

CRIMES INVOLVING DISHONESTY OR MORAL TURPITUDE IN MALAWI'S ELECTIONS

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ABSTRACT

The Constitution of the Republic of Malawi disqualifies any person for election as president, vice president or member of parliament who has, within the last seven years, been convicted by a competent court of a crime involving dishonesty or moral turpitude. The Local Government Elections Act also disqualifies such a person from being elected as a councillor on similar grounds. In addition, once elected, these office holders can lose their seats on similar grounds. The question becomes, what are crimes involving dishonesty or moral turpitude? Worldwide, courts have struggled to define this amorphous concept. In Malawi, a few cases have been heard in both the High Court and the Supreme Court of Appeal to determine whether the offences in issue were crimes involving dishonesty or moral turpitude. The courts have labelled some offences as involving dishonesty or moral turpitude, in other instances have rejected this label and in yet others have avoided expressing an opinion one way or another. What is clear is that these words remain vague but will keep coming up in the courts for determination in relation to various offences. This paper is of the view that this disqualification is an unlawful limitation of various political rights guaranteed under section 40 of the Constitution. While exploring different approaches to clarify the phrase moral turpitude, it is ultimately recommended to simply scrap this disqualification from the law and to empower the electorate to freely choose whoever they want.

Keywords: crimes, moral turpitude, dishonesty, Malawi, elections, politics

INTRODUCTION

The phrase 'moral turpitude' in relations to elections appears in four provisions in Malawian law, three of which are in the Constitution of the Republic. It first

appeared in the 1994 Constitution in section 80(7)(c) which stipulates that a person shall not be eligible for nomination as a candidate for election as president or first vice president or for appointment as first vice president or second vice president if that person has, within the last seven years, been convicted by a competent court of a crime involving dishonesty or moral turpitude. Nomination and election for members of parliament are similarly excluded by section 51(2)(c), section 94(3)(c) covers disqualification for appointment as a minister or deputy minister¹, and section 27(2)(c) of the *Local Government Elections Act* (LGE) disqualifies a person from being elected as a councillor on the same grounds.

In addition, after having been elected these office holders may also lose their seats if convicted on these grounds. Yet neither the Constitution nor the LGE define crimes involving dishonesty or moral turpitude or stipulate a clear method that judges can use to determine these crimes. Considering that being convicted of a crime involving dishonesty or moral turpitude carries such grave consequences for public office, it becomes incumbent to discuss the meaning of this phrase and its efficacy. It appears that the phrase is so amorphous that courts worldwide struggle to define it. Yet the question of which crimes involve moral turpitude so as to make someone ineligible for election or appointment to certain offices will keep coming up in our courts. Further, while there appears to be not much disagreement regarding crimes involving dishonesty, the bone of contention is 'crimes involving moral turpitude'. For this reason, crimes involving moral turpitude are the focal point here.

So, what exactly are crimes involving moral turpitude? What is the history behind this phrase in our law? How have Malawian courts interpreted this phrase? Is a conviction for a crime involving moral turpitude a legitimate disqualification from election to the offices of councillor, member of parliament or even the presidency? This paper seeks to answer these questions and more.

There are very few Malawian cases on this issue and even those few seem inconclusive on many relevant questions regarding crimes involving moral turpitude, leaving numerous questions unanswered. The meaning of which crimes involve sufficient moral turpitude as to make someone ineligible for election or appointment to certain offices is as nebulous as ever. This paper will critically analyse the few Malawian cases on this point to highlight how our courts have addressed the issue. It will also examine foreign jurisprudence and highlight various approaches to interpreting this phrase. The paper is of the view that the use of this notoriously amorphous concept to bar people from election or appointment to such high office does not resonate well with the constitutional

¹ This paper will however focus on the elected offices, though the discussion is relevant even for ministerial appointments.

right to stand for election for any elective office, as well as the right of constituents to vote for someone of their choice. Removal of this disqualification for these offices is therefore recommended.

WHAT ARE CRIMES INVOLVING MORAL TURPITUDE?

The phrase 'crimes involving moral turpitude' has been a popular subject of judicial interpretation in the United States of America (US) more than any other country (Simon-Kerr 2012, p. 1001). The US has a rich jurisprudence on crimes involving moral turpitude in relation to various purposes but mostly in immigration. In contrast, there is a dearth of jurisprudence on this point from both other African countries and the United Kingdom. Key local cases on this point rely on cases from the US and for this reason this paper will make extensive use of US jurisprudence.

The phrase 'crimes involving moral turpitude' as used in the above provisions does not create a new criminal offence nor does it declare certain conduct to be criminal. All it does is attach the label of moral turpitude to a particular crime following which the consequences stipulated in law may be visited upon the person concerned. But which crimes fit the label? As the Constitution and the LGE Act have neither defined the phrase nor indicated the list of crimes includable in this phrase, it is now left to the courts to determine various crimes that can be said to include moral turpitude. Unfortunately, this is no easy task because reference must be made to fluid moral standards prevailing in a not-so-homogeneous society and a decision made whether a particular offence can be said to be immoral. For this reason, the phrase has never had a universally accepted single definition.

Courts grappling to attach meaning to this phrase have indicated that the phrase is: an elusive concept (*Luyimbazi & Kasirye V Bazigatirawo & the Electoral Commission of Uganda*, HCT-00-CV-EP-0044 of 2011); a nebulous concept (*Matter of Perez Contreras*, 20 I & N Dec 615, BIA 1992); notoriously plastic (*Ali v Mukasey* 521 F 3d 737, 7th Cir 2008); an amorphous morass (*Partyka V AG of US* 417 F. 3d 408, 3rd Cir 2005); an invitation to judicial chaos (*People v Castro* 696 P. 2d 111, Cal.1985) and even an undefined and undefinable standard (*Jordan V De George* 71 S. Ct 703, 1951)².

The case of *Tembo and Kainja V Attorney General* [2002-2003] MLR 229 HC seems to be the only Malawian case where the court adequately considered the meaning of crimes involving moral turpitude in relation to elections and the holding of political office in Malawi. The court was invited to determine whether contempt of court is a crime involving moral turpitude. In answering the question

2 Per Justice Jackson, dissenting.

of what crimes involving moral turpitude are, the court relied on Black's Law Dictionary definition of the phrase and also made reference to some US judgments which also relied on the same definition. This seems to be the most commonly used definition by courts, defining moral turpitude as:

act of baseness, vileness, or the depravity in private and social duties which man owes to fellow man or to society in general, contrary to accepted and customary rule of right and duty between man and man. Act or behavior that gravely violates moral sentiment or accepted moral standards of community and is a morally culpable quality held to be present in some criminal offences as distinguished from others. The quality of a crime involving grave infringement of the moral sentiments of the community as opposed to statutory *mala prohibita*.

The court further adopted a definition of the phrase from North American decisions which define crimes involving moral turpitude as 'conduct... contrary to the accepted rules of morality and duties owed between persons or to society in general... an act which is per se morally reprehensible and intrinsically wrong'.

Black's Law Dictionary offers by far the most popular definition of crimes involving moral turpitude as adopted by courts. While there is a dearth of jurisprudence on the issue from other African countries, the Ugandan court also adopted this definition. Nevertheless, this definition does not provide a clear and precise meaning of what crimes involving moral turpitude are or which specific crimes are includable in the phrase. It assumes consensus on public morality and the ability of judges to identify such. Yet, what are the accepted and customary rules of right and duty between one person and another in Malawi and which crimes violate such? What are the moral sentiments or accepted moral standards of the Malawian community? Which Malawian community? Is the Malawian community homogenous with uniform moral sentiments and standards? Who decides those standards? Which conduct is morally reprehensible and to whom? Is the judge best placed to determine this? How does the judge gauge contemporary moral standards prevailing in Malawi? These and many more questions remain unanswered and the phrase, crimes involving moral turpitude, remains vague. Even the courts' definitions and meanings attached to the phrase seem ambiguous.

All this leads to uneven application as judges rely on their own biases or on precedent decisions where other judges have also relied on their own biases to decide which offences are morally reprehensible (Genovese 2018). For instance, some judges have treated false statements as crimes involving moral turpitude while others are of the opposite view (*Ghani V Holder* 557 F. 3d 836, 7th Cir. 2009 & *Hirsch V Immigration & Naturalisation Serv* 308 F. 2d 562, 9th Cir 1962). In some

cases judges have held that money-laundering crimes are those involving moral turpitude while others have held the opposite view (*Matter of Tejano*, 24 I &BN Dec 97, BIA 2007 & *Goldshtein V I.N.S.* 8 3d 645, 9th Cir 1993). By 1951 the US had over 50 cases in various courts which had applied the phrase at issue but without consistency, each case depending on the moral reactions of particular judges to particular offences (*Jordan V De George* 71 S. Ct 703, 1951). All this evidences the phrase's amorphous nature and its potential for arbitrary enforcement.

The final determining factor as to what meaning is attached to the phrase and which particular crimes are captured by it is the judge's own moral sense. Presidential, parliamentary and local government candidates (and their constituents) with criminal convictions do not have definite notice of whether they are eligible for election or whether they can be removed. Their fate depends on the whims of judges and this may lead to arbitrary enforcement. The phrase crimes involving moral turpitude indeed seems to be an undefined and undefinable standard (*ibid.*).

HISTORY OF CRIMES INVOLVING MORAL TURPITUDE IN MALAWI

The moral turpitude standard does not have a long trajectory in Malawi. It dates back to the 1995 National Constitutional Conference on the Provisional Constitution. The inclusion of crimes involving moral turpitude as a disqualification for the presidency was one of the most controversial issues for the constitution committee to the National Assembly and was most debated when the committee discussed section 80, section 7(c). The focal point was on crimes involving moral turpitude with barely any discussion on the dishonesty aspect. A majority of the members considered that crimes involving moral turpitude should, for a limited time, remain a disqualification for the presidency. The most popular reason given was that people change and society must not condemn them forever, but forgive and offer them another chance. Political positioning seems to have motivated this reasoning as memories were fresh that the newly elected democratic president, Dr Bakili Muluzi, had managed to win Malawi's first-ever multiparty elections despite having been convicted of theft.

In the initial debate a few members indicated that the phrase be expanded to include all offences, not merely crimes involving dishonesty or moral turpitude, while others favoured retaining the section with no time limit. Only two members indicated that the section was not necessary and should be removed altogether, and one of these asked the key question of who decides what is morally right and morally wrong. In this initial debate only two members attempted to discuss why the section should be retained. The first member indicated that it should be retained because in other Commonwealth countries criminal convictions

bar candidates. The second indicated that as criminal convictions can make a candidate ineligible even for a civil service appointment the same should apply to the president.

The focus of discussion in the initial debate was on whether the section should be retained with a time limit and for how long? Following this, the vote was on two issues, viz. whether section (7)(c) should be removed or retained, and whether it should be retained with a time limit. Members favoured retaining the section, but the key issues remained unsettled: whether the section should be retained with a seven-year limit, or longer/shorter. Suggestions ranged from seven years to ten and less, but these seem to have been random figures as they were not justified nor was there evidence of how long it takes for a convict to reform. The second issue was whether the section should be modified to extend the range of offences covered, and the discussion remained hotly contested. In this second debate there was again minimal discussion on crimes involving dishonesty, the focus being on crimes involving moral turpitude.

- In discussing the phrase ‘crimes involving dishonesty or moral turpitude’ some members were of the view that the term moral turpitude is ambiguous and that it is better to bar anyone convicted by any court of any crime. This was opposed on the basis that it would include even traffic offences. Instead, it was suggested that the section should only cover serious crimes such as treason, sedition, arson, rape and murder. However, treason and sedition are threats to democracy and not crimes involving dishonesty or moral turpitude. Views included that moral turpitude is a vague term that can include a wide range of issues and so it should be changed.
- Could and should moral turpitude could be defined.
- Moral turpitude does not cover traffic and political offences though one response was that knowingly driving without a licence could fall under this section.
- Finally, it was also suggested that it was best to penalise any conviction without the option of a fine as this would exclude minor offences.

When the issue was again put to the vote 140 members supported retaining the section with a seven-year limit; 107 were against the retention and in favour of removal, while two votes were invalid. The conference finally resolved that section 80(7)(c) was to be retained in its present form which is mirrored in section 51(2)(c), 94(3)(c) and the LGE Act.

So contentious was the issue that even after voting members continued debating the provision, indicating their dissatisfaction. It was suggested that they should take a further vote on the outstanding issue of whether to modify or extend the range of offences covered by the section and whether to define moral turpitude. Finally, the conference resolved by consensus that drafting experts should consider the record of the conference with a view to the possible modification of the section by extending the range of offences.

From the conference proceedings it is clear that the term moral turpitude is so vague and ambiguous that even after protracted debates lawmakers could not decide their meaning, leaving the matter to drafting experts. That drafting experts failed to do so left judges to decide which crimes are more immoral than others, mirroring popular concerns about the amorphous nature of crimes involving moral turpitude. It is clear that lawmakers wanted the section to apply to serious offences only, but unfortunately they failed to reach a consensus on which specific serious offences involve moral turpitude.

Judicial Interpretation of Crimes involving Moral Turpitude in Malawi

Experience is the life of the law, according to *Johnson V US* 2015 US Court of Appeals, 8th Cir. Malawi's experience in trying to derive meaning regarding crimes involving dishonesty or moral turpitude, is as follows:

The first opportunity for the judiciary to decide the meaning of a crime involving dishonesty and moral turpitude in relation to elections and the holding of political offices came in 2003. The High Court in the *Tembo and Kainja* case was called upon to decide whether contempt of court is a crime involving dishonesty or moral turpitude. In that case, Mr Gwanda Chakuamba obtained a court injunction restraining the plaintiffs from holding a convention for the Malawi Congress Party (MCP). Despite having full notice and knowledge of the injunction, the plaintiffs proceeded to hold the convention in defiance of the court order. On these grounds the plaintiffs were found guilty of contempt of court and were sentenced to a fine of K200,000 in default 12 months imprisonment. They paid the fine and there was no appeal against sentence or conviction. Acting on these facts, the National Assembly proceeded to declare their seats vacant under section 63(1)(e) of the Constitution.

The key question for the court was whether contempt of court was a crime involving dishonesty or moral turpitude conviction which rendered the accused subject to removal under section 63(1)(e). Having determined that contempt of court was a crime, the court began by stating that section 51(2)(c) of the Constitution applies to sitting members of parliament as far as their removal from their seats is concerned. This is by virtue of section 63(1)(e) which provides that the seat of

a member of the National Assembly shall become vacant if any circumstances arise that, if a person were not already a member of parliament, would cause that member to be disqualified for election under the Constitution or any other Act of Parliament.

The court then indicated correctly, in our view, that section 51(2)(c) does not demand that the crime should involve both dishonesty and moral turpitude. It is clear from a reading of the section that either dishonesty or moral turpitude suffices. On whether contempt of court involves dishonesty, the court referred to Black's Law Dictionary which defines dishonesty as: 'a disposition to lie, cheat, deceive, or defraud; untrustworthiness; lack of integrity; lack of honesty, probity or integrity in principle, lack of fairness and straight forwardness and a disposition to defraud, deceive or betray'. The court indicated that dishonesty equals any of the meanings prescribed in that dictionary and thus proceeded to hold that contempt of court was an offence involving dishonesty.

Regarding whether contempt of court was a crime involving moral turpitude, the court again referred to the definition in Black's Law Dictionary quoted above, and also adopted the definition of the phrase as discussed in US cases (see above).

Again referring to American jurisprudence, the court indicated that in deciding whether a crime involves moral turpitude, the focus should be on the nature of the crime and not the circumstances in which it was committed. This popular approach to dealing with crimes involving moral turpitude in the US is known as the categorical approach. This approach has also been used in Uganda (*Bazigatirawo case*, HCT-00-CV-EP-0044 of 2011). Its viability to Malawi is discussed below.

The court reiterates the same definition of crimes involving moral turpitude that judges have applied in almost all cases in the US. However, the definition as highlighted above is inadequate and unclear. For instance, what offences are regarded as vile, base, and/or depraved from a Malawian moral perspective? Or morally reprehensible and intrinsically wrong? There may be a few crimes like murder, child pornography or rape over which there may be some consensus regarding immorality, but there remains a legion of criminal offences whose morality invites diversity of views.

In this regard the court simply concluded that contempt of court is morally reprehensible and intrinsically wrong without any analysis of or reference to the prevailing moral sentiments in Malawi. The key question of whether the Malawian community finds contempt of court to be morally reprehensible and intrinsically wrong was not even asked. Thus the inquiry into moral turpitude invites judges to set inconsistent moral standards and there is no legal definition of which crimes will lead to the disqualification of a candidate.

The court in the *Tembo and Kainja* case also indicated that section 51(2)(c) does not violate political rights under section 40 of the Constitution. The court also discussed the purpose of the section and indicated that the provision should ensure that undesirables such as rapists, defilers and armed robbers not be elected to the National Assembly or, if already there, ensure their removal from Parliament. This statement appears to suggest that in the court's view the offences of rape, defilement and robbery are crimes involving moral turpitude. It is however debatable as to whether the section excludes undesirables. Another question is, undesirable from whose perspective? In the case of *Yeremiah Chihana* (Civil Cause Number 41 of 2009) (discussed below) the applicant had been nominated and therefore approved by his constituents, yet he was rejected by Malawi Electoral Commission (MEC) on the basis of section 51(2)(c). Again, regarding the seven-year limit, what is magic about this number? Does a person cease to be an undesirable with the passing of seven years? These questions and more remain unanswered. Nevertheless this case remains a significant authority on crimes involving moral turpitude in Malawi.

Shortly after the High Court judgment, the *Tembo and Kainja* case proceeded to the Supreme Court of Appeal. The Supreme Court held an extensive discussion on whether the contempt of court in issue was a crime or a civil wrong and unanimously decided that the contempt in issue was a civil not a criminal wrong. The court proceeded to hold that, having determined that the contempt was not criminal and therefore outside the ambit of section 51(2)(c) as read with 63(1)(e), 'we do not see any need to go through the academic exercise of determining whether or not the contempt involved moral turpitude or dishonesty'.

It is regrettable that Malawi missed an opportunity to hear the views of the highest court in the land on crimes involving dishonesty and moral turpitude. As the Supreme Court said nothing about the High Court's views on the meaning of crimes involving dishonesty or moral turpitude and whether criminal contempt involves these elements, and in the absence of any other relevant authorities, we take the view that the High Court judgment in this case is still valid on this point.

In 2009, another opportunity arose in the case of *Yeremiah Chihana* for the High Court yet again to determine section 51(2)(c) and the meaning of crimes involving dishonesty and moral turpitude. Interestingly, the same judge was sitting as in the previous case. In this case the applicant was convicted of the offence of unlawful wounding and sentenced to 18 months imprisonment, reduced to 14 months on appeal. It was alleged that he did not serve the full sentence owing to a presidential pardon. In 2009 the applicant was nominated by the Alliance for Democracy (AFORD) party for election as Member of Parliament (MP). When he presented his nomination papers to EC, they were rejected on the basis of his conviction. The key issues for the court's determination were, inter alia, whether

the applicant should have been heard before the decision disqualifying him was made and secondly whether unlawful wounding is a crime involving moral turpitude.

Regarding the first question, the court held that a person whose eligibility is at stake should be afforded the right to be heard as guaranteed by section 43 of the Constitution. Since this had not been done, the decision to bar Mr Chihana was taken in breach of his right to be heard and was therefore void. When the same question arose in the *Tembo and Kainja* case, viz, whether the National Assembly had afforded the plaintiffs the right to be heard, the court indicated that the plaintiffs automatically lost their seats the moment they were convicted of a crime involving dishonesty or moral turpitude and that it was not necessary to determine whether or not they were heard.

The latter decision seems correct in our view. The decision to bar someone from standing as MP, councillor or president or to remove such person affects the person and his or her constituent rights, freedoms, and legitimate expectations or interests, so as to warrant compliance with the right to be heard under section 43 of the Constitution.

The court also indicated that section 51(2)(c) is about more than the applicant's candidature or eligibility to stand. It concerns the applicant's right to stand for elective office, his right to vote and the right of persons in his constituency to vote for a candidate of their choice as guaranteed by section 40 of the Constitution. Subsequent paragraphs discuss whether section 51(2)(c) is a justifiable limitation to section 40.

Secondly, the court indicated that the MEC has no power to disqualify anyone simply because they have a criminal conviction. It has to be a conviction for an offence involving dishonesty or moral turpitude. This was in response to the fact that MEC had simply written to the applicant that his nomination was ineligible following his conviction by a competent court of law, without specifying whether the conviction was for a crime involving dishonesty or moral turpitude. The court refused to determine whether unlawful wounding was a crime involving moral turpitude on the basis that firstly, such determination was irrelevant to the resolution of the matter; and secondly, that the words moral turpitude and dishonesty keep appearing in the courts for determination and the court did not wish to burden other judges with its opinions.

This was yet another missed opportunity to further clarify the law on this point. The court's definition of the words in *Tembo and Kainja* therefore remain relevant. There have, however, been other cases where the courts discussed moral turpitude, though not in relation to elections and the holding of political offices. In *R V Gondwe* ((1964-1966) ALR Mal 247) for instance, the court stated that theft of money was a felony of grave moral turpitude. The recent case of *Symon Kamuna*

(Confirmation Case Number 669 of 2002; *R V Manyozo* Confirmation Case Number 431 of 2002) declares that simple theft is not an offence of moral turpitude. This further evidences the inconsistencies in court application of the moral turpitude standard. Thus the phrase moral turpitude remains vague even after attempts to define it; yet it is a script that will keep replaying in our courts.

CONSTITUTIONALITY

Section 40 of the Malawian Constitution makes provision for political rights in Malawi, including the following guarantees: the right to participate in peaceful political activities intended to influence the composition and policies of the government; the right freely to make political choices; the right to vote; and the right to stand for any elective office. In the *Tembo and Kainja* case, the plaintiffs argued that their expulsion from the National Assembly was a violation of their political rights in terms of section 40 of the Constitution.

The judge indicated, correctly in our view, that the rights under section 40 can be limited as long as such limitation complies with section 44(1) of the Constitution. This section provides that a limitation shall only be lawful if it is prescribed by law; is reasonable; is recognised by international human rights standards; and is necessary in an open and democratic society. Referring to its previous decision in the case of *Maggie Kaunda* (Criminal Appeal Number 8 of 2001) the court stated that, with regard to limitations, it is necessary to establish firstly, if the plaintiff's right or freedom has been infringed; and secondly, if the limitation complies with section 44(1). With respect to the first question, the court held that depriving the plaintiffs of the right to participate in the activities of the National Assembly was a clear infringement of their political rights. We concur with the court that barring someone from standing for election, or removing them from their position on the basis of a crime involving dishonesty or moral turpitude, is *prima facie* an infringement of the person's right to stand for election for any elective office and also the right of his or her constituents to vote for or be represented by a person of their choice. This is more so where the person is barred after nomination, as happened in the *Yeremiah Chihana* case, or where the person is removed after election. The right to participate in peaceful political activity intended to influence the composition and policies of the government is also infringed.

The key question is whether this infringement complies with section 44(1) and is therefore lawful. In the *Tembo and Kainja* case, the court answered this question in the affirmative, asserting that that limitation was lawful because section 51(2)(c) as read with section 63(1)(e) serves the legitimate aim of protecting the integrity of parliament by eliminating undesirable people. The court further

indicated that the limitation is legal because it does not impose a blanket ban on all political rights. The plaintiffs were free to engage in political activities and to exercise their political rights in other ways or areas other than parliament. The court therefore held that there was a reasonable proportionality between the means used i.e. disqualifying/removing people convicted of crimes involving dishonesty and moral turpitude, and the aim of keeping people of bad character out of parliament. The court therefore concluded that section 51(2)(c) was a lawful limitation under section 44 of the Constitution.

Having established that disqualification or removal on the basis of a conviction for a crime involving moral turpitude infringes section 40 rights, it is incumbent to critically analyse this disqualification against section 44(1) to determine if this is indeed a lawful limitation and therefore constitutional. Any lawful limitation of constitutional rights must comply with all the requirements prescribed by section 44(1) of the Constitution (*Wavunduka Mwenitete V Fishani Mkandawire* Civil Appeal Number 29 of 2000). That is, it must be prescribed by law, reasonable, recognised by international human rights standards and necessary in an open and democratic society.

Prescribed by Law

Section 44(1) stipulates that a lawful limitation must be prescribed by law. The European Court of Human Rights has held that a law cannot be regarded as 'prescribed by law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct (*Sunday Times V the UK* 2 EHRR 245). As discussed above, the phrase 'crimes involving moral turpitude' is notoriously vague. Malawian citizens and their constituents are not given definite notice of which exact crime warrants disqualification to the said offices. Whether a particular crime is regarded as a crime involving moral turpitude and therefore disqualifies a candidate depends on the moral reactions of the judge sitting. This is untenable and we submit that crimes involving dishonesty or moral turpitude are not prescribed by law and therefore fail the section 44(1) test.

Reasonable Limitation

Is a disqualification for election as councillor, MP or president on the basis of a conviction involving dishonesty or moral turpitude within the last seven years a reasonable limitation? Chirwa (2011, p. 48) indicates that at the very minimum, reasonableness demands that laws should not be arbitrary and that the limitation must be rationally connected to its stated objectives. The analysis above has already established that the phrase is grossly ambiguous. The legislature struggled to make

sense of it and courts have struggled to attach a definite meaning to it. Morality is so fluid a concept that even courts are not competent to gauge it accurately, particularly in a pluralistic society, and though courts have tried to define this phrase, their definitions are also amorphous. This goes for the *Tembo and Kainja* case too. Consequently the phrase is applied unevenly. Even with respect to the same offence some judges will regard it as involving moral turpitude while others have the opposite view. Which particular crime involves enough moral turpitude to warrant disqualification for elections or removal from office, depends on the personal moral view of the sitting judge. The persons concerned are not given definite notice. We submit that subjecting someone's right to be elected to office, and the constituents' right to vote for someone of their choice (ie for a nominated candidate) to the whim of the sitting judge is a sufficiently arbitrary application of a law for us to question the law's reasonableness.

Secondly, the law in issue is not reasonably connected to its supposed objectives. Justice Chikopa argues that the law in the *Tembo and Kainja* case is meant to protect the integrity of parliament by eliminating so-called undesirables from parliament. We argue that integrity is so intrinsic a matter that the lack of a conviction involving dishonesty or moral turpitude does not guarantee this protection. Stories are rife in Malawi of sitting parliamentarians involved in corruption and other dubious activities. Are such people desirable just because they have never been convicted of a crime involving dishonesty or moral turpitude? What of the person who is convicted of a crime involving dishonesty or moral turpitude but has such conviction overturned on appeal on a technical point of law?

The law's supposed purpose is also undermined by candidates like Jeremiah Chihana who were duly nominated by their constituents. We consider that the disqualification undermines such constituents' right to vote for a person of their choice. People do not vote for a candidate to contribute to a national assembly comprised of persons of moral uprightness and integrity. They vote for candidates they consider may represent them in parliament and deliver their developmental needs. There may also be tribal motivations in Malawi. There is thus no guarantee that a representative without a criminal record can serve the people better than a previous convict. A criminal record has nothing to do with the ability to ably represent and deliver proper services to one's constituents.

There is no evidence that character matters in the choice of political leaders for the Malawian electorate. A few days before Malawi's first multiparty general elections in 1994, Malawi was awash with a story involving one of the strongest contenders for the election, Dr Bakili Muluzi. In 1968 Muluzi had been convicted of stealing 6.10 pounds sterling while working as a court clerk at Nsinja traditional court in Lilongwe. He served a prison sentence of six months. Less than a week

before the election, the *Malawi Democrat* carried this story on its front page, with full details and a picture of Muluzi in prison uniform. This newspaper was sponsored by the AFORD party whose Chakufwa Chihana was a strong contender for the elections and was generally regarded as the candidate with an impeccable record of integrity. He was considered the more principled of the two, a family man, a trade unionist, human rights activist and a pro-democracy advocate. The paper running this story was widely circulated and freely distributed in communities to ensure wide dissemination of the scandal. Muluzi chose not to respond to these allegations and went on to win the election with 47% of the vote, becoming Malawi's first democratic president and emerging as a charismatic leader. This incident is probably why section 80(7)(c) was hotly contested during the 1995 constitutional conference.

In addition, in 2004 Muluzi's UDF won the election under Bingu wa Mutharika who was himself handpicked by Muluzi. This was despite the fact that Muluzi and other key UDF figures were not exactly paragons of virtue. During the run up to the 2004 election, further damning allegations of corruption, theft of public funds, abuse of office and womanising involving Muluzi were released by his chief economic adviser and business partner, Kalonga Stambuli.

Another example is that of Yerehiah Chihana who was nominated as a candidate for AFORD by his constituents when memories of his conviction for unlawful wounding were still fresh. Members of parliament have often been re-elected into parliament by their constituents despite scandalous stories associated with them, involving even corruption.

This proves the point that good character alone is not a strong determinant for the choice of a candidate by the Malawian electorate. Should the right to stand for elective office and the right of constituents to vote and be represented by a person of their choice be limited on the strength of such a nebulous concept whose objectives do not matter to the electorate and which is not even guaranteed to achieve its purported aim? We think not. To disqualify a candidate convicted of a crime involving dishonesty and moral turpitude for the purpose of protecting the integrity of parliament in these circumstances does not seem reasonable. It is therefore submitted that these provisions are not a reasonable limitation of the rights concerned.

In addition, the case of *Maggie Kaunda* (Criminal Appeal Number 8 of 2001) states that reasonableness also entails that there be proportionality between the limitation and its aim. Specifically, the limitation must be capable of achieving its purpose and also not unnecessarily impinge on human rights in achieving its objective. On this basis, assuming that good moral character matters to the Malawian electorate, it is possible to protect the integrity of parliament by enacting a precise provision that can be applied without arbitrariness, uncertainty

or unpredictability. Other countries such as South Africa and Namibia use unambiguous words and phrases, e.g. 'convicted of a crime punishable with a prison sentence without the option of a fine'. The provisions at issue cannot therefore pass the reasonableness test under section 44(1).

Recognition by International Human Rights Standards

While it is unclear whether the state needs to demonstrate that a particular limitation is recognised in international law and domestic jurisdictions, evidence that the limitation is rarely found in comparative human rights law will undermine its necessity (Chirwa 2011, p. 49). The state has to prove that the limitation is recognised in international law or by a significant number of democratic states (ibid.). In this regard, it must be noted that only a few African countries (Ghana, Uganda and Libya) have provisions disqualifying candidates convicted of crimes involving moral turpitude from political office (see constitutions of Ghana and Libya; IFES 2011 report on elections in Libya). While most African countries have constitutional provisions disqualifying previously convicted persons from election to parliament or the presidency, they do not disqualify candidates on the basis of a conviction involving dishonesty or moral turpitude. The disqualification is usually for crimes punishable by death or imprisonment without the option of a fine³. Tanzania and Nigeria have constitutional provisions disqualifying persons from the presidency and legislative houses if they have been convicted of a crime involving dishonesty, but no reference is made to moral turpitude. Only a negligible number of African countries apply the principle of moral turpitude to elections and the holding of political office. Within the Southern African Development Community (SADC) region, disqualification on the basis of moral turpitude seems to be peculiar to Malawi. On this premise we submit that this is an unnecessary limitation not generally recognised by international human rights standards.

Necessary in an Open and Democratic Society

To begin with, the case of *Jumbe and another* (Constitutional Case Numbers 1 & 2 of 2005) noted that the term 'open and democratic society' is not easy to define. Paragraph 20 of the Siracusa principles (1985) indicates that the term 'in a democratic society' demands that states should show that limitations do not impair the democratic functioning of the society. The provision also entails that the limitation at issue must serve a legitimate purpose which is necessary in

3 See the constitutions of Zambia, Zimbabwe, Lesotho, Swaziland, Botswana.

an open and democratic society (*Jumbe* case). In answering the question as to whether a limitation is necessary in an open and democratic society, Malawian courts consider whether the limitation promotes the fundamental principles of the Constitution or principles of national policy (Chirwa 2011, p. 52; *Attorney General & another V Malawi Congress Party & others* [1997] 2 MLR 181; *Friday Jumbe* case). It is a fundamental principle of the Malawian Constitution that the authority to govern derives from the people and shall be exercised in accordance with the Constitution solely to serve and protect their interests. To the extent that the provisions in issue undermine the constituents' right freely to make political choices and the right to vote for a person of their choice, it is submitted that they impinge the democratic functioning of society and the fundamental right of people to choose their leaders. On that account again, we find this limitation unjustifiable.

Overall, it is submitted that, having failed the tests stipulated in section 44(1), disqualifying candidates convicted of a crime involving dishonesty or moral turpitude in the last seven years is an unjustifiable limitation of the right to participate in peaceful political activities intended to influence the composition and policies of the government; the right freely to make political choices; the right to vote; and the right to stand for any elective office as guaranteed by section 40 of the Constitution. It is therefore recommended that this disqualification should be removed from the Constitution.

POSSIBLE APPROACHES TO IDENTIFYING CRIMES INVOLVING MORAL TURPITUDE

While it is recommended that the disqualification for election on the basis of a conviction involving dishonesty or moral turpitude be removed altogether from the Constitution, it is necessary also to explore other viable alternatives to the problem. A variety of tests have been used or proposed to clarify this nebulous phrase and help identify crimes involving moral turpitude. These alternatives are discussed below in relation to their viability in the Malawi legal system.

Firstly, in the case of *Luyimbazi & Kasirye V Bazigatirawo & the Electoral Commission of Uganda* (HCT-00-CV-EP-0044 of 2011) the High Court of Uganda has adopted a unique approach to interpreting crimes involving moral turpitude by using the standard of a reasonable man in the accused's community. Other than the local cases cited above, this seems to be the only case interpreting crimes involving moral turpitude in relation to elections on the African continent. In this case the respondent was nominated and won local council elections by a large margin. He had recently been convicted of assault causing actual bodily harm and sentenced accordingly, having slapped another man after a heated political argument. The applicants who lost the elections challenged his victory on the

basis that the respondent had, within seven years preceding the nomination, been convicted of a crime involving moral turpitude contrary to Section 80 (2)(f) of the Ugandan Constitution.

Relying on the Malawian cases quoted above as well as American jurisprudence, the court indicated that moral turpitude is an elusive concept incapable of precise definition. It held that the standard of a reasonable man in the convict's community would be appropriate. On this basis the court went further to hold that slapping another person following an argument is not conduct so 'depraved, vile and base as to shock the Mubende people' as proved by the fact that they nominated and overwhelmingly voted for the respondent despite knowing of his conviction. This ruling was upheld by the Ugandan Court of Appeal (election petition appeal number 40 of 2011). As indicated above, in making moral assessments of the crimes in issue, Malawian judges have not made any reference to the community's moral sentiments. The Ugandan approach, though it does not fully address the ambiguity surrounding moral turpitude, mitigates the problem by ensuring that judges use an established yardstick applicable to a specific community.

Secondly, American jurisprudence has now adopted the categorical approach to interpreting crimes of moral turpitude. The categorical approach considers if moral turpitude is necessarily inherent in a conviction under a particular law without regard to the specific circumstances of the offence (Salem 2018, p. 233; Dadhania 2011, pp. 313-355). Here the court examines the particular law under which the person was convicted to determine whether such law categorically involves moral turpitude. If the least culpable conduct that can sustain a conviction under a particular law involves moral turpitude then that statute categorically involves moral turpitude without even considering the convict's actual conduct (*ibid.*; Frank 2017, p. 578). The *Tembo and Kainja* case adopted this approach. Nevertheless, this approach entails that the court should undertake the difficult task of determining if moral turpitude inheres in a particular crime, and then categorise it accordingly. This may invite judges to hypothesise whether moral turpitude is inherent in the nature of a particular crime and is still ambiguous. The categorical approach also hampers useful flexibility in the sense that once there is a finding that moral turpitude does not inhere in a particular statute it matters not that the offence was committed in aggravating or deplorable circumstances. To a large extent, however, the categorical approach enables courts to avoid the difficult task of making moral assessments.

A third way to mitigate the ambiguity and identify crimes involving moral turpitude is actually the opposite of the categorical approach. This is to look at the actual circumstances of a particular case and the facts underlying it and determine if it was committed in such a way that it can be said to involve moral

turpitude (*Marchiano* 450 F. 2d.1025). Here every case turns on its facts. If a felony has been committed in excusable circumstances, for example killing in self-defence, then it does not involve moral turpitude. Alternatively, if a misdemeanor has been committed in aggravating circumstances then it can be said to involve moral turpitude regardless of its classification. While this can be said to be a fair approach for the convict, it still hampers uniformity and predictability because it is premised on the judge's subjective assessment of the facts of a particular case.

A fourth possible alternative to identifying crimes of moral turpitude is to simply regard every felony as a crime involving moral turpitude, but not misdemeanors. It has been argued that the law takes into account the degree of moral turpitude in fixing punishment for a crime (Riddall 1999, p. 308). The problem with this approach is that felonies and misdemeanours are categorised according to the degree of punishment and not the nature of the act (Bradway 1935, p. 923). This becomes problematic when a felony is committed under excusable circumstances or a misdemeanor is committed in aggravating and deplorable circumstances.

A fifth approach to identifying crimes of moral turpitude has been to consider the mental element accompanying its commission. If the crime committed involves reprehensible conduct and it is committed with specific intent, willfulness or knowledge then it is regarded as involving moral turpitude (Dhadania 2011, pp. 313-355). Here, evil or malicious intent is the determining factor. Statutes that are regulatory in nature or which do not have an intent requirement, such as strict liability offences, are regarded as not involving moral turpitude. On the other hand, crimes committed knowingly or with evil intent are considered to involve moral turpitude (Moore 2008, p. 825). The best advantage of this approach is that it enables judges to avoid making moral value judgments, while its key disadvantage is that it hampers flexibility in decision-making which can be helpful especially for misdemeanors requiring evil intent.

A sixth recommended approach is to distinguish between crimes involving moral turpitude and those not involving moral turpitude. This has been the case in Alabama, where crimes of moral turpitude have been used to disenfranchise and the law now provides a list specifying which crimes involve moral turpitude and which do not. It has been suggested that the Malawi legislature should adopt this approach and clearly list the offences that involve moral turpitude and those that do not (Bande 2017, p. 83). While this removes guesswork and discretion and provides useful insight, the question remains as to what informs the decision as to which crimes should be on the list? It should also be borne in mind that such lists are never exhaustive and other approaches may still be needed to supplement the inquiry into excluded offences. These lists may be unduly restrictive as there are many situations where an offence may have been committed in excusable circumstances.

Finally, common law crimes were also classified as *malum in se* and *malum prohibitum*. This distinction has also been used to differentiate crimes involving moral turpitude from those that do not involve moral turpitude (ibid., 81). *Malum in se* means 'evil in itself' and refers to an act that is inherently immoral like murder or rape (Garner 2007, p. 978). Crimes *malum in se* were and are generally considered crimes of moral turpitude. *Malum prohibitum* means 'prohibited evil' and refers to acts that are criminal merely because they are prohibited by the law though the acts themselves are not immoral (ibid.). For example, regulatory offences like road traffic violations are generally not regarded as crimes involving moral turpitude because they do not invite adequate moral condemnation (Salem 2018, 232). We submit that this distinction is not precise enough to solve the moral turpitude ambiguity nor flexible enough to allow changes where an offence *malum in se* is committed in excusable circumstances, or *malum prohibitum* is committed in inexcusable circumstances

CONCLUSIONS AND RECOMMENDATIONS

This paper set out to critically analyse crimes involving dishonesty or moral turpitude in relation to elections and the holding of political office in Malawi. It has established that, although the Constitution and the LGE Act disqualify people for election and make them removable if they are convicted of a crime involving dishonesty or moral turpitude, the term moral turpitude is ambiguous. Local Malawian and international courts have tried unsuccessfully to define this phrase, and consequently it is unevenly applied. The paper has also established that this disqualification is an unlawful limitation of the right to participate in peaceful political activities intended to influence the composition and policies of the government; the right freely to make political choices; the right to vote; and the right to stand for any elective office as guaranteed by section 40 of the Constitution.

While different approaches to addressing the ambiguity around moral turpitude have been explored, they all present various weaknesses that undermine their efficacy. It is therefore recommended that the best way forward is to delete this disqualification from the Constitution and the LGE Act altogether. The electorate is quite capable of making its own choice and should be afforded the opportunity to do so. The Muluzi saga is adequate proof. The freedom to make political choices imposes an obligation on the state to ensure that people are empowered to make informed political decisions (Chirwa 2011, p. 389). The best way for this is to permit all candidates to contest the election and let the voters decide after providing them with all relevant information, including information on criminal records. Should they elect someone with a criminal record then let that be their call.

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