

'Spy machine' has great potential of abuse, says court

 By Gregory Gondwe: @Kalipochi

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The High Court in Blantyre on Friday, 21 September 2012, ruled that the Consolidated ICT Regulatory Management Systems (CIRMS) dubbed the '[spy machine](#)' that Malawi Communication Regulatory Authority (MACRA) wanted to implement within the telecommunication circuit has the potential to be abused as it has the capability to eavesdrop into people's conversations, emails and text messages.

High Court Judge, Justice Healy Potani ruled that MACRA has no mandate, powers and jurisdiction to implement the rolling out of the 'spy machine' and therefore prohibited and restrained the regulating body from implementing putting in place the system.

MACRA has since said it is going to appeal against the ruling.

The reason for appealing is...

Speaking to the local media after the ruling, director of Legal Services, James Kaphale said the reason for appealing is to prove that the judgement is based on illogical grounds.

"The capability of the machine to listen into a phone conversation is not all there. The fact that we have a gun does not mean that we intend to shoot people with it," argued Kaphale.

He however said, in the event that MACRA has lost the appeal, MACRA's board will consult with government on what to do with the machine.

Citizens challenge MACRA

Two concerned citizens, Eric Sabwera and Hophmally Makande, went to court to challenge the use of the machine by MACRA to monitor and analyse all telecommunication traffic.

In their submission, they also challenged the directive by MACRA to all telecommunication operators to provide it with subscribers call detail records.

The two were of the view that the decision by MACRA was unreasonable, not backed by any law and would infringe upon their constitutional right to privacy.

MACRA fails to satisfy requirements

Justice Potani established that MACRA has failed to satisfy six necessary requirements: that the operation must be prescribed by law; reasonable; recognised by international human rights standards; necessary in an open and democratic society; of general application; and must not negate the essential content of the right to privacy.

The judge said he had very serious doubts that MACRA would really need caller details in order to monitor performance, quality of service or indeed revenue generated in counter argument to MACRA's submission that as a regulator, it has the right to monitor the performance of telecommunications service providers particularly on quality, efficiency and reliability of service and revenue generated.

The potential to be abused

The judge said since the machine was going to be used to access all call subscriber details, including what numbers a mobile phone had called, this is an invasion of people's privacy.

It is at this point that the judge said the machine had the potential to be abused as it had the capability to eavesdrop into people's conversations, emails and text messages.

In October last year the High Court in Blantyre also [stopped MACRA from switching on the machine](#).

At that time, just as the case with the latest ruling, the court gave an order to government's telecommunication regulating arm, restraining it from getting Call Details Records from the country's telephone operators.

Politicians and human rights activists led the masses challenged implementation of the 'spy machine' which at that time MACRA was planning to silently switch on amidst vehement protest from telecommunication companies and subscribers.

A violation of human rights, privacy and confidentiality

Lawyer Ralph Kasambara, now Justice Minister and attorney general, was hired to challenge the rolling-out of the machine.

He had argued at that time that the rolling-out of the 'spy machine' was not justifiable as it is a violation of human rights, privacy and confidentiality.

MACRA reportedly bought the machine from a US-based company Agilis International at US\$6.8 million.

From the onset, the project met resistance from telecommunication operators in Malawi who said this will violate and compromise obligation and duty they have to their subscribers. It was also said to be against the laws of Malawi.

Section 21 Subsection C of the Malawi Constitution states that 'Every person shall have the right to personal privacy, which shall include the right not to be subject to interference with private communications including mail and all forms of telecommunications.'

Accessing customers call detail records

The information that MACRA had directed all the mobile companies in the country namely Malawi Telecommunication Limited (MTL), Telecom Networks of Malawi (TNM), Airtel Malawi and Access Communications Limited (ACL) to provide it with was customers call detail records.

The said records included information on subscribers' details on who called which number, details of the calls received, time and duration of the call, location where calls were made or received, type of handset used and also SMS sent or received and other subscriber information.

In their submission during the hearing MACRA argued that while the machine was capable of listening into people's conversation, the regulator had no intentions to use it for that purpose.

MACRA said it only wanted information on calling numbers, dialled numbers, duration of calls, devices used and the call junction and location of the caller.

"The impression and implication I get is that the machine could be set up in such a manner that would make it capable of tapping the content of telecommunications traffic. One would tend to wonder, justifiably with suspicion, why MACRA would opt to use a system or gadget that has great potential of abuse," the judge said.

He also agreed with an earlier ruling last year under commercial case in similar case contesting the legality of the machine which the court also ruled against MACRA.

Time to put the matter to rest?

"I would tend to agree that it is unreasonable and not necessary in an open and democratic society for subscribers call details to be laid bare wholesale," he said.

President of Association of Telecom Operators, Saulos Chilima told *Malawi News* that with such a ruling it was time to put the matter to rest and move on.

"As an industry, we have been saying all along that this machine does not add any value to anyone. We hope this judgement will put the matter to rest and that moves are made to recover the hard-earned millions of American dollars paid out as deposit for the machine," Chilima, Airtel Malawi's managing director, is quoted as saying.

The matter of this machine does not look like a government agenda to operators according to Chilima.

"Why should we waste US\$6.8 million particularly at this time of economic squeeze and pressure on expenditure to bring such a machine? If I were MACRA, I would comply with the ruling, bury this thing and move on," argued Chilima.

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