EXAMINING THE CONSTITUTIONALITY OF ROGUE AND VAGABOND OFFENCES IN MALAWI

Chikosa Banda[1] *and Anneke Meerkotter*[2]

Introduction

Malawi's Penal Code, like the Penal Codes of Zambia, Botswana, Tanzania, and many other former British colonies, contains the nebulous 'offence' of someone being deemed a rogue and vagabond. Essentially, the offence provides a tool for police to arrest persons whom they think are engaging in, or planning, criminal conduct – under circumstances when a charge under a substantive offence in the Penal Code[3] cannot be supported. In practice, the offence is often a tool for abuse by the police,[4] and legal scholars have long cautioned that these types of vagrancy offences are used almost exclusively against the poor and marginalised and target persons due to their status in society and not because of their actual conduct.[5]

This paper interrogates these assertions and seeks to establish whether rogue and vagabond offences meet the constitutional threshold for validity. The paper focuses on the two most frequently used sub-sections of the rogue and vagabond offence under the Penal Code. These are section 184(1)(c), and, to a lesser extent, section 184(1)(b), which have repeatedly been examined by courts in Malawi – and for good reason.

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

> Every suspected person or reputed thief, who has no visible means of subsistence and cannot give a good account of himself, shall be deemed a rogue and vagabond.

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

> Every person found in or near any premises or in any road or highway or any place adjacent thereto or in any public place,[6] at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose, shall be deemed a rogue and vagabond.[7]

1 Lecturer, Chancellor College Faculty of Law; LLB (Hons) (University of Malawi), LLM (University of Essex).

2 Lawyer, Southern Africa Litigation Centre; BProc, LLB (University of the Western Cape), MSoc (University of Amsterdam).

3 Cap 7:01 of the Laws of Malawi.

4 See for example, research conducted in Blantyre, Malawi in 2013, which shows that the offence is often used as a basis to harass sex workers and extort money from them. Centre for Human Rights Education, Advice and Assistance (CHREAA) and the Southern Africa Litigation Centre (SALC) (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi*, chapter 7.

5 H Zimmerman "Louisiana Vagrancy Law – Constitutionally Sound" (1969) 29(2) *La L Rev* 361, 363.

6 The Penal Code defines a "public place" as including "any public way and any building, place or conveyance to which, for the time being, the public are entitled or permitted to have access, either without any condition or upon condition of making any payment, and any building or place which is for the time being used for any public or religious meetings or assembly or as an open court".

7 Notably, the Penal Code (in section 185) allows for a removal order to be issued where a person was convicted under section

This paper discusses the purpose of sections 184(1)(b) and (c), and focuses on the historic and contemporary justification for the offences concerned, the courts' interpretation of rogue and vagabond offences, and their validity in a constitutional democracy. The paper draws lessons from the various ways in which foreign jurisdictions have interrogated the legality and constitutionality of comparative vagrancy offences.[8]

Historic[9] and contemporary justifications for rogue and vagabond offences

Traditionally, rogue and vagabond offences were broadly crafted[10] – giving police more discretion by creating a lighter burden of proof than with other offences. Often, these offences did not require specific conduct, causation, or intention. In addition, the offences allowed arrest based on mere suspicion, and without a warrant. These offences, dating back to 1349,[11] typically characterise targeted individuals as being idle, lazy, drunk, unwilling to work, habitual criminals, or morally depraved.[12] Over time, penalties for such offences varied and included branding, having an ear cut off, being whipped, or even the death penalty.[13]

The vagrancy offences were eventually codified in the English Vagrancy Act of 1824 (the 1824 Act). The 1824 Act contained provisions very similar to sections 184(1)(b) and (c) of the Penal Code referred to above.[14] Within a short period, the provisions of the 1824 Act were applied as part of the criminal law in British colonies and eventually – and unceremoniously – they found their way into the Penal Codes of these same colonies.[15]

The authority of the 1824 Act diminished in Britain over the years as various provisions were repealed or refined in line with changing notions of fairness and justice. In a number of countries

184. This provision potentially infringes on a range of constitutional rights, but is beyond the scope of this paper.

8 Section 11 of the Constitution of Malawi provides that, in interpreting provisions of the Constitution, a court shall, where applicable, have regard to the current norms of international law and comparable foreign case law.

9 For a detailed analysis of the history of rogue and vagabond offences, see Centre for Human Rights Education, Advice and Assistance (CHREAA) and the Southern Africa Litigation Centre (SALC) (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi*, 15-28.

10 JD Berg "The Troubled Constitutionality of Antigang Loitering Laws" (1993) 69(2) *Chi-Kent L Rev* 461, 467.

11 *Id* 463; W Chambliss "A Sociological Analysis of the Law of Vagrancy" (1960) 12 *Soc Prob* 67, 68.

12 P Ranasinghe "Reconceptualising Vagrancy and Reconstructing the Vagrant: A Socio-Legal Analysis of Criminal Law Reform in Canada, 1953-1972" (2010) 48 *Osgoode Hall LJ* 55, 60-61.

13 W Chambliss "A Sociological Analysis of the Law of Vagrancy" (1960) 12 *Soc Prob* 67, 72.

14 Section 4 included the following offences, under rogues and vagabonds: "Every suspected person or reputed thief, frequenting any river, canal ... or any street, highway or avenue leading thereto, or any place of public resort, with intent to commit a felony". (This section was repealed in 1981.); "Every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or wagon, not having any visible means of subsistence and not giving a good account of himself or herself." (Reference to "visible means of subsistence" was removed in 1935 and the option of imprisonment was removed in 1982.)

15 By the late 1800s, English criminal law applied in many areas under British control. In 1902, English law became effective in Malawi through the British Central African Order in Council. To ensure uniformity in the application of its criminal laws, Britain developed Model Criminal Codes, which explains the similarity between offences in former colonies. Wright notes that these Codes were developed by British administrators and adopted without local input. He contrasts this with the Canadian, New Zealand, and Queensland contexts, in which voluntary codifications were adopted through relatively democratic processes. B Wright "Codification of English Criminal Law, Imperial Projects, and the Self-Governing Codes: The Queensland and Canadian Examples" Presentation at Research Seminar Series, TC Beirne School of Law, University of Queensland (2006) 9, available at http://www.law.uq.edu.au/research/seminar-series/2006/seminar_outline_bwright.pdf.

where the 1824 Act provisions have been incorporated into domestic law, there has also been movement towards either abolishing vagrancy provisions entirely or ensuring that the offences specifically relate to a suspect's activities – rather than to his or her status.[16] These amendments and conceptual shifts reflect the recognition that the original vagrancy laws are archaic and anachronistic.[17]

However, this has not been the case in Africa. During the colonial period, rogue and vagabond offences were primarily aimed at maintaining control in the colonies.[18] This practice has remained intact in post-independence Africa and many of the offences have remained unaltered.

The contemporary justification for retaining the rogue and vagabond offences is that of crime prevention.[19] As expressed by a magistrate in Balaka, Malawi, recently, "[t]he tendency of loitering within the town at night can make the town prone to crime".[20] The Malawi Police Service has also noted protection of the public as the purpose of arrests under section 184.[21] However, these arguments can be problematic.

Firstly, there is no evidence that the purpose of section 184(1)(b) and (c) is actually achieved in practice.[22] The United Nations Guidelines for Crime Prevention emphasise – as a basic principle – that crime prevention strategies "should be based on a broad, multi-disciplinary foundation of knowledge about crime problems, their multiple causes and promising and proven practices".[23] The Guidelines state that crime prevention measures should be assessed to determine both the outcomes and the positive and negative consequences of the measures concerned.[24]

Secondly, while crime prevention might be a laudable objective, a broadly-worded offence will,

16 In 1972, Canada repealed the offence of wandering abroad without an apparent means of support and not giving a good account of his or her presence. The reasons for the repeal included recognition of a need to make the criminal law more modern, compassionate, and remedial; that the law was unevenly applied between different classes of persons; that criminal law was seen as too punitive a measure to rely on; and that the provisions were too vague for the purpose of criminal law. P Ranasinghe "Reconceptualising Vagrancy and Reconstructing the Vagrant: A Socio-Legal Analysis of Criminal Law Reform in Canada, 1953-1972" (2010) 48 *Osgoode Hall LJ* 55, 87-88.

17 J Kimber "'A Nuisance to the Community': Policing the Vagrant Woman" (2010) 34(3) *J of Austl Stud* 275, 279.

18 S Coldham "Criminal Justice Policies in Commonwealth Africa: Trends and Prospects" (2000) 44 *J Afr L* 219, 219-20.

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

20 "Malawi Court Convicts 26 People for Loitering at Night" *Nyasa Times* (12 August 2014) available at http://www.nyasatimes.com/2014/08/12/malawi-court-convicts-26-people-for-loitering-at-night/.

21 "Police Nets 183 Suspects in a Sweeping Exercise in the Eastern District of Zomba" *Mana Online* (8 August 2014) available at http://www.manaonline.gov.mw/index.php/national/general/item/916-police-nets-183-suspects-in-a-sweeping-exercise-in-the-eastern-district-of-zomba.

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

23 *United Nations Guidelines for the Prevention of Crime* Economic and Social Council Resolution 2002/13, UNODC, article 11. See also the United States District Court cases *Floyd and Others v City of New York* 08 Civ. 1034 SAS (DC) and *Ligon and Others v City of New York and Others* [2013] 12 Civ 2274 SAS (DC) 5. Quoting the US Department of Justice, Scheindlin USDJ noted that there was significant evidence that unlawfully aggressive police tactics are unnecessary for effective policing and that they are detrimental (and even counter-productive) to the mission of crime reduction. The Court noted that there was no evidence that the police's use of the stop-and-frisk technique was successful in producing arrests and reducing crime.

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

inevitably, be subjectively applied. A recent case in point is that of *Chidziwe v Republic*,[25] in which a person was arrested under section 184(1)(c) because he was found at an odd hour with a bottle of beer. Needless to say, the High Court of Malawi overturned the conviction and held that there was no evidence that holding a bottle of beer implies an illegal purpose.

Finally, crime prevention can arguably be achieved by more precise and constitutionally valid provisions. These include other provisions in the Penal Code; developing alternatives to arrest; ensuring arrests are more targeted and based on actionable intelligence; reducing vulnerability; addressing structural issues; preventing and reducing exploitation; and adopting strategies to expand educational, economic, and social opportunities.[26]

Court interpretations of rogue and vagabond offences

Courts have long expressed their discomfort with the wide ambit of rogue and vagabond offences, and have sought to narrowly interpret these offences to save them from invalidity. In addition, courts have emphasised that a conviction under rogue and vagabond offences would only be proper where all the elements of the crime have been proved.[27] The High Court of Malawi – when reviewing convictions under section 184 – has been particularly alarmed that magistrates have allowed persons to plead guilty under section 184, without such persons understanding what they were pleading to[28] or acknowledging all the elements of the offence.[29] Similarly, in a 2010 study conducted by Women and Law in Southern Africa (WLSA-Malawi) on women in prison in Malawi, the authors found that many arrests and convictions under section 184(1)(c) were irregular, and that the action of women prior to arrest under section 184(1)(c) simply did not correspond to the definition of the crime.[30]

Interpretations of section 184(1)(b) and section 184(1)(c) are now discussed in turn.

Interpreting Section 184(1)(b)

A conviction under section 184(1)(b) of the Penal Code requires proof of the following elements:

- The accused is a suspected person or reputed thief;
- The accused has no visible means of subsistence; and
- The accused, when asked to do so, could not give a good account of himself.

In the 1936 English case of *Ledwith v Roberts*,[31] the Court of Appeal held that reference to a "suspected person or reputed thief" should be construed narrowly to refer to one whom law-enforcement officers suspected of being guilty of criminal behaviour based upon previous conduct

25 *Chidziwe v Republic* MWHC Criminal Appeal No. 14 of 2013.

26 *United Nations Guidelines for the Prevention of Crime* Economic and Social Council Resolution 2002/13, UNODC.

27 Attorney General v Tse Kam-Pui [1980] HKLR 338 (CA).

28 *Republic v Luwanja and Others* [1995] 1 MLR 217 (HC).

29 *Republic v Foster and Others* [1997] 2 MLR 84 (HC). The twelve accused were arrested at three different places and accused (in one charge) of being rogues and vagabonds. The Court held this to be a misjoinder. The Court held that the acceptance of guilty pleas can only be made where each accused person admitted all essential elements of the charge.

30 S White *et al Poor, Invisible and Excluded: Women in State Custody Malawi* (2010) 38.

31 [1937] 1 KB 233.

of which they are actually aware.

The Supreme Court of Ireland, however felt that even on a narrow construction the offence is unconstitutional. As explained by Kenny J:[32]

> It is a fundamental feature of our system of government by law (and not by decree or diktat) that citizens may be convicted only of offences which have been specified with precision by the judges who made the common law, or of offences which, created by statute, are expressed without ambiguity. But what does "suspected person" mean? Suspected of what? What does "reputed thief" mean? Reputed by whom? It does not mean a person who has been convicted of theft, for then "convicted thief" would have been the appropriate words. So one is driven back to the conclusion that it is impossible to ascertain the meaning of the expressions. In my opinion, both governing phrases "suspected person" and "reputed thief" are so uncertain that they cannot form the foundation for a criminal offence.[33]

Courts have further interpreted reference to "suspected person" as incorporating an element of intent.[34]

Taking a different approach, Australian courts have interpreted the phrase "who has no visible means of subsistence" as being limited to "a person whose means of support so far as they are lawful are insufficient for the way he is living may fairly be regarded as belonging to a class of persons likely to resort for their support to activities from which society needs to protect itself."[35] The courts have deliberately not interpreted the offence as aimed at vagrants, despite the offence's origins: "It is not or should not be a criminal offence, per se, to sleep on a river bank, nor to adopt a lifestyle which differs from that of the majority."[36]

The High Court of Malawi, in *Republic v Willie*,[37] questioned the rationale behind a section in the Penal Code of 1929 – which is similar to section 184(1)(b). The Court held that failure to find employment does not make a person a rogue and vagabond.

It remains unclear what exactly is expected by the phrase "and cannot give good account of himself". In *United States v Margeson*,[38] the United States District Court considered the word "good" to be subjective and capable of too many meanings.[39] In the early English case of *R v Dean*,[40] it was held that to find that one has failed to give good account of oneself requires more substantial and incriminating evidence, and that the burden of proof should not be compromised.

32 *King v Attorney General and Another* [1981] 1 LR 245.

33 *Id* 263.

34 *Ledwith v Roberts* [1937] 1 KB 233 (CA); *Republic v Willie* [1923-60] ALR (M) 152 (HC) 154.

35 *Zanetti v Hill* [1962] 108 CLR 433 (HC) 442. The Court emphasised that "the onus is on the prosecution to prove that an accused person has no visible lawful means of support". *Id* 438.

36 *Moore v Moulds* [1981] 7 QL 227 (DC), quoted in G Lyons "*Moore v Moulds* (Vagrancy Conviction Appeal against Sentence – Desirability of Legal Representation – Proper Interpretation of the Offence of Vagrancy)" (1982) *Aboriginal L Bulletin* 1, 3.

37 [1923-60] ALR (M) 152, 154.

38 (1966) 259 F Supp 256.

39 "Criminal Law – Constitutional Law – Vagrancy Statutes and Due Process – *Alegata v Commonwealth* 231 NE2d (Mass 1967)" (1968) 9 *Wm & Mary L Rev* 1162, 1165.

40 (1) 18 Cr App R 134, quoted in *Republic v Willie* [1923-60] ALR (M) 152 (HC).

Interpreting Section 184(1)(c)

Section 184(1)(c) provides that a person is deemed a rogue and vagabond if found in a public place, at such a time, and under such circumstances, as to lead to the conclusion that such a person is there for an illegal or disorderly purpose.

A conviction under section 184(1)(c) should, in essence, hinge on whether or not there is proof of an illegal or disorderly purpose. For example, in *Republic v Luwanja and Others*,[41] the High Court of Malawi overturned a conviction under section 184(1)(c), on the basis that there was no evidence that the accused was loitering for an illegal purpose: "The accused might have been poor, with holes in their pockets but this unfortunate state of affairs, and often without choice, does not make them criminals." The Court emphasised that it is not an offence in terms of section 184(1)(c) to simply wander about.

In the recent case of *Chidziwe v Republic*,[42] Sikwese J reiterated that the illegal and disorderly purpose element is really an intention requirement.[43]

Examining the constitutionality of rogue and vagabond offences

The question that flows from the above discussion is whether judicial interpretations of sections 184(1)(b) and (c) of the Penal Code are sufficient to save these sections from being declared unconstitutional.

The Threshold for Constitutionality

In essence, any offence should comply with the rights, principles, and values underlying the Constitution and the constitutional order. Sections 12 and 44 of the Constitution of Malawi (the Constitution) provide a useful structure within which to measure whether any limitation of rights through any law is justifiable.

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

Furthermore, according to section 44 of the Constitution:

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

41 [1995] 1 MLR 217.

42 MWHC Criminal Appeal No. 14 of 2013.

43 "There must be an intention in the mind of the accused that his mission at any particular place and time would be illegal or improper." *Id* 2.

Thus, any inquiry into the constitutionality of an offence must consider whether:

1) A right in the Constitution has been infringed by the offence.

2) The infringement can be justified as a permissible limitation of the right in terms of section 44 of the Constitution:

   a.) Was the violation prescribed by a law of general application?
   b.) Was the violation reasonable and necessary in an open and democratic society?
   c.) Does the violation meet international human rights standards?
   d.) Does the violation negate the essential content of the right in question?

The inquiry is primarily a factual one – including looking at evidence about the impact of the rogue and vagabond offences.

Are Any Constitutional Rights Infringed by Sections 184(1)(b) and (c) of the Penal Code?

A number of rights are implicated in arrests under sections 184(1)(b) and (c) of the Penal Code, each of which are briefly described below.

The Right to Dignity

Section 19(1) of the Constitution states that "[t]he dignity of all persons shall be inviolable". The right to dignity has received significant emphasis in regional law. In *Purohit and Another v The Gambia*,[44] for instance, the African Commission on Human and Peoples' Rights (the African Commission) held that "[h]uman dignity is an inherent basic right to which all human beings ... are entitled to without discrimination".[45]

In *Floyd and Others v City of New York*,[46] Scheindlin J noted that each police stop is a demeaning and humiliating experience that makes people feel unwanted and distrustful of the police. It creates a situation in which people live in fear of being stopped when they go about their daily activities, and it alienates the police from the community.[47] Similar arguments can be made about arrests using rogue and vagabond offences, where the broad nature of these offences exposes innocent people to degrading treatment at the hands of the police during questioning, arrest, and detention.

Freedom from Inhuman and Degrading Treatment or Punishment

Section 19(3) of the Constitution provides that no person shall be subjected to cruel, inhuman, or degrading treatment or punishment.

The African Commission emphasised in *Doebbler v Sudan*[48] that inhuman and degrading treatment includes not only actions that cause serious physical or psychological suffering, but those "which

44 (2003) AHRLR 96 (ACHPR).

45 *Id* at para. 57

46 [2013] 08 Civ 1034 SAS (DC).

47 *Id* 3, 82.

48 (2003) AHRLR 153 (ACHPR).

humiliate or force the individual against his will or conscience".[49]

The right to be protected from inhuman and degrading treatment is infringed when rogue and vagabond offences are applied arbitrarily against particular groups of people or are used to target behaviour that is not criminal.[50] In such cases, the arrest and detention of a person amounts to inhuman and degrading treatment. Even if detention is only for a short period, the harm done to the individual and his or her family is significant. In this regard, the 2010 Open Society Initiative for Southern Africa (OSISA) survey of five police stations in Malawi noted that police stations provided little or no food to persons in custody, and conditions were often unhygienic and hazardous.[51]

Freedom and Security of Person

Section 19(6) of the Constitution provides that every person shall have the right to freedom and security of person. The right to security of person is infringed when a person is stopped, arrested or detained arbitrarily by police.[52] In *King v Attorney General*,[53] the Irish Supreme Court held that a section similar to section 184(1)(b) violated the right to security of person.

Freedom from Discrimination and Equal Protection before the Law

Section 20(1) of the Constitution prohibits discrimination in any form and all persons are, under any law, guaranteed equal and effective protection against discrimination on various grounds, including sex and social status. Section 20 should be read with section 41(1) of the Constitution, which provides that every person shall have the right to recognition as a person before the law, and also with section 12(1)(e) which states that all persons have equal status before the law.[54]

The enforcement of rogue and vagabond offences which allow police wide discretion to arrest, inevitably leads to cases where arrests are influenced by police assumptions of criminality based on biases relating to poverty, gender, race, ethnicity, and place of origin.

In *Floyd and Others v City of New York*,[55] the United States District Court held that the police stop-and-frisk practice violated the plaintiffs' right to equal protection of the law, since they were targeted for stopping based on their race. The Court held that it is impermissible to subject all members of a racially defined group to heightened police enforcement simply because some members of the group are criminals.[56] A similar argument can be made in relation to arrests that

49 *Id* at para. 36.

50 In the United States case of *Farber v Rochford* (1975) 407 F Supp 529, 533 (DC), a court struck down a loitering ordinance, in part because it criminalised a person's status (such as being a suspected person or reputed thief) in circumstances where there was no apparent criminal conduct. JD Berg, "The Troubled Constitutionality of Antigang Loitering Laws" (1993) 69(2) *Chi-Kent L Rev* 461, 483. See also UN General Assembly *Report by Special Rapporteur on Extreme Poverty and Human Rights* 66th session, 4 August 2011, A/66/265, 5, available at http://www.ohchr.org/Documents/Issues/Poverty/A.66.265.pdf.

51 L Muntingh "Survey of Conditions in Detention in Police Cells" in *Pre-Trial Detention in Malawi: Understanding Caseflow Management and Conditions of Incarceration* (2011) 52-65.

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

53 [1981] 1 LR 245, 57.

54 See K Nyirenda "An Analysis of Malawi's Constitution and Case Law on the Right to Equality" in this publication.

55 [2013] 08 Civ 1034 SAS.

56 *Id* 15.

are essentially based on social status.[57]

A concern around enforcement was raised by the High Court of Malawi in the case of *Kaseka and Others v Republic*,[58] where women in a rest house were arrested under the assumption that they were soliciting for an immoral purpose. The Court lamented that the arrest of the women and not their male counterparts, smacked of discrimination.[59]

Similarly, courts have expressed concern that vagrancy offences target persons who are poor.[60] Jackson J in the United States Supreme Court case of *Edwards v People of State of California*[61] cautioned:

> We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States ... The mere state of being without funds is a neutral fact – constitutionally an irrelevance, like race, creed, or color.[62]

These concerns have been echoed in various Malawi judgments. In cases like *Republic v Balala*[63] and *Mwanza and Twelve Others v Republic*,[64] the High Court of Malawi expressed concern that the charge of rogue and vagabond could be used to oppress disadvantaged persons who are not criminals. The reality is that many persons in a developing country have no "visible means of subsistence", and an offence that requires proof of subsistence to avoid arrest invariably discriminates against the poor and marginalised groups within society.

The Right to Privacy

Section 21 of the Constitution provides that every person shall have the right to personal privacy, which shall include the right not to be subjected to a search of his or her person, home or property. This right is infringed when persons are questioned about their private life, and have their person searched prior to or during an arbitrary arrest.

57 See *King v Attorney General* [1981] 1 LR 245 (SC) 257.

58 [1999] MLR 116. That case dealt with the offence of being an idle and disorderly person under section 180(e) of the Penal Code. Women are, however, often arrested under circumstances similar to that case, and then charged under section 184(1)(c). This case is also discussed in ACK Nyirenda "The Role of the Judiciary in Protecting the Rights of Vulnerable Groups in Malawi" and K Nyirenda "An Analysis of Malawi's Constitution and Case Law on the Right to Equality" in this publication.

59 *Id.* "It seems to me that police action was rather discriminatory because only the appellants were arrested leaving their male companions free. Even those who had no male companion were not to be arrested just because they were suspected to be there for purposes of immoral activity."

60 The UN Committee on the Elimination of Racial Discrimination has also expressed the concern that laws which prohibit begging and loitering effectively criminalises homelessness. It also noted that such laws have a disproportionate effect on vulnerable groups, such as racial and ethnic minorities in the United States. Committee on the Elimination of Racial Discrimination, Concluding Observations (United States), CERD/C/USA/CO/7-9, 29 August 2014 at para. 12, available at http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/CERD_C_USA_CO_7-9_18102_E.pdf.

61 (1941) 314 US 160.

62 *Id* 184-85.

63 [1997] 2 MLR 67. This case is also discussed in ACK Nyirenda "The Role of the Judiciary in Protecting the Rights of Vulnerable Groups in Malawi" in this publication.

64 [2008] MWHC 228. The case concerned thirteen women who were arrested in rest-houses during a police sweep. The Court held that the convictions were improper, as there was no indication, based on the facts that the women were there for a disorderly purpose. The Court commented: "But surely the law could not have intended to criminalise mere poverty and homelessness, 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 the state responsibility to shelter and provide for such people than condemn them merely on account of their lack of means."

Freedom of Movement

The right to freedom of movement and residence is protected under section 39 of the Constitution. Police have interpreted section 184 as allowing them wide discretion to arrest persons found loitering at night.[65] Notably, such arrests are more likely to affect the poor: someone who drives around at night will not be arrested under section 184, but someone who walks about at night might well be.

That section 184 is frequently used in a manner that infringes the right to freedom of movement, was recognised in *Brown v Republic*.[66] In this case, the accused was arrested for staying at a trading centre without work. He was convicted under section 184(1)(c) and sentenced to five months' imprisonment with hard labour. Overturning the conviction, the High Court of Malawi stated:

> It is not an offence merely to be found, during the night, on or near a road, highway, premises or public place. An unemployed or homeless person may be found sleeping on the veranda of public premises or beside a road or highway. He could be found loitering or sleeping at a market place or in a school building, just because he is poor, unemployed and homeless. It would be wrong and unjust to accuse such person of committing an offence under section 184(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.

Are the Rights Violations Resulting from Section 184 of the Penal Code Prescribed by Law?

The innocuous phrase "prescribed by law" is arguably steeped in meaning. It encompasses, in a constitutional inquiry, many of the common law principles of legality – including the prohibition against vagueness[67] and arbitrariness.

According to Currie and De Waal,[68] the enquiry about whether or not a law is "of general application"[69] is a two-pronged one. Firstly, it looks at whether or not the law is "sufficiently clear, accessible and precise that those affected by it can ascertain the extent of their rights and obligations." Secondly, it looks at whether the law is of equal application and not arbitrary in application.[70] The test is the same in relation to the phrase "prescribed by law", as contained in section 44(1) of the Constitution of Malawi. The Canadian Supreme Court has held that "prescribed by law" requires

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

66 MWHC Criminal Appeal No. 24 of 1996.

67 *R v Rimmington* [2006] 1 AC 459.

68 I Currie & J De Waal (eds) *The New Constitutional and Administrative Law* (2001) 340.

69 Note: there is a difference between the exact wording of the limitations clause in the Constitution of South Africa, section 36, and the limitation clause in the Constitution of Malawi, section 44. The Constitution of South Africa refers to "a law of general application", whilst the Constitution of Malawi refers to "prescribed by law". It is submitted that both these phrases have the same meaning. In any event, section 44(2) of the Constitution of Malawi emphasises the requirement that the law must be of general application.

70 *Id.*

that the provision was properly adopted, that it is of general application, and that it is sufficiently accessible and precise.[71]

The High Court of Malawi has essentially applied the principles of legality to avoid a conclusion that sections 184(1)(b) and (c) are unconstitutional.[72] Court decisions based on section 184 have thus tried to interpret these sections narrowly, by reading into section an element of intent – so as to avoid the offence covering too wide a range of conduct.[73] Nevertheless, the High Court of Malawi has not been able to restrain the police from arbitrarily applying sections 184(1)(b) and (c).[74]

An offence should provide the public and the police with a clear standard of what constitutes prohibited conduct;[75] yet broad articulation of sections 184(1)(b) and (c) lead to the continued arrest of persons in circumstances in which the police are unaware that any offence has been committed. Thus, the offence, by its nature, leads to unlawful and arbitrary arrests.

The Malawi Supreme Court of Appeal in *Kamwangala v Republic* recently emphasised the problem of using arrest as a tool of law enforcement without facts justifying the arrest:[76]

> 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. Where there is no evidence it would seem only natural that there should be no arrests. We therefore find it rather perverse that law enforcement should arrest with a view to investigate.

In contrast, the offences in sections 184(1)(b) and (c) allow arrest on nothing more than the "mere suspicion of criminality". Such arrests are inevitably arbitrary, as they are based on an individual police officer's perception of whether a person is in a public place for an illegal or disorderly purpose, or gives good account of himself or herself.[77]

Whether a prescribed law is void on vagueness grounds, is therefore an important aspect for consideration in any inquiry into whether a law justifiably limits constitutional rights.[78] Indeed, many courts in the United States have explicitly ruled certain vagrancy laws void because of

71 *Greater Vancouver Transportation Authority v Canadian Federation of Students - British Columbia Component* [2009] 2 SCR 295 at para. 53.

72 This approach is also referred to as the Rule of Lenity, which requires that, in construing an ambiguous criminal statute, the court should resolve the ambiguity in favour of the defendant. *McNally v United States* (1987) 483 US 350.

73 *Brown v Republic* MWHC Criminal Appeal No. 24 of 1996; *Republic v Balala* [1997] MLR 67 (HC); *Mwanza and 12 Others v Republic* [2008] MWHC 228; *Republic v Luwanja and Others* [1995] 1 MLR 217 (HC); *Chidziwe v Republic* MWHC Criminal Appeal No. 14 of 2013.

74 Ackermann J in the South African Constitutional Court case of *State v Makwanyane* 1995 (3) SA 391 (CC) at para. 156, emphasised that arbitrariness is contrary to the values underlying the constitutional order, since it inevitably leads to the unequal treatment of persons.

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

76 MWSC Miscellaneous Criminal Appeal No. 6 of 2013.

77 See *United States v Margeson* (1966) 259 F Supp 256 (DC), which held that a provision allowing a policeman's judgment (as to the validity of a person's 'account') to be determinative of guilt, is unconstitutional.

78 JD Berg, "The Troubled Constitutionality of Antigang Loitering Laws" (1993) 69(2) *Chi-Kent L Rev* 461, 470.

vagueness. In *Baker v Binder*,[79] the Federal District Court ruled that a law, which declared persons who habitually loiter without work vagrants, was too wide in ambit and not specific enough about what conduct it wanted to prohibit. In *Papachristou v City of Jacksonville*,[80] the United States Supreme Court struck down a rogue and vagabond offence as unconstitutionally vague, because the broad provision did not give citizens adequate notice of what conduct was forbidden and did not sufficiently curtail police discretion, which can easily be abused. The Supreme Court of Ireland, in *King v Attorney General*,[81] held that an offence similar to section 184(1)(b) was arbitrary and vague, and vested too much discretion in the prosecutor and judge.

Are the Rights Violations Derived from Section 184 of the Penal Code Reasonable and Necessary in an Open and Democratic Society?

The enquiries into reasonableness[82] and necessity[83] often overlap, and, for the purpose of this analysis, will be discussed as a single inquiry into the proportionality of sections 184(1)(b) and (c) of the Penal Code. This exercise essentially seeks to balance the objective of the offence against the rights infringements caused by it.

Currie and De Waal, in analysing the Constitution of South Africa's limitations clause, note that:

> It is not simply a question of determining whether the benefits of a limitation to others or to the public interest will outweigh the cost to the right-holder. If rights can be overridden simply on the basis that the general welfare will be served by the restriction then there is little purpose in the constitutional entrenchment of rights. The reasons for limiting a right need to be exceptionally strong.[84]

The proportionality test was articulated in the Canadian Supreme Court case of *R v Oakes*,[85] as consisting of three components:

- The offence must be rationally connected to its objective and not be arbitrary, unfair, or based on irrational considerations;
- The offence, even if rationally connected to the objective, should impair "as little as possible", the right or freedom in question; and
- There must be proportionality between the *effects* of the offence that are responsible for limiting the right or freedom, and the objective that has been identified as of "sufficient importance" to warrant over-riding a constitutionally protected right.

79 (1967) 274 F Supp 658.

80 (1972) 405 US 156. This case is also referred to in SB Nkonde "Judicial Decision-Making and Freedom of Expression in Zambia: The Case of *People v Paul Kasonkomona*" in this publication.

81 [1981] 1 LR 245, 257.

82 A reasonableness enquiry tends to consider whether or not the offence is relevant, sufficient, and proportionate to a legitimate government aim.

83 An enquiry into whether or not an offence is necessary in an open and democratic society incorporates a proportionality analysis and also examines the question of whether or not there is a pressing social need for the violation. The content of the phrase "necessary in a democratic society" has been discussed by the European Court of Human Rights. See *Koretskyy and Others v Ukraine* Case No. 40269/02 (2008) (ECHR) at paras. 39-42; *Gorzelik and Others v Poland* Case No. 44158/98 (2004) (ECHR); *Partidul Comunistilor (Nepeceristi) and Ungureanu v Romania* Case No. 46626/99 (2005) (ECHR); *Tsonev v Bulgaria* Case No. 45963/99 (2006) (ECHR) at para. 52.

84 I Currie & J De Waal *The Bill of Rights Handbook* Fifth Edition (2005) 164.

85 [1986] 1 SCR 103 at paras. 69-81.

As stated earlier, sections 184(1)(b) and (c) are aimed at preventing crime. Whilst crime prevention is a legitimate government objective, any measures proposed to deal with this objective should be well researched and not be arbitrary, unfair, or based on irrational considerations.

Essentially, vagrancy laws like sections 184(1)(b) and (c) make assumptions about a person's likelihood of engaging in criminal activity, based on considerations that are often subjective. While persons who have no means of subsistence or who walk around at night might engage in criminal activity, this does not mean that all persons who are poor or who exercise their freedom of movement at night are potential criminals. As such, sections 184(1)(b) and (c) are overly broad. The High Court judgments that have set aside convictions under section 184 are indicative of this overbreadth of section 184.

In this regard, the Supreme Court of Canada noted:

> Overbreadth allows courts to recognise that the law is rational in some cases, but that it over-reaches in its effect in others ... For example, where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the specific individual.[86]

In the United States case of *Fenster v Leary*,[87] the New York Court of Appeals held that a statute which defined vagrants as persons without visible means of support, constituted over-reaching of proper limitations of police power and made lawful conduct criminally punishable – even when such conduct in no way encroached upon the rights or interests of others.[88] The UN Special Rapporteur on Extreme Poverty and Human Rights has also noted that overly broad police powers "increase the exposure of persons living in poverty to abuse, harassment, violence, corruption and extortion by both private individuals and law enforcement officials."[89]

Sections 184(1)(b) and (c) are, furthermore, not the most appropriate crime prevention measures. There are measures that serve the same objective, but with less infringement of the rights elucidated above. Section 28 of the Criminal Procedure and Evidence Code of the Laws of Malawi, for example, already provides for the circumstances under which a police officer may arrest a person without a warrant. The section authorises a police officer to arrest, without a warrant or order from a magistrate, any person whom he finds lying or loitering in any highway, yard, or place during the night – and whom he suspects, upon reasonable grounds, of having committed or being about to commit a felony. The section also extends to the arrest of any person who is about to commit an arrestable offence or whom the officer has reasonable grounds of suspecting is about to commit an arrestable offence. Section 28 of the Criminal Procedure and Evidence Code is a more appropriate response to crime prevention, as it contains the yardstick of "reasonable grounds". Section 28 further requires that the police officer must suspect that a specific offence

86 *Canada (Attorney General) v Bedford* 2013 SCC 72 at para. 113.

87 (1967) 20 NY2d 309.

88 *Id* 312-13; see also "Criminal Law – Constitutional Law – Vagrancy Statutes and Due Process – *Alegata v Commonwealth*, 231 NE2d (Mass 1967)" (1968) 9 *Wm & Mary L Rev* 1162, 1166.

89 UN General Assembly *Report by Special Rapporteur on Extreme Poverty and Human Rights* 66th session (4 August 2011) A/66/265, 5, available at http://www.ohchr.org/Documents/Issues/Poverty/A.66.265.pdf. See also UN General Assembly *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation: Stigma and the Realisation of the Human Rights to Water and Sanitation* 21st Session of the Human Rights Council (2012) 11.

has, or is about to be, committed. This is a better option than section 184(1)(c), which 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 limited to cases where there is a suspicion that a substantive offence has actually been committed or is about to be committed. As explained by Hewart CJ in *R v Dean*:[90]

> It would be in the highest degree unfortunate if in any part of the country those who are responsible for setting in motion the criminal law should entertain, connive at or coquette with the idea that in a case where there is not enough evidence to charge a prisoner with an attempt to commit a crime, the prosecution may, nevertheless, on such insufficient evidence, succeed in obtaining and upholding a conviction under the Vagrancy Act, 1824.[91]

The effect of sections 184(1)(b) and (c) is not only an infringement of the rights of those arbitrarily arrested under these sections. The policing and prosecution of these offences which relate to suspicious conduct (as opposed to actual conduct), are a strain on the resources of police, the courts, and prisons. Thus, it cannot be shown that the alleged deterrent effect of these offences outweighs the negative impact these offences have on the functioning of the justice system.

Since the offence is vague, overly broad, and disproportionate, it does not meet the requirements that justify an infringement of rights – as set out in sections 12 and 44 of the Constitution – and does not comply with international human rights standards.[92]

The fact that the courts have interpreted the offence narrowly does not save it from unconstitutionality. While sections 184(1)(b) and (c) could, as a result of precedent in Malawi, be read to include an element of intent, this is not the case in practice. These offences continue to be applied in an arbitrary manner and still do not give citizens a clear understanding of the conduct that is prohibited. These offences are, accordingly, in clear violation of section 44(1) of the Constitution of Malawi.

Taking the proportionality test further, the fact that sections 184(1)(b) and (c), in their effect, infringe on the essential contents of, *inter alia*, the rights to dignity, privacy, and security of person and the rights to be protected from inhuman and degrading treatment and discrimination, amounts to a violation of section 44(2) of the Constitution of Malawi.

90 (1) 18 Cr App R 134.

91 *Id*, quoted in *Republic v Willie* [1923-60] ALR (M) 152 (HC) 154.

92 The United Nations Guidelines for the Prevention of Crime (2002), provides (in article 12) that "the rule of law and those human rights which are recognised in international instruments to which Member States are parties must be respected in all aspects of crime prevention".

Conclusion

In 1996, the Malawi High Court opined in *Brown v Republic*[93] that "[i]n light of the new Constitution, offences such as that of rogue and vagabond need to be reviewed, as they appear to violate the Constitution".

The Malawi Law Commission published a report on its review of the Penal Code in 2000. However, the review did not include a discussion of the relevance of rogue and vagabond offences. Twea JA, who participated in the Law Commission review process, commented that:

These offences have been problematic and will continue to be so. Yes, we reviewed the law, but at the time consultations on the review of the Penal Code took place, we had not thought through the issues of the rights of the poor in respect of these laws ... It may be time to re look at the laws.[94]

While a review of the entire rogue and vagabond provision in the Penal Code is necessary, and urgent, this does not preclude the courts from ruling – in terms of section 108(2) of the Constitution – that the offence is invalid. In the rogue and vagabond cases that have come before the courts, the accused were often poor and did not have legal representation. In such cases, the court should not wait for a constitutional matter to be raised by the accused before interrogating it.

93 MWHC Criminal Appeal No. 24 of 1996.

94 Keynote Address of Justice EB Twea SC JA at the Expert Consultation on the Law and Practice Regarding Nuisance-Related Offences, 6 and 7 February 2014, Capital Hotel, Lilongwe, Malawi.