

Mapping Digital Surveillance and Privacy Concerns in Malawi



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A report compiled by

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List of Acronyms

ANR	National Intelligence Agency
ACCSPDP	African Convention on Cyber Security and Personal Data Protection.
CDMA	Code Division Multiple Access
CIPESA	The Collaboration on ICT Policy for East and Southern Africa
CIRMS	Consolidated ICT Regulatory Management System
COMESA	Common Market for Eastern and Southern Africa
CSOs	Civil Society Organisations
GoM	Government of Malawi
GPRS	General Packet Radio Service
GSM	Global System for Mobiles
HDI	Human Development Index
ICCPR	International Convention on Civil and Political Rights
ICT	Information and Communication Technology
KYC	Know Your Customer
MACRA	Malawi Communications Regulatory Authority
MEC	Malawi Electoral Commission
MPTC	Malawi Post and Telecommunication Corporation
MRA	Malawi Revenue Authority
NRB	National Registration Bureau
NRIS	National Registration and Identification System
PI	Privacy International
SADC	Southern Africa Development Community
SDGs	Sustainable Development Goals
TNM	Telekom Networks Malawi
UDHR	Universal Declaration of Human Rights
UNHRC	United Nations Human Rights Council

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Summary

This study maps digital surveillance and privacy concerns in Malawi. It concentrates on the potential and real human rights implications of the country's privacy and data protection legislation, especially in view of implementation of some data centralisation programmes in the absence of robust data protection laws.

The report has established that Malawi's information and communication technology (ICT) sector only opened up in the mid to late 1990s, having been heavily controlled during 31 years of dictatorship. Having emerged from the history of strict state control, the sector is still small, characterised by low penetration and access to ICTs. For instance, only 14.6% of Malawians have access to the internet and fewer than 40% own a mobile phone. This is largely attributed to low levels of income and the high cost of both smartphones and internet data for the majority of the population.

The low ICT penetration and usage means that the majority of Malawi's 17.5 million people cannot exercise their freedoms online or take part in the emerging digital economies which rely on ICT. The lack of access to the internet and ICTs means that personal privacy, data protection and surveillance, especially in relation to electronic communication, are not things that most Malawians are concerned about. Further, although privacy is provided for in the Constitution of the Republic of Malawi, the country lacks supportive legislation. Although the Communications Act, No. 34 of 2016 and the Electronic Transaction and Cyber Security Act, No. 33 of 2016 have provisions for data protection, these laws are insufficient as they are narrowly focused on the implementation and operationalisation of these specific instruments.

In 2017 the Malawian Government implemented the national digital ID programme. The National Registration and Identification System (NRIS) is used by a number of government agencies, replacing all the previous ID programmes. All public and private institutions now only accept the national ID card as a form of identification. This includes mandatory SIM card registration, which was implemented in 2018. Thus, the national ID has paved the way for data centralisation in the absence of robust and overarching data protection legislation, thus exposing people to possible surveillance.

This study used qualitative research methods, combining document and policy analysis as research methods. Respectively, document analysis is a systematic procedure for reviewing or evaluating documents and policy analysis provides a way for understanding how and why governments enact certain policies, and their effects. The study also interviewed key stakeholders, including civil society, media practitioners and IT experts.

Introduction and background to the study

Although still relatively small, Malawi's ICT sector has grown steadily in the last 20 years. The growth is due to the telecommunication sector reforms of the 1990s following the country's transition from one party dictatorship to a pluralistic multiparty system of government.¹ During 30 years of Hastings Kamuzu Banda's dictatorship, the sector was characterised by heavy state control and an absence of commercial and private investment; the state-owned Malawi Post and Telecommunication Corporation (MPTC) was the only telecommunications operator in the country. The state monopoly and the sector's poor performance were among key issues for the telecommunication reforms.² One of the main outcomes of the reforms was the enactment of the Communications Act No. of 41 of 1998, which consolidated previous legislation – the Malawi Posts and Telecommunications Act, No. 29 of 1994, the Malawi Broadcasting Corporation Act, Cap. 20:01. and the Radio-communications Act, Cap. 68:02.³

The Communications Act, 1998 established the Malawi Communications Regulatory Authority (MACRA), as an independent regulator to take over the functions of the disbanded MPTC. However, MACRA's independence has only been on paper; in practice the regulator is subjected to political intervention. In his study, Juwayeyi (2017)⁴ established that “the respective provisions in the Communications Act, 1998, that authorise the State President to appoint members to serve on the Authority and authorise the roles that members of the executive branch of government have to play in

the internal organization, administration, financial affairs, and regulatory activities of the Authority, cumulatively, undermine both the formal and informal independence of the authority”.

Although Freedom House has defined the country's ICT sector as competitive,⁵ Malawi's ICT sector still lags behind its regional neighbours. For instance, internet penetration remains below 15%, mobile phone penetration is below 40%. and landline usage is below 1%. The mobile phone market is characterised by the duopoly of Telekom Networks Malawi Limited (TNM) and Airtel Malawi Limited – they have a market share of 99.6% between them. In 2013, the Government of Malawi (GoM) initiated a National ICT Policy aimed at offering policy direction in Malawi's attempts to “putting into place [an] appropriate institutional, regulatory and legal framework that should effectively support successful deployment and utilisation of ICT in all sectors of the economy”.⁶ The policy is yet to be implemented; no reasons for this have been provided but Makoza and Chigona found that barriers to the ICT policy implementation included:

*... inadequate resources, operational problems and differences in interests among policy actors. Process barriers were the lack of legal frameworks and political stability and legitimate policy choices. Political constraints were lack of policy championing, conflicts in goals and values assigned to policy priorities; and government popularity. The study provides insights on ICT policy implementation barriers in the context of a low-income status country.*⁷

¹ Clarke, G., Gebreab, F.A. & Mgombelo, H.R. (2003). Telecommunications Reform in Malawi. Available at: <https://ssrn.com/abstract=636398>

² Ibid.

³ Article 19 (2003). Memorandum on the Malawi Communications Act 1998, Article 19. London. Available at: <https://www.refworld.org/pdfid/4753d3c60.pdf>

⁴ Murendehle M. Juwayeyi (2017). The Malawi Communications Regulatory Authority: Issues of De Jure and De Facto Independence, *Communication Law and Policy*, 22:2, 213-253, DOI: 10.1080/10811680.2017.1290989

⁵ Freedom House (2019). Freedom on the Net: Malawi. Available at: <https://freedomhouse.org/country/malawi/freedom-net/2021>

⁶ The Government of Malawi (2013). National ICT Policy: An ICT Led Malawi. Available at: <https://www.macra.org.mw/?wpdmpromo=malawi-ict-policy-2013>

⁷ Makoza, F. & Chigona, W. (2016). Analysing barriers in the implementation of national ICT policy: Case of Malawi,” 2016 *IST-Africa Week Conference*, 2016, pp. 1-12, doi: 10.1109/ISTAFRICA.2016.7530654.

Part of these problems were also explained by Kunyenje and Chigona⁸ whose study established that among the problems with policy implementation in most African countries is that policies are mostly initiated and funded by donors. African governments, which may not fully appreciate the policies, have the duty of implementing the policies.

Unlike the ICT policy which has not been implemented, between 2016 and 2018 the GoM implemented legislation that has adverse effects on human and digital rights in the country. In 2017 the government implemented a national digital ID programme which uses a National Registration and Identification System (NRIS). Since its implementation, the NRIS is now used by a number of government ministries and departments, replacing previously isolated identification programmes, including driver's license, passport and voter registration cards.⁹ Although it is not provided for in the law, the Malawi Electoral Commission (MEC) implemented the use of a national digital ID card as the only acceptable form of identification since the country's 2019 tripartite elections. The national ID card has also become the only form of identification required by Malawi Revenue Authority (MRA) to register taxpayers; likewise, the immigration department also uses the ID only to verify applicants for passport and other travel documents. Banks are also using the ID card to verify existing customers, through Know Your Customer (KYC) exercise in which customers must identify themselves using the ID card, and to register new customers.

In 2018 the GoM implemented mandatory SIM card registration of which the national ID card has also become the only required form identification

to register the SIM card.¹⁰ This is the case although section 92(a)(ii) of the Communications Act, No. 34 of 2016 provides that any other document that proves the identity of the subscriber can be used.¹¹ The Communication Act, No. 34 of 2016 does not specify the reasons why the SIM card registration is necessary but the Malawi Communications Regulatory Authority (MACRA) has provided six reasons¹² why the registration is important, as follows:

- To prevent SIM boxing;¹³
- To help recover stolen phones;
- For protection from hate texts, threats and incitation of violence;
- To create a conducive environment for all phone users and instil discipline in those that abuse phones;
- To help law enforces track-down criminals who use phones for illegal activities; and
- To curb fraud and theft that occurs through the use of phones.

These are indeed real issues that need addressing but it is also insufficient to have it as a justification for making the SIM card registration mandatory. It would be enough to inform people to allow them to make informed decisions on whether to register or not. In fact, media reports suggest that SIM card-related crimes, such as mobile money are on the

⁸ Gregory Kunyenje & Wallace Chigona (2019). External Actors in Forming National ICT Policy in Malawi: A case for Concern In Low-Income Countries?, *The African Journal of Information Systems*, 11(1); Article 2 <https://digitalcommons.kennesaw.edu/ajis/vol11/iss1/2>

⁹ Malik, T. (2020). Malawi's journey towards transformation: Lessons from its National ID Project. Available at: <https://www.cgdev.org/sites/default/files/malawi-journey-towards-transformation.pdf>

¹⁰ Sangala, T. (2018). MACRA sets new SIM card registration deadlines, *The Times Group*. Available at: <https://times.mw/macra-sets-new-sim-card-registration-deadlines/>

¹¹ Malawi Government Gazette (2016). Communications Act, No. 34 of 2016. Available for download at: <https://www.macra.org.mw/?wpdmpo=communications-act-2016>

¹² Why is it important to have my sim card registered, MACRA. Available at: https://www.macra.org.mw/?page_id=9582

¹³ What is SIM boxing and why you should care? <https://androidkenya.com/2019/03/sim-boxing/>

increase in the country^{14,15}. As Wanyama (2018)¹⁶ noted, in 2013 the Government of Mexico repealed its SIM card registration legislation “after a policy assessment showed that it had not helped with the prevention, investigation and/or prosecution of associated crimes.” Wanyama asserts that governments should carefully reconcile between interests of the state and personal data and privacy rights.

For Malawi, both the mandatory SIM card registration and mandatory biometric national ID registration have been implemented in the absence of supportive legislation. The country has a Data Protection Bill, 2021, which remains in draft form.

14 The Times Group (2021). Prisons struggle on mobile money fraud, *The Times Group*. Available at: <https://times.mw/prisons-struggle-on-mobile-money-fraud/>

15 Magombo, A. (2021). Malawi: Zomba Prison harbouring majority of mobile money fraudsters: <https://allafrica.com/stories/202108270209.html>

16 Wanyama, E. (2018). The stampede for SIM card registration: A major question for Africa. Available at: <https://cipesa.org/2018/04/the-stampede-for-sim-card-registration-a-major-question-for-africa/>

The legislation gap has serious implications on personal privacy, which is protected under section 21 of the constitution of Malawi. Privacy International (PI) defines as a “fundamental right, essential to autonomy and the protection of human dignity, serving as the foundation upon which many other human rights are built”.¹⁷ PI considers privacy as a critical human right as it gives citizens a necessary “space to be ourselves without judgement, allows us to think freely without discrimination, and is an important element of giving us control over who knows what about us”.¹⁸ Thus, privacy paves way for full realisation of other fundamental rights and freedoms, such as freedom of expression.

It is from this perspective that this paper seeks to map digital surveillance and privacy concerns in Malawi. The study will pay particular attention to potential human rights implications of the data centralisation in absence of robust data protection.

17 Privacy International (2017). What is Privacy? Available at: <https://privacyinternational.org/explainer/56/what-privacy>

18 Privacy International (2017). What is Privacy? Available at: <https://privacyinternational.org/explainer/56/what-privacy>

Methodology

This study uses qualitative research methods. It includes a literature review, as a way of generating an understanding of the current debates and issues on privacy, data protection and digital surveillance in Malawi. As part of data collection, key informants and stakeholders’ interviews were conducted, in addition to documentary and policy analysis. Document analysis is a systematic procedure for reviewing or evaluating documents,

both printed and electronic material¹⁹ and policy analysis provides a way for understanding how and why governments enact certain policies, and their effects.²⁰

19 Bowen, Glenn A. (2009). Document Analysis as a Qualitative Research Method’, *Qualitative Research Journal*, 9(2): 27-40. DOI 10.3316/QRJ0902027.

20 Browne J, Coffey B, Cook K, Meiklejohn S, Palermo C. (2019). A guide to policy analysis as a research method. *Health Promot Int.* 1;34(5):1032-1044. doi: 10.1093/heapro/day052.

Country context

This section will provide the country's political and telecommunication contexts and background. This is deemed a necessary foreground to understanding the present context.

Political context

Malawi borders Zambia to the west, Tanzania to the north and northeast and Mozambique to the east, south and southwest. According to the 2018 Malawi Population and Housing Census, Malawi has a population of 17.5 million people.²¹ The country was a British protectorate from 1891 to 1963 when it gained independence, becoming a republic in 1964. The country's founding president Hasting Kamuzu Banda held absolute power for 31 years before both internal and external pressures forced him to call for a referendum, allowing Malawians to decide whether to continue as a one-party dictatorship or become a multiparty democracy.²² Malawians voted in favour of multiparty democracy in 1993 and Banda lost the subsequent general elections in 1994. Malawi has a 5-year electoral cycle, electing president, members of parliament and local government councillors. The country is defined by the Economist Political Unit's 2020 Democracy Index as a "hybrid democracy".²³

Economic landscape

Malawi is among the least developed countries in the world, despite being politically stable and without any civil conflicts. Malawi ranks 174 on the United Nation Development Programme's (UNDP) Human Development Index (HDI), which is "a summary measure of average achievement in key dimensions of human development." According to the UNDP, Malawi's ranking is below the average of countries in the low human development group and below the average for countries in sub-Saharan Africa.²⁴ Agriculture is the mainstay of the country's economy and the primary economic activity for over 80% of Malawi's population.²⁵ Tobacco is the country's chief export product, while cotton, tea, sugar and coffee are also grown for export and consumption. Roughly 83%²⁶ of Malawians live in rural areas. The country's GDP currently stands at 11.962 billion USD.²⁷ Agriculture contributes 28% of the national GDP while manufacturing contributes 10.4% and industry contributes 15.9%, respectively.²⁸

²¹ National Statistics Office of Malawi, 2018 Malawi Population and Housing Census. Available at: http://www.nsomalawi.mw/index.php%3Foption%3Dcom_content%26view%3Darticle%26id%3D226:2018-malawi-population-and-housing-census%26catid%2E%80%89%3D%2E%80%898:reports%26Itemid%2E%80%89%3D%2E%80%896

²² Malawi: Between the Referendum and the Elections. Available at: <http://www.refworld.org/docid/3ae6a6be8.html>

²³ The Economist Intelligence Unit, Democracy Index 2020: In Sickness and in Health? Available at: https://pages.eiu.com/rs/753-RIQ-438/images/democracy-index-2020.pdf?mkt_tok=NzUzLVJJUS00MzgAAAF_P1EkdCDH9MqSEUiyhXTFiLspZTWkiEN042ME7Bzqub-lzcY7Nrs-S2O7-0WqSkjCMB7OZIFG4FQ5caX_bhR99TjYwz1g1pEeQt80HFV7FXkNQ

²⁴ UNDP, Briefing Note for Countries on the 20th Human Development Report. Available at: http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/MWI.pdf

²⁵ Malawi economy and industry. Available at: <http://www.our-africa.org/malawi/economy-industry>

²⁶ Malawi: Rural Population (% of the Total Population). Available at: <http://data.worldbank.org/indicator/SP.RUR.TOTL.ZS?locations=MW>

²⁷ Malawi Gross Domestic Product. Available at: <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=MW>

²⁸ Agriculture, Value Added (% of GDP). Available at: <http://data.worldbank.org/indicator/NV.AGR.TOTL.ZS>

Telecommunication landscape

Information Communication Technologies

MACRA is Malawi's telecommunication regulator, as established by part II of the Communications Act, No. 41 of 1998. The regulator makes regulations and policies governing Malawi's communications sector; issue licenses to providers of communications services; monitor and enforce compliance with rules, regulations and policies; hear and decide on disputes and complaints brought by industry or members of the general public; plan, control and manage the frequency spectrum efficiently in order to maximize frequency availability; and protect the interests of consumers, purchasers and other users of communication services from unfair business practices, poor quality services and harmful or inferior products.

However, MACRA has been criticised for failure to implement some of its core mandate. The failure is mainly attributed to political interference, which undermines the regulator's autonomy. This criticism is warranted and the current Minister of Information, Gospel Kazako, has previously admitted this, although indirectly; after assuming office in July 2021, the information minister told local media²⁹ that his first job would be making sure that MACRA operated independently with favouring the government (in Malawi the ruling party is a de facto government). Likewise, MISA Malawi has also publicly called for the independence of the regulator,³⁰ arguing that the GoM "should stop using MACRA as a tool to silence and intimidate independent broadcasters in the country." By the same token, political interference at MACRA threatens independent implementation

of policy and legislations such as the Consolidated ICT Regulatory Management System (CIRMS) and the mandatory SIM card, which could be used to target and monitor activities of political opposition, dissidents and critical civil society organisations in the country, as the regulator has access to call logs and other private information.

The country's mobile phone market is dominated by the duopoly of privately owned companies, TNM and Airtel Malawi.³¹ Airtel Malawi is owned by Bharti Airtel International. In accordance with section 35 of the Communications Act, No. of 2016, "an electronic communications licensee should have at least 20% local shareholding. Recently two Airtel Malawi shareholders summoned the company to court, alleging that the company had flouted the shareholding provisions as provided by the law.³² The case is yet to be concluded. TNM is locally owned, with majority shareholding by Press Corporation Limited, a local business conglomerate. TNM has a market share of 71.0% and Airtel Malawi has a market share of 61.0%.³³ This means that MACRA is a critical institution for the state because it is only through MACRA that the GoM can exert its influence and control over the operations of the telecommunications sector.

²⁹ Chimjeka, R. (2020). MBC, MACRA Should be Independent – Minister. Available at: <https://times.mw/mbc-macra-should-be-independent-minister/>

³⁰ MISA Malawi (2020). MISA Malawi Calls for Media Independence, Professionalism. Available at: <https://malawi.misa.org/2020/05/03/misa-malawi-calls-for-media-independence-professionalism/>

³¹ Kainja, J. (2021). Malawi Telcos Further Reduce Data Prices but Affordability Concerns Remain. Available at: <https://cipesa.org/2021/05/malawi-telcos-further-reduce-data-prices-but-affordability-concerns-remain/>

³² Mkandawire, L. (2021). Shareholders Take Airtel Malawi to Task. Available at: <https://www.mwnation.com/shareholders-take-airtel-malawi-to-task/>

³³ NSO and MACRA (2019). National Survey on Access and Use of Information and Communication Technologies by Household and Individuals in Malawi. Available at: http://10.150.35.18:6510/www.nsomalawi.mw/images/stories/data_on_line/economics/ICT%20Household%20Survey%202019.pdf

Legal framework

Treaties and Conventions

Malawi is a party to the Universal Declaration of Human Rights (UDHR). Article 12 of the UDHR³⁴ provides that “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.” The country is also a party to the International Convention on Civil and Political Rights (ICCPR). Article 17 of the ICCPR³⁵ has divided its provision on privacy in two parts; 1) “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.” 2) “everyone has the right to the protection of the law against such interference or attacks.” Malawi is not yet a party to the African Convention on Cyber Security and Personal Data Protection (ACCSPDP)³⁶, which was established³⁷ as a “credible framework for cybersecurity in Africa through organization of electronic transactions, protection of personal data, promotion of cyber security, e-governance and combating cybercrime.”

Constitution of the Republic of Malawi

Following Malawi’s political transition from dictatorship to multiparty democracy, the country’s 1995³⁸ constitution came into force as the supreme law of the land. Section 5 of the constitution says that “any Act of Government or any law that is inconsistent with the provisions of [the] constitution shall, to the extent of such inconsistency, be invalid.³⁹” Section 21 of the constitution guarantees the right to personal privacy, as follows: “every person shall have the right to personal privacy, which shall include the right not to be subjected to – (a) searches of his or her person, home or property; (b) the seizure of private possessions; or (c) interference with private communication, including mail and all forms of telecommunication. The country has no law giving effect to section 21. The Electronic Transactions and Cyber Security Act, No. 33 of 2016 and Access to Information Act, No. 13 of 2017 have provisions on privacy but these provisions are especially to guide the implementation of these legislations; it is not cross-cutting.

³⁴ The Universal Declaration of Human Rights. Available at: <https://www.un.org/sites/un2.un.org/files/udhr.pdf>

³⁵ International Covenant on Civil and Political Rights. Available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

³⁶ African Union Convention on Cyber Security and Personal Data Protection. Available at: https://au.int/web/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf

³⁷ African Union. Available at: <https://ccdcoe.org/organisations/au/>

³⁸ Mutharika, A. P. (1996). The 1995 Democratic Constitution of Malawi. *Journal of African Law*, 40(2): 205. doi:10.1017/s0021855300007774

³⁹ Chapter 1, Section 5 of the Constitution of the Republic of Malawi, 1995 amendment.

Electronic Transaction and Cyber Security Act

The Electronic Transactions and Cyber Security Act, No. 33 of 2016, was enacted to “make provisions for electronic transactions; for the establishment and functions of the Malawi Computer Emergency Response Team; to make provision for criminalising offences related to computer systems and information communication technologies; and provide for investigation, collection and use of electronic evidence; and for matters connected therewith and incidental thereto.”⁴⁰ The Act is modelled on the SADC Model Law on Electronic Transaction and Electronic Commerce.⁴¹ The GoM has only adopted this Model Law and not others on Data Protection and Computer Crime and Cybercrime.⁴²

Nonetheless, Kuda Hove⁴³ (interview), notices that the problem with model laws is that they are often drafted by experts who have no deep understanding of national contexts. Hove observes that “individual nations that have the ultimate power to bring the model law to reality at national level often have their own motives which work against the adoption of the model law. These motives make up part of the local contexts that the drafting expats often miss.” Hove gives an example of the African Union’s Convention on Cyber Security and Personal Data Protection, which so far only 14 states are party to, seven years after its adoption. Although cyber laws are meant to promote cooperation among regions

and neighbouring states, Hove says this does not mean that cyber legislations have to be drafted in a top-down manner; for example, the SADC then “forced down onto member states to localise and implement.”

Section 72(1) of the Electronic Transaction and Cyber Security Act, 2016 provides for the rights of a data subject. The data subject to obtain from a data controller, without any constraint or unreasonable delay and at no expense, confirmation as to whether or not data relating to them is being processed. The data controller is mandated to communicate to the data subject whether their data is undergoing processing and purposes of the processing and the recipients to whom the data is disclosed. Section 72(2) entitles the data subject to object at any time, on legitimate grounds, relating to the processing of data relating to them. Section 72(3) entitles the data subject to obtain from data controller, as appropriate, the rectification, erasure or blocking of data the processing of which does not comply with the provisions of the Act, in particular because of the incomplete or inaccurate nature of the data. Articles 74(1) & (2) provides for security obligations. Here the data controller is mandated to implement technical and organisational measures to enable the protection of personal data against accidents or unlawful destruction of accidental loss, alteration, unauthorised disclosure or access. In particular, where the processing involves the transmission of data over a network, and against all other unlawful forms of processing. protected.

These provisions provide a grounding for ensuring personal data protection. However, Hunter and Mare (2020)⁴⁴ observe that the Act does not provide an interpretation for legal interception of communication, and without this provision there is a room for the state to illegally intercept personal data without the data subject’s knowledge. In addition to this, the Act does not provide any

⁴⁰ The Malawi Gazette supplement (2016). Available at: <https://malawilii.org/mw/legislation/act/2016/33>

⁴¹ Electronic Transaction and Electronic Commerce: Southern African Development Community (SADC) Model Law. Available at: https://www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Documents/FINAL%20DOCUMENTS/FINAL%20DOCS%20ENGLISH/sadc_model_law_e-transactions.pdf

⁴² Hove, K. (2017). The Model Law on Computer Crime and Cyber Crime: A Harmonized Assault on the Right to Privacy? Available at: <https://www.linkedin.com/pulse/sadc-model-law-computer-crime-cybercrime-harmonised-assault-kuda-hove/>

⁴³ Interview with Kuda Hove, who is a Policy Officer at Privacy International where he is currently leading the organisation’s Identity work. Full profile available at: <https://privacyinternational.org/people/3700/kuda-hove>

⁴⁴ Hunter, M. and Mare, A. (2020). A Patchwork for Privacy: Mapping Communications Surveillance Laws in Southern Africa. Available at: <https://necessaryandproportionate.org/uploads/2020-comparative-southafrica.pdf>

distinction “between communications data and any other data that might be held by an internet service provider.” Furthermore, Hunter and Mare have observed that the Act is “entirely silent on telecommunications networks, even though telephony and mobile networks enjoy many more subscribers in Malawi than internet networks.”

Section 84(2) is also problematic. The section empowers a minister (Minister of Information, in the current case) to come up with specific cases where unauthorized access to, or interception of, or interference with, data may be permitted in specific conditions set out in the regulations. This is problematic because the minister is a political appointee and has political bias and affiliation. International standards and good practice is that limitations to human rights be set in law and not left to a single individual, in this case a political appointee.

The Communications Act

Communications Act, No. 34 of 2016 is an amendment to the Communications Act, No. 41 of 1998. This Act was enacted to “provide for the regulation of the provision of services in the electronic communications sector, posts, information society; for the establishment of the Malawi Communications Regulatory Authority, the Malawi Broadcasting Corporation and the Malawi Posts Corporation; and for matters connected therewith or incidental thereto.”⁴⁵

Section 176(2) of the Act provides that a person who, without lawful authority intercepts, attempts to intercept, or causes any other person to intercept or to attempt to intercept, any communications; discloses or attempts to disclose to any person the contents of any communications, knowingly or having reason to believe that the information was obtained through the interception of any communications in contravention of this Act;

or uses or attempts to use the contents of any communications, knowingly or having reason to believe that the information was obtained through the interception of any communications in contravention of this Act, commits an offence and shall, upon conviction, be liable to a fine of K5,000,000 (\$6,154) and imprisonment for five years.

Section 177 of the Act provides that a licensee, an employee or agent of the licensee, who discloses, other than in accordance with this Act, the content of a message which is part of an electronic communication service or information about a user; or misuses an electronic communications service, commits an offence and shall, upon conviction, be liable to a fine of k1,000,000 (\$1,230) and imprisonment for two years. Despite these assurances, Hunter and Mare (2020)⁴⁶ notice that the legislation lacks clear provision and interpretation for legal interception of communication. In addition to Hunter and Mare, Freedom House⁴⁷ has also reported that interception of communication is suspected in the country.

These suspicions have their credence in the commercial court case 54 of 2011⁴⁸ in which a subscriber complained against violation of privacy, which is protected under Section 21 of the Constitution of the Republic of Malawi. The case established that the country’s telecommunication regulator, MACRA was asking telecommunication companies, Access Malawi Limited, Airtel Malawi Limited, Telekom Networks Malawi Limited and Malawi Telecommunications Limited, to provide it with call detail records, including “information about who called who, time and duration of such calls, location where calls were made from, SMSs

⁴⁵ Malawi Gazette Supplement (1998). Communications Act, No. 34 2016. Download available at: <https://ictpolicyafrica.org/en/document/amhhiqgfbq>

⁴⁶ Hunter, M. and Mare, A. (2020). A Patchwork for Privacy: Mapping Communications Surveillance Laws in Southern Africa. Available at: <https://necessaryandproportionate.org/uploads/2020-comparative-southafrica.pdf>

⁴⁷ Freedom House (2021). Freedom on the Net: Malawi. Available at: <https://freedomhouse.org/country/malawi/freedom-net/2021>

⁴⁸ Kimu v Access Malawi Limited and Others (Commercial Case No. 54 of 2011) [2012] MWCommC 1 (02 May 2012). Available at: <https://malawilii.org/mw/judgment/high-court-commercial-division/2012/1>

sent and received and the identity of handsets used.” The court said that any unauthorised access to personal data by the telecommunication companies would be a “limitation and/or erosion of the right to privacy”. MACRA was demanding this information as it is service condition for the licensees, which says: “the licensee shall not monitor or disclose the contents of any communication conveyed as part of a public telecommunications service except”:

- (a) To the extent necessary for the purpose of maintaining or repairing any part of the network used to provide the service or monitoring the Licensee’s quality of service;
- (b) When requested to do so by a person authorized by law or by an order of the court;
- (c) If so requested by a competent authority for the maintenance of national authority.

Draft Data Protection Bill, 2021

The GoM has drafted Data Protection Bill, which underwent public consultations February 2021⁴⁹. The objectives of the draft data protection legislation are: to ensure that the processing of personal data complies with principles of data protection, including privacy and data security; to provide individuals with rights with respect to the processing of personal data relating to them; to set standards for the transmission of personal data outside of Malawi; to establish an institutional mechanism to promote and enforce the principles, rights and obligations provided for in the Act; and to provide a legal foundation to promote the digital economy of Malawi and its participation in the regional and global economies through the beneficial uses of personal data.

The draft Data Protection Act, 2021 is broad and encompassing, unlike the Electronic Transaction and Cyber Security Act, 2016 and Communications Act, 2016, and while it provides for data protection, such provisions are limited in scope as it provides

for data related to specific areas addressed by those Acts. This is a welcome development, as the draft law is better placed to actualise section 21 of the Constitution of the Republic of Malawi. In its analysis of the draft legislation, CIPESA (2021) believes that “nacting the data protection would represent fulfilment of the state’s obligation to protect the right to privacy of the individual and represent a key step towards meeting Malawi’s commitments under international human rights law”⁵⁰.

Thus, the law is overdue, given that in the last four years or so there has been escalation of personal data collection in the country. However, the downside is that draft has proposed that MACRA should be the implementing agent. This is problematic given that MACRA is a victim of political interference⁵¹ and it has struggled to fulfil some of its critical objectives, as provided for in the Communications Act, 2016, such as implementation of a Universal Service Fund⁵² aimed at improved access to affordable telecommunication services in the country.

Escalation of personal data collection

This section will look at mass personal data collection programmes. Although the discussion has been heightened since 2017, particularly with implementation of mandatory SIM card registration and nation biometric ID registration, concerns about surveillance and privacy in Malawi date back to 2011 when MACRA sought to implement the use of CIRMS.

⁴⁹ Invitation to Comment on the Draft Data Protection Bill, 2021. Available at: https://web.facebook.com/pppcmalawi/photos/a.1394796444016105/1898064847022593/?_rdc=1&_rdp

⁵⁰ CIPESA (2021). Analysis of the Malawi Draft Data Protection Bill, 2021. Available at: <https://media.africaportal.org/documents/Analysis-of-the-Malawi-Draft-Data-Protection-Bill-2021.pdf>

⁵¹ Freedom House (2021). Freedom on the Net: Malawi. Available at: <https://freedomhouse.org/country/malawi/freedom-net/2021>

⁵² Mlanjira, D. (2020). MACRA Sets Up System to Reach Out to Rural Malawi on Access to ICT. Available at: <https://www.nyasatimes.com/macra-sets-up-system-to-reach-out-to-rural-malawi-on-access-to-ict/>

Consolidated ICT Regulatory Management System

Fears of communication surveillance and privacy concerns in Malawi were first registered in 2011 when MACRA sourced and announced its intention to use a Consolidated ICT Regulatory Management System (CIRMS), locally known as the “spy machine”. MACRA said that CIRMS would enable the regulator to monitor service providers for quality of service and fair pricing.⁵³ A court ruling on Alick Kimu versus Access and others,⁵⁴ which challenged the implementation of CIRMS on privacy grounds, shows that MACRA procured CIRMS for the purposes of lawful interception of communication; internet interception; GSM and CDMA, GPRS interception; and equipment identity registry. However, its implementation was blocked by a court injunction⁵⁵ in which a mobile phone subscriber complained that CIRMS would undermine personal privacy, contrary to section 21 of the Constitution of the Republic of Malawi in particular, section 21(c), which says “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.” The client sought the court intervention after telecommunication companies warned its customers that customers’ privacy could not be guaranteed, as the companies are obliged to provide information to the regulator as part of their licence.⁵⁶

An insider at MACRA⁵⁷ indicated that the telecommunication companies deliberately went public on the issue, as they were not pleased with CIRMS in relation to their business interests and not privacy, as stated. The insider believes that the companies deliberately came up with the term “spy machine” to increase public fear. Indeed, the presiding judge on the Alick Kimu versus Access and others condemned the use of the term “spy machine” by the telecommunication companies, which he describes as being “careless”.⁵⁸ The MACRA insider believes that the telecommunication companies successfully capitalised on the political environment at the time, in which President Bingu wa Mutharika was being criticised as increasingly becoming authoritarian amid rising commodity prices, fuel shortages and unemployment.⁵⁹ Likewise, Gregory Gondwe,⁶⁰ believes that the political environment at the time made Malawians believe that CIRMS would indeed be used by the regime to eavesdrop on people; it’s this belief that mobilised the civil society against CIRMS. Nevertheless, in 2017 the Supreme Court of Appeal allowed MACRA to implement the usage of the system.^{61,62} However, the court directed MACRA not to use CIRMS to access personal content. CIRMS has been operational since September 2017.⁶³

⁵³ Gondwe, G. (2011). MACRA Courts Media on “Spy Machine”. Available at: <https://www.bizcommunity.com/Article/129/78/66853.html>

⁵⁴ *Kimu v Access Malawi Limited and Others* (Commercial Case No. 54 of 2011) [2012] MWCommC 1 (02 May 2012). Available at: <https://malawilii.org/mw/judgment/high-court-commercial-division/2012/1>

⁵⁵ Gondwe, G. (2012). Court Stops “Spy Machine”. Available at: <http://www.bizcommunity.com/Article/129/15/74706.html>

⁵⁶ Gondwe, G. (2011). “Spy Machine” Brings Telecoms Fears. Available at: <http://www.biztechfrica.com/article/spy-machine-brings-telecoms-fears/1437/>

⁵⁷ An interview with MACRA official privy to the case. He opted to speak in confidence as he was not sure his senior would authorise him to give the interview, October 2020.

⁵⁸ *Kimu v Access Malawi Limited and Others* (Commercial Case No. 54 of 2011) [2012] MWCommC 1 (02 May 2012). Available at: <https://malawilii.org/mw/judgment/high-court-commercial-division/2012/1>

⁵⁹ Cammack, D (2011). Malawi Risks Becoming “Fragile State”. Available at: <https://www.theguardian.com/global-development/poverty-matters/2011/nov/17/malawi-political-economic-crisis>

⁶⁰ Personal Interview with Gregory Gondwe a journalist who has extensively covered the story, October 2020.

⁶¹ Sangala, T. (2017). Court Clears MACRA on CIRMS Machine. Available ay: <https://www.times.mw/court-clears-macra-on-cirms-machine/>

⁶² Namangale, F. (2017). Court Nods to Macra’s “Spy Machine”. Available at: <http://mw-nation.com/court-nods-to-macras-spy-machine/>

⁶³ Namangale, F. (2017). Court Nods to Macra’s “Spy Machine”. Available at: <http://mw-nation.com/court-nods-to-macras-spy-machine/>

SIM card registration

SIM card registration has been mandatory in Malawi, since 2018. This is provided for under section 92(1) of the Communication Act, No. 34 of 2016. All unregistered SIM cards were deactivated after 30 September 2018.⁶⁴ The section provides that “a person who uses a generic number or owns or intends to use a SIM card for voice telephony services shall register that generic number or SIM card with any electronic communications licensee or with the distributor, agent or dealer of the electronic communications licensee, authorized to provide or sell generic numbers or SIM cards.”

Section 92(2) obliges the subscriber to provide their full name, identity card or any other document that proves the identity of the subscriber; and the residential and business or registered physical address of the subscriber. Where the subscriber is a legal entity, they must provide certificate of registration or incorporation; business license; and where applicable, taxpayer identification certificate number; and any other information that the electronic communication licensee deems necessary. SIM cards can be registered through agents who are required by law – section 93(1) of the Act – to submit information and documents within seven days. There is a fine of K5,000,000 (\$6,154) and imprisonment for five years for any agent who is found guilty of failing to comply with the provision of the law.

While CIRMS implementation faced resistance, the mandatory SIM card registration, which was implemented in June 2017, did not face notable resistance.⁶⁵ If anything, it was the government that hesitated to implement the policy, as it suspended the exercise for a couple of weeks, citing lack of

civic education on the issue.⁶⁶ However, there was no notable civic education that was done before the resumption of the registration. Criticisms on the implementation of the SIM card registration centred around the government’s indecisiveness on the rollout and insufficient deadlines for the registration period; none of the arguments were concerned about privacy and data protection, as was the case with the CIRMS.⁶⁷ An insider⁶⁸ from MACRA believes that the SIM card registration did not face resistance for two reasons: first, because the telecommunication companies did not raise any concerns; and second, because the political environment was amicable, unlike the CIRMS case. Additionally, Gregory Gondwe⁶⁹ believes that it was much easier to implement SIM card registration, unlike CIRMS, because it was implemented “at a time when a number of countries were also said to be enforcing SIM card registration and therefore the general feeling was that Malawi was only following the global trend, as was the case with digital migration, for example.”

National ID registration

According to National Registration Bureau (NRB) statement,⁷⁰ the ID registration was implemented because it would provide policymakers with “reliable, accurate and up to date source of information by which to govern and direct policies for development.” It adds that such information would enable improvements in service delivery

⁶⁴ Mlanjira, D. (2018). Malawi Imposes K5 million penalty if Found Using Unregistered SIM card from October 1. Available at: <https://www.nyasatimes.com/malawi-impose-k5m-penalty-if-found-using-unregistered-sim-card-from-oct-1/>

⁶⁵ Muheya, G. (2018). Malawi SIM Card Registration Deadline Extended to September 30. Available at: <https://www.mbc.mw/index.php/news/sports/item/4597-malawi-starts-mandatory-sim-card-registration>

⁶⁶ Gwede, W. (2018). Malawi Govt Lift Suspension on SIM Card Registration, Dausi Tells Parliament. Available at: <https://www.nyasatimes.com/malawi-govt-lift-suspension-sim-card-registration-dausi-tells-parliament/>

⁶⁷ Sangala, T (2018). Government Faulted Over SIM Registration. Available at: <https://times.mw/government-faulted-over-sim-registration/>

⁶⁸ An Interview with MACRA Official Privy to the Case. He Opted to Speak in Confidence as he was not Sure his Senior Would not Authorise him to give the interview, October 2020.

⁶⁹ Personal Interview with Gregory Gondwe a journalist who has extensively covered the story, October 2020.

⁷⁰ National Registration Bureau, Frequently Asked Questions. Available at: <https://www.nrb.gov.mw/index.php/faqs/item/4-frequently-asked-questions>

across both the public and private sectors. For the individual, NRB says the national ID would “give them proof of their nationality and personal information so that they can use it to claim their benefits”. At the time of implementation, Malawi was the only country in the Southern African Development Community (SADC) and Common Market for Southern and Eastern Africa (COMESA) without a functioning national registry and identification system.⁷¹

There are no clear reasons why other countries and international organisations funded the initiative but then Malawi is heavily donor dependent. It is said that up to 40% of the country’s national budget is donor funded.⁷² As such, the funding of the national ID registration programme would not ordinarily raise any serious questions, as it was not out of the ordinary. However, the United Nations Sustainable Development Goals (SDGs) have set a specific target to provide every person with a legal identity by 2030.⁷³ This could be one of the reasons that encouraged other countries and organisations to fund the programme, as they try to help the country achieve the set SDGs target.

The registration is governed by the Malawi National Registration Act, No. 13 of 2010.⁷⁴ The ID cards are chip-based and are entered into a multi-modal biometric database, referred to as the National Registration and Identification System (NRIS). Personal information collected includes: “a person’s surname and given names, nationality, date of birth, place of birth, sex, current residence,

height, eye color, passport number, marital status and parents’ information. Unique biometric information is also collected in the form of all ten fingerprints, a person’s photograph and signature.”⁷⁵

Before the implementation of the national ID programme, forms of identification available to Malawians were a driver’s license, passport, and voter registration certificate – citizens without these documents needed to bring any person with these documents as a witness.⁷⁶ There were no problems with these forms of identity but as stated above, the GoM believes that, unlike these fragmentary forms of identification, the national ID system would provide the government with a “reliable, accurate and up to date source of information by which to govern and direct policies for development.” It is much easier to have everyone registered using one system than disintegrated forms of identification.

The programme covers both citizens and foreign nationals domiciled in Malawi. NRB is also responsible for registering specific populations such as refugees⁷⁷ but no specific data could be found about registration of other populations such as internally displaced persons. The national register maintained by NRIS maintains details of Malawian citizens and those who have been granted a residence permit, temporary employment or business permit. You must be 16 years of age or older to be registered for the national ID card. Features on the identity card include a photograph; full name; date of birth; gender; identification number (for example, QRJT46J5), date of issue; nationality; expiry date; owner’s signature; and thumbprint.

However, in rolling out the ID programme, the GoM also ignored other policy and legal frameworks in place. This is critical, especially since the National Registration and Identification System

⁷¹ Malawi’s Journey Towards Transformation: Lessons from its National ID Project. Available at: <https://www.cgdev.org/sites/default/files/malawi-journey-towards-transformation.pdf>

⁷² Page S. (2019). The Development Aid Situation in Malawi. In: Development, Sexual Cultural Practices and HIV/AIDS in Africa. Palgrave Macmillan, Cham. https://doi.org/10.1007/978-3-030-04119-9_3

⁷³ GSMA (2020). Digital Identity Country Report: Malawi. Available at: <https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2019/02/Digital-Identity-Country-Report.pdf>

⁷⁴ World Bank Group (2017). The State of Identification Systems in Africa. Available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/28310/119065-WP-ID4D-country-profiles-report-final-PUBLIC.pdf?sequence=1&isAllowed=y>

⁷⁵ National Registration Bureau, Frequently Asked Questions. Available at: <https://www.nrb.gov.mw/index.php/faqs/item/4-frequently-asked-questions>

⁷⁶ Ibid, <https://openknowledge.worldbank.org/bitstream/handle/10986/28310/119065-WP-ID4D-country-profiles-report-final-PUBLIC.pdf?sequence=1&isAllowed=y>

⁷⁷ UNHCR – Malawi, 2019. Available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/74288.pdf>

(NRIS) which the system uses is used by a number of government ministries, departments and agents – replacing previously siloed ID programmes.⁷⁸ For instance, the biometric national ID is used by the Malawi Electoral Commission as the only form of ID to register voters – this is the case although the law says citizens can use other forms of identification such as driver’s license and passport. It is also mandatory that all SIM cards in Malawi be registered on a central database.⁷⁹ Although MACRA provides that customers can use several forms of identification to identify themselves when registering a SIM card, it has become a practice that only the biometric national ID card is accepted.⁸⁰ In an interview with a MACRA insider,⁸¹ he admitted that this is an “oversight” that needs to be rectified because it can legally be challenged as it were.

Likewise, the national ID is also used by all public transactions. The Malawi Revenue Authority uses it to register citizens for taxpayers’ identification – one cannot import goods into the country without this registration. The biometric digital ID is used to pay civil servants; Malawi’s passport agency uses the ID to verify applicants. The ID allows for data exchange between programmes, such as cash transfers, government loans, and listing of agriculture subsidies beneficiaries. Lately the ID has been used for the Covid-19 vaccination exercise. Since the implementation of the national IDs, banks have also been ordered to use the ID card only to verify and register new customers. Banks had to undertake a “know your customer” (KYC) exercise in which all customers had to bring

their national IDs.⁸² Those who did not participate in the KYC had their bank accounts frozen.

Although the majority of Malawians welcomed the programme, as evidenced through the high registration numbers,⁸³ the implementation of the national ID programme also overlooked policy gaps, especially in areas of personal data protection. Although there was no visible backlash from the public, this has been the main area of concern for those in the civil society and technology sector. Michael Kaiyatsa⁸⁴ believes that one of the reasons Malawians readily accepted the national ID is because most Malawians lacked forms of identification. He criticises the government, however, for insufficient public consultations on the implementation of the ID programme. He believes that this could exclude some marginalised groups especially those living the rural areas, women, people with disabilities and many others.

He is also concerned that Malawi does not have adequate legislation to support the biometric ID registration, especially the absence of data protection laws, which would make the digital ID system prone to abuse by both public and private institution. These sentiments are shared by Vincent Kumwenda⁸⁵ who believes that although the government had good intentions, the programme should not have been rolled out in the absence of data protection legislation. He is worried that “people are giving up a lot of information without

⁷⁸ Malik, t. (2020). Malawi’s Journey Towards Transformation: Lessons from its National ID Project. Available at: <https://www.cgdev.org/sites/default/files/malawi-journey-towards-transformation.pdf>

⁷⁹ <https://times.mw/macra-sets-new-sim-card-registration-deadlines/>

⁸⁰ SIM Card Registration, MACRA. Available at: https://www.macra.org.mw/?page_id=9582

⁸¹ An Interview with MACRA Official Privy to the Case. He Opted to Speak in Confidence as he was not Sure his Senior Would not Authorise him to give the interview, October 2020.

⁸² Burt, C. (2019). Malawi Bank Intergrates Biometric National ID System for KYC Checks. Available at: <https://www.biometricupdate.com/201906/malawi-bank-integrates-biometric-national-id-system-for-kyc-checks>

⁸³ UNDP Malawi. (2017). Over 9 Million People Register for National Identity Cards as Malawians Make History. Available at: <https://www.mw.undp.org/content/malawi/en/home/presscenter/articles/2017/12/05/over-9-million-people-register-for-national-identity-cards-as-malawians-make-history-.html>

⁸⁴ Michael Kaiyatsa is an Executive Director for the Centre for Human Rights and Rehabilitation.

⁸⁵ Vincent Kumwenda is the Chief Executive Officer at Malawi’s first technology and innovation hub, mHub. Among other issues, mHub promotes the use of local technology solutions, civic and voter education.

clear laws on how their data is going to be used or stored. Unfortunately, there are no known public awareness campaigns to sensitise people about data protection. This is worrying, especially as the ID

card is also used for voter registration so it can be used to manipulate elections or target a section of the society.”

Findings and discussion

Legal framework

Section 21 of the Constitution of Republic of Malawi provides the right to personal privacy, including the right not to be subjected to searches of one’s personal, home or property. The section also prohibits seizure of private possessions; or, interference with private communications, including forms of telecommunications. The inclusion of forms of telecommunications is important particularly in the digital age when, as observed by the United Nations Human Rights Council (UNHRC), “digital technologies exploit data linked to people’s lives, are progressively penetrating the social, cultural, economic and political fabric of modern societies”.⁸⁶ The recognition of privacy including forms of communication aligns the constitution with the UN’s⁸⁷ recognition “that privacy online is important for the realization of the right to freedom of expression and to hold opinions without interference, and the right to freedom of peaceful assembly and association” (A/HRC/32/L.20, Para. 9).

Additionally, Malawi is also party to several international and regional instruments which guarantee the right to privacy. These include section

12 of the Universal Declaration of Human Rights; section 16 of the Convention of the Child; section 17 of the International Covenant on Civil and Political Rights; and section 14 of the International Convention on the Protection of all Migrant Workers and Members of their Families. Regional instruments protecting the right to privacy include section 19 of the African Charter on the Rights and Welfare of the Child; principles 40 & 41 of the Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019. Malawi has not signed these and has not ratified the African Union Convention on Cybersecurity and Personal Data Protection (see CIPESA’s report).⁸⁸

Malawi’s decision not to sign or ratify the African Union Convention on Cybersecurity and Personal Data Protection is consistent with the country’s lack of supportive legislation to ensure full implementation of progressive constitutional provisions, especially in the Bill of Rights and privacy guarantees in section 21 of the Constitution. Although personal data protection is provided for in the Electronic Transaction and Cyber Security Act, No. 33 of 2016 and the Communications Act, No. 34 of 2016 – these provisions are specifically for the implementation and operationalisation of these specific laws, and are not cross-cutting in the same way that a data protection bill would be. The lack of this legislation leaves the country without a robust privacy and personal data protection framework. The GoM has an obligation to ensure such legislation, as affirmed by the UNHRC that a “state party must respect and

⁸⁶ United Nations Human Rights Council (2018). The Right to Privacy in the Digital Age: Report of the United Nations High Commissioner for Human Rights. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/239/58/PDF/G1823958.pdf?OpenElement>

⁸⁷ United Nations Human Rights Council (2016). The Promotion, Protection and Enjoyment of Human Rights on the Internet. Available at: https://www.article19.org/data/files/Internet_Statement_Adopted.pdf

⁸⁸ CIPESA (2021). Analysis of Malawi’s Draft Data Protection Bill, 2021. Available at: <https://media.africaportal.org/documents/Analysis-of-the-Malawi-Draft-Data-Protection-Bill-2021.pdf>

ensure that the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within its territory” (A/HRC/39/29, Para. 9).

Personal data and privacy provisions in the Electronic Transactions and Cyber Security Act, No. 33 of 2016, the Communications Act, No. 34 of 2016, and the Access to Information Act, No. 13 of 2017 are inadequate and only fit for purpose insofar as these laws address specific issues relating to electronic commerce, electronic communication, and access to public information, respectively. This provision does not, for example, protect personal data in the custody of other public institutions such as the Road Traffic Directorate, the Malawi Electoral Commission, the Malawi Revenue Authority or commercial banks. The GoM is aware of this legislation gap, as in February 2021 it called for public contributions to the draft Data Protection Bill, 2021.⁸⁹

Hopefully, the critical input that the public made on the draft bill will be given serious consideration as the draft is being revised. A lesson from the access to information legislation, which took over 15 years to implement,⁹⁰ is that bills that extend human rights are slow to be implemented while bills that have clauses limiting human rights are introduced with speed, such as the Electronic Transaction and Cyber Security Act, No. 33 of 2016, which activists have been calling for the amendment of as it has clauses that undermine digital rights.⁹¹ The urgency of the data protection bill is justified because in the last four years there has been an escalation of data collection and centralisation programmes in the absence of the law. These programmes have been

introduced at “breakneck speed”⁹² without regard to policy and legislation gaps, which compromises personal data safety and therefore raises privacy and state surveillance concerns. This shows the government’s disregard for the legitimate concerns of personal data and privacy, although such concerns are largely muted and lack serious public discourse in the country.⁹³

Socioeconomic factors

Understanding privacy

The lack of public discourse on these privacy and data protection in Malawi is reflective of the country’s socioeconomic inequality. The digital divide is too wide in which access to telecommunication is for the privileged few. For instance, a 2019 MACRA/National Statistical Office survey⁹⁴ established that over 40% of Malawians are not aware of what the internet is. These people will not occupy themselves with issues of communication surveillance and privacy concerns, as these do not exist in their lives. A 2019 survey on Privacy and Personal Data Challenges and Trends in Malawi⁹⁵ found that most Malawians have a problem grasping the very concept of privacy. The study found that the concept of privacy does not carry the same meaning in local languages as it does in English. For example, in

⁸⁹ Invitation to Comment on the Draft Data Protection Bill, 2021. Available at: https://web.facebook.com/pppcmalawi/photos/a.1394796444016105/1898064847022593/?_rdc=1&_rdr

⁹⁰ Kainja, J. (2021). Data Protection Law on the Horizon in Malawi. Available at: <https://cipesa.org/2021/06/data-protection-law-on-the-horizon-in-malawi/>

⁹¹ Mzungu, W. (2020). CHRR Asks Malawi Parliament to Review Electronic Transactions and Cyber Security Act: Threat to ATI. Available at: <https://www.nyasatimes.com/chrr-asks-malawi-parliament-to-review-electronic-transaction-and-cyber-security-act-threat-to-ati/>

⁹² Hersey, F. (2020). How Malawi Established a Biometric National ID System at Breakneck Speed. Available at: <https://www.biometricupdate.com/202010/how-malawi-established-a-biometric-national-id-system-at-breakneck-speed>

⁹³ Kainja, J. (2019). Are Malawians Sleepwalking into Surveillance State? Available at: <https://cipesa.org/2019/08/are-malawians-sleep-walking-into-a-surveillance-state/>

⁹⁴ NSO and MACRA (2019). National Survey on Access and Use of Information and Communication Technologies by Household and Individuals in Malawi. Available at: http://10.150.35.18:6510/www.nsomalawi.mw/images/stories/data_on_line/economics/ICT/ICT%20Household%20Survey%202019.pdf

⁹⁵ CIPESA (2018). Privacy and Personal Data Challenges and Trends in Malawi. Download available at: https://www.researchgate.net/publication/335136113_State_of_Internet_Freedom_in_Malawi_Privacy_and_Personal_Data_Challenges_and_Trends_in_Malawi

Chichewa, a local language spoken by over 57% of the country's population, privacy literally be translated as kuchita zinthu mchibisibisi (which literary means doing things in secrecy), this has negative connotations, and it is generally frowned upon in Malawian culture.

Thus, the implementation of both the NRIS and SIM card registration did not meet any resistance because there were no public concerns over personal data and privacy. Malawians were made to believe that SIM card registration would curb fraud, particularly those associated with electronic money transaction, which have been prevalent in the country – even after the implementation of the mandatory SIM card registration.⁹⁶ Contrary to this belief studies elsewhere have established that SIM card registration does not reduce crime and fraud.⁹⁷

As pointed out elsewhere, the fear is that Malawians could be “sleepwalking” into a surveillance state⁹⁸ in which the very freedoms enshrined in the country's constitution could become meaningless because most of individual freedoms are best realised when people's privacy is protected. In his observation, journalist Glenn Greenwald says that “only in a realm where we're not being watched can we really test the limits of who we want to be. It's really in the private realm where dissent, creativity and personal exploration lie... When we think we're being watched, we make behaviour choices that we believe other people want us to make ... it's a natural human desire to avoid societal condemnation. That's why every state loves

surveillance — it breeds a conformist population.”⁹⁹

Socioeconomic factors

Edge Kanyongolo,¹⁰⁰ a legal scholar at the University of Malawi, says that the “Malawian society is shaped by the realities of poverty and inequality experienced the majority of Malawians.” This means that the majority of Malawians are more occupied with immediate and more pertinent issues of finding food, decent shelter and health care than the somewhat distant issues of freedom of expression in comparative terms to their basic needs. This socio-political context weakens the case to have punitive legislation repealed and amended because it is a minority issue.

The national ID in particular is seen as a social equaliser, as it allows everyone to have a form of identification, which was previously not the case. Concerns of personal data protection and privacy pales in the face of this recognition. It is then not surprising that people willingly give out personal information without regard for privacy. Although targeted and indiscriminate communication in the country is not widespread, mobile phone companies, banks, and lately government agencies routinely send promotions and other unsolicited messages to subscribers. There has not been any public outcry over such use of indiscriminate communication and unsolicited information in the country. This is perhaps understandable, given that there have not been cases of personal data breaching in the country.

⁹⁶ Faiti, O (2018). Malawi Kicks off Enforcing Real-Name SIM card Registration: All Phone Users Required to Register by March 31. Available at: <https://www.nyasatimes.com/malawi-kicksoff-enforcing-real-name-simcard-registration-phone-users-required-register-march-31/>

⁹⁷ The Mandatory Registration of Prepaid SIM Cards Users. Available at: https://www.gsma.com/publicpolicy/wp-content/uploads/2013/11/GSMA_White-Paper_Mandatory-Registration-of-Prepaid-SIM-Users_32pgWEBv3.pdf

⁹⁸ Kainja, J. (2019). Are Malawians Sleep-Walking into a Surveillance State? Available at: <https://cipesa.org/2019/08/are-malawians-sleep-walking-into-a-surveillance-state/>

⁹⁹ Miles, K. (2014). Glenn Greenwald on why Privacy is Vital, Even if you “Have Nothing to Hide”. Available at: https://www.huffpost.com/entry/glenn-greenwald-privacy_n_5509704

¹⁰⁰ Kanyongolo, E. (2012). Report on Laws that Restrict Freedom of the Press in Malawi. Download available at: <https://crm.misa.org/upload/web/29-report-on-laws-that-restrict-freedom-of-the-press-in-malawi.pdf>

The only exception to this was the CIRMS case.¹⁰¹ In this case it was telecommunication companies that alerted the public that MACRA intended to instal CRIMS, which meant that telecom operators could no longer guarantee the privacy of their clients. The country's CSOs and telecom operators successfully took legal action against implementation of CIRMS, citing section 21 of the Constitution, which guarantees privacy. Unlike the

¹⁰¹ Gondwe, G. (2011), MACRA Courts Media on "Spy Machine". Available at: <http://www.bizcommunity.com/Article/129/78/66853.html>

CIRMS, the national ID and SIM card registration did not attract public outrage mainly because the telecommunication companies did not raise the alarm. This gives credence to the argument that in the CIRMS case the telecommunication companies were not really worried about privacy – they were more concerned about what CIRMS meant to their business operations and income. As argued elsewhere in this paper, a conducive political environment has made the implementation of the national ID and SIM card registration easier than CIRMS.

Conclusion and recommendations

Conclusion

Among the encouraging things is that Malawi has a progressive constitution that fully respects human rights. It is also encouraging that the discussion over personal data protection and privacy is slowly being recognised by the government, as evidence by the draft Data Protection Bill, 2021. The implementation of law is critical to a full realisation of some of the constitutional provisions such as freedom of expression and the right to privacy. People are unable to express themselves freely knowing that they are being watched. This is undemocratic and has a chilling effect on citizens, especially vulnerable groups, including dissidents, investigative journalists and human rights defenders.

Malawians should care about the dangers of the current data collection exercises in the absence of a robust data protection law. Everyone deserves their privacy, even if you have nothing to hide, as Glenn Greenwald puts it.¹⁰² The CIRMS case in 2011 is a good indication that people care about

their privacy and the CIRMS case also shows that collective efforts by the various stakeholders can push the discourse on data protection and privacy in the right direction. The key prerequisite is that telecommunication companies should alert the public on privacy concerns not only when it fits their business interests, as has been the case.

The major issue in Malawi is the lack of robust personal data protection legislation. This has been exposed by the huge increase in personal data collection through the introduction of mandatory SIM card registration and biometric national ID registration through the implementation of NRIS. The introduction of new technologies often demands adjustments in law and legislation, but this must be done to enhance national interests through citizens' rights. In this case, the implementation of mandatory SIM card and registration and NRIS should not have taken precedence over data protection laws, knowing full well that these programmes involve the mass collection of personal data, risking people's right to privacy and putting them under possible surveillance.

¹⁰² Miles, K. (2014). Glenn Greenwald on why Privacy is Vital, Even if you "Have Nothing to Hide". Available at: https://www.huffpost.com/entry/glenn-greenwald-privacy_n_5509704

Recommendations

Government

- The GoM must work on the Data Protection Bill, 2021, with urgency.
- The GoM must ensure people's constitutional right to privacy even in absence of a robust data protection law.

Media

- The media must sensitise people on the importance of personal data protection and privacy.
- The media must identify and expose cases of potential and actual surveillance.

Academia/researchers

- Academics must provide intellectual leadership and guidance on issue personal data protection and privacy.
- Academics must take up the issue of data protection and privacy in their research and outreach activities.

Civil Society

- CSOs must lobby and demand urgent enactment and implementation of data protection law.
- CSOs must demand that they are consulted when government is undertaking programmes that will affect people on a large scale such as NRIS and SIM card registration.

Media Policy and Democracy Project

The Media Policy and Democracy Project (MPDP) was launched in 2012 and is a joint collaborative research project between the Department of Communication Science at the University of South Africa (UNISA), and Department of Journalism, Film and Television at the University of Johannesburg (UJ). The MPDP aims to promote participatory media and communications policymaking in the public interest in South Africa.

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