

CHAPTER 6: WHICH WAY MALAWI?

A central problem identified at the beginning of the enquiry in this study was the conduct of public functionaries in Malawi and, by extension, most African countries. The attainment of good governance and constitutionalism, it has been argued, is strongly connected to the conduct of public functionaries. Very important in this regard is the manner in which society regulates and monitors all public functionaries but also the legitimacy of the framework that is used for this purpose. The framework for regulating public functionaries, therefore, is largely predictive of the manner in which public functionaries perform their duties.¹ However, the success of such a framework depends, to a large extent, on its legitimacy in the perceptions of the concerned people. It is mainly for the preceding reasons that this study proposed the social trust-based framework as the paradigm that must be used in regulating and monitoring public functionaries in Malawi. The values underlying the social trust-based framework, which draw from *ubuntu* and the trust concept, can be utilised in shaping governance and constitutionalism in a manner that enhances responsiveness and accountability on the part of public functionaries.

It must be recalled, as pointed out in Chapters One and Five, that the social trust-based framework is presented in this study at two levels. Firstly, as the ‘animating metaphor’ for governance and constitutionalism in Malawi. At this level, the study proposed the social trust-based framework as the philosophy that must conceptually ground governance and constitutionalism in Malawi. Secondly, the social trust-based framework, it was argued, can be utilised to source rights and obligations as between public functionaries and the citizenry through a creative interpretation of the Constitution and other statutes in Malawi. Understanding the legal system from a social trust-based perspective, it was argued, would imbue transparency, responsiveness and accountability in the way public functionaries conduct themselves in Malawi. The infusion of *ubuntu*, it was also argued, would enhance the legitimacy of the social trust-based framework for governance and constitutionalism.

Central to the argument in this study is the need to re-imagine democracy, governance and constitutionalism in Malawi. It must be pointed out that Malawi, and many African countries, are confronted by the failures of the liberal democratic paradigm while at the same time

¹ As this study has also demonstrated the framework by itself can never be the solution. The existence of an appropriate framework, however, can spur governance and constitutionalism in line with a preferred vision.

being urged to implement more liberally inclined reforms.² Liberal scholarship, unfortunately, tends to envisage African predicaments predominantly through analogies drawn from Euro-American experiences.³ An uncritical recourse to Euro-American experiences for inspiration, however, obfuscates African experiences and concerns.⁴ It is because of such tendencies that this study made a deliberate call for the re-imagination of democracy, governance and constitutionalism along the lines of the social trust-based framework. This call is a concession of the fact that the failures of the liberal democratic paradigm require solutions that are either outside the paradigm or solutions that creatively and sensitively adapt the liberal democratic paradigm.⁵ It is in the need for a creative but sensitive approach to governance and constitutionalism that *ubuntu* and the trust acquired importance to this study's argument. It is important to note that the value of *ubuntu* and other African paradigms does not lie at the level of specific practices as these are often culture specific and vary from one locality to the other.⁶ The strength of *ubuntu* and other African paradigms for societal organisation lies in their social legitimacy as they are grounded in community involvement and established traditions.⁷ It is to this legitimacy that this study appeals. This study has argued that by connecting mainstream legal discourse to *ubuntu* and the trust, for example, there is immense potential for fostering compliance and acceptance with norms pertaining to governance and constitutionalism. The compliance and acceptance would be built on the legitimacy that concepts like *ubuntu* already possess in African societies.

In assessing this study's overall contribution one may do well to bear in mind some of Held's insights.⁸ Writing about theories in ethics and morality, Held argued that the search for a

² H Englund "Introduction: Recognising identities, imagining alternatives" in H Englund & F Nyamnjoh (eds) *Rights and politics of recognition in Africa* (2004) 1 2.

³ As above.

⁴ This study concedes that Euro-American experience may be relevant and important for governance and constitutionalism in Africa but these experiences need to take adequate cognisance of the situation prevailing in Africa. Such experiences may thus have to be modified to properly respond to the African situation

⁵ UJ van Beek "Editor's introduction" in UJ van Beek (ed) *Democracy under construction: Patterns from four continents* (2006) 21 36.

⁶ C Villa-Vicencio "Transitional justice and human rights in Africa" in A Bosl & J Diescho (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* (2009) 33 39.

⁷ As above.

⁸ V Held *Rights and goods: Justifying social action* (1984) 3-4.

theory that answers all questions is illusory. According to Held, a theory that answers some questions but not others should be acceptable and not discredited on the basis of its failure to answer all questions. As she further argued, attempts to devise a theory or system that can answer all problems often suffer from indeterminacy, vagueness, unclarity and grandiosity. Held's conclusion is that we must be prepared to accept the suitability of partial views for partial contexts. Notably, however, Held's argument is not referred to as a way of excusing the shortcomings, if there be any, in this study. Rather, I have referred to her argument as a way of reminding the reader that the social trust-based framework is not offered here in the belief that it would solve all manner of problems that afflict Malawi or African countries, generally. It is prudent to acknowledge that in dealing with complex problems like governance and constitutionalism in Africa, 'modest' approaches are inevitable.⁹ A 'modest' approach is not necessarily a weak approach but it is a 'responsible' approach that acknowledges the limitations of human faculties to deduce comprehensive solutions to complex problems.¹⁰ Importantly, a 'modest' approach is a crucial factor in the development and acquisition of knowledge for problem-solving.¹¹

The analysis in this study focused on the regulation and monitoring of public functionaries along the social trust-based model and it is within this realm that the enquiry herein has contributed. It would be erroneous, therefore, to regard this study as an architectural blue print for governance and constitutionalism in Malawi or Africa, generally. Some of the major conclusions in this study are presented below.

6.1 Towards social trust-based governance and constitutionalism in Malawi

To go back to the questions that this study set out to answer: It is clear that the social trust-based approach to governance and constitutionalism can overcome most of the shortfalls of the liberal democratic approach in Malawi. Because of its connections to *ubuntu*, the social trust-based approach stands a better chance of garnering legitimacy among the Malawian

⁹ Cf. P Cilliers "Complexity, deconstruction and relativism" (2005) 22 (5) *Theory, Culture & Society* 255 263.

¹⁰ As above 256 & 263-264.

¹¹ This means that we must be slow and deliberate in appreciating the complexities of the problems we seek to solve, in this study, the problem of entrenching governance and constitutionalism in Malawi. We must also be slow in dismissing proposed solutions. – Cf. K van Marle "Jurisprudence, friendship and the university as heterogeneous public space" <http://www.up.ac.za/dspace/bitstream/2263/13735/1/vonmarle_paper_2009.pdf> (Accessed 6 September 2010).

people. This legitimacy, it has been argued, would be a strong factor in ensuring that public functionaries exercise their powers in line with the stipulations of the social trust-based approach. As Chapter Two demonstrated, the legal foundation for social trust-based governance and constitutionalism in Malawi stems, primarily, from the Constitution, especially sections 12 and 13 which establish government in a fiduciary position vis-à-vis the citizenry. Sections 12 and 13 of the Constitution are supported by provisions of other statutes, for example, the Corrupt Practices Act and the Public Finance Management Act. In spite of the fact that the Constitution supports the social trust-based approach to governance and constitutionalism, past experiences in Malawi demonstrate that there has been no effort at implementing the social trust-based approach to governance and constitutionalism. While this may have been excusable under the 1966 Constitution, which did not support social trust-based governance and constitutionalism, it is no longer excusable under the current dispensation in Malawi. Further, while the 1994 Constitution is heavily underlain by liberal democratic notions, it is notable that most of these ideals have yet to take root in Malawi. As this study has argued, part of the solution lies in concretely relating the liberal democratic framework to African values and principles. The philosophy of *ubuntu* offers a helpful reservoir of values that can be utilised in relating the liberal democratic framework to African values in a bid to improve governance and constitutionalism.

In considering the question of constitutionalism and good governance in Malawi, it is apt to recall, in the words of Kay, that '[w]ith respect to constitutionalism it may be that our very capacity to live in safety depends on the a priori creation of abstract limits, on an honest effort by our public actors to stay within those limits, and on an ordinarily uncritical trust by the rest of us that they will – more or less – succeed.'¹² Kay's position should not be taken to suggest that social trust-based governance and constitutionalism cannot be attained in Malawi. It merely highlights the fact that its attainment will not be a simplistic uni-linear process that materialises overnight. As Kay further argued, while constitutionalism, for example, is centrally concerned with a proper limitation of state authority, the most difficult component of any such exercise is the translation of abstract rules into discernible human

¹² RS Kay "American constitutionalism" in L Alexander (ed) *Constitutionalism: Philosophical foundations* (1998) 16 50. It is here argued that Kay's postulation accords with what this study has done especially when considers the two levels at which it has been argued the social trust-based framework must be understood. The creation of a priori abstract limits can be equated to the elucidation of an appropriate philosophy for governance and constitutionalism – which this study has done. The other level involves attempts at making public functionaries govern in line with the identified philosophy.

conduct.¹³ In order to create a viable framework for governance and constitutionalism, therefore, one must start with conceptualising a particular vision for governance and constitutionalism. This conceptual exercise should centrally revolve around how public functionaries must be monitored and regulated. It is important, however, to conceptualise a vision of governance that is likely to be socially legitimate. Social legitimacy can be achieved by connecting such a vision directly to values and ideals that a particular people already subscribe to – it is for this reason that this study made recourse to the *ubuntu* philosophy. The law has a very crucial role in this. The achievement of all this depends, in part, on the trust that society reposes in the ability of human beings to change their behaviour in response to legal prodding. Trust, in the moral sense is not, however, sufficient and it is for this reason that this study alluded to the trust concept as developed in equity which would guarantee and protect the societal expectation and reliance interests in instances involving public functionaries.

The attainment of social trust-based governance and constitutionalism requires deliberate action in several critical areas, as demonstrated in Chapter Five of this study. In moving towards the attainment of social trust-based governance and constitutionalism there is need to get a clear conceptual appreciation of the limitations that will operate on all public functionaries. Some of the critical interventions that may be undertaken are briefly highlighted hereunder. The discussion below follows the same thematic areas that were identified in Chapter Five.

6.2 The relationship between the branches of government

It requires no stretch of imagination to appreciate the necessity that government branches should operate within their constitutional limits. The branches of government have special roles to play in engendering governance and constitutionalism particularly as a result of the positions they occupy in the constitutional structure. Two concessions are important in appreciating how the branches of government can be made to operate within their constitutional mandates. Firstly, the path towards good governance and constitutionalism is not a uni-linear one.¹⁴ It is not a mere technical process with predetermined means and ends that must mechanically be executed.¹⁵ Secondly, the consolidation of democracy, good

¹³ As above 17.

¹⁴ H Englund (note 2 above) 3.

¹⁵ As above.

governance and constitutionalism encompasses social processes that have both formal and informal aspects.¹⁶ This means that time must obviously be a factor in any evaluation. Consolidation of constitutionalism, governance and democracy, of necessity will require changes in attitudes and values and this cannot be an overnight process. However, the recognition of a framework based on particular ideals, in this case the social trust-based framework, would help provide direction in terms of which attitudes must change. The starting point in attaining governance and constitutionalism, therefore, is to have a clear conceptual understanding of the norms that would regulate the exercise of public power.

6.2.1 The executive

As earlier pointed out, the executive remains the branch of government with the greatest potential for overstepping its constitutional boundaries.¹⁷ While this is a legitimate cause of concern, out of this very situation great potential is evident. The executive can utilise its heightened visibility to stimulate greater compliance with the Constitution. By way of illustration, one of the areas in which the executive was found to be dithering was compliance with judicial decisions perceived to be inimical to its interests.¹⁸ A change in perspective on this matter would set an ideal example for the purposes of consolidating the rule of law in the country. This illustration, however, highlights the point made earlier on. To achieve ideal executive compliance with judicial decisions requires an ‘enlightened’ executive that appreciates its place and role within the constitutional structure.¹⁹ This also requires an ‘enlightened’ citizenry and civil society that can properly monitor the executive’s performance of its constitutional obligations. While this cannot be an overnight achievement concrete steps must be taken towards the attainment of this objective. One of the ways which this study has explored is the ‘repackaging’ of the Constitution in such a way that it resonates much easier with most public functionaries in Malawi. This entails relating concepts like the rule of law, for example, to values that can be identified within *ubuntu*-based systems of organisation. One must, however, be cautious in this repackaging process. To use the example earlier given, while the study urges the connection of *ubuntu* to constitutional governance in Malawi, it would be naive to look for the direct equivalent of the

¹⁶ E Wnuk-Lipinski & S Fuchs “Theoretical framework and methodology” in UJ van Beek (ed) (note 5 above) 39 54. This means that the prevailing socio-political economy also plays a role in the entrenchment of governance and constitutionalism.

¹⁷ Cf. Chapter 3 of this study especially part 3.5.3.1.

¹⁸ Cf. As above.

¹⁹ See the discussion in Chapter Five part 5.3.1.1.

rule of law within the *ubuntu* framework. A more reasonable search would be to look for values in *ubuntu* that can be said to embody aspirations similar to the rule of law. Recourse to the values underlying *ubuntu* in ‘repackaging’ the Constitution may, in the long run, allow Malawian public functionaries connect with the Constitution much easier. This would flow from the legitimacy that *ubuntu* has a philosophy for societal organisation in Africa.

Specifically, in terms of enhancing the accountability of the President, for example, it was earlier demonstrated that traditional Malawian societies still perceive traditional leaders as social trustees who are amenable to removal from office if they are found wanting.²⁰ To give practical meaning to this stipulation, it is important to review and clarify the impeachment procedure in section 86 of the Constitution. This is because while the Constitution does provide room for removal of a sitting President by way of impeachment, the procedure for achieving this has yet to be settled. The possibility of removal from office for grave breaches of the Constitution would be a significant factor in fostering constitutionalism and good governance. As matters stand, it is practically impossible to remove a sitting President from office by way of impeachment even though the Constitution allows for this – the Constitution merely stipulates that the President can be impeached without detailing the procedure to be followed. The two points discussed above give an indication of the possible direction to be taken in order to enhance the accountability of the executive in Malawi. It must be emphasised that this is merely a direction and not an exhaustive compilation of what must be done by the executive in order to enhance governance and constitutionalism.

6.2.2 The legislature

The legislature possesses immense potential for activating the involvement of the populace in the governance processes. It must be recalled that *ubuntu*-governed societies insist on the participation of the populace in all decision making. A deeper involvement by the populace in the working of the legislature is bound to enhance governance and constitutionalism. This would also go a long way in realising the vision of participation in the governance of the country. Some of the steps that need to be taken in order for the legislature to achieve its potential are quite straight forward. Two steps are immediately relevant here. Firstly, the legislature needs to re-enact section 64 of the Constitution that allowed constituents to recall parliamentarians. Admittedly, the original section 64 did not provide sufficient detail to allow a meaningful implementation of the recall. However, having regard to the centrality of the recall, especially in guaranteeing the accountability of

²⁰ Cf. Chapter 4 of this study especially part 4.4.

parliamentarians, the recall provision needs to be reintroduced in the Constitution. The specific details about how the recall must be effected should be left for the legislature to expound in a separate statute.²¹ As pointed out earlier in this study, the implementation of the recall resonates with the manner in which beneficiaries of a trust can remove an errant fiduciary and also with the way traditional African societies disciplined social trustees.²² The reintroduction of the recall provision would enhance the connection between the democratically elected representatives and their constituents thereby making the representatives more accountable and responsive. It is this accountability and responsiveness that would be the bedrock for a culture of constitutionalism and good governance.

The second immediate step that can be taken to make the legislature more vibrant is to reintroduce the senate. The senate, as part of the National Assembly in Malawi, was a crucial component in enhancing the representativity of parliament as well as in terms of enhancing accountability. Even though the senate never demonstrated what it could achieve in practice,²³ the presence of the provisions for the senate in the Constitution was a sufficient reminder of the representation and accountability that the Constitution envisaged. By removing the provisions for the senate the legislature banished the ideal of representation that framers of the Constitution had envisaged. The composition of the senate, if it were reinstated, would increase the cross-section of the citizenry that is involved in making decisions affecting the nation. In the context of this study, the re-introduction of the senate would create an avenue for traditional leaders to influence governance and constitutionalism in Malawi.²⁴ The increased diversity of people involved in legislative decision making would also work to increase the legitimacy and acceptability of legislative decisions. Needless to

²¹ The Malawi Law Commission has already worked on the text of a revised section 64 that parliament could re-enact.

²² See, Chapter 4 of this study, part 4.4.

²³ By the time the provisions for the senate were being repealed from the Constitution in 2001, no upper house, senate, had ever been constituted in Malawi.

²⁴ To reiterate a caveat made throughout this study, the involvement of traditional leaders in the legislative process would not by itself solve Malawi's problems in governance and constitutionalism. As earlier pointed out, the institution of traditional leadership itself has, over the years, suffered from a 'corruption' that has eroded its traditional position in Malawian society. In spite of this, this study contends that there remains a benevolent role that traditional leaders can play in governance and constitutionalism. Besides, since the 'corruption' is acknowledged this means that there must be a cautious engagement with traditional leaders so that only the positive roles are utilised.

state that constitutionalism and governance are more likely to thrive on a foundation infused with legitimacy.

6.2.3 The judiciary

The judiciary in Malawi is uniquely poised to contribute towards the attainment of social trust-based governance and constitutionalism. As earlier pointed out, public confidence in the judiciary remains very high.²⁵ This puts the judiciary in a unique position to initiate changes that can significantly transform Malawian society.²⁶ It is important to bear in mind, as Klare noted, that judicial decision-making is a site for law making.²⁷ However, as contrasted to other sites of law making, the legislature for example, the judicial site is more grounded in reason and reflection. It is fair, therefore, to expect judicial adjudication to innovate and model intellectual and institutional practices in line with the Constitution's transformative potential.²⁸ The judiciary can utilise this potential to assist in the entrenchment of the social trust-based framework for governance and constitutionalism. The realisation of this potential, it must be pointed out, builds on the ability of the law to model human conduct in line with a particular preferred vision – the preferred vision in this case is the social trust-based framework. Crucial to the judiciary's role in this regard would be the move away from rigid common law perspectives towards an approach that embraces the transformative potential of the Constitution.²⁹

This study has argued that the judiciary is aptly positioned to take the lead in articulating transformative constitutionalism in Malawi.³⁰ This would make the judiciary a central vehicle for the attainment of social transformation in Malawi. However, it is submitted that in engineering social transformation in Malawi the judiciary should have recourse to the social trust-based framework which, as demonstrated in this study, is poised to be adequately responsive to the needs of Malawians. For example, in checking legislative or executive

²⁵ See, Chapter 5 of this study especially part 5.3.3.2.

²⁶ Both the executive and the legislature also retain some important roles in achieving societal transformation.

²⁷ K Klare "Legal culture and transformative constitutionalism" (1998) 14 (1) *South African Journal on Human Rights* 146 147.

²⁸ As above.

²⁹ Cf. 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.

³⁰ Cf. Chapter 5 of this study especially part 5.3.3.1.

excesses the judiciary's censure may be framed in such a way that it deliberately draws from the values that inform and shape the social trust-based framework. Acting along these lines, it is argued, would slowly but significantly sow the seeds for social trust-based regulation of public functionaries in Malawi. This would set the pace for the utilisation of social trust-based standards for monitoring public functionaries. Restraining and regulating both the executive and the legislature could thus be deliberately connected to ideals that inform *ubuntu* and the trust.

6.3 Public resource management

Public resources, as reiterated in this study, are crucial to the development of any country. The social trust-based framework possesses considerable potential for improving management of public resources in Malawi. In this connection one must concede that the existing statutory framework for public resource management possesses substantial potential which merely needs to be revitalised if public resources are to be utilised in line with the dictates of the Constitution. The social trust-based framework can be employed to boost public resource management in Malawi by utilising the principles of social-trust based regulation in directing the management of public resources and remedying the mismanagement of public resources.

By way of illustration, corruption was identified as a major problem with regard to public resource management in Malawi.³¹ If significant progress in dealing with corruption can be achieved, this would have significant repercussions in the country's political economy. As earlier demonstrated, the social trust-based framework can be utilised in boosting the anti-corruption drive in Malawi.³² This can be attained at two levels. Firstly, by utilising the standards in the social trust-based framework in articulating the duties that all public functionaries must observe. Secondly, by strictly enforcing the social trust-based duties that inhere in all leadership roles. This, it is submitted, would help in creating a regulatory framework that more closely monitors public functionaries but such a framework would also be sufficiently responsive in terms of granting effective remedies for abuse of trust by public functionaries. To attain the above stated goals would not necessarily require the passage of new pieces of legislation but would require a creative recourse to the existing laws.

³¹ See, for example, Chapter 3 of this study especially part 3.5.3.1.

³² Cf. Chapter 5 of this study especially part 5.3.1.2.

While the Malawi Law Commission has, for example, been working on legislation regulating the declaration of assets by public functionaries, it is important that this legislation be finalised. To properly enforce and monitor, for example, the duty to avoid conflicts of interest on the part of public functionaries it is important to have a prior indication of their wealth before they assume their positions. It is for this reason that concerted action must be undertaken to ensure the adoption of legislation regulating the declaration of assets. This legislation would be critical in determining instances of unjust enrichment as well as in the activation of mechanisms for remedying unjust enrichment. It is thus crucial that the Malawi Law Commission finalises the consultations on the asset-declaration legislation and also that the legislature promptly adopt this legislation.

6.4 Accountability of public functionaries and citizenry empowerment

Notions of accountability or representation are not alien in Malawi. As Englund has argued ‘the local notions of representation and accountability are ... variations on the wider notions of morality and personhood.³³ The challenge remains the extent to which local notions of accountability or representation, for example, are allowed to critique and influence political processes in the country. It is thus important to reverse this situation and allow more room for a critique of participation and accountability from an indigenous Malawian perspective. To achieve this several things could be done. For example, although the role of political parties in liberal democracies is largely uncontested, a thorough critique of their role in Malawi’s democracy needs to be conducted. From such a critique it ought to be apparent, for example, that political parties in Malawi need to be transformed from being ‘top heavy’ to a point where significant ‘bottom’ involvement is discernible. To achieve this some statutory catalysis may be necessary. This could be in the form of a review and amendment of the Political Parties (Registration and Regulation) Act.³⁴ The shortfalls of this piece of legislation were already highlighted.³⁵ Suffice it to point that in the current dispensation it may be necessary to create a legislative obligation on parties to involve their membership in all their activities. The review of the Political Parties (Registration and Regulation Act), for example, ought to make it mandatory for political parties to hold regular conventions for the purposes of electing leaders and transacting other party business. The review could also introduce provisions requiring parties to maintain membership rolls without necessarily re-introducing

³³ H Englund *Hybrid democracy: From patronage to corruption in Malawi* Working Paper 4/97 3.

³⁴ Act No. 15 of 1993.

³⁵ Cf. Chapter 5 of this study especially part 5.5.2.

the oppression that party membership brought during the Malawi Congress Party (MCP) rule. Generally, it is submitted that the review would be aimed at making political party leaders accountable to their members while at the same time increasing the avenues for participation in the parties by their membership. This would serve to reduce the elitism that defines almost all political parties in Malawi.

This study has also argued that traditional leaders in Malawi still have a significant role in consolidating governance and constitutionalism. As earlier noted, the ‘village society’³⁶ remains the most prominent in Malawi by reason of the fact that the majority of Malawians live in rural areas. Traditional leaders, as was also pointed out,³⁷ are consistently the first port of call for most Malawians in the event there is a social problem or a societal issue needing resolution. Traditional leaders in Malawi still wield significant influence.³⁸ To properly allow indigenous versions of accountability and representation to influence the country’s governance, a greater role for traditional leaders in the governance of the country must be facilitated. One of the ways, as earlier pointed out, is the re-enacting of the provisions relating to the senate which would allow a selection of traditional leaders to sit as part of the upper house of the National Assembly in Malawi. This would, it is submitted, create an avenue for traditional norms of governance to influence decisions that affect the country.

Further, there is a need to review and amend both the Chiefs Act³⁹ and the Local Government Act⁴⁰ in order to expressly acknowledge and frame the role of traditional leaders in Malawi especially for decentralisation.⁴¹ It is a fact that Malawi’s decentralisation project,

³⁶ 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.

³⁷ Cf. Chapter 5 of this study especially part 5.5.1.

³⁸ AL Chiweza “The ambivalent role of chiefs: Rural decentralisation in Malawi” in L Buur & HM Kyed (eds) *State recognition and democratisation in Sub-Saharan Africa: A new dawn for traditional authorities?* (2007) 53 71.

³⁹ Cap 22:03 Laws of Malawi.

⁴⁰ Cap 22:01 Laws of Malawi.

⁴¹ Admittedly the Local Government Act in section 5(1) makes senior traditional leaders i.e. Traditional Authorities or Sub-Traditional Authorities members of the local government assembly within their areas as *ex-officio* members. Two things are notable here, being *ex-officio* members entails that the traditional leaders do not have significant influence in the local assemblies. Secondly, membership is restricted to the high echelons of traditional leadership and thus excludes a significant number of lower ranking traditional leaders.

as demonstrated,⁴² has proceeded in fits and starts. The process of decentralisation, however, remains a very potent avenue in which the citizenry can involve themselves in the governance of the country. For example, while traditional leaders have, especially in the continued absence of counsellors,⁴³ increasingly assumed central roles in the management of rural Malawi this has not been with legislative imprimatur. The Chiefs Act is an antiquated piece of legislation that was adopted in 1967 largely in order to harness the authority of traditional leaders in line with the MCP vision.⁴⁴ The Local Government Act itself does not seem to envisage any serious role for traditional leaders in the decentralisation of Malawi. This needs to be changed in order to reflect the reality on the ground where traditional leaders are already informally involved in many decentralisation processes. The involvement of traditional leaders in decentralisation, specifically, and governance, generally, is likely to enhance the public's involvement in the running of the country. The increased participation that may result is bound to generate legitimacy and contribute towards the consolidation of governance and constitutionalism.

6.5 Final remarks

Malawi may be poor but this is not a permanent bar towards the attainment of good governance, democratic consolidation and constitutionalism. While most of the countries that can put a credible claim to good governance, constitutionalism or democratic consolidation are fairly affluent, it is clear that democracy can still thrive amidst poverty. A crucial point to realise in this regard is that democracy, good governance and constitutionalism are bound to take root much easier if they are readily identified with the values prevailing in the concerned localities. Democracy, for example, must be deliberately connected to similar values in indigenous traditions, for it to take easy root. In achieving this, various avenues can be and should be utilised. There is no one-size fits all approach here. In this study, the social trust-based framework has been offered as a way in which governance and constitutionalism can be related more closely to the situation obtaining in Malawi and thereby enhancing chances of consolidation.

⁴² Cf. Chapter 5 of this study especially part 5.5.3.

⁴³ There have only been one set of local government elections since 1994.

⁴⁴ RL Muriaas "Local perspectives on the 'neutrality' of traditional authorities in Malawi, South Africa and Uganda" (2009) 47 (1) *Commonwealth and Comparative Politics* 28.