

**RETHINKING GOVERNANCE AND CONSTITUTIONALISM IN AFRICA: THE  
RELEVANCE AND VIABILITY OF SOCIAL TRUST-BASED GOVERNANCE AND  
CONSTITUTIONALISM IN MALAWI**

**By**

**Mwiza Jo Nkhata**

**Submitted in fulfilment of the requirements for the degree**

**DOCTOR LEGUM (LLD)**

**In the Faculty of Law, University of Pretoria**

**November 2010**

**Prepared under the supervision of Prof Frans Viljoen and Prof Karin van Marle**

## **DECLARATION**

I declare that this thesis, which I hereby submit for the degree Doctor Legum (LLD), at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at this or any other tertiary institution.

Mwiza Jo Nkhata

## ACKNOWLEDGMENTS

During the time in which I have been working on this thesis numerous people have assisted me in diverse ways to put together this document. The fallibilities of the human memory – and the pressures of working on a doctoral thesis - make it impossible for me to remember each and every person that has assisted me during this time. To everyone who has rendered me assistance in the course of this project I say ‘thank you very much!’ Specifically, however, I would like to thank the following: the Political and Administrative Studies Department at the University of Malawi and NUFU for making available the funds that enabled me to pursue my studies, Professors Frans Viljoen and Karin van Marle for the first class supervision, this work has benefited immensely from your direction and guidance – of course all shortfalls in this thesis are entirely my own and not a reflection on your supervision! My parents Jo Nkhata Snr and Isabel Kaonga for being very supportive during this whole process and for offering encouragement when all my chips seemed to be down, my siblings PamuziPawene and Fwilawulanda for being there for me always, my uncle Isaac George Kayira and my good brother AnganileKyala. I could also detail out a whole list of friends that have been very helpful and supportive but the strictures of space do not allow me that luxury. However, let me specially thank Chikondi Khondiwa for all the help and especially for providing a home whenever I happened to be in Malawi, Eric Salima for bringing me more reading material all the way from Australia and Gilbert Khonyongwa for all the ‘stories’ that, arguably, helped me maintain my sanity during very trying times. To Lusungu Chitete and Henry Lipita, a big thank you for your friendship over the years especially the past three or so years. To all friends not specifically mentioned and colleagues at Faculty of Law, University of Malawi and the Centre for Human Rights, University of Pretoria I say ‘thank you very much!’.

## **DEDICATION**

This thesis is dedicated to my parents Jo Nkhata Snr and Isabel Kaonga

## SUMMARY

The failures of constitutionalism and good governance in Africa are well documented. Importantly, these failures have also highlighted the importance of constitutionalism and good governance in Africa. This study centrally explores the relevance and viability of social trust-based governance and constitutionalism in Malawi, specifically, and Africa, generally. Social trust-based governance and constitutionalism is an approach to governance and constitutionalism that is informed by the trust concept and is also fully mindful of local conditionalities in its operationalisation. By referring to the Constitution of Malawi and other pieces of legislation in Malawi, this study demonstrates that there is a legal basis for articulating and practising social trust-based governance and constitutionalism in Malawi. This legal basis stems primarily from sections 12 and 13 of the Constitution but is also supported by legislation like the Corrupt Practices Act, Public Finance Management Act, Public Procurement Act and the Public Audit Act.

In spite of the fact that there is a basis for social trust-based governance and constitutionalism in Malawi it is evident that governance and constitutionalism in Malawi have not, so far, been practised in line with the stipulations of the social trust-based approach. The current approach to governance and constitutionalism in Malawi is heavily steeped in the liberal democratic tradition. In this connection, this study demonstrates the limitations of the liberal democratic approach to governance and constitutionalism in Malawi principal among which is the lack of autochthony. Since the apparatus of liberal democracy has subsequently become quite entrenched in Malawi and most African countries, it is argued that the way forward involves creating a synthesis out of liberal democracy and the norms, traditions and values indigenous to Africa. This study identifies the philosophy of *ubuntu* as being an important source of values and principles that can be utilised to confer some autochthony to governance and constitutionalism in Malawi, specifically and Africa, generally. The approach adopted in this study concedes that neither a rigid insistence on liberal democratic constitutionalism nor a strict adherence to *ubuntu*-based governance and constitutionalism can succeed in Malawi. The solution is to utilise values from both traditions in order to generate a viable approach to governance and constitutionalism.

In this study, the viability and relevance of social trust-based governance and constitutionalism is demonstrated by reference to the relationship between the branches of government, public resource management and the accountability of public functionaries and citizenry empowerment in Malawi. This study argues that a social trust-based approach to governance and constitutionalism can improve the relations between the branches of

government, reinvigorate public resource management and also enhance accountability of public functionaries and empower the populace in line with the Constitution's vision. The Constitution, as the supreme law of the land, thus remains integral to governance and constitutionalism in Malawi.

**Keywords:** Governance, constitutionalism, democracy, ubuntu, public resource management, trust, fiduciary obligations, public functionaries, accountability, participation.

## TABLE OF CASES

- Aberdeen Railway Company v Blaikie* (1854) 1 Macq. 461
- Achuthan and another (On behalf of Banda and others) v Malawi* (2000) AHRLR (ACHPR 1994) 144
- Attorney General and others v MCP and others* MSCA Civil Appeal No. 22 of 1996
- Attorney General for Hong Kong v Reid and others* (1994) 1 All ER 1; (1994) 1 AC 324
- Attorney General v Dr Mapopa Chipeta* MSCA Civil Appeal No. 33 of 1994
- Attorney General v Lunguzi et al* MSCA Civil Appeal Cause No. 23 of 1994
- Attorney General v Masauli (representing himself and members of MCP)* MSCA Civil Appeal No. 28 of 1998 (High Court Civil Cause No.36 of 1997)
- Australian Capital Television Pty Ltd v Commonwealth of Australia* (No.2) (1992) 108 ALR 577
- AZAPO v The President of the Republic of South Africa* 1996 (8) BCLR 1015 (CC)
- Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC)
- Boardman v Phipps* (1967) 2 AC 46
- Bray v Ford* (1896) AC 44 51
- Bristol and West Building Society v Mothew* (1998) 1 Ch 1
- Chakuamba and others v Attorney General and others* Civil Cause No. 1B of 1999 (heard on appeal as *Chakuamba and others v Attorney General and others* MSCA Civil Appeal No. 20 of 2000)
- Chakuamba v Ching'oma* Misc Civil Cause No. 99 of 1996
- Charles Kafumba and others v The Electoral Commission* Misc. Cause No. 35 of 1999
- Chief Constable of North Wales Police v Evans* (1982) 1 WLR 155
- Civil Liberties Committee v The Minister of Justice and another* MSCA Civil Appeal No. 12 of 1999
- Civilian War Claimants' Association Ltd v R* (1931) All ER Rep 432
- Commissioners of Customs and Excise v Cure and Deeley Ltd* (1962) 1 QB 340
- Council for Civil Service Unions and others v Minister for the Civil Service (GCHQ)* (1985) 1 AC 374
- Delgamuukw v British Columbia* (1991) 79 DLR (4<sup>th</sup>) 185
- Dikoko v Mokhatla* 2006 (6) SA 235 (CC)
- Driscoll v Burlington-Bristol Bridge Co.* 86 A. 2d 201 at 221-22 (N.J. Sup Ct. 1952).
- English v Dedham Vale Properties Ltd* (1978) 1 All ER 382
- Ex Parte Chilumpha* Misc. Civil Cause No. 22 of 2006
- Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)
- Fred Nseula v Attorney General and Malawi Congress Party* Civil Cause No. 63 of 1996
- Fred Nseula v Attorney General* MSCA Civil Appeal No. 32 of 1997

*Friday Jumbe and another v The Attorney General* Constitutional Cases Nos. 1 and 2 (HC)

*Gable Masangano v Attorney General, Minister of Home Affairs and Commissioner of Prisons* Constitutional Case No. 15 of 2007

*Government of the Republic of South Africa v Grootboom and others* 2000 (11) BCLR 1169 (CC)

*Guerin v The Queen* (1984) 2 SCR 335

*Guinness Plc v Saunders* (1990) 2 AC 663

*Gwanda Chakuamba v John Tembo* Civil Cause No. 2509 of 2001

*Hassan Hilale Ajinga v United Democratic Front* Civil Cause No. 2466 of 2008

*Hodgkinson v Simms* (1994) 3 SCR 377 409

*Hoffmann v South Africa South African Airways* 2001 (1) SA 1 (CC)

*Hospital Products Ltd V United States Surgical Corporation* (1984) 156 CLR 41

*Howe v Earl of Dartmouth* (1802) 7 Ves 137

*In re Coomber* (1911) Ch 723

*In re Wait* (1927) 1 Ch 606

*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 the crossing of the floor by members of the National Assembly*, Presidential Reference No. 2 of 2005 (heard on appeal as Presidential reference Appeal No. 44 of 2006)

*In the matter of the Adoption of Children Act and in the matter of the adoption of CJ (An infant)* MSCA Adoption Appeal No. 28 of 2009

*In the matter of the Constitution of the Republic of Malawi and in the matter of the removal of Mac William Lunguzi as Inspector General of Police* Misc. Appl. No. 55 of 1994

*In the matter of the Ministry of Finance Ex Parte SGS Malawi Ltd* Misc. Civil Application No. 40 of 2003

*Julius Ishengoma Francis Ndyababo v Attorney-General* (2002) AHRLR 243 (Tz 2002)

*Keech v Sandford* (1726) Sel. Cas. Ch. 61

*Kesavanandra Bharati v State of Kerala* (1973) AIR 1461

*Khosa v Minister of Social Development* 2004 6 SA 505 (CC)

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

*LAC Minerals v International Corona Ltd* (1989) 61 DLR (4<sup>th</sup>) 14

*Lapken v Katsonga & UDF* Civil Cause 436 of 2004

*Learoyd v Whitely* (1887) 12 App Cas 727

*Liyanage v The Queen* (1967) 1 AC 259

*Lloyds Bank v Duker* (1987) WLR 1324 1330

*Mabo v Queensland (No. 2)* (1992) 175 CLR 1

*Maggie Nathebe v The Republic* Misc. Criminal Application No. 90 of 1997



*Malawi Congress Party and others v Attorney General and others* Civil Cause No. 2074 of 1995

*Malawi Human Rights Commission v Attorney General* Miscellaneous Civil Cause No. 1119 of 2000

*Malawi Law Society and others v The State and the President and others* Misc. Civil Cause No. 78 of 2002

*Manchester Trust v Furness* (1895) 2 QB 539

*Meinhard v Salmon* (1928) 249 N.Y 458

*Metcalf v Leedy, Wheeler and Company* 140 Fla.149 (1939) 191

*Minister of Finance and another v Van Heerden* 2004 (11) BCLR 1125 (CC)

*Minister of Health and others v Treatment Action Campaign and others* (1) 2002 (10) BCLR 1033.

*Minister of Home Affairs v Fisher* (1979) 2 All ER 21

*Minors Oposa v Secretary of the Department of Environment and Natural Resources* (1994) 33 International Legal Materials 173

*Mpinganjira and others v Speaker of the National Assembly and Attorney General* Misc. Civil Cause No. 3140 of 2001

*Mponda Mkandawire v Attorney General* Misc. Civil Cause No. 49 of 1996

*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1

*Ndomondo v UDF* Civil Cause No. 484 of 2004

*Njoya and others v Attorney General and others* (2004) AHRLR 157 (KeHC 2004)

*Norberg v Wynrib* (1992) DLR (4<sup>th</sup>) 449

*NZ Netherlands Society Oranje Inc v Kuys* (1973) 2 All ER 1222; (1973) 1 WLR 1126.

*Paul v Constance* (1977) WLR 527

*Peter K Waweru v The Republic* Misc. Civ. Appl. 118 of 2004 (Judgment of 2 March 2006)

*Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC)

*Premachandra v Major Montague Jayawickrema and another* <[http://www.lawnet.lk/docs/case\\_law/slr/HTML/1994SLR2V90.htm](http://www.lawnet.lk/docs/case_law/slr/HTML/1994SLR2V90.htm)> (Accessed 29 July 2008)

*President of Malawi and another v RB Kachere and others* MSCA Civil Appeal No. 20 of 1995 (High Court Civil Case No.2187 of 1994)

*Rae v Meek* (1889) 14 App Cas 558

*Re Kayford* [1975] WLR 279

*Reading v Attorney General* (1951) 1 All ER 617

*Regal (Hastings) Ltd v Gulliver* (1967) 2 AC 134

*Rookes Case* (1598) 5 Co Rep 99b

*S v Makwanyane* 1995 (6) BCLR 665 (CC)

*SEC v Cheney Corporation* (1943) 318 US 80

Selangor v Sagong Tasi Paragraph 52 - 57  
<[http://www.ipsofactoj.com/appeal/2006/Part1/app2006\(1\)-010.htm](http://www.ipsofactoj.com/appeal/2006/Part1/app2006(1)-010.htm)> (Accessed 29 July 2008)

*Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696

*Sparrow v The Queen* (1990) 1 SCR 1075

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

*Swain v Law Society* (1981) 3 All ER 797

*Taulo and others v Attorney General and others* (1993) 16(2) MLR 856

*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

*The Republic v Dennis Kambalame* Criminal Case No. 108 of 2002 Judgment on sentence.

*The State and Speaker of the National Assembly and others Ex Parte Titus Divala* Misc. Civil Cause No. 225 of 2007

*The State and the Attorney General Ex Parte Abdul Pillane* Constitutional Case No. 6 of 2005

*The State and the Electoral Commission Ex Parte Bakili Muluzi* Constitutional Civil Cause No. 2 of 2009 (Miscellaneous Civil Cause No. 36 of 2009).

*The State and The Minister of Finance Ex Parte Bazuka Mhangu and others* Misc. Civil Cause No. 163 of 2008

*The State and The President of the Republic of Malawi, Minister of Finance, Secretary to the Treasury Ex Parte Malawi Law Society* Constitutional Cause No. 6 of 2006 (Misc. Civil Cause No. 165 of 2006)

*The State and the Speaker of the National Assembly and others Ex Parte Mary Nangwale* Misc. Civil Cause No. 1 of 2005

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

*The State v The Speaker of the National Assembly Ex Parte JZU Tembo* Misc. Civil Cause No. 565 of 2009

*The State, The Electoral Commission Ex Parte Bakili Muluzi and United Democratic Front* Constitutional Cause No. 2 of 2009

*Tito v Waddell* (1977) Ch 106

*Tuffour vs. Attorney General* (1980) G.L.R. 637

*Van Rooyen and others v S and others* 2002 (8) BCLR 810 (CC)

*Vandervell v IRC* (1967) 2 AC 291

*Wallace Chiumia and others v AFORD and others* Civil Cause No. 108 of 2005

*Westdeutsche Landesbank v Islington LBC* (1996) AC 669

## TABLE OF CONTENTS

Declaration.....	ii
Acknowledgment .....	iii
Dedication.....	iv
Summary.....	v
Table of Cases.....	vii
Table of contents .....	xi
Chapter 1: Introduction .....	1
1.1 Statement of the research problem.....	1
1.2 Definitions .....	4
1.3 Background to the research problem .....	8
1.4 Focus and objectives of the study .....	13
1.5 Significance of the study .....	14
1.6 Assumptions.....	16
1.7 Literature review.....	17
1.8 Methodology.....	26
1.9 Limitations of the study .....	26
1.10 Overview of the chapters .....	29
Chapter 2: Understanding the concepts and their relevance: <i>Ubuntu</i> , the social trust, good governance and constitutionalism .....	31
2.1 Introduction .....	31
2.2 What is <i>ubuntu</i> ? .....	32
2.2.1 <i>Ubuntu</i> in modern day Africa: Romantic idealism or potent catalyst? .....	37
2.3 Understanding the social trust.....	40
2.3.1 The law and fiduciary relationships .....	44
2.3.2 Identifying fiduciaries and fiduciary relationships .....	47
2.3.3 Fiduciaries and fiduciary relationships in an evolving society .....	49
2.4 Good governance.....	51
2.4.1 Emergence of the good governance concept.....	51
2.4.2 Elements commonly associated with good governance.....	54
2.4.3 Is good governance important for Africa? .....	56
2.5 Constitutionalism.....	58
2.5.1 What is meant by constitutionalism? .....	58
2.5.2 Some major aspects of constitutionalism .....	61

2.5.3	Constitutions and constitutionalism: Is constitutionalism important in Africa? .....	63
2.6	The interface between <i>ubuntu</i> , the social trust, good governance and constitutionalism.....	67
2.6.1	<i>Ubuntu</i> , constitutionalism and good governance: The case for conceiving government as an enforceable trust.....	67
2.7	Impediments to recognising government as an enforceable trust.....	74
2.7.1	‘Political metaphor’ and ‘true trusts’: Exploring the conundrum.....	76
2.7.2	The case for circumventing the objections against recognising government as an enforceable trust and some consequential governance implications .....	80
2.8	A conceptual starting point: Government as a trust and administrative law.....	88
2.9	What is social trust-based governance and constitutionalism? The search for a viable paradigm for governance and constitutionalism in Africa.....	91
2.10	Conclusion .....	92
	Chapter 3: Patterns in governance and constitutionalism in Malawi .....	94
3.1	Introduction .....	94
3.2	A brief history of constitutionalism and governance in Malawi .....	95
3.2.1	The pre-colonial period.....	95
3.2.2	The colonial period .....	98
3.2.3	The post-colonial period .....	102
3.2.3.1	The immediate post-independence: 1964 –1966 .....	102
3.2.3.2	The First Republic: 1966 – 1994 .....	104
3.2.3.3	The Second Republic: 1994 to date .....	107
3.3	Trends in constitutionalism and governance in Malawi .....	111
3.3.1	An evaluation of governance and constitutionalism in colonial Malawi .....	111
3.3.2	An evaluation of governance in post-colonial Malawi: The First Republic, 1964-1994 .....	118
3.4	An evaluation of governance and constitutionalism in post-colonial Malawi: The Second Republic (1994 to date).....	125
3.4.1	Managing the transition to multi-partyism in Malawi.....	126
3.4.2	Governance and constitutionalism in Malawi beyond the transition .....	131
3.4.3	The relations between the branches of government .....	132
3.4.3.1	The executive .....	133
3.4.3.2	The legislature .....	137
3.4.3.3	The judiciary .....	141
3.4.4	The approach to public resource management.....	143

3.4.5	Accountability of public functionaries and the empowerment of the citizenry .	147
3.5	Conclusion .....	151
Chapter 4: Democratic governance and constitutionalism in Malawi: Is there a need for an alternative paradigm? .....		153
4.1	Introduction .....	153
4.2	Rethinking governance and constitutionalism in Malawi: The need for an alternative paradigm .....	154
4.2.1	Trendy but may be not the best: A critique of liberal democracy in Malawi .....	154
4.2.1.1	Understanding liberal democracy .....	155
4.2.1.2	The emergence of liberal democracy in Africa and Malawi .....	165
4.2.2	The case for reconceptualising governance and constitutionalism from an Afro-centric perspective.....	170
4.3	Interrogating the connection between democracy, governance and constitutionalism and African traditions, customs and institutions .....	178
4.3.1	<i>Ubuntu</i> as a basis for a reconstructed discourse on governance, constitutionalism and democracy in Africa: A tentative direction.....	180
4.4	<i>Ubuntu</i> and the social trust: A potent bulwark for governance and constitutionalism in Malawi? .....	188
4.4.1	The role of transformative constitutionalism in social trust-based governance and constitutionalism.....	194
4.5	Conclusion .....	198
Chapter 5: (Re)Discovering and revitalising social trust-based governance and constitutionalism in Malawi: The way forward .....		200
5.1	Introduction .....	200
5.2	Recapturing the foundation: The law, public functionaries and social trust-based governance and constitutionalism in Malawi .....	202
5.3	The relationship between the branches of government in Malawi .....	203
5.3.1	The executive in Malawi .....	206
5.3.1.1	The supervisory role of the executive.....	206
5.3.1.2	Accountability and transparency.....	210
5.3.1.3	Management of the budget process .....	214
5.3.2	The legislature.....	217
5.3.2.1	Oversight over the executive .....	218
5.3.2.2	Representational role .....	222
5.3.2.3	Budgetary supervision .....	229
5.3.3	The judiciary .....	231

5.3.3.1	The judiciary as a vehicle for social transformation .....	233
5.3.3.2	The judiciary as the ultimate adjudicator and bulwark against executive and legislative excesses .....	239
5.4	Public resource management .....	242
5.4.1	Interrogating public resource management in Malawi .....	244
5.4.2	The social trust-based framework and public resource management in Malawi. ....	248
5.5	Accountability of public functionaries and citizenry empowerment .....	253
5.5.1	The role and place of civil society .....	255
5.5.2	Political parties and citizen participation in political processes .....	259
5.5.3	The place and role of local government .....	264
5.6	Conclusion .....	269
Chapter 6: Which way Malawi? .....		271
6.1	Towards social trust-based governance and constitutionalism in Malawi .....	273
6.2	The relationship between the branches of government .....	275
6.2.1	The executive .....	276
6.2.2	The legislature .....	277
6.2.3	The judiciary .....	279
6.3	Public resource management .....	280
6.4	Accountability of public functionaries and citizenry empowerment .....	281
6.5	Final remarks .....	283
BIBLIOGRAPHY .....		284