

# POCKET GUIDE

## TO ARREST AND DETENTION IN MALAWI



## Pocket Guide to Arrest and Detention in Malawi, 2014

This publication is a joint project of the Paralegal Advisory Services Institute (PASI), Catholic Commission for Justice and Peace (CCJP), Centre for Human Rights and Rehabilitation (CHRR), the Centre for Human Rights Education, Advice and Assistance (CHREAA), and the Community Law Centre (CLC) of the University of the Western Cape. The input of officials working in the criminal justice system of Malawi, as well as academics at Chancellor College, University of Malawi, at a series of consultations, is acknowledged. The financial support of the European Union, the Open Society Foundations, and the Open Society Initiative for Southern Africa is also acknowledged.

Materials development: Jo Monson at Mojoflo

Content: Jean Redpath

Artwork layout and design: Jaywalk Design

Disclaimer: This publication has been produced with assistance from the European Union. The content of this publication is the sole responsibility of the authors and can in no way be taken to reflect the views of the European Union.

## About this guide

This guide is for anyone who needs a quick reference to the laws around arrest and detention in Malawi. This may include police, court clerks, prosecutors, magistrates, paralegals and detainees.

First there is an **orientation to the criminal justice system** and a diagram and summary of what happens in Malawi around arrest and detention, page 1.

The main part of the book focuses on what the Criminal Procedure and Evidence Code says. It starts with **when and how arrest can happen and possibilities for release at the police station**, page 4. This is followed by a section on **how things happen in court and how people can be released by the court**, page 12.

There are **special sections on the arrest and release of children**, pages 7 and 11. There is also a list of children's offences that are considered serious, see page 34, and there is a section on the **maximum times allowed for the commencement and duration of trial**, page 16.

The **rights of every person in Malawi**, as well as the specific **rights of those who have been arrested and detained** are described, pages 18 - 21.

The **meanings of legal words** can be found in the glossary near the back, page 22.

At the very back is a long **list of all the offences for which someone can be arrested** in Malawi. These offences are divided into those that need a warrant for arrest, and those that do not, page 26.

# CONTENTS

ORIENTATION	1
ARREST	4
RELEASE AT THE POLICE STATION	8
RELEASE AT THE COURT	12
PLEADING	15
COMMENCEMENT AND DURATION OF TRIAL	16
THE CONSTITUTION OF MALAWI AND THE BILL OF RIGHTS	18
GLOSSARY	22
LIST OF OFFENCES	26

# ORIENTATION

**This section gives an orientation to Malawi’s criminal justice system and the main laws around arrest and detention. It also details different stages of detention and the ways in which someone can be released at each stage.**

## Orientation to the criminal justice system

Police may arrest people who commit offences or who are suspected of doing so. People arrested for serious crimes are charged and eventually tried by the High Court. Specialised lawyers act as prosecutors in these courts. Less serious crimes are tried in the subordinate courts. Police prosecutors bring the cases in these courts. After being charged, arrested people are called “the accused”. A magistrate is in charge of a court and “clerks of the court” do the administration.

Paralegals, who are not lawyers but have some training in law, help the accused and other detainees with legal advice and provide practical assistance at police stations, in courts or at prisons.

## Laws around criminal justice in Malawi

The Criminal Procedure and Evidence Code (CPEC) is the main law that deals with arrest and detention in Malawi. There is an overview of this law on the next page.

Apart from the CPEC, other laws to consider around arrest and detention in Malawi are:

- The Penal Code
- Bail Guidelines Act
- Legal Education and Legal Practitioners Act
- Child Care, Protection and Justice Act (CCPJA)
- The Malawian Constitution and Bill of Rights

The Constitution is the highest law in Malawi and all other laws must be in line with it.

*Serious crimes are tried in the High Court with specialised lawyers as prosecutors.*

*Non-serious crimes are tried in the subordinate courts with police prosecutors.*

## The Criminal Procedure and Evidence Code

The Criminal Procedure and Evidence Code (CPEC) is the main law that deals with arrest and detention in Malawi. The CPEC outlines the legal ways in which the right to personal liberty can be limited. The CPEC lays out the process of what should happen and sets times within which these things should happen. If these laws are not complied with, then the detention is no longer legal. The different stages of detention in the process, and the time within which each stage must happen, are shown by the red blocks on the left hand side of the diagram on the opposite page.

At each stage of the process, there is a possibility that the person could be released from detention through various ways set out in the CPEC. The green blocks on the right hand side of the diagram give the ways that a person can be released from detention. For some, such as release on bail, the person must return to court for trial.

### Different stages of detention and ways of release

A brief overview of the criminal procedure and ways of release is as follows:

- Someone is arrested without a warrant
- For non-serious offences, the arrested person could be released without trial at the police station with a caution, or due to lack of evidence. Police bail on bond allowing release before trial could also be granted
- If not released at the police station, all arrested persons must appear at court within 48 hours. At the court they could be released on bail for later trial, or if there is not enough evidence the case could be withdrawn
- An accused detained person could be released on bail at a later stage, especially if the case takes too long to finalise
- The case could also end in release through discontinuance, discharge or acquittal
- If the case ends with a conviction, the convicted person could be sentenced to community service, a fine, compensation, a suspended prison term or to a prison term

*The Criminal Procedure and Evidence Code gives the legal ways in which the constitutional right to personal liberty can be limited.*

## Some stages of detention

As described in the Criminal Procedure and Evidence Code (CPEC)

Police make arrest

- must be reasonable suspicion

Detained at Police Station

- maximum 48 hours

Arrested person must appear in court within 48 hours

Court institutes proceedings with charge and trial date

Detention before trial

- maximum 30 days in subordinate court
- maximum 60 days in High Court
- maximum 90 days for serious crimes

Trial starts

Adjournment

- if in detention no longer than 15 days
- if released on bail no longer than 3 months

Trial ends

- the trial cannot go on longer than 12 months after it started

Detention on sentence

## Ways of release

Release at Police Station

- no evidence
- caution
- police bail on bond
- bail

Release at Court

- no evidence
- bail

Release at Court

- no evidence
- bail

Release on bail at Court

- time limit exceeded

Release at Court

- acquittal
- discharge
- discontinuance

Release at Court

- bail on bond

Release at Court

- acquitted

Release at Prison

- end of sentence
- parole

## ARREST

This section covers arrest. It details what the Criminal Procedure and Evidence Code (CPEC) says about when an arrest can happen and how an arrest can happen. It also gives the special laws around children and arrest which are set out in the Child Care, Protection and Justice Act (CCPJA).

### When arrest happens

**This section describes how someone can be arrested when they are committing or are suspected of committing an offence. Some offences need a warrant for arrest, others do not.**

#### Legal arrest (Sections 28, 29, 31 and 33 CPEC)

Arrests must happen within the law and police are not allowed to just arrest someone when they feel like it. The purpose of arrest is to bring the person to court.

#### Arrests without a warrant

There is a list of “arrestable offences” that police may arrest someone on without a warrant. These are also known as “cognizable offences.” Arrestable or cognizable offences include common offences like “theft” and “house-breaking”. A full list is on page 26.

People can be arrested if the police have a reasonable suspicion they have committed one of these arrestable offences. “Reasonable suspicion” means more than just a feeling and must be based on facts. For example, a person running away from the scene of a robbery with a stolen item may be arrested on reasonable suspicion of robbery.

It is not only the police who can arrest people. A private person may also arrest someone without a warrant but they must also have reasonable suspicion.

#### Arrests with a warrant

Some offences do need a warrant for arrest, see page 26. This means a warrant for arrest must be issued by a court, before the police can arrest the person named in the warrant. Many of the offences which need a warrant are those which can only be committed by officials, such as “abuse of office”. But the offence of “common assault” also needs a warrant for arrest.

*The Malawi  
Police  
may arrest  
without a  
warrant only  
if they have  
a reasonable  
suspicion  
someone has  
committed  
an offence,  
and only in  
relation to a  
defined list of  
offences.*

### Other circumstances where someone can be arrested

At the moment, the CPEC says a person may also be arrested if they:

- Disturb the peace in the presence of the police officer
- Lie or loiter on a highway, yard or place at night so they are suspected on reasonable grounds of being involved in a crime
- Are about to commit an arrestable offence
- Are apparently hiding with a view to committing an offence in a policing area
- Are an habitual offender
- Are accused of a non-arrestable offence but refuse to give their name and address or lie about these

Some of these “other circumstances” could go against people’s rights in the Malawi Constitution as well as international human rights law. However they have not yet been challenged in court and remain part of Malawi law.



People can be arrested if the police have reasonable suspicion they have committed an offence.

*No force greater than reasonable or necessary is justified in an arrest.*

## How arrest happens

**This section gives the law on how arrest happens. It discusses how people must be informed that they are being arrested and of their right to remain silent. It also makes it clear that arrests must be made without unnecessary force.**

### Making an arrest (Sections 20 and 20A CPEC)

An arrest involves informing the person that they are to be arrested. If the person surrenders to arrest this is enough. If the person does not surrender and resists arrest, reasonable force can be used to make the arrest. But no force greater than reasonable or necessary is justified in an arrest.

The person arrested must be informed of their right to remain silent and of the consequences of making a statement. The CPEC says not informing the person of the right to remain silent does not make the arrest unlawful. But as this right is now a constitutional right, this could be challenged in court.

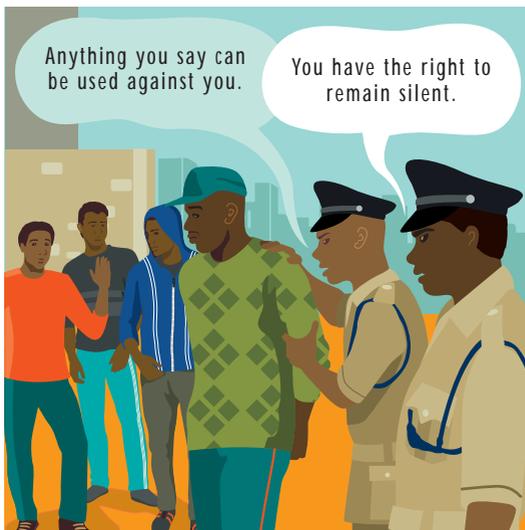
## The right to silence on arrest

The right to remain silent means the person arrested does not have to say anything. They do not have to explain or give any information. The police may not threaten them to try and get them to speak. Nor may they inflict pain to get them to speak. This would be torture.

If an arrested person chooses to speak, then what they say can be used as evidence against them. For example, if an accused makes a statement on arrest which puts him or her at the scene of the crime, then that statement is evidence that he or she was indeed at the scene of the crime.

In the end, it is up to the prosecution to prove the case beyond reasonable doubt. If the prosecution does not have enough evidence to do so, then the accused cannot be found guilty.

The purpose of arrest is to bring a person to court, so that the court can decide if the case must go to trial.



The person arrested must be informed of their right to remain silent.

## Arrest and children

**This section describes how, as set out by the Child Care, Protection and Justice Act (CCPJA), children can only be arrested as a measure of last resort, and children under 10 cannot be arrested at all.**

### Young children not to be arrested (Section 93 CCPJA)

*A child who seems to be younger than 10 years old must not be arrested.*

Children under 10 must not be arrested. Instead they must be referred to a probation officer, or taken to a safety home, or the prosecutor handling the matter must release the child. Paralegals may be able to help find parents.

### Older children to be arrested as a last resort (Section 89 and 90 CCPJA)

*International law and the CCPJA says arrest and imprisonment of children is a measure of last resort. The CCPJA defines children as younger than 16.*

Handcuffs and violence cannot be used on children. Children may not be detained with adults who are not their relatives. As far as possible, a relative or responsible adult must be informed immediately and accompany the child through the process.

*Children cannot be detained with adults who are not their relatives.*

## RELEASE AT THE POLICE STATION

This section sets out the different ways of release at the police station according to the Criminal Procedure and Evidence Code (CPEC). It gives details of the four ways police officers can release people arrested on non-serious offences:

- **Unconditionally, if there is not enough evidence**
- **With a caution, taking the circumstances into account**
- **On bail for non-serious offences**
- **On police bail, if they can't get to court in 48 hours**

This section also explains how anyone arrested and detained **MUST** be brought to court within 48 hours. It also gives the law on detention and release of children as set out in the Child Care, Protection and Justice Act (CCPJA).

### Unconditional release (Section 35(3) CPEC)

*People must be released if there is not enough evidence against them.*

A person arrested on any offence can be released by the *police officer in charge* when after, due inquiry, insufficient evidence is, in the officers opinion, available to go ahead with the case.

### Caution and release (Section 32 A CPEC)

*Police officers can decide to caution and release people arrested for non-serious offences.*

When someone is arrested, it is not always necessary to take the case to trial. A *police officer of the rank sub-inspector and above* can decide to caution and release the arrested person. The caution can be spoken or in writing. This can be done for offences which are not serious. The law doesn't say what defines a serious offence, but says the police officer making the decision must take into account:

- The petty nature of the offence
- The circumstances in which it was committed
- The views of the victim or complainant
- The arrested person's age, physical or mental infirmity, general character and family circumstances

*An arrested person may be cautioned and released at the police station if the offence is not serious.*

### Police bail for non-serious offences (Section 118 CPEC)

*People arrested without a warrant on non-capital offences may be released on police bail. Bail is the conditional release of an arrested person, who must return to court for trial.*

Anyone arrested without a warrant for a non-capital offence who is prepared to give bail at any time while in the custody of a police officer or before a subordinate court, may be released on bail bond with or without sureties. Only the court can require cash bail. There is no police bail for people arrested on capital offences like treason, murder, rape, and robbery with violence. A court can grant bail on these offences.

Guidelines on the granting of police bail are in the Bail Guidelines Act. The conditions must be reasonable. For example, the amount bonded must take into account the circumstances of the case and the person. If the police don't grant bail, they must tell the person the reasons for not giving bail, and tell them they can ask the court for bail.

*There is no police bail for people arrested on capital offences like treason, murder, rape, and robbery with violence.*

### Understanding cash bail and bail on bond

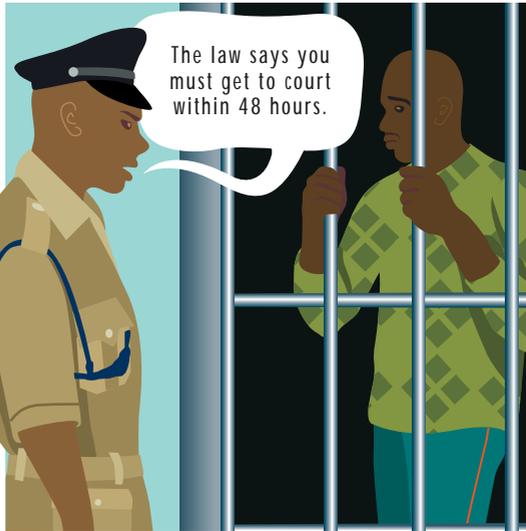
A **bond** is a written promise to pay a specific amount of money if the accused person does not appear in court when told to. A bond can be signed by the accused or by a surety – someone who agrees to pay the money if the accused doesn't turn up in court. In Malawi, bail on bond is usually granted by the police.

**Cash bail** is money which is deposited at the court as a condition of bail. If the accused comes to court when they are supposed to, then the cash bail amount is refunded. Only the courts can set cash bail.

### Police bail on bond for 48 hour time limit (Section 35(1) CPEC)

*If they won't get to court within 48 hours, the police officer in charge MUST make sure people arrested on non-serious offences are released on police bail.*

If the police cannot bring an arrested person before court within 48 hours, the police officer in charge must inquire into the case and release them on a bail bond. People arrested for capital or serious offences cannot be released in this way and must be brought to court. The CPEC says this must be done "as soon as is practical," but the Constitution, a higher law, says this must be within 48 hours.



A person who is arrested and detained must be brought to court within 48 hours.

### **To court within 48 hours (Section 42 Constitution)**

**A person arrested and detained in custody and who is not cautioned and released, released on police bail, or released on insufficient evidence, *must* be brought to a court having jurisdiction as soon as is practical but not later than 48 hours after arrest, unless the 48 hours expires outside court hours, in which case the first day after the expiry of 48 hours, failing which, the Constitution says he **MUST** be released.**

A person arrested on Monday at 11am, who is not otherwise released within 48 hours, must be brought before court before Wednesday at 11am. A person arrested on Thursday night, if it is practical, must be brought before court on Friday; if Friday is not practical, then they must be brought to court on Monday morning, unless the person is otherwise released. The Constitution does not distinguish between offences. Therefore even homicide arrests must be brought to court within 48 hours.

## Release at the police station and children

This section describes how children should be released as soon as possible to their parents or a responsible adult on non-serious offences. Reasons not to release a child are if the child needs to be removed from a situation for their own safety, or if releasing the child would defeat the ends of justice (Sections 95 and 98 CCPJA).

### Caution and release of children (Section 94 CCPJA)

*A police official of rank sub-inspector or higher may caution and release a child arrested on a non-serious offence, if there is evidence to proceed, and the child admits responsibility.*

For the CCPJA “serious” includes offences like rape, murder, housebreaking, robbery and violence. For a full list see page 30. In these cases, a child may get bail or be detained.

### Police bail for children (Section 98 CCPJA)

*If an arrested child cannot be taken to a magistrate immediately and cannot be cautioned and released, the officer in charge must release the child to a parent, guardian or responsible adult, with or without sureties.*

The exception to this is if the charge is one with a penalty of seven or more years. Other reasons not to release a child is if the child needs to be removed from a situation for their own safety, or if releasing the child would defeat the ends of justice. Paying money cannot be a condition of bail for children.

### Detention of children (Section 95 CCPJA)

*No child should be detained while waiting for a finding. The exception is if the Director of Public Prosecutions satisfies the magistrate they will proceed on a charge of a serious offence on which there is sufficient evidence to prosecute.*

Children who are detained, must be detained in a safety home, not prison. The officer in charge of a police station or prosecutor can also argue that detention is not in the best interests of the child and apply to the court for an option other than detention, such as a parenting or hospital order.

*Ordinarily, children should be cautioned and released if they accept responsibility for their actions.*

## RELEASE AT THE COURT

This section summarises what the Criminal Procedure and Evidence Code (CPEC) says about arrest on warrant and why arrested people must get to court within 48 hours. It also gives details of the different ways detainees can be released at the court:

- On bail awaiting trial
- If there is not enough evidence to institute proceedings
- If the prosecution discontinues or withdraws the case
- If the prosecution is absent, unable or unwilling to proceed

### Why must arrested people be at court within 48 hours?

The reason an arrested person must be brought to court within 48 hours is so that the court can decide whether the person should be released or remain in detention on remand while the case against them is investigated. This is particularly important around serious offences. The court must also assess the health of the arrested person and check whether torture or ill-treatment may have taken place.

Many prosecutors think they must be ready to prosecute the person when they first bring them to court. This is not correct and it causes prosecutors to delay bringing people to court. It also happens that arrested people are asked to plead when they first appear in court, in under 48 hours after arrest. This is also not correct. The accused should only be asked to plead when the prosecution is ready to proceed with the trial and able to give the accused all the particulars of the charge.

### Arrest on a warrant (Section 104 CPEC)

*People arrested on a warrant must go to court to be released on bail.*

Usually, a person arrested on a warrant must be taken to the nearest subordinate court. But if the court which issued the warrant is within 30km of the place of arrest, then they must go to the court which issued the warrant. If the person is arrested on a warrant for an offence other than genocide, murder, treason or rape, the magistrate *must* grant bail if the person is willing to meet the conditions of bail set.

### Release on insufficient evidence (Section 83 CPEC)

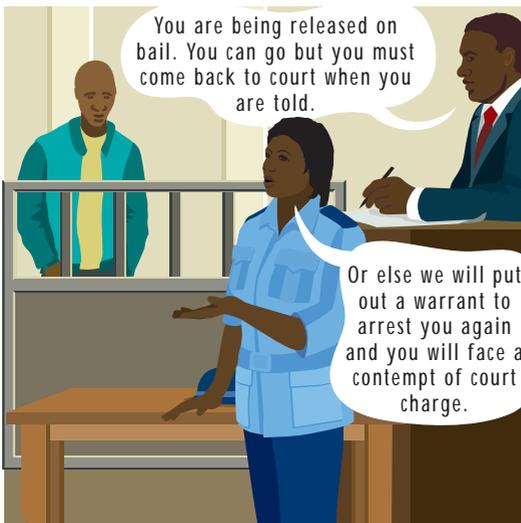
*People arrested without a warrant must be released by the court if there is not enough evidence to institute proceedings against them.*

The magistrate must institute proceedings against a person arrested without a warrant. They do this by drawing up a statement of the offence with which the accused is charged. If there is not enough evidence to proceed with the case, the person must be released.

### Release on court bail (Section 118 CPEC)

*Anyone arrested without a warrant for a non-capital offence who is prepared to give bail at any time when before a subordinate court, may be released on bail bond, or cash bail, with or without sureties by the subordinate court. The High Court may grant bail to any accused on application or on its own initiative.*

People accused of capital offences have to apply to the High Court for bail. The High Court can vary the bail conditions of any subordinate court, and the subordinate court can vary the conditions of police bail.



Bail may be given to someone arrested without a warrant for a non-capital offence.

*If an arrested person is not released, the court must issue a remand warrant which is valid for a maximum of 15 days.*

*Without a valid remand warrant, further detention is illegal.*

*If the prosecutor is absent, unable or unwilling to proceed, the court should discharge the accused.*

### **Discontinuance (Section 77 CPEC)**

*The Director of Public Prosecutions can decide not to continue prosecution. This is called a discontinuance. They must inform the court either orally or in writing, at any stage before judgment.*

If the discontinuance happens after the accused has started his or her defence, then the accused must be acquitted and released. If the discontinuance happens before the accused has begun his or her defence, then the prosecution can bring charges on the same facts, as long as these are brought within 6 months of the discontinuance of the first charge. If the person is in custody when the discontinuance is made, the clerk of the court must give notice in writing to the head of the prison of the discontinuance.

### **Withdrawal (Section 81 CPEC)**

*The public prosecutor can get consent from the court not to continue the prosecution. This is called a withdrawal. The public prosecutor must get the consent of the court to withdraw or they might be instructed by the Director of Public Prosecution. This can happen at any stage before judgment.*

If withdrawal takes place after the accused has started their defence, the accused must be acquitted and released. If the withdrawal occurs before defence, then the prosecution can bring charges on the same facts at a later stage. No time limit applies to bringing a case on the same facts after withdrawal, compared to the 6 month limit for discontinuance.

### **Discharge (Section 247 CPEC)**

*If the prosecutor doesn't turn up or is unable to proceed at trial, the accused must be discharged and released unless there is good reason to adjourn.*

If at the time set for hearing the prosecutor is absent, unable or unwilling to proceed, and the court is satisfied that reasonable notice was given, and unless there is good reason to adjourn, the court *must* discharge the accused. The discharge due to this reason does not prevent the same case being brought in future, as long as it is within 12 months of the date of discharge (Section 247(2) CPEC). This means that the case cannot be brought again if 12 months have gone by after a discharge on this basis.

# PLEADING

This section introduces the different ways the accused can plead to the charges made against them as outlined in the Criminal Procedure and Evidence Code (CPEC). It discusses the accused's choices to plead guilty, not guilty or not to plead at all. It also explains how the accused might enter into plea bargaining.

## Guilty plea (Section 251 CPEC)

*The court must make sure the accused understands the nature and consequences of a guilty plea.*

The court must not accept a guilty plea if the accused does not understand the consequences, only admits the charge with qualification. For example, if the accused admits assaulting someone, but says this was done in self-defence, then this is not a guilty plea as self-defence is a complete defence on the charge of assault.

## Plea bargaining (Section 252A CPEC)

*This happens when the accused and prosecutor agree on a way to resolve the case. It often involves the accused agreeing to plead guilty to a lesser offence or fewer counts.*

Plea bargaining agreements must be approved by the court.

## Not-guilty plea (Sections 252, 253 & 254 CPEC)

*If the accused pleads not guilty or does not plead, the prosecution must present the evidence against the accused. If this is not enough, the accused must be acquitted and released.*

The accused can plead not guilty to the charge or choose not to plead at all. It is up to the prosecution to present evidence against the accused and this could involve hearing witnesses. The court must hear the prosecution's case. If the prosecution's case is not strong enough for the accused to have to make a defence, the court must acquit the accused.

This means the accused need not say anything if the prosecution does not have enough evidence. Anyone representing or advising an accused person should argue at this stage that not enough evidence has been provided by the prosecution.

*It is up to the prosecution to present the evidence and make the case against the accused.*

## COMMENCEMENT AND DURATION OF TRIAL

**This section focuses on what the Criminal Procedure and Evidence Code (CPEC) says about when a trial should start and how long it can last, and how this depends on the kind of offence being tried. The section also covers how long the breaks in a trial can be.**

### Maximum time of detention before trial (Sections 161A – 161J CPEC)

*In the subordinate courts trial must start within 30 days. In the High Court trial must start within 60 days, except for serious crimes when the limit is 90 days. The court should grant bail to the accused after this time is up if the prosecution is still not ready to proceed. These time limits are known as custody time limits.*

A person arrested and not released before trial may only be held in custody for 30 days before the trial begins in the subordinate court or is committed to the High Court. A trial in the High Court must then start within 60 days, unless the offence is treason, murder, genocide, rape, defilement or robbery, in which case it is 90 days. On application, an additional extension of 30 days may be granted. At the expiry of the time limit, the court may on its own or on application of the accused, grant bail to the accused. Once trial begins there is a time limit of one year to finalise the case, unless the offence is punishable by more than three years' imprisonment.

### Adjournments and remand (Section 250 CPEC)

*If the accused is being kept in detention, breaks in the trial can only be for periods of 15 days. If the accused has been released on bail, adjournments can be up to three months.*

An adjournment is when a break is taken from the trial. Where a person is being held in custody, adjournments can't be longer than 15 days. However, at adjournment, the court may decide to release the accused person on bail with or without securities. Where the accused person has been released, the adjournment may be for three months if all the parties agree, otherwise for a maximum of 15 days.

*A person may be in custody for 30 days awaiting a trial in a subordinate court, after which they must get bail.*

### Case duration in the subordinate court (Section 261 CPEC)

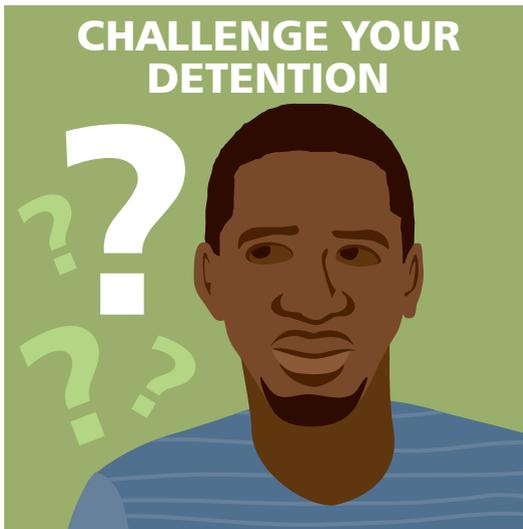
Any case which can be tried in the subordinate court must have started within 12 months of the complaint arising, and must be completed within 12 months of the trial commencing.

The maximum amount of time between the complaint arising and completion of the case is two years.

### Case duration in the High Court (Section 302A CPEC and Section 42 Constitution)

*Any case which can be tried in the High Court must start within 12 months of the complaint, and must be completed within 12 months of the trial starting. The exception is an offence which is punishable by three or more years' imprisonment, or where the accused has absconded (run away), or if the cause of delay is not due to the prosecution.*

The Constitution says that the trial, of any case, no matter how serious, must happen within a reasonable time after charging. What is a reasonable time? This depends on each case. An accused has the right to challenge continued detention, even on serious offences, when they have not been tried for a long time.



s42(1)e

There is a general right to ask for bail on the basis of unreasonable delay.

## THE CONSTITUTION OF MALAWI AND THE BILL OF RIGHTS

This section gives information about the Constitution of Malawi which is the highest law in Malawi. Any laws and actions by government which are not in line with the Constitution are not valid. This section also gives detail of the Bill of Rights in the Malawi Constitution which apply to all people, including those arrested and detained. The section discusses which rights can be limited and which may not. Some rights, such as the right not to be tortured, may not be limited by any other law. Other rights, such as the right to privacy, may be limited or restricted by laws passed by Parliament and during a State of Emergency.

*No one may  
be tortured  
under any  
circumstances.*



s19

Torture is never allowed and the right not to be tortured can not be limited in any way.

## Everyone has these rights

Everyone has the right:

- **To life:** No-one may be arbitrarily deprived of life, but the Constitution says the death penalty is not arbitrary deprivation. The right to life cannot be limited in any other way.
- **To personal liberty:** This right may be limited by law. Laws which allow detention and imprisonment must be reasonable, recognised by international human rights standards, and necessary in an open and democratic society.
- **To human dignity:** This includes during court proceedings and when a penalty imposed by a court is applied. The right includes the right not to be subjected to torture nor to cruel, inhuman and degrading treatment. The Constitution says corporal punishment is against human dignity.
- **Not to be tortured:** This right may not be limited. Torture means any act by a public official intentionally inflicting severe pain or suffering on a person to get information, to punish, or to intimidate or coerce a person, or for any reason based on discrimination. It does not include pain or suffering incidentally caused by lawful punishments.
- **To freedom and security of the person:** This includes the right not to be detained without trial, not to be detained solely for political opinions, and not to be detained for civil debt (owing somebody money). The right not to be imprisoned for civil debt may not be limited.
- **To privacy:** This includes the right not to be subject to searches, seizures of private possessions and interference with private communications. This right may be limited by laws which are reasonable, recognised by international human rights standards, and necessary in an open and democratic society. Any searches and seizures by police must be in line with these laws.

*Conditions of detention must be consistent with human dignity.*

## The rights of arrested people

Arrested people have the right:

- **To be informed**, in a language they understand, that they have the right to remain silent and to be warned of the consequences of making any statement.
- **To be brought before court to be charged** or informed of the reason for further detention, as soon as possible, but not later than 48 hours after the arrest, failing which, to be released. Note that if 48 hours expires outside court hours, then they must appear in court on the first court day after 48 hours.
- **Not to be compelled to make a confession or admission** which could be used in evidence against them.
- **To be segregated** (except in exceptional circumstances) from convicted persons and to be subject to separate treatment appropriate to their status as an un-convicted person.
- **To be released from detention**, with or without bail unless the interests of justice require otherwise.

## The rights of detained people

Detained people, including sentenced people, have the right:

- **To be informed** of the reason for detention promptly, and in a language which they understand.
- **To be detained under conditions consistent with human dignity**, which shall include at least the provision of reading and writing materials, adequate nutrition and medical treatment paid for by the State.
- **To consult confidentially with a legal practitioner** of their choice, to be informed of this right and to be provided with the services of a legal practitioner by the State if it is in the interests of justice.
- **To be given the means and opportunity to communicate and be visited** by family, priest, doctor of choice.
- **To challenge the lawfulness of detention** in person or through a legal practitioner before a court of law; and to be released if the detention is unlawful (also known as the right of *Habeas Corpus*). The right of *Habeas Corpus* may not be limited.

## The rights of accused people

Accused people have the right to a fair trial, which includes the right to:

- **A public trial** before an independent and impartial court of law within a reasonable time after having been charged.
- **To be informed** with sufficient particularity of the charges facing them.
- **To be presumed innocent and to remain silent** during plea proceedings or trial and not to testify during trial.
- **To bring and challenge evidence**, and not to testify against themselves.
- **To be represented by a chosen legal practitioner**, or where it is in the interests of justice, to be provided with a lawyer paid for by the State, and to be informed about this.
- **Not to be convicted of an offence not considered to be a crime when it was committed.**
- **Not to be sentenced to a more severe punishment than applied when the offence was committed.**
- **Not to be prosecuted again if already convicted or acquitted on the same facts.**
- **To appeal** or review of their case in a higher court.
- **To be tried in their language**, or through interpretation paid for by the State.
- **To be sentenced within a reasonable time after conviction.**

*Accused people have the right to a fair trial in their own language.*

## GLOSSARY

### **Acquittal**

An acquittal is a judgement or verdict by a judge or magistrate that a person is not guilty of the crime with which they have been charged.

### **Accused**

The accused is a person who is formally charged or accused of a crime and is on trial for that crime.

### **Adjournment**

Adjournment is the postponement of legal processes to a later date or time.

### **Arrest**

Arrest is the apprehending or detaining of a person for the purposes of legal processes, such as prosecution for alleged or suspected crime.

### **Bail**

Bail is the temporary release of an accused person, usually with conditions, to guarantee his or her appearance in court.

### **Bond**

Bond is a written promise signed by an accused person or surety (one who promises to act in place of another) to pay a specified amount should the accused person named in the document fail to appear in court for the designated criminal proceeding at the date and time specified. In Malawi, bail on bond is usually granted by the police.

### **Capital offence**

A capital offence is one for which a court may impose the penalty of death. Although Malawi has not executed anyone since 2008, the penalty of death is provided for in law for some offences.

### **Cash bail**

Cash bail is a cash amount which is lodged with the court as a condition of bail. If the accused does not abscond and appears in court at the date and time specified, then the cash bail amount is refunded. If the person absconds (runs away), the cash bail amount is forfeited.

### **Clerk of the Court**

A clerk of the court is an officer of the court who is responsible for the clerical and administrative business of the court and is responsible for keeping court records.

### **Conviction**

A conviction is a formal declaration of the judgment or verdict that a person is guilty of the crime with which they have been charged.

**Custody time limits**

These are time limits which determine for how long someone can continue to be held in detention legally before trial commences.

**Discontinuance**

A discontinuance is a decision not to continue prosecution, entered by the Director of Public Prosecutions, by informing the court either orally or in writing, at any stage before judgment.

**Discharge**

This is when a court decides not to continue with a case against an accused and they are released.

**Evidence**

Evidence is information which tends to prove or disprove any fact, and includes oral evidence by witnesses and documentary evidence.

**Felony**

A felony is a serious crime. In Malawi felonies are defined in section 4 of the Penal Code as those offences which are punishable by death or three years' hard labour or more, or as those offences explicitly defined as felonies.

**Habeas Corpus**

*Habeas Corpus* is a Latin phrase which means "may you have the body" and refers to an application to court requiring a detained person to be brought before court without delay to determine whether the detention is legal and whether he or she should continue to be detained.

**High Court**

The High Court of Malawi has the right to hear any matter in Malawi, but it is usually more serious or important cases which are heard in the High Court. Cases heard in the subordinate courts can be appealed in the High Court.

**Issuing Court**

This is the court which issues the warrant in the particular case.

**Judgment**

A judgment is the finding of the court as to whether the accused is guilty or not of the charge with which he or she is charged.

**Jurisdiction**

Jurisdiction is the official power to make legal decisions and judgments. In Malawi the jurisdiction of a court is determined geographically, by the type of court, and by seniority of the magistrate or judge presiding in the court.

**Magistrate**

A magistrate is a judicial officer who makes the decisions in subordinate courts. There are different grades of magistrate depending on their experience.

**Misdemeanour**

A misdemeanour is any crime which is not a **felony**. Misdemeanours are less serious crimes.

**“Own recognisance”**

A ‘recognisance’ is a legal promise used when an accused person is released on bail, without having to lodge a **bond** or produce sureties. “Own recognisance” means the accused person promises to return to court at the date and time specified.

**Paralegal**

A paralegal is a person with some legal training who helps people in detention with legal advice and with practical help, like finding relatives of the detained person.

**Petty offence**

A petty offence is a minor or insignificant offence, which often is punishable only by a fine and often does not have a direct complainant.

**Prosecution**

The prosecution brings the evidence against an accused before the court, so that the court can decide whether the accused is guilty or not. The prosecution has an obligation to help the court to find the truth.

**Reasonable suspicion**

Reasonable suspicion of an offence exists when it is actually suspected that an offence has been committed, and there are objective facts which support that suspicion.

**Remand**

Remand is a return to custody pending trial or for further detention.

**Remand warrant**

A remand warrant is a document issued by a court authorising a person’s further detention in custody before trial.

**Security**

Security is the general term for the cash bail or bond amount which is exchanged for the release of an arrested person as a guarantee of that person’s appearance for trial.

**Sentence**

A sentence is the punishment assigned to a person found guilty by a court, or fixed by law for a particular offence.

**Subordinate court**

A subordinate court is a court in which a magistrate is the judicial officer who makes the decisions. These courts are called “subordinate” because they are subordinate to the High Court. This means the High Court can overrule any subordinate court. All courts in which a magistrate, of whatever grade, makes the decisions, are subordinate to the High Court.

**Surety**

A surety is a person who promises to act in place of another person. In Malawi a condition of bail is often that a surety sign a bond promising to pay a specified amount should the accused person not appear in court at the date and time specified.

**Suspended sentence**

A suspended sentence is a sentence which does not come into effect unless the conditions of suspension are triggered. For example, a sentence of 2 years imprisonment suspended for 5 years on condition the person is not found guilty of another offence, will only come into effect if the person commits and is found guilty of another offence within 5 years of the conviction.

**Torture**

Torture means any act by a public official intentionally inflicting severe pain or suffering on a person for the purposes of obtaining information, for the purposes of punishing, or for the purposes of intimidating or coercing a person, or for any reason based on discrimination. It does not include pain or suffering caused by lawful sanctions.

**Warrant**

A warrant is a document issued by a court authorising the police to make an arrest or conduct a search.

**Withdrawal**

A withdrawal is a decision not to prosecute, taken after the accused was charged, with the agreement of the court.

## LIST OF OFFENCES

This section gives a full list of offences found in Schedule 1 of the Criminal Procedure and Evidence Code. It divides up the offences into those which don't need a warrant for an arrest and those for which a warrant is needed for arrest to take place. There is also a list of offences that children might commit that are considered serious.

TREASON AND OTHER OFFENCES AGAINST THE REPUBLIC	
WARRANT	NO WARRANT
Aiding in acts of mutiny Inducing desertion Permitting prisoner of war to escape Importing prohibited publications Possessing prohibited publications Seditious offences Possessing seditious publications Using or attempting to use confiscated printing machine Printing or publishing a newspaper in contravention of an order made under section 51(2) Publishing false reports Communication of false statements published generally outside Malawi	Treason Misprision of treason Promoting of war etc. against groups Inciting to mutiny Aiding prisoner of war to escape Failing to deliver prohibited publications to the police Administering or taking oath to commit capital offence Administering or taking other oaths Compelling another person to take an oath Being present and consenting to the administration of an oath Unlawful drilling Being unlawfully drilled Publishing false reports
OFFENCES AFFECTING RELATIONS WITH FOREIGN STATES AND EXTERNAL TRANQUILITY	
WARRANT	NO WARRANT
Defamation of foreign dignitaries Foreign enlistment	Piracy Managing unlawful society Being member of an unlawful society
ASSEMBLIES, RIOTS AND OTHER OFFENCES AGAINST PUBLIC TRANQUILITY	
WARRANT	NO WARRANT
Challenging to fight in a duel	Unlawful assembly Riot Rioting after proclamation Obstructing proclamation Rioters destroying buildings Rioters damaging buildings Rioters preventing sailing of ship Prohibition of carrying offensive weapons without lawful authority or reasonable excuse Forcible entry Forcible detainer Committing affray Threatening violence Proposing violence at assemblies Intimidation Assembling for purpose of smuggling

**CORRUPTION AND THE ABUSE OF OFFICE**

<b>WARRANT</b>	<b>NO WARRANT</b>
Official corruption Extortion by public officers Receiving property to show favour Officer discharging duties in respect of property in which he has a special interest False claims by officials Abuse of office	False certificates by public officers Unauthorised administration of oaths False assumption of authority Impersonating public officers Threat of injury to persons employed in public service

**OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE**

<b>WARRANT</b>	<b>NO WARRANT</b>
Official corruption Extortion by public officers Receiving property to show favour Officer discharging duties in respect of property in which he has a special interest False claims by officials Abuse of office False statements by interpreters Perjury or subornation of perjury Fabricating of evidence False swearing Deceiving witnesses Destroying evidence Conspiring to defeat justice and interference with witnesses Compounding penal actions Compounding felonies Advertising for stolen property Offences relating to judicial proceedings	None

**RESCUES, ESCAPES AND OBSTRUCTING OFFICERS OF COURTS OF LAW**

<b>WARRANT</b>	<b>NO WARRANT</b>
Frauds and breaches of trust by public officers Neglect of official duty Disobedience of statutory duty	Rescue, if person rescued is under sentence of death or imprisonment for life or charged with offence punishable with death or imprisonment for life Rescue, if person rescued is imprisoned on a charge or under sentence for any other offence Escape Permitting prisoners to escape Aiding prisoners to escape Removal of property under lawful seizure Obstructing court officers False information to person employed in public service Soliciting persons to break the law Soliciting public officers etc. to fail to carry out their duties

**OFFENCES AGAINST MORALITY**

<b>WARRANT</b>	<b>NO WARRANT</b>
Male person living on earnings of prostitution or persistently soliciting	Rape Attempted rape Abduction Abduction of girl under 16 years Indecent assault on females Insulting the modesty of a woman Indecent practices between females Defilement of girl under 16 years Attempted defilement of girl under 16 years Defilement of an idiot or imbecile Procuration Procuring defilement by threats or fraud or administering drugs Householder permitting defilement of girl under 16 years on his premises Detention with intent or in brothel Woman aiding etc. for gain prostitution of another woman Keeping a brothel Promoting prostitution etc. Conspiracy to defile Attempting to procure abortion Woman attempting to procure her own abortion Supplying drugs or instruments to procure abortion Unnatural offences Attempt to commit unnatural offences Indecent assault on boys under 14 years Indecent assault against idiots and imbeciles Indecent practices between males Incest by males if female person is under the age of sixteen years Attempt to commit incest Incest by females

**OFFENCES RELATING TO MARRIAGE AND DOMESTIC OBLIGATIONS**

<b>WARRANT</b>	<b>NO WARRANT</b>
Fraudulent pretence of marriage Bigamy Dishonestly or fraudulently going through ceremony of marriage Desertion of children Neglecting to provide food etc. for children Master not providing for servants or apprentices	Child stealing Trafficking in obscene publications

**NUISANCE OFFENCES AGAINST HEALTH AND CONVENIENCE**

WARRANT	NO WARRANT
Keeping common gaming house Being found in common gaming house Carrying on lottery Printing or publishing advertisement relating to a lottery Organising, managing or conducting pools Chain letters Conduct likely to lead to breach of the peace Use of insulting language Nuisances by drunken persons Wearing uniform without authority Bringing contempt on uniform Importing or selling uniform without authority Doing any act likely to spread infection or dangerous disease Adulteration of food or drink intended for sale Importation of adulterated food or drinks Selling or offering for sale, noxious food or drink Adulteration of drugs intended for sale Selling adulterated drugs Fouling water of public spring or reservoir Carrying on offensive trade Making the atmosphere noxious to health	Being an idle or disorderly person Found drunk and incapable Riotous or disorderly behaviour or in possession of a firearm while drunk Being a rogue and vagabond

**OFFENCES RELATING TO RELIGION**

WARRANT	NO WARRANT
Uttering words with intent to wound religious feelings	Insult to religion of any class Disturbing religious assemblies Trespassing on burial places Hindering burial of dead body, etc.

**DEFAMATION**

WARRANT	NO WARRANT
Libel	None

**MURDER AND MANSLAUGHTER; GENOCIDE; SUICIDE**

WARRANT	NO WARRANT
None	Manslaughter Murder Genocide Attempted murder Attempted murder by convict Being accessory after the fact to murder Sending written threat to murder Conspiracy to murder Aiding suicide Attempted suicide Infanticide Killing unborn child Concealing the birth of a child Abandonment of child at birth

**OFFENCES ENDANGERING LIFE OR HEALTH; OFFENCES ENDANGERING THE ENVIRONMENT**

WARRANT	NO WARRANT
Failure to provide necessaries of life	Disabling in order to commit felony or misdemeanour Stupefying in order to commit felony or misdemeanour Acts intended to cause grievous harm or to prevent arrest Preventing escape from wreck Intentionally endangering safety of persons travelling by railway Doing grievous harm Attempting to injure by explosive substances Administering poison with intent to harm Wounding and similar acts Offences endangering the environment

**CRIMINAL RECKLESSNESS AND NEGLIGENCE**

WARRANT	NO WARRANT
None	Rash and negligent acts Other negligent acts causing harm Dealing in poisonous substances in negligent manner Endangering safety of persons travelling by railway Exhibiting false light, mark or buoy Conveying of person by water for hire in unsafe or overloaded vessel Causing danger of obstruction in public way or line in navigation

**ASSAULTS**

WARRANT	NO WARRANT
Common assault	Assault occasioning actual bodily harm Assaulting person protecting wreck Various assaults

**OFFENCES AGAINST LIBERTY**

WARRANT	NO WARRANT
None	Kidnapping Kidnapping or abducting in order to murder a person Kidnapping or abducting with intent to confine a person Kidnapping or abducting in order to subject person to grievous hurt, slavery etc. Wrongful concealing or keeping in confinement of kidnapped or abducted person Kidnapping or abducting child under 14 years with intent to steal from its person Punishment for wrongful confinement Buying or disposing of any person as a slave Habitually dealing in slaves Unlawful compulsory labour

**HOUSEBREAKING AND SIMILAR OFFENCES**

WARRANT	NO WARRANT
Unauthorised user of land or premises Damaging or unlawfully removing detained aircraft, vessel or vehicle	Entering dwelling-house with intent to commit felony Breaking into building and committing felony Breaking into building with intent to commit felony Being found armed, etc., with intent to commit felony, if offender has been previously convicted of a felony relating to property Criminal trespass, if the property upon which offence committed is building used as human dwelling or as a place of worship or as a place for custody of property

**OFFENCES UNDER OTHER LAWS**

<b>WARRANT</b>	<b>NO WARRANT</b>
Counterfeiting, etc. trademark Corrupt practices Secret commissions on government contracts Neglecting to prevent commission or completion of felony Conspiracy to effect certain specified purposes Being accessory after the fact to a misdemeanour Charging persons with witchcraft Employment of witch finder Pretending witchcraft Using charms, lots etc.	Trial by prohibited ordeal (Witchcraft Act) Chiefs, headmen permitting trial by prohibited ordeal (Witchcraft Act)

**THEFT AND STEALING OFFENCES; OFFENCES ALLIED TO STEALING; RECEIVING STOLEN PROPERTY OFFENCES**

<b>WARRANT</b>	<b>NO WARRANT</b>
	All

**ROBBERY AND EXTORTION OFFENCES**

<b>WARRANT</b>	<b>NO WARRANT</b>
	All

**FALSE PRETENCE OFFENCES**

<b>WARRANT</b>	<b>NO WARRANT</b>
	All

**FRAUDS BY TRUSTEES AND PERSONS ON POSITION OF TRUST; FALSE ACCOUNTING OFFENCES**

<b>WARRANT</b>	<b>NO WARRANT</b>
	All

**FORGERY OFFENCES**

<b>WARRANT</b>	<b>NO WARRANT</b>
	All

**INJURY TO PROPERTY OFFENCES**

<b>WARRANT</b>	<b>NO WARRANT</b>
	All

**OFFENCES RELATING TO COIN BANK AND CURRENCY NOTES**

<b>WARRANT</b>	<b>NO WARRANT</b>
	All

**PERSONATION OFFENCES**

**WARRANT**

**NO WARRANT**

All

**ATTEMPTS TO COMMIT OFFENCES WHICH ARE ARRESTABLE**

**WARRANT**

**NO WARRANT**

All

**CONSPIRACIES TO COMMIT OFFENCES WHICH ARE ARRESTABLE**

**WARRANT**

**NO WARRANT**

All

**ACCESSORIES AFTER THE FACT TO FELONIES WHICH ARE ARRESTABLE, BUT NOT ACCESSORY**

**WARRANT**

**NO WARRANT**

All

**AFTER THE FACT TO ANY MISDEMEANOURS**

**WARRANT**

**NO WARRANT**

All

**ALL HIJACKING OFFENCES**

**WARRANT**

**NO WARRANT**

All

## Serious offences children (CPPJA)

Rape

Attempted rape

Abduction

Defilement of a girl and attempted defilement

Defilement of an idiot or imbecile

Manslaughter

Murder

Attempted murder

Infanticide

Killing an unborn child

Disabling in order to commit a felony or misdemeanour

Stupefying by overpowering drug or thing with intent to commit a felony  
or misdemeanour

Robbery with violence

Attempted robbery with violence

Housebreaking and burglary

Arson

Offences against aircraft

Offences against motor vehicles trains etc.

Conspiracy to murder

Aiding suicide

Acts intended to cause grievous harm or prevent arrest

Preventing escape from a wreck

Maliciously administering poison with intent to harm

Intentionally endangering safety of persons travelling by railway

Accessory after the fact to murder

## WHAT DOES THE LAW SAY ABOUT ARREST AND DETENTION IN MALAWI?

The Pocket Guide  
to Arrest and Detention  
in Malawi is for detainees, para legals,  
police officers, court clerks, prosecutors  
and magistrates.

The guide gives information on what  
the law says about arrest, detention and  
release in Malawi.

The guide also explains  
the rights of people in Malawi, including  
those who have been arrested, detained  
and accused.