constitutionalism in Malawi largely revolve around the uneasy relations between the branches of government, poor public resource management and a failure to properly empower and involve the citizenry in governance. The social trust-based approach to governance and constitutionalism relies, as has been demonstrated in this Chapter, on an innovative sublation of liberal democratic constitutionalism with principles of societal organisation that are indigenous to Malawi. It does not wholesale condemn liberal democratic constitutionalism but emphasises the need to be critical in practising liberal democratic

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<sup>393</sup> R Poeschke & W Chirwa (note 223 above) 50.

<sup>394</sup> AL Chiweza (note 321 above) 64.

<sup>395</sup> G Erdman & others (note 114 above) 11-12.

<sup>396</sup> K Mojela "Traditional authority and local government" in R van der Berg & G van Nierkerk (eds) *New perspectives on origins, foundations and transition* (1999) 145.

constitutionalism in African contexts. Social trust-based governance and constitutionalism is thus acutely mindful of the need to properly factor local conditionalities in devising governance paradigms. It is for this reason that it was argued in this Chapter that a deliberate need to infuse governance and constitutionalism with indigenous norms should be undertaken in Malawi. It was also argued that the *ubuntu* philosophy offers a basis for anchoring governance and constitutionalism.

The approach that was demonstrated in this Chapter operates at two levels. Firstly, this Chapter demonstrated that the social trust-based framework can be used a governing philosophy to inform governance and constitutionalism in Malawi. This entails a philosophical shift in the way governance and constitutionalism is approached in Malawi. Secondly, the social trust-based framework can be utilised as an alternative framework for understanding the roles and responsibilities of public functionaries. On the basis of this understanding the social trust-based framework can be used as a basis for claiming particular rights, obligations and remedies in relation to governance and constitutionalism. These two approaches are not necessarily exclusive of each other. However, as the discussion in this Chapter demonstrated, applying this approach in specific contexts requires a variation in emphasis. For example, in dealing with public resource management, recourse to the social trust-based framework will demonstrate the benefits that the framework can confer if used as a source of rights and obligations but also as a governing philosophy for the management of public resources. The emphasis in this connection is on the fiduciary core to social trust-based framework. On the other hand, in dealing with citizenry empowerment, accountability and political participation, the social trust-based framework seeks to heavily draw on the latent potential in African societies. It is in this connection that *ubuntu* acquires relevance. In all instances, however, the emphasis is on a creative application of the synthesis between *ubuntu* and the trust to governance and constitutionalism in Malawi.