IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISC. APPL. NO. 5 OF 2015

In the Matter Between:

MAYESO GWANDA **APPLICANT**

And

THE STATE **RESPONDENT**

And

LEGAL AID BOARD **FIRST *AMICUS CURIAE***

CENTRE FOR HUMAN RIGHTS EDUCATION, ADVICE AND ASSISTANCE CENTRE **SECOND *AMICUS CURIAE***

PARALEGAL ADVISORY SERVICE INSTITUTE **THIRD *AMICUS CURIAE***

ARGUMENTS OF THE PARALEGAL ADVISORY SERVICE INSTITUTE

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1. The Paralegal Advisory Services Institute (PASI) was admitted as *amicus curiae* in this matter on 1 August 2016.

2. PASI submits that section 184(1)(c) of the Penal Code is unconstitutional. In this respect PASI notes that the applicant in this matter has argued that section 184(1)(c) of the Penal Code violates the right to dignity; the right to be free from inhumane and degrading treatment and punishment; the right to freedom and security of person; the right to be free from discrimination; the right to privacy; and the right to freedom of movement. PASI will accordingly not make any submissions on the abovementioned rights.

3. PASI submits that section 184(1)(c) of the Penal Code further violates the rights of arrested persons and the right to access to justice. It is in this regard the PASI makes these submissions.

4. In addition, PASI submits that the Court's powers include declaring section 184(1)(c) of the Penal Code unconstitutional with retrospective effect, so that all those people who are currently in police detention or in prison on charges under section 184(1)(c) of the Penal Code are entitled to release if section 184(1)(c) of the Penal Code is declared unconstitutional.

SECTION 184(1)(C) OF THE PENAL CODE VIOLATES SECTION 42 OF THE CONSTITUTION

5. The fairness and equity of the criminal justice system has often been highlighted because pre-trial detainees are more likely to be poor and unable to afford a legal representative or bail.[1] Many pre-trial detainees will eventually be released or convicted of a minor sentence which does not carry a prison sentence, a clear indication that their detention was without cause. The negative impact of pre-trial detention on public resources, detainees, and their families has also been well documented.[2] There is increasing recognition at a regional and international level that the decriminalisation of minor offences such as loitering or vagrancy would assist in reducing the number of pre-trial detainees.[3]

6. PASI submits that in practice, the enforcement of section 184(1)(c) of the Penal Code violates the rights under section 42(2) of the Constitution and the arrest procedures set out in the Criminal Procedure and Evidence Code, in a number of ways:

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[1] M Shaw "Reducing the excessive use of pre-trial detention" Justice Initiatives, Open Society Justice Initiative, (2008), 1-10, 2.
[2] M Schönteich "The scale and consequences of pre-trial detention around the world" Justice Initiatives, *Open Society Justice Initiative* (2008), 11-43.
[3] Open Society Foundations *Pre-trial detention and torture: Why pre-trial detainees face the greatest risk*, A Global Campaign for Pre-trial Justice Report (2011), 13.

6.1. Persons continue to be arrested for conduct which does not comply with the offence with which they are charged. For example, section 184 is often used to arrest women presumed to be sex workers when their conduct did not fall within the terms of section 184. This practice continues despite the High Court in Malawi having cautioned against this.[4]

6.2. Sweeping exercises risk arrests without proper procedures or probable cause for arrest.

6.3. Persons arrested under section 184 are often released immediately after their arrest, suggesting that there was no probable cause for the arrest and no intention to pursue the case judicially at the time when the arrest was made.

6.4. Arrest and detention under section 184 is often not a proportionate response to the conduct of the person arrested.

6.5. Arrests under section 184, especially during weekends, sometimes mean that persons are detained for longer than a day for what is a very minor offence.

6.6. Even if detention was only for a short period, the harm caused to the individual and his or her family is significant.

6.7. Once arrested under section 184, police stations provide little or no food to persons in custody, and conditions are often unhygienic and hazardous.[5]

6.8. Arrests burden families who have to spend scarce resources to visit the police station, bring food and pay bail.

6.9. The conditions in custody and consequences of arrest sometimes lead to a person pleading guilty so that he or she can be released even if no offence was committed.

7. These examples illustrate the concerns relating to offences which are overly broad and which give police far more discretion to arrest.

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[4] *Stella Mwanza and 12 Others v Republic* [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.

[5] 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.

The purpose of arrest

8. During the colonial period, arrest served a much different purpose from its purpose in a constitutional democracy. Muntingh notes that *"an important feature of colonial policing was the creation of a range of offences to be used as a means to bring the local population under criminal justice control"*.[6] The manner in which colonial law enforcement took place in Malawi is described as follows:

> *"The enforcement of minor offences took up most of the police time. In 1937, for instance, no less than 6000 Africans were prosecuted for being resident in townships without permission, or because of failure to produce a pass, over 3000 for crimes against property, more than 4700 for not paying hut taxes, and more than 1000 for vagrancy… The enforcement of the Palm Wine Regulations of 1900 in Nyasaland, hut taxes (to be paid in cash) and vagrancy laws compelled Africans to take up employment but also to limit their exposure to alcohol, which according to the police undermined the quality of their labour."*[7]

9. Muntingh concludes:

> *"The colonial police served a narrow interest group with its own political and commercial concerns; policing was not aimed at general public safety; there was little investigative capacity or purpose in policing, and the style of policing was para-military in character. High volumes of arrests enabled by a myriad of administrative offences were used to control the population and facilitate participation in the colonial economy in order to provide cheap labour."* [8]

10. Section 184(1)(c) of the Penal Code, which was enacted during the colonial era, is one such offence that served the purpose of social control.[9]

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[6] L Muntingh (2015) *Arrested in Africa*, CSPRI, 14.
[7] L Muntingh (2015) *Arrested in Africa*, CSPRI, 15, quoting Deflem M (1994) "Law enforcement in British colonial Africa: A comparative analysis of imperial policing in Nyasaland, the Gold Coast and Kenya" *Police Studies* 17(1) 45-68.
[8] L Muntingh (2015) *Arrested in Africa*, CSPRI, 15.
[9] The offence of being a rogue and vagabond exists in the same wording in the Penal Codes of many former colonies and dates back to when these colonies were under British colonial rule, including Nigeria (1916), Gambia (1934), Zambia (1930), Uganda (1950), Botswana (1964), Seychelles (1955), Tanzania (1930). Some countries have since sought to limit the offence, so Ghana limits is application

10.1. Baker describes how the legal framework *"enabled the police to tackle legalistically what it had previously accomplished militaristically. State law provided the technical and the bureaucratic framework that enabled the police to rationalise their activities as law enforcement."*[10]

11. In contrast, in a constitutional democracy based on the rule of law, arrest is a *prima facie* interference with the right to liberty and accordingly the powers of arrest are supposed to be reduced.[11] The purpose of arrest and subsequent detention is essentially to secure attendance of the person in court and an arrest is unlawful if the arrestor has no intention of bringing the arrestee before a court.[12]

12. In practice, arrests still retain their colonial character, since arrests are easily used as a tool in circumstances where there is no clear indication of an offence having been committed.

The exercise of police discretion to arrest

13. Ultimately, in many cases it is police discretion which determines whether an arrest without a warrant takes place.

14. However, the vagueness of section 184(1)(c) of the Penal Code encourages inconsistency in the exercise of police discretion.

15. In *Papachristou v City of Jacksonville*,[13] the US Supreme Court explained why offences should be clear and unambiguous:

"The poor among us, the minorities, the average householder, are not in business and not alerted to the regulatory schemes of vagrancy laws; and we

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to instances where the behaviour caused annoyance to persons AND where the person did not move away after request by the police, and in Mauritius the offence is limited to persons found in a building or on property.

[10] L Muntingh and K Petersen (2015) *Punished for being poor: evidence and arguments for the decriminalisation and declassification of petty offences*, 40.

[11] L Muntingh (2015) *Arrested in Africa*, CSPRI at page 4.

[12] *Ex parte Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613 (CC).

[13] 405 US 156 (1972).

assume they would have no understanding of their meaning and impact if they read them. Nor are they protected from being caught in the vagrancy net by the necessity of having a specific intent to commit an unlawful act…

"A presumption that people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or who look suspicious to the police are to become future criminals is too precarious for a rule of law. The implicit presumption in these generalised vagrancy standards – that crime is being nipped in the bud – is too extravagant to deserve extended treatment. Of course, vagrancy statutes are useful to the police. Of course, they are making easy the roundup of so-called undesirables. But the rule of law implies equality and justice in its application. Vagrancy laws of the Jacksonville type teach that the scales of justice are so tipped that even-handed administration of the law is not possible. The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together."

16. Because of the wide ambit of section 184(1)(c), police discretion plays a pertinent role in determining who will be arrested, allowing prejudice, stigma and discrimination to become factors in determining whether to arrest a person.

17. A police officer may in general only arrest a person without a warrant in those circumstances set out in section 28 of the Criminal Procedure and Evidence Code and such discretion to arrest should be based on suspicion on reasonable grounds that an offence had been committed. Very little guidelines exist for police on what would constitute suspicion on reasonable grounds.

18. Whether there is a reasonable suspicion that gives rise to the use of discretion should be influenced by a number of factors:[14]

    18.1. The arrestor must have an open mind with regard to factors pointing to both innocence and guilty;

[14] L Muntingh (2015) *Arrested in Africa*, CSPRI, 12 quoting Plasket C (1998) 'Controlling the discretion to arrest without warrant through the Constitution' *SA Journal for Criminal Justice* 1(2), 186.

18.2. In the appropriate circumstances the suspect should have the opportunity to deal with allegations against him before being arrested;

18.3. For the suspicion to be reasonable, it must extend to all elements of the offence; and

18.4. The arrestor must be able to prove he considered the rights of the suspect to human dignity and freedom.

19. This problem is made worse by the wording of section 184(1)(c) itself which is so vague that the police's exercise of discretion to arrest could easily be exercised incorrectly. Section 28 of the Criminal Procedure and Evidence Code suggests arrests should only occur where it is clear that an offence has or will occur.[15] Since section 184(1)(c) of the Penal Code does not target a specific offence it is of concern that the power to arrest without a warrant can be applied by the police in relation to the offence, yet this happens on a daily basis in Malawi.

20. The United Nations Office on Drugs and Crime (UNODC) notes that *"an arrest must be based on a reasonable, lawful suspicion that a person has committed an offence defined as such by law. The arrest must be in compliance with the basic principles of proportionality, legality and necessity."*[16]

21. With regard to the meaning of the words "arbitrary arrest" in article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) the Human Rights Committee has explained that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of appropriateness, injustice, lack of predictability and due process of law. "*This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances. Remand in custody must further be necessary in all the*

[15] Section 28 provides for those circumstances under which a police officer may arrest a person without a warrant, including any person whom he suspects upon **reasonable grounds** of having committed an arrestable offence, a person who commits breach of peace in his presence, and 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**; and any person who is about to commit an arrestable offence or whom he has reasonable grounds of suspecting to be about to commit an arrestable offence.

[16] UNODC *Handbook on strategies to reduce overcrowding in prisons*, 2013, 93.

circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime."[17]

22. The United Nations Human Rights Committee, in General Comment 35[18] on the right to liberty and security of person, argues:

"An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality. For example, remand in custody on criminal charges must be reasonable and necessary in all the circumstances."[19]

"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. Deprivation of liberty without such legal authorization is unlawful."[20]

Abuse of power by police in enforcing section 184(1)(c) of the Penal Code

23. Arrests under section 184 of the Penal Code can involve bribery, degrading treatment, and violence, creating a scenario where the acts involved in arresting a person are sometimes more blameworthy than the behaviour for which the person is arrested, creating a breakdown in community-police relations and making a mockery of the criminal justice system.

24. The continued existence of a vague offence helps perpetuate police corruption:

    24.1. Since colonial times, the practice of police receiving hut taxes and fines in cash have encouraged police corruption. Post-independence, the lack of

[17] *Mukong v Cameroon*, Communication No. 458/1991, 1994.
[18] General Comment 35 on Article 9 of the ICCPR, CCPR/C/GC/35, December 2014.
[19] General Comment 35 on Article 9 of the ICCPR, CCPR/C/GC/35, December 2014, at para 12.
[20] General Comment 35 on Article 9 of the ICCPR, CCPR/C/GC/35, December 2014, at para 22.

police funding and low wages have perpetuated practices where money is demanded from citizens.[21]

24.2. The UN Special Rapporteur on Extreme Poverty and Human Rights noted that the discretionary powers provided to the police by offences such as section 184(1)(c) of the Penal Code "increase the exposure of persons living in poverty to abuse, harassment, violence, corruption and extortion by both private individuals and law enforcement officials."[22]

24.3. The Malawi Governance and Corruption Survey note the prevalence of corruption in the police service, and suggest low salaries is a significant factor contributing to public sector corruption. [23]

24.4. It has been noted that it is much easier for police to target poor and vulnerable groups who are less able to sue the police if the police exercised their discretion mistakenly or solicited a bribe. [24]

25. The manner of enforcement of section 184(1)(c) of the Penal Code during police sweeping exercises also raises some concerns. The police in Malawi frequently engage in so-called 'sweeping exercises' in which people are arrested in large numbers. These police operations tend to violate a range of provisions on arrest in the Criminal Procedure and Evidence Code. At times people are even charged jointly when they were arrested at different locations, and adults are charged with children.

26. Typically, sweeping exercises have only very general objectives, meaning that persons are arrested, for example, for being on the street at night, even when they have not committed a specific offence or engaged in suspicious activity. Sweeping exercises include within their net persons trying to make a living through vending in the context of extremely limited work opportunities, and persons with psychosocial disabilities in the context where there are inadequate social services to support them.

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[21] L Muntingh (2015) *Arrested in Africa*, CSPRI, 16-17.
[22] UN General Assembly Report by the Special Rapporteur on Extreme Poverty and Human Rights, 66th Session, August 2011, A/66/265, 11.
[23] B Chinsinga et al *Governance and Corruption Survey Report 2013*, 2014, Centre for Social Research, University of Malawi.
[24] L Muntingh (2015) *Arrested in Africa*, CSPRI, 20.

27. There is no overarching policy on sweeping exercises, and police have relative freedom to arrest persons without having to follow procedures or conduct thorough investigations.

28. The US Interagency Council on Homelessness raised concerns about the effect of sweeping exercises on persons who are homeless:

> *"Police action to arrest people or force movement to other areas is costly, contributes to distrust and conflict, and is a short-term intervention. Those arrested may return again to the streets, only now with criminal records or outstanding fines. Those who move to other neighbourhoods in police sweeps remain on the street but may lose their personal belongings. Such police action may exacerbate the problem as criminal records and loss of key personal documents can make it even harder for people to leave the streets."*[25]

29. It is in this context that PASI seeks to make submissions on the need for a rights-based approach to arrest in Malawi and on how the ongoing practice of arresting and detaining people under section 184(1)(c) becomes untenable.

A lawful, human rights-based approach to arrests

30. In 1979, the United Nations General Assembly adopted a Code of Conduct for Law Enforcement Officials which emphasised that police must respect dignity and human rights at all times.[26]

31. Similarly, the African Commission on Human and Peoples' Rights in its Resolution on Police and Human Rights in Africa, called on States Parties *"to ensure that in the execution of their duties, police fully comply with the respect for human rights and the rule of law" and to take appropriate measures "to ensure that police*

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[25] US Interagency Council on Homelessness, *Searching out solutions: constructive alternatives to criminalisation*, 2012, 24.

[26] United Nations General Assembly Resolution 34/169 of December 1979. Article 2 provides that *"in the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons."* Article 3 states that *"law enforcement officials may use force only when strictly necessary and to the extent required in the performance of their duty."*

services respect the dignity inherent in the individual in the discharge of their duties."[27]

32. In May 2014, the African Commission on Human and Peoples' Rights adopted the Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention (Luanda Guidelines) which establishes a clear framework within which arrests must take place to ensure that rights are respected:[28]

    32.1. The Guidelines note that *"pre-trial detention disproportionately impacts the vulnerable and marginalised who are unlikely to have the means to afford legal representation and assistance or comply with conditions of police bail or bond, and who in some cases may be detained through the justice system in psychiatric hospitals, departments or institutions both inside and outside of prisons and detention centres."*

    32.2. 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 for the rights of the individual."*

    32.3. Section 2(b) provides that *"arrests must not be carried out on the basis of discrimination of any kind such as on the basis of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth, disability or any other status."*

33. The law relating to arrests and detention can be found in the Malawi Constitution, 1995, the Criminal Procedure and Evidence Code as amended in 2010, the Penal Code, as amended in 2010 and the Police Act, 12 of 2010, and illustrates a legal framework which requires respect for human rights.

34. Section 42(2) of the Constitution provides that every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right to:

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[27] Resolution 259, African Commission on Human and Peoples' Rights 54th Ordinary Session, November 2013, Banjul.
[28] Adopted at the 56th Ordinary Session of the African Commission on Human and Peoples' Rights in 2014.

1. *“promptly to be informed, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;*
2. *as soon as it is reasonably possible, but not later than 48 hours after the arrest, or if the period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an independent and impartial court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be released;*
3. *not to be compelled to make a confession or admission which could be used in evidence against him or her;*
4. *save in exceptional circumstances, to be segregated from convicted persons and to be subject to separate treatment appropriate to his or her status as an unconvicted person;*
5. *to be released from detention, with or without bail unless the interests of justice require otherwise;*
6. *as an accused person, to a fair trial, which shall include the right –*
    - *i. to public trial before an independent and impartial court of law within a reasonable time after having been charged;*
    - *ii. to be informed with sufficient particularity of the charge;*
    - *iii. to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;*
    - *iv. to adduce and challenge evidence, and not to be a compellable witness against himself or herself;*
    - *v. to be represented by a legal practitioner of his or her choice or, where it is required in the interests of justice, to be provided with legal representation at the expense of the State, and to be informed of these rights;*
    - *vi. not to be convicted of an offence in respect of any act or omission which was not an offence at the time when the act was committed or omitted to be done, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;*
    - *vii. not to be prosecuted again for a criminal act or omission of which he or she has previously been convicted or acquitted;*
    - *viii. to have recourse by way of appeal or review to a higher court than the court of first instance;*
    - *ix. to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her, at the expense of the State, into a language which he or she understands; and*
    - *x. to be sentenced within a reasonable time after conviction.*

35. The Criminal Procedure and Evidence Code has been amended by Act 14 of 2010 to provide for increased protection of persons who have been arrested:

35.1. Section 20A provides that an arrest is unlawful where the person arrested was not informed of the reason for the arrest at the time of, or as soon as practicable after, the arrest.[29]

35.2. Section 20A(6) provides that, once a person is arrested, *"the police officer shall promptly inform him that he has the right to remain silent, and shall warn him of the consequences of making any statement".*

35.3. Section 32A provides that the police may caution and release an arrested person.

35.4. Section 32A(4) provides that a police officer must, when exercising his or her discretion to caution and release an arrested person, bear in mind the following: the petty nature of the offence, the circumstances in which it was committed, the views of the victim or complainant, and personal consideration of the arrested person, including age or physical and mental infirmity.

36. The Bail (Guidelines) Act, 8 of 2000 deals with the circumstances in which bail is granted. It provides that a senior police officer must release someone unconditionally where it appears that there is insufficient evidence.

37. In our experience, the enforcement of section 184(1)(c) of the Penal Code is often accompanied by a violation of one or more of the above legal provisions in the Constitution and Criminal Procedure and Evidence Code. Section 184(1)(c) so easily results in arbitrary enforcement that the offence militates against a human rights approach to policing and should be declared in violation of section 42 of the Constitution.

38. Specifically, by arresting someone when no offence has been committed, the right to be presumed innocent is infringed. Persons who are arrested are seldom immediately informed of the nature of arrests and the charge against them, and they are often taken to a magistrates' court to plead without access to a legal representative. Since those arrested under section 184 are poor, they are often left with little choice but to plead guilty so that they can pay a fine and be released.

[29] This section was inserted by Act 14 of 2010.

SECTION 184(1)(C) OF THE PENAL CODE VIOLATES SECTION 41 OF THE CONSTITUTION

39. The right of access to justice is protected in section 41 of the Constitution and subsection (1) provides that "*Every person shall have a right to recognition as a person before the law."*

40. The right is enshrined in article 16 of the International Covenant on Civil and Political Rights which states: "*Everyone shall have the right to recognition everywhere as a person before the law."*

41. The right is also contained in article 5 of the African Charter on Human and Peoples' Rights: "*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 slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."*

42. The Convention on the Rights of Persons with Disabilities contains this right in article 12: "*States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law."*

43. The UNODC has highlighted the wide array of ways in which access to justice is at stake in the criminal justice process:

> *"Improving people's access to justice is essential to ensure fairness and equality before the law in each individual's case, as well as to strengthen trust and confidence in the justice system and people's cooperation with it. Trust in the justice system itself has been identified as a factor that can help reduce crime and imprisonment… Improving poor and vulnerable people's access to justice is also an essential element of ensuring that prisons are not filled with people who, were the police and court systems functioning as they should, would not be in detention, be that either prolonged pre-trial detention or following unfair convictions and sentencing… Delays and obstacles*

encountered in accessing justice is a cross-cutting cause for high levels of imprisonment…"[30]

44. PASI submits that the enforcement of section 184(1)(c) of the Penal Code particularly affects the poor in society and its enforcement often has the effect of denying them access to justice in violation of section 41 of the Constitution.

ANY ORDER DECLARING SECTION 184(1)(C) OF THE PENAL CODE UNCONSTITUTIONAL SHOULD BE RETROSPECTIVE

45. Section 41(3) of the Constitution provides that *"every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law".*

46. The courts in Malawi have emphasised that section 41(3) is an important right that must be protected by the courts.[31] The Court in *Attorney General v Msiska* has held that the right under section 41(3) is an essential right which is a restatement of common law rights and enshrined in the International Covenant on Civil and Political Rights.[32]

47. Article 2(3) of the International Covenant on Civil and Political Rights provides for the right to an effective remedy, as well as the right to have competent authorities enforcing any remedy granted.

48. The Human Rights Committee in General Comment 31 stated that:

"The right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid

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[30] UNODC *Handbook on strategies to reduce overcrowding in prisons*, 2013, 22.
[31] *Attorney General v Msiska* (MSCA Civil Appeal 42 of 1998) [2000] MWSC 6. See also *Banda v Lekha* (IRC 277 of 2004) [2005] MWIRC 44.
[32] *Attorney General v Msiska* (MSCA Civil Appeal 42 of 1998) [2000] MWSC 6. See also Article 2(3) of the International Covenant on Civil and Political Rights.

continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations."[33]

49. This means that remedies should go beyond those relating to the main applicant, but also consider preventing recurring violations.

50. PASI submits that all those persons who are currently being detained or imprisoned on charges in terms of section 184(1)(c) of the Penal Code are entitled to an effective remedy if the section is declared unconstitutional. There should be no need for them to approach the Court on an individual basis to secure their release, which would be impossible for most. A retrospective order would be both necessary and appropriate and would ensure that there are no further rights violations incurred by those who are currently in detention as a result of section 184(1)(c) of the Penal Code.[34]

51. It is recognised that there are many different approaches to the issue of retrospectivity of a declaration of unconstitutionality.

52. The declaratory approach provides that once a section is declared unconstitutional, the provision is nullified from the outset, and any government action taken pursuant to the section is also invalid. The effect is that those affected by the provision have a right to redress which reaches back into the past.[35]

53. Others claim that any legal provision which pre-dates the Constitution, only becomes invalid the moment when the provisions of the Constitution came into effect.[36]

    53.1. In South Africa, when the Constitutional Court declared the offence of consensual sodomy unconstitutional, it held that the order of invalidity extended only to acts of consensual sexual conduct between males in private committed after the date of the enactment of the Constitution. The order did

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[33] Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), at paras 17, 19.
[34] *Banda v Lekha* (IRC 277 of 2004) [2005] MWIRC 44.
[35] *Canada (Attorney General) v Hislop* [2007] 1 SCR 429 at para 83-84.
[36] *Ferreira v Levin* [1995] ZACC 13; 1996 (1) SA 984 (CC), at para 30.

not invalidate any convictions that occurred prior to the date when the Constitution was enacted.[37]

54. However, a fully retroactive declaration is not always practical. In some instances, the declaration of invalidity is suspended temporarily to allow government time to enact legislation to rectify the unconstitutionality.

54.1. The South African Constitutional Court in the case of *Minister of Justice v Ntuli*,[38] held that where the government sought to have an order of invalidity suspended, it was the duty of the Minister responsible for the administration of the statute to place sufficient information before the court to justify a suspension, with due regard to the importance of the rights and the government's duty to uphold rights.[39]

55. In weighing the extent of a declaration of retrospectivity, the Court should consider the fairness of the limitation of retroactivity of the remedy on those affected by the section declared unconstitutional and whether an order limiting retrospectivity of the declaration of invalidity would indeed be just and equitable on a proper consideration of the context of the Constitution as a whole.[40]

55.1. The South African Constitutional Court remarked that imprisonment *"is a drastic curtailment of a person's liberty, which is the essence of the freedom and security provision in section 11(1) of the Constitution. In the criminal law, it is generally accepted that imprisonment should be resorted to only after the most anxious consideration."*[41] Declaring the imprisonment of judgment debtors unconstitutional, the Court ordered that *"with effect from the date of*

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[37] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).
[38] 1997 (3) SA 772 (CC).
[39] See also *Canada (Attorney General) v Hislop* [2007] 1 SCR 429: "Finally, a temporary suspension of the declaration of invalidity is not appropriate in the present case. Suspensions should only be used where striking down the legislation without enacting something in its place would pose a danger to the public, threaten the rule of law or where it would result in the deprivation of benefits from deserving persons without benefiting the rights claimant."
[40] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC), at para 87.
[41] *Coetzee v Government of South Africa and Others*, [1995] ZACC 7, at para 33.

this order, the committal or continuing imprisonment of any judgment debtor" is invalid.

56. In *Kafantayeni v Attorney General*,[42] where the High Court declared the mandatory requirement of the death sentence for murder unconstitutional, it made a consequential order under section 46(3) of the Constitution for each plaintiff to be brought before the High Court for the judge to pass an individualised sentence after hearing argument on sentencing.

57. To rectify the initial order, the High Court in *Yasini v Republic*,[43] held that:

"The Court [in the Kafantayeni case] clearly ordered that the Plaintiffs were entitled to a re-sentence hearing on the death sentence individually. The Court's decision on this point, affected the rights of all prisoners who were sentenced to death under the mandatory provisions of section 210 of the Penal Code. The right to re-sentence hearings therefore accrued to all such prisoners… We wish to observe that it is the duty of the Director of Public Prosecutions to bring before the High Court for re-sentence hearing all prisoners sentenced to death under the mandatory provision of section 210 of the Penal Code."

58. In the present case, the offence in question does not require proof of criminal conduct. To keep in prison persons convicted under the offence, would be tantamount to the imprisonment of persons who are not guilty of an offence and contrary to the presumption of innocence protected in section 42 of the Constitution. Had the persons been suspected of having committed an offence, they would have been charged with those specific offences instead of with section 184(1)(c) of the Penal Code. There is accordingly no need to send people back to court to be re-charged, which the experience of *Kafantayeni* illustrates is a cumbersome process. In *Kafantayeni* however the issue was one of re-sentencing after conviction, whilst persons convicted under section 184 of the Penal Code were not convicted of a specific offence in the first place.

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[42] (Constitutional Case 12 of 2005) [2007] MWHC 1.
[43] MSCA Criminal Appeal No 29 of 2005 (unreported).

59. PASI submits that a declaration that section 184(1)(c) of the Penal Code is unconstitutional should benefit all persons currently in detention or charged with the offence.

60. PASI further submits that there is no need to suspend the declaration of unconstitutionality since the removal of section 184(1)(c) from the Penal Code will not create a lacunae in the law - Any potential criminal conduct that could lead to charges under section 184(1)(c) can as easily lead to charges under other sections in the Penal Code and arrest under section 28 of the Criminal Procedure and Evidence Code.

61. Should this Court declare section 184(1)(c) of the Penal Code unconstitutional and declare that such order is retrospective, constraints in the dissemination of information to all prisons and places of detention might reduce the extent to which all persons so entitled immediately benefit from the order.

62. In this regard PASI proposes that this Honourable Court makes use of a supervisory order to ensure that the order is implemented without undue delay which could provide for the following:[44]

    62.1. Requiring the State to report back to the Court within a specified period on the process of releasing prisoners charged under section 184(1)(c) of the Penal Code;

    62.2. Ordering the State to ensure that all police stations are informed that the offence has been declared unconstitutional and to produce evidence to the Court to this effect.

63. The *amici curiae* in this matter have a wide reach within Malawi and are willing to assist the Court to monitor implementation of the order and report back to the Court on the State's release of prisoners charged under section 184(1)(c) of the Penal Code.

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[44] *EN and Others v Government of RSA and Others* (2006) AHRLR 326 (SAHC 2006)

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