

# PROMOTING BEST PRACTICE AMONG ACTIVISTS FOR MORE EFFECTIVE COLLABORATION IN DIGITAL RIGHTS LITIGATION IN UGANDA

A Case Study of Cyber Law Initiative (U) Limited and Five Others versus The Attorney General of Uganda and Two Others

Constitutional Petition No. 26 of 2018

## Background

In an April 2018 letter, Uganda’s president, Yoweri Kaguta Museveni, branded social media platforms as enablers of “gossip” and directed the Finance Ministry to introduce taxes on the platforms. Shortly thereafter, an Excise Duty (Amendment) Bill, 2018 was presented to Parliament by the Finance Minister to introduce taxes on “Over the Top” (OTT) services, and raise taxes on other telecommunications services. The bill was passed into law on May 30, 2018, and took effect on July 1, 2018. Section 6(b) of the Act requires citizens to pay Uganda Shillings (UGX) 200 (USD 0.05) per day in order to access Facebook, WhatsApp, Twitter, and Viber, among other social media platforms. The law’s enactment raised concerns over its social, political and economic implications,<sup>1</sup> as well as the mode of collection of the tax<sup>2</sup>, and saw many users resort to use of Virtual Private Networks (VPN).<sup>3</sup> Notably, the introduction of the OTT tax led to widespread outcry over its potential curtailment of freedom of expression online, innovation and inclusion.<sup>4</sup>

Indeed, within three months of its implementation, the tax slashed the number of internet users in the country by five million, according to figures from the industry regulator, the Uganda Communications Commission (UCC). The numbers also showed that revenue from the tax was far from the windfall which government had predicted the tax would add to the national treasury.<sup>5</sup>



<sup>1</sup> Uganda’s Social Media Tax Threatens Internet Access, Affordability, <https://cipesa.org/2018/04/ugandas-social-media-tax-threatens-internet-access-affordability/>.

<sup>2</sup> Uncertainty Over How Uganda’s New Social Media Tax Will be Collected, <https://cipesa.org/2018/06/uncertainty-over-how-ugandas-new-social-media-tax-will-be-collected/>

<sup>3</sup> Uganda Blocks Access to Social Media, VPNs and Dating Sites as New Tax Takes Effect, <https://cipesa.org/2018/07/uganda-blocks-access-to-social-media-vpns-and-dating-sites-as-new-tax-takes-effect/>

<sup>4</sup> Social media, mobile money taxes unconstitutional, *New Vision*, July 12, 2018, [https://www.newvision.co.ug/new\\_vision/news/1481316/social-media-mobile-money-taxes-unconstitutional-kadaga](https://www.newvision.co.ug/new_vision/news/1481316/social-media-mobile-money-taxes-unconstitutional-kadaga); see also, PWDS decry social media tax, *New Vision*, July 4, 2018, [https://www.newvision.co.ug/new\\_vision/news/1480870/pwds-decry-social-media-tax](https://www.newvision.co.ug/new_vision/news/1480870/pwds-decry-social-media-tax); Social media tax will hamper growth of financial services in Uganda, *New Vision*, July 16, 2018, [https://www.newvision.co.ug/new\\_vision/news/1481496/social-media-tax-hamper-growth-financial-services-uganda](https://www.newvision.co.ug/new_vision/news/1481496/social-media-tax-hamper-growth-financial-services-uganda); Uganda social media tax to be reviewed, *BBC*, July 11, 2018, <https://www.bbc.com/news/world-africa-44798627>

<sup>5</sup> Social Media Tax Cuts Ugandan Internet Users by Five Million, Penetration Down From 47% to 35%, <https://cipesa.org/2019/01/%EF%BB%BFsocial-media-tax-cuts-ugandan-internet-users-by-five-million-penetration-down-from-47-to-35/>



## Filing and Objectives of the Case

On July 2, 2018, Cyber Law Initiative (U) Limited and four individuals – Opio Daniel Bill, Baguma Moses, Okiror Emmanuel and Silver Kayondo – sued the Attorney General;<sup>6</sup> the UCC;<sup>7</sup> and the Uganda Revenue Authority (URA)<sup>8</sup> in the Constitutional Court over the introduction of the OTT tax.<sup>9</sup> The applicants sought the court's declaration that the new law was unconstitutional and infringed on economic rights, freedom of expression and information, freedom of assembly and other political rights and freedoms.

The applicants argued that the Excise Duty (Amendment) Act, 2018, which imposes the social media tax, was inconsistent and in contravention with the Constitutional provisions to the extent that:

- (a) Sections 3(b) and 6(e) promote discrimination contrary to article 21 of the Constitution of Uganda, 1995 which guarantees equality and non-discrimination in all spheres of life.
- (b) Sections 3(b) and 6(g) impede, suffocate, and hamstring internet based or enabled business start-ups, budding entrepreneurs, job searches, talent promotion, creativity and innovation in contradiction, infringement and contravention of economic rights guaranteed by articles 40 (2), 79, 43, 20, 8A (1), and 45 of the Uganda Constitution.
- (c) Sections 3(b) and 6(g) inhibit access to internet and social media based or enabled fundamental human rights and freedoms of expression, civic/public participation, political mobilisation, peaceful assembly and unarmed demonstration and thereby contravene Articles 29, 38, 43, 45 and 8A of the Uganda Constitution.
- (d) Sections 3(b) and 6(g) limit access to information and therefore contravene article 41 (1) of the Uganda Constitution which provides for the right to information of citizens.
- (e) Sections 3(b) and 6(g) are unnecessary and incompatible in a free, open and democratic society and therefore contravene article 29, 43 and 45 of the Uganda Constitution.
- (f) Sections 3(b) and 6(g) are unnecessary and incompatible with profound good internet governance principles and tenets of open internet and internet neutrality and thereby contravene articles 21, 79, 43, 29, 8A (1), 45 and 38 of the Uganda Constitution.
- (g) Provisions under sections 3(b) and 6(g) were enacted without prior and meaningful public participation or consultations in contravention of articles 38, 29, 43, 79, 8A (1), 45 and 20 of the Uganda Constitution.
- (h) Sections 3(b) and 6(g) contravene and are inconsistent with national interest and common good of online promotion of accountability in the running of public affairs under Articles 8(A)(1) and national objectives and directive principles of state policy XXVI of the Uganda Constitution.
- (i) The respondents by their actions are not alive to article 20 of the Uganda Constitution on the inherent nature of fundamental human rights and freedoms.<sup>10</sup>
- (j) Sections 3(b) and 6(g) in as far as they impose tax on users, create and lead to double/multiple taxation of internet/social media users, contravene and are inconsistent with national interest, common good, and democratic practice pursuant articles 8(A)(1), 45, 79, and national objectives and directive principles of state policy XXVI of the Uganda Constitution.
- (k) Sections 3(b) and 6(g) were enacted by the Parliament of Uganda without following the requisite procedure.

In light of the above alleged violations, the applicants sought a court order to permanently stop the imposition of the tax and its collection by the URA. Moreover, the applicants sought an order directing the UCC to enact regulations for OTT services in accordance with principles that guarantee free access, net neutrality and open internet.

The petition was filed under Article 137 (1), (3) (a) and (b), (4) of the 1995 Constitution of Uganda; and the Constitutional Court (Petitions and References) Rules, S.I. 91/2005.<sup>11</sup>

<sup>6</sup> Article 119 (4) (c) and article 250 (2) of the Constitution of the Republic of Uganda, 1995 and section 10 of the Government Proceedings Act Cap 77 in effect provide that civil proceedings by or against the Government shall be instituted by or against the Attorney General.

<sup>7</sup> The Uganda Communications Commission is established by section 4 of the Uganda Communications Act, 2013 with the main objective of developing a modern communications sector including telecommunications, broadcasting, radio communications, postal communications, data communication and infrastructure. See UCC website <https://www.ucc.co.ug/>

<sup>8</sup> The Uganda Revenue Authority is established by section 2 of the Uganda Revenue Authority Act Cap 196. Its main objective is to assess, collect and account for Central Government Tax Revenue (includes Non-Tax Revenues) and to provide advice to government on matters of policy relating to all revenue sources. See the URA website: <https://www.ura.go.ug/index.jsp>

<sup>9</sup> The Constitutional Court is provided for by article 137 of the Constitution of the Republic of Uganda, 1995. Its main function is to determine any question as to the interpretation of the Constitution. It should be noted that the Constitutional Court is constituted by the Court of Appeals, which then sits as the Constitutional Court.

<sup>10</sup> Article 20 of the Uganda Constitution provides that: "(1) Fundamental rights and freedoms of the individual are inherent and not granted by the State. (2) The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons."

<sup>11</sup> See Article 137 of the Constitution of the Republic of Uganda, *Ibid*; The Constitution of Uganda; and the Constitutional Court (Petitions and References) Rules guide the mode and procedure of presenting of constitutional petitions in the Constitutional Court.



## Collaboration

There were deliberate efforts to work together with digital rights experts and civil society organisations. Initially, consultations were held on April 30, 2018 by the applicants, together with the Open Forum Initiative. The consultations delved into the general aspects of the proposed digital tax and its impact on access to the internet and the respective budget implications.<sup>12</sup> The Open Forum Initiative consultations were the genesis of the Cyber Law Initiative's case against the OTT tax.

Meanwhile, affidavits were sought and secured from the applicants and from the Collaboration on International ICT Policy for East and Southern Africa (CIPESA). Nevertheless, while the issues raised in the case affect the general public and the future of digital rights in the country, the campaigns around it have yet to gain nationwide support. Certainly members of the public are aware about the imposition and implementation of the OTT tax, but awareness of the ongoing petition to challenge the tax is low due to limited media coverage and efforts to raise general awareness.

Two months after filing the case in September 2018, the Network for Public Interest Lawyers (NETPIL), which emerged out of the Public Interest Law Clinic- Makerere University,<sup>13</sup> supported a litigation surgery. The surgery was held in preparation for the case scheduling conference, which was slated for September 3, 2018. During the surgery, possible arguments of the applicants and the anticipated respondents' arguments were explored. The surgery was also a forum for identifying and discussing strategies for ensuring that the petition achieves its goals and objectives. The surgery also identified signed petitions as a possible case strategy. Indeed, as the case stalled before the court, a petition with over 400 signatures was presented before the Deputy Chief Justice.<sup>14</sup>

## Use of Media

At the filing of the petition, a press conference was held to highlight the applicants' justifications for the petition and to increase public awareness.<sup>15</sup> Thereafter, all media engagements related to the case were informed by a communication strategy. Local print, broadcast and online media were approached and as a result got involved in the collective force towards the popularisation of the case, rallying support.<sup>16</sup> Similarly, international media such as Al Jazeera covered the case and organised a 30 minute live stream on the case<sup>17</sup> and the effects of the tax on digital rights, which featured representatives of Cyber Law Initiative and other concerned citizens. In addition to media, there were efforts aimed at gathering strategic advocacy support from global digital rights organisations such as Access Now.<sup>19</sup>

Meanwhile, social media platforms – the very issue at stake in the case – played a crucial role in raising public awareness and pushback against the tax through encouraging use of Virtual Private Networks (VPNs).<sup>20</sup>

<sup>12</sup> Interview with Opio Bill, *Supra*

<sup>13</sup> <http://netpil.co.ug/>

<sup>14</sup> A copy of the petition presented to the Deputy Chief Justice, <https://twitter.com/CyberLineUG/status/1090859631537201152>

<sup>15</sup> Interview with Opio Bill, *Supra*, see also; Juliet Kogongo, "Government sued over social media tax," *Daily Monitor*, July 2, 2018, <https://www.monitor.co.ug/News/National/Government-sued-over-social-media-tax/688334-4642632-uvi8qe/index.html>.

<sup>16</sup> See for instance, Juliet Kogongo, *Ibid*; Charles M. Mpagi, "Uganda social media tax challenged in court," *The East African*, July 2, 2018, <https://www.theeastafrican.co.ke/business/Uganda-Social-Media-tax-challenged-in-court/2560-4642862-d24qa9z/index.html>

<sup>17</sup> Uganda Introduces Social Media Tax Despite Criticism, Al Jazeera, July 1, 2018, <https://www.aljazeera.com/news/2018/06/uganda-introduces-social-media-tax-criticism-180630180322121.html>

<sup>18</sup> Al Jazeera, *Are Ugandans Being Forced Off Social Media?* March 5, 2019, <http://stream.aljazeera.com/story/201903050419-0025800>

<sup>19</sup> Access Now defends and extends the digital rights of users at risk around the world, <https://www.accessnow.org/about-us/>

<sup>20</sup> See <https://twitter.com/CyberLineUG/status/1090859631537201152>; <http://stream.aljazeera.com/story/201903050419-0025800>, [https://twitter.com/hashtag/SocialMediaTax?src=hashtag\\_click](https://twitter.com/hashtag/SocialMediaTax?src=hashtag_click); [https://twitter.com/hashtag/MobileMoneyTax?src=hashtag\\_click](https://twitter.com/hashtag/MobileMoneyTax?src=hashtag_click); [https://twitter.com/hashtag/CountMyVoiceUG?src=hashtag\\_click](https://twitter.com/hashtag/CountMyVoiceUG?src=hashtag_click); [https://twitter.com/hashtag/ThisTaxMustGo?src=hashtag\\_click](https://twitter.com/hashtag/ThisTaxMustGo?src=hashtag_click); and <https://www.facebook.com/events/254943705235489>



## Progress of the Case

It is over a year since the case was filed and all relevant submissions have been tabled before court. However, a hearing date has not been fixed. Efforts to have the case hearing date fixed have included a petition to the Deputy Chief Justice with an annexation of over 400 signatures, all to no avail.<sup>21</sup> The slow progress of the case is attributed to the backlog in the judiciary. As of January 31, 2017 case backlog stood at 37,827 of which 72% (27,517) had been in the system for two to five years; 24% (8,979) for five to ten years; and 4% (1,331) for over ten years.<sup>22</sup> Slow progress is also partly attributed to poor understanding amongst judges of the specifics of the case, including digital rights and how the digital economy operates.<sup>23</sup>

## Lessons Learned

- The applicants and their lawyers agreed that while stakeholders involved in the case, including through amicus curiae, are experts, more consultations would have been good, especially in the aftermath of filing the case.
- Financial constraints affected the progress of the case. Failure to facilitate resource persons affected timely filing of documents and evidence gathering. Accordingly, there is a need for increased funding to digital rights organisations and experts to support public interest litigation in digital rights.
- Despite the fact that public interest litigation matters attract a lot of attention from legal practitioners, there were few involved in this case. Hence, there is a need to build capacity of lawyers and other legal practitioners in digital rights. A competent legal fraternity will lead to increased knowledge and understanding of digital rights, and thereby enhance advocacy and collaborative litigation.
- Given the slow progression of the case, attributed to case backlog at the judiciary, establishment of a High Court Division fully dedicated to adjudication of digital rights would go a long way in advancing growing interest in strategic litigation for digital rights in Uganda.
- The delay in hearing the case on the OTT tax has been partly attributed to limited understanding of digital rights by judicial officers, specifically judges. Hence, capacity building judicial officers such as justices, judges and magistrates in digital rights will ease knowledge building of all court processes and administration of justice in cases involving digital rights.

<sup>21</sup> A copy of the petition presented to the Deputy Chief Justice is available at <https://twitter.com/CyberLineUG/status/1090859631537201152>

<sup>22</sup> A Report of the Case Backlog Reduction Committee, <http://www.judiciary.go.ug/files/downloads/case%20backlog%20Report%20final.pdf>

<sup>23</sup> Interviews with Opio Bill and Kiiza Aaron.