The Registrar of High Court
Civil Registry
25 AUG 2016
P.O. Box 30244
Chichiri, Blantyre 3.

THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CONSTITUTIONAL CAUSE NO.5 OF 2015
[Being Criminal Case No. 444 of 2015 at Blantyre Magistrates Court]

BETWEEN:

MAYESO GWANDA — APPLICANT

-AND-

THE STATE — RESPONDENT

PARALEGAL ADVISORY SERVICES INSTITUTE — 1ST AMICUS CURIAE
LEGAL AID — 2ND AMICUS CURIAE
CENTRE FOR HUMAN RIGHTS EDUCATION, ADVICE AND ASSISTANCE — 3RD AMICUS CURIAE

THE RESPONDENT'S SKELETAL ARGUMENTS

May it please Your Lordships!

1.0 BACKGROUND FACTS

1.1 The Applicant was charged with the offence of being a rogue and vagabond under Section 184(1)(c) of the Penal Code.

1.2 On 25th March 2015, his trial was stayed pending the determination of the constitutional petition that was lodged by the Applicant.

1.3 On 3rd June 2015 the Chief Justice certified this matter pursuant to Section 9(3) of the Courts Act.

Accepted by:
..on behalf of Mlenbulasa ..
Attorney ... Advocate

1.4 It is the Applicant's challenge that the offence of rogue and vagabond as provided for under Section 184(1)(c) of the Penal Code is unconstitutional as it allegedly infringes his rights under the Constitution in itself and in its application.

1.5 The Respondent opposes the application on the grounds that the issues pertaining to Section 184(1)(c) of the Penal Code are to do with the law enforcement officers and not the provision itself.

2.0 ISSUE

2.1 Whether or not Section 184(1)(c) of the Penal Code is unconstitutional on the grounds that it infringes the rights provided under Sections 19(1), 19(3), 19(6), 20(1), 21 and 39(1) of the Constitution in itself and in its application.

3.0 THE LAW

4.0 The Offence of Rogue and Vagabond

4.1 The law being challenged for its constitutionality is Section **184(1)(c) of the Penal Code** whichprovides 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 placeat 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."

5.0 Invalidating an Act of Parliament

5.1 The Court has mandate under the Constitution to declare any law invalid if it is inconsistent with the Constitution.

5.2 **Section 5 of the Constitution** provides that:

> "Any act of Government or any law that is inconsistent with the provisions of thisConstitution shall, to the extent of such inconsistency, be invalid."

5.3 **Section 46(1) of the Constitution** is in the following terms:

> "Save in so far as it may be authorized to do so by this Constitution, the NationalAssembly 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 thefundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall, to the extent of the contravention, be invalid."

5.4 **Section 11 of the Constitution** deals with interpretation of the Constitution by the Courts and provides that:

"(1) Appropriate principles of interpretation of this Constitution shall be developed andemployed by the courts to reflect the unique character and supreme status of this Constitution.
(2) In interpreting the provisions of this Constitution a court of law shall--
(a) promote the values which underlie an open and democratic society;
(b) take full account of the provisions of Chapter III and Chapter IV; and
(c) where applicable, have regard to current norms of public international law and comparableforeign case law.
(3) Where a court of law declares an act of executive or a law to be invalid, that court mayapply such interpretation of that act or law as is consistent with this Constitution.
(4) Any law that ousts or purports to oust the jurisdiction of the courts to entertain matterspertaining to this Constitution shall be invalid."

6.0 The Constitutionality of Section 184(1)(c)

6.1 The Applicant is arguing that Section 184(1)(c) is a violation of the rights provided under Sections 19(1), 19(3), 19(6), 20(1), 21 and 39(1) of the Constitution and so ought to be declared unconstitutional and therefore invalid.

6.2 In determining whether or not Section 184(1)(c) of the Penal Code is inconsistent with the Constitution, the present arguments will first look at whether it limits or restricts the rights under the constitution and secondly whether the said limitations are lawful under Section 44 of the Constitution.

6.3 Does Section 184(1)(c) limit the rights under Sections 19(1),

19(3), 19(6), 20(1), 21 and 39(1) of the Constitution?

6.4 **Section 19(1) of the Constitution** provides that:

"The dignity of all persons shall be inviolable."

6.4.1 The Appellant has argued that Section 184(1)(c) is a violation of his right to dignity on the grounds that it allegedly "allows 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."[1]

6.4.2 It is the Respondent's submission that this proposition is incorrect as it is not Section 184(1)(c) that allows arrest and detention in circumstances where there is no evidence but rather it is an issue to do with the officers that are mandated to enforce the said provision and their lack of understanding.

6.4.3 This can be illustrated from the case of **Kaipsya v. Republic** 4 MLR 283 where the Court stated that an arrest/conviction of the offence under Section 186(1)(c) requires evidence. The Court in setting aside the appellant's conviction and sentence said as follows:

> "In my view, **the words in s.184(4) of the Penal Code – "Under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose" mean that such conclusion must be the only one possible.** In this case there was only some suspicion regarding the accused's presence at the telephone box and **the conclusion of the magistrate that he was there for an illegal purpose was not justified by the evidence."**

6.4.4 The lack of understanding and blatant disregard of the elements of Section 186(1)(c) has not only been prevalent amongst Police Officers but also Magistrates Courts when conducting trials involving that offence. Such concerns have been raised numerous times by the High Court.

6.4.5 The High Court has raised concerns that Magistrates Courts

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do not ensure that the accused persons have an understanding of the elements of the offence of rogue and vagabond prior to taking guilty pleas.

6.4.6 In the case of **Republic v. Lawanja**[1995] 1 MLR 217 three persons were convicted of the offence of rogue and vagabond under Section 184(1)(c) of the Penal code on their own plea of guilt, when the matter came for confirmation the High Court said as follows in quashing the conviction and sentence:

> "The plea was clearly irregularly obtained. It cannot be said that the Convicts understood and appreciated what they were pleading to. The admitted facts do not bear out the offence. It is not an offence for any person to enjoy freedom , peace and calm of this country and walk about in public places be it aimlessly and without a penny in his pocket....The point is that one does not commit an offence by 'simply wandering about' as the Court here found....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."

6.4.7 In the case of **Republic v.Agnes Mbewe& 18 Others** Confirmation No. 166 of 2000 (Unreported) the High Court in setting aside the convictions under Section 184(1)(c) held that the pleas of guilt were defective. The Court said as follows:

> "...it is clear that the pleas were defective. The trial court ought not to have accepted the. The sixth accused said: i understand the charge. I admit i was loitering. I admit i was found there illegally. There is no indication of the time, the place or indeed the circumstances. What, if i may ask is meant by being found there illegally. Since it is the police who found the accused cannot we say that the alleged illegality should attach to the police and not the accused."

6.4.8 See also the case of **Thomas v. R** (ante).

6.5 **Section 19(3) of the Constitution** provides that:

> "No person shall be subject to torture of any kind or to cruel, inhuman or degradingtreatment or punishment."

6.5.1 The Applicant has also argued that Section 184(1)(c) is a violation of his right under Section 19(3) of the Constitution due to its broad ambit. He has further argued that by arresting him without cause when going about his normal daily activities he was subjected to demeaning and humiliating treatment.2

6.5.2 Again, even if we were to accept that the Applicant was arrested without cause, which fact has not yet been proven, the Applicant has not demonstrated how that would have been as a result of the contents or wording of Section 184(1)(c).

6.5.3 Section 184(1)(c) does not allow for arrest without cause nor does it make it lawful to arrest one simply because they are going about their usual everyday business.

6.5.4 This position has been confirmed by the Courts numerous times.

6.5.5 In the case of **Republic v.Agnes Mbewe& 18 Others** Confirmation No. 166 of 2000 (Unreported) the Court in commenting on Section 184(1)(c) said as follows:

> "Clearly the section does not per se prohibit being found at a particular place or places. It prohibits being found there in such circumstances and at such times as would lead to the conclusion that one is there for an illegal or disorderly purpose. **The points of emphasis are the circumstances and the time. It is from them that the offending conclusions will be drawn i.e. conclusions of illegality or disorderliness."**

6.5.6 See also the case of **Kaipsya v. Republic** [Supra].

6.5.7 Therefore, Section 186(1)(c) does not provide for arbitrary arrests. It has not been worded as such, if arbitrary arrests have

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been made under the said provision and convictions made erroneously, that has been for other reasons other than the provision itself. It is likely that it has been as a result of lack of understand, negligence, disregard of the elements of the offence and other factors that are independent of the law itself. The problems have been amongst the Police when enforcing the provision and the Magistrates Courts when conducting trials.

6.6 **Section 19(6) of the Constitution** provides that:

"Subject to this Constitution, every person shall have the right to freedom and security ofperson, which shall include the right not to be--

(a) detained without trial;

(b) detained solely by reason of his or her political or other opinions; or

(c) imprisoned for inability to fulfill contractual obligations."

6.6.1 The Applicant has argued that Section 184(1)(c) is a violation of his right to freedom and security as provided under Section 19(6) of the Constitution in that he was arrested and detained arbitrarily by the Police.

6.6.2 In the case of **Board of Regents v. Roth** 408 US 564 the United States Supreme Court held that liberty is a broad and majestic term, which is dynamic and changes in accordance with the experiences of the society. Right to liberty includes freedom from arbitrary arrest.

6.6.3 The Human Rights Committee has attempted to define arbitrariness. In the case of **Mukong v. Cameroon** Communication No. 548 of 1991 the Committee said that arbitrariness is not to be equated with against the law, it must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of the law."

6.6.4 The question therefore is whether or not Section 184(1)(c) allows for arbitrary arrests or/and arrests that are unjust and lack due process of the law.

6.6.5 The elements of the offence under Section 184(1)(c) are:

- A person has to be 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

6.6.6 Clearly the provision does not make being a mere sex worker, homeless, poor, or a beggar a rogue and vagabond an offence. Section 184(1)(c) expressly provides that not only must one be found in or near premises etc but must also be found at such time and **in circumstances as to lead to the conclusion that they are there for an illegal or disorderly purpose.**

6.6.7 It is the Respondents' submission that the elements of the offence to not provide for arbitrary arrests. [See also the cases of **Republic v.Agnes Mbewe& 18 Others; Kaipsya v. Republic**supra].

6.6.8 In support of his argument the Applicant has cited the case of **King v. Attorney General** where it was held by the Supreme Court of Ireland that Section 4 of the vagrancy Act that:

> "the ingredients of the offence and the mode by which the 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..."

6.6.9 It is submitted however that the comparison is misplaced as the two provisions are not similar and in fact it was not the whole of Section 4 of the Vagrancy Act that was declared inconsistent with the constitution.

6.6.10 Section 4 of the Vagrancy Act 1824 that was referred to in that case provides as follows:

> "Every person committing any of the offences hereinbefore mentioned, after having been convicted as an idle and disorderly person; every person pretending or professing to tell fortunes, or using any subtle craft,

means or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects; every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of himself or herself; every person wilfully exposing to view, in any street, road, highway, or public place, any obscene print, picture or other indecent exhibition; every person wilfully, openly, lewdly and obscenely exposing his person in any street, road or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female; every person wandering abroad and endeavouring by the exposure of wounds or deformities to obtain or gather alms; every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence; every person running away and leaving his wife, or his or her child or children, chargeable, or whereby she or they or any of them shall become chargeable to any parish, township or place; every person having in his or her custody or possession any picklock key, crow, jack, bit or other implement, with intent feloniously to break into any dwelling house, warehouse, coachhouse, stable or outbuilding or being armed with any gun, pistol, hanger, cutlass, bludgeon or other offensive weapon, or having upon him or her any instrument, with intent to commit any felonious act; every person being found in or upon any dwelling house, warehouse, coachhouse, stable or outhouse, or in any inclosed yard, garden, or area, for any unlawful purpose; every suspected person or reputed thief, frequenting any river, canal or navigable stream, dock or basin, or any quay, wharf or warehouse near or adjoining thereto, or any street, highway or avenue leading thereto. . . or any street, highway or place adjacent, with intent to commit felony; and every person apprehended as an idle and disorderly person, and violently resisting any constable or other peace officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have

been so apprehended, shall be deemed a rogue and vagabond, within the true intent and meaning of this Act; and it shall be lawful for any Justice of the Peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the House of Correction, there to be kept to hard labour for any time not exceeding three calendar months; and every such picklock key, crow, jack, bit and other implement, and every such gun, pistol, hanger, cutlass, bludgeon or other offensive weapon, and every such instrument as aforesaid, shall, by the conviction of the offender, become forfeited to the King's Majesty."

6.7 **Section 20(1) of the Constitution** provides that:

"Discrimination of persons in any form is prohibited and all persons are, under anylaw, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin,disability, property, birth or other status."

6.7.1 The Applicant has also argued that Section 184(1)(c) of the Penal Code "in effect limits his right to equal protection of the law and his right not to be discriminated" against as provided under Section 20 of the Constitution.

6.7.2 It is the Respondent's submission that the Applicant does not demonstrate how Section 184(1)(c) has resulted or results in a violation of the right against discrimination.

6.7.3 What he has argued is that the offence under Section 184(1)(c) leads to arbitrary arrests which are allegedly influenced by assumptions of criminality based on biases relating to poverty, gender, race, ethnicity, place of origin and social status."[3]

6.7.4 The offence of rogue and vagabond under Section 184(1)(c) was enacted as a tool for prevention of crime as it aims to prevent those with an intention to commit crime from committing the said crime or disorderly conduct.

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6.7.5 It isconceded that despite this objective, the implementation of the Section 184(1)(c) has been rather problematic, however, the challenges faced with the implementation of the said provision are not due to the wording or content of the provision itself but rather already mentioned above.

6.7.6 The problems when enforcing Section 184(1)(c) has included instances where the Police have been discriminatory in effecting arrests by targeting a particular section of society.

6.7.7 For example, in the case of **Kaseka v. Republic** H.C. Criminal Appeal No. 2 of 1999 Justice Chinangwa observed as follows in quashing the conviction under Section 186(1)(c):

> "...It is further observed that some of the appellants are alleged to have had male companions who were not arrested and the state has not given reasons why they were not prosecuted...both men and women have a right to stay there provided that they do not breach the law...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 have no male companions were not arrested just because they were not suspected to be there for purposes of immoral activities..."

6.7.8 Challenges in implementation have been twofold, firstly by the Police when effecting arrests as well as the Magistrates Courts when conducting trials.The Police when effecting arrests under the said provision have mostly targeted the poor people, sex workers and beggars. A concern which even the High Court has raised on numerous occasions, however, even the Courts have held that Section 184(1)(c) is not intended to target a particular section of society.

6.7.9 In the case of **Republic v. Ganizani and Four Others,** Confirmation Case No. 290 of 1999 (Unreported) the accused were found in a classroom sleeping and charged with rogue and vagabond on suspicion that they were in the classroom for an illegal or disorderly purpose. Mtambo J said as follows:

> "It would not be right to conclude that merely because one cannot give a good account of oneself or has no

means of subsistence the he she is up to an illegal purpose. In any case the accused were found sleeping so that the conclusion that they were, or might have been there for any of those purposes might be even harder to sustain or justify than otherwise."

6.7.10 In the case of **Rep v. Balala**[1997] 2 MLR 67 a juvenile was found walking around in Nkhatabay trading centre, a policeman during a patrol called and questioned him and came to the conclusion that he had no permanent home and no visible means of livelihood. He was charged with the offence of rogue and vagabond contrary to Section 184(1)(C) and was convicted by the Magistrates Court. The High Court in quashing the conviction said as follows:

> "I have examined the facts which were presented before the magistrate's Court. It is not very clear to me for what purpose the juvenile was found wandering about within the Trading Centre. When he was questioned by the Police he said that he came to look for employment. It is possible that the juvenile is a person who needs care and protection. He is a needy person. I am concerned that the charge of being rogue and vagabond can be used to oppress needy persons who are not criminals. The juvenile in the present case would be a clear example where mere poverty, homelessness and unemployment would land a person in prison. I am of the view that the facts did not support the offence of being rogue and vagabond."

6.7.11 In the case of **Stella Mwanza and 12 Others v. Republic** Confirmation Criminal Case No. 1049 of 2007, the Accused persons pleaded guilty to the offence of rogue and vagabond under Section 184(1)(c), when the matter came for confirmation in the high Court, the Court said as follows:

> "The ordinary English definition of a rogue is a dishonest or unscrupulous person. A vagabond is someone with no fixed home who lives an unsettled wondering life. 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 simply on account of their lack of means."

6.7.12 The Court proceeded to quash the convictions and sentence on the grounds that the only circumstances attached to the convicted persons were that they were persons without means and nothing more.

6.7.13 It is clear from the foregoing that the there has been instances of victimisation of poor people, sex workers and homeless people by the Police in the name of enforcing Section 184(1)(c) and those that have been victims have further been the victims of injustice by getting convicted by Magistrates Courts simply on account of their personal status and nothing more.

6.7.14 It is yet again submitted that that has stemmed from a misunderstanding or negligent disregard of the elements of the offence under Section 186(1)(c).

6.7.15 Again, it is the Respondent's submission that the provision itself in Section 184(1)(c) is not discriminatory and does not aim to target a particular group of people as has been held in numerous cases, neither is it discriminatory in its correct application.

6.8 **Section 21 of the Constitution** provides that:

"Every person shall have the right to personal privacy, which shall include the right
not to be subject to--
(a) searches of his or her person, home or property;
(b) the seizure of private possessions; or
(c) interference with private communications, including mail and all forms oftelecommunications."

6.8.1 The Applicant has also submitted to this Court that Section 184(1)(c) is a violation of his right to privacy under Section 21 of the Constitution.

6.8.2 He states that the right is infringed when people are going

about their daily activities and are questioned about their private life and have their person searched prior to or during arrest.4

6.8.3 In the case of **DPP Cape of Good Hope v. Bathgate** CCT 46 OF 2000, the Constitutional Court of South Africa held that in most cases when ones person or property is searched, or when ones possession are seized or communication intercepted, the right to privacy will be infringed.

6.8.4 The right to privacy is however, not an absolute right, it can be limited for a legitimate purpose. In arresting people suspected of having committed an offence under Section 184(1)(c), as in many instances where the Police effects arrests under other provisions in the Penal Code, the Police in most cases have to conduct searches and indeed ask questions even about ones personal or private life. It is the Respondent's submission that that does not amount to a violation of the right to privacy under the Constitution and indeed there is nothing in Section 184(1)(c) that allows for that save as to question one and arrest one where the circumstances lead to a conclusion that that person is where they are for an illegal or disorderly purposewhich is similar to other penal provisions that require searches and interviews, that does not make the said legal provisions unconstitutional.

6.8.5 However, it should be noted and it is conceded that again when enforcing the said provision, the police have been prone to conduct sweeping exercises at rest houses, for example, during which indeed the rights to ones privacy have been violated as it is not an offence to be a sex worker for example and further there have been times where there have been no circumstances in such scenarios to lead one to believe that the suspects are about to commit an offence or disorderly conduct. Again, the issue is to do with enforcement by the police not correct application of Section 186(1)(c).

6.9 Section 39(1) of the Constitution provides that:

"Every person shall have the right of freedom of movement and residence within theborders of Malawi."

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6.9.1 Lastly, the Applicant alleges that Section 184(1)(c) is a breach of ones right of movement and residence.

6.9.2 In the case of **Thomas Brown v. Republic** Criminal Appeal No. 24 of 1996 the police, following a series of housebreaking in Mwanza, decided to arrest everyone that was moving around aimlessly and charged them with being rogue and vagabond under Section 184(1)(c) of the Penal Code. Justuce Tambala said as follows in quashing the conviction:

> "Section 184(1)(c) creates an offence of rogue and vagabond if a person is found on or near a building, road or highway or public place and there are circumstances which suggest that the person is there for an illegal or disorderly purpose. It is not an offence merely to be found, during night, on or near a road, highway, premises or public place...It would be wrong and unjust to accuse such a person of committing an offence under Section (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; and
> 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. In light of the new Constitution, offences such as that of rogue and vagabond need to be reviewed as they appear to violate the Constitution...Merely to be found during night at public premises , road or market should not automatically lead to the conclusion that the person was there for an illegal or disorderly purpose."

6.9.3 Again, it is clear from the reading of Section 184(1)(c) that it does not make it an offence to simply be found wandering around or loitering. The Courts have confirmed that position

many times as illustrated above.

6.9.4 The issue is yet again, the incorrect mode of enforcement. Even the Applicant in his skeletal arguments admits as much when he states that "Despite these pronouncements by the courts, research indicates that Police in Malawi continue to interpret Section184 as allowing them wide discretion to arrest persons found loitering at night or in the early morning."5It is submitted that the challenges in enforcement are not from the wording or any alleged vagueness of the provision, which is clear as to what amounts to an offence under Section 184(1)(c).

6.10 It is thus the Respondent's submission that Section 184(1)(c) does not violate any of the rights enshrined in the Constitution as alleged but that there has been many instances where the law enforcement officers do so when enforcing, be it knowingly or through lack of understanding or negligence, neither of which is as a result of the contents of Section 184(1)(c).

6.11 Even if we were to accept that Section 184(1)(c) amounts to a limitation of the rights as alleged, which fact we do not, the alleged limitations of the rights would only be deemed to be unlawful if they fell foul of the provisions under the Constitution by virtue of Section 44 of the Constitution as the rights mentioned are not absolute. That determination involves a balancing exercise of carefully weighted interests.

6.12 Section 12 and 44 of the Constitution recognises that rights provided thereunder can be limited but only if the said limitations are within the ambit of the provisions in Section 44.

6.13 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."

6.14 Section 44 of the Constitution provides that:

"(1) No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this

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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) Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, and shall be of general application."

6.15 Therefore according to Section 44 of the Constitution, the limitations of any rights under the Constitution will only pass the constitutionality threshold, if the limitations are:
6.15.1 prescribed by law;
6.15.2 necessary in an open and democratic society;
6.15.3 meet international human rights standards; and
6.15.4 do not negate the essential content of the right in question

6.16 Are the Limitations Prescribed by Law?

6.16.1 To be prescribed by law means that the limitation must be legally authorised.

6.16.2 In the case of **Ralph Mhonev. Attorney General** Misc Civil Cause No. 115 of 1993 (Unreported) the Court said that a directive is not law no matter how seriously it is made.

6.16.3 Indeed a law must be sufficiently precise and clear to enable the public and enforcement officers to know their obligations under the law. [See Hogg, P.W. (1999) Constitutional Law of Canada, page 723].

6.16.4 The limitations complained of are allegedly as a result of Section 184(1)(c) of the Penal Code in itself and in its application as such they are provided for under the law.

6.16.5 The Applicant has submitted to this Court that the limitations are not prescribed by law because Section 184(1)(c) is not a statute of general application and also because it is not sufficiently clear and is arbitrary in its application.

6.16.6 Section 44 of the Constitution does not state that the limitation has to be prescribed by law of general application, it simply states that it has to be prescribed by law.

6.16.7 Further the alleged arbitrary application is not because of the provision itself as already illustrated above.

6.16.8 Lastly, it is submitted that Section 184(1)(c) was drafted with clarity, its elements were clearly spelled out and have time and again been listed by the Courts without issues or allegations of vagueness or lack of clarity. It is the enforcement that has been problematic but even that has not been as a result of the wording, contents or correct application of Section 184(1)(c).

6.16.9 In support of the alleged vagueness the Applicant has cited the case of **Papachristu v. Jacksonville** 405 US. 156 where the Supreme Court of Appeal held that the Jacksonville vagrancy ordinance was unconstitutional on the grounds that "it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute" However, the vagrancy ordinance is not the same as Section 184(1)(c) of the Penal Code in Malawi which does give notice of what conduct is forbidden.

6.16.10 It is thus the Respondent's submission that any of the alleged limitations in Section 186(1)(c) are prescribed by law.

6.17 Are the Limitations necessary in an Open and Democratic Society?

6.17.1 In order to pass this test, any alleged limitations have to not only be prescribed by law but have to also be for a legitimate purpose that is necessary in an open and democratic society.

6.17.2 This means that laws that limit human rights should not go further than to achieve the legitimate purpose or objective for which they were enacted, in other words they must be proportional to the objective.

6.17.3 In the case of **The State v. Makwanyane**[Supra]the Court in South Africa said as follows:

> "…the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality…The fact that different rights have different implications for

democracy, and in the case of our constitution for 'an open and democratic society based on freedom and equality" means that there is an absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established but the application of such principles to particular circumstances can only be done on a case by case basis…This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited and the importance of that purpose of such a society; the extent of the limitation, its efficiency and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question…"

6.17.4 The offence of rogue and vagabond dates back to colonial times in the Penal Code of Nyasaland in 1929.

6.17.5 The offence is there as a tool for preventing crime by protecting the public from potential and known criminals before they commit an offence and also for preventing anti-social behaviour.

6.17.6 This is clearly for the benefit of society and is therefore for a legitimate purpose.

6.17.7 Further, as already submitted above, Section 184(1)(c) is sufficiently clear in what conduct would be criminal under the Act and the fact that there has to be existence of circumstances that would lead law enforcement officers to believe that the suspect is at a place for the purposes of committing an offence or disorderly conduct means that it is also clearly connected to its objective which is crime prevention.

6.17.8 It is thus the Respondent's submission that Section 184(1)(c) is necessary in an open and democratic society.

6.18 Do the Limitations meet International Human Rights Standards?

6.18.1 It has also been alleged that the alleged limitation of rights as provided under Section 184(1)(c) does not meet international human rights standards.

6.18.2 Indeed in other countries the amount of discretion given to the police under laws criminalising vagrancy have either been amended or repealed such as in England where the offence of vagrancy originated in the Vagrancy Act of 1984 was repealed by the Vagrancy Act of 1966. In the United States on the other hand the Courts have held that that some vagrancy statutes are unconstitutional.

6.18.3 For example, in the case of **Kolender v. Lawson** 461 US 352 (1953), the Supreme Court in America held that the statute that prohibited loitering or wandering without apparent reason or business and refusing to identify oneself when asked to do so by the Police was unconstitutional because it invested too much discretion in the Police.

6.18.4 In the American case of **Papachristu v. Jacksonville** 405 US. 156 the Supreme Court of Appeal held that the Jacksonville vagrancy ordinance was unconstitutional. The Court in that case held as follows:

> "A presumption that people who might walk or loaf or loiter or stroll or frequent hole where liquor is sold, or who look suspicious to the police are to become future criminals is too precarious for a rule of law. The implicit presumption in the generalised vagrancy standards – that crime is being nipped in the bud – is too extravagant to dissolve extended treatment..."

6.18.5 Those cases however did not necessarily deal with a provision similar to Section 184(10(c) of the Penal Code.

6.18.6 In addition, despite the amendments here and there, vagrancy laws still exist internationally, including in countries that have older bill of rights are deemed to be 'modern' and 'older' democracies.

6.18.7 For example, England still has the Vagrancy Act of 1966 and Article 5(1)(e) of the European Convention on Human Rights provides for the lawful detention of "...drug addicts and vagrants."

6.18.8 In the case of **De Wilde Dems and Verpssy v. Belgium [1971]** 12 Eur. Crt. H.R (Ser.A) the European Court of Human Rights upheld the conviction of three Belhians charged with being vagrants.

6.18.9 Other African Countries such as Zambia, Tanzania and Botswana, just to name a few also have Penal Codes containing the offence of someone being deemed rogue and vagabond.

6.18.10 It is thus the Respondent's submission that Section 184(1)(c) of the Penal Code contains limitations that are recognised by international human rights standards.

6.19 In the circumstances, The Respondent therefore submits that even if it were to be accepted that Section 184(1)(c) infringes or limits the rights as listed above, which fact has not been accepted, the said limitations would be deemed lawful under Section 44 of the Constitution.

7.0 SUBMISSION

7.1 In view of the foregoing the Respondent submits that Section 184(1)(c) of the Penal Code is not unconstitutional but that it serves an important and legitimate purpose.

7.2 The Respondent also submits that indeed there have been problems in the enforcement of Section 184(1)(c) in that those mandated to enforce the same, i.e. the Police and Magistrates Courts have at times done so with lack of understanding of the said provision, negligently and perhaps at times in total disregard of what the offence actually entails for reasons not connected with Section 184(1)(c).

7.3 This does not, however, mean that the said provision is unconstitutional. The remedy to the problems highlighted by the Applicant in the enforcement of Section 186(1)(c) lies in training and sensitising the law enforcement officers so that they enforce Section

186(1)(c) in a manner envisioned by the law makers and in a manner that seeks to achieve its objective.

7.4 The Respondent therefor prays that Section 186(1)(c) should not be declared unconstitutional.

Dated this 25 day of August 2016

Apocheltimu
Senior State Advocate
For: **ATTORNEY GENERAL**