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REFORMING THE INSTITUTIONAL AND LEGAL FRAMEWORKS OF E-COMMERCE IN KENYA; CONSUMER RIGHTS PROTECTION IN THE DIGITAL ECONOMY.

Silas Mbogo Gitari

Submitted in partial fulfillment of the requirements of the Master of Laws Degree, at Strathmore University.



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Silas Mbogo Gitari.

Signature:

Date:



The thesis of **Silas Mbogo Gitari** was reviewed and approved by the following:

Dr. Williams Chima Iheme

Senior Lecturer, Strathmore Law School,
Strathmore University

Dr. Peter Kwenjera

Dean, Strathmore Law School,
Strathmore University

Dr. Bernard Shibwabo

Director, Office of Graduate Studies,
Strathmore University

ABSTRACT

Electronic commerce (E-commerce) is fast growing in Kenya, attributable to improved internet accessibility and increased usage of smart phones. The use of E-commerce has spurred growth and created new opportunities for entrepreneurs, especially the small and medium-sized businesses, which can operate with reduced initial investment and set up costs. Its other benefits to entrepreneurs and consumers include reduced transaction costs, convenience of flow of information and movement of goods, better coordination of activities between manufacturers, suppliers and customers as well as instant access to worldwide markets among others.

Despite the foregoing benefits, Kenya is yet to formulate an effective legal and institutional framework that protects consumer rights. Such a regime should afford the consumers transparency, through information disclosure and verification, data privacy and protection, conformity of the goods to the required quality standards and opportunity for redress, in a similar fashion to the consumer rights protection afforded in other traditional forms of commerce.

Under the current regime, there is potential for abuse, especially because there is no personal interactions between the consumers and the vendors or an opportunity to inspect the goods or service prior to contracting. The multi-jurisdictional nature of E-commerce also makes it challenging for dispute resolution and consumer redress. Internationally, policies, legislations, regulations and laws have been/ are being enacted to address the various consumer rights concerns in E-commerce. Kenya should thus follow suit.

This thesis sets out a conceptual framework and analyses the existing legal and institutional regime in Kenya, relating to consumer rights protection in E-commerce. Through a comparative study with South Africa, it shall assist identify the gaps in the Kenyan regime and make proposals for reform.

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LIST OF ACRONYMS

B2B- Business to business.

B2C- Business to consumer.

C2C- Consumer to consumer.

G2C- Government to citizen.

CAK- Communication Authority of Kenya.

COMESA- Common Market for Eastern and Southern Africa.

DMS- Digital Monitoring Systems.

EPAL- Enterprise Privacy Authorization Language.

ICASA- Independent Communication Authority of South Africa.

ICT- Information and Communications Technology.

IOT- Internet of things.

KRA- Kenya Revenue Authority

OECD- Organization for Economic Co-operation and Development.

PII- Personally identifying information.

P3P- Privacy Preferences Project.

RBAC- Role Based Access Control.

SMEs- Small and medium sized enterprises.

TELCO- Telecommunications Company.

UNCTAD- United Nations Conference on Trade and Development.

UNCITRAL- United Nations Commission on International Trade Law.

VAT- Value Added Tax

VPN- Virtual Private Network

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DEDICATION

Dedicated to my daughter Ella Wanjiku Mbogo and my wife Rita Gakii Njeru.



1 CHAPTER ONE: BACKGROUND AND INTRODUCTION

1.1 ABSTRACT

Technological evolution, which brought forth the development of E-commerce, has resulted in various benefits and opportunities to vendors and consumers as well as various challenges that are both technical and legal in nature. Some of the benefits include; reduced initial investments and set up costs, convenience in flow of information and movement of goods, better co-ordination of activities between suppliers and customers as well as instant access to global markets. Technical challenges include poor internet connectivity, limited ICT technical skills, payment logistical issues, cyber security and lack of a national addressing system among others. The legal challenges entail: data privacy and protection, lack of dispute resolution platforms and opportunity for redress for consumers, information disclosure and verification, conformity of goods to the required standards and inability to pre-inspect goods prior to transacting.

This Chapter explores the background of this research by analysing the various opportunities and challenges in various jurisdictions through a review of the existing literature and jurisprudence on E-commerce. It also introduces the conceptual framework that will form the basis for the study.

1.2 INTRODUCTION

The use of electronic data transmission to conduct all aspects of business - including communication, contracting and exchange of goods and services, has over the latter half of the past century steadily increased. This mode of doing business is what is referred to as e-business.¹ During this period, it slowly became clear that it was possible to trade through E-commerce, the same way business ventures could facilitate their activities based on a 'brick and mortar' business model.² Consequently, E-commerce developed, disrupting the traditional market for goods and services.³ With increased access to internet connectivity, minimum infrastructural requirements

¹Reiss M, 'E-Business: Basics and Challenges', available at <http://www.ifp.uni-stuttgart.de/publications/phowo01/Reiss.pdf>. Accessed on 27 February 2019

² Laudon K, Guercio Carol T, 'E- Commerce 2016: Business, Technology, Society', (12th Ed. Edinburg, Pearson Education: 2016) at 67. Accessed on 10 February 2019.

³ Brewer C, 'Is E-commerce challenging traditional business models in Africa?' *IT News Africa* (Johannesburg 27 February 2015) available at <https://www.itnewsafrika.com/2015/02/is-E-commerce-challenging-traditional-business-models-in-africa/>. Accessed on 27 February 2019.

and lower operating costs, E-commerce has gained popularity in the African region, creating new opportunities for entrepreneurs and consumers.⁴

Digital transactions in E-commerce can be between two organizations, which is referred to as *B2B* or may involve customers who engage directly with organizations without an intermediary, which is referred to as *B2C*. According to UNCTAD, 9.3% of all purchases in 2017 in Kenya were made via e-commerce platforms, ranking fourth in Africa. Kenya, South Africa and Nigeria accounted for almost half of the online shoppers in Africa.⁵ The growth in popularity over the years has been mainly attributed to increased internet access and greater use of smartphone technology.⁶

Examples of E-commerce platforms in Kenya include e-malls such as Kilimall, Masoko and Jumia, transport hailing service providers such as Uber, Taxify and Mondo, social network platforms, i.e. personal and business such as Instagram, Facebook and LinkedIn and mobile banking services Applications such as M-Pesa, M-Akiba and Tala⁷.

On the flip side, consumer rights have been violated severally due to the fragmentation of the current legislation and regulatory framework, which does not provide for express regulations on E-commerce transactions.⁸

Consumers have numerous rights established by our current consumer rights protection laws.

However, the laws are not explicit on E-commerce transactions thereby bringing about the challenges such as; disclosure of information and verification, data privacy and security, establishing jurisdiction in dispute resolution, opportunity for redress, fraud and insufficient opportunity to inspect goods upon delivery among others⁹.

⁴ See generally, Yugi C *et al*, 'E-commerce Adoption Levels And Applications Among Manufacturing SMEs In Kenya', *International Journal of Economics, Commerce and Management* Vol. III, Issue 4, April 2015 available at <https://pdfs.semanticscholar.org/c2b7/131aa91ad853f393dfc74642a1eff21c9fdc.pdf>. Accessed on 27 February 2019.

⁵ UNCTAD, B2C E-Commerce Index, 2018, 'Focus on Africa', Available at https://unctad.org/en/PublicationsLibrary/tn_unctad_ict4d12_en.pdf. Accessed on 09 March 2019.

⁶ Yugi C *et al*, 'E-commerce Adoption Levels', 1.

⁷ Gitonga S, 'E-commerce; The Multibillion Industry in Kenya', (Nairobi, *Business Today* 25 September 2018) available at <https://businesstoday.co.ke/E-commerce-multi-billion-industry-kenya/>. Accessed on 27 February 2019.

⁸ Communications Authority of Kenya, *Report on the Development of E-commerce in Kenya*, 2018.

⁹ Sadat Mulongo L, 'E-commerce and Consumer Rights; Applicability of Consumer Protection Laws in Online Transactions in East Africa', *International Journal of Scientific Research and Innovative Technology*, Vol 4 No. 1 January 2017.

This study seeks to provide a solution for these challenges through a review of the existing frameworks and harmonizing the consumer rights protection laws and institutions for ease of enforcement of digital contracts in Kenya.

1.3 STATEMENT OF THE PROBLEM

Disruptive innovation is creating new opportunities for trade and new unprecedented consumer choice of goods and services. E-commerce has numerous potential to stimulate economic growth in Kenya and other developing countries. According to a report by Communications Authority of Kenya and Kenya Bureau of Statistics,¹⁰ internet penetration rate in Kenya was 26% and about 27% of the companies in retail trade sold their products online in 2017. Although E-commerce penetration in Kenya is currently estimated at 0.5% of the formal trade, more players are entering the market with estimates pointing to turnovers 25 times higher than traditional retail stores¹¹. E-commerce also has the potential to revolutionize the informal trade as a contributor to economic growth and development.

In order to harness its benefits, efforts need to be put in place to address a range of technical, legal and regulatory concerns that impact on the consumer. The technical challenges include poor internet access or unreliable connection, lack of adequate logistical infrastructure, cyber security, payment mode challenges and lack of technical know-how concerning sale of goods and services on a digital platform. Beyond the technical challenges, Kenya lacks an integrated and supportive legal and regulatory framework that caters for regulatory gaps in E-commerce.¹² There is need for Kenya to manage and control E-commerce consumer risks by removing cross border trade barriers and eliminating the ambiguity on the applicability of the conventional consumer rights protection laws in digital transactions. This will address the consumers' general distrust of trading online especially when it comes to data privacy and protection, lack of a dispute resolution system or opportunity for redress, lack of requirements for vendors to disclose all relevant information on goods and services for verification purposes, non-conformity of goods and services to the required quality standards, inability to pre-inspect goods prior to transacting and fraud among other consumer risks.

¹⁰ Communications Authority of Kenya, *Report on the Development of E-commerce in Kenya*, 2018.

¹¹ Nordea Trade, E-commerce in Kenya, <https://www.nordeatrade.com/en/explore-new-market/kenya/e-commerce>. Accessed on 22 June 2020.

¹² Wyckoff A, Colecchia Alessandra *The Economic and Social Impact of Electronic Commerce, Preliminary Findings and Research Agenda*, (Organization for Economic Cooperation and Development (OECD) Paris, 1999).

Despite experiencing similar technical challenges, South Africa has come up with certain innovative solutions to deal with the legal and regulatory challenges and boost consumer confidence in online trading. It would be practical for Kenya to adopt and apply some of the solutions locally as the economic conditions of both countries are almost similar. In 2019, Kenya had an estimated population of 47.6 Million¹³ while South Africa had a population of 58.7 Million¹⁴ and according to World Bank data in 2019,¹⁵ Kenya had a GDP per capita of 1,816.5 USD while South Africa had a GDP per capita of 6,001.4 USD.

Organizations like UNCITRAL, the Common Wealth and regional bodies like COMESA have come up with a model law to guide how municipal legislation is to be drafted and to harmonize the legal outlook and policy guidelines.¹⁶ They offer a benchmark against which the local laws regulating E-commerce can be drafted. Similarly, considering E-commerce is extra territorial in nature, it would take international co-operation in order to avoid disparately crafted regimes that will undermine trade.

The issue of concern therefore is not only how, but also who will be in charge of ensuring consumer rights protection, noting the multi-disciplinary aspects of E-commerce requiring international co-operation.

1.4 OBJECTIVES OF THE RESEARCH

This research will review the existing Kenyan legal and regulatory frameworks for consumer rights protection in E-commerce. It will further undertake a comparative study and analysis with South Africa and propose recommendations to the law and institutions governing its implementation.

Specific objectives

- i. To analyse and assess the existing legal and regulatory framework for consumer rights protection concerns in E-commerce in Kenya.
- ii. To compare the existing legal framework in Kenya with South Africa and other advanced countries.

¹³ Kenya National Bureau of Statistics, 2019 Kenya Population and Housing Census, Population by County and Sub-County, Vol 1.

¹⁴ Statistics South Africa, Statistical Release, Mid-year Population Estimates, 2019.

¹⁵ The World Bank, World Bank National Accounts Data and OECD National Accounts Data Files, <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD>. Accessed on 26 June 2020.

¹⁶ See Kumar V, 'A study of E-commerce and its Legal Framework: With Special Reference to India', *International Journal of Law*, Volume 3; Issue 3; May 2017; Page No. 89-94.

- iii. To recommend amendments to the law and institutions governing its implementation.

1.5 RESEARCH HYPOTHESES

1. The success of E-commerce depends on the enactment of legal and institutional frameworks that caters for consumer rights protection such as data privacy and security, choice of law and forum, opportunity for redress for consumer rights violations and envisions co-operation with other states, as South Africa has done.
2. The absence of bespoke legal and institutional frameworks on E-commerce in Kenya has resulted to violation of consumer rights.

1.6 RESEARCH QUESTIONS

This research seeks to respond to the following research problems;

1. Does the success of E-commerce depend on the enactment of legal and institutional frameworks that cater for consumer rights protection?
2. Is it necessary for Kenya to co-operate with other states for effective enforcement of consumer rights in E-commerce?¹⁷
3. What are some of the ways in which South Africa has developed legal and institutional frameworks that enhance consumer rights protection in E-commerce, and can such ways be adapted to suit Kenya's local conditions?

1.7 CONCEPTUAL FRAMEWORK

1.7.1 Background

A conceptual framework, generally understood, is the intellectual tool that is used by a researcher to analyze a topic of study. It represents the researcher's comprehension and proposed approach to a particular subject or topic that is under scrutiny. In the context of instant research, it is the intellectual guide used to analyze the current legal regime with respect to E-commerce, the responses that have already been established in policy and whether or not the said responses are adequate to the needs of E-commerce.

¹⁷ State cooperation is fundamental for enforcement of E-commerce because online trading without the support of brick and mortar business model goes beyond individual jurisdictions. States that participates in E-commerce benefit from it just like they also suffer the same challenges. Additionally, the actions by an individual in one state such as South Africa, may cause adverse effects in another state such as Kenya. For example, a person in South Africa can defraud another in Kenya while operating from South Africa.

To put this to perspective, we need not go further than the examples of Nokia, Motorola and Yahoo, which were muscled out of their positions of leadership due to failure to either innovate or keep abreast of the changes in the relevant fields.¹⁸ It is with this understanding that the quest to find the appropriate blend of regulations for E-commerce must be accelerated. This is so because there are two distinct consequences that the law may end up achieving, that is; stifling E-commerce by overregulation and making unbearable demands or supporting it in order to enhance the ease of doing business.¹⁹

1.7.2 Definitions and Contextualization

E-commerce, strictly understood, refers to the use of ICT to facilitate commerce by enhancing communication between the parties to commercial transactions prior to the crystallisation of legal rights and obligations. Accordingly, the term is used to refer to trading through electronic platforms, which is usually facilitated by the internet.²⁰ However, better understood, E-commerce goes beyond the contract formation stage and actually facilitates the consummation of the contract by offering a platform for monitoring progress and expression of satisfaction or dissatisfaction with goods and services.

In Kenya, companies such as Jumia, Kilimall, PigiaMe and OLX are the best examples of foremost entities that offered the E-commerce experience.²¹ Globally, we have the likes of Alibaba, eBay and Amazon that are evidence of the future of E-commerce.²² Despite the skepticism with which they were received, today they are accepted as part of commerce and enterprise. There is, therefore, ample evidence that Kenya is trying²³ to keep abreast of developments elsewhere and with

¹⁸ Tellis, G. 'Creating a culture for unrelenting innovation', *J. MWorld* 12.2 (2013): 38-41. Available at <https://pdfs.semanticscholar.org/3ba1/fb4e785ad1d05ee823151e079361acf91ee5.pdf>. Accessed on 21 July 2019.

¹⁹ Wang, Minyan. 'Do the Regulations on Electronic Signatures Facilitate International Electronic Commerce? A critical review', *Computer Law & Security Review* 23.1 (2007): 32-41.

²⁰ Mwencha Peter Misiani 'E-commerce Sub-Sector Assessment Report for Kenya', *Research Gate*, 2016, pp. 10 https://www.researchgate.net/publication/322910347_2016_ECommerce_SubSector_Assessment_Report_for_Kenya. Accessed on 28 February 2019.

²¹ Kabuba, P. K. (2014). '*E-commerce and Performance of Online Businesses in Kenya*', (Doctoral dissertation, University of Nairobi). Available at http://41.204.161.209/bitstream/handle/11295/77075/Kabuba_E-commerce%20And%20Performance%20Of%20Online%20Businesses%20In%20Kenya.pdf?sequence=3&isAllowed=y. Accessed on 21 July 2019.

²² Ou, Carol Xiaojuan, and Robert M. Davison. 'Technical opinion-Why eBay lost to TaoBao in China: The global advantage', *Communications of the ACM* 52.1 (2009): 145-148, see also Osawa, Juro. "Alibaba Tackles Amazon, eBay on Home Turf." *Wall Street Journal* 11 (2014). Available at <http://cartelequity.com/press/20140611%20-%20Alibaba%20Tackles%20Amazon,%20eBay%20on%20Home%20Turf.pdf>. Accessed on 21 July 2019.

²³ UNCTAD, 'B2C E-Commerce Index, 2018, Focus on Africa', Available at https://unctad.org/en/PublicationsLibrary/tn_unctad_ict4d12_en.pdf. Accessed on 9 March 2020.

effective and enabling regimes, enterprises in Kenya might be able to compete with the tech giants such as Alibaba and Amazon. Unlike the United States and China, among other states where giant E-commerce companies began, Kenya faces challenges associated with lacuna in law, regulatory lapses, and lack of a comprehensive oversight body.

Further, it would be critical to distinguish E-commerce from E-business; the latter being the use of ICT to enhance business processes within an organization.²⁴ Therefore, E-business is the use of savvy means by entities to do things such as virtual meetings, E-board meetings and staff human resource management using ICT based solutions among other things. E-commerce on the other hand refers to the broader category of online commercial transactions and denotes the act of vending and purchase of goods and services on a computer based network. Whereas E-business uses ICT as a supplement to trade, E-commerce uses ICT as the main medium of trade. An online shop has no physical address and relies on the internet infrastructure for its trade entirely.²⁵ For purposes of this research, the framework of online trading shall mainly focus on E-commerce.

E-commerce does not necessarily have to be *vide* the use of the internet to facilitate trade. The exchange may rely on the use of other communication devices such as mobile phones. Furthermore, E-commerce also encompasses subjects such as internet advertising, electronic payments and funds transfers, management of systems of supplies and management of inventories using information technology.²⁶ The law, whether *sui generis* or otherwise that may be crafted to respond to the existing lacunae will have a bearing on all these matters. This is because E-commerce encompasses B2B, B2C and C2C interactions and as such, any of the listed concepts will be relevant. C2C interactions will be relevant for referrals, advertisement, and sale of items that a customer no longer needs to use.²⁷ This thesis therefore, analyses the response of the law to this new model of commerce.

²⁴ Chaudhury, Abhijit, and Jean-Pierre Kuilboer 'E-business and E-commerce Infrastructure: Technologies Supporting the E-business Initiative', McGraw-Hill Higher Education, 2001.

²⁵ Zoraya Ruth Andam, 'E-commerce and E-Business', The Asean Task Force UNDP-APDIP. 2003, https://www.kau.edu.sa/Files/830/Files/61164_Ecommerce%20and%20E%20Business.pdf. Accessed on 21 July 2019.

²⁶ Li, Zhaolin (July 2015). 'Online Versus Bricks-And-Mortar Retailing: A Comparison of Price, Assortment and Delivery Time', *International Journal of Production Research*. **53** (13): 3823–3835. doi:10.1080/00207543.2014.973074. Accessed on 21 July 2019.

²⁷ Lu, Yaobin, Ling Zhao, and Bin Wang 'From Virtual Community Members to C2C E-commerce Buyers: Trust in Virtual Communities and its Effect on Consumers' Purchase Intention', *Electronic Commerce Research and Applications* 9.4 (2010): 346-360.

Despite attempts to enact effective legal and institutional frameworks in Kenya, it is yet to put in place an elaborate framework for regulation of service providers and consumers. At the apex of the legislative framework is the *Constitution of Kenya, 2010*,²⁸ whose provisions bind all state organs, and all persons as enumerated under Article 2(1).²⁹ The Constitution, under Article 46 provides for consumer rights protection. Under this provision, quality of goods and services and the health of consumers are placed at the forefront of consumer protection.³⁰

Additionally, the statutory framework comprises of the *Kenya Information and Communications (Amendment) Act, 2013*³¹, *Kenya Information and Communications Act Cap 411A*³², *Competition Act*³³, *The Sale of Goods Act*³⁴, *The Evidence Act*³⁵, *The Law of Contract Act*³⁶, *Consumer Protection Act*³⁷, *The Computer Misuse and Cyber Crimes Act*³⁸ and *The Business Laws (Amendment) Act*³⁹. Furthermore, Kenya has also put in place a regulatory framework, which include *Kenya Commercial (Electronic Transactions) Regulations*⁴⁰ and *Kenya Information Communication (Consumer Protection) Regulations*.

The *Consumer Protection Act*⁴¹ is the fundamental piece of legislation that guarantees rights to consumers. Although the Act does not specifically make provision for electronic transactions, it defines an internet agreement as a consumer agreement formed by text-based internet communications. It also provides for disclosure of all material information on the internet agreement, availing of a copy of the agreement to a consumer and circumstances for cancellation of an internet agreement. This forms the pre-requisites for an online transaction in Kenya.⁴²

²⁸ The Constitution of Kenya, 2010.

²⁹ The Constitution of Kenya, 2010. Article 2. (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

³⁰ The Constitution of Kenya, 2010. Article 46 (1), (2), and (3).

³¹ No.41 A of 2013.

³² Cap 411A Laws of Kenya.

³³ Competition Act 2010.

³⁴ Sale of Goods Act, Cap 31 Laws of Kenya. Retrieved from: <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2031>. Accessed on 11 June 2019.

³⁵ The Evidence Act, Cap 80 Laws of Kenya. <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2080>. Accessed on 11 June 2019.

³⁶ Cap 23, Laws of Kenya.

³⁷ Consumer Protection Act No. 46 of 2012.

³⁸ Act No.5 of 2018, Laws of Kenya.

³⁹ Act No.1 of 2020, Laws of Kenya.

⁴⁰ Kenya Commercial (Electronic Transactions) Regulations of 2009.

⁴¹ Act, No.46 of 2012. Laws of Kenya.

⁴² Act No.46 of 2012, sections 31, 32 and 33.

Kenya Information and Communications Act Cap 411A is the law that anchors E-commerce in Kenya by allowing transactions through electronic means and authentication of the same through electronic signatures. However, it only covers engagements between the government, its agencies and ordinary citizens. No specific provisions provide for E-commerce between B2B and B2C. On the contrary, the statute creates a body corporate for purposes of regulating e-transactions. The Communication Authority of Kenya is established under the Act for protection of consumers as part of its mandate.

The Sale of Goods Act (SOGA)⁴³ captures the overriding aspects of the law of contract for sale of goods, in all platforms including the electronic ones. Despite the fact that the Act does not expressly acknowledge the platforms for completing transactions, it does give provisions that operate in all platforms including the electronic state. Under section 5 of SOGA, contracts can be written or oral. The subject matter of contract addressed under section 6, 7, and 8 remains the same despite the platform. Furthermore, transfer of property in goods upon ascertainment of the goods as contemplated under section 18 is universal, the platform notwithstanding and the overriding rule under section 19 of the Act, which states that property in goods should pass when intended to pass is still applicable in E-commerce.

The Evidence Act⁴⁴ expressly acknowledges E-commerce, Section 106 of the Evidence Act provides for admissibility of electronic evidence, albeit by requiring a certificate from the person bearing the electronic signature of the gadget. This presupposition supports E-commerce in that contracts made and executed on the internet are recognized as evidence of a legal obligation that is actionable as if it was made on paper, provided that the computer from which the data is generated is demonstrated to have worked properly. As emphasized in ***R v Barisa Wayu Matuguda***⁴⁵, electronic evidence is only admissible if the bearer of the electronic machine from which the evidence is obtained has produced an electronic certificate indicating that it was working correctly and was operated by the bearer. The same position was reiterated in ***Nonny Gathoni***

⁴³Sale of Goods Act, Cap 31 Laws of Kenya. Retrieved from: <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2031>. Accessed on 14 June 2019.

⁴⁴The Evidence Act, Cap 80 Laws of Kenya. <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2080>. Accessed on 14 June 2019.

⁴⁵Republic v Barisa Wayu Matuguda [2011] eKLR. Retrieved from: <http://kenyalaw.org/caselaw/cases/view/77213>.

*Njenga and Anor v Catherine Masitsa and Anor*⁴⁶. The court adopted the principles of natural justice and constitutional principles thereby invoking the requirement that justice be administered without undue regard to technicalities of procedure.

*The Law of Contract Act*⁴⁷, under section 2(1) imports the English common law of contract for application in Kenya.⁴⁸ The Act makes provision to the effect that certain contracts, usually commercial agreements, be in writing.⁴⁹ Despite the provisions of the Act not expressly providing for E-commerce, they are inconsistent with the development on the law of E-commerce since the requirements contemplated thereunder may be achieved by electronic means or internet transactions. For example, manual signing of agreements can be achieved through 'ACCEPTANCE' of terms of an agreement after online verification of user identity.

The *Competition Act*⁵⁰ aims to protect consumers and the public at large from unfair and restrictive trade practices. Section 7 of the Act establishes the Competition Authority of Kenya. Its mandate includes protection of consumers from unfair and misleading market conduct. Section 70-A gives the Authority the power to investigate consumer rights violations and impose administrative remedies whether such breach was occasioned online or offline. Despite the Act not expressly providing for online transactions, Section 32 contains provisions allowing investigating officers of the Authority to search for information from computers held by an undertaking against whom a complaint has been made. Impliedly, unfair and misleading market conduct taking place online is included within the purview of the Act and the Authority's mandate.

The *Access to Information Act*⁵¹ gives effect to Article 35 of the Constitution,⁵² which recognizes the right to access relevant information from both public and private bodies. Institutions are required to proactively, routinely and systematically disclose information that they hold. It promotes the constitutional principles of transparency and accountability.

⁴⁶Nonny Gathoni Njenga & another v Catherine Masitsa & another [2014] eKLR. Retrieved from: <http://kenyalaw.org/caselaw/cases/view/95650/>. Accessed on 26 June 2019.

⁴⁷ Cap 23, Laws of Kenya.

⁴⁸ The Law of Contract Act, Section 2(1).

⁴⁹ The Law of Contract Act, Section 3 provides that specific contracts must be in writing to be enforceable. These includes; security agreements by third parties; such as a guarantee, surety or indemnity and contracts for the disposition of an interest in land.

⁵⁰ No.12 of 2010.

⁵¹ The Access to Information Act No.31 of 2016.

⁵² Constitution of Kenya 2010.

The *Data Protection Act*⁵³ gives effect to Article 31(c) and (d) of the Constitution⁵⁴ which guarantees the right to privacy of information relating to the private affairs and communication not necessarily shared or revealed. This impacts on E-commerce by checking the excesses of E-commerce vendors that collect vast amounts of personal data from consumers for their own commercial or competitive advantage. Section 48 restricts transfer of personal data outside Kenyan borders unless it is done with the consent of the data subject, with full knowledge of the possible risks of transfer. The transfer must also meet the required conditions, including having in place appropriate safeguards for protection of the data, transfer is necessary for performance of a contract between the data subject and the data processor and the transfer is for the benefit of the data subject. As such, all cross border E-commerce transactions must comply with the pre-conditions set out in the Act.

The *Computer Misuse and Cyber Crimes Act* prevents the unlawful use of computer systems by facilitating the prevention, detection, investigation, prosecution and punishment of cybercrimes. The Act further establishes the National Computer and Cybercrimes Coordination Committee. One of the functions of the Committee that could relate to regulation of E-commerce is to advise the Government on security of matters pertaining to block chain technology, critical infrastructure, mobile money and trust accounts. In relation to international cooperation in combating fraudulent activities in E-commerce transactions, the Act provides that the provisions of Part V of the Act⁵⁵ apply in addition to the Mutual Legal Assistance Act⁵⁶ and the Extradition (Contiguous and Foreign Countries) Act⁵⁷. This essentially means a person who commits any of the offences under the Act, commits an offence that warrants extradition if that person is domiciled in another reciprocating jurisdiction. The downside to this is that for one to be extradited for such an offence, that particular offence has to satisfy the duality requirement.

Despite the Act not expressly providing for fraudulent activities in relation to E-commerce, inferences can be drawn from the provisions therein that could tangentially apply to E-commerce transactions. Section 26 of the Act provides for computer fraud. The section makes it an offence for a person who either fraudulently or dishonestly obtains an economic benefit for oneself or for

⁵³ Data Protection Act, 2019.

⁵⁴ Constitution of Kenya 2010.

⁵⁵ Essentially, Part V of the Act provides for international cooperation.

⁵⁶ Cap 71 A, Laws of Kenya.

⁵⁷ Cap 76, Laws of Kenya.

another person by means provided under Sub-Section 2. Further, under Section 30, the Act makes phishing⁵⁸ an offence. This would encompass the E-commerce vendors who send unsolicited messages to consumers after purchasing from their sites.

The Business Laws (Amendment) Act digitalizes different processes of transacting government services, including expanding the use of electronic signatures⁵⁹ and advanced electronic signatures⁶⁰ to sixteen pieces of legislation⁶¹. It has explicitly recognized the possibility of contracting through data messages by broadening the use of electronic signatures to the various amended statutes as captured under the *Kenya Information and Communications Act*⁶². However, the Act mainly relates to G2C services, by digitizing government services and facilitating ease of doing business in Kenya. It must be noted that the Act only provides for B2B and B2C interactions in E-commerce by amending section 3 (6) of the Law of Contracts Act⁶³ to expand the definition of the word “sign”, to incorporate the use of an advanced electronic signature.

Nevertheless, the current legal regime in Kenya fails to remedy the various consumer risks in the area of E-commerce⁶⁴. Perhaps the country could borrow a leaf from the jurisprudence of South

⁵⁸ Where a person creates or operates a website or sends messages through a computer system inducing the recipient to disclose personal information.

⁵⁹ Refers to data in electronic form affixed to or logically associated with other electronic data, which may be used to identify the signatory in relation to the data message and indicate the signatory’s approval of the information contained in the data message.

⁶⁰ This is an electronic signature that is uniquely linked to the signatory, capable of identifying the signatory, created using means that are within the signatory’s control and linked to the data to which it relates such that any subsequent change to the data can be detected.

⁶¹ The amended pieces of legislation include; The Law of Contract Act, Registration of Documents Act, Companies Act, Insolvency Act, Kenya Information and Communications Act, Income Tax Act and Stamp Duty Act, that have an impact on E-Commerce.

⁶² Act No.1 of 1998.

⁶³ Cap 23, Laws of Kenya.

⁶⁴ For instance, the South African National Consumer Protection Act promotes good business practices such as fairness, openness, transparency, and delivery of goods fit for the intended purpose including online transactions. Kenya, through the Sale of Goods Act only seems to provide for the delivery of goods fit for purpose but does not consider the online medium as a pertinent factor to legislate on. Unlike Kenya, the South African Electronic Communication and Transactions Act (ECT) mandatorily requires vendors to disclose information concerning the legal status of their websites, business email address, telephone number, the price of goods, payment options and return policies. The legislation also allows customers to change their minds after placing an item in a cart online. Additionally, they also have an option of returning goods within seven days of receipt only with a requirement that they pay for the return transportation cost. All these are provisions which are absent in the Kenyan context and which demand a legislative review and enactment. Protection of Personal Information Act restricts the use of information of purchasers for any other purpose other than for completing transactions and getting payment therefrom. This is yet another South African legislation that addresses the pertinent issue of data security and privacy concerns in E-commerce. Regulations of Interception and Provision of Communication-Related Information Act also seeks to uphold data security and prevent unauthorized leakage of private information. At the moment, these fundamental provisions

Africa. Specifically, their legal and institutional frameworks take care of some E-commerce obstacles such as online security breaches, jurisdictional incompatibility, and fraud among others. South Africa has come up with more elaborate and effective legislative framework documented in just a handful of legislation, which shall be analysed and considered in detail under Chapter Three, where a comparative study between the Kenyan and South African E-commerce regimes will be undertaken.⁶⁵ Through the aforementioned statutes, the major consumer rights protection concerns have been addressed, at least, in a more elaborate manner as compared to the situation in Kenya.

In a bid to find solutions to the gaps in the Kenyan legal and regulatory regime, the jurisprudence in South Africa shall be consulted with a steady focus on data security, privacy concerns, information disclosure and verification. In addition, the study shall also look into issues concerning the inability or insufficiency of opportunity for the customer to inspect the goods pre-delivery, opportunity to have disputes redressed effectively in a timely and less costly manner, imbalance in negotiation power, safeguards concerning quality of goods and guarantee that the products match the standards advertised, fraud, among other challenges. The study shall also delve into the mandate and effectiveness of institutions such as the Consumer Affairs Committee, The Independent Communication Authority of South Africa (ICASA), and the South African Communications Security Agency.

Having looked into the challenges and compared the situation in Kenya with South Africa, this research shall advance possible solutions, which will be tailor-made to address concerns of consumer rights protection in Kenya, in the context of E-commerce. Consequently, based on the findings, recommendations shall be structured in a manner that correspond to the challenges being faced in the Kenyan market and how some of them can be addressed through reference to the legal and institutional frameworks in South Africa.

The South African regime is an ideal source of benchmarking for solutions for the Kenyan market as it experiences similar economic conditions as Kenya and infrastructural challenges such as access to internet services, access to financial services, cyber security and lack of a national

are missing in the Kenyan's legal framework in E-commerce such as *The Kenya Information and Communications Act of 2009*.

⁶⁵The pertinent statutes for the present study include the South African Consumer Protection Act 2008, Electronic Communication and Transactions Act, and Protection of Personal Information Act.

addressing system, which makes delivery logistics cumbersome⁶⁶. It would therefore be practical to adapt some of the innovative solutions by South Africa and apply them to the local Kenyan conditions. Some of the innovative solutions that South Africa has put in place include: establishing an E-commerce regulatory authority, providing for a cooling off period which offers consumers an opportunity to cancel or return orders made online within a specific period of time, regulations protecting consumers from unsolicited communications, protection of data privacy and prohibition of unauthorized use of information, provision for online dispute resolution platforms, such as .Za Domain Name Authority (.ZADNA) that handles domain names disputes and appointment of an Online Ombudsman⁶⁷.

Extraterritorial cooperation is a fundamental pillar in E-commerce. Without it, issues such as jurisdictional incompatibility cannot be solved effectively. There is therefore need for Kenya to co-operate with other states to effectively address enforcement of consumer rights in E-commerce. As such, this study shall also be amenable to receipt of ideas from economically advanced countries, notwithstanding its focus on South Africa, since E-commerce is better established in more developed countries. For example, Amazon, which is amongst the leading E-commerce vendors in the world was established in Seattle in the United States in 1994⁶⁸, the second and third are Chinese companies named Jingdong and Alibaba established in 1995 and 1999 respectively, and the fourth is eBay founded in 1995 at San Jose, California. Consequently, it would be amiss to discuss the solutions to E-commerce challenges without mentioning the United States and China, albeit in passing. The rationale is that the aforementioned have solved most of the challenges using strategies such as putting in place secure data protection mechanisms, proper naming of streets to ensure accuracy of physical locations and online accessibility so that deliveries can be made conveniently. Kenya's E-commerce, on the contrary, seems to be a relevant

⁶⁶ Communications Authority of Kenya, 'White Paper on Facilitation and Adoption of E-commerce Via Postal/Courier Networks, 2015', <<https://ca.go.ke/wp-content/uploads/2018/02/White-Paper-on-E-Commerce-Adoption-in-Kenya-April-2015.pdf>>. Accessed on 5 March 2020.

⁶⁷ World Economic Forum, White Paper, 'The Global Governance of Online Consumer Protection and E-commerce; Building Trust, March 2019'. <http://www3.weforum.org/docs/WEF_consumer_protection.pdf> Accessed on 5 March 2020.

⁶⁸ Mahendran Kirubakaran, Warren Loo, Pwai Keong, Ong Eu Chin, and Jignyasu A/L Prafulla Joshi. 'The Evolution of E-commerce: A Case Study on AMAZON', *Academia.edu*. pp. 7. https://www.academia.edu/30175817/Evolution_of_E-commerce_Amazon_case_study?auto=download. Accessed on 16 July 2019.

discussion only in the capital city, Nairobi, and selected towns such as Mombasa, Kisumu, Eldoret, and Nakuru.

With a more advanced and effective institutional and legal framework, Kenya can achieve the benefits of online trading. As discussed by Dr. Mwencha, E-commerce has myriad of benefits including reduction in the cost of investment and operational costs, extension of the market for goods and services beyond national borders, creation of more options for customers, creation of jobs, increase in competition, and elimination of investment barriers, among others.⁶⁹ To enjoy the aforementioned benefits, the country should begin with transforming the institutional and legal aspects to meet elevated standards as shall be elaborated in chapter two on conceptual framework.

Conceptually, this research is based on a practical understanding of data privacy and protection in the current political economy, a progressive view of the data protection laws and a distinction between the different parameters of the theory of contextual integrity. The research shall rely heavily on the political economy as the basis for aligning and balancing political and economic interests of different states. This is because aside from the law being required to protect the user of E-commerce as an individual having rights of their own, the law also ought to ensure that it does not engender inhibitions that defeat the very reason for E-commerce; that is to improve the efficiency of the velocity of transactions while reducing the costs of doing business.

Among the main consumer rights protection concerns in E-commerce is information privacy and protection. This is an integral part of any digital transaction as the consumer is required to share sufficient personal information, physical address, financial information, shopping trends and preferences, which is then stored electronically by the vendors. This has in some cases resulted to consumer profiling and data mining, where consumer's personal data is used to create individual profiles for targeted advertisements, solicitations and fraud.

1.7.3 The Main Theoretical Approaches/Paradigms

As a justification for the chosen theoretical paradigms for the study, E-commerce brings its own peculiarities, which the law must respond to sufficiently in order for such law to be deemed to have utility. Foremost, the potentially global nature would demand that the strategies adopted allow room for multinational co-operation. Secondly, ICT is dynamic in nature, it would be required that the law is also dynamic and open to cover all possible scenarios. Thirdly, the central

⁶⁹ Mwencha Peter Misiani, 'E-commerce Sub-Sector Assessment Report for Kenya' 12-15.

place of the consumer and the making of choices means that the law ought to consider enhancing the role of the consumer in regulation. Finally, owing to the far-reaching consequences of hampered growth of E-commerce on the economy, a political-economic approach that seeks the most suitable compromise is unavoidable.

Further expanding the issue of the dynamic nature of ICT and the potential breaches of privacy, the context has to be of paramount importance. Due to the administrative difficulty of policing and enforcement, self-regulation also becomes a potent alternative to public regulation. However, a mix of both is most appreciated as long as the enabling law does not make it impossible for both to co-exist harmoniously. Based on the foregoing, the particular theoretical approaches are discussed below.

1.7.3.1 Contextual Integrity

In order to lay emphasis on the need for keeping consumer information private and confidential, I shall rely on Prof. Helen Nissenbaum's theory of *contextual integrity* as an alternative standard for protection in relation to data privacy and protection.⁷⁰ It relates appropriate protection of privacy to contexts, requiring that collection of information and usage be suitable to that context and comply with the set of pre-conditions governing its distribution.

Under this theory, two critical norms determine whether privacy has been infringed. Foremost, we have the norms of appropriateness.⁷¹ It speaks to the inherent category of information and usage suitable to a particular context. This understanding analyses the kind of information whose release would amount to a breach of privacy. It is therefore inward looking. For instance, matters to do with health and sexuality are private and intimate and ought not to be divulged unless for very explicit and legal reasons. It is noted that where E-commerce relies on social media as a platform for offering good and services, this theory gains enhanced significance.⁷²

Other than the norms of appropriateness, we have norms of distribution that govern flow, distribution or transfer of information. This speaks to the rules that ought to guide the process of release of information from one entity to another. In the event a company that provides the

⁷⁰ Helen N, 'Privacy as contextual integrity', *Washington Law Review*, 2004, 1.

⁷¹ Barth, Adam, et al. 'Privacy and Contextual Integrity: Framework and applications', *2006 IEEE Symposium on Security and Privacy (S&P'06)*. IEEE, 2006 available at <https://theory.stanford.edu/people/jcm/papers/barth-dattamitchell-nissenbaum-2006.pdf>. Accessed on 15 August 2019.

⁷² Lipford, Heather Richter, et al. 'Visible Flows: Contextual Integrity and The Design of Privacy Mechanisms on Social Network Sites', *2009 International Conference on Computational Science and Engineering*. Vol. 4. IEEE, 2009. Accessed on 15 August 2019.

infrastructure for communication, whether via the internet or mobile telephony, shares information with E-commerce companies to assist in decision-making and targeted advertisements, the process of sharing such information ought to also be interrogated. Where the information that is distributed is de-identified and no longer capable of identifying a person and the same is shared after consulting the data subject, then privacy would still be maintained. This can be achieved, if upon registration of users to a platform, the terms and conditions for registration specifically require the user to give consent to the use of their personal information in a de-identified manner. The reason for the appeal of this framework is that the traditional frameworks that have been used to justify data protection regimes, policies and laws do not often yield satisfactory results.⁷³

The objective of the contextual integrity understanding is to propose a typology that does not stop the flow of information, but allows such flows if the flows are not in contravention of the original intention for the provision of the information.⁷⁴ The ideal example would relate to information given by a person to a government agency in accessing services or in the process of undertaking civic duties. A person who provides information to a customs agent about their trade and earnings should be able to expect that the information he/she provided to the Customs agent shall be safe. In the event the customs agent provides such information to an investigative journalist to piece a story about the robust business empire owned by person A, then such unauthorized disclosure of information ought to be viewed as being illegal. Based on the principle of *ubi jus ibi remedium*,⁷⁵ Person A is then entitled to a right of action in a court of law and the equitable remedy of compensation for the wrong suffered.

The theory of contextual integrity as espoused by Nissenbaum is the core of this research in relation to data privacy and protection.⁷⁶ It is the intellectual strand that appreciates the need to put in place infrastructure to support usage of technology without stifling the usage itself.⁷⁷ It relates to the protection of private information in different contexts. What may be breach of privacy in one instance may not be viewed the same way in another instance. The information gathered in a

⁷³Helen N, 'Privacy as contextual integrity' 119.

⁷⁴ Barth, A, 'Privacy and Contextual Integrity: Framework and Applications', *2006 IEEE Symposium on Security and Privacy (S&P'06)* IEEE, 2006.

⁷⁵ Loosely translated to mean, where there is a right there is a remedy.

⁷⁶ Nissenbaum, Helen, 'Privacy as Contextual Integrity', *Wash. L. Rev.* 79 (2004): 119 available at <https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=4450&context=wlr>. Accessed on 12 August 2019.

⁷⁷ Grodzinsky, Frances S., and Herman T. Tavani, 'Privacy in the Cloud: Applying Nissenbaum's Theory of Contextual Integrity', *ACM SIGCAS Computers and Society* 41.1 (2011): 38-47 available at http://digitalcommons.sacredheart.edu/cgi/viewcontent.cgi?article=1040&context=computersci_fac. Accessed on 12 August 2019.

particular context must be used for the purpose for which it was collected and must not go beyond that purpose.

This theory is based on the understanding that personal information may be provided or shared in different contexts. The context within which the information is provided determines whether or not the same information can be shared with third parties and if so it sets the conditions precedent and the applicable safeguards. This theory, therefore, appreciates the current state of ICT not only in Kenya but also globally. It is a practical approach to the need for direct regulation of ICT with respect to data privacy and protection.

To put it into perspective, privacy would be tantamount to contextual integrity. In other words, what would otherwise constitute a breach of privacy would not be a breach as such if the context within which such information is accessed allows such usage. This is especially relevant to the research in this age where the internet is no longer a library of information but a tool for accessing things and items. If the items or goods sourced by a person may reveal another's identity, health status, marital status, religion, financial expenditure and preferences, then it would be critical to put in place measures to ensure that such information is used strictly for the intended purpose and not any other or shared with third parties. This is the essence of contextual integrity and importantly so in the rise of the Internet of Things (IoT) where data can be exchanged without a human interface.⁷⁸

This research adopts this framework because it appreciates that the law must support E-commerce.⁷⁹ Further, it appreciates the peculiarities of the use of technology. In this case, a new approach is therefore the best solution. In the end, the enacted laws should consider the need to enhance the role of the data subject and the power to determine which of their information can be shared. It is also appreciated that efficient businesses must leverage on E-commerce. In doing so, there will be need to gather information and analyze it. This will result in enhanced roles of analytics, big data, cloud and data protection impact assessment. The law must therefore, be appreciative of context and economic realities but also support endeavors to protect the

⁷⁸ Winter, Jenifer Sunrise. 'Privacy and the Emerging Internet of Things: Using the Framework of Contextual Integrity to Inform Policy', *Pacific Telecommunications Council Annual Conference Proceedings*. Vol. 2012. Pacific Telecommunications Council, 2012
<https://scholarspace.manoa.hawaii.edu/bitstream/10125/63532/1/Privacy%20and%20the%20emerging%20Internet%20of%20Things%20PTC%202012%20Proceedings%20%20J.%20S.%20Winter.pdf>. Accessed on 12 August 2019.

⁷⁹ Omoola, Sodiq O., and Umar A. Oseni. 'Towards an effective legal framework for online dispute resolution in E-commerce transactions: trends, traditions and transitions', *IJUM Law Journal* 24.1 (2016).

consumer.⁸⁰ Information flows that are commercial in nature and meets the two criteria must therefore not be inhibited.⁸¹

1.7.3.2 Political Economy

The other relevant conceptual framework is the theory of political economy. Properly understood, political economy refers to the manner in which political forces and institutions interact with the economy and the law. These always have a way in which they influence each other and viewing them as separate matters that ought to be observed in their different compartments is likely to lead to insensitive and unresponsive policies and laws. Historically, political economy was viewed as the laws that were relevant for purposes of production of wealth at the state level. That is to say, the origins of this theory were focused on the interactions between the law and the economy resulting in the framing of the laws with economic progress in mind. A more recent view of the political economy is the view of policy decisions as the resultant community of the interaction between political and economic institutions and agents in the market.⁸²

The theory of political economy therefore propounds an approach that is sensitive to the interaction between politics, the economy and the law. The cross border nature of E-commerce will make it more needful to adopt approaches that support concerted international efforts and practical solutions such as self-regulation and brand competitiveness to regulate E-commerce. Similarly, the dispute resolution regime must also be flexible enough to respond to the needs of the consumers and businesses.

This research pursues an academically researched solution to fill in the gaps in E-commerce. However, it also seeks to offer practical solutions that are sensitive to the economic realities and political factors at play. This would include for instance the explicit protection of privacy in the Constitution and the approaches the courts may take at the slightest indication of breach of privacy.

Despite the foregoing, there are also the winds of globalization and the competition that has now moved to more innovative frontiers of using technology to enhance business efficiency and

⁸⁰ Smith, Rhys, and Jianhua Shao. 'Privacy and E-commerce: A Consumer-centric Perspective.' *Electronic Commerce Research* 7.2 (2007): 89-116 available at http://rsmith.org.uk/publications/ecom_res_rhyssmith.pdf. Accessed on 15 August 2019.

⁸¹ Barth, A. 'Privacy and Contextual Integrity: Framework and Applications.' *2006 IEEE Symposium on Security and Privacy (S&P'06)* IEEE, 2006.

⁸² Ostrom, E, 'Beyond markets and states: polycentric governance of complex economic systems', *American Economic Review* 100.3 (2010): 641-72.

customer experience. In fact, the utility in goods between two competitors may be the same but the consumers may feel more attracted to entities that appear to be abreast of the changing times. To position Kenya as a leader in this respect, there is no doubt whatsoever that the law must be an enabler and not a 'stifler' of E-commerce. Actually, the leading global brands today are companies that are technology-based solution providers. These include Alibaba, Google, Microsoft, Tesla and Samsung among others.⁸³

The sensitive nature of laws that touch on commerce is revealed by the intensity of lobbying that takes place when such laws are being discussed by legislative bodies. This may result in a regulatory capture, where the legislative bodies are dominated by the E-commerce vendors to act in their best interest, at the expense of the consumers. Better still, a more refined understanding of the theory of political economy views policies as the results of the interaction between politics and commerce or the economy.⁸⁴ Critically, this approach offers a flexibility that concerns itself with utility and can be extrapolated to deal with the politics of not only E-commerce but also data protection and data wars among telecommunication companies, as well as the involvement of state-sanctioned regulators.⁸⁵ In our case, we have the Communication Authority of Kenya.

The letter and spirit of the law must therefore reflect a compromise between the need to protect consumer rights and the need to support commerce. The support for commerce stems from the overwhelming benefits and new opportunities, already discussed hereinbefore. These would include but are not limited to reduced transaction costs, enhanced sustainability of businesses and economic liquidity by enhanced access to finance among other things.⁸⁶ This theory blends well with the theory of contextual integrity as earlier discussed owing to their preoccupation with

⁸³ Tigges, Jana, Bettina van der Stelt, and Jessica Volk, 'The New Kids on the Block-Exploring the brand identity of disruptive innovators', *LBMG Strategic Brand Management-Masters Paper Series* (2018) available at <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOID=8967620&fileOID=8967893>. Accessed on 15 August 2019.

⁸⁴ Ostrom, E, 'Beyond markets and states: polycentric governance of complex economic systems', *American Economic Review* 100.3 (2010): 641-72.

⁸⁵ Peter K, 'The Political Economy of Data Protection', 84 *Chi.-Kent L. Rev.* 777 (2010). Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol84/iss3/6> at 779. Accessed on 10 September 2019.

⁸⁶ SMEs avoid heavy set up costs by being able to offer goods online. These goods may be stored at a warehouse from where they can be retrieved upon demand. The charges therefore will be less compared to renting space in an upmarket location in order to reach to customers.

practical solutions.⁸⁷ Furthermore, the problem of diminishing employment opportunities will not be helped by stifling endeavors that make it possible to incubate small businesses.

1.7.3.3 E-commerce and the future.

Conceptually, this research also fits E-commerce into the timeframe of now and then. This looks beyond E-commerce merely as leveraging on use of ICT in supporting business and views E-commerce, generally as an integral part of commerce. The future of sustainable business practice generally lies in minimizing the use of resources as much as possible and maximizing the benefits to the end user. This research, shall also view E-commerce not only as an enabler of efficiency but also as a crucial component of sustainable development. This is because E-commerce provides a tool for cutting costs for the SMEs.⁸⁸ It eliminates heavy set up costs such as those required for retail spaces, hiring security consultants for stock theft management, insurance and handling costs in the nature of employment.⁸⁹

With the accelerated uptake of technology all over the world and the rapid rate of globalization, communication has been made much easier. Critically, commerce depends on communication. Therefore, technology consequently ends up playing a huge role in making goods or services from one corner of the globe available to a purchaser at the other end of the globe.⁹⁰ Information Technology is the bridge between the said two parties and with the enhanced infrastructural systems; movement is no longer as arduous as it was. This being the case, a person who would traditionally not be able to access distant goods or services cost effectively, can now access the specialized goods and services.⁹¹

According to Raju, E-commerce is the future of commerce. This explains the meteoric rise to the top of online advertising entities such as Google, which have capitalised on various revenue

⁸⁷ Henriksen-Bulmer J, Shamal F, and Sheridan J. 'Privacy Risk Assessment in Context: A Meta-Model based on Contextual Integrity', *Computers & Security* 82 (2019): 270-28 at 272& 273.

⁸⁸ Chun-Sheng Y, and Xue-Bing D, 'A Conceptual Framework for E-commerce Innovation in Chinese SMEs', *Journal of International Technology and Information Management* 22.1 (2013): 2.

⁸⁹ Idris, Abdhakeem O, 'Assessing a Theoretically-Derived E-Readiness Framework for E-commerce in a Nigerian SME', *Evidence Based Information Systems Journal* 1.1 (2015).

⁹⁰ Oxley, Joanne E. and Bernard Yeung. 'E-commerce readiness: Institutional environment and international competitiveness', *Journal of International Business Studies* 32.4 (2001): 705-723. Available at <https://link.springer.com/article/10.1057/palgrave.jibs.8490991>. Accessed on 21 July 2019.

⁹¹ Generally, there is enhanced concentration on certain areas of commerce by different enterprises, Kendall, Julie E., and Kenneth E. Kendall. 'A paradoxically peaceful coexistence between commerce and ecommerce', *Journal of Information Technology Theory and Application (JITTA)* 3.4 (2001): 3. Available at <https://aisel.aisnet.org/cgi/viewcontent.cgi?article=1196&context=jitta>. Accessed on 21 July 2019.

sharing models to assist companies to directly reach consumers (B2C) at the expense, generally, of certain retailers.⁹² Therefore, it is my argument that as technology gains more traction and use in commerce, business transactions will increase, enterprises will become more reliant on E-commerce to cut costs and break into new frontiers and markets. Furthermore, according to Criteo,⁹³ the consumer of this day is aptly described by the word ‘convenience.’⁹⁴ They are more concerned about getting their wants satisfied with the least of exertions and at their convenience. This being the case, such innovations as shall be able to provide this convenience and enhance customer experience while maintaining a competitive advantage and by leveraging on ICT infrastructure enhance customer loyalty.⁹⁵

Despite the foregoing, this paper appreciates ‘brick and mortar’ businesses and the fact that physical retail spaces will remain. However, there will need to be good reasons for such businesses to exist. Such reasons may include the selfsame convenience, layered uses of such outlets and customer prestige.

1.7.4 Goal-Setting and Clear Identification of the Role of the Law

From the foregoing, E-commerce must therefore be adopted by the various components that together make up the economy of our country.⁹⁶ This being so, and in order to keep maintaining leadership in innovation in Sub-Saharan Africa, the regulatory framework must be supportive of such disruptive business processes. Currently, Kenya is known as the “Silicon Savanna” and the

⁹² K V Raju, ‘E-commerce: The Future of Business’, *IOSR Journal of Economics and Finance (IOSR-JEF)* e-ISSN: 2321-5933, p-ISSN: 2321-5925.

PP 33-37 available at <http://www.iosrjournals.org/iosr-jef/papers/ICIMS/Volume-1/6.pdf>. Accessed on 05 August 2019.

⁹³ One of the leading online advertisement companies in France that helps companies to offer personalized and targeted advertisement as to persons who visit the company sites. See Mahmoud Gamal, ‘France’s E-commerce Firm Criteo Sets Eyes on Saudi, UAE for GCC Expansion – Interview 20th December 2018’, *Mubasher* available at <https://english.mubasher.info/news/3385630/France-s-E-commerce-firm-Criteo-sets-eyes-on-Saudi-UAE-for-GCC-expansion-Interview/>. Accessed on 05 August 2019.

⁹⁴ Criteo, ‘*The Future of E-commerce: The Road to 2026*’, available at <https://www.criteo.com/es/wp-content/uploads/sites/8/2017/09/ovum-the-future-of-E-commerce-the-road-to-2026.pdf>. Accessed on 05 August 2019.

⁹⁵ Chege, Stanley Mwangi. ‘IT strategic alignment maturity levels in Kenya’, *Journal of Business Theory and Practice* 2.2 (2014): 203-220. Available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.654.1391&rep=rep1&type=pdf>. Accessed on 05 August 2019.

⁹⁶ Mwencha Peter Misiani ‘E-commerce Sub-Sector Assessment Report for Kenya’, *Research Gate*, 2016, 10 https://www.researchgate.net/publication/322910347_2016_ECommerce_SubSector_Assessment_Report_for_Kenya. Accessed on 05 August 2019.

laws in respect of innovation in commerce must continually reflect this.⁹⁷ In the event the policy environment fails to do so, we would be stifling our very own growth by sticking to traditional models that will be more expensive to sustain.⁹⁸

It has been argued that ICT based solutions have made it cheaper for SMEs to sustain their operations by reducing the need for labour, cutting down on advertisement budgets and making it possible to reach to customers without having to travel long distances.⁹⁹ Therefore, it would be advisable for the government to craft the policy and legal framework in a manner that is harmonized and further, with the goal of supporting E-commerce.¹⁰⁰

Further, by enhancing the chances of SMEs surviving cutthroat competition, the challenge of unemployment is better addressed and long term sustainable development goals are made more achievable. Perhaps for further emphasis, other goals including environmental sustainability may also be achieved through extensive adoption of E-commerce even if as an externality.¹⁰¹

1.8 LITERATURE REVIEW

There has been extensive development of literature by global and regional trade bodies in formulating what is termed as a model law for adoption and implementation by individual countries. UNCITRAL Model Law on Electronic Commerce (UNCITRAL Model Law) provides for digital signatures in relation to digital contracts, where it considers a digital contract as duly signed where the identity of that person can be established and it indicates the person's approval of the information as contained in the digital contract¹⁰². It further provides for the admissibility

⁹⁷ World Bank, 'Kenya Economic Update: Accelerating Kenya's Digital Economy', October 2019 available at <https://www.worldbank.org/en/country/kenya/publication/kenya-economic-update-accelerating-kenyas-digital-economy>. Accessed on 05 August 2019.

⁹⁸ Ministry of Information and Communication Technology, 'Digital Economy Blueprint Powering Kenya's Transformation', available at <http://www.ict.go.ke/wp-content/uploads/2019/05/Kenya-Digital-Economy-2019.pdf> page 13. Accessed on 12 August 2019.

⁹⁹ Boateng, Richard, et al. 'E-commerce and socio-economic development: conceptualizing the link', *Internet Research* 18.5 (2008): 562-594. Available at <https://www.emerald.com/insight/content/doi/10.1108/10662240810912783/full/html>. Accessed on 12 August 2019.

¹⁰⁰ Molla, Alemayehu, and Paul S. Licker. 'E-commerce Adoption in Developing Countries: A Model and Instrument', *Information & Management* 42.6 (2005): 877-899.

¹⁰¹ Oláh, J., Kitukutha, N., Haddad, H., Pakurár, M., Máté, D., and Popp, J. 'Achieving Sustainable E-commerce in Environmental, Social and Economic Dimensions by Taking Possible Trade-offs', *Sustainability*, 11(1), (2019), 89, full text available at https://www.researchgate.net/publication/329901796_Achieving_Sustainable_E-commerce_in_Environmental_Social_and_Economic_Dimensions_by_Taking_Possible_Trade-Offs. Accessed on 12 August 2019.

¹⁰² Article 7, UNCITRAL 'Model Law on Electronic Commerce with Guide to Enactment', 1996, (hereinafter UNCITRAL, Model law).

and evidential weight of digital contracts in legal proceedings.¹⁰³ UNCITRAL later promulgated a Model Law on Electronic Signatures, expounding on the issue of electronic signatures¹⁰⁴, in order to comply with the digital signature requirements.¹⁰⁵ Building up on the UNCITRAL Model Law, the Commonwealth have also recently developed a Model Law on Electronic Transactions, which contains a malleable and neutral set of sample provisions. It buttresses the validity of digital contracts and confirms validity of electronic signatures in digital contracts.¹⁰⁶

According to *Nissebaum*,¹⁰⁷ public surveillance and users' data protection is a controversial subject that is yet to be properly understood by both the subjects of the law and the governments that are given the mandate of coming up with policy positions. According to the author, it is critical to have a proper framework into which the law can be fitted. It is the premise of her research that traditional approaches to the question of privacy fall short of the set standard. The research takes over from the building blocks that were laid by Walzer who posited that there are different "spheres of justice."¹⁰⁸ Critically, the dissemination and use of information provided for use in one sphere may not be proper for use in a different sphere.¹⁰⁹ It is with this conceptual understanding that it is proposed that the law ought to consider the justification of use and dissemination of information if the parameters of contextual integrity are satisfied.

On the other hand, *Barth et al* reviewed the issue of contextual integrity and stressed the fact that it is distinct from the traditional controls and privacy policies, which do not consider the possibility of justified usages of personal information.¹¹⁰ The study focuses on personal information and compares the contextual integrity model to Role-Based Access Control framework (RBAC), the Enterprise Privacy Authorization Language (EPAL) and the Privacy Preferences Project (P3P) as conceptual bases for the restriction of access to personal or hitherto private information. It is argued that these frameworks may limit information flow from being modelled for the sole objective of

¹⁰³ Article 9, UNCTRAL, Model law.

¹⁰⁴ It is defined as data in electronic form, affixed to or logically associated with a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message

¹⁰⁵ Article 6, 'UNCTRAL, Model Law on Electronic Signatures with a Guide to Enactment', 2001.

¹⁰⁶ *The Commonwealth, Model Law on Electronic Transactions*, 2017.

¹⁰⁷ Helen N, Privacy as Contextual Integrity, 1.

¹⁰⁸ Helen N, Privacy as contextual integrity, 122.

¹⁰⁹ Walzer, M, 'Spheres of Justice: A Defense of Pluralism and Equality', (Basic books New York, 2008).

¹¹⁰ Barth, A, 'Privacy and contextual integrity', 1.

restriction. On the other hand, the contextual integrity model seeks to view whether or not the access is justified having in mind the initial objective for the provision of the information.

In an effort to do self-regulation, the E-commerce Committee¹¹¹ in India, bringing together the E-commerce sector has developed Self-Governing Principles based on best practices, as an applicable legal regime for consumer rights protection.¹¹² However, the Self-Governing Principles are based on a self-regulatory model and as such, adoption of the Principles by E-commerce companies is discretionary and enforcement might be challenging for E-consumers.¹¹³

Ostrom,¹¹⁴ in studying the political economy identifies the complex interactions between the state, its institutions and the economy. She is of the view that this complex web of relationships heavily influences the laws and policies that result therefrom. It is her view that this complexity in relationships is what has resulted in scholars adopting a multidisciplinary approach to the study of socio-economic and political phenomena. She concludes that where simple theories can explain phenomena, such simple models ought to be used. However, where the relationships are complex and require such complex conceptual theorization, then we should be willing to engage the use of complex structures to understand and try to resolve social dilemmas. This explains the political economy approach that is proposed by this research.

McKenna assesses the phenomenon of E-commerce on a global scale and avers that despite its benefits there is the challenge of data protection that is inextricable linked to E-commerce.¹¹⁵ The disparities in jurisdictional policies is identified with the European Union (EU) and the United States of America (USA) being used as examples. The study identifies the effect of electronic commerce in enhancing cross border trade. As far as fair practices are concerned, the study highlights the need for notice, consent, access to the information by the persons to whom the data

¹¹¹ E-commerce Committee at Federation of Indian Chambers of Commerce and Industry.

¹¹² The Self-Governing Principles provide for provision of complete information on policies, terms and conditions of a transaction along with full details of the sellers or service providers, maintaining a complete record of all transactions and enabling the consumer to access and retain a copy of their records, E-commerce companies to set up a technology enabled process for fast tracking resolutions of complaints, facilitating easy returns, mandatory notification of recurring charges or renewal of subscription and use of personal data solely for purposes of facilitating transactions on the platform and for such other purposes that are disclosed to the consumer at the pre-transaction stage and for which he has given express consent.

¹¹³ CNBC TV 18, 'E-commerce Sector Looks to Self-regulate, Flipkart, Amazon not on board', <<https://www.cnbc18.com/business/e-commerce-sector-looks-to-self-regulate-flipkart-amazon-not-on-board-4188921.htm>>. Accessed on 5 April 2020.

¹¹⁴ Ostrom, E, 'Beyond Markets and States', 741.

¹¹⁵ McKenna, A, 'Playing Fair with Consumer Privacy in the Global On-line Environment', *Information & Communications Technology Law* 10.3 (2001): 339-354.

belongs, security and availability of enforcement mechanisms in the event of breach as the foundation stones for a fair regime of data protection. The study finds that the current global mechanisms have been insufficient in protection of the users of E-commerce. It is however proposed that the EU Directive offers a stronger model. The study is limited to the global environment of E-commerce but has insights that are necessary for municipal legislation.

Kayleen assesses the challenges posed to the consumers by emerging technologies.¹¹⁶ It is her view that what she terms the third wave computing is resulting in a pervasive and intrusive internet where the users of platforms and sites are exposed and at the mercy of developers and governments¹¹⁷. It is her view that what we are witnessing is just the beginning and that as we go into the future, the current laws shall be useless and in disconnect with the developments in computing. The author discusses what are called E-objects as being the next frontier of data protection violations. This is because these are in-built capabilities in computers, which have the capacity to record data, handle it and communicate based on the said information. Further, these objects have the capacity to engage with the physical world and adapt to the environment. It is identifiable, autonomous and has the ability to interact with human beings. These issues are of concern especially regarding autonomy, since they can act outside of commands from the operator and can be modified remotely by the suppliers. *Kayleen* argues that the complexity makes it difficult to apportion legal culpability in the instance of harm. Critically, the author identifies the need to ensure that innovation is not stifled by overregulation. The study is meant however, to offer a foundation for further research and stops short of making proposals for consumer rights protection.

In addition, writing in the context of the EU and therefore the United Kingdom, *Abdulrahman* recognized the great leaps that have been taken all over the world in E-commerce transactions. These are either Business to Customer or Business to Business.¹¹⁸ It is noted that UK contributes-together with France and Germany to 70% of E-commerce in Europe. The Electronic Commerce Directive adopted in 2000 and the Electronic Signatures Directive of 1999 provide the foundational

¹¹⁶ Kayleen M, 'Emerging Information Technologies: Challenges for Consumers', *Oxford University Commonwealth Law Journal*, 17:2, (2017) 265-289.

¹¹⁷ Kayleen M, 'Emerging Information Technologies', 272.

¹¹⁸ Abdulrahman A, 'An evaluation of E-commerce legislation in GCC states: Lessons and principles from the international best practices (EU, UK, UNCITRAL)', LLD Thesis Lancaster University May 2016 (on file with author) and available at <http://eprints.lancs.ac.uk/83401/1/2016Abdulrahmanphd.pdf>. Accessed on 19 July 2019.

framework that has been adopted by the United Kingdom.¹¹⁹ Critically, it is identified by the author that the role of the framework is to protect both the consumer and the businesses by providing legal certainty.¹²⁰ The examples given include Article 4, which makes certain disclosure requirements in distance contracts under the Directive on Distance Contracts [1997] OJ L144 19–27. The author also highlights the Directive on Consumer Rights [2011] OJ L304, which requires certain guarantees to the consumer.¹²¹ These are domesticated by the Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013 that further makes effort to make E-commerce transactions more certain by adding further requirements to the community law.

Edwards in his study generally looks at the E-commerce regulatory regime in Europe and not specifically the UK.¹²² The author argues that through the implementation of the Directive from 2002 by the United Kingdom, the community regulation is meant to be a strategy for both regulation and promotion. It is not either of the two but both. This is critical having in mind the conceptual framework of this research in propounding the need for regulation, which not only protects privacy, but one that also does not stifle E-commerce. Importantly, the author goes beyond the E-commerce regulation to matters such as distance transactions, online dispute resolution and online money transactions.

Writing earlier, Rowe also grapples with the issues that these other authors have come across including distance selling.¹²³ However, at the time of the paper, the current regulations and their domestication by the UK had yet to be done. The Financial Services Act of 1986 was still useful in that it required services to be approved by the relevant regulator before being offered, under Section 57. This would have offered some form of reprieve to the consumer against the rogue vendors.

In the case of South Africa, OECD posits that E-commerce is steadily on the rise and a 26% growth was witnessed in online retail in 2016. However, the cross border nature of the transaction has made it close to impossible to track these types of transactions. In terms of contribution to the GDP, it is stated that E-commerce did contribute 33% in 2014 and this was expected to grow to

¹¹⁹ Directive 1999/93/EC of the European Parliament and the Council of December 13 1999.

¹²⁰ Abdulrahman A, 'An evaluation of E-commerce legislation in GCC states', 58.

¹²¹ On the basis of the Council Directive 93/13/EEC on unfair terms in consumer contracts [1993] OJ L95 29–34, it is argued that certain terms of the E-commerce may be deemed to be unfair terms.

¹²² Edwards, L, Ed. 'The new legal framework for E-commerce in Europe', (Bloomsbury Publishing, 2005).

¹²³ Rowe H, 'Internet- Enabled commerce: International Issues for Business Lawyers', *The Journal of World Intellectual Property* 2.4 (1999): 517-563.

42% by the first quarter of 2015. Critically, it is noted that ICASA is not only concerned with privacy but also enhancing the growth of E-commerce transaction velocity. The Electronic Commerce Transactions Act is phrased in these very terms and is meant to facilitate the said growth. Section 9 provides that the Minister be given the responsibility of facilitating the creation of centers to sensitize SMEs on E-commerce. Regarding consumer protection, the Act refers to the Consumer Protection Act.

Jobodwana identifies the fact that governments have identified both E-commerce and M-commerce¹²⁴ as the new frontiers of development.¹²⁵ However, it is noted that the levels of growth have been slow owing to certain key challenges. These include low internet uptakes in remote areas and limited infrastructure. It is stated that this is what motivated the UN to follow up and come up with the model laws. It is stated that the more urgent need therefore is to come up with a more robust framework for the sector.

Olakpe argues that E-commerce is enhancing commercial transactions owing to its ability to reduce start-up costs for SMEs.¹²⁶ E-commerce in Nigeria from 2011 to 2014 grew by 25%. It is stated that the law has generally been responsive. For instance, the updating of the Evidence Act 2011, to cater for electronic signatures. Generally, the author states that there have been concerns about the readiness of Nigeria for full-scale online transactions after the fraudulent activities that were witnessed in relation to the banking sector over online platforms. The study highlights government effort in the form of the Online Transactions Bill that is yet to be passed into law by its National Assembly. The author concludes that it is only after the law is passed that online transactions can be made safe and predictable in the event of breaches of warranties and conditions.

Elvy on the other hand looks further into the future and finds that by 2025, the consumer will be further disadvantaged by what is termed the Internet of Things (IOT).¹²⁷ In this age, consumers will have little involvement in the contracting process since the IOT will make it possible for items to be automatically replenished without the action of the consumer. Consequently, the consumer

¹²⁴ The conduct of commercial transactions electronically, through use of mobile devices such as smartphones and tablets.

¹²⁵ Jobodwana, Z, 'E-commerce and mobile commerce in South Africa: regulatory challenges', *J. Int'l Com. L. & Tech.* 4 (2009): 287.

¹²⁶ Ovie O, 'The State of Regulating the E-commerce Industry in Nigeria: A Lesson from the UK', *Academia*, available at: https://www.academia.edu/12135311/The_State_of_Regulating_the_E-commerce_Industry_in_Nigeria._A_Lesson_from_the_UK. Accessed on 19 July 2019.

¹²⁷ Elvy, S, 'Contracting in the Age of the Internet of Things: Article 2 of the UCC and Beyond', *Hofstra L. Rev.* 44 (2015): 839.

will be less inclined to look at the contract terms making them susceptible as those that may allow automatic and unilateral change of terms of the contract without the input of the consumer. The author, writing in the context of the United States of America, proposes that Article 2 of the Uniform Commercial Code ought to be amended in order to ensure that such terms do not restrict access to judicial processes and that the courts are given sufficient power to look into such scenarios.¹²⁸

Ciochetti who writes in the context of United States, states that the challenge that comes with E-commerce is for businesses to be able to piece up together information and come up with a digital dossier.¹²⁹ The information when pieced together becomes personally identifying information (PII) and thereafter the consumer is put at risk of manipulation. It is argued that the sectorial approach means that certain sectors are well regulated whereas others are left unregulated exposing the user of the web. This it is argued is partly also due to the allowance for private or self-regulation. At the federal level, it is only the Children's Online Privacy Protection Act of 1998 and the E-Government Act of 2002 that appear to touch directly on the sphere of E-commerce. The author argues that the others touch remotely and therefore at this level there ought to be efforts to craft an all-encompassing framework for E-commerce at the federal level. This will seal the gaps that exist and thus, engender harmony.

Hemphill also in his paper reveals what happens in the United States as it pertains to the issue of online mining of data.¹³⁰ The paper is a case study of Double Click Inc. a company that developed and provided internet ad services¹³¹, which failed to protect the data of its online consumers. In the end, the company was sued for violation of consumer online privacy¹³². There are also lawsuits that were at the time pending having been instituted by the Attorney General of New York and another one by the AG of Michigan. The challenges that faced Double Click are evidence of what

¹²⁸ As is, Article 2 generally allows courts to interfere only on the basis of unconscionability and the *contra preferentum* rule.

¹²⁹ Corey C, 'E-commerce and Information Privacy: Privacy Policies as Personal Information Protectors', *American Business Law Journal* Volume 44, Issue 1, 55–126, Spring 2007.

¹³⁰ Thomas H, 'DoubleClick and Consumer Online Privacy: An E-commerce Lesson Learned', *Business and Society Review* 105:3 361–372.

¹³¹ In *Re DoubleClick Inc. Privacy Litigation*, 154 F. Supp. 2d 497 (S.D.N.Y. 2001). < <https://law.justia.com/cases/federal/district-courts/FSupp2/154/497/2429654/>>. Accessed on 5 September 2019.

¹³² Double Click is a Delaware corporation. The Plaintiffs filed a class action suit, seeking injunctive and monetary relief for injuries suffered because of Double Click's alleged illegal action. Double Click was accused of placement of cookies on computer hard drives of internet users who accessed its affiliated website and tracking the users surfing activities and build up profiles for purposes of delivering targeted advertisements. The court held that Double Click was not liable because the alleged action fell under the consent exceptions.

happens when there is a lack of a clear framework. The authors therefore conclude that the solutions to these challenges is to come up with an effective legislative framework and to ensure better self-regulation strategies.¹³³

Furthermore, *Zhang, Chen & Lee* focus their attention on the use of smart phones by consumers to make purchases online. They argue that it has enhanced access especially with the penetration of fast speed internet.¹³⁴ Different from E-commerce, M-commerce they argue is ubiquitous, immediate, localized and capable of tracking the user owing to the use of sim-cards for connection to networks. This makes E-commerce more prone to abuse and harder to regulate. These concerns according to the authors need to be addressed in order to make it safer for the consumers.

Nurridin, Abdulah & Yussop posits that the potential of E-commerce in Nigeria is great. It is for this very reason that they view the current state of things as jeopardizing the safety concerns of the consumers of the goods and services offered online.¹³⁵ They conclude that there is need to craft a systematic regime in Nigeria in order to better enhance the safety and trust of the users and ensure that the businesses benefit from certainty in case of disputes arising.

1.9 METHODOLOGY AND APPROACH

This study will entail a desktop research of primary texts such as constitutions, legislation, regulations, rules and case law as well as secondary texts including books, articles and law journals.

I will embark on a comparative study concerning the consumer protection mechanisms in E-commerce as established in South Africa vis-à-vis Kenya.

1.10 LIMITATIONS OF THE STUDY

This research is limited to a desktop research of primary and secondary sources of literature and a comparative study mainly with South Africa selected to represent an African country in a similar economic position as Kenya.

¹³³ Thomas H, DoubleClick and Consumer Online Privacy: An E-commerce Lesson Learned *Business and Society Review* 105:3 361–372.

¹³⁴ Ruidong Z, Jim Q. C & Ca Jaejung L Mobile Commerce and Consumer Privacy Concerns, *Journal of Computer Information Systems*, 53:4, (2013) 31-38.

¹³⁵ Muhammad N, Yuhanis Y, ‘Anita Abdullah, Electronic Commerce Transaction in Nigeria: A Critical Legal Literature Review Conference’, The 9th UUM ILC 2017, At Malaysia.

There are countries which have made developments in consumer rights protection in E-commerce globally but which will however not be considered.

1.11 CHAPTER BREAKDOWN

Chapter One introduces and explores the background to this research paper. It also provides a conceptual framework that delimits the scope and maps out the legal and institutional frameworks in E-commerce in light of consumer rights protection by defining the key terms, evaluating the usage of E-commerce by discussing the benefits, shortcomings and the need of having in place an effective consumer rights protection regime in E-commerce. Further, it outlines the consumer risks, proposed solutions and the need for co-operation with other states.

Chapter Two takes stock of the Kenyan legal and institutional frameworks on E-commerce. It covers the problem of consumer rights protection in E-commerce using particular cases that consumers have encountered. This chapter also analyzes how Kenya is dealing with the issues arising through legislation and institutional reforms.

Chapter Three undertakes a comparative study and analysis of the South African legal and institutional regime, which is an African country facing similar challenges and in a similar economic position as Kenya.

Chapter Four forms a discussion based on the findings of chapter One, Two and Three. The chapter interrogates whether indeed enactment of legislation and institutional reforms is necessary as a tool to protect consumer rights in E-commerce in Kenya. This chapter will also give proposals for further research in order to extensively develop this area of study.

2 CHAPTER TWO: LEGAL AND INSTITUTIONAL FRAMEWORKS IN KENYA

2.1 ABSTRACT

This Chapter evaluates the Constitutional provisions that set out the general principles upon which, all other rights are premised. It also reviews specific pieces of legislation that have a bearing on E-commerce, whether directly or by implication and identifies the consumer risks in the Kenyan regime. Finally, it proposes possible solutions based on a comparative study with South Africa, in Chapter Three.

2.2 LEGAL FRAMEWORK

The legal Framework on E-commerce in Kenya is marked by constitutional provisions that facilitate E-commerce and those that permit it. Pursuant to Section 3 of the Judicature Act¹³⁶, the Constitution of Kenya ranks at the apex of all other laws of Kenya. The framework is further anchored by legislation passed by Parliament from time to time, the common law of England and precedents developed by the Kenyan courts through the *stare decisis* principle, the doctrines of Equity in force, international statutes ratified in Kenya and general principals of international law.

2.2.1 The Constitutional Framework

Article 31 of the Constitution provides for the Right to privacy. This is central to E-commerce because of the susceptibility of consumers who use E-commerce platforms, to have personally identifiable information mined. This is especially so in this age of big data where the cutting edge of competition has shifted from mere speed in churning out goods and services to the ability to gather information about consumers and to analyze their trends and information for future use.¹³⁷ Critically, the privacy in the Constitution relates not only to the search for the privacy of homes and property but also private communication and the bar against the unnecessary revelation of personal information. It must be noted that companies in this age heavily rely on the agencies that can mine and interpret such data as a tool for staying ahead of the pack.¹³⁸

¹³⁶ Judicature Act, Cap 8 Laws of Kenya.

¹³⁷ Salehan, Mohammad, and Dan J. Kim. 'Predicting the performance of online consumer reviews: A sentiment mining approach to big data analytics', *Decision Support Systems* 81 (2016): 30-40.

¹³⁸ Chong, Alain Yee Loong, et al. 'Predicting consumer product demands via Big Data: the roles of online promotional marketing and online reviews', *International Journal of Production Research* 55.17 (2017): 5142-5156.

Since the Constitution is written in broad terms for it to serve the present and the future generations as contemplated in the preamble, it does not expressly authorize E-commerce. However, it guarantees the right to initiate or participate in electronic businesses. Were it to attempt to be written to cover specific areas of human interactions, it would be unnecessary to have Acts of Parliament. Further, such an attempt would be defeated by the practicalities of having all facets of the law in one volume. In any event, by definition, the constitution is the ground norm setting forth the bare minimums against which other laws must be measured. Therefore, it cannot possibly go into the practical details of E-commerce but can set forth the principles that must govern the lawmakers in enacting the laws that are relevant for E-commerce.

Article 31, has been the subject of judicial consideration in the twin cases of *Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 others*¹³⁹ and *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others*¹⁴⁰. These cases were both determined by Hon. Justice J. Mativo who was explicit that where the network providers attempted to introduce generic device management systems that would gather information about users without their consent, such would be tantamount to a violation of Article 31. In both cases, it was recognized that such electronic platforms for communication were key enablers of E-commerce. However, in both cases, the learned judge was clear that the constitutional ideal of the right to privacy and the need for public participation in the development of such necessary policy, regulations or decisions were imperative and not mere suggestions.

Tangentially, Article 35 of the Constitution is relevant to E-commerce as it guarantees the right to access information that is not only within the control of state agencies but also held by another person for purposes of the enforcement of any right enshrined under the Constitution. Where a vendor of goods or a provider of services, gathers information about consumers, they can be compelled to furnish the information for purposes of enforcement of the bill of rights. Therefore, this serves as a safeguard against the mining of data that may be used to mitigate harm after a breach of privacy. To this extent, the Constitution has an inbuilt system that can be used to facilitate E-commerce.

¹³⁹ Constitutional Petition 53 of 2017.

¹⁴⁰ Constitutional Petition 86 of 2017.

The right of access to information is enshrined in the Constitution including the power to be able to make an application to the court to force a person to provide information within their control is crucial to E-commerce. As discussed in the foregoing, the law must have two objectives. That is to protect the consumer or user of electronic commerce and to support E-commerce. The provision allowing compulsion of a person holding information for enforcement of a right establishes an avenue for consumers to protect their rights. In the event they are apprehensive or have reasonable grounds to believe that their privacy or economic rights are jeopardized, they can approach the constitutional court under that provision and seek a declaration and damages as may be appropriate.

In both *Okiya Omtatah and Kenya Human Rights Commission cases*, the major network providers in Kenya were Respondents. Since E-commerce must be done over the internet, this is where the critical role of Internet Service Providers (ISPs) comes into play, since E-commerce companies may not by themselves engage in data mining. This may be done by the program developers or third parties granted access by the ISPs. Therefore, the key role of the ISPs in ensuring that the infrastructure has inbuilt safeguards cannot be gainsaid. The court declared the use of the network service providers as an avenue for gathering information without the knowledge of platform users as unconstitutional. Even when the introduction of such generic device management systems was provided for in the user agreement, it would be immaterial, considering there was no real choice in the circumstances for the users to consent. Despite not touching directly on commerce, the decisions lay the basis for the implementation of Article 31 with respect to data protection.

Evidently, the provisions of the law relevant to E-commerce are still concerned more with issues of privacy and protection of personally identifiable information (PII) as opposed to the utilization of the information systems in commerce. In fact, these are among the few cases that have extensively dealt with the question of the use of digital platforms and protection of consumers. Simply put, the law is frozen at the point at which telecommunication service providers merely oversee communication and not the facilitation of commercial transactions.

The Constitution further promotes E-commerce by giving omnibus protection to all consumers including those that acquire their goods and services through electronic platforms. Although the letter of Article 46 is couched in general terms, it offers protection that touches on the quality of goods and services passed through various mediums including the electronic platforms. Pursuant to Sub-Article 1 (a), the quality of goods and services are required to be reasonable. When this

standard is applied to E-commerce, it operates as a fundamental parameter for ascertainment of quality, since parties are usually operating from distant geographical locations and without physical contact. The provision therefore compels vendors to match the constitutional threshold on quality and gives purchasers a right to reject the goods and services if their quality does not meet the aforesaid parameter. Critically, this provision provides the legal basis for customer redress in E-commerce disputes involving quality of goods, sale of goods by sample, sale of present but unascertained goods and sale of future goods.

E-commerce depends on the dissemination of full and accurate information to customers. Usually, internet-based platforms disseminate information necessary to enable customer acquire the right description, the right specification, size, quality, year of manufacture and expiry dates of products. Without such information being made available by the vendor to the benefit of an online purchaser, the consumer would be greatly prejudiced in his/her decision-making concerning the product. As such, the letter of Article 46(1)(b) makes it mandatory for the vendor to release all material information needed by the customer to make a decision on whether to purchase the product or not. The requirement is an entrenched obligation on the part of the vendor, upon which, limitation is only permitted in a regulated manner as contemplated under Article 24 of the Constitution.

Furthermore, Article 46 (1) (c) offers protection of consumer health, economic interests, and safety. As a fundamental requirement in common law sale of goods, the buyer was presumed to be aware of the pertinent information concerning goods and services procured, as postulated by the principle of *caveat emptor*. With the development of common law through various cases such as *Ashington Piggeries v. Christopher Hill Ltd*,¹⁴¹ common law imposed a requirement that vendors supply goods that are of merchantable quality. Consequently, the requirement meant that “caveat emptor” would be changed to “caveat vendor.” The merit of such common law principle is similar to the provision of Article 46 (1) (c) wherein the Constitution attempts to protect the consumers through the preservation of the economic interests of the purchasers, their health and safety. In that regard, the Constitution shifts the ascertainment of suitability for use and merchantability from the purchaser to the vendor.

Article 46 (1) (c) of the Constitution offers compensation for detriment suffered by consumers owing to a defect in goods. This provision is intended to further enhance protection for trading,

¹⁴¹ *Ashington Piggeries Limited v Christopher Hill Limited* (1972; AC 441). Retrieved from: https://en.wikipedia.org/wiki/Ashington_Piggeries_Ltd_v_Christopher_Hill_Ltd on 17 September 2019.

especially in E-commerce where parties usually have no opportunity to inspect the goods before initiating a transaction. Furthermore, E-commerce in Kenya is still at its infancy, hence, the provision improves the safety standard for online transactions. As such, the constitution augments trust and confidence by providing consumers with recourse in case a purchaser for value suffers loss and/or injury attributable to the goods and services procured from an identified vendor.

In effect, therefore, the Kenyan constitution makes it a right for any consumer of goods or services to require that their consumer rights be protected. Notwithstanding the lack of an express reference to electronic commerce, the Constitution would protect any consumer whose rights are violated in contravention of Article 46 as read together with the **Consumer Protection Act**. With regard to the right to information, a consumer would, seemingly have an upper hand against a producer or vendor of goods or provider of services who fails to provide the necessary information resulting in harm and injury to any consumer. The challenge therefore would be how to enforce this right in cross border trade where the dealers or vendors are not licensed locally.

The Constitution further protects E-commerce by promoting and encouraging fair administrative practices. Article 47 stipulates that administrative actions should be procedurally fair and expedient. This provision can be extrapolated to regulate the operations of the Communications Authority of Kenya, especially on matters touching on the making of internet agreements. Under Section 3, the Kenya Information and Communication Act forms the Communication Authority of Kenya and assigns roles to it. Among others, the Authority is mandated to regulate communication whether postal or conveyed through the internet. The functions of the Authority cut across the E-commerce platform. Accordingly, decisions of the commission touching on sales via the internet should be done in a procedurally fair and expedient manner.

Importantly, fair administrative action is not only a requirement for public entities but also private persons.¹⁴² Therefore, where an entity offering goods or services via electronic platforms acts unfairly with respect to Article 47, they can be required to justify their acts/omissions under this Article of the Constitution. This is especially so where such cases may generate public interest due to potential coverage and involvement of other state and non-state actors as is revealed by the cases of *Okiya Omtatah and Kenya Human Rights Commission* referred to hereinabove.

¹⁴² Such application of the principles of administrative law to private agencies has its recent origins in the case of *R v Panel on Take-overs and Mergers, ex parte Datafin plc [1987] QB 815*. Before this express declaration, administrative law was thought to be only applicable to the decisions or actions of public agencies.

Based on the foregoing, it can be argued that the Constitution as the foundational law is conducive to E-commerce. It helps to facilitate it, by enhancing the confidence of the consumer through explicitly protecting privacy. However, Article 31 is silent on the issue of whether or not such privacy can be modified to allow for incubation of E-commerce. Further, the Constitution also protects the rights of the consumer under Article 46, despite not expressly providing for the rights to consumers of goods and services offered through E-commerce. The utility of the Constitution as the repository of general principles suffices as a basis for enactment of a *sui generis* legal and institutional regime on E-commerce.

Finally, having underlined the general nature of the constitutions world over, and the fact that they ought to provide the general norms and principles, it is clear that the provisions of Articles 31, 35, 46 and 47, *inter alia*, can form a solid foundation for the protection of consumer rights in electronic communication platforms. However, with regard to Article 47, the challenge of the practicalities of subjecting virtual entities or those with origins in foreign jurisdictions to Kenyan courts remains one of the key challenges.

2.2.2 Statutory Legal Framework

From the foregoing, it is noteworthy that the statutory legal framework in Kenya is yet to adequately cover the realm of E-commerce. This general statement is relative to the realities of E-commerce in South Africa where the law specifically touches on the salient aspects of E-commerce. However, the statutes discussed contain provisions that apply to ordinary trading in 'brick and mortar' businesses, which can be extrapolated to operate in the E-commerce platform. Such statutes include the **Law of Contracts Act, Sale of Goods Act, Competition Act, Evidence Act, Access to Information Act and Data Protection Act** among others. However, Kenya has come up with certain statutes and regulations that specifically touch on the operations touching on E-commerce in Kenya. For example, **Kenya Information and Communications (Consumer Protection) Regulations, 2010**¹⁴³, which seem to extend their operations to address issues such as consumer privacy, personal security, selection of service provider, the accuracy of bills or consideration for the goods and services rendered through the E-commerce platforms. The **Competition Act** has provisions touching on remote contracts and internet contracts, separately.

¹⁴³ Regulations made in 2010, by the Minister for Information and Communications pursuant to sections 27,38,39,46K, 66 and 83R of the Kenya Information and Communications Act,1998.

The **Data Protection Act** expressly provides for the protection and security of personal data against loss, damage, unlawful access or unauthorized processing.

2.2.2.1 Consumer Protection Act

The Consumer Protection Act is enacted pursuant to Article 46(2) of the Constitution.¹⁴⁴ The definition of a consumer under the Act includes a person to whom vendors' goods and services are marketed in an ordinary transaction. The definition does not specifically mention the electronic platform because the statute is meant for general application to all consumers. In essence, the statute extrapolates the definition of a 'consumer' to include any person who has entered into a transaction with a supplier, unless such an arrangement is made outside the operations of the Act. Notably, the definition does not specify the types of transaction contemplated under the operations of the Act and those that may have been entered into beyond the scope of the operations of the Act. As such, recipients or beneficiaries of any form of commercial transaction, including E-commerce and E-business, are considered as consumers whose rights and interests are protected under the aforementioned statute.

Article 23 of the Constitution authorizes the High Court to hear and determine applications for redress, violation or infringement to a right or a fundamental freedom in the bill of rights. In doing so, the High Court has adopted a purposivist approach¹⁴⁵ to judicial interpretation and more often than not would incorporate an expansive approach by considering the objects and purpose of the law. The relevant provisions of the bill of rights, with a direct impact on E-commerce, include, Articles 31 that provides for right to privacy, Article 35 that provides for right access to information, Article 46 that provides for consumer rights protection and Article 47 that provides for fair administration action.

The judiciary in Kenya has taken into consideration the social advancements, which in turn spur socio-economic developments by adopting a purposivism approach to interpretation that would expand the scope of the law by finding a balance between fundamental human rights and the need to contextualize laws to the social demands. The mechanical adoption of textualism maintains the

¹⁴⁴ The Consumer Protection Act, Article 46 (2)

(2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.”

¹⁴⁵ As demonstrated in the cases of both *Okiya Omtatah* and *Kenya Human Rights Commission*, by the court declaring against the installation of a communication surveillance system dubbed DMS, in the manner the Government intended. The underlying rationale for the decision as pointed out by the Court is that privacy rights as provided for under Article 31 of the Constitution are sacrosanct and the use of the DMS posed imminent threat thereto.

status quo and novel social needs are left ungoverned until when it is expressly legislated upon, which often takes time. It thus becomes obvious that purposivism would often expand the law, which in turn brings forth positive impacts as it regulates novel areas of social interactions and renders certainty on the laws.

The challenge therefore, is that the definition of consumer has to be stretched or applied by implication for it to apply to E-commerce. As it emerged in the preceding section that was analysing the Constitution, the place of a consumer is that of inference. The legal framework does not contemplate them. It must be noted that these laws are not old laws. It is therefore not likely to be the case, as a justification, that they were developed before the emergence of E-commerce. However, it is admitted that the scale of E-commerce and the attendant need for a policy to cover for the consumer rights is more recent. Most certainly, in the process of policy development, there ought to be sufficient justification for undertaking the relatively expensive process of law making and establishment of institutional arrangements to enforce the law. However, the modification in terms of internet-based agreements is a laudable addition. The same is discussed in the succeeding paragraph.

Section 2 (1) (C) includes ‘users of goods and services’ in the definition of a consumer, protected under the Act. Since online trading and E-commerce at times involve the sale of certain goods classified as intangible goods, the clause incorporates the users of such goods within the limits of statutory protection. Such goods include downloaded music from online platforms, sale of computer software online, pay per view content, among others.

Besides general protection, the *Consumer Protection Act* proceeds to include internet-based agreements within its scope of operation. Section 2, defines an internet agreement as a consumer agreement made through the internet and/or text-based communication. The Act further defines a consumer agreement as an arrangement between a supplier and a beneficiary in which goods are transferred from a supplier to the beneficiary in exchange for payment.

In furtherance of the caveat vendor principle, Section 31 of the Act places an obligation on the vendor to disclose pertinent information to the purchaser, allow such purchaser to consider the terms, make corrections if necessary, before agreeing to bind himself or herself with the terms. The provision further makes it clear under Sub-Section 2 that the supplier must expressly provide

for an opportunity to either accept or reject the offer. In my view, the rationale of establishing such a threshold before acceptance is to ensure that the purchaser is furnished with all the necessary knowledge about the product and to enable him or her print the agreement conveniently, as contemplated under Section 3(a). The requirement is so stringent that non-compliance makes the contract voidable at the instance of the consumer. Under Section 33(1) (a) and (b), the purchaser is enabled to rescind an internet agreement if the aforementioned requirements concerning disclosure of information and provision of a fair chance of acceptance or rejection of the offer are not satisfied. Such cancellation can also be based on failure to disclose to the purchaser information concerning prohibited representation as contemplated under Section 43 of the Act. In any such case, the consumer is mandated to terminate the agreement within thirty (30) days from the date of signing.

E-commerce in Kenya is further anchored on the provisions of the Act concerning remote agreements. As a fundamental factor to note, agreements appertaining E-commerce are usually made remotely. Recently, there have been developments in the making of contractual agreements and a regime of smart contracts has been introduced. With recent globalization and the age of information technology, many people have begun to make distant purchases and procurement of services. As such, Kenyans are also drifting towards this direction; hence, the provisions of the Act seeking to protect purchasers in remote contractual agreements apply to the realm of E-commerce in Kenya.

Under Section 37, the Act further reiterates the contents of Section 32 on the provision of a written copy of agreements. In the same manner, a supplier is required to send such a copy within the duration prescribed. Furthermore, Section 38 reiterates the contents of section 33 on cancellation. However, the provision extends the duration of cancellation to one year as opposed to the seven (7) days prescribed under section 33(1).

The law of contract applied for traditional contracts is the same as that applied for internet agreements. Perhaps this is why Section 32 of **The Law of Contract Act**¹⁴⁶ requires the supplier to provide a written version of the agreement to the consumer. To make this effective, the same may be printed or a complete soft copy of it may be provided to the consumer within an agreed

¹⁴⁶ Cap 23, Laws of Kenya.

period. The copy supplied contains all fundamental and/or material information appertaining to the contract, the obligations of parties and the remedies in case of a breach. Consequently, **The Law of Contract Act** and the provisions of the **Sale of Goods Act**¹⁴⁷ begin to operate and enforcement ensues, in the same manner, an ordinary contract would.

In terms of analytical implications, the **Evidence Act** as read together with the **Kenya Information and Communication Act** provide that where there is a requirement for a hard copy of a document, or a signature for that matter, an electronic version of the document or signature would suffice. As long as the requirements as to the state of the electronic equipment and the authority of user are assured, the electronic versions function legally in the same way as the hardcopy versions. In this case therefore, implicitly, Section 32 of the **Law of Contract Act** would serve to protect the rights of parties to a virtual contract.

Notably, the laws discussed above do not directly provide for E-commerce and the unique challenges that consumers face. This includes ascertainment of quality of the goods and services, identification of the most appropriate forum for resolution of disputes in case of breach, cross border application, dominance and abuse of dominance on the relevant platforms and enforcement. Many times, the goods delivered may not match the orders of the customers. It would be critical to also have an independent entity specialized to deal with the challenges that are peculiar to E-commerce. The independence of such an entity ought to be viewed against the desire for control by the state and the ideal situation of market forces control.

An example of such independent entity is the .Za Domain Name Authority (.ZADNA) in South Africa. It is a not for profit agency that does not receive government funding and is thus exempted from complying with the **Public Finance Management Act, 2012**. Its mandate includes administering, regulating and licensing domain name registration in South Africa pursuant to the **Electronic Communications and Transactions Act (ECTA)**, enhance public awareness on the economic benefits of domain name registration and resolution of domain name disputes through ADR by accrediting suitable service providers to offer ADR services.

¹⁴⁷ Sale of Goods Act, Cap 31 Laws of Kenya. Retrieved from: <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2031> on 17 September 2019.

2.2.2.2 *The Data Protection Act*

This is a recently enacted piece of legislation. It is meant to effect the provisions of Article 31 on the right to privacy. The relevance of data to electronic commerce cannot be gainsaid because data is the channel of communication through a network system between a person sourcing for goods or services and the person who is offering them. In this process, it is necessary that the law safeguards the privacy of the person who is sourcing for the information since that information may be intimate and private. This may relate for instance to health issues where a person is seeking medication or information that is personally identifying.

The Act regulates the processing of personal data and protects privacy by ensuring that the processing complies with the provisions of Section 25, which sets out the principles. E-commerce relies on the study of customer habits and trends and as such, sometimes, it is necessary to collect data and analyze the said data. It is therefore critical for the law to state clearly what is acceptable and what is unacceptable in processing of the data.

It applies to entities that process data and are resident in Kenya and those that are not resident in Kenya, if they are processing data relating to a Kenyan. In this case, with the cross border nature of E-commerce, the law offers protection even with respect to external corporations as long as they collect and process data relating to Kenyans. The only challenge would be that of enforcement where such an entity does not have a physical presence in Kenya. The Act grants the Commissioner of Data the power of hearing complaints in relation to the breach of the Act.¹⁴⁸ That protection of privacy is the third on the list and indicates that the law is not merely meant to be a tool of curtailing any possible processing of data but should be an enabler.

There is a growing jurisprudence especially in the EU, to the effect that an aggrieved user or consumer of goods and services offered on an online platform can sue in their home country, regardless of a forum selection clause nominating the jurisdiction of the company in question to have all disputes settled in their home country. A case in point is *Douez v. Facebook, Inc, 2017 SCC 33, [2017] 1 S.C.R. 751*¹⁴⁹ which addresses enforceability of forum selection clauses in consumer contracts. The argument brought forth by the Plaintiff Deborah Douez is that Facebook's conduct that allowed third parties to use the names and pictures of Facebook users to advertise without their knowledge or consent violates **British Columbia's Privacy Act**, which demands

¹⁴⁸ This office is established under Section 6 and the functions stipulated under Section 8.

¹⁴⁹ < <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16700/index.do>>. Accessed on 14 March 2020.

consent for a company or an entity to use a name, picture of a person in advertisements. Facebook on the other hand filed an application arguing that Douez by agreeing to the terms of use (by clicking “*I agree*”) while signing up, she and other Facebook users, in general, agreed to the *forum selection clause* in those terms that stated that users could only bring claims in Santa Clara County in California.

The Supreme Court of Canada overturned the British Columbia Court of Appeal’s decision by modifying the *Pompey* test¹⁵⁰. The majority reasoned that there was gross inequality in bargaining power because the Terms of Service were a ‘consumer contract of adhesion’, where a user must accept all the terms as written, without a right to negotiate, in order to use Facebook.

Despite its jurisprudential impact, the decision faces a challenge in terms of enforcement. A judgment is as good as its enforcement. The challenge herein is how efficient would enforcement be where in the forum preferred by the judgment creditor, the judgment debtor has no attachable assets or it is uneconomical to enforce against the subsidiary (if any) of the judgment debtor in other jurisdictions.

The net-effect therefore is that though a Plaintiff may obtain a favorable decision it would still be difficult to enforce it. The functional solution would then be that Plaintiffs after filing their case in their convenient forum it should then apply for security for costs. However, this will also be defeated where the judgment is that which has been entered on default of appearance. Therefore, as jurisprudence in this province grows; key players should device effective mechanisms to ensure enforceability of court decisions in cross border electronic transactions.

Other avenue for dispute resolution in e-commerce transactions would be using online dispute resolution platforms that are embedded on the digital online platforms. If done, such a platform would address questions of unconscionability, capacity, jurisdiction, among other grievances, which may be submitted to by users from time to time.

It is noteworthy that the Office of the Data Commissioner is tasked with ensuring that the persons involved in the collection and processing of data have mechanisms for self-regulation. Across all sectors, there are obvious benefits of self-regulation.¹⁵¹ This ensures that the law promotes rather

¹⁵⁰ The *Pompey* test required asking, first, whether there is an enforceable contract binding the parties; and if so, is there strong enough cause for the clause not to be enforced, mainly because another forum would be far better suited to hear the case?

¹⁵¹ Brookman, Justin. ‘Protecting privacy in an era of weakening regulation’, *Harv. L. & Pol’y Rev.* 9 (2015): 355.

than curtails the development of Big Data¹⁵², which is the next frontier in global business development.

Section 25 provides for the principles that shall govern the analysis of data by entities that collect personal information. The principles include protection of privacy, lawful, fair and transparent processing, the purposes should be explicitly stated from the onset, the collection should be limited to what is necessary, not to be transferred out of the country without the knowledge of the subject and retained for as long as is necessary.

Data protection is viewed in light of the rights of the subject of data processing provided for under Section 26. They include the right to:

- a. be informed
- b. access the data
- c. object to the collection and processing
- d. require deletion; and
- e. correction of misleading information.

The Act does not expressly mention commercial use of data in the trade. It only prohibits the use of such processed information for commercial use¹⁵³ under Section 37, unless the conditions provided are met. The conditions are that the person has sought consent from the data subject or that the person has been licensed to do so by the Data Commissioner. However, to the extent that the law provides safeguards against infringement of privacy, especially in online transactions- then it becomes imperative to ensure that it is conducted within the parameters of the law.

This piece of newly enacted legislation is the most supportive of E-commerce. It presents a departure from the past. In the past, as can even be seen from the Constitution, privacy has been interpreted to require respect of the information that relates to a person. This is not modified by

¹⁵² Refers to the large, diverse sets of information that maybe analysed computationally to reveal patterns, trends and associations.

¹⁵³ The theory of contextual integrity provides that the context within which information is shared determine whether it can be shared with third parties and if so sets the conditions precedents and applicable safeguards. Information gathered for a particular context must be used for that purposes for which it was collected and must not go beyond that purpose. However, Section 37 of the Data Protection Act authorizes the use of such personal information in instances where the data processor demonstrates compelling legitimate interest that overrides the data subject's interests. This provision disregards the norms of appropriateness and distribution as advanced by the theory of contextual integrity.

the limitation clauses that are inserted in the Constitution.¹⁵⁴ However, the Act now allows, under the principles, for the collection and analysis of data as far as this is done within the bounds of the law. This therefore facilitates commerce in that it allows E-commerce vendors to gather relevant information and have pointed and targeted advertising provided that the conditions set out under section 37 be adhered to. One such condition is that the express consent of the data subject is sought and that the data subject has been informed of such use when collecting the data. The manner in which the consent is obtained is however not addressed. In most cases, the online companies use standard adhesive contracts, where the users do not have a chance to negotiate the terms but must accept all the terms as written in order to use the company's online platform. This was addressed in the *Douez v Facebook Case*¹⁵⁵, where the court considered the fact that Facebook was a social networking platform with extensive reach. It further noted that participating in such a social network has become increasingly important for exercise of free speech, freedom of association and full participation in democracy and as such having the choice to remain "offline" may not be a real choice in the internet era.

In order to enhance the utility of the law, self-regulation should be introduced to allow industry players to come up with codes, procedures, and fines in respect to collection, analysis and utilization of information gathered. This will be in tandem with the theory of contextual integrity.

From the foregoing, a keen reading of the Act reveals that the Act does not consider the competing interests in the technological and global world we are living in today. Factually, it is more or less a response to the big data age and ease of analysis and transfer that has been engendered by technology. However, as the law advances, there ought to be a multi-pronged approach to all the interests at play. This is why this research is premised on the political economy theory. That is in order to ensure that the recommendations pursue all encompassing solutions that not only protect individual liberties but also balance those interests with the need to compete globally and to adopt sustainable business models.

¹⁵⁴ Article 24 of the 2010 Constitution.

¹⁵⁵ *Douez v Facebook*, Para 56.

2.2.2.3 Kenya Information and Communications Act

The **Kenya Information and Communications Act**¹⁵⁶ regulates the use of electronic media to relay information and as such includes E-commerce. The legislation majorly covers electronic communications and dissemination of information outside the purview of ink and paper form of writing and contains express provisions that facilitate E-commerce. To begin with, Section 83J recognizes the formation and validity of electronic contracts. The provision makes it clear that an offeror may make an offer through electronic means and the offeree may accept such an offer using the same medium. In any case, the use of electronic medium shall not make the contract invalid. Additionally, the provision, under Subsection 2, proceeds to indicate that nothing provided therein shall vitiate the operation of any other law that provides for further requirements for the formation of a valid contract.

In furtherance of E-commerce, the Act proceeds to indicate, under Section 83k, that parties to an electronic transaction would be recognized as such, for purposes of their contract formed through electronic means, and their intent as communicated shall be legally sanctioned and enforceable as such, notwithstanding being contained in an electronic message format. For any purposes including E-commerce, communications made through the electronic medium is attributable to the originator of the information and the contents therein considered his if the same was made by him or by another person duly authorized to make such communication. That notwithstanding, the Act creates a general presumption that any communication from an originator through electronic means is made by him. In case of any doubt, the recipient is entitled to verify the information by any means previously agreed. In furtherance of good commercial practices, any person previously authorized to make electronic communication for commercial purposes is permitted to do so and such information is deemed as passed by the original offeror or offeree.

2.2.2.4 Kenya Information and Communications (Consumer Protection) Regulations, 2010

The **Kenya Information and Communications (Consumer Protection) Regulations, 2010**¹⁵⁷ also contribute to safeguarding consumer interest in E-commerce. Since trading online has more challenges than offline transactions done ‘in brick and mortar’ businesses, the Regulations seem

¹⁵⁶ Cap 411 A, Laws of Kenya.

¹⁵⁷ Regulations made in 2010, by the Minister for Information and Communications pursuant to sections 27,38,39,46K, 66 and 83R of the Kenya Information and Communications Act,1998.

to extend their operations to address issues such as consumer privacy, personal security, selection of service provider, the accuracy of bills or consideration in E-commerce platforms. Regulation 3 provides that a customer has the right to receive communication concerning taxes and terms and conditions of purchase of goods or procurement of services. The Regulations do not provide for the timing within which such information should be furnished to the consumer. The information should be clearly communicated to the consumer prior to the purchase of goods or services, so that the consumer has full advance knowledge of the financial and other implications of the transaction and therefore makes an informed decision.

Additionally, suppliers are only mandated to charge for the services they provide.¹⁵⁸ The implication of the same is that online vendors who have access to credit and debit cards of their customers can only deduct funds from their accounts when service has been rendered or in any manner consistent with their agreement for sale of goods and services online. There however lacks an enforcement mechanism or an effective opportunity for redress where online vendors of goods and service providers violate this provision by charging for goods and services prior to delivery or where they fail to deliver at all.

Regulation 4 is critical in that it provides that the service provider must ensure that they have safeguards in place. This is especially relevant for E-commerce where the consumer might not have the ability or even the awareness of the risks involved in electronic commerce. It is therefore the obligation of the service provider to ensure that the safeguards are not only technical but also with respect to the organizational structure. This proposes the structuring of a service provider in a manner that there is an established office for a person to handle risks and complaints among other things.¹⁵⁹

However, it is critical to note the context of these regulations. The regulations relate to the provision of electronic communication services by licensed telecommunication service providers. They do not relate to the protection of consumers of goods and services provided by other third parties. They protect the consumers of telecommunication companies such as *Safaricom*, *Airtel*,

¹⁵⁸ Regulation 3 (b).

¹⁵⁹ Regulation 5 of the **Kenya Information and Communications (Consumer Protection) Regulations, 2010** with respect to a customer care system that receives feedback, which can be acted on by the service provider for purposes of improvement. In as much as these regulations apply to service providers, it also applies to the actual providers of goods and services.

Telcom and *Equitel*. However, in as far as the latter is concerned and in the provision of banking services by the licensee itself, the Regulations can be deemed to be applying to electronic commerce directly. However, in effect, the Regulations protect consumers of the services of regulated telecommunication companies and only tangentially electronic commerce.

This is to say that the regulations cannot be enforced against *Alibaba*, *Amazon*, *Google* and *Jumia* among other E-Commerce companies. In this case, there ought to be developed laws to relate to matters such as licensing of companies to sell goods to Kenyans, how to tax them, applicable laws in case of dispute resolution, contracting and protection of consumers. It is with this understanding that the application of the Regulations and the parent statute must be reviewed and their utility to E-commerce measured.

Under Regulation 15, confidentiality is provided for as an obligation of a service provider. This is to say that a network service provider must ensure that subscribers are protected from illegal intrusion into their privacy. It also requires that the service provider must provide avenues through which the user can be informed where information about them is being collected. Further, there ought to be notice that such information could be collected and distributed to third parties and agencies not involved in the initial communication. Therefore, where an entity uses such networks for commerce, they must ensure that the licensed service provider complies with the law in this respect, to avoid being treated as violators together with the licensee of the Communication Authority. Furthermore, the rules provide that nothing shall be construed as granting the licensee the right to sell information relating to users of the electronic platforms without the knowledge of the platform users. In case a person uses a platform provided by a service provider, their consent is therefore still critical to the dissemination of such information by the licensee or any other party.

In terms of the foregoing and the critical role of information for purposes of advertising and understanding consumer behavior, there ought to be, under a *sui generis* law, regulations to guide the process of collection of data relating to the consumers. It is the telecommunication service providers offering the platform that can mine data, in order to understand preferences and dispositions of consumers. Therefore, despite the tangential relationship, there is still a lacuna that ought to be filled by a separate law, which conceptualizes the problem, identifies the challenges and proceeds to provide legal solutions. Furthermore, this must be made in the understanding of the cross border and global nature of E-commerce.

The **Law of Contract Act** stipulates that certain contracts are only legal if evidenced in writing¹⁶⁰. In the context of E-commerce, the abovementioned statute recognizes the use of an electronic signature to satisfy the provision and enable the contracts to acquire validity as duly signed and executed. Precisely, Section 83P provides that use of an advanced electronic signature shall be deemed permissible for purposes of signing a contract made through electronic means. Furthermore, the minister is permitted to particularize the nature of the advanced electronic signature that may be used. Section 83(R) of the Act proceeds to empower the minister to make regulations prescribing the type of the advanced electronic signature, the manner of affixing the same, and control of procedures and processes for fixing the electronic signatures in the bid to ensure that payments made through electronic means are kept confidential.

The above-mentioned Act further facilitates E-commerce by making provisions bordering on the privacy of electronic data. Section 83W incriminates interception of electronic data and imposes a penalty in the form of a fine and or a custodial sentence. Additionally, the Act proceeds to incriminate unsanctioned modification of computer data, passwords, software, and programs under section 83X. It also incriminates damaging a computer or malicious damage to computer systems under section 83Y and prohibits unauthorized disclosure of passwords or security information used to obtain access to secured electronic information. The object of the Act is to ensure that the information disseminated through electronic means is protected and remains reliable, retrievable and usable for the intended and authorized purpose.

The provisions above therefore enable E-commerce by allowing distant contracts and electronic signatures in online transactions. To the extent unauthorized interference with login credentials is proscribed, the law further enables E-commerce. It also makes E-commerce safe to the consumer who is also a subscriber to a network provider. It must be noted, as stated herein before, that the safety is with respect to requiring the telecommunication service providers to have in built features as part of their package to the consumer of their services ensuring that the consumer is protected. However, the law has indirect implications to third parties offering goods and services to consumers.

¹⁶⁰ The Law of Contract Act, Section 3 provides that specific contracts must be in writing to be enforceable. These includes; security agreements by third parties; such as a guarantee, surety or indemnity and contracts for the disposition of an interest in land.

Further to the above, the **Evidence Act** is relevant to the extent that it provides that electronic evidence can be admissible in a court of law. In the event a dispute arises, data reproduced in a form that can be understood by the court can be used as evidence of the fact that the parties had entered into a contract for the purchase of goods or provisions of services. The case of **R v Barisa Wayu Matuguda** that was discussed in Chapter One is instructive with respect to the requirements for admissibility under Section 106B of the Act.¹⁶¹

The **Kenya Information and Communications (Consumer Protection) Regulations, 2010** and the parent Act attempt to regulate E-commerce. However, the challenge is that the Act was meant to regulate telecommunication service providers who are licensed by the Communication Authority. It is therefore only tangentially relevant to E-commerce in that it regulates the entities that provide the platform for communication. This is crucial for purposes of enforcement of the Data Protection Laws and facilitating access to the platforms by the buyers and sellers. It is therefore keen on the relationship between the state and the telecommunication service providers more than it concerns itself with electronic commerce.

2.2.2.5 The Value Added Tax ACT 2013

VAT is an indirect tax on the consumption of goods and services in the economy. KRA would always strive to increase its tax base to improve on revenue sources and with effective collection mechanisms, improve on revenue mass. E-commerce, with its exponential growth and convenience, has placed itself as one area where KRA can stretch its reach. This summary seeks to analyze the prevailing VAT legal framework on E-commerce. It also points out the challenges in enforcement, which are universal and thus cannot be solely blamed on the inadequacy of existing VAT laws and regulations.

The **VAT Act 2013** provides for VAT on electronic services.¹⁶² The Act defines what electronic services entail, which includes websites, web-hosting, or remote maintenance of programs and equipment. Generally, Part IV of the VAT Act provides for the place and time of supply, which in essence touches on the taxation of the digital marketplace. The Act further confers power to the

¹⁶¹ This can be viewed *vis a vis* Article 5 of the UNCITRAL Model Law which states that information shall not be denied legal recognition for merely being in electronic form.

¹⁶² Section 8 (3) Value Added Tax Act, 2013.

Cabinet Secretary to make such regulations for the better implementation of the Act¹⁶³, which in essence grants him the power to formulate regulations on E-commerce transactions.

In exercise of the statutory powers to formulate regulations, the Cabinet Secretary for National Treasury and Planning have recently made draft regulations, *The Draft Value Added Tax (Digital Market Place Supply) Regulations, 2020*. Although the Draft Regulations are yet to be enforced, it aims at streamlining the digital platforms to facilitate revenue collection. It supplements the Value Added Tax 2013 on the taxation of the digital marketplace. Under the Draft Regulations, VAT is charged on taxable services supplied to Kenya in the digital marketplace in both B2B and B2C transactions. Where the supply is made under B2B transactions,¹⁶⁴ the provisions of Section 10 of the Act shall apply, which provides that where the supply of imported taxable goods and services is made to a registered person, that person is deemed to have made a taxable supply to himself.

The scope of application of the Regulation is also highlighted,¹⁶⁵ although the list and/or scope is not conclusive. The Commissioner has the discretion to determine any other digital market place supply.¹⁶⁶ This discretion allows the Commissioner to include new areas of regulation given the inherent mutative nature of the digital marketplace. To facilitate enforcement thereof, the Draft Regulation provides for the registration for VAT of persons supplying taxable services through a digital marketplace.¹⁶⁷

Challenges/Gaps in Taxation of E-commerce Transactions in Kenya

- Universal nature of E-commerce

The inherent challenge in this area of law is largely enforcement of the law given the extraterritorial nature of the matter. It requires a lot of liaison between states, which largely depends on the diplomatic goodwill between states and geopolitics of the day.

¹⁶³ Section 67 Value Added Tax Act, 2013.

¹⁶⁴ Regulation 3, The Draft Value Added Tax (Digital Marketplace Supply) Regulations 2020.

¹⁶⁵ Regulation 4, The Draft Regulations 2020.

¹⁶⁶ Regulation 4 (k), The Draft Regulations 2020.

¹⁶⁷ Regulations 5 & 6, The Draft Regulations 2020.

- Draft Regulation Penalties

In addition, Kenya's penalty for offenders of the Draft Regulations is simply to restrict access to its digital marketplace. Given the jungle nature of the internet, it is possible for suppliers to host dark webs or other invisible sites that KRA cannot navigate. This then puts a leash on the tax master's reach to restrict access to its digital market place.

Further, the use of VPN has the possibility of aiding the avoidance of this tax. This is effectuated by its inherent ability to hide and/or alter a user's exact browsing location. This coupled with a dark web or a website hosted outside Kenya would mean that the transaction cannot be construed as having happened within Kenya's jurisdiction.

- Mutative nature of the Internet

Other than enforceability as a challenge, the internet's inherent mutative nature poses a threat to any regulation howsoever futuristic. It is difficult to anticipate the conduct of internet users/digital marketplace, thus the law will always be on the chase. This implies that before the law adjusts change to conform to the new digital marketplace avenues, KRA would have already lost huge amounts of revenues.

- Non-uniformity of tax policies

The non-uniformity of tax policies around the world poses a huge challenge when dealing with E-commerce transactions that cross international borders.¹⁶⁸ The tax systems are different, with competing interests and inconsistent tax policies, which makes it hard to effect tax regimes that can be used across the board.

- Tax havens

Another challenge in Kenya's taxation regime is the existence of tax havens.¹⁶⁹ Some jurisdictions have a reputation for aiding and abetting tax malpractices. Thus, in an area such as this, which requires comprehensive diplomatic assistance, it becomes difficult to have reciprocal conduct from countries that have such reputation.

¹⁶⁸ Mark G. Simkin, Graham W. Bartlett & J. P. Shim, "Pro and Cons of E-Commerce Taxation" International Business & Economics Research Journal, Vol.1 No.2.

¹⁶⁹ Mark G, et al Pro and Cons of E-commerce Taxation.

Therefore, even if the Draft Regulations become law, Kenya will still face such prevailing challenges as detailed above. Some of these challenges are universal and thus cannot be solely blamed on the inefficiencies of the existing VAT legal framework.

2.2.3 General Principles of International Law and International Statutes Ratified

2.2.3.1 The United Nations Guidelines for Consumer Protection

The United Nations Guidelines for Consumer Protection contain express provisions intended to facilitate E-commerce. The Guidelines, which applies in Kenya by virtue of being an outcome of a conference of the United Nations, is recognized for purposes of improving and facilitating commerce. Kenya is a party state in the Charter of the United Nations and Statute of the International Court of Justice; hence, the sources of law specified under Article 38 of the Charter are applicable in Kenya. Additionally, the Constitution imports the general rules of international law under Article 2(5).

Part I of the Guidelines specifically address E-commerce. Clause 63 provides that continued development of consumer protection policies and the frameworks should be done by member states to match the general protection in other forms of commerce. This approach should be adopted expressly in the Kenyan municipal law. As it stands there are no such express provisions in the law that establish obligations on the government in terms of facilitating E-commerce, or better still, there are no provisions in the law that consummate this international obligation.

Under Clause 64, the Guidelines proceed to provide specific protection for E-commerce by imposing a positive obligation on members to review existing protection for E-commerce consumers to accommodate the special circumstances in which electronic transactions are conducted and to ensure that the online business operators and customers are duly informed of their rights and obligations prior to transacting.

Clause 65 requires that member states benchmark and familiarize themselves with the international standards of protection and the other regional guidelines of protection intended to facilitate E-commerce and/or offer consumer protection.

2.2.3.2 OECD Guidelines for Multinational Enterprises

The abovementioned guidelines are non-binding recommendations to multinational corporations operating in party states. Since such enterprises operate across borders similar to E-commerce that has eliminated geographical barriers in trade, the recommendations are intended to ensure that

corporations adhere to certain minimum standards aimed at promoting fair business practices. Despite being non-binding in nature, the Guidelines form part of the general principles of law recognized by civilized nations, as contemplated under Article 38 (1) (c) of the Charter of the United Nations and the Statute of the International Court of Justice.

Consumer interests are covered under part VIII of the Guidelines. It prescribes that multinational corporations should inculcate fair business practices when dealing with consumers. Since cross-border trade is anchored on E-commerce, it is implied that companies participating in that nature of business should adopt fair business practices. They should take reasonable steps in ensuring that the goods they supply are of quality that meets the legally required and agreed standards for the safety and health of the end-users. The Guidelines are so strict on matters concerning fair business practices that it encourages cooperation with the Authorities, under Clause 7, with a view of eliminating unfair practices including commercial fraud.

In addition, the Guidelines stipulate that vendors should furnish consumers with adequate, verifiable, and reliable information that can assist them to make informed decisions in their commercial engagements. Such information should be availed online for the purchasers to acquaint themselves before making a decision concerning an intended purchase. As particularized under Part VIII (2), such information should include the price, safety for use, mode of disposal and environmental concerns.

The Guidelines encourage amicable settlement of disputes. In that regard, Part VIII (3) requires vendors to provide a non-judicial means of settlement of disputes with a view of addressing concerns from consumers. Such forms of out of court settlements would include mediation, arbitration, and conciliation benchmark among others. The rationale is that cross-border trading, which is anchored under the realm of E-commerce, should have effective mechanisms of settling vendor-consumer disagreements expeditiously and cost-effectively, without overburdening them with the cost of litigation. The Guidelines further discourage the use of misleading, fraudulent, and unfair business practices that may cause prejudice to the consumers. Under Clause 5, the Guidelines support the promotion of consumer education and sensitization.

The Guidelines also operate to address the issues concerning consumer privacy. Pursuant to Clause 6, vendors are advised to ensure the privacy of consumer data and to refrain from using it in a manner that can prejudice consumers' personal interest and ensure proper security of personal data during collection, storage and dissemination of information.

Clearly, the Guidelines lay a basis for responsive legislation, by addressing consumer protection, contracting, administrative mechanisms and dispute resolution. The Guidelines recognize the challenging administrative arrangements posed by the cross border nature of E-commerce. In this case, they propose fair practices by the providers of goods and services. This is akin to self-regulation. If the providers of goods and services in E-commerce ensure that they comply with fair business practices, the need for stringent legal and regulatory regime, capable of curtailing instead of promoting E-commerce, will be greatly diminished. This must trickle down to the Kenyan municipal legislation in order to not only protect consumers but to also ensure that e commerce is not stifled by overregulation.

Furthermore, the Regulations promote E-commerce in requiring information to be provided online and that disputes are resolved amicably in an expeditious and cost effective manner. It would be difficult to avoid responsibility if the law expressly requires providers to display their information online and they fail to do so. In terms of enforcement, the licensees of government regulatory agencies, offering such platforms, as has been discussed herein before, can be used to enforce this requirement.

In terms of dispute resolution, the Guidelines protect the consumers who would otherwise find it impossible to deal with virtual entities that cannot be brought under the ambit of the Kenyan local laws. If the inbuilt systems overseen by the telecommunication companies provide for methods of penalizing violators, then we will not need to resort to conflict of laws every time there is a dispute.

2.2.3.3 UNCITRAL Model Law on Electronic Commerce, 1996. (With additional Article 5 as adopted in 1998)

As discussed in Chapter One, the model law provides a benchmark against which states can measure their municipal law. The example we have is the UNCITRAL Model Law on Arbitration, which has been incorporated largely in Kenya, in the Arbitration Act, 1995. In terms of Application, Article 1 provides as follows:

“This Law applies to any kind of information in the form of a data message used in the context of commercial activities.”

Therefore, the model law proposes clauses that can be incorporated in the Kenyan law for purposes of regulating E-commerce. However, the same has not been implemented explicitly, the way the **Model Law on Arbitration** was implemented. In this case, the proposals therein still await

domestication in order to gain the force of law in Kenya. This being the case, the licensing requirements set by the Communication Authority anchored on the provisions set out in an Act of parliament meant to domesticate the **Model Law**.

Articles 6, 7, 8 & 9 touch on the evidentiary and legal validity of electronic messages and data in court processes. Article 6 states that enforcement shall not be denied solely because of information being in the form of data. To this extent, the Model law provisions are similar to the law in Kenya as far as electronic evidence is concerned. However, the scope of the Kenyan Laws is only limited to adducing evidence in court.

Further, it posits that where the law requires an original, a data message whose integrity is secured and can be presented to another person meets that requirement. This acts as a comfort to persons who engage in E-commerce since the domestication of these ideals will mean that the law protects their commercial engagements even if they do not have paper contracts. These provisions are lacking in the Kenyan legal framework. It would be important to have this included in the law in order to validate the process of offer and acceptance where the same is done by use of transmissions of data messages over either the internet or any other telecommunication mechanisms.

Critically, Article 11 provides that contracts can be formed through the expression of an offer and acceptance through data messages. Therefore, it no longer has to be written on a piece of paper or by word of mouth as contemplated by the Law of Contract at common law.¹⁷⁰ Article 14 provides that acknowledgment of receipt of communication shall be as agreed by the parties or by the conduct of the party receiving the communication. The place of communication is not to have much bearing on the validity of the contract since Article 15 deems communication to have been commenced once it enters into an information system that is outside the control of the person sending the message.

In the case of Kenya, the recently enacted **Business Laws (Amendment) Act**¹⁷¹ has digitalized different processes of transacting including expanding the use of electronic signatures and advanced electronic signatures to sixteen pieces of legislation¹⁷². It has explicitly recognized the

¹⁷⁰ *Smith v. Hughes (1871) LR 6 QB 597 and Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd [1977] EWCA Civ 9*, which illustrate the original common law position on offer and acceptance.

¹⁷¹ Act No.1 of 2020.

¹⁷² Refer to 105, 106 and 107 above.

possibility of contracting through data messages by broadening the use of electronic signatures to the various amended statutes as captured under the *Kenya Information and Communications Act*¹⁷³. However, the Act mainly relates to G2C services, by digitizing government services and facilitating ease of doing business in Kenya. It must be noted that the Act only provides for B2B and B2C interactions in E-commerce by amending section 3 (6) of the Law of Contracts Act¹⁷⁴ by expanding the definition of the word “sign”, to incorporate the use of advanced electronic signature.

2.3 ADJUDICATIVE FRAMEWORK

Considering the country does not have an elaborate jurisprudence on E-commerce, there are just a handful of cases in which the judiciary had an opportunity to address the problems surrounding E-commerce. Specifically, the question concerning the nature of information that can be passed through the internet was addressed in the case of *Geoffrey Andare v Attorney General & two others*¹⁷⁵. In this case, the High Court observed that Section 29 of the *Kenya Information and Communication Act's* purpose is to establish the Communication Commission of Kenya. Additionally, it provides for the development of ICT and the E-commerce sector. Considering the broad nature of the provision and the vagueness thereby, the Court addressed itself on the part of the provision incriminating communication through the online platform. Specifically, the provision read to the effect that a person who sends a message that is grossly offensive and/or obscene or a person who sends a false message for purposes of annoyance and or inconvenience commits an offence. Based on vagueness and mootness, the court declared that the proviso under section 29 is unconstitutional.

On the other hand, in the twin cases of *Okiya Omtatah and Kenya Human Rights Commission* referred to hereinabove, Justice Mativo grappled with the issue of privacy with respect to network service providers. Although the decision related to the use of network service providers to surveil the citizenry, it is relevant since it is the same way data on subjects are collected and used by enterprises in categorizing consumers. This is especially so where companies contract social media

¹⁷³ Act No.1 of 1998.

¹⁷⁴ Cap 23, Laws of Kenya.

¹⁷⁵ *Geoffrey Andare v Attorney General & two others* [2016] eKLR.

giants and sites such as Facebook and Instagram in order to collect information on customers and potential customer demographics.

The court made a determination that installation of the Digital Monitoring Systems (DMS) without the knowledge of the subscribers was a violation of Article 31 and Article 10 on national values and principles specifically the principle of public participation. The court issued a peremptory order, that in the event the Respondents would desire to take such a tangent, they had to ensure that they involved the public and that the public was aware of the existence of such a surveillance framework.

The gaps in the development of jurisprudence in Kenya will be addressed by a comparative study with South Africa in Chapter Three, which will offer alternative experiences.



3 CHAPTER THREE: COMPARATIVE ANALYSIS BETWEEN THE KENYAN AND SOUTH AFRICAN E-COMMERCE REGIMES

3.1 ABSTRACT

This chapter reviews the legal and institutional regime in South Africa, with a specific objective of ascertaining how the South African regime differs from the Kenyan regime. It also considers what lessons Kenya can learn from South Africa and whether such lessons are capable of being implemented in Kenya. Considering that Kenya and South Africa face the same technical and legal challenges, it would be imperative to borrow a leaf from South Africa on how they have dealt with the challenges successfully.

The comparative study will then inform my recommendations to law and policy makers on the necessary amendments to the Kenyan legal and regulatory regime.

3.2 INTRODUCTION

South Africa is the leading economy in Africa in innovation and adoption of Information Technology.¹⁷⁶ In fact, the 2019 World Bank report ranks South Africa together with Botswana, Morocco and Namibia, as among the countries, which rank above the world's average indicators of progress and support for digital commerce in Africa.¹⁷⁷ It is therefore imperative that this research assesses the developments that have been achieved in South Africa in drawing important lessons that will help Kenya in adopting the right strategy for purposes of developing an effective and suitable legal and institutional regime for E-commerce. It is noteworthy that these reforms started even earlier in South Africa at a time when mobile phone technology was starting to take root in Kenya.¹⁷⁸ It would be important that the relevant state agency take the very same steps to

¹⁷⁶ The World Bank Group, 'Taking the Pulse of Africa's Economy', The World Bank 2019, available at <https://www.worldbank.org/en/region/afr/publication/taking-the-pulse-of-africas-economy>. Accessed on 04 October 2019. The World Bank Group, 'Taking the Pulse of Africa's Economy', 110.

¹⁷⁷ The World Bank Group, 'Taking the Pulse of Africa's Economy', 110.

¹⁷⁸ Dillo Lehlokoe, Francis Malema, '*A Green Paper on Electronic Commerce For South Africa*', (Pretoria 2001 Department of Communications Pretoria). The paper discusses among other things the legal framework for E-commerce at the time, the steps needed to build trust in digital commerce, infrastructure to ensure access to digital commerce and how to maximize the benefits of digital commerce. Available at https://www.gov.za/sites/default/files/gcis_document/201409/electroniccommerce1.pdf. Accessed on 04 October 2019.

consider a green paper or a policy for the country before the laws are amended or a *sui generis* regime is developed.¹⁷⁹

Currently, the laws that are relevant to digital commerce in South Africa include the **Electronic Communications and Transactions Act (ECTA)**, **Consumer Protection Act (CPA)**, **Value Added Tax (VAT) Act** and the **Protection of Personal Information Act (POPIA)**.¹⁸⁰ These are the laws that this chapter shall review and assess to see how they are used to enhance, protect the personally identifiable information, ensure accountability in E-commerce and how the government derives its taxes while also engendering an environment that supports electronic commerce.¹⁸¹ It is clear that the **ECTA** is meant to be the *sui generis* regime that makes provision for the law on digital commerce.¹⁸² The **VAT Act** reveals the policy perspective of the government towards electronic commerce whereas the **POPIA** does make provision for the rules that will have to be complied with by the goods and service providers in relation to information provided by the users of such platforms. While at it, the study will review how the theories established in the contextual framework play out in the drafting of the laws in South Africa.

3.3 A REVIEW OF THE LAWS OF SOUTH AFRICA

As already indicated in the preceding section, the laws that are most relevant for digital commerce in South Africa are the **Consumer Protection Act (CPA) of 2011**, the **Electronic Communications and Transactions Act (ECTA)**, **Value Added Tax (VAT) Act** and the **Protection of Personal Information Act (POPIA)**. This section shall review the said provisions of the South African Law with a view to drawing lessons that shall be relevant for policy and law reform in Kenya, if need be, and help in answering to the research questions posed in Chapter One.

3.3.1 Consumer Protection Act (CPA)

The Preamble to the Act notes that owing to the manner in which discriminatory laws of the past have caused inequality and poverty, one of the objects of the **CPA** is to ensure that the law is

¹⁷⁹ Tana Pistorius, 'From Snail Mail to E-mail — a South African Perspective on the Web of Conflicting Rules on the Time of E-Contracting', *The Comparative and International Law Journal of Southern Africa*, Vol. 39, No. 2 (JULY 2006), pp. 178-213.

¹⁸⁰ Mkhosi, P. 'National Report on E-commerce Development in South Africa', Retrieved August 10 (2017): 2018. available at https://www.unido.org/sites/default/files/2017-10/WP_18_2017.pdf. Accessed on 04 October 2019.

¹⁸¹ Alemayehu Molla, Paul S. Licker, 'Perceived E-Readiness Factors in E-commerce Adoption: An Empirical Investigation in a Developing Country', *International Journal of Electronic Commerce*, Vol. 10, No. 1 (Fall, 2005), pp. 83-110) the authors consider the readiness of the developing world for E-commerce.

¹⁸² Tana Pistorius, 'Contract Formation: A Comparative Perspective on the Model Law on Electronic Commerce', *The Comparative and International Law Journal of Southern Africa*, Vol. 35, No. 2 (JULY) (JULY 2002), 129-156.

responsive to the changes in technology, trading methods and patterns, which are certain to alter the manner in which exchange of goods and services is done. Moreover, the Preamble also notes that this change is not about to stop and will continue affecting commerce as long as there shall be change in technology.

This Act is relevant to E-commerce since it is the relevant law on matters touching on the protection of the consumer by the government. This therefore will directly have an effect or influence on the providers of goods and services whether or not they are doing so through E-commerce. Under Section 1 of the Act a consumer is defined to include any person to whom goods are marketed or a person who enters into a transaction with a supplier in the ordinary course of the business of the supplier of the goods or services.¹⁸³ This definition is therefore wide enough to capture the offering of goods and services whether or not over the internet or by the use of any other communication method that utilizes electronic means of communication. Further, Section 5 provides that the Act applies to all transactions within the republic unless exempted by Section 15.

Under Section 2, it provides that where there is a requirement for a signature, electronic signatures shall suffice. It is noteworthy that the said electronic signature shall comply with the provisions of the **ECTA**, which provides for the law on digital commerce.¹⁸⁴ Under Section 2(3), it is the obligation of the supplier to ensure that the electronic signature provided by the consumer is used only for that purpose. The supplier is mandated or required to take reasonable measures to ensure that potential misuse of the signature is not possible. This is a critical element of electronic commerce from the angle of consumer protection. This is because if the law does not place this obligation on the supplier, they may not take keen interest in installing such necessary security measures to the detriment of not only the consumer but also other players in the entire E-commerce eco system.

Part 2 of the Act provides for the fundamental rights of the consumer. Relevant to digital commerce includes the restriction of unwanted direct marketing and the right to a cooling off period after marketing. Direct marketing is the offering of goods and services directly without use of middle traders such as wholesalers and retailers. Direct marketing may take the form of offering on email

¹⁸³ J Barnard, 'The Virtue of Cooling-off Rights to Consumers: 'Be in the Habit of Choosing the Mean' – A Comparative Discussion of South Africa, the United Kingdom and Belgium', *The Comparative and International Law Journal of Southern Africa*, Vol. 49, No. 1 (MARCH 2016), 1-23.

¹⁸⁴ Tana Pistorius, 'Contract Formation: A Comparative Perspective on the Model Law on Electronic Commerce', *The Comparative and International Law Journal of Southern Africa*, Vol. 35, No. 2 (JULY 2002), 129-156.

or use of telephone.¹⁸⁵ Owing to the imbalance in information, the consumer is at a disadvantage. It is therefore necessary to ensure that such arrangements provide for a cooling off period within which the consumer can cancel the contract without any legal consequences as may be available under the sale of goods or contract law. Secondly, Section 18(3) provides that goods sold to a consumer must fundamentally match the goods that are displayed. This is a ground for refusal to accept delivery. It has happened often that goods delivered may not correspond to what is displayed to consumers on online platforms. This being the case, provision for a cooling off period gives an opportunity for the consumers to confirm that goods or services conform to the advertised standard in online transactions.¹⁸⁶

Further, the Act also requires the supplier to disclose all material information about the goods or services. This may include the right to have information as pertaining usage and may include use of legends and diagrams. It is also required that information about price is disclosed. However, this section is modified by Section 43 of the ECTA, which sets out a list of the necessary disclosures. The Act also lays down certain rules for marketing. Bait marketing and negative option marketing are illegal. It is required that the suppliers must be responsive in their marketing. In essence therefore, the propensity with which online commerce agents may abuse information to do marketing or phishing is also dealt with here. Deception or fraud is also illegal and any such contracts that come into existence after the supplier has used fraud to induce them are automatically void.¹⁸⁷

Importantly, Sections 48 and 49 deal with unfair contractual terms. It is easier for E-commerce based entities to incorporate unfair contract terms to their contracts without the consumers noticing it. This may be because of things such as complexity of the sites hosting the platforms; too much information being made available on the sites, less sophisticated consumers among others. This being the case, it will be easy to dupe consumers with terms that they may not read. Many of the pop ups that come on sites with terms and conditions may be too long and the consumers may not read. This Act therefore requires the suppliers to ensure that they do not incorporate unfair contractual terms to the detriment of the consumers.

¹⁸⁵ Sara Dolnicar, Yolanda Jordaan, 'A Market-Oriented Approach to Responsibly Managing Information Privacy Concerns in Direct Marketing', *Journal of Advertising*, Vol. 36, No. 2, Special Issue on Responsibility in Advertising (Summer, 2007), 123-149.

¹⁸⁶ J Barnard, 'The virtue of cooling-off rights to consumers', 1-23.

¹⁸⁷David Gefen, Izak Benbasat, Paul A. Pavlou, 'A Research Agenda for Trust in Online Environments', *Journal of Management Information Systems*, Vol. 24, No. 4, Trust in Online Environments (Spring, 2008), 275-286.

3.3.2 *Electronic Communications and Transactions Act (ECTA)*

ECTA is the specialized legislation in South Africa that directly touches on digital commerce. It was enacted in 2002 and has therefore been tested for close to two decades. This is testament to the fact that, South Africa has been ahead in terms of policy formulation, which creates a conducive environment that balances the interests of key players in different sectors of commerce. The Act seeks to promote legal certainty in E-commerce, develop a safe and secure environment for the consumers, promote stability of electronic transactions in South Africa, encourage innovation and eliminate barriers to E-commerce. It is noted from the priority of the objects that the intention is to promote and not increase the bureaucracy and roadblocks to E-commerce. This ought to be the key policy objective bearing in mind the potential of electronic commerce to engender sustainable development.¹⁸⁸

Clearly, this is where Kenya lags behind as compared to South Africa. In Kenya, the state, consumers and dealers have to rely on other laws such as the **Constitution**, **Consumer Protection Act** and the **Evidence Act** to construct what would be the applicable regulatory regime for online transactions. It is apparent from the objective of ECTA that the two countries are currently approaching the question of electronic commerce differently. In the case of Kenya, the matter has not been dealt with sufficiently, despite the existence of international model laws that can be domesticated by enactment of a relevant piece of legislation. It is the premise of this thesis that such a stand-alone legislation will be critical in resolving the policy gap.

Sections 2 and 3 provide that in application and interpretation, the law cannot exclude common law and statute. The Act applies to data messaging and electronic transactions. It is noteworthy that data messaging is the core of electronic commerce since electronic commerce entails, at its most basic sense, the use of data messages to bring together parties in a commercial transaction. The mode of connecting the consumer and the supplier may be mobile technology, the internet or simple messaging. However, the object must be to create a legally enforceable transaction of exchange.¹⁸⁹

¹⁸⁸ Christian M. Rogerson, 'Developing Small Tourism Businesses in Southern Africa', *Botswana Notes and Records*, Vol. 39, Tourism as a Sustainable Development Factor (2008), 23-34.

¹⁸⁹ Simpson Poon, Paula Swatman, 'A Longitudinal Study of Expectations in Small Business Internet Commerce', *International Journal of Electronic Commerce*, Vol. 3, No. 3, Developing the Business Components of the Digital Economy (Spring, 1999), 21-33.

Section 11 of the Act recognizes data messaging as a legitimate method of communication for purposes of electronic commerce and requires that electronic information not be deemed invalid because it is wholly or partly in the form of data messaging. This is foundational since electronic commerce is heavily dependent on data messaging. Further, Sections 12, 13 and 14 deal with the other formalities that are relevant to electronic commerce such as the requirement for a contract to be in writing, electronic signatures and the requirement of originals. It is stated that where these are in the form of data messages, and for the purpose of E-commerce, the requirements in the pre-existing laws have been met. The other requirements of formality provided therein include acknowledgement, notarization, retention and admissibility in court. With these, the Act lays the basis for making E-commerce contracts that arise from such electronic data messaging, enforceable.

Part 2 deals with the actual formation of an E-commerce contract. It provides that such communication of intention done through data messages will not be deprived of legal enforceability. Further, in terms of location, one need not be in a particular physical place. The law requires them to enter into a communication channel and for them to pass information into a system that is outside their control as the communicator. Once such an offer or acceptance is made, it can be accepted and the other party can act knowing that the law will enforce any obligations that may emanate therefrom.¹⁹⁰ Section 24 provides that an expression of intent shall not be deemed void just because it was made via a data message or it is not expressed by any other means that may be ascertained as an expression of intent.¹⁹¹

To support the enforceability that has been provided for as above, the law also provides for accreditation of service providers in respect to electronic signatures. This is required to be done by the Accreditation Authority and will serve to ensure that the regime is secured from attack and misuse of sensitive matters such as electronic signatures. The requirements for the accreditation of the signatures is that, they are unique to the user, can identify the user, is crafted using means that are under the sole control of the user, will be linked to the information of the user in such a manner that any alterations are detectable and finally that it ought to be based on face to face identification of the user.

¹⁹⁰ Section 23 of ECTA.

¹⁹¹ Section 24 ECTA.

As partly provided for under the CPA, the ECTA also makes provision for strategies of protecting the consumer. These includes provision of information, cooling off rights relating to unsolicited goods and performance rights. As far as information is concerned, the party offering goods and/or services to a consumer must make available certain information. These includes name and legal status, address, website, any code of conduct, and regulatory body governing the provider, registration details, mode of payment, guarantees, manner in which the consumer can obtain a full record of the transaction among other things.¹⁹² The consumer is supposed to be given an opportunity to review the entire transaction and correct any mistakes.¹⁹³

Critically, Section 44 provide for a cooling off period. This enables the customer to cancel the transaction after thinking through it. This ought to be viewed as against the influence that electronic media has on the choices that consumers may have. Therefore, other than providing an avenue for reviewing the entire transaction, it would be proper to allow a period to reconsider such choices. This is what Section 44 provides for. A consumer is entitled to cancel a transaction without giving any reason and without incurring any penalty within 7 days of receipt of the goods or in the case of services within 7 days of entering into the contract for the service.¹⁹⁴ This is critical to ensure that the consumer is not forced to retain goods that do not match expectation or description because they were not able to assess the goods at the time the offer was being made. As such, it enhances E-commerce by boosting the confidence of the consumer in the system. Otherwise, E-commerce cannot be viable if the potential customers view it as a potential trap to lose money where only the lucky ones end up getting what they wanted.

To even out the playground, it is provided that the only transaction costs that may be incurred is that of ferrying the goods back to the seller.¹⁹⁵ This is important in that it also helps the entrepreneurs by forestalling a situation where they risk everything they have, by the law granting the consumer too much leeway. Actually, this might forestall a situation where the consumer rejects the goods for superficial reasons and have them accept goods where the intended utility can be consummated hence a suitable situation for the parties. In the event the consumer had already paid for the goods or services, the law entitles them to a full refund within a period of thirty (30) days. Furthermore, the section provides that this does not prejudice any right the consumers may

¹⁹² Section 43(1) ECTA.

¹⁹³ Section 43(2) ECTA.

¹⁹⁴ Section 44 (1).

¹⁹⁵ Section 44 (2).

have under any other law. This may include the right to pursue the seller for damages under the Sale of Goods Laws or under Common Law.

In addition, where the provider of goods or services enters into an unsolicited exchange or communication with a consumer, they must provide an option to the consumer to cancel subscription to the mailing list and the source of the information that was able to personally identify the consumer. Importantly, the provider of goods and services cannot allege that a contract has been entered into if the consumer fails to respond to any communication. This is critical in ensuring that the consumer is protected from any legal obligations that they are yet to address. This is almost similar to the common law rule that silence cannot be interpreted as acceptance.¹⁹⁶

Finally, the Act also provides for the protection of personal information that may be obtained in the course of an electronic transaction.¹⁹⁷ It is noteworthy that the Act does not specify whether the electronic transaction in this case would restrict misuse of only the information obtained from such transactions. It is obvious that these entities use other sites such as social media to mine for information. Sometimes they source for information from telecommunication service providers in order to do targeted advertisements. In this case, the law herein does not specifically regulate such information expeditions. This can be explained by the fact that the law herein is focused on electronic transactions.

Section 51 provides for the principles that are relevant to the protection of the relevant information. However, it is a requirement under Section 50 that a data controller must adhere to the principles provided for under Section 51. These include, the need for express consent from the data subject for collection, collation and processing of personally identifying information, disclosure of purpose of collection to the data subject, no use of such information for any other purpose other than with the permission of the data subject, keeping of information for at least a year after the period of use, no disclosure of the information to third parties unless required by law or allowed by the data subject and destruction of obsolete data after the period of time that is provided.¹⁹⁸

¹⁹⁶ *McGlone v. Lacey*, 288 F.Supp 662 (D.S.D. 1968). Of course there are exceptions to this rule including where the conduct of the offeree is so as to suggest that silence should be deemed acceptance, where it is expressly agreed that silence is to amount to acceptance, use of supplied goods and failure to communicate an acceptance (*Louisville Tin & Stove Co., v. Lay* 65 S.W.2d 1002 (Ky. 1933) or rejection of a counteroffer arising from delayed acceptance of an offer.

¹⁹⁷ France Bélanger, Robert E. Crossler, 'Privacy in the Digital Age: A Review of Information Privacy Research in Information Systems', *MIS Quarterly*, Vol. 35, No. 4 (December 2011), 1017-1041.

¹⁹⁸ Section 51 (1)-(9) of ECTA.

To ease administration, the *.za Domain Name Authority* is established for purposes of administering the said domain name among other objects. The residents of South Africa are all required to register as members of the authority upon payment of a nominal fee. In as much as this appear to be obvious now as a necessity, especially for businesses to register domain names, the South African regime makes it mandatory for citizens and permanent residents to register with the authority. The domain name acts as the virtual address for an entity or individual within South Africa.

3.3.3 Protection of Personal Information Act (POPIA)

This Act provides for the guidelines to be adhered to in processing personal information. This Act is fundamental to electronic commerce since most of E-commerce entities rely on shared personal information to be able to process transactions. They also sometimes source for the information through third parties. These third parties are entities that have access to information through various mechanisms such as social media. They then help the entities that are in business by analyzing the information and profiling the social media users with a view of coming up with potential customers and those who may be inclined to purchasing certain goods or using certain services.¹⁹⁹

Under Section 4, processing personal information is guided by the principles of accountability, openness, subject participation and security of information among other things. It recognizes that it may be inevitable that information has to be shared and processed in order to support electronic commerce. However, the outlook of the principles shows an attitude that seeks to enable electronic commerce and not to stifle it. Section 5 provides for the rights of the data subjects as including; notification that information is being collected, right of access to information and to request alteration, reject on reasonable grounds to the processing of such information, not to have their information processed for purposes of direct advertisement and the right to submit to the regulator any claim as pertaining an infringement of the law relating to personal information.

These provisions of Section 5 are similar to those provided for under the Data Protection Act. Therefore, in terms of protection of data and enforcement of Article 31 of the Kenyan Constitution, the Kenyan Laws are almost at par with the South African Laws. However, the jurisprudence from Kenya shows that our development in actual enforcement is still lagging behind as compared to

¹⁹⁹ Patricia Buckley, Sabrina Montes, 'The Promise and challenge of E-commerce', *Georgetown Journal of International Affairs*, Vol. 1, No. 2 (Summer/Fall 2000), 29-35.

the judicial edicts of the South African Constitutional Court. Under the Kenyan Law, these are provided for under Section 25 of the Data Protection Act.

The prohibition against processing of personal information may be exempted.²⁰⁰ The regulator is allowed to exempt processing from prohibition where the processing is in the public interest or where the processing is for the benefit of the data subject for instance where there is need for processing for purposes of health care. However, the issue of health records is normally provided for under a different regime altogether. It is arguable that it is in the public interest that electronic commerce is supported by the prevailing policy procedures. In this case, the policy ought to work towards considering any attempts to promote E-commerce and decision making through processing information, as being in the public interest.²⁰¹

Section 26 of the Kenyan Data Protection Act provides for the guidelines that must be adhered to in the process of collection and processing of data. However, there is no provision for the public interest exemption. This exemption may be used to anchor the quest for pursuing economic ends and balancing them with individual liberties. In an economy that is stable and vibrant, it is easier to protect individual liberties. This perhaps ought to guide policy imperatives and determination of priorities, where public interest rank in priority over narrow private rights.

It is noteworthy that under Section 37 (2) of ECT, public interest is defined. It is viewed to include important economic interest of a public body. However, with respect to the entire economy, the proper and broader interpretation ought to be that such economic interests are also included as part of the wider public interest.

3.3.4 Value Added Tax Act, 1991, (VAT Act)

This Act is relevant in this discussion to the extent that it provides for the charge of 14% VAT on all online transactions.²⁰² Such transactions are defined to include online auction services, purchase and selling of goods over the internet, selling of music over the internet through downloads,

²⁰⁰ Section 37 of POPIA.

²⁰¹ Groenewald, Michael, and Dillo Lehlokoe. 'Towards an electronic commerce policy for South Africa', *Proceedings of the INET'99, Annual Meeting of the Internet Society*. Available at: www.isoc.org/inet99/1g/1g_4.htm. 1998. Available at https://web.archive.org/web/20080907134315/http://www.isoc.org/isoc/conferences/inet/99/proceedings/1g/1g_4.htm. Accessed on 18 January 2020.

²⁰² SP van Zyl, WG Schulze, 'The Collection of Value Added Tax on Cross-Border Digital Trade- Part 2: VAT Collection by Banks', *the Comparative and International Law Journal of Southern Africa*, Vol. 47, No. 3 (NOVEMBER 2014), 316-349.

educational services that are internet based among other things. The Government Notice of 28th March 2014 is the one that defined electronic services. It is important for this definition to be clear so that it does not include matters that are not commercial in nature.

The person who is providing electronic goods and services is required by law to register and declare their obligations if their transactions amount to more than ZAR 50,000 a year. This is much less than the ZAR 1 Million that applies as the limit for other lines of business. Clearly, the intention of the South African government is to try as much as possible to widen the tax base, with a specific bias on electronic commerce activities. This is partly because of the administrative challenges that are posed in enforcement, where there might be no physical office or permanent establishment within South Africa for the entities offering goods and services for sale through E-commerce.²⁰³

As a threshold, it is required that for the VAT law to apply to a transaction:

- a. The user of the services or goods is a South African
- b. Payment originates from a Bank in South Africa
- c. The user of the goods and/or services has a business or permanent address in South Africa.

In terms of comparison, the Kenyan Law does not have any provision on taxation of E-commerce, other than *The Draft Value Added Tax (Digital Market Place Supply) Regulations, 2020*, which are not yet in force. The thriving of E-commerce in Kenya imposes challenges on the country's jurisdiction to impose tax on goods and services rendered online due to the insufficiency of the current taxation model.

The traditional way of establishing the connection between source of funds and the Kenya Revenue Authority (KRA) is through source principle and resident principle, both of which require physical presence to be established in determining whether an entity is a resident or a non-resident for tax purposes. For a non-resident entity to be taxed in Kenya, as depicted under the current Income Tax Act, a Permanent Establishment must exist. The Company must have a fixed place of business that has been in existence for at least 6 months. A website cannot be deemed to constitute a fixed place of business since it is a virtual office/platform hence not tangible. The only physical part of

²⁰³ David R. Agrawal, William F. Fox, 'Sales Taxes In an E-commerce Generation Proceedings', Annual Conference on Taxation and Minutes of the Annual Meeting of the National Tax Association, Vol. 108, 108th Annual Conference on Taxation (2015), 1-47.

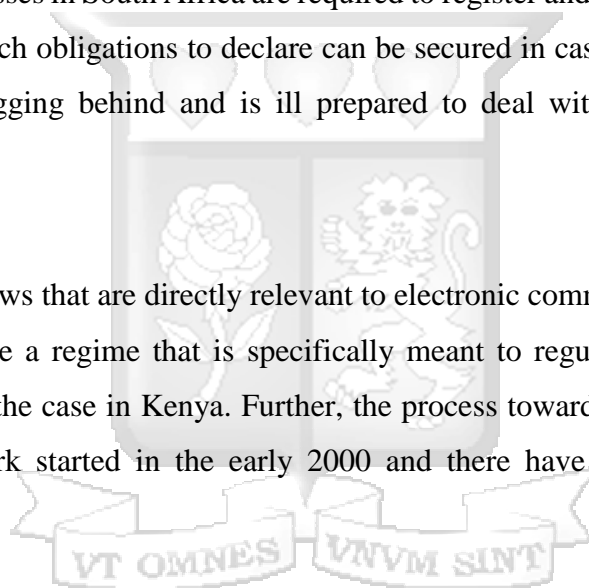
internet-based transactions and services is the server which most of the time is located outside the country.

Furthermore, the current tax regime does not provide a mechanism for the collection of indirect taxes, such as VAT, for E-commerce transactions, especially B2C transactions. Traditionally, collection of VAT is the responsibility of suppliers and retailers who then remit the same to the relevant tax authority; another way is through self-declaration, which involves the consumers doing the remittance by themselves. This mechanism proves to be insufficient in E-commerce transactions since suppliers lack a physical presence in Kenya's jurisdiction hence the tax authority cannot impose a duty on them to collect indirect taxes on their behalf.

In contrast, online businesses in South Africa are required to register and have a permanent address in South Africa after which obligations to declare can be secured in case of default. The taxation law in Kenya is still lagging behind and is ill prepared to deal with the complexities of E-commerce.

3.4 CONCLUSION

From the review of the laws that are directly relevant to electronic commerce in South Africa it is evident that they do have a regime that is specifically meant to regulate matters of electronic commerce, which is not the case in Kenya. Further, the process towards enactment of such laws and regulatory framework started in the early 2000 and there have been policy studies that preceded that process.



4 CHAPTER FOUR: FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

4.1 ABSTRACT

This Chapter takes into account the findings of Chapters One, Two and Three. It interrogates whether in respect of consumer protection, an enactment of legislation and institutional reforms is necessary and to what extent the lessons learnt from South Africa could be adapted to effectively fit into the Kenyan system. Considering that technological advancements are fast changing, the law should adapt to the environment, and not remain static.

4.2 FINDINGS

Despite an increase in E-commerce activities in Kenya, the law is inadequate in protecting consumers, owing to the fragmented pieces of legislation that are inconclusive and not express. Comparatively, South Africa is a country that experiences similar economic circumstances and facing similar technical and legal challenges as Kenya. The technical challenges include poor internet access, lack of technical expertise, payment logistical challenges and lack of a national addressing system, which makes delivery cumbersome.

The legal challenges include data privacy and protection, lack of dispute resolution system and opportunity for redress, conformity of goods to the required standards, inability to pre-inspect the goods prior to transacting and fraud.

South Africa unlike Kenya has come up with innovative solutions to manage and control the legal E-commerce risks. This solutions include, establishing an E-commerce regulatory authority, providing for a cooling off period after delivery of goods, regulations protecting consumers from unsolicited communications, protection of data privacy by prohibition of unauthorized use of information, provision for online dispute resolution platforms (such as ZADNA) which handles domain name disputes and appointment of an E-commerce ombudsman.

Kenyan tax laws do not provide for taxation of E-commerce transactions. The conventional way of taxation puts a leash on KRA to broaden the tax base. For instance, Kenya's E-commerce marketplace is estimated to be worth Kenya Shillings Five Hundred Million (KShs. 500 Billion).²⁰⁴

²⁰⁴ Frankline Sunday, "Tax for Online Traders", *Standard*, (Nairobi, 14th June 2019) Available on <<https://www.standardmedia.co.ke/business/article/2001329795/tax-for-online-traders>> viewed on 16 June 2020.

In addition, more businesses are transforming their platforms to online trading; meaning the potential of E-commerce is on an exponential rise, hence the need to tax. South African VAT Act imposes a 14% VAT on online transactions and provides for registration of Vendors where the value of transactions amount to ZAR 50,000 a year or more. The scope of application is wide enough to cover most if not all E-commerce transactions in South Africa.

Due to the similarities in the challenges experienced by both countries, it would therefore be practical to apply some of the innovative solutions that South Africa has come up with to the Kenyan local conditions.

4.3 RECOMMENDATIONS

In light of the foregoing, this part highlights, in summary the key recommendations for policy formulation and legislation. It is timely to consider the subject in Kenya, because of the fast growing E-commerce attributable to improved internet access and increased usage of mobile phones. To realize the goal of supporting E-commerce while enforcing and protecting consumer rights, the following are the recommendations:

- a. Policy Study; it is recommended that a study be commissioned by the government focusing on E-commerce and geared towards identifying challenges in the Kenyan legal and institutional regime and formulate a responsive policy to address those challenges²⁰⁵. Importantly, legislation should be enacted after a deliberate and detailed policy formulation. This can supplement the current ICT Policy, which is general in this respect.
- b. From the South African case study, it is demonstrated that it will be better to have a *sui generis* legal and regulatory regime²⁰⁶ to govern the area of online transactions. This will enhance regulation by ensuring that specific conditions are met and standards adhered to, in the interest of the consumers in E-commerce.
- c. The enacted law ought to consider the future of E-commerce. Owing to the sustainability angle of business and continued increase in efficiency engendered by E-commerce, the law

²⁰⁵ These challenges include data privacy and security, opportunity for dispute resolution and redress, conformity of goods to the required standards, opportunity for the consumer to inspect the good prior to contracting (cooling of rights), information disclosure and verification.

²⁰⁶ In the case of South Africa, this includes CPA, ECTA and POPIA, which have express provisions governing E-commerce.

ought to be sensitive to the need to allow access to personal data in a contextual manner²⁰⁷. The law should enhance the role of the data subject by according a real chance for the consumer to determine which of their personal information can be shared.

- d. There ought to be established the Office of Commissioner of E-commerce which shall be in charge of E-commerce licensing, setting conditions for licensing, registration of domain names and oversight of local and international E-commerce vendors that are trading in Kenya. The powers of the Commissioner would entail implementation and enforcement of the *sui generis* legislations on E-commerce, establish and maintain a register of all the licensed E-commerce vendors, promote self-regulation among E-commerce vendors, receive and investigate any complaints by any person on infringement of consumer rights by vendor(s). The Commissioner shall have quasi-judicial authority to hold hearings and investigate on disputes as well as to impose financial penalties and sanctions against E-commerce vendors who violate the set standards and regulations. To be able to fund the operations of the Office of the Commissioner of E-commerce, the Commissioner could charge a transaction levy payable by all E-commerce Vendors, as well as receive funding from the exchequer through the Ministry of Information, Communications and Telecommunication.
- e. A specialized system of online dispute resolution can be provided for with a view to ensuring that disputes involving cross border transactions are resolved expeditiously and cost effectively, without the need to resort to conflict of laws. There is also a need to promote international co-operation on matters relating to dispute resolution on matters involving cross border E-commerce transactions through domestication of international treaties, guidelines and model laws on E-commerce²⁰⁸, which will give them the force of law in Kenya.
- f. Kenya should review the VAT Act 2013 and establish elaborate regulations, which govern taxation of digital transactions in E-commerce. In doing so, KRA should develop a platform for registration of vendors who wish to transact in Kenya's digital marketplace. KRA should also ensure that vendors have a resident agent with a known physical address. The role of the Agent should be to file monthly returns as conducted in the electronic

²⁰⁷ As discussed in Chapter One, refer to contextual integrity, as a theoretical approach to data privacy and protection. Distribution of personal information ought to adhere to the norms of appropriateness and distribution.

²⁰⁸ This can be achieved through domestication of the United Nations Guidelines for Multinational Enterprises, OECD Guidelines for Multinational Enterprises and UNICITRAL Model Law on Electronic Commerce.

platform and ensure compliance in remittance of VAT. The agent should also be liable in case of any malfeasance concerning remittance of VAT. For international co-operation in tax matters, OECD has developed *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters*,²⁰⁹ which became effective in 2011. It provides for administrative cooperation between the parties in the assessment and collection of taxes, in particular, to combat tax evasion and avoidance. Kenya being a member of OECD can optimize on this bilateral agreement and maximize VAT collection in online transactions and even facilitating enforcement.

4.4 CONCLUSIONS

In conclusion, it is established that currently, Kenya lacks a sui generis legislation regulating E-commerce in Kenya. There are diverse laws that have a bearing on online transactions but they only deal with the matter of E-commerce tangentially. As demonstrated, E-commerce is the future of business. It is therefore important that the law is reviewed or enacted in a manner that promotes it and does not stifle the efforts of entrepreneurs to use technology to enhance business efficiency and reduce overhead costs.

In terms of the conceptual framework, this research has discussed the need to approach this subject with a forward thinking outlook. The world is fast changing into a global commercial village. Therefore, the law must also change in order to reflect the new norms that ought to govern interactions. This is mostly the case in the area of E-commerce where the changes in technology have continually overtaken the law and the law is playing catch up. The theories of contextual integrity and political economy are based on practical and flexible understanding of the social phenomena involved. They have therefore laid a solid foundation to this research by proposing a practical approach to addressing the legal and social concerns raised because of innovation and use of technology in conducting commercial transactions.

²⁰⁹ OECD, *The Role of Digital Platforms in the Collection of VAT/GST on Online Sales* as presented for consideration at the fifth meeting of the Global Forum on VAT March 2019 available on <<http://www.oecd.org/tax/consumption/the-role-of-digital-platforms-in-the-collection-of-vat-gst-on-online-sales.pdf>>. Accessed on 16 June 2020.

This research has also found that South Africa, the leading economy in Africa has a legal and regulatory regime that is dedicated to E-commerce. This is the **Electronic Communications and Transactions Act (ECTA)**, the **Consumer Protection Act** and the **Protection of Personal Information Act** supports the enforcement of **ECTA**. As viewed against the findings of the legal and institutional frameworks in Kenya, it is crucial to note that the key difference is the *sui generis* legislation specifically meant to protect online consumers of goods and services and the policy formulation that preceded the legislative process.



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5.8 GUIDELINES

- Electronic Commerce and Consumer Protection Group (E-commerce Group), ‘Guidelines for Merchant to Consumer Transactions’ (hereinafter E-commerce Group Guidelines).

6 APPENDICES

6.1 APPENDIX A: Turnitin Originality Report



6.2 APPENDIX B: Final Decision Certificate-Institutional Ethics Review Committee