IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CONSTITUTIONAL CASE NO. 5 OF 2015
(Being Criminal Cause No. 444 of 2015 before the Blantyre Magistrate's Court)

BETWEEN

MAYESO GWANDA	**…..……**	**APPLICANT**
	-AND-	
THE STATE	**…….…….**	**RESPONDENT**
LEGAL AID BUREAU	**……**	**1ST AMICUS CURIAE**
PARALEGAL ADVISORY SERVICE INSTITUTE	**……**	**2NDAMICUS CURIAE**
CENTRE FOR HUMAN RIGHTS EDUCATION, ADVICE AND ASSISTANCE	**……**	**3RDAMICUS CURIAE**
MALAWI LAW SOCIETY	**……**	**4THAMICUS CURIAE**

CORAM : MTAMBO, KALEMBERA AND NTABA, J.
: Mr. M. Mambulasa, Counsel for the Appellant
: Ms. A. Itimu and Mr. T.Chakaka-Nyirenda, Counsel for the Respondent
: Mr. T. Kalua, *Amicus Curiae* – Legal Aid Bureau
: Mr. F. Maele, *Amicus Curiae* – Centre for Human Rights Education, Advice and Assistance (CHREAA)
: Mrs. V. Jumbe, *Amicus Curiae* – Paralegal Advisory Services Institute (PASI)
: Mr. L. Gondwe, *Amicus Curiae* – Malawi Law Society
: Ms. E. Chimang'anga, Court Clerk
: Mrs. Pindani, Court Reporter

Ntaba J.

JUDGMENT

1.0 BACKGROUND

1.1 This is a separate concurring Opinion to the Judgment that has been delivered by my Senior brother Judge, Mtambo J, in the instant matter. This is a matter which was certified as a constitutional matter by the Chief Justice on 3rd June,

2015 following a referral by Her Worship Moyo in Form 3 of the Courts (High Court) (Procedures on the Interpretation or Application of the Constitution) Rules of the Courts Act (hereinafter the Rules). This was subsequent to the Applicant making an application for stay of proceedings of the lower court and seeking the said referral to the Honourable Chief Justice which was accordingly granted.

1.2 The facts of the case are that Mayeso Gwanda, an informal vendor by trade was arrested by officers of the Malawi Police Service on or about 20th March, 2015 at Chichiri round about at around 4 am. He informed the Police Officers that he was on his way from Chilomoni to Limbe where he sells plastic bags, but they arrested him all the same. He was kept in custody until 23rd March, 2015 when he was taken to Blantyre Magistrate Court where he was charged with the offence of rogue and vagabond contrary to section 184(1)(c) of the Penal Code and subsequently released on bail. At the commencement of his trial, he indicated that he wanted to challenge the constitutionality of the said section as he was of the opinion that it violates several constitutional rights guaranteed to him namely; in sections 19(1), 20(1), 21 and 39(1) of the Constitution.

1.3 He prayed that if the court agrees with his submission 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, and that it does not meet the requirements set out in sections 12 and 44 of the Constitution which justify an infringement of those rights, the Court should declare section 184(1)(c) of the Penal Code to be unconstitutional and accordingly null and void; and that it should order that the charge against the Applicant should fall away with immediate effect.

1.4 The application was supported by four (4) organizations which joined as *Amici Curiae* and which were in agreement with the Applicant that section 184(1)(c) of the Penal Code was unconstitutional on the following basis –

1.4.1 all manner of legislation must achieve one thing at the barest minimum, that is, is constitutionalism and central to constitutionalism is respect for human rights which this section does not achieve;

1.4.2 human rights are an essential element of constitutionalism and that the inherent dignity and worth of a human being enshrined in section 19 of the Constitution should be valued. Further all laws in Malawi should be in line with the human rights provisions entrenched in the Constitution;

1.4.3 the purpose of section 184 is clear that it is geared at crime prevention which is a laudable objective however the implementation has resulted in convictions of persons where it has not been proved as to what specific crime has been committed. International standards for crime prevention;

1.4.4 international standards for crime prevention measures suggest that vagrancy laws like section 184(1)(c) as a catch-all provision to arrest persons to prevent future crime is without basis and indeed counter-

productive to the government's objectives of fostering a working relationship with the community and the rule of law. Therefore it is not rationally connected to the said objective;

1.4.5 section 184(1)(c) in its implementation has resulted in a lot of arrests which were opined to be arbitrary as such not in line with section 44(2) of the Constitution;

1.4.6 the section is contrary to the principle of proportional justice and accordingly falls short of the limitation requirement set out in section 44 of the Constitution; and

1.4.7 police engage in frequent 'sweeping exercises' where people are arrested in large numbers and such arrests violate the procedures laid down in the Criminal Procedure and Evidence Code. Furthermore, these arrests involve bribery, degrading treatment and violence as such question the essence of the provision.

1.5 The State, in response, submitted that the said section was not unconstitutional as it would stand the test of the limitations set out in section 44 of the Constitution. However, it conceded that the implementation of the section 184(1)(c) has been rather problematic. The State contended however, that the challenges faced with the implementation of the said provision are not due to the wording or content of the provision itself but rather a lack of understanding and blatant disregard of the elements of the offence, thereby indeed resulting in its enforcement agency, the Malawi Police Service not applying it properly. It was their submission that the solution is not declaring it invalid but training the police on its proper use and enforcement.

4.0 THE LAW AND FINDINGS

4.1 Let me indicate from the beginning that this case has raised very interesting and fundamental issues on both sides of the argument. Furthermore, this matter made me deeply examine the section especially in relation to the Bill of Rights which is provided for in the Malawian Constitution. I now turn to the issues before this court. I will not expound the definition of rogue and vagabond in this judgment as I know that my brother judges, whose judgments I have had the privilege of reading in draft, have already had done so. It is however imperative that at this point I discuss the historical perspective of the section as it has a deep bearing on my views and thoughts.

4.2 The offence of being a rogue and vagabond is among the vagrancy offences under Malawian criminal law. Vagrancy laws in most common law jurisdictions owe their existence to the English laws enacted between 1530 and 1824. These were in response to the increasing numbers of homeless and penniless urban poor in England and Wales but with their beginnings being traced back to the 1329 Statute of Labourers. Supposedly, the English Parliament justified the passing of these laws on the basis that parish constables could not keep in control the 'vagrants' and that laws on free movement were not operative. These laws discriminated against the poor and included their marking as paupers onto

clothes or branding rogues, vagabonds and slaves, using an "R", "V" or "S" tattooed on the skin with a hot iron as per W Chambliss in A Sociological Analysis of the Law of Vagrancy, (1960) found in 12 Social Problems 67-77. A lot of literature is available on the history of vagrancy laws and it was important that this determination contextualize it.

4.3 Significantly, it is the 1824 Vagrancy Act which has a great bearing on the case herein. This Act was promulgated so that it could 'guarantee' the more effectual suppression of vagrancy and punishment of idle and disorderly persons in England. It further repealed all previous statutes on the subject, amended the definitions of idle and disorderly persons, rogues and vagabonds and set out powers to search persons and premises. However, it retained a lot of the original vagrancy offences whilst including new categories, such as offences of a kind that only "professional" criminals might commit like loitering with intent to commit an arrestable offence and offences against public decency and morality like offensive behavior by prostitutes and indecent exposure. Notably, there was also a distinction in terms of punishment for a vagrant depending on whether they were idle and disorderly persons, rogues and vagabonds and incorrigible rogues. All these had a different punishment specified for each. For instance those found guilty of being idle and disorderly were sentenced to hard labour for one month in a correction facility or jail whilst rogues and vagabonds were subjected to a public whipping followed by incarceration for more than six (6) months or even imposing slavery. However, they could be subjected to further punishment at the next meeting of sessions like imprisonment and hard labour for a further six months. Upon finishing their sentences, they were either removed to their place of settlement by a pass, or if male and above twelve years old, sent to the army or navy. Consequently for those rogues and vagabonds who were frequent and well-known offenders, they were classified as incorrigible rogues and sentenced to between six months and two years further imprisonment and hard labour, and a further round of whippings.

4.4 Turning to the Malawi law on vagrancy, such first found its way into our law during the colonial times when British laws were inherited under the 1902 British Central Africa Order in Council. The Penal Code was first promulgated in 1930 and has undergone a number of reviews with the last review in 2011 which also amended section 184. The section in dispute stipulates 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.

4.5 The application of section 184 of the Penal Code throughout Malawi's criminal justice system has been varied with both narrow and wide interpretation of the provisions especially section 184(1)(c). For instance in the case of ***Republic v Agnes Mbewe & 18 Others,*** Confirmation No. 166 of 2000 (HC)(Unrepd) the court stated that -

> *"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."*

4.6 Conversely, the courts have been specific as to how the section should be interpreted with a lot of decisions being effected in favour of the accused or convict on review, confirmation or appeal. In the case of ***Kaipsya v Republic*** 4 MLR 283, the court ruled that -

> *"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*."

4.7 Significant for the court herein is that the issue that the section has always targeted a certain type of people for instance a juvenile looking for work who was found at a trading centre at night as in ***Republic v Balala*** [1997] 2 MLR 67 or ***Stella Mwanza and 12 Others v Republic,*** Confirmation l Case No. 1049 of 2007 where the court stated -

> *"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."*

4.8 Interestingly, the concerns on the application of section 184(1)(c) have been quite distinct and well-articulated, and they go deep into the history of our jurisprudence. An example is the case of ***Thomas v Republic*** Crim App. No. 24 of 1996 (HC) (Unrep) where it was held that –

> *"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(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."*

4.9 At this point, one begs the question, is the problem with section 184(1)(c) stemming from the words used to create the offence, or it lies in its enforcement by police officers or its interpretation by the courts? In my view the answer is a very convoluted one as there are so many issues to determine, especially since the challenge on this section is being raised under the 1995 Constitution. It is therefore imperative that one must ensure that the discussion must take place against the backdrop that Malawi's governance is based on 'constitutional supremacy' and deeply steeped in human rights principles.

4.10 It is important that section 15 of the Constitution be pointed out at this point as it stipulates that he human rights and freedoms enshrined shall be respected and upheld by the executive, legislature, judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Malawi and shall be enforceable in the manner prescribed therein. This provision is of significant value as it is closely linked to section 20 of the Constitution which provides that-

> (1) Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.

4.11 The law on determining discrimination in Malawi has been laid down in section 20 of the Constitution. In ***Malawi Congress Party and Others v Attorney General*** [1996] MLR 244 (HC) Mwaungulu J as (he then was) held that section 20(1) of the Constitution should be interpreted in accordance with section 11(2)(b), as well as taking into account the fundamental principles under section 12(e). He further 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. Malawian courts have further ruled on the essence of what constitutes such for instance in ***Marinho v SGS Blantyre (Pvt) Ltd*** [1998] MLR 208 where the plaintiff brought an action against her employer claiming, she had been discrimination against as well as treated unfairly. The High Court held at 225-226 that the defendant had violated the plaintiff's right not to be discriminated against –

> *"Discrimination is now proscribed by the Constitution. There can be no doubt that some rights under the Constitution apply to relations between individuals. There are others which relate to matters between the State and its citizens. The rights under this provision (section 20) are intended to apply between citizens. Where there has been a violation of them, the court is supposed to give an effective remedy ... Resignation, revulsion and rejection are the usual feelings of a man who has been discriminated. The law should therefore take injury to feelings as a component of the damages awarded. It must also be borne in mind that any type of discrimination is forbidden. Its practice must really have been detested by framers of the Constitution that right in the Constitution they provided for two things that underline the attitude that this Court must have when faced with this sort of matter. First, the Constitution makes the right non-derogable. Secondly, the Constitution allows*

affirmative action by legislators to punish violators and to pass laws that promote respect for equality."

4.12 The Applicant has further argued that the provisions of this section violate a number of his rights as guaranteed in the Constitution like the right to liberty under section 18 or the right, and to a fair trial or due process under section 42. It should be noted that my opinion does not tackle all of the rights but is selective to the rights which have a great and direct bearing on the purposes of the curial interpretation of the section.

4.13 The right to fair trial or due process is a principle of legality which in my view is an integral part of the rule of law. Consequently, in Malawi we saw it fit to elevate it to a constitutional right by including section 42(2)(f)(iv) which states -

> 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 as an accused person, to a fair trial, which shall include the right 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.

4.14 The State has opined that the Applicant has failed to demonstrate that his arrest and detention violated the various rights he has claimed in his application. It is their opinion that the question 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. They contend that it does not because 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. Furthermore, the United Nations' Human Rights Committee's definition of arbitrariness in ***Mukong v Cameroon,*** Communication No. 548 of 1991, offers some useful insight. 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. Therefore it was their submission that the elements of the offence do not provide for arbitrary arrests and this, they argued, is supported by ***Republic v Agnes Mbewe and 18 others*** or ***Kaipsya v Republic*** (supra).

4.15 The State also distinguished the case of ***King v Attorney General*** [1981] 1 LR 245**,** where the Supreme Court of Ireland held that section 4 of the Vagrancy Act in terms of the ingredients of the offence and the mode by which the commission may be proved are so arbitrary, so vague, so difficult to rebut, or related to rumour or ill-repute or past conduct, so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature. The State contended, however, that the comparison was 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.

4.16 Arguably, when dealing with the concept of arbitrariness, the European Court of Human Rights has held in ***Kokkinakis v Greece*** 3/1992/348/42 that Article 7

para. 1 (art. 7-1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty: *nullum crimen, nulla poena sine lege*. Further the principle that the criminal law must not be extensively construed to an accused's detriment. For that reason, it follows that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable.

4.17 In the Kenyan case of ***Keroche Industries Limited v Kenya Revenue Authority & 5 others*** [2007] 2 KLR 240, the court pointed out -

> *"One of the ingredients of the rule of law is certainty of law. Surely the most focused deprivations of individual interest in life, liberty or property must be accompanied by sufficient procedural safeguards that ensure certainty and regularity of law. This is a vision and a value recognized by our Constitution and it is an important pillar of the rule of law.*

4.18 In ensuring legality, the High Court of Kenya recently struck down section 24 of the HIV and AIDS Prevention and Control Act for vagueness in ***Aids Law Project v Attorney General & 3 others*** [2015] eKLR, Petition No. 97 of 2010. The court clearly linked the principle of legality as requiring certainty of the law to the prohibition of the retrospective application of criminal laws. One therefore cannot help to argue that legality is a fundamental rule of criminal law and no crime exists unless such is clearly forbidden in law. Undeniably this principle is a core value, a human right, but also a fundamental defence in criminal prosecution in a way that no crime can exist without a legal ground. Similarly said by Sir Francis Bacon in *A Treatise on Universal Justice* quoted in Coquiellette at pp 244 and 248, from Aphorism 8 and Aphorism 39 -

> "*For if the trumpet give an uncertain sound, who shall prepare himself for the battle? So if the law give an uncertain sound, who shall prepare to obey it? It ought therefore to warn before it strikes...Let there be no authority to shed blood; nor let sentence be pronounced in any court upon cases, except according to a known law and certain law...Nor should a man be deprived of his life, who did not first know that he was risking it.* "

4.18 Furthermore, in ***Grayned v City of Rockford*** [1972] 408 US 104, the United States Supreme Court identified -

> *"a basic principle of due process is that an enactment is void for vagueness if its prohibitions are not clearly defined. Vagueness offends several important rules...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."*

4.19 For that reason justice or the need for legal certainty demands for a citizen to be able to know without doubt as what constitutes a crime or not and when faced with an arrest to be clear on the offence which they are possibly being arrested

for. Clarity and certainty in criminal matters are imperative and that is why courts guard jealously the principles that no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly ascertainably punishable by law when the act was done.

4.20 Closely linked to the issue of due process, is the right to liberty as well as a person's freedom to move and thereby starts the fight with a country's criminal justice policies. Sections 18 and 39 recognize the right to liberty and freedom of movement where if one was to argue almost begs the question whether this does not guarantee a person the right to loiter. Since this is not an academic discussion where I would be able to go on and make propositions on why I think that a person should be allowed to loiter so to speak as the Constitution says they have a right to do so. However, I must reign myself and remind myself that the application of vagrancy laws do limit the right of movement of a person as well as has a bearing on the right to privacy under section 21 as it empowers police to stop and search.

4.21 In criminal law, ordinarily, stop and search powers must only be exercised on probable cause. In the context of an ambiguous penal provision, this power may not always be exercised properly in view of the wide discretion granted police officers to determine possible criminality line in ***Floyd and Others v City of New York*** which held that the stop and search of individuals on the basis of a prohibited ground of differentiation was impermissible. The idea of setting a criteria or profiling which section 284(1)(c) actually ends up in is something which a lot of countries are working towards eliminating.

4.22 Justice Tambala's sentiments in the ***Brown*** case raised very fundamental issues on not just the application and interpretation of the section, but more so on what mischief it intended to curb. Therefore, the concerns expressed by Professor Reich in "Police Questioning of Law Abiding Citizens" (1966) 75 *Yale Law Journal* 1161, on stop and search practices for unjustifiable reasons are ones that I share -

> *"I am not concerned with police investigations after a crime has been reported, or with circumstances which suggest that the individual who has been stopped may be doing something illegal. My problem is this: no crime has been reported, no suspect has been described, there is no visible sign of an offense, there is nothing whatever to direct police attention to this particular individual. I am concerned with what is called preventive police work. Although the experiences I have had are in themselves trivial, the increasing preventive activities of the police present an issue of first importance. What happens when the person stopped is a Negro, or poor, or frightened? What intrusions upon privacy, what affronts to dignity, occur? How much discretion do the police have to invent an offense for anyone who objects to being questioned? May the police establish a regular routine of requiring pedestrians to carry identification and explain their presence, or of requiring motorists to stop and tell where they are going? I do not have answers, but I have some questions. Let us focus on the moment of contact between the citizen and the police. The first issue that troubles me is whether the police have any power at all to stop a law abiding person on a public street. Of course any individual has a right to approach any other individual-to ask him the time, to ask him how to*

find the Yale Divinity School, or to ask his opinion about foreign policy. But it is not quite the same when the police stop someone. There is authority in the approach of the police, and command in their tone. I can ignore the ordinary person, but can I ignore the police? Police officers tell me that they have a right to stop anyone in a public place, without having a reason. I think I have a right not to be stopped. So far as I know, reported court decisions do not supply us with an answer. The next issue is what questions the police may ask. Name? Address? Occupation? Age? Marital status? Explanation of presence and destination? Documentary proof of identity? Many people might have no objection to giving out any or all of these facts about themselves. But I have a strong sense that however innocuous the facts may be, some things are nobody's business. I do not particularly like to be probed, and I like it much less when the probing is official. I certainly do not think that every police officer has a roving commission to satisfy his curiosity about anyone he sees on the street. Closely related to questioning is the issue of the individual's replies. May he refuse to answer? May he demand to know the identity of the officer? May he demand to know why he is being stopped? May he lie to the officer about his age, or why he is out on the street? May he turn and go on his way? I submit that very few people know what their rights are under such circumstances. I do not even know how to find out. The next issue is what actions the officer may take if the individual attempts to claim some rights. May the officer detain him? Frisk him? Search him? Take him to the police station? Hold him there for questioning? Here the law does supply an answer in general terms, for we know that arrests and searches can be made only upon probable cause. But concrete answers really depend upon what we conclude about the right to stop and to ask questions …

If I choose to get in my car and drive somewhere, it seems to me that where I am coming from, and where I am going, are nobody's business; I know of no law that requires me to have either a purpose or a destination. If I choose to take an evening walk to see if Andromeda has come up on schedule, I think I am entitled to look for the distant light of Almach and Mirach without finding myself staring into the blinding beam of a police flashlight."

4.23 Let me now look into another element of the right to fair trial which vagrancy laws have seriously affected - the "presumption of innocence". This is a fundamental safeguard afforded to an accused person that the person alleging the commission of the crime must produce the evidence of the person's guilt. Vagrancy laws actually take away this presumption and creates a statutory presumption of *guilt* and reverses the burden of proof to the accused. This is clearly evident in the wording of section 184(1)(c) of the Penal Code.

4.24 The Canadian case of ***Regina v Oakes***, [1986] 19 CRR 306, is also very instructive. At page 322, 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 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."*

4.25 Clear from the State's arguments is that they believe that section 184(1)(c) of the Penal Code has received a narrow and restrictive interpretation from the courts as such should not be declared unconstitutional. Moreover, the section allows the individual police officer to act on his own observations of the suspicious conduct of an individual rather than on the complaint of a member of the public. Furthermore, it is used as a general crime prevention measure against intending criminals as such it is a crime which anticipates and makes punishable preparatory criminal activity. The State believes that as a preventative device, it will be at the forefront of the mind of every patrolling officer.

4.26 It was their opinion that for a person to be convicted of the offence under section, one should be found in (a) in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place (b) at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose. After which the prosecution has to prove the factors surrounding the finding of the person would lead to the conclusion that such person is there for an illegal or disorderly purpose. The indication here is that the section exists to punish criminal behaviour where there is ultimately no substantive offence committed by the accused. This is not unusual as other inchoate offences such as conspiracy and attempt exist to punish criminal behavior where no substantive offence has been committed**.** In ***DPP v Nock* [1978] AC 977**, Lord Scarman justified criminalizing conspiracy because it is a step -

> *"towards the commission of a substantive offence… [A]greement is the necessary ingredient in conspiracy… The law of conspiracy thus makes possible an earlier intervention by the law to prevent the commission of the substantive offence."*

4.27 Understandably, the State is concerned with crime prevention and so is this court. Every person would want to live is a society free from crime but we also want to live in a society where we are arrested on mere suspension that we committed a crime or are about to commit one. This court despite the State's argument above can **clearly distinguish its crimes**, that is, conspiracy with rogue and vagabond under section 184(1)(c).

4.28 The State also argued that that the rogue and vagabond offence is an inchoate offence as such, the Applicant cannot complain that section 184(1)(c) law is bad simply because it criminalizes behavior where no actual offence has been committed. Thus the Applicant's argument that "the criminalization of a person before they have committed a crime or attempted to commit a crime is impermissible" is without legal foundation in Malawi and such is not against the Constitution as it is within section 44 limitations.

4.29 In terms of impugning section 184(1)(c) of the Penal Code as unconstitutional. Firstly, it must first be determined whether the section is void for vagueness as it is not in line with a constitutional dispensation with a human rights focus. Concerns with the vagueness of legislation arise from the principle of legality and in particular the *ius certum* principle which holds that laws must be sufficiently clear so that ordinary members of society can take steps to abide by them. Throughout history and more so recently, vagrancy laws have often been faulted for failing to identify the actual prohibited conduct and have on this ground been struck down for unconstitutionality. Courts in America have developed an extensive jurisprudence on the void-for-vagueness doctrine especially in vagrancy offences. This jurisprudence indicates that vagueness may arise from two aspects as explained in ***City of Chicago v. Morales*** 527 U.S. 41, 55, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) –

> *"Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement."*

4.30 Further, that the law is a violation of due process as was stated in ***Papachristou v City of Jacksonville*** 405 US. 156 at 162 and 169 that -

> *"This ordinance is void-for-vagueness, in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute … Another aspect of the ordinance's vagueness appears when we focus, not on the lack of notice given a potential offender, but on the effect of the unfettered discretion it places in the hands of the Jacksonville police…*
> *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..."*

4.31 Justice Frankfurt in ***United States v. Reese***, 92 U. S. 214, 92 U. S. 221 also observed that -

> *"[Statutes] of the type that seek to control 'vagrancy' ... are in a class by themselves, in view of the familiar abuses to which they are put ... Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense. In short, these 'vagrancy statutes' and laws against 'gangs' are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided. Where the list of crimes is so all-inclusive and generalized as the one in this ordinance, those convicted may be punished for no more than vindicating affronts to police authority:*
> *The common ground which brings such a motley assortment of human troubles before the magistrates in vagrancy-type proceedings is the procedural laxity which permits 'conviction' for almost any kind of conduct and the existence of the House of Correction as an easy and*

convenient dumping-ground for problems that appear to have no other immediate solution."

4.32 Accordingly, a law can be can be struck down for vagueness if it does not clearly identify the prohibited conduct in a way that an average man may understand it, in that, they do not know what conduct is criminalized. In ***Johnson v. Athens - Clarke County*** 529 S.E.2d 613 (Ga. 2000), the court posited the test for vagueness as a factual inquiry -

"this case must be decided on its facts, the question here is whether the ordinance in question provided sufficient notice, under the circumstances of this case, that a person in Johnson's situation would know whether his conduct was criminal."

4.33 The facts in ***Johnson*** were that the plaintiff was arrested for violating an Athens municipal ordinance prohibiting loitering or prowling. A policeman had observed Johnson at a particular intersection four times over a two-day period. At trial, the policeman testified that the location where he arrested Johnson was a known drug area, although the state presented no evidence of drug activity. The Georgia Supreme Court found the ordinance void for vagueness, since there was nothing in the ordinance's language that would put an innocent person on notice that particular behaviour was forbidden. There was no way a person of average intelligence could be aware of what locations were known drug areas and what innocent-seeming conduct could seem to be drug-related in the opinion of a police officer. The ordinance also failed scrutiny because it did not provide adequate safeguards against arbitrary or discriminatory enforcement. The court found that -

"an innocent person unfamiliar with the drug culture could stand or sit in a "known drug area" without knowing the area had such a designation, and could return to the area for a legitimate reason, or for no reason at all, and, as the facts of this case show, be subject to arrest and conviction. However, there is nothing in the ordinance's language that would put such an innocent person on notice that such behavior was forbidden. In upholding the Georgia loitering statute, this Court noted in Bell, supra, that "the conduct sought to be prohibited is only that loitering which creates a danger to persons or property. `As a threshold matter, the section requires at least some manifestation of aberrant behaviour [and] the circumstances must be such that this behaviour warrants alarm for the safety of persons or property in the vicinity.' Given that interpretation, this Court found the statute to give sufficient notice of the conduct to be avoided. The additional language in the ordinance in question, however, is not susceptible of such a rehabilitative interpretation. While we assumed in Bell that persons of average intelligence would understand what conduct creates a reasonable alarm or immediate concern for the safety of persons or property in the vicinity, we cannot so readily assume that a person of average intelligence will be sufficiently aware of which locations are "known drug areas" and what innocent-seeming conduct will seem to be drug-related in the opinion of a police officer. In the present case, the arresting officer's testimony that the place he arrested Johnson was a known drug area and that Johnson's conduct in returning to the same spot repeatedly was characteristic of drug related activities was based on the officer's law enforcement experience in that area, not on the general knowledge and common experience of a person of ordinary intelligence.

> *We conclude, therefore, that the language in the ordinance on which Johnson's arrest and conviction were based "does not provide fair warning to persons of ordinary intelligence as to what it prohibits so that they may act accordingly. We therefore hold that the [ordinance] is too vague to justify the imposition of criminal punishment for its violation."*

4.34 In all the submissions in this matter, the biggest issue, which has been the common cause, is that the section has resulted in arbitrary and or discriminatory enforcement. This has been acknowledged by the State. Thus, the second test for vagueness which is linked to its application in practice is fulfilled. Therefore, a law will be unconstitutionally vague if it fails to sufficiently notify law enforcement officers of the prohibited conduct and instead give them wide discretion to determine which conduct falls within a penal provision. The problem that this leg seeks to address is arbitrary and discriminatory law enforcement. This was well explained in ***Bullock v City of Dallas*** 248 Ga. 164, 281 S.E.2d 613 (1981) where the Court stated that -

> *(I)f 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 ... Under our democratic system of government, lawmaking is not entrusted to the moment-to-moment opinions of a policeman on his beat.... Vagrancy-loitering ordinances, as carryovers from the feudal ages, tend to be inherently vague so as to allow law enforcement officials to throw as large a net as possible to rid the public of undesirables. However, "(t)o the extent the statute can be interpreted to support dragnet, street-sweeping operations absent probable cause of actual criminality, it conflicts with established notions of due process."*

4.35 In the Malawian case of ***Kaseka v Republic*** Criminal Appeal No. 2 of 1999 (HC(Unrepd), Justice Chinangwa (as he then was) observed as follows -

> *"...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..."*

4. 36 Arguably, the State has continuously argued that the section is constitutional as it does not violate the limitations set out in section 44 of the Constitution and that, accordingly, it should be applied. Notably, the principle of legality is a facet of the rule of law and one which courts in Malawi have upheld. The State is also right in arguing that there is always a presumption in favour of the constitutionality of a statutory provision unless demonstrated otherwise as held in ***Attorney General v Malawi Congress Party and others*** [1997] 2 MLR 181 (SCA). The Supreme Court of India in ***Ram Dalmia v Justice Tendolkar*** AIR 1958 SC 538 stated the following on the presumption of constitutionality -

> *"... (b) that there is always a presumption in favour of the constitutionality of an enactment and this burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles; (c) that it must be presumed that the legislature*

understands and correctly appreciates the needs of its own people, that its law are directed to problems made manifest by experience and its discriminations are based on adequate grounds.. (e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the time and may assume every stage of facts which can be conceived existing at the time of legislation; (f) that while good faith and knowledge of the existing conditions on the part of the legislature are presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporation to hostile or discriminating legislation. (see [1975-77] SLR 231 at 237)."

4.37 The State argued that the courts should consider the terms of ***Zondi v MEC & Others***, 2005 (3) SA 589 (CC), as the proper approach to take when considering whether a provision in a statute is unconstitutional or not. Further that courts should consider whether the provisions in question can be read in a manner that is consistent with the Constitution. The case held that courts are restrained from reading-in or severing words from a provision if to do so would require the court to engage in the details of law making, a constitutional activity that is assigned to legislatures. It was their opinion herein that the reliefs sought by the Applicant have the effect of making the court to sever or read-in words into the statute which is the duty of the legislature.

4.38 Incidentally, it was their argument that these are policy considerations attendant to the enactment of the law relating to preservation of public security as well as necessary in an open and democratic society which courts must be slow to intervene into issues that require policy considerations like the present matter. Further that it is in the public interest, that police should retain the power to arrest persons who are found at such places and at such a time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose because if they could intervene at an earlier stage in a criminal enterprise than would otherwise be possible without this section. If this power were removed, the police would have to wait for, at the very least, an attempt, and this delay could endanger people and property. The police may not have enough evidence to arrest for actual or attempted theft, but might know that somebody was there in order to commit a crime. Therefore, the section is useful to the police as a general catch-all provision, giving them back-up when they had not enough evidence to arrest for actual or attempted theft, but they knew that somebody was "up to no good".

4.39 Furthermore, it was their contention that to be prescribed by law means that the limitation must be legally authorised. They cited ***Ralph Mhone v Attorney General,*** Misc Civil Cause No. 115 of 1993 (HC)(Unrepd) where the court said that a directive is not law no matter how seriously it is made. They conceded that a law must be sufficiently precise and clear to enable the public and enforcement officers to know their obligations under the law. They maintained that the limitations complained of are alleged are provided for under the law. Further that 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.

4.40 Let me state that the rule of law which is a tenet of the Malawian Constitutional law and indeed Malawian constitutional democracy, should be always be upheld and should not be compromised merely in the name of public safety or preventive policing. As a former prosecutor, I very much know the importance of ensuring that law enforcement agencies have the laws to prevent and stop crime but I am also mindful that they must operate within the rule of law. Therefore I am in agreement with the statement in ***King v Attorney General*** [1981] 1 LR 245 at 257 where the Supreme Court of Ireland stated –

> *"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 identifying the particular constitutional provisions with which such an offence is at variance."*

4.41 It is therefore important to echo the sentiments of the Malawi Law Society echoing Uzoukwu L in Constitutionalism, Human Rights and the Judiciary in Nigeria, June 2010, who submitted that the starting point is to understand the role of constitutionalism in the rule of law. It is imperative to appreciate how the impugned provision criminalising being a rogue and vagabond impacts on the Constitution. Further the Malawi Law Society argued that constitutionalism denotes a kind of government designed to protect principles of liberty. Constitutionalism entails effective restraint upon the powers of those who govern; guarantee of individual fundamental rights; existence of an independent judiciary to enforce these rights; and enforcement of the rule of law as reflected in the absence of arbitraries and equality of all before the law. Lastly, that short constitutionalism requires adherence to the letter, tenor and spirit of the Constitution. It embodies a culture of complete submission to the rules and regulations formulated by the Constitution.

4.42 Incidentally, Justice Mwaungulu (as he then was) exhaustively re-examined the principles of constitutional interpretation in line with Human Rights provisions in the Constitution in ***Thandiwe Okeke v The Minister of Home Affairs and the Controller of Immigration*** Miscellaneous Civil Application No. 73 of 1997 where he indicated that -

> *"Courts must interpret the Malawi Constitution from the democratic ideal and its astute protection of fundamental human rights. It is characteristic that our Constitution, anticipating the problems it intended to forestall and our aspirations for promoting democracy and fundamental human rights, provides notions unheard or never thought of in modern constitutional and political theory, conceptualisation and thought. This goes to its uniqueness."*

4.43 Whilst in ***Malawi Human Rights Commission v Attorney General,*** Justice Nyirenda (as he then was) illustrated this point –

> *The starting point therefore is that a Malawi Court must first recognize the character and nature of our Constitution before interpreting any of its provisions. The purpose of interpreting any legal document is to give full effect to what parliament intended and you cannot give full effect to that intention unless you first appreciated the character and nature of the document you are interpreting.*

4.44 To finally buttress the point is Justice Mumbi Ngugi's holding in ***Anthony Njenga Mbuti and 5 others v Attorney General and 2 others*** [2015] eKLR, Constitutional Petition 45 of 2014 that in construing the meaning of legislation, courts must be guided by the object and purpose of the impugned statute in determining its constitutionality. Her probing on the constitutionality of the law also raise very important issues like that arrests based on a suspicion or belief that one is *likely* to commit a crime are purely subjective. She further 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 and stated at page 300

> "*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?*

4.45 With respect to the State's argument, theirs is a misreading of Section 44 of the Constitution. It is a basic tenet of statutory as well as constitutional interpretation that a statute or the Constitution must be read as a whole. On this specific point, Section 44 of the Constitution must be read as a whole. For the purposes of this judgement, I now set out subsections (1) and (2) of that Section:

> (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, recognized 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**. (Emphasis supplied)

4.46 It is clear from Section 44(2) of the Constitution that a law prescribing a limitation or restriction of a constitutional right must be of general application and there are no grey areas to that.

4.47 When one examines section 184(1)(c) of the Penal Code, it is clear that in terms of section 44 of the Constitution, that it is not a law of general application. Firstly it goes against the principles of legality as no specific crime has been legislated. Secondly, it goes the prohibition against vagueness and arbitrariness not only in terms of the offender but the law officers enforcing it. It is therefore obvious that is would accordingly fail a constitutional inquiry. The Canadian Supreme Court in ***Greater Vancouver Transportation Authority v Canadian Federation of Students-British Columbia Component*** [2009] 2 S.C.R. 295 at para. 53 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.

4.48 In terms of whether the limitations of section 184(1)(c) are reasonable or necessary in an open and democratic society. One needs to look no further than the provisions of our Constitution. Furthermore, Malawi having ratified various international obligations realizes that such standards are those to be found to be reasonable or necessary in an open and democratic society. ***R v Oakes*** [1986] 1 SCR 103 held that -

> *"69.To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": R. v. Big M Drug Mart Ltd., supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.*
>
> *70. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": R. v. Big M Drug Mart Ltd., supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R. v. Big M Drug Mart Ltd., supra, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".*

4.49 Whilst, in the case of ***Charles Onyango-Obbo and Another v Attorney General*** [2004] UGSC 1, Mulenga SCJ stated –

> *"Democratic societies uphold and protect fundamental human rights and freedoms, essentially on principles that are in line with J.J. Rousseau's version of the Social Contract theory. In brief, the theory is to the effect that the pre-social humans agreed to surrender their respective individual freedom of action, in order to secure mutual protection, and that consequently, the raison d'etre of the State is to*

> *provide protection to the individual citizens. In that regard, the state has the duty to facilitate and enhance the individual's self-fulfillment and advancement, recognising the individual's rights and freedoms as inherent in humanity….*
> *Protection of the fundamental human rights therefore, is a primary objective of every democratic constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance."*

4.50 Further, the ***Onyango-Obbo*** case also stated that –

> *"It is not correct that the test of what is acceptable and demonstrably justifiable for the purposes of limitation imposed on the freedoms of expression and freedom of the press in a free and democratic society must be a subjective one. The test must conform with what is universally accepted to be a democratic society since there can be no varying classes of democratic societies for the following reasons:- (i). First Uganda is a party to several international treaties on fundamental and human rights, and freedoms all of which provide for universal application of those rights and freedoms and the principles of democracy. The African Charter for Human and Peoples Rights and the International Covenant on Civil and Political Rights are only two examples. (ii). Secondly, the preamble to the Constitution recalls the history of Uganda as characterised by political and constitutional instability: recognises the people's struggle against tyranny, oppression and exploitation and says that the people of Uganda are committed to building a better future by establishing through a popular and durable constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress. When the framers of the Constitution committed the people of Uganda to building a democratic society, they did not mean democracy according to the standard of Uganda with all that it entails but they meant democracy as universally known...It is a universally acceptable practice that cases decided by the highest courts in the jurisdictions with similar legal systems which bear on a particular case under consideration may not be binding but are of persuasive value, and are usually followed unless there are special reasons for not doing so."*

4.51 It is therefore this court's opinion that arbitrariness cannot be tolerated in an open and democratic society. In ***R M v Attorney General*** (2006) AHRLR 256 (KeHC 2006), the African Commission adopted the test set out in ***State of WB v Anwarali*** 1952 SCR 284 and 335 -

> *"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:*
> *That the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and*
> *That that differentia must have a rational relation to the object sought to be achieved by the Act."*

4.52 Agreeably, the inquiry herein must primarily be a factual one, including looking

at evidence about the impact of section 184(1)(c) of the Penal Code. That is when looking at the issue one must examine as where does the problem lie? This court has carefully have to determine whether the problem lies in implementation as argued by the State or the conception of the provision as well as its implementation as argued by the Applicant and *Amicus Curia.*

4.53 As held in ***Republic v Luwanja and others*** [1995] 1 MLR 217 (HC) one doesn't commit an offence under section 184(1)(c) of the Penal Code by *"simply wandering about".* The time which the accused person is found in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place is crucial for this offence. For an accused person to be convicted of the offence under section 184(1)(c) of the Penal Code, the facts must support the elements set out in section 184(1)(c) of the Penal Code. Further, the case of ***Republic v Foster and others*** [1977] 2 MLR 84(HC) cited by the Applicant did not state that the offence of rogue and vagabond contrary to section 184(1)(c) of the Penal Code is unconstitutional. It only emphasized the need to prove all the elements of the offence charged. However, one realizes that the courts above did not have this question before it. These cases however point to a fundamental flaw, which is as long as the conception is problematic, then implementation shall be difficult.

4.54 Still on the issue of implementation of the section, the State argued that the averment of Clifford Msiska has been made in abstract terms and not supported by evidence. In terms of the Applicant, he did not state that he was arrested during the sweeping exercise nor has any person who was arrested during the sweeping exercise. Therefore this court should that the issues raised by are purely hypothetical and imaginary and are based on assumptions. In Malawi, courts do not allow moot cases – where no dispute has arisen. In ***Maziko Charles Sauti-Phiri v Privatisation Commission,*** Const. Cause No 13 of 2005, the court held that it would not give gratuitous legal opinions -

> *"…secondly it is not in courts to give gratuitous legal opinions. This, we think is for practitioners to do. Practitioners must not and should not therefore be encouraged to come to court to seek opinions which they will then pass on to their clients. Thirdly, and following on the foregoing we think we must also emphasise the point that courts should be allowed to decided real disputes/issues."*

4.55 The above principle was cited with approval in the case of ***James Phiri v Muluzi and Another*** [2008] MWHC 4 as well as ***Matalinga & Others v Attorney General*** [1972] E.A. 578 where Simpson J held -

> *"Before a declaration can be granted there must be a real and not a theoretical question in which the person raising it must have a real interest and there must be someone with present interest in supporting it."*

4.56 Dealing with the above attack by the State, it is my opinion that the argument does not deal with the affidavit fairly because it in terms of the matter herein, the affidavit itself is evidence. Furthermore, it was open for the State to challenge this affidavit evidence by requesting to cross-examine the deponent. Nevertheless, such would be a futile exercise in my opinion because the

averment by Mr. Msiska is an issue which this court can easily be handled by stating that this court has judicial notice of the numerous media coverage of these police sweeping exercises. Therefore, there was no need for evidence to be adduced nor for the Applicant to have indicated such.

4.57 In terms of the Centre for Human Rights Education, Advice and Assistance that the purpose of section 184(1)(c) is said to be one of crime prevention in that arrest under section 184 potentially nets prospective criminals and serves as a deterrent for crime, which in the State's opinion was attacking the whole of section 184 and not just section 184(1)(c) of the Penal Code which was invoked against the Applicant. Per the ***King*** case**,** the Amicus curiae has no *locus standi* to challenge the provisions which have not been invoked against the Applicant. On this matter, this court is in agreement with the State. Thus this court will only be dealing with section 184(1)(c) of the Penal Code.

4.58 Turning to the problem of using arrest as a tool of law enforcement without facts justifying the arrest in unconstitutional, the Supreme Court of Appeal in the case of ***Kettie Kamwangala v Republic,*** Misc. Crim. Appeal No 6 of 2013 where Chikopa JA stated that -

> *"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 therefore find it rather perverse that law enforcement should arrest with a view to investigate."*

4.59 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.

4.60 It is this Court's view that section 184(1)(c) of the Penal Code 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 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 as suggested by the United Nations Guidelines for the Prevention of Crime, Economic and Social Council resolution 2002/13, UNODC.

4.61 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), 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. Notably the same Penal Code can be used like section 319 which deals with criminal trespass and this section could be used instead of section 184(1)(c). Therefore the argument that the objectives of section 184(1)(c) of the Penal Code can still be achieved in a manner that infringes less on constitutional rights cannot be sustained.

4.62 The Applicant countered that section 28 of the Criminal Procedure and Evidence Code provides for those circumstances under which a police officer may arrest a person without a warrant. It 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.

4.63 Therefore it was his submission that section 28 is a more appropriate response to crime prevention as it contains the yardstick of "reasonable grounds". Especially since it requires that the police officer should suspect that a **specific offence** has been 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.

4.64 This court appreciates the gallant effort by the court to provide an alternative to section 184(1)(c). Nonetheless section 28 does not offer any assistance as it does not create an offence but merely sets down the procedure for how police officers should make an arrest in section 184(1)(c) and where they do not have a warrant or court order. It is trite law that where there is no offence, then there is no crime.

4.65 Courts in constitutionality determination in Malawi are guided by various provisions for instance section 11 and 211. Another is section 46(1) of the Constitution which 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."*

4.66 Several judgments, both of the High Court and Supreme Court of Appeal have expounded the principles to be followed when interpreting the Constitution so that one can now safely say that there has developed some consensus on the proper approach to be used when interpreting the Constitution. In the Malawi Supreme Court of Appeal decision in ***The State and Malawi Electoral Commission ex parte Rigtone Mzima,*** MSCA Civ. Appeal No 17 of 2004 [see para 1 pages 5 to 6], Tembo JA said:

"to begin with, we must state the relevant and applicable principles on constitutional interpretation. In so doing, we note the fact that such a statement ought to commence with the express acknowledgement of section 11 of the Constitution. This Court in the case of ***The Attorney General vs Fred Nseula and Malawi Congress Party****, MSCA Civil Appeal No of 1997 made the following observations in that regard-*

"Section 11 of the Constitution expressly empowers this court to develop principles of interpretation to be applied in interpreting the constitution. The principles that we develop must promote the values which underlie an open and democratic society; we must take full account of the provisions of the fundamental constitutional principles and the provisions on human rights. We are also expressly enjoined by the Constitution that where applicable we must have regard to current norms of public international law and comparable foreign case law. We are aware that the principles of interpretation that we develop must be appropriate to the unique and supreme character of the Constitution. The Malawi constitution is the Supreme law of the country. We believe that the principles of interpretation that we develop must reinforce this fundamental character of the Constitution… There is no doubt that the general purpose of the Constitution was to create a democratic framework where people would freely participate in the election of their government. It creates an open and democratic society … Constitutions are drafted in broad and general terms which lay down broad principles and they call, therefore, for generous interpretation avoiding a strict legalistic interpretation. The language of a constitution must be construed not in a narrow legalistic and pedantic way, but broadly and purposively."

The position taken by this court on constitutional interpretation is on all fours with that taken by the Privy Council in the case of ***Minister of Home Affairs and Another vs Fisher and Another*** *[1979] 3 All E.R. p. 21, 25-26, where the Privy Council observed, among other things that constitutional interpretation calls for a generous interpretation, avoiding what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms, thus, to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character without necessary acceptance of all the presumptions that are relevant to legislation of private law.*

Besides, such position is on all fours with that taken and expressed by the Supreme Court of Ghana on the matter in the case of ***Tuffour vs Attorney General*** *[1980] G.L.R. 637, 647-648 where the court said-*

"*A written Constitution ….is not an ordinary Act of Parliament. It embodies the will of the people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people's search for a better and fuller life. The constitution has its letter of the law. Equally, the Constitution has its spirit … the language … must be considered as if it were a living organism capable of growth and development. A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time."*

4.67 The Indian case of ***A. K. Gopal v State*** [1950] S.C.R. 88 AT 120 (50) in an often cited passage OF Kania CJ -

> *"A court of law must gather the spirit of the Constitution from the language used and what one may believe to be the spirit of the constitution cannot prevail if not supported by the language which therefore must be construed according to well established rules of interpretation uninfluenced by an assumed spirit of the Constitution. Where the Constitution has not limited either in terms or by necessary implication, the general powers conferred upon the legislature, the court cannot limit them upon any notion of the spirit of the constitution."*

4.68 The Supreme Court of Canada in ***R v Big M Drug Mart Ltd***., [1985] 1 S.C.R. 295 enunciated this principle as follows-

> *"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."*

4.69 I am grateful to the State who invariably argued that a bad law will neither be saved simply because it operates equally upon those to whom it is intended to apply nor will a law unavoidably be bad because it makes distinctions. In the wisdom of Kapanda, J (as he then was) who delivered the unanimous opinion of the court ***In the Matter of David McRester Nyamirandu and in the Matter of the Legal Education and Legal Practitioners Act (Cap. 3:03 of the Laws of Malawi),*** Const. Case No. 3 of 2008 -

> *"It is our understanding that section 20 of the Constitution was not meant to be a tool for the wholesale subjecting any legislation to judicial scrutiny the way the Applicant wants this Court to believe. As we understand it, any distinction is enough to establish discrimination but when discrimination is found to exist the Courts should immediately turn to its constitutional validity. As it were, discrimination under Section 20 must be undesirable in nature for it to fail the constitutional validity test. Indeed. It must result from an unreasonable classification or unjustifiable differentiation. Accordingly, purely any differentiation as it is in the matter at hand should not result in a resort to declaring it unconstitutional. We say this as that could not have been intended by section 20 that every legislative categorization should invite the striking out of a statute as doing so only trivializes the fundamental rights guaranteed by the Constitution as many important and socially acceptable distinctions such as restrictions on drunken driving and special provisions for care, protection and education of children would be subject to automatic review under the Republican Constitution. It is further our finding and conclusion that likening Section 20 with a guarantee against all distinctions would in effect elevate Section 20 to the position of subsuming the other rights and freedoms as defined by the Constitution. That would produce an absurdity in so far as the enjoyment of rights and freedoms are concerned under our constitution. Thus, the right questions that should arise and be considered by the Court, as it endeavours to understand the provisions of Section 20 of the Constitution and the concept of equality as it relates to Section 9 of the Act, should be:*

(a) *What degree of evaluation of the legislation (in this case, Sections 9 and 9A of the Act) should be done under section 20 of the Constitution?*
(b) *What role, if any, does the Constitution play when legislation (in this case, Section 9 of the Court) is attached under section 20 of the Constitution?*
(c) *Is the impugned distinction (in this case, under Sections 9 and 9A of the Act) under Section 20 of the Constitution reasonable, or fair having regard to the purposes, aims and its effects on persons adversely affected by it?*

4.70 Kapanda J, continued to state that the question to be asked was whether a fair minded Court, deliberating the purpose of legislation as against its effects on the individuals adversely affected, and upon giving due weight to the right of the legislature to pass laws for the good of all, would find that legislative means adopted are unreasonable.

4.71 At this point, I examined the provision to see if it could be saved or as argued by the State, whether it can be resolved in terms of what it actually was meant to be used for instance a reputable thief in terms of its history)? Initially, one can already note that the historical application of the offence seems troubling more so in Malawi's current constitutional dispensation. In ***Ledwith v Roberts*** [1937] 1 K.B. 232 at 271summarized -

> *"The early Vagrancy Acts came into being under peculiar conditions utterly different to those of the present time. From the time of the Black Death in the middle of the 14th century till the middle of the 17th century, and indeed, although in diminishing degree, right down to the reform of the Poor Law in the first half of the 19th century, the roads of England were crowded with masterless men and their families, who had lost their former employment through a variety of causes, had no means of livelihood, and had taken to a vagrant life. The main causes were the gradual decay of the feudal system under which the labouring classes had been anchored to the soil, the economic slackening of the legal compulsion to work for fixed wages; the breakup of the monasteries in the reign of Henry VIII, and the consequent disappearance of the religious orders which had previously administered a kind of 'public assistance' in the form of lodging, food and alms; and, lastly, the economic changes brought about by the Enclosure Acts. Some of these people were honest labourers who had fallen upon evil days, others were the 'wild rogues,' so common in Elizabethan times and literature, who had been born to a life of idleness and had no intention of following any other. It was they and their confederates who formed themselves into the notorious 'brotherhood of beggars' which flourished in the 16th and 17th centuries. They were a definite and serious menace to the community, and it was chiefly against them and their kind that the harsher provisions of the vagrancy laws of the period were directed."*

4.72 Secondly, the wording of vagrancy provisions are problematic. In the US Supreme Court case of ***Edwards v California*** 314 U. S. 160, 314 U. S. 177, in referring to ***City of New York v Miln*** 11 Pet. 102, 36 U. S. 142 said –

> *"Whatever may have been the notion then prevailing, we do not think that it will now be seriously contended that, because a person is without employment and without funds, he constitutes a 'moral pestilence.' Poverty and immorality are not synonymous."*

4.73 The remarks of the Irish Supreme Court case ***King*** at page 245 of on the 'reputed thief' aspect of vagrancy laws might be helpful -

> *"The requirements of the offences with which the plaintiff was charged were that he should be a suspected person or a reputed thief, that he should have been loitering in a public place, and that he should have had an intent to commit a felony, i.e., to steal. But no proof of any act showing an intent to commit a felony was necessary as the statute provides that such intent may be established from the bad character of the plaintiff and the circumstances of the case. I may observe that the expression "loitering" is somewhat indefinite and that, without the other ingredients, it could not possibly constitute an offence in any way; so that doing something which is a perfectly lawful act on the part of any other citizen may be the foundation of an offence on the part of a suspected person or a reputed thief. As no proof of any act showing intent to commit a felony is necessary, a person could be convicted for doing an otherwise lawful act mainly because he was a suspected person or a reputed thief."*

4.74 Looking at the available positions on how this penal provision could be saved. Jurisprudence suggests that the issue is to either severance or reading in. The remedy of reading-in was comprehensively expounded by the Constitutional Court of South Africa in the case of ***National Coalition for Gay and Lesbian Equality (NCGLE) and others v Minister of Home Affairs and others***, 2000 (2) SA 1 as para. 1, where the Court held that when it concludes that provisions in a statute are unconstitutional, the Court may read words into the statute to remedy the unconstitutionality. The Court carefully considered the argument that the "reading-in" remedy could be viewed as a form of usurpation of legislative power by the Court. The Court acknowledged that a court must keep in mind…the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It then observed that in stating that the declaration of invalidity can only be made to the extent of the inconsistency with the Constitution, there is no dispute that a Court thereby has power to sever some words from a statutory provision that offend the Constitution. The Court the held that at para. 67 -

> *"there is in principle no difference between a court rendering a statutory provision constitutional by removing the offending part by actual or notional severance, or by reading words into a statutory provision. In both cases the parliamentary enactment, as expressed in a statutory provision, is being altered by the order of a court. In the one case by excision and in the other by addition."*

4.75 Ackermann J then stated that on para. 70-

> *"I accordingly conclude that reading in is, depending on all the circumstances, an appropriate form of relief under section 38 of the Constitution and that ". . . whether a court 'reads in' or 'strikes out' words from a challenged law, the focus of the court should be on the appropriate remedy in the circumstances and not on the label used to arrive at the result.(Knodel v British Columbia (Medical Services Commission)* (1991) 91 CLLC ¶ 17, 023 at 16, 343, [1991] 6 WWR 728; 58 BCLR (2d) 356 (SC) per Rowles J, as quoted with approval by Lamer CJC in *Schachter*'s case)*". The real question is whether, in the*

circumstances of the present matter, reading in would be just and equitable and an appropriate remedy."

4.76 The ***National Coalition for Gay and Lesbian Equality*** Court then explored a number of constitutional democracies where Courts similarly exercise the power of reading-in. The Court stated at para. 71 that -

> *In* ***Schachter*** *(1992) 93 DLR (4th) 1 per Lamer CJC for the Court, at 11-25. the leading Canadian case, the Supreme Court of Canada held that a court may read words into a statute in appropriate circumstances and set out principles to guide such decisions. Since then, Canadian courts have read words into statutes on several occasions (Miron v Trudel (1995) 124 DLR (4th) 693) Courts in the United States also accept that they have the power to read words into statutes to provide remedies for unconstitutionality (Iowa-Des Moines National Bank v Bennett* 284 US 239 (1931); *Welsh v United States* 398 US 333 (1970); *Califano, Secretary of Health, Education and Welfare v Westcott et al* 443 US 76 (1979); *Skinner v Oklahoma* 316 US 535 (1942);*). The Israeli Supreme Court (El Al Israel Airlines Ltd v Danilowitz and Another* High Court of Justice case no. 721/94, a judgment of the Supreme Court of Israel sitting as the High Court of Justice) *and the German Constitutional Court have also made similar orders."*

4.77 The Court then provided general guidelines in the approach of reading-in in the enterprise of constitutional interpretation. The Court held that -

> *"In deciding to read words into a statute, a court should also bear in mind that it will not be appropriate to read words in, unless in so doing a court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing) a court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution. Even where the remedy of reading in is otherwise justified, it ought not to be granted where it would result in an unsupportable budgetary intrusion. In determining the scope of the budgetary intrusion, it will be necessary to consider the relative size of the group which the reading in would add to the group already enjoying the benefits. Where reading in would, by expanding the group of persons protected, sustain a policy of long standing or one that is constitutionally encouraged, it should be preferred to one removing the protection completely."*

4.78 It might also be of interest that in the ***King*** case, the court declined to save the offending provision by severing the words 'reputed thief' from the offending provision on the ground that doing so would render the remaining portion of the provision inconsistent with the intention of the legislature in creating the provision. It noted that the power of severance which is given to the Courts by Article 50, s. 1, requires that pre-Constitution statutory provisions which are inconsistent with the Constitution be held to have been put out of existence by the Constitution, but only to the extent of such inconsistency; thus enabling so much of such laws as are not tainted with inconsistency to be preserved in truncated form as laws which have not failed the test of constitutionality. That power of severance is an aspect of judicial review which is dealt with in this or a similar manner in other Constitutions, and the scope of its operation is well covered by judicial authorities in many jurisdictions. The application of the doctrine of severability or separability in the judicial review of legislation has

the effect that if a particular provision is held to be unconstitutional, and that provision is independent of and severable from the rest, only the offending provision will be declared invalid. The question is one of interpretation of the legislative intent. Article 15, s. 4, sub-s. 2, of the Constitution lays down that every law enacted by the Oireachtas which is in any respect repugnant to the Constitution or to any provision thereof shall, but to the extent only of such repugnancy, be invalid; therefore there is a presumption that a statute or a statutory provision is not intended to be constitutionally operative only as an entirety. This presumption, however, may be rebutted if it can be shown that, after a part has been held unconstitutional, the remainder may be held to stand independently and legally operable as representing the will of the legislature. But if what remains is so inextricably bound up with the part held invalid that the remainder cannot survive independently, *or if the remainder would not represent the legislative intent*, the remaining part will not be severed and given constitutional validity

4.79 The ***King*** court further held that interpretation of the power of the Courts under Article 15, s. 4, sub-s. 2, to sever the unconstitutional part and accord constitutional validity to the remaining part of a statutory provision applies with equal force to the power of severance given by s. 1 of Article 50 except that the presumption of consistency with the present Constitution, which attaches to post-Constitution statutes, does not apply to pre-Constitution statutes. Also the limitation which is common to the jurisdiction of the Courts under both constitutional provisions is that the power of severance is but an aspect of the power of judicial interpretation in the light of the Constitution; it does not amount to a legislative power which, in effect, would allow the Courts to enact that which the legislature did not enact. It is one thing to strike down a particular statutory provision on constitutional grounds. It is quite a different thing, and one for which there is no constitutional warrant, for the Courts to attempt to breathe statutory and constitutional life into a set of words which acquires a new and separate existence after the severance, but which was never enacted as law. That would be a legislative function which the Constitution expressly reserves to the Oireachtas: see Article 15, section 2. In other words, Article 50, s. 1, cannot be held to give the Courts power to declare that a truncated or residual part of a statutory provision has constitutional validity as a law, unless the relevant court first finds that such part had the force of law … immediately prior to the coming into operation of the present Constitution. This necessarily involves a finding that, in that form and to that extent, it was expressly or impliedly enacted as a law by the legislative authority or authorities from which it emanated. Numerous decisions to this effect, based on similar constitutional or statutory provisions, could be cited from widely separated jurisdictions, but I shall confine myself to two of them.

4.80 In conclusion, the court stated that it was true that a statute bad in part is not necessarily void in its entirety. A provision within the legislative power may be allowed to stand if it is separable from the bad. But no provision, however unobjectionable in itself, can stand unless it appears both that, standing alone, the provision can be given legal effect and that the legislature intended the unobjectionable provision to stand in case other provisions held bad should fall. On the question whether what remained was so inextricably bound up with the

part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all. Therefore if the suggested words were to be excised from s. 4 of the Act of 1824, and if the remainder were to be held constitutionally unobjectionable, that remaining version would so unwarrantably extend what was enacted by parliament that it would not be possible to say that the result would represent the enacted will of parliament.

4.81 In the case herein, it is undeniable that section 184(1)(c) of the Penal Code cannot be saved nor can words be imputed in by this court. This court opines that saving or reading in would fail because the implementation will remain discriminatory and its application still arbitrary.

4.82 In the circumstances of this case, an interpretation that the limitations are justifiable under section 44 of the Constitution cannot be sustained. No reading or saving of this offence would meet the requirements set by the Constitution. In addition, the section does in its application especially in terms of the Applicant resulted in infringements of his rights as it disproportionality affected poor people.

4.83 It should be stressed that where a law inherently lends itself open to arbitrary or discriminatory application or enforcement, such a law is inherently bad law as it offends the constitutional fundamental principles of human dignity and non-discrimination. Notably, it has been argued that neither the Applicant nor *Amici Curiae* have provided evidence to show that the section is discriminatory. However, taking an account of the cases cited by the Applicant, *Amici Curiae* as well as the State, it clearly emerges that whilst one cannot invariably conclude that Section 184(1)(c) only applies to poor people, sex workers or homeless people, the very conception of the provision, that provides very broad discretion to police officers to arrest and prosecute people under this section, lends itself obviously open to arbitrary or discriminatory application or enforcement.

4.84 Therefore, this court upholds the Applicant and *amici* arguments that the section is unconstitutional because it is discriminatory. As a strong believer in human rights especially the aspect of protection and promotion of personal freedoms and rights like equality, non-discrimination, liberty, dignity to mention a few. Sitting in this institution whose core values and role is the pursuit of justice and fairness, why should we be saving a law that will continue to target poor people and treat them discriminately? This court does and echoes Warren, C.J.'s words in ***Trop v Dulles,*** 356 US 86 on why courts should uphold constitutionality where there has been infringement of rights–

> *"We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence.*

The provisions of the Constitution are not time- worn adages or hollow shibboleths. They are vital, living principles that authorise and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice."

5.0 CONCLUSION

5.1 Taking all the above matters into consideration, I am in entire agreement with my brother Judges Mtambo and Kalembera, that the Applicant had his rights in terms of 19(1), 19(3), 19(6), 20(1), 21 and 39(1) enshrined in the Constitution of the Republic of Malawi violated when he was arrested and charged with the offence of being a rogue and vagabond as contained in section 184(1)(c) of the Penal Code.

5.2 I also find that section 184(1)(c) of the Penal Code and its consequent application constitutes an unjustifiable limitation on 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. As a limitation, it is not reasonable, it is not recognized by international human rights standards, and cannot be said to be necessary in an open and democratic society. The Respondent's submission that Section 184(1)(c) of the Penal Code is in line with section 44 of the Constitution, that it is, legally justifiable, reasonable, necessary and acceptable in an open and democratic society; as well as meeting internationally acceptable human rights standards cannot be sustained. I therefore join my brother Judges in the instant matter in declaring the said provision unconstitutional.

5.4 As indicated earlier, I have had the opportunity of reading in draft, the judgments of my brother Judges Mtambo and Kalembera JJ. They take the position that this Court should simply stop at making a declaration of invalidity and leave the task of the eventual amendment or replacement of the Section to the Executive and the Legislature. Whilst I agree that the responsibility to amend or replace, or indeed take any other legislative measures to give effect to this decision lies ultimately with the Legislature, I also opine that the Court, in the process of making a declaration of invalidity following a finding of inconsistency with the Constitution, should also, wherever appropriate or necessary, ensure that the existing law operates in a framework that does not create a vacuum in an important area of the preservation of law, order and security in the country.

5.5 In the instant case, it is imperative that crime prevention and control is still maintained despite section 184(1)(c) of the Penal Code having been declared unconstitutional and invalid. It is my view however that necessary measures need to be adopted by the Executive and the Legislature so that criminals and

do not get the wrong idea that the effect of this decision is that they are now free to loiter around looking for opportunities to commit a crime.

5.6 In making the Order herein, the Court would also be in agreement with the remarks of Ngcobo J (as he then was), in the case of ***Zondi*** case where, delivering the judgment of the Constitutional Court of South Africa, he held, correctly, that whatever remedy a court chooses, it is always open to the legislature, within constitutional limits, to amend the remedy granted by the court.

5.7. In light of the foregoing, I would make the following additional declarations –

5.7.1 the Executive and the Legislature should move with speed, and in any event within 18 months from the date hereof, to ensure that section 184(1)(c) of the Penal Code is effectively amended or otherwise dealt with to reflect the Court's declaration herein and in a manner that ensures consistency with the Constitution and to take care of any unintended gap in the law that may result from the declaration of invalidity herein. I would have been minded to advocate the exercise of the power of this Court to preserve section 184(1)(c) of the Penal Code by severing some words from and to reading in some words into the section in order to achieve the desired language of a provision that would comply with Constitutional dictates, but I consider that perhaps that might constitute an excessive intrusion into a province pre-eminently reserved for the Legislature in the scheme of separation of powers especially since such powers are not available to me under the Constitution;

5.7.2 the Executive is encouraged to make a detailed assessment of vagrancy laws in Malawi generally and where appropriate initiate legislative changes in order to ensure such laws' consistency with the Constitution;

5.7.3 the Executive especially the Malawi Police Service undertake to inform its officers of the change in the law as well as undertake a pending case audit of all outstanding cases on section 184(1)(c) and properly deal with the persons being held under such a charge; and

5.7.4 as the Executive is examining the solutions of implementing this decision, it consider a full review of the vagrancy laws like section 180 of the Penal Code so as to be in line with Constitutional dictates but to avoid future constitutional challenges.

Made in Open Court this 10th day of January, 2017 at Blantyre.

Z.J.V. Ntaba
Judge