IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

MISCELLANEOUS APPLICATION NO. 5 OF 2015
(Being Criminal Case No. 444 of 2015 at the Blantyre Magistrate's Court

IN THE MATTER OF:

MAYESO GWANDA **APPLICANT**

AND

THE STATE **RESPONDENT**

SUBMISSIONS

Contents

1. BACKGROUND

1.1 The Applicant herein was arrested and charged with the offence of being a rogue and vagabond as provided for in section 184(1)(c) of the Penal Code.

1.2 Section 184(1)(c) of the Penal Code provides that:

> "Every person found in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose, is deemed a rogue and vagabond".

1.3 A brief chronology of events leading up to this Petition is listed below:

(1) The Applicant was arrested by the Malawi Police Service in Chichiri on 20 March 2015 at around 4:00am. At the time, the Applicant was on his way to Limbe where he sells plastic bags. The Applicant is a street vendor by trade and was carrying the plastic bags at the time of his arrest.
(2) The police officers on patrol asked the Applicant to explain where he was going and he informed them that he was walking to Limbe from Chilomoni to sell plastic bags.
(3) The police officers did not believe the Applicant's explanation and arrested him. He was told that he would have to explain his case at the police station.
(4) The Applicant was kept in custody at Soche Police sub-station in Blantyre until 23 March 2015 when he was taken to the Blantyre Magistrates Court. He was charged with the offence of being a rogue and vagabond contrary to section 184(1)(c) of the Penal Code.[1] He was subsequently released on bail pending trial on 25 March 2015.
(5) On 25 March 2015 the trial was stayed pending the determination of a Constitutional Petition filed by the Applicant.

[1] Cap 7.01 of the Laws of Malawi.

(6) This matter was certified by the Chief Justice in terms of section 9(3) of the Courts (Amendment) Act of 2004, on 3 June 2015.

1.4 Courts have long expressed their discomfort with the wide ambit of rogue and vagabond offences, and have sought to narrowly interpret these offences to save them from invalidity. In addition, courts have emphasised that a conviction under rogue and vagabond offences would only be proper where all the elements of the offence have been proved.[2]

1.5 The High Court of Malawi, when reviewing convictions under section 184, has expressed concern that magistrates frequently allow persons to plead guilty under section 184 without understanding what they were pleading to[3] or acknowledging all the elements of the offence, and often in instances where there is no attempt to individualise the charges against a group of persons accused of an offence under section 184.[4]

1.6 A conviction under section 184(1)(c) should in essence turn around whether there is proof of an illegal or disorderly purpose. In the Malawi case of *Republic v Kaipsa*[5] it was held that the magistrate must be convinced of what the illegal purpose was. In *Republic v Luwanja and Others*[6] the High Court of Malawi overturned a conviction under section 184(1)(c) on the basis that there was no evidence that the accused was loitering for an illegal purpose - "The accused might have been poor, with holes in his pocket, but this unfortunate state of affairs, and often without choice, does not make them criminals." In the more recent case of *Chidziwe v Republic*,[7] Sikwese J reiterated that the illegal and disorderly purpose element is really an intention requirement.[8]

1.7 In a 2010 study conducted by Women and Law in Southern Africa (WLSA-Malawi) regarding women in prison in Malawi, the authors found that many arrests and convictions under section 184(1)(c) were irregular and that the actions prior to arrest of women under section 184(1)(c) simply did not correspond to the definition of the crime.[9]

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[2] *Attorney General v Tse Kam-Pu*i [1980] HKLR 338, Hong Kong Court of Appeal.
[3] *Republic v Luwanja and Others* [1995] 1 MLR 217.
[4] *Republic v Foster and Others* [1997] 2 MLR 84 (HC). The twelve accused were arrested at three different places and accused in one charge of being a rogue and vagabond. The court held this to be a misjoinder. The court held that the acceptance of guilty pleas can only be made where each accused person admitted all essential elements of the charge. See a similar decision by the Hong Kong Court of Appeal in *Attorney General v Chan Chin-hung and Others* [1980] HKLR 737.
[5] [1966-68] ALR (Mal) 283.
[6] [1995] 1 MLR 217.
[7] Criminal Appeal 14 of 2013.
[8] "There must be an intention in the mind of the accused that his mission at any particular place and time would be illegal or improper."
[9] S White et al, *Poor, Invisible and Excluded: Women in State Custody Malawi* (2010) 38.

1.8 Similarly, interviews conducted with police officers in Blantyre revealed that police officers interpret section 184 to allow them to arrest persons who are not doing anything, or who are found in a public place at night or in the early morning.[10] Thus, although the proclaimed purpose of using section 184 is crime prevention, no evidence exists to support the assumption that its use reduces specific crimes.

1.9 The Applicant submits that the continued application of section 184(1)(c) in a manner that violates constitutional rights is indicative of the problematic nature of the offence itself and through this Application, the Applicant requests that the court declares section 184(1)(c) of the Penal Code unconstitutional.

1.10 The Applicant submits that section 184(1)(c) of the Penal Code is dated[11] and vague in formulation and consequently, its application is arbitrary and it is applied disproportionately to the poor in society who are more likely to be found in circumstances that could lead to an arrest under section 184(1)(c) and are less able to assert their rights.[12] As such, the Applicant submits that section 184(1)(c) is not compatible with the values of an open and democratic society as espoused by the Constitution of Malawi.

1.11 The Applicant argues that section 184(1)(c), which had its origin in the English Vagrancy Act cannot be enforced perpetually without an evaluation of whether it corresponds with modern concepts of criminal law, which requires respect for human rights and compliance with principles of criminal law such as the right to be presumed innocent until proven guilty, the need for offences to be sufficiently clear and precise and the need for the laws to be applied evenly and without discrimination based on social status.

2. THE ISSUES FOR DETERMINATION

2.1 The first issue for determination is whether the offence of being a rogue and vagabond as contained in section 184(1)(c) of the Penal Code in itself and in its general application violates one or more of the rights enshrined in the Constitution of the Republic of Malawi, including sections 19(1), 19(3), 19(6), 20(1), 21 and 39(1) of the Constitution.

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[10] Centre for Human Rights Education, Advice and Assistance (CHREAA) and the Southern Africa Litigation Centre (SALC) (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre*, Malawi 64-65.

[11] The history and origin of section 184(1)(c) of the Penal Code is set out in Centre for Human Rights Education, Advice and Assistance (CHREAA) and the Southern Africa Litigation Centre (SALC) (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre*, Malawi 15-29.

[12] As noted by the UN Special Rapporteur on Extreme Poverty and Human Rights: "Penalisation policies reflect a serious misunderstanding of the realities of the lives of the poorest and most vulnerable and ignorance of the pervasive discrimination and mutually reinforcing disadvantages that they suffer … Asymmetries of power mean that persons living in poverty are unable to claim their rights or protest their violation." UN General Assembly, 4 August 2011.

2.2 The second issue for determination is whether section 184(1)(c) of the Penal Code and its consequent application is such a limitation to one or more of the rights contained in sections 19(1), 19(3), 19(6), 20(1), 21 and 39(1) of the Constitution of the Republic of Malawi that it cannot be said to be reasonable, recognised by international human rights standards, and necessary in an open and democratic society.

3. KEY PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

Relevant Constitutional Provisions

3.1 Section 9 of the Constitution of the Republic of Malawi (the Constitution) states that "the judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws and in accordance with this Constitution in an independent and impartial manner *with regard only to legally relevant facts* and the prescriptions of law."[13]

3.2 Section 9 of the Constitution should be read with section 10(1) of the Constitution which provides that, "in the interpretation of all laws and in the resolution of political disputes the provisions of this Constitution shall be regarded as the supreme arbiter and ultimate source of authority.

3.5 Section 11(2) of the Constitution provides that: "in interpreting the provisions of this Constitution a court of law shall c) where applicable, have regard to current norms of public international law and comparable foreign case law." Where applicable, these submissions will refer to relevant international law and comparable foreign case law.

3.6 In addition, section 211 of the Constitution provides that:

> "(1) Any international agreement entered into after the commencement of this Constitution shall form part of the law of the Republic if so provided by an Act of Parliament.
> (2) International agreements entered into before the commencement of this Constitution shall continue to bind the Republic unless otherwise provided by an Act of Parliament.
> (3) Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall form part of the law of the Republic."

3.7 Malawi ratified the *International Covenant on Civil and Political Rights* (ICCPR) on 22 December 1993 and the *African Charter on Human and Peoples' Rights* (ACHPR) on 17 November 1989. These Conventions are binding on Malawi.

[13] *Chakuamba v Attorney General and Others* [2000] MWSC 5.

3.8 As stated by Nyirenda J, as he then was, *In the matter of David Banda (a male infant)*[14] Malawi has chosen to be bound by the international treaties it ratified:

> "In other words, Malawi has consciously and decidedly undertaken the obligations dictated by these Conventions. It is therefore our solemn duty to comply with the provisions of the Conventions."

3.9 Section 41(3) of the Constitution entitles all successful litigants to an effective remedy.

3.10 Sections 12 and 44 of the Constitution provide a useful structure within which to measure whether any limitation of rights through any law is justifiable.

3.11 Section 12(1)(e) of the Constitution provides that "all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society."

3.12 According to section 44 of the Constitution:

> "(1) No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society.
> (2) Law prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, and shall be of general application."

3.13 Section 46(1) of the Constitution states that:

> "Save in so far as it may be authorized to do so by this Constitution, the National Assembly or any subordinate legislative authority shall not make any law, and the executive and the agencies of Government shall not take any action, which abolishes or abridges the rights and freedoms enshrined in this Chapter, and any law or action in contravention thereof shall, to the extent of the contravention, be invalid."

3.14 It is accepted that the Constitution should be interpreted in a generous and broad fashion as opposed to a strict, legalistic and pedantic one[15] and in a manner that gives force and life to the words used by the legislature, avoiding at all times interpretations that produce absurd consequences.[16]

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[14] [2008] MLR 1.
[15] *Fred Nseula v Attorney General and Malawi Congress Party* MSCA Civil Appeal No. 32 of 1997. See also *Anthony Njenga Mbuti and 5 Others v Attorney General and 2 Others* [2015] eKLR, Constitutional Petition 45 of 2014, at para 112.
[16] *Attorney General v Dr Mapopa Chipeta* MSCA No. 33 of 1994.

3.15 The rules of legality require that a statute should be interpreted in a manner that avoids absurdity. A statement of prohibited conduct must be clear and unambiguous and should leave no room for dispute or uncertainty as to whether particular conduct comes within the ambit of a proscription set out in the definition of the crime.[17]

3.16 Furthermore, in construing the meaning of legislation, courts must be guided by the object and purpose of the impugned statute in determining its constitutionality.[18]

Burden of Proof where Rights Violations are Alleged

3.17 The burden of proof is on the Applicant to show that his rights have been violated. However, once the Applicant has established a *prima facie* violation of his rights, the burden will shift to the Respondent to justify that the offence is a justifiable limitation of the rights in the Constitution.[19]

3.18 The Canadian Supreme Court, in *R v Oakes*[20] held that "the onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation".[21]

3.19 The Human Rights Committee has similarly explained that the onus on the State extends to demonstrating the necessity and proportionality of the Act:

> "When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat."[22]

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[17] In the case of *Susan Kigula and 416 Others v Attorney General* [2005] UGCC 8, the Constitutional Court of Uganda asserted that: "There is a well known rule of interpretation that to take away a right given by a statute, the legislature must do so in clear terms devoid of any ambiguity."

[18] *Anthony Njenga Mbuti and 5 Others v Attorney General and 2 Others* [2015] eKLR, Constitutional Petition 45 of 2014, at para 111.

[19] *Attorney General of Trinidad and Tobago v Morgan* 45 [1985] LRC 9. ("Where an Act is passed into law … and that Act is one that restricts the rights and freedoms of an individual, in order to impugn such as Act, all that an individual is required to do is to show that one or more of his rights have been restricted. Having done so the burden shifts to the proponent of the Act to show that the provisions of the Act restricting such rights and freedoms are 'reasonable' restrictions. If the proponents of the Act fail to discharge this burden then the Court of competent jurisdiction may pronounce against the validity of the impugned Act…"). Also quoted by the Kenya High Court in *Nation Media Group Limited v Attorney General* [2007] 1 EA 261 (HCK). See also *Lyomoki and Others v Attorney General* [2005] 2 EA 127 (UGCC); *Muwanga Kivumbi v Attorney General*, Constitutional Petition 9 of 2005, Uganda Constitutional Court; *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* [2004] ZACC 10; 2005 (3) SA 280 (CC) at para 34.

[20] *R v Oakes* [1986] 1 SCR 103.

[21] *Id* at p 105D, 136J.

[22] UNHCR General Comment 34 paragraph 35.

4. SECTION 184(1)(C) OF THE PENAL CODE VIOLATES CONSTITUTIONAL RIGHTS

4.1 The Applicant submits that section 184(1)(c) in itself and in its effect violated his constitutional rights, including his rights to dignity; freedom from inhumane and degrading treatment and punishment; freedom and security of person; freedom from discrimination and equal protection of the law; privacy; and freedom of movement.

4.2 The Applicant further submits that the arbitrary and discriminatory enforcement of section 184(1)(c), and the section's inherent reversal of the presumption of innocence, is manifestly unjust, contrary to international human rights law, and negates the essential content of the abovementioned constitutional rights.

4.3 Each of the alleged rights violations are set out below.

Section 184(1)(c) of the Penal Code Violates the Right to Dignity

4.4 The Applicant is a law-abiding citizen who seeks to make a living by selling plastic bags. As such, he joins a multitude of people throughout Malawi who wake early in the morning to make their way to the places where they will sell their goods. These are hard-working individuals who struggle to make ends meet, whether by selling plastic bags, fruit and vegetables, clothes, crafts or other goods. The Applicant submits section 184(1)(c) of the Penal Code and his arrest and detention in terms of section 184(1)(c) violated his inherent right to dignity. He objects to a situation where, if he is found walking in the early hours of the morning to make a living, he can be stopped, questioned, arrested and detained for days, without any respect for his rights as an individual.

4.5 Section 19(1) of the Constitution provides that "the dignity of all persons shall be inviolable."

4.6 The African Charter on Human and Peoples' Rights, adopted on 27 June 1981, in Article 4 provides: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

4.7 In the case of *Purohit and Another v The Gambia*, the African Commission on Human and Peoples' Rights (hereinafter referred to as the 'African Commission') held that:

> "[H]uman dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are

entitled to without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right."[23]

4.8 In addition to being a substantive right, dignity is also an underlying constitutional principle. Section 12(1)(d) of the Constitution provides that "the inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote."

4.9 In this regard, the South African Constitutional Court in *Dawood v Minister of Home Affairs*[24] held that human dignity informs constitutional adjudication in many ways: It is a value that informs the interpretation of other rights; it is a constitutional value central in analysis of limitation of rights; and it is a justiciable and enforceable right that must be protected and respected.

4.10 The South African Constitutional Court, in *S v Makwanyane and Another*[25] held that:

> "Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights…" [507A]

4.11 Many jurisdictions have elaborated on the importance of the presumption of innocence in upholding the right to dignity and protecting citizens from arbitrary arrests.

4.12 In Canada, in the seminal case of *Regina v Oakes*, Dickinson CJC explained that the right to dignity requires a State to be able to prove the guilt of an accused:

> "The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in section 11(d) of the Charter, the presumption of innocence is referable and integral to the general protection of life, liberty and security of the person contained in section 7 of the Charter…. The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences the presumption of innocence is crucial. It ensures that until the State proves an

[23] (2003) AHRLR 96 (ACHPR).
[24] 2000 (3) SA 936 (CC).
[25] 1995 (3) SA 391 (CC) *(abolished death penalty*, O'Regan J).

accused's guilt beyond all reasonable doubt he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in human kind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise."[26]

4.13 Unfortunately, section 184(1)(c) of the Penal Code is used in a manner that disregards the right to dignity by allowing the arrest and detention of persons in instances where no effort is made by the State to prove that the accused had an illegal or disorderly purpose.

4.14 The High Court of Kenya in *Anthony Njenga Mbuti and 5 Others v Attorney General and 3 Others*, concluded that the State blatantly disregarded the "inherent dignity" of all people by subjecting them to the Peace Bond provisions that have their roots in 11th century British criminal procedure.[27] The Court also reasoned that subjecting people to such archaic procedures prohibit due process and equal protection under the Constitution.[28]

4.15 The Applicant submits that section 184(1)(c), which was uniformly introduced in most British colonies outside of democratic processes and as a tool for social control, does not meet the constitutional standards required from all laws in a constitutional democracy.[29]

Section 184(1)(c) of the Penal Code Violates the Right to be Free from Inhumane and Degrading Treatment and Punishment

4.16 The Applicant submits that the broad ambit of section 184(1)(c) of the Penal Code resulted in him being subjected to inhumane and degrading treatment and punishment. By arresting the Applicant without cause when he was going about what is a normal activity for street vendors in Malawi and subjecting him to arrest and detention for three days, the police's application of section 184(1)(c) was demeaning and humiliating. The large number of people who are arrested in this manner on a daily basis without regard to the mental anguish it causes is concerning and perpetuated by the continued existence of section 184(1)(c).

[26] [1986] 19 CRR 306, at page 322.
[27] [2015] Constitutional Petition No 45 of 2014, at para 21.
[28] At para 66.
[29] These colonial offences were introduced through a Model Criminal Code drafted by the British colonial office and based on the wording of the English Vagrancy Act of 1824 [for example in Nigeria (1916), Gambia (1934), Malawi (1929), Zambia (1930), Uganda (1950), Botswana (1964), Seychelles (1955), Tanzania (1930). Some countries have since sought to limit the impact of these offences: Kenya repealed these offences in 2003; Ghana limits the offence to instances which actually caused annoyance to persons and where the person did not move away after requested by police; and Mauritius limits the offence to persons found in a building or on property.

4.17 Section 19(3) of the Constitution provides that no person shall be subjected to cruel, inhuman, or degrading treatment or punishment. Section 45(2)(b) of the Constitution provides that this is a non-derogable right.

4.18 The right is also entrenched in international and regional treaties which Malawi has ratified, such as Article 7 of the International Covenant on Civil and Political Rights has a similar provision, and the United Nations' Human Rights Committee, in General Comment 20,[30] observed that this right allows no limitation.[31]

4.19 The African Charter on Human and Peoples' Rights, in Article 5 provides:

> "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly … cruel, inhuman or degrading punishment and treatment shall be prohibited."

4.20 The African Commission, in the case of *Huri-Laws v Nigeria*[32] noted: "the term 'cruel, inhuman or degrading treatment or punishment' is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental."[33] In this case it was contended that "being detained arbitrarily, not knowing the reason or duration of detention, is itself a mental trauma."[34]

4.21 Section 184(1)(c) exposes innocent people to degrading treatment at the hands of the police during questioning, arrest and detention.

4.22 The High Court of Kenya in *Anthony Njenga Mbuti* considered the Peace Bond provisions to be a class of crimes that subjects citizens to inhuman and degrading treatment because there isn't normally any evidence of actually committing a crime, so constitutional safeguards are negated.[35] Mumbi Ngugi J considered the Peace Bond provisions as constituting a criminal process with severe penal consequences that fall outside of the fundamental rights prescribed by the Constitution.[36]

4.23 In instances where specific groups of people are more at risk of being stopped, questioned and arrested by the police whilst going about their daily activities, each police stop becomes a demeaning and humiliating experience which makes people feel unwanted and distrustful of the police. It creates a situation where people live in

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[30] Adopted by the Human Rights Committee at the 44th Session, 1992.
[31] *Id* at para 3.
[32] (2000) AHRLR 273 (ACHPR 2000).
[33] At para 40.
[34] *Id.* See also *Doebbler v Sudan* (2003) AHRLR 153 (ACHPR).
[35] *Anthony Njenga Mbuti & 5 Others v Attorney General & 3 Others [2015]* Constitutional Petition No 45 of 2014, at para 149.
[36] *Id* at para 150.

fear of being stopped when they go about their daily activities and alienates the police from the community.[37]

4.24 Even if detention is only for a short period, the harm done to the individual and his or her family is significant, and includes stress; financial hardship linked to loss of income, transport to the police station and court, fines; enduring inhumane conditions in detention with a subsequent impact on health.[38]

Section 184(1)(c) of the Penal Code Violates the Right to Freedom and Security of Person

4.25 The Applicant submits that section 184(1)(c) of the Penal Code violated his right to freedom and security of person, as protected under section 19(6) of the Constitution, in that he was stopped, arrested and detained arbitrarily by police.[39]

4.26 Article 9 of the International Covenant on Civil and Political Rights similarly recognises and protects both liberty (freedom) of person and security of person.

4.27 The Human Rights Committee's General Comment 35 explains that liberty of persons concerns freedom from confinement of the body, whilst security of person concerns freedom from injury to the body and the mind, or bodily and mental integrity.[40]

4.28 In terms of General Comment 35, the right to liberty prohibits arbitrary arrest and detention and any arrest or detention that lacks any legal basis is arbitrary.[41] "Arbitrariness" is defined as "to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.[42]

4.29 General Comment 35 further provides that "any substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application".[43]

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[37] *Floyd and Others v the City of New York* 08 Civ. 1034 (SAS), 2013.

[38] An Open Society Initiative for Southern Africa (OSISA) survey of five police stations in Malawi in 2010 noted that police stations provided little or no food to persons in custody, and conditions are often unhygienic and hazardous. L Muntingh (2011) "Survey of conditions in detention in police cells" in Open Society Initiative of Southern Africa (2011) *Pre-trial Detention in Malawi: Understanding Caseflow Management and Conditions of Incarceration*, 52-65. African Policing Civilian Oversight Forum *Policing and Human Rights: Assessing Southern African Countries' Compliance with the SARPCCO Code of Conduct for Police Officials* (2012) 67; UN General Assembly, *Report by Special Rapporteur on Extreme Poverty and Human Rights*, 66th session, 4 August 2011, A/66/265, 5, http://www.ohchr.org/Documents/Issues/Poverty/A.66.265.pdf.

[39] *See Floyd and Others v City of New York* [2013] 08 Civ 1034 SAS: where the District Court held that the police's stop-and-frisk practice violated the plaintiffs' right to personal security and not to be subjected to unreasonable searches.

[40] Adopted by the Human Rights Committee at its 112th Session, October 2014, CCPR/C/GC/35, at para 3.

[41] *Id* at para 11.

[42] *Id* at para 12.

[43] *Id* at para 22.

4.30 Similarly, the African Charter on Human and Peoples' Rights, in Article 6 provides:

> "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

4.31 The African Commission, in *Amnesty International and Others v Sudan*[44] concluded that Article 6 must be interpreted in such a way as to permit arrests only in the exercise of powers normally granted to security forces in a democratic society:

> "In these cases, the wording of this decree allows for individuals to be arrested for vague reasons, and upon suspicion, not proven acts, which conditions are not in conformity with the spirit of the African Charter".[45]

4.32 In *King v Attorney General*[46] the Supreme Court of Ireland considered the provisions of section 4 of the Vagrancy Act, which is the origin of rogue and vagabond offences,[47] to be contrived and contrary to the right to security of person:

> "In my opinion, the ingredients of the offence and the mode by which its commission may be proved are so arbitrary, so vague, so difficult to rebut, so related to rumour or ill-repute or past conduct, so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature, so prone to make a man's lawful occasions become unlawful and criminal by the breadth and arbitrariness of the discretion that is vested in both the prosecutor and the judge, so indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct, when engaged in by another person in similar circumstances, would be free of the taint of criminality, so out of keeping with the basic concept inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed standard of conduct, and generally so singularly at variance with both the explicit and implicit characteristics and limitations of the criminal law as to the onus of proof and mode of proof, that it is not so much a question of ruling unconstitutional the type of offence we are now considering as

[44] *Amnesty International, Comite Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, 48/90-50/91-52/91-89/93, November 1999.
[45] *Id* at para 59.
[46] [1981] 1 LR 245, 57.
[47] Centre for Human Rights Education, Advice and Assistance (CHREAA) and the Southern Africa Litigation Centre (SALC) (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre*, Malawi 15-21.

identifying the particular constitutional provisions with which such an offence is at variance."[48]

4.33 Dealing with the right to security of person, the Supreme Court of Canada, in *Canada (Attorney General) v Bedford*[49] held that in considering the question "whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient" to establish a breach of the right.

The Application of Section 184(1)(c) of the Penal Code Violates the Right to be Free from Discrimination and to Equal Protection of the Law

4.34 The Applicant submits that section 184(1)(c), in effect, limits his right to equal protection of the law and his right not to be discriminated against. Section 184(1)(c) provides the police with an unfettered power to arrest individuals, and exposes the Applicant and others in his position, to discrimination based on their economic status in society.

4.35 Section 20(1) of the Constitution prohibits discrimination in any form and all persons are, under any law, guaranteed equal and effective protection against discrimination on various grounds, including sex and social status.

4.36 Section 20 should be read with section 41(1) of the Constitution, which provides that every person shall have the right to recognition as a person before the law, and also with section 12(1)(e) which states that all persons have equal status before the law.[50]

4.37 In *Malawi Congress Party and Others v Attorney-General*[51] Mwaungulu J held that section 20(1) of the Constitution should be interpreted in accordance with section 11(2)(b), as well as accounting for the fundamental principles under section 12(e).[52] Mwaungulu J contended that equality under the law is a fundamental aspect of the law, and that the courts will do right by striking down any government action or law that infringes upon this right, concluding that "a law which results in unequal treatment between the citizens of the land will be arbitrary."[53]

4.38 In the case of *Somanje v Somanje and Others*[54] Ndovi J observed:

[48] At page 257.
[49] [2013] 3 SCR 1101.
[50] *See* K Nyirenda "An Analysis of Malawi's Constitution and Case Law on the Right to Equality" *Using the Courts to Protect Vulnerable People.*
[51] [1996] MLR 244 (HC).
[52] *Id* at page 300.
[53] *Id.*
[54] [1999] MLR 400 (HC).

> "The right to equality under the law is an absolute right. This right cannot be limited or restricted in terms of section 44(2). Section 44(1)(g)[55] specifically lays down that there shall be no derogation, restrictions or limitations with regard to the right to equality and recognition before the law."[56]

4.39 The African Charter on Human and Peoples' Rights, in Article 3 provides that every individual shall be equal before the law and shall be entitled to equal protection of the law.

4.40 The African Commission, in *Zimbabwe Lawyers for Human Rights & IHRD in Africa v Zimbabwe*[57] held that unfettered power in the hands of an officer is tantamount to unrestrained power based on "vague and unsubstantiated reasons of a danger to public order" and destroys the right to equality before the law and violates Article 2.[58] The Commission also considered that Article 3 should be read to mean: "The right to equality before the law does not [solely] refer to the content of legislation, but [also] … to its enforcement. It means that judges and administration officials may not act arbitrarily in enforcing laws."[59]

4.41 Mumbi Ngugi J, in the Kenya High Court linked the practice of profiling by police to a violation of the right to equal protection before the law:

> "How can [it] be permissible with respect to mere suspicion that because there is lawlessness and crimes committed in a particular locality, the police can arrest, and the court lock up, persons on mere suspicion that they are likely to commit crimes? Does this not lead to the worst form of profiling, that those who 'appear suspicious' ... because of their poverty … or their economic status, should be rounded up, taken to court with no evidence of a crime being committed, yet end up in prison?"[60]

4.42 In that case, the High Court of Kenya quoted a Parliamentary Departmental Committee on Administration of Justice and Legal Affairs which dealt with Part "H" of section 24 of the Penal Code:

> "This is aimed at punishing poverty, [w]hen the police; anywhere in the country, cannot find an offence with which to charge an innocent person who is poor and does not appear to have any means of livelihood, they will take him to the magistrate and say that they want the person bound to keep peace. There is no threat that the individual was about to commit any breach of peace ... Perhaps

[55] Now section 45(1)(g) of the Constitution as amended in 2010.
[56] *Id* 403-404.
[57] (2009) AHRLR 268 (ACHPR 2009).
[58] At para 89.
[59] At para 96.
[60] *Anthony Njenga Mbuti & 5 Others v Attorney General & 3 Others* [2015] Constitutional Petition No 45 of 2014, at para 158.

the time has now come for us not to punish poverty. Therefore the Committee is recommending that Part "H" in Section 24 of the Penal Code, that is so much abused by the police be deleted."[61]

4.43 Ultimately the High Court of Kenya concluded that the provisions were "arbitrary, discriminatory, and really cannot withstand the principles of [the Kenyan] Constitution."[62] Mumbi Ngugi J concluded that the provisions of the Criminal Procedure Code were unconstitutional and null and void.[63]

The Test Relating to Discrimination

4.44 In *RM v Attorney General*[64] the Kenya High Court adopted the test set out in *State of WB v Anwarali*[65] to see if the discrimination is reasonable:

> "The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test two conditions must be fulfilled namely:
> 1. That the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and
> 2. That that differentia must have a rational relation to the object sought to be achieved by the Act."[66]

4.45 The High Court of Malawi in the case of *Bridget Kaseka and Others v Republic,*[67] where women were arrested in a rest house under the assumption that they were soliciting for an immoral purpose, lamented that arresting women, but not their male counterparts, smacked of discrimination,[68] thus discouraging arbitrary and uneven application of the law.

4.46 The Irish Law Reform Commission commented that rogue and vagabond provisions similar to section 184(1)(c) appear to discriminate against the poor and were:

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[61] *Anthony Njenga Mbuti & 5 Others v Attorney General & 3 Others* [2015] Constitutional Petition No 45 of 2014, at para 161.
[62] *Anthony Njenga Mbuti & 5 Others v Attorney General & 3 Others* [2015] Constitutional Petition No 45 of 2014, at para 163.
[63] *Anthony Njenga Mbuti & 5 Others v Attorney General & 3 Others* [2015] Constitutional Petition No 45 of 2014, at para 169.
[64] (2006) AHRLR 256 (KeHC 2006).
[65] 1952 SCR 284 and 335.
[66] *Id.*
[67] [1999] MLR 116 (HC). That case dealt with the offence of being an idle and disorderly person under section 180(e) of the Penal Code. Women are however often arrested under circumstances similar to the facts in that case, and then charged under section 184(1)(c).
[68] "It seems to me that the police action was rather discriminatory because only the appellants were arrested leaving their male companions free. Even those who had no male companions were not to be arrested just because they were suspected to be there for purposes of immoral activity."

> "[O]ut of keeping with the basic concept inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed course of conduct."[69]

4.47 These concerns have been echoed in our courts. In cases such as *Republic v Balala*[70] and *Stella Mwanza and 12 Others v Republic*[71] the High Court of Malawi cautioned that the charge of rogue and vagabond could be used to oppress poor persons who are not criminals.[72]

4.48 The Applicant submits that the enforcement of rogue and vagabond offences which allow police wide discretion to arrest, inevitably leads to arbitrary arrests which are influenced by police assumptions of criminality based on biases relating to poverty, gender, race, ethnicity, place of origin and social status. This amounts to indirect discrimination as it has a disproportionate effect on marginalised groups in society.[73]

The Application of Section 184(1)(c) of the Penal Code Violates the Right to Privacy

4.49 The Applicant submits that section 184(1)(c) of the Penal Code, in effect, violated his right to privacy.

4.50 The right to privacy is infringed when persons who are going about their daily activities are targeted to be questioned about their private life, and to have their person searched prior to or during an arbitrary arrest.

4.51 Section 21 of the Constitution provides that every person shall have the right to personal privacy, which shall include the right not to be subjected to a search of his or her person, home or property. The right is also protected in Article 17 of the International Covenant on Civil and Political Rights.

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[69] Law Reform Commission of Ireland *Report on Vagrancy and Related Offences* (1985) 26. See also *Papachristou v City of Jacksonville* 405 U.S. 156 (1972) at 170.
[70] [1997] 2 MLR 67 (HC).
[71] [2008] MWHC 228. The case concerned thirteen women who were arrested in rest-houses during a police sweep. The court held that the convictions were improper, as there had been no indication from the facts that the women were there for a disorderly purpose. The court commented: "But surely the law could not have intended to criminalise mere poverty and homelessness more especially in a free and open society. It could never be a crime for a person to be destitute and homeless. And if a person is homeless he or she is bound to roam around aimlessly. One would have thought it becomes State responsibility to shelter and provide for such people than condemn them merely on account of their lack of means."
[72] See also *Edwards v People of State of California* 314 U.S. 160 (1941). ("We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a State to test, qualify, or limit his rights as a citizen of the United States… The mere state of being without funds is a neutral fact – constitutionally an irrelevance, like race, creed or colour.")
[73] *D. H. et al v Czech Republic*, European Court of Human Rights, No. 57325/00, November 2007, at para 175.

4.52 The Human Rights Committee, in General Comment 16, explains that "the obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against interferences and attacks as well as to the protection of this right".[74] The General Comment explains that "even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances".[75]

4.53 In this context, a police officer's interference with a person who goes about his or her daily business negates the right to be left alone.[76] Instead of section 184(1)(c) protecting constitutional rights, it contributes to its violation.

The Application of Section 184(1)(c) of the Penal Code Violates the Right to Freedom of Movement

4.54 Finally, the Applicant submits that section 184(1)(c) of the Penal Code violates his right to freedom of movement in that he was arrested and detained when going about his daily business. Ironically, had the Applicant been found in a motor vehicle it is unlikely that he would have been arrested under section 184(1)(c).

4.55 Section 39 of the Constitution protects the right to freedom of movement and residence. A similar protection is in Article 12 of the International Covenant on Civil and Political Rights and Article 12(1) of the African Charter.

4.56 In terms of the Human Rights Committee's General Comment 27,[77] "liberty of movement is an indispensable condition for the free development of a person".[78]

4.57 In *Malawi African Association and Others v Mauritania*[79] the African Commission concluded that Article 2 should be read with Article 12 because it "lays down a principle that is essential to the spirit of this convention, one of whose goals is the elimination of all forms of discrimination and to ensure equality among all human beings."[80]

4.58 Section 184(1)(c) is frequently used in a manner that infringes the right to freedom of movement, this was recognised in *Brown v Republic.*[81] In this case, the accused was

[74] Adopted by the Human Rights Committee at its 32nd Session, 1998, at para 1.
[75] *Id* at para 4.
[76] In the case of *Rajagopal v State of Tamil Nadu* (1994) 6 SCC 632 the Supreme Court of India held that the right to privacy is a fundamental right guaranteed to Indian citizens in the pursuit of life and liberty under Article 21 of the Constitution of India. "It is the right to be let alone … [and] every citizen has a right to safeguard the privacy of his own."
[77] CCPR/C/21/Rev.1/Add.9, November 1999.
[78] *Id* at para 1.
[79] (2000) AHRLR 149 (ACHPR 2000).
[80] *Id* at para 131.
[81] MWHC Criminal Appeal No. 24 of 1996.

arrested for staying at a trading centre without work. He was convicted under section 184(1)(c) and sentenced to five months' imprisonment with hard labour. Overturning the conviction, the High Court of Malawi stated:

> "It is not an offence merely to be found, during the night, on or near a road, highway, premises or public place. An unemployed or homeless person may be found sleeping on the veranda of public premises or beside a road or highway. He could be found loitering or sleeping at a market place or in a school building, just because he is poor, unemployed and homeless. It would be wrong and unjust to accuse such person of committing an offence under section 184(1)(c). When faced with a case, such as the present, Magistrates must bear in mind the following: (1) Section 39(1) of the Constitution gives every person the right to freedom of movement and residence within the borders of Malawi; (2) Section 30(2) of the Constitution suggests that the State has a duty to provide employment to its citizens. It would, therefore, seem to me that it is a violation of an individual's right to freedom of movement to arrest a person merely because he is found at night on or near some premises, road, highway or public place."

4.59 The High Court in Malawi has held that "it is not an offence for any person to enjoy the freedom, peace and calm of the country and walk about in public places be it aimlessly and without a penny in their pocket. One does not commit an offence by simply wandering about."[82]

4.60 Despite these pronouncements by the courts, research indicates that police in Malawi continue to interpret section 184 as allowing them wide discretion to arrest persons found loitering at night or in the early morning.[83]

5. SECTION 184(1)(C) IS NOT A JUSTIFIABLE LIMITATION OF CONSTITUTIONAL RIGHTS

5.1 Section 44 of the Constitution states that:

> "(1) No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society.
> (2) Law prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, and shall be of general application."

[82] *Republic v Luwanja and Others* [1995] 1 MLR 217 (HC).
[83] Centre for Human Rights Education, Advice and Assistance (CHREAA) and the Southern Africa Litigation Centre (SALC) (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre*, Malawi 64-65.

5.2 Accordingly, any inquiry into the constitutionality of an offence must consider the following:

1) Whether a right in the Constitution has been infringed by the offence?
2) Whether the infringement can be justified as a permissible limitation of the right in terms of section 44 of the Constitution?
    a. Is the violation prescribed by a law of general application?
    b. Is the violation reasonable?
    c. Does the violation meet international human rights standards?
    d. Is the violation necessary in an open and democratic society?
    e. Does the violation negate the essential content of the right?

5.3 The first question, was elaborated in the previous section, and this section accordingly proceeds to assess the second question. If any of questions (a) to (e) are answered in the negative with regard to any of the rights discussed in the previous section this would not be a permissible limitation of the right.

5.4 The inquiry is primarily a factual one, including looking at evidence about the impact of section 184(1)(c) of the Penal Code.

Section 184(1)(c) is Not a Law of General Application

5.5 Section 44 of the Constitution requires that any offence which interferes with constitutional rights should be prescribed by a law of general application, and encompasses into a constitutional inquiry many of the common law principles of legality, including the prohibition against vagueness[84] and arbitrariness.[85]

5.6 According to Currie and de Waal, the enquiry whether a law is "of general application" is a two-pronged one: Firstly, it looks at whether the law is sufficiently clear, accessible and precise that those affected by it can ascertain the extent of their rights and obligations. Secondly, it looks at whether the law is of equal application and not arbitrary in application.[86]

[84] *R v Rimmington* [2006] 1 AC 459.
[85] The Canadian Supreme Court has held that "prescribed by law" requires that the provision was properly adopted, that it is of general application, and that it is sufficiently accessible and precise. *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component* [2009] 2 S.C.R. 295 at para. 53.
[86] Currie and de Waal (eds) (2001) The New Constitutional and Administrative Law Vol 1 at page 340. Ackermann J in the South African Constitutional Court case of *State v Makwanyane* 1995 (3) SA 391 (CC) at para 156, emphasised that arbitrariness is contrary to the values underlying the constitutional order since it inevitably leads to the unequal treatment of persons.

5.7 The European Court of Human Rights has held that the expression "in accordance with the law" also refers to quality and accessibility of the law, including that the law must be sufficiently precise for citizens to foresee the consequences for any action".[87]

Section 184(1)(c) is Not Sufficiently Clear

5.8 An offence should provide the public and the police with a clear standard of what constitutes prohibited conduct, yet the broad articulation of section 184(1)(c) leads to the continued arrest of persons in circumstances where the police are not aware that any offence has been committed. Thus, the offence, by its nature, leads to unlawful and arbitrary arrests.[88]

5.9 Whether a prescribed law is void on vagueness grounds, is therefore an important aspect for consideration in any inquiry into whether a law justifiably limits constitutional rights.

5.10 Under the African Commission's Guidelines on the Use and Conditions of Arrest, Police Custody and Pre-trial Detention in Africa (the Luanda Guidelines), section 2(a) provides that:

> "Persons shall only be deprived of their liberty on grounds and procedures established by law. Such laws and their implementation must be *clear*, accessible and *precise*, consistent with international standards and respect the rights of the individual."[89]

5.11 A leading case that exemplifies this rationale is the United States case *Papachristou v Jacksonville (City).*[90] In *Papachristou* the Supreme Court of the United States nullified a vagrancy ordinance promulgated by the city of Jacksonville.[91]

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[87] *Amann v Switzerland*, European Court of Human Rights, 16 February 2000, at para 50.

[88] "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." *United States v Reese* 92 U.S. 214, 221 (1875).

[89] African Commission on Human and Peoples' Rights: Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, 2014.

[90] 405 U.S. 156 (1972).

[91] *Id.* The pertinent language from the ordinance is as follows:
"Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offences."

> "This ordinance is void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' ... and because it encourages arbitrary and erratic arrests and convictions. *See Thornhill v Alabama*, 310 U.S. 88 (1940); *Herndon v Lowry*, 301 U.S. 242 (1937). Living under a rule of law entails various suppositions, one of which is that "(all persons) are entitled to be informed as to what the State commands or forbids." *Lanzetta v New Jersey*, 306 U.S. 451, 453 (1939). *Lanzetta* is one of a well-recognized group of cases insisting that the law give fair notice of the offending conduct."[92]

5.12 The standard for evaluating the vagueness principle was further discussed in *Grayned v Rockford (City)*[93] which elaborated that:

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly … Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[94]

Section 184(1)(c) is Arbitrary in Application

5.13 The fact that the courts have tried to interpret the offence narrowly, does not save it from unconstitutionality. Whilst section 184(1)(c) should be read to include an element of intent, this is not the case in practice. The offence continues to be applied in an arbitrary manner.

5.14 In section 184(1)(c), we have an offence which allows arrests on nothing more than the mere suspicion of criminality. Such arrests are inevitably arbitrary, as they are

[92] *Id* at page 162.
[93] 408 U.S. 104 (1972).
[94] *Id* at page 108-109. See also *Luscher v Canada* [1985] 1 F. C. 85. ("In my opinion, one of the first characteristics of a reasonable limit prescribed by law is that it should be expressed in terms sufficiently clear to permit a determination of where and what the limit is. A limit which is vague, ambiguous, uncertain, or subject to discretionary determination is, by that fact alone, an unreasonable limit. If a citizen cannot know with tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained, he is likely to be deterred from conduct which is, in fact, lawful and not prohibited. Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally protected rights and freedoms. While there can never be absolute certainty, a limitation of a guaranteed right must be such as to allow a very high degree of predictability to the legal consequences.")

based on an individual police officer's perception of whether a person is in a public place for an illegal or disorderly purpose.[95]

5.15 The Kenya High Court has cautioned that arrests based on a suspicion or belief that one is *likely* to commit a crime are purely subjective.[96] The High Court questioned how police determine who is likely to commit an offence and cautioned that allowing police to use their own subjective views to arrest inevitably leads to profiling:

> "Does this not lead to the worst form of profiling, that those who 'appear suspicious', for want of a better word, because of their poverty, racial or ethnic origin, or their economic status, should be rounded up, taken to court with no evidence of a crime being committed, yet end up in prison?"[97]

The Rights Violations Caused by Section 184(1)(c) of the Penal Code are Neither Reasonable nor Necessary in an Open and Democratic Society

5.16 The enquiries into reasonableness[98] and necessity[99] often overlap, and, for the purpose of this analysis, will be discussed as a single inquiry into the proportionality of section 184(1)(c) of the Penal Code. This exercise essentially seeks to balance the objective of the offence against the rights infringements caused by it.

5.17 Currie and de Waal, in analysing the South African Constitution's limitations clause, notes that:

> "It is not simply a question of determining whether the benefits of a limitation to others or to the public interest will outweigh the cost to the rights-holder. If rights can be overridden simply on the basis that the general welfare will be served by the restriction then there is little purpose in the constitutional entrenchment of rights. The reasons for limitation of a right need to be exceptionally strong." [100]

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[95] See *United States v Margeson* 259 F. Supp. 256 (D.C Oa. 1966), which held that a provision allowing a police officer's judgment as to the validity of a person's 'account' to be determinative of guilt is unconstitutional.
[96] *Anthony Njenga Mbuti and 5 Others v Attorney General and 3 Others* [2015] eKLR, at para 140.
[97] *Anthony Njenga Mbuti and 5 Others v Attorney General and 3 Others* [2015] eKLR, at paras 157 and 158.
[98] A reasonableness enquiry tends to consider whether the offence is relevant, sufficient and proportionate to a legitimate government aim.
[99] The enquiry whether the offence is necessary in an open and democratic society incorporates a proportionality analysis and also examines the question whether there is a pressing social need for the violation. The content of the phrase "necessary in a democratic society" has been discussed by the European Court of Human Rights. See *Koretskyy and Others v Ukraine*, 3 April 2008, European Court of Human Rights, at paras 39-42; *Gorzelik and Others v Poland*, 17 February 2004, Case no 44158/98. *Partidul Comunistilor (Nepeceristi) and Ungureanu v Romania*, 46626/99, 3 February 2005; *Tsonev v Bulgaria*, 45963/99, 13 April 2006, European Court of Human Rights, at para 52.
[100] I Currie and J de Waal, The Bill of Rights Handbook, Fifth Edition, 2005, page 164.

5.18 The proportionality test has been articulated in the Canadian case of *R v Oakes*[101] as consisting of three components: 1) The offence must be rationally connected to its objective and not be arbitrary, unfair or based on irrational considerations; 2) The offence, even if rationally connected to the objective, should impair "as little as possible" the right or freedom in question; and 3) There must be proportionality between the *effects* of the offence which are responsible for limiting the right or freedom, and the objective which has been identified as of "sufficient importance" to warrant overriding a constitutionally protected right.

Section 184(1)(c) of the Penal Code is Not Rationally Connected to its Objective

5.19 The contemporary justification for retaining the rogue and vagabond offences is that of crime prevention.[102] As expressed by a magistrate in Balaka, Malawi, "the tendency of loitering within the town at night can make the town prone to crime".[103] The Malawi Police Service has also noted protection of the public as a purpose of arrests under section 184.[104] The crime prevention argument is not without its problems.

5.20 There is no evidence that the purpose of section 184(1)(c) is actually achieved in practice.[105] Whilst crime prevention is a legitimate government objective, any measures proposed to deal with this objective should be well researched and not be arbitrary, unfair or based on irrational considerations. If we look at how the police respond to the use of section 184 of the Penal Code, the police argue that these sections provide an important tool to prevent more serious crimes from being committed, but cannot point to any evidence to support such claims.[106]

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[101] [1986] 1 S.C.R. 103 at paras 69-81.

[102] Centre for Human Rights Education, Advice and Assistance (CHREAA) and the Southern Africa Litigation Centre (SALC) (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-related Offences in Blantyre, Malawi*, at page 66. Interviews conducted with police on the use of section 184, indicated that police generally viewed section 184 as a useful tool of law enforcement which, in their opinion, had a deterrent value.

[103] "Malawi Court Convicts 26 People for Loitering at Night" *Nyasa Times*, 12 August 2014, http://www.nyasatimes.com.

[104] "Police Nets 183 Suspects in a Sweeping Exercise in the Eastern District of Zomba" *Mana Online*, 8 August 2014, http://www.manaonline.gov.mw/index.php/national/general/item/916-police-nets-183-suspects-in-a-sweeping-exercise-in-the-eastern-district-of-zomba. See also "28 People Arrested in Mzuzu Over Rogue and Vagabond" *Leyman Publications*, 7 May 2016, http://leymanmw.com/28-people-arrested-in-mzuzu-over-rogue-and-vagabond/ where the police public relations officer justified the arrests under the rogue and vagabond offences on the basis that it was "aimed at reducing the rate of crime" and that "they suspect that from those who have been arrested might have been involved in crimes like burglary and theft" – This begs the question why they were arrested under the rogue and vagabond offence instead of being charged with the crimes they were suspected to be involved in.

[105] Centre for Human Rights Education, Advice and Assistance (CHREAA) and the Southern Africa Litigation Centre (SALC) (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-related Offences in Blantyre, Malawi* at page 71.

[106] BE Harcourt "Punitive Preventive Justice: A critique" *Chicago Institute for Law and Economics Working Paper* No. 599 (2012), 10 (in A Ashforth & L Zedner (eds), 2014, *Preventive Justice*, Oxford University Press). ("There are no statistically significant relationships between disorder and purse-snatching, physical assault, burglary, or rape when other explanatory variables are held constant.")

5.21 The Applicant submits that claims about the crime prevention value of section 184(1)(c) cannot be accepted without evidence and do not constitute legally relevant facts to be taken into account in a determination of the constitutionality of the offence under section 9 of the Constitution.

5.22 The United Nations Guidelines for Crime Prevention emphasise, as a basic principle, that crime prevention strategies "should be based on a broad, multidisciplinary foundation of knowledge about crime problems, their multiple causes and promising and proven practices".[107] The Guidelines state that crime prevention measures should be assessed to determine both the outcomes and the positive and negative consequences of these measures.[108]

5.23 The criminalisation of a person before they have committed a crime or attempted to commit a crime is impermissible.

5.24 The effect of section 184(1)(c) is not only the infringement of the rights of those arbitrarily arrested under the section. The policing and prosecution of the offence, which relate to suspicious as opposed to actual conduct, are a strain on the resources of police, courts and prisons. Thus, it cannot be shown that the alleged deterrent effect of the offence outweighs the negative impact the offence has on the functioning of the justice system and its ability to address serious crimes.

5.25 Sampson and Raudenbush argue that "attacking public disorder through tough police tactics may thus be a politically popular but perhaps analytically weak strategy to reduce crime."[109]

5.26 The offence further contributes to overcrowding in prisons. In this regard, the African Commission's Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa, called for the "decriminalisation of some offences such as being a rogue and vagabond, loitering, prostitution, failure to pay debts and disobedience to parents" as a strategy to reduce overcrowding in prisons.[110] The lack of space in prisons has significant consequences for prisoners and pre-trial detainees, including poor nutrition and sanitation, increased transmission of communicable

[107] *United Nations Guidelines for the Prevention of Crime*, Economic and Social Council Resolution 2002/13, UNODC, article 11. See also *Floyd and others v the City of New York* 08 Civ. 1034 (SAS), 2013. Quoting the US Department of Justice, the judge noted that there was significant evidence that unlawfully aggressive police tactics are unnecessary for effective policing and detrimental (and even counter-productive) to the mission of crime reduction. The court noted that there was no evidence that the police's use of stop and frisk was successful in producing arrests and reducing crime.

[108] *United Nations Guidelines for the Prevention of Crime*, Economic and Social Council Resolution 2002/13, UNODC, article 23.

[109] Quoted in Harcourt BE Harcourt "Punitive Preventive Justice: A critique" *Chicago Institute for Law and Economics Working Paper* No. 599 (2012) 14.

[110] Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa, African Commission 34th Ordinary Session, November 2003.

diseases, and a harmful impact on their physical and mental well-being.[111] In this context, the offence becomes counter-productive, causing serious and continuous human rights violations.

5.27 The United Nations Office on Drugs and Crime (UNODC) explains that this is the result of punitive criminal justice policies:

> "When poverty and lack of social support to the disadvantaged are combined with a 'tough on crime' rhetoric and policies which call for stricter law enforcement and sentencing, the result is invariably a significant increase in the prison population. Sometimes described as warehousing, the increased population typically comprises an overrepresentation of the poor and marginalised, charged with petty and non-violent offences. Although unrelated to crime rates this situation is fuelled by media stories which promote tough action to combat crime despite the absence of evidence to demonstrate the link between rates of imprisonment and crime rates."[112]

5.28 Often the objective of arrests using section 184(1)(c) of the Penal Code is to assure the public that sufficient attention is paid to crime prevention. However, in reality people find themselves imprisoned or detained in potentially life-threatening conditions, especially in cases where they cannot afford bail or the fine, even when there is no proof of an actual offence having been committed.[113]

Section 184(1)(c) of the Penal Code is Overly Broad

5.29 Whilst crime prevention might be a laudable objective, the effect of having an offence which is broadly worded, is that it is inevitably subjectively applied. A case in point, is that of *Chidziwe v Republic*,[114] where a person was arrested under section 184(1)(c) because he was found at an odd hour with a bottle of beer. The High Court of Malawi overturned the conviction and held that there was no evidence that holding a bottle of beer implies an illegal purpose.

5.30 The Supreme Court of Canada explains overbreadth as follows:

> "Overbreadth allows courts to recognise that the law is rational in some cases, but that it overreaches in its effect in others… For example, where a law is

[111] *Handbook on strategies to reduce overcrowding in prisons*, United Nations Office on Drugs and Crime, 2013, at 11.
[112] *Handbook on strategies to reduce overcrowding in prisons*, United Nations Office on Drugs and Crime, 2013, at 25.
[113] In one instance, for example, 82 people were arrested in Lilongwe during a sweeping exercise and charged with being a rogue and vagabond. They were all ordered to pay a fine of K4000 or spend 5 months in prison. Six of these people were unable to afford the fine and were imprisoned. "Six to Serve 5 Month Jail for Rogue and Vagabond" *Malawi News Agency*, 11 September 2015, http://allafrica.com/stories/201509141075.html.
[114] *Chidziwe v Republic*, Criminal Appeal 14 of 2013, High Court of Malawi, 26 February 2014.

> drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the specific individual."[115]

5.31 The UN Special Rapporteur on Extreme Poverty and Human Rights has noted that overly broad police powers "increase the exposure of persons living in poverty to abuse, harassment, violence, corruption and extortion by both private individuals and law enforcement officials."[116]

5.32 It is further quite problematic that the power to arrest persons without a warrant can be applied so widely when courts have consistently emphasised the use of arrest as last resort.

5.33 The Supreme Court of Appeal has emphasised the problem of using arrest as a tool of law enforcement without facts justifying the arrest, in the case of *Kettie Kamwangala v Republic*:[117]

> "Speaking for ourselves we believe that law enforcement should only effect an arrest when they have evidence of more than mere suspicion of criminality. We also believe that such evidence should only be the product of investigations. Where there is no investigation there cannot, we believe, be any evidence. We therefor find it rather perverse that law enforcement should arrest with a view to investigate."

5.34 Ironically, this principle is completely disregarded in the case of section 184(1)(c) arrests, where no offence is alleged to have taken place and no evidence collected or investigations conducted to prove any offence. In such instances, people often have no choice but to plead guilty simply to avoid prolonged detention or additional costs related to returning to court for trial. In addition, magistrates might feel constrained to allow such guilty pleas to save people from returning for trial.

The Objectives of Section 184(1)(c) of the Penal Code Can be Achieved in a Manner that Infringes Less on Constitutional Rights

5.35 Section 184(1)(c) is not the most appropriate crime prevention measure. Crime prevention can arguably be achieved by more precise and constitutionally valid provisions; including other provisions in the Penal Code; developing alternatives to

[115] *Canada (Attorney General) v Bedford* 2013 SCC 72, at para 113.
[116] UN General Assembly, *Report by Special Rapporteur on Extreme Poverty and Human Rights*, 66th session, 4 August 2011, A/66/265, 5, http://www.ohchr.org/Documents/Issues/Poverty/A.66.265.pdf. Similar comments were made by the Global Commission on HIV and the Law *HIV and the Law: Risks, Rights and Health* (2012) 99; and the UN General Assembly *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation: Stigma and the Realisation of the Human Rights to Water and Sanitation* 21st Session of the Human Rights Council (2012) 11.
[117] Miscellaneous Criminal Appeal No 6 of 2013, Chikopa JA, 28 January 2014.

arrest; ensuring arrests that are more targeted and intelligence-based; reducing vulnerability; addressing structural issues; preventing and reducing exploitation; and adopting strategies to expand educational, economic and social opportunities.[118]

5.36 It should be noted that where persons are merely found loitering at odd hours, which appears to be the main reason for arrests under section 184(1)(c),[119] arrest in itself is not automatically the most appropriate response and police can for example caution and warn a person as a first response, whereafter an arrest for a substantive offence could be appropriate where there is a sufficient basis for such arrest.[120] For example, section 319 of the Penal Code deals with criminal trespass and this section could be used instead of section 184(1)(c).

5.37 Further, section 28 of the Criminal Procedure and Evidence Code already provides for those circumstances under which a police officer may arrest a person without a warrant. The section authorises a police officer to arrest, without a warrant or order from a magistrate, any person whom he finds lying or loitering in any highway, yard or place during the night and whom he suspects, *upon reasonable grounds*, of having committed or being about to commit a felony. The section also extends to the arrest of any person who is about to commit an arrestable offence or whom the officer has reasonable grounds of suspecting to be about to commit an arrestable offence.

5.38 Section 28 of the Criminal Procedure and Evidence Code is a more appropriate response to crime prevention as it contains the yardstick of "reasonable grounds". Section 28 further requires that the police officer suspects that a *specific* offence has or is about to be committed. This is a better option than section 184(1)(c) which is overly broad in that it simply requires a suspicion that the person is at a place for an illegal or disorderly purpose. The objective of crime prevention is better balanced against the rights of persons if an arrest is only limited to cases where there is a suspicion that a substantive offence has actually been or is about to be committed.

5.39 According to Black's Law Dictionary, "reasonable grounds" are defined as amounting to more than a bare suspicion but less than evidence that would justify a conviction. The test is an objective test.[121]

5.40 The African Commission's 2014 Guidelines on Arrest, in section 3(a) provides:

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[118] *United Nations Guidelines for the Prevention of Crime*, Economic and Social Council resolution 2002/13, UNODC.

[119] Centre for Human Rights Education, Advice and Assistance (CHREAA) and the Southern Africa Litigation Centre (SALC) (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre*, Malawi 64-67.

[120] Centre for Human Rights Education, Advice and Assistance (CHREAA) and the Southern Africa Litigation Centre (SALC) (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre*, Malawi 67, 121-123.

[121] *Anthony Njenga Mbuti and 5 Others v Attorney General and 3 Others* [2015] eKLR, at paras 37 and 38.

> "Arrests shall only be carried out by police or by other competent officials or authorities authorised by the State for this purpose, and shall only be carried out pursuant to a warrant or on reasonable grounds to suspect that a person has committed an offence or is about to commit an arrestable offence."[122]

5.41 In the case of *Kivumbi v Attorney General*[123] the Constitutional Court of Uganda dealt with a constitutional challenge to section 32 of the Police Act which provided the police with the power to regulate assemblies and processions. The case hinged on the conflict between section 32 of the Police Act and Articles 20(1)(2) and 29(1)(d) of the Constitution.[124] Okello JA questioned whether the power to prohibit the convening of an assembly or forming of a procession, in a public place, for whatever reason, fall within the general limitation clause of the Constitution:

> "My humble answer is that it does not. It goes beyond what is acceptable and demonstrably justifiable in a free and democratic society or what is provided in this Constitution. The reason is that the exercise of that power has the effect of denying the citizens enjoyment of the fundamental right guaranteed under Article 29(1)(d)."[125]

5.42 The United Nations Guidelines for the Prevention of Crime (2002), provides in Article 12 that "the rule of law and those human rights which are recognised in international instruments to which Member States are parties must be respected in all aspects of crime prevention". The use of section 184(1)(c) of the Penal Code as a crime prevention measure simply does not meet this standard.

6. CONCLUSION

6.1 The Applicant submits that section 184(1)(c) of the Penal Code and its application violates a range of constitutional rights and that the section is so vague, unreasonable, overly broad and disproportionate, that it does not meet the requirements which justify an infringement of any constitutional rights, as set out in sections 12 and 44 of the Constitution.[126]

6.2 Based on the above submissions, the Applicant urges the Court to declare section 184(1)(c) of the Penal Code to be unconstitutional and accordingly null and void and to order that the charge against the Applicant be withdrawn with immediate effect.

Dated the _____ day of _____ 2016

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[122] African Commission on Human and Peoples' Rights: Guidelines on the conditions of arrest, police custody and pre-trial detention, 2014.
[123] *Kivumbi v Attorney General* [2008] 1 EA 174 (CCU) at 186.
[124] *Id.*
[125] *Kivumbi v Attorney General* [2008] 1 EA 174 (CCU) at 169. Article 29(1)(d).
[126] The United Nations Guidelines for the Prevention of Crime (2002), Article 12.

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