SHYLOCKS OR LEGITIMATE LENDERS? AN INQUIRY INTO THE REGULATION OF DIGITAL LENDING IN KENYA

Augustus Mutemi Mbila[*]

Abstract

The lending market in Kenya has seen a proliferation of digital lenders that are largely unregulated. The lenders provide seemingly cheap loans whose interest is huge when the Annual Percentage Rate (APR) is calculated. The lenders operate through apps that are uploaded to App Stores and pulled down at will. They require their customers to 'accept' terms and conditions before accessing the loans, and these terms sometimes allow the lenders unfettered access to customer data which they use and abuse in equal measure. The lenders use such customer data to threaten, to contact those on the contact lists of the customers' phonebook, and to report them on Credit Reference Bureaus (CRBs).

This paper seeks to examine the law on regulation of the digital lending environment in Kenya and to recommend the enactment of the Financial Markets Conduct Bill of 2018 which introduces elements of the Twin Peaks model of financial regulation.

[*] LL.B. (Hons) (University of Nairobi), LL.M. (Regional Integration and East African Community Law) - (University of Dar es Salaam and University of Bayreuth in Germany), PhD. (Candidate), Lecturer in Law, Mount Kenya University, School of Law, Parklands Campus. The author can be reached on ambila@mku.ac.ke for comments on this article.

Key Words: Shylocks; digital lenders; data privacy; Annual Pricing Rate (APR); digital regulation; Twin-Peaks Model

1. INTRODUCTION

In the play *The Merchant of Venice,* William Shakespeare presents a character by the name Shylock, who accepts to lend Bassanio, a young Venetian of noble rank, some 3,000 ducats to spend in wooing Portia, a beautiful and wealthy heiress in Belmont. Antonio, Bassanio's friend and a merchant in Venice, has accepted to be the guarantor in the loan agreement and has bonded his ships and merchandise as security for the loan. Shylock demands that if Bassanio defaults on the loan, Shylock may take a pound of Antonio's flesh. Such a penalty, or interest if you may, is too much, arising from a loan of a paltry 3,000 ducats. Antonio signs the contract, and Bassanio now has the money to travel to Belmont to court Portia. He succeeds in his mission and marries her.

A lot more happens in this plot, but the most relevant part is that Antonio is unable to pay the loan he took for his friend Bassanio. Shylock insists that he wants a pound of Antonio's flesh, as per the agreement, even after Antonio offers to pay twice the principal sum, that is, 6,000 ducats. From a series of events that follow, Portia decides to disguise herself as a "doctor" to provide the necessary legal services to save her husband from Shylock's knife. The case is taken to court and the court grants Shylock his bond of taking off a pound of flesh from Antonio. Portia must think fast. She must make good use of her legal skills. She demands from Shylock that he must remove exactly one pound of flesh from Antonio's body, no more, no less, and that, if the scales turn, his property will be confiscated. She says:

Just a moment; there is something else.

This contract gives you not a jot of blood;

The words expressly are "a pound of flesh:"

Take then your bond, receive your pound of flesh;

But, in the cutting of it, if you shed One drop of Christian blood, your lands and goods

Are, by the laws of Venice, confiscated[1]

Since it is not possible for Shylock to avoid the tilting of the scale, he backs out from his position, and is not ready to accept the principal sum, with three times interest. However, Portia has gained a very strong position and is now arguing that not even a ducat is available for him, since he declined it when it was offered to him. There are questions regarding how Portia's role has changed from Antonio's advocate to a judge, as she is the one now making decisions, but the legal services she has provided to save Antonio's flesh cannot be overstated.

This play is reminiscent of the status of digital lending in Kenya. Digital lending platforms have proliferated in the recent past, and there is reason to believe that such platforms are largely unregulated. A report by Financial Sector Deepening (FSD) shows that by 2019, approximately 88% of the adult population in Kenya had access to mobile money and that over six million Kenyans had borrowed money from digital mobile lenders to meet their daily needs.[2] Since the introduction of M-Shwari in 2012, the number of

---

[1] Act IV, Scene 1. Stage set at Venice. A court of justice.

[2] FSD Kenya, "Digital credit audit report: Creating value through inclusive finance Evaluating the conduct and practice of digital lending in Kenya", Available at <https://fsdkenya.org/publication/digital-credit-audit-report-evaluating-the-

mobile platforms providing quick access to loans has shot up to approximately 50 in 2019.[3] Since these platforms are not commercial banks, hence not regulated under the Banking Act and the Central Bank of Kenya, nor deposit taking SACCOs hence not regulated by the SACCO Societies Act, not deposit taking microfinance institutions hence do not fall under the Microfinance Act, there is evidence to suggest that they are hardly regulated. Hence, issues to do with licensing, mode of operation, maximum interest they can charge borrowers, or sanctions in the event they are engaged in illegal activities are not addressed by law.

Available data shows that these digital lending platforms charge high interests for loans that must be paid within a very short time, sometimes within a week.[4] The Annual Pricing Rate (APR) sometimes shoots to 15 times the interest that commercial banks charge for unsecured loans. However, despite the high interest rates, borrowers still access these loans because of the ease of accessing them compared with the process they must undergo if they were to access the loans from commercial banks.[5] Defaulters are listed with the Credit Referencing Bureau (CRB), hence tainting their creditworthiness, despite the little amounts they might have

---

conduct-and-practice-of-digital-lending-in-kenya/> (accessed on 30 September 2020).

[3] See *note* 2, above.

[4] Central Bank of Kenya (CBK), "Kenya National Bureau of Statistics (KNBS) & FSD Kenya". 2019. 2019 FinAccess household survey. Nairobi, Kenya. Available at https://www.centralbank.go.ke/uploads/financial_inclusion/2050404730_FinAccess%202019%20Household%20Survey-%20Jun.%2014%20Version.pdf, (accessed on 30 September 2020).

[5] FSD Kenya, "Digital credit in Kenya: evidence from demand-side surveys" 2018. Available at https://fsdkenya.org/publication/digital-credit-in-kenya-evidence-from-demand-side-surveys/, (accessed on 30 September 2020).

borrowed.[6] The platforms also illegally and without consent access confidential data from the borrowers, which in effect injures the borrowers' privacy rights. To what extent, if any, has Kenyan law regulated the digital lending environment? Are these lenders "Shylocks" or legitimate lenders? Do the platforms require for commercial security like the one that Antonio of *The Merchant of Venice* provided? Do the borrowers have access to legal services, like the ones provided by Portia, and do they know their legal rights about borrowing?

This paper will examine the nature of the digital lending environment in Kenya, the law governing this environment (if any), and adequacies or inadequacies of this law, and make recommendations on ways of improving on such regulation.

2. METHODOLOGY

This paper is based on an exploratory review of data collected using qualitative techniques. A desktop review on the internet regarding digital lenders was carried out for more than 110 digital lending platforms.[7] Further data was collected from the main mobile app stores (Google Play and App Store) to generate a list of all mobile phone apps that are listed as providing digital credit in Kenya. It is important to note that some of the apps are listed as such on the mobile app stores, yet they are not licensed to operate as such under Kenyan Law. Further data was collected on the individual digital lender platforms. Crucially, data regarding the terms and

---

[6] Kaffenberger, M., and Edoardo, T., *A Digital Credit Revolution: Insights from Borrowers in Kenya and Tanzania.* Working Paper. Washington, D.C.: CGAP, 2018.

[7] We use the term "digital lending platforms" to refer to both app-based and STK-based products that provide digital credit as loans through mobile devices and the loans are repaid through the same mobile device. The service is instant and is automated.

conditions for getting credit from the lenders, minimum and maximum amounts, timeframes for paying back the principal sum and the interest, interest chargeable for the principal sum, attendant penalties, and other service charges was collected from these digital lenders. Attempts were also made to sign up to the platforms and "borrow" money to practically understand the process of digital lending in the platforms. Since the service is linked with mobile sim cards, the main limitation was the fact that the researcher could only sign up for a limited number of digital lenders. Finally, a qualitative analysis of this data was carried out, along with a review of available laws on the subject. the results are presented in the sections that follow.

3. STATUS OF DIGITAL LENDING IN KENYA, 2021

The number of mobile apps providing instant, automated credit in the two main mobile app stores, Google Play and App Store, keeps fluctuating. In 2018, there were approximately 110 such mobile apps on Google Play and App Store. However, 65 of these apps had been pulled down from the stores by April 2019, with 47 new ones emerging on the stores. Whereas most of these mobile apps have less than 10,000 downloads, two main apps, Tala and Branch, dominate the market with more than I million downloads each as at 2020. A few more apps had downloads of between 500,000 and I million. The rate of download from app stores does not, however, reflect the rate of borrowing of credit from these apps and overall demand from customers. Research shows that Tala, Branch, M-Coop Cash, and Eazzy Loan are the most popular mobile lending platforms in the country.[8] The rate at which the apps are uploaded to and pulled down from app stores shows the ease with which the

[8] Kaffenberger, M. and Edoardo, T., *A Digital Credit Revolution: Insights from Borrowers in Kenya and Tanzania*. Working Paper. Washington D.C. CGAP, 2018.

market operates. In addition, the ease with which the download and sign-up is done by customers reflects how easy it is to obtain digital credit in the country, oblivious of the repercussions.

Based on the success of the four leading apps in Kenya, other emergent apps have resorted to mimicking the names of these leading apps, perhaps to increase demand. They include: Mkopo Branch Rahisi, Fuliza Sasa, Fuliza Mpesa Loans, Tala-Mkopo Instant, Tala Cash, Tala Pewa Loans, Tala Loans Kenya, and Coop M-Pesa Credits. Other apps require customers to deposit some money before they can be eligible for loans. Interestingly, other apps indicate that they provide loans, while in real sense they act as fronts for in-app advertising. This shows that there is very little or no regulation in this industry. The fact that apps can mimic the names of more popular apps and still operate in the same industry shows that regulatory bodies do not monitor this industry.

The proliferation of the mentioned unscrupulous digital lenders does not mean that there are no legitimate lenders in the industry. For example, Equity bank operates Eazzy Loan app, Kenya Commercial Bank operates KCB M-Pesa, while Commercial Bank of Africa operates M-Shwari. In addition, NIC Bank and Family Bank have mobile platforms that provide access to loans for their customers, while Barclays Bank has the Timiza platform that allows virtual access to loans for customers. The digital lending apps do not require customers to provide any security to obtain loans, as Shylock asked Antonio to provide in *The Merchant of Venice*. This is meant to lure customers to apply for as much loan as possible, the only requirement being that they must commit to pay back on time. The loan must be paid back between a week and a month, except KCB M-Pesa which allows members to pay back within six months. Interest ranges between 5% and 10% and can sometimes

be higher than this. Penalties are levied for failure to pay back on time, and default in payment leads to the defaulter being listed with the Credit Referencing Bureau (CRB), therefore tainting their creditworthiness.

Some of the digital lenders operate internationally, making it even more difficult to trace their operations, license, and regulate them. For example, Branch International has offices in Mexico, Mumbai, Lagos, San Francisco and Nairobi. They entered the Kenyan market in 2015. The lender provides loans to Kenyan customers ranging from Kshs. 1000/- and Kshs 50,000/-. The loan is repayable in three equal weekly instalments, along with the interest. The interest rate depends on the creditworthiness of the borrower and their commitment to pay the designated weekly instalments.[9] At clause 5 of the Terms and Conditions for acceptance to download and operate the app, the lender states that the customer agrees to authorise the lender to access all personal information related to credit score, date of birth, name, gender, mobile phone number, national identification number, and such other information that will enable the lender to identify the customer. The lender even has authority to access phone data like call history, messages, contacts, and any other crucial data.[10] Data collected from this research shows that some of these digital lenders, including Branch International, sometimes contact the people in the customer's phone book, asking them to remind the customer to repay the loan. This paper will assess whether such acts are in breach of privacy laws.

---

[9] Drexler, A., Fischer, G. and Schoar, A., "Keeping it Simple: Financial Literacy and Rules of Thumb", 6 (2) *American Economic Journal: Applied Economics*, 2011, pp. 1-31

[10] See clause 5.3.3 of the Terms and Conditions, available at <https://branch.co.ke/tou>, (accessed on 9 October 2020).

In what was seen a measure to curb predatory pricing by digital lenders, Google issued user guidelines on several aspects of digital lending in September 2019.[11] Google owns the Google Play Store in which the mobile lending apps are uploaded by digital lenders and then downloaded by customers. Specifically, on personal loans, Google required advertisers of personal loans to provide adequate information regarding the destination site of the creditor. Notably, digital lenders do not disclose their physical location, based on the data collected for this research. The loans are applied on mobile phones and are repaid on the same mobile phones.

Google continues to note that the providers must always indicate the minimum and maximum repayment period when advertising the loans. Secondly, the providers must always indicate the Annual Percentage Rate (APR) which essentially includes interest rate, attendant fees and penalties, and any other costs as allowed by the local law. Thirdly, Google required the providers to always indicate the expected total cost of the loan. This would allow the customer to accept the loan on a point of information. Fourthly, Google indicates that the user guidelines are meant to protect Google customers from harmful and deceptive products, such as high-cost personal loans. Data collected for this research shows that digital lenders do not implement these guidelines as issued by Google. Instead, they indicate the measures taken to implement the guidelines on the app, to deceptively convince Google that the measures are being implemented, yet the measures are not implemented when issuing the loans to customers.

---

[11] Google., Financial Products and Services, 2019. Available at <https://support.google.com/adspolicy/answer/2464998?hl=en>, (accessed on 9 October 2020).

This analysis of the current status of digital lending in Kenya shows that there are several issues that need to be discussed regarding how and whether the law regulates digital lending in the country. The issues include permissions granted by customers when installing digital lending apps in their devices, data protection, privacy, consumer protection, regulation of financial services in Kenya in the perspective of digital lending, and the regulation of digital services as far as lending apps are concerned.

4. REGULATION OF SELECTED AREAS OF DIGITAL LENDING

4.1 App permissions

The rapid proliferation of digitally derived data such as social media data, financial transactions data, applications data, and telecommunications data has largely contributed to the rapid expansion of digital credit in Kenya. Digital operators have access to a lot of data from their consumers, especially when they have cookies. In the absence of law and policy to regulate data access and use, these digital operators can access a lot of consumer data and in the end violate consumer right to privacy and dignity.[12] Most consumers do not know for what reason the digital operators want to use the data, and they easily grant permission for access of their personal data.[13] The digital lending apps are designed to mine as

---

[12] For an overview of the use of alternative data for financial access, see Mesropyan, E., "Alternative Data & Financial Access: The Good, the Bad, and the Ugly", 2018: Available at <https://gomedici.com/alternative-data-financial-access-good-bad-ugly>. (Accessed on 24 May 2021).

[13] AFI Consumer Empowerment and Market Conduct Working Group, ''Digitally Derived Credit: Consumer Protection Issues and Policy Responses to New Models of Digital Lending'', 2017. Available at https://responsiblefinanceforum.org/wp-content/uploads/2017/11/AFI_CEMC_digital-survey_AW2_digital.pdf (accessed on 24 May 2021).

much data as possible to facilitate the determination of the creditworthiness of the customer.[14] For example, the app will access customer data such as contacts, GPS location, call logs, messaging, internet use, previous borrowing trends, and cash flow trends within the device. The digital lending app can only access the data if the customer grants it permission. However, the customer does not have a choice as they will not be allowed to sign up and access credit if they do not grant the app the permissions.[15] Therefore, the customer is placed between a rock and a hard place and forced to choose between Baal and Beelzebub.

Once the apps are downloaded, the customer is required to provide their mobile phone number, full name, national identification number, email address, and such other basic bio data. Some lenders also require the customers to provide data about their income, that is, whether they are employed or not and how much they earn per month. Other lenders require the customers to sign up using their social media accounts like Facebook and Twitter. Every app that was examined in this research required customers to grant access to all phone and social media data. The apps updated their systems to ask for permission from customers to access their phone data when Google updated its user policies. Previously, the apps directly accessed such data without asking for permission from users. In the user policy, Google requires app

---

[14] Insights from a digital lender operating in the Kenyan market revealed that relying on credit scores provided by Safaricom, a mobile network operator with a mobile money product, increased the lenders loan ticket size by up to 250% when compared to using the lender's own data. See Mazer, F, "Data sharing models: The potential for financial innovation and the risks that must be managed", 2018. Available at <https://fsdkenya.org/blog/data-sharing-models-the-potential-for-financial-innovation-and-the-risks-that-must-be-managed/> (accessed on 24 May 2021)

[15] Collins, D., *et al., Portfolios of the Poor: How the World's Poor Live on $2 a Day.* Princeton University Press, 2009. P.18.

developers to only use the data for purposes that their customers have consented to.[16] This is difficult to implement, because most customers hardly ever follow up to know how the app developers are using the data that they have permitted them to use.

The apps have terms and conditions which very few customers read before granting permissions. More than 50% of the people interviewed in this study were not aware of the terms and conditions to which they "consented" while granting permissions. The most common clause in the terms and conditions is that the customer will authorise their mobile service provider (that is, Safaricom, Airtel, Telecom, etc.) to access vital information that the app requires. Timiza, for example, requires the customer to consent to authorise Safaricom to share data with the "bank" pursuant to the agreement between the customer and Safaricom. This means that Timiza, the digital lender, is interfering with the agreement that it is not privy to. The digital lender also requires the customer to authorise it to request additional information from Safaricom regarding M-Pesa, M-Pesa system, and Safaricom services as the "bank" will deem fit. For this condition, the customer is not even made aware what kind of additional data the lender will require from Safaricom. The customer therefore proceeds to authorise Safaricom to allow the lender access to all data, as the lender will need from time to time. Branch International clearly states under clause 2.2 of its terms and conditions that the customer will not be allowed to access the system if they click "decline" when the system requires them to either accept or decline.[17]

---

[16] See Google, "Permissions", available at <https://support.google.com/googleplay/android-developer/answer/9888170?hl=en>. (Accessed on 12 October 2020).
[17] See clause 2.2 of the "Terms of Use", available at <https://branch.co.ke/tou>, (accessed on 12 October 2020).

It is not clear how this conduct by the digital lenders regarding permissions can be regulated under Kenyan Law. The law on this subject is a fragmented one. The starting point is the Data Protection Act of 2019.[18] This Act was enacted to give effect to article 31(c) of the Constitution of Kenya which states that every person has the right to privacy, which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed. The Act defines "data" in several ways: information which is processed by means of equipment operating automatically in response to instructions given for that purpose, information which is recorded with intention that it should be processed by means of such equipment, and information which recorded as part of a relevant filing system. A person has a right to be informed of the use to which their personal data is to be put.[19] They also have a right to object to the processing of all or part of their personal data.[20] This is not possible for customers of digital lending apps because if they object to the processing of all or part of their data then they will not obtain the credit they are looking for.

When the data is being collected, a person has a right to be informed of the data that is being collected, the fact that personal data is being collected, the third parties to whom the data will be transferred to, and a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.[21] Mobile digital lenders do not do this. In fact, once they have been granted permission to mine data from the customer's mobile device that is the last time the customer will be informed

[18] The Data Protection Act, No. 24 of 2019.
[19] S. 26(1).
[20] S. 26(3).
[21] S. 29(a), (b), (c), and (f).

about their data. This is in breach of the customer's rights under the Constitution and the Data Protection Act.

Section 72 of the Act creates several offences arising from breach of data protection law. For example, it is an offence for someone to use personal data in any manner that is incompatible with the purpose for which such data has been collected, without any lawful excuse.[22] It is also an offence to access personal data from a person who controls that data without their permission.[23] Disclosing personal data to a third party is also an offence.[24] For these offences, the Act creates a penalty of a maximum fine of three million shillings or a maximum of ten years in jail. In addition to the fine or jail sentence, a court may order the forfeiture of any equipment or any article used or connected in any way with the commission of an offence,[25] or order or prohibit the doing of any act to stop a continuing contravention.[26]

Mobile digital lenders in Kenya violate this law all the time. First, they access data that they have not been authorised to access, sometimes because of the naivety of the customer. Secondly, they share this data with third parties like telecommunication companies and persons in the contact list of the customer's device. It is not easy to charge them with the offences under the Data Protection Act because some of them are unregulated. There are those lenders that upload their apps on app stores and pull them down as they wish. There is therefore need for further review of applicable

[22] S. 72(1).
[23] S. 72(3)(a).
[24] S. 72(3)(b).
[25] S. 73(2)(a).
[26] S. 73(2)(b).

law, because the consumer may have their rights violated, yet the culprits are not charged with the listed offences under the Act.

The Kenya Information and Communications Act of 2012,[27] was enacted to, among other things, facilitate the development of the information and communications sector. The most relevant Part is Part VIA titled "Electronic Transactions." The Act empowers the Communications Authority of Kenya to facilitate electronic transactions by ensuring the use of reliable electronic records.[28] It also empowers the Authority to foster the development of electronic commerce through the use of electronic signatures to lend authenticity and integrity to correspondence in any electronic medium.[29] The Act further requires the Authority to develop sound frameworks to minimize the incidence of forged electronic records and fraud in electronic commerce and other electronic transactions.[30] Part VIA of the Act therefore positions the Communications Authority of Kenya as the custodian of all electronic transactions in Kenya, so that if certain electronic transactions violate the Act, the Authority has powers to act against the persons or entities carrying out such violations. Digital creditors operate apps that are designed, uploaded, and downloaded through electronic devices. Therefore, the Authority has powers under part VIA of the Act to regulate their operations.

The Act also empowers the Authority to license all entities that operate electronic certification system, repository or a sub-domain in the Kenya country top level domain (.ke ccTLD).[31] If a person contravenes the provisions of the Act in this Part, they commit an

---

[27] Cap 411A Laws of Kenya.
[28] S. 83C(a).
[29] S. 83C(d).
[30] S. 83C(f).
[31] S. 83D(1)(a) and (b).

offence and are liable on conviction to a maximum fine of three hundred thousand shillings or to a maximum prison sentence of three years, or both. Ordinarily, lending in Kenya is regulated by the Central Bank of Kenya, as the Central Bank is the institution that regulates the banking industry in the country.[32] However, as it will be demonstrated later in this paper, digital lenders are not deposit taking institutions and therefore they are not banks. The Central Bank of Kenya regulates banks; banks are deposit taking institutions. Most of the current digital lenders in the country are unlicensed, and this may explain why they are often pulled out of app stores and replaced.

4.2 Data Privacy and Consumer Rights

Digital operators usually require their customers to consent to access to data stored in their digital spaces and other spaces that the digital operator may want to access. The presumption is that when someone ticks “yes, I agree” to a box requiring them to accept the terms and conditions, they have read and understood those terms. Murphy and Medine (2018) write that consent is not enough in data access.[33] This is because people rarely read online contracts and oftentimes accept the terms and conditions without ever reading them. A recent study by Deloitte showed that 91% of the 2000 respondents who were interviewed accept terms and conditions without ever reading them.[34] Their findings are backed

---

[32] See s. 4Z of the Central Bank of Kenya Act, Cap 491 Laws of Kenya.

[33] Murthy, G. and Medine, D., “Data Protection and Financial Inclusion: Why Consent Is Not Enough”, 2018. Available at <https://www.cgap.org/blog/data-protection-and-financial-inclusion-why-consent-not-enough>. (Accessed on 13 October 2020).

[34] Cakebread, C., “You're not alone, no one reads terms of service agreements”, 2017, available at <https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11?IR=T>, (accessed on 13 October 2020).

by further empirical evidence. For example, Obar and Oeldorf-Hirsch carried out an experimental survey with 543 respondents to establish to what extent people ignored privacy policy and terms of service on the internet.[35] They designed a fictitious internet site, NameDrop, and created a fictitious privacy policy and terms of service. They then required users to "accept" those terms before accessing the site. Results showed that 74% of the respondents ignored the requirement and proceeded to quickly accept the terms without attempting to read them.

Even if users were to be careful and decide to read the privacy policies and terms of service, research shows that it would take them very long to complete reading them. Cranor and McDonald (2008) carried out an experiment to calculate the time it would take users to read all the privacy policies that they are required to read. The authors found that the average length of the privacy policy and terms of service for the top 75 websites that they used as case studies was 2,514 words. Assuming that the average reading rate in academic literature was 250 words a minute, they estimated that a person would take 10 minutes to read one privacy policy in the websites. They also estimated the average number of websites a person visits per year and found that 1,462 websites were visited. From their calculations, a person would therefore spend 25 days from their calendar year reading privacy policies. Using economic regression formulae, they further estimated that the opportunity cost for reading the privacy policies would be $781 billion for the

---

[35] See Obar, J.A. and Oeldorf-Hirsch, A., "The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services", *Information, Communication & Society*, ,2018, pp. 1-20. TPRC 44: The 44th Research Conference on Communication, Information and Internet Policy, 2016., Available at SSRN: <https://ssrn.com/abstract=2757465> or <http://dx.doi.org/10.2139/ssrn.2757465>, (accessed on 13 October 2020).

entire US.[36] This means that reading those privacy policies, though to the benefit of the user, requires the user to incur huge opportunity cost.

The privacy policies and terms of service exist to enable companies owning the websites to avoid legal trouble, as there will be evidence that the customer accepted the terms. However, customers do not have a choice, because they are not allowed to access the site if they do not accept those terms. The consent requirement therefore plays no role in enhancing credibility and ensuring that the dignity of the user is upheld.[37] Privacy policies and terms of service are long and are drafted by the company's legal teams to reduce the company's liability as much as possible in the event of loss to the customer. They are also meant to grant the company close to free reign over the customers personal data. These digital apps have been found to track every move that the user makes and can then report back to the designers.[38]

This study reviewed the privacy policies of leading digital lenders under four key heads: Whether the lender has a clause on its terms and conditions committing itself to respect user's dignity and privacy, whether the lender commits to using the data only for business purpose, whether the lender shares the data to third

---

[36] Cranor, L.F., and McDonald, A., "The Cost of Reading Privacy Policies". *Journal of Law and Policy for the Information Society*, 2008, pp. 543-68.

[37] See Matthan, R., "Do away with consent to strengthen data privacy", 2018, available at <https://www.livemint.com/Opinion/ksxauMlxKS8UsuScPs114K/Do-away-with-consent-to-strengthen-data-privacy.html>, (accessed on 14 October 2020).

[38] See DeVries, J.V., *et al*., "Your Apps Know Where You Were Last Night, and They're Not Keeping It Secret", 2018, Available at <https://www.nytimes.com/interactive/2018/12/10/business/location-data-privacy-apps.html?action=click&module=Top%20Stories&pgtype=Homepage>, (accessed on 14 October 2020).

parties and whether they seek consent from the user before sharing such data, and whether the user has any rights in the use of their data by the lender. Results show that a total of 14 of the apps reviewed in this study have data privacy policy that is distinct from the terms and conditions. Shockingly, though, six of these lenders have similar privacy policies. There is every reason to believe that either all the six lenders copied from the same source or five of them copied from one of the lenders. Results also show that all the lenders that were reviewed in the study share customer data with third parties without seeking the consent of the customer. Data is shared with Credit Reference Bureaus (CRBs) while mobile service providers provide access to customer data that they hold in their servers. Some lenders even contact the customer's contacts in the phone book, asking them to request the customer to pay the loan that is due, when the customer defaults in payment. Other lenders have clauses that allow it to decide how to use the customer data without seeking the customer's consent. mKey, a digital lender, for example has a clause giving it the sole discretion of deciding what to do with the data. Tala, another digital lender, stores the data and uses it even after the customer has stopped using the app and deleted it. The lender requires the customer to waive their rights over the data by accepting the terms and conditions.[39]

The right to data privacy is anchored in the Constitution. Every person has a right to data privacy, which includes not to have information relating to their family or private affairs unnecessarily required or revealed or the privacy of their communications infringed.[40] When lenders share their customer data to third parties and ask third parties to help them access customer data, they

---

[39] Tala, "Privacy Policy", Available at <https://tala.co.ke/privacy-policy-ke/>, (accessed on 14 October 2020).

[40] Constitution of Kenya, 2010, article 31(c) and (d).

breach the customer's right to data privacy which is anchored in the constitution. This breach of the salient constitutional right to data privacy mostly escapes unchecked because of the largely unregulated nature of the industry. For example, the lenders who have violated this right and have already discontinued their operations by pulling their apps from the app stores have effectively escaped sanctions. Their customers' data therefore remains in the virtual spaces and can be misused for a long time.

4.3 Digital Credit Pricing

The emergence of modern digital channels as avenues for obtaining credit by most of the unbanked citizenry has been hailed as one of the greatest innovations of the decade.[41] Most Kenyans who might not have managed to obtain credit from conventional lenders because of the conditions that such lenders impose on their credit can now obtain such credit from digital lenders. Digital credit does not require any security to obtain, unlike conventional lending by banks. The only things that digital lenders require is a clean bill of health from the data that they obtain from the borrower's mobile device. Looked at in that perspective, digital credit is 'cheap". It was expected that this kind of lending would lower the cost of lending from the amount of interest charged by digital lenders to lower levels. That has not been the case.[42] The cost of credit has continued to rise eight years after the launch of the first digital credit product in the country. A review of the cost of digital credit for the lenders used in this study shows that the lenders charge a variety

---

[41] For further analysis on the cost of consumer credit in Kenya, see Naheed, H., Ketley, R., & Oyier, T. "Definition of a standard measure for consumer interest rates in Kenya: a scoping study", 2009. Available at <https://s3-eu-central-1.amazonaws.com/fsd-circle/wp-content/uploads/2015/08/30095756/09-06-03_Definition_of_Std_Interest_Measures.pdf>. (accessed on 30 October 2020).
[42] Kaffenberger, M., and Totolo, E., 2018, *note* 8.

of fees on the credit. Some of the fees are: repayment interest fees, facility/arrangement fees, upfront interest, transfer from wallet to primary account, and mobile operator charge.

Typically, the repayment duration is short and ranges from one week to one month. It is only banks that operate digital lending apps like M-Coop Cash, Equity Eazzy Loan, and NIC Sasa that allow borrowers to repay within a month. The rest of the digital lenders like Tala, Branch, Kopa Cash and Stawika expect repayment to be done between one and two weeks. Paying the loans earlier does not attract any favours from the lenders, save for the fact that the credit score of the lender improves, so that they can easily apply for and obtain another loan. It is only M-Shwari that allows its borrowers rebate for early repayment of their loans. Repaying the loan earlier in fact raises the annualised interest rates, as the loans are repaid within a short time.

Most lenders also charge an additional penalty for late repayment, thereby further raising the cost of the loans. The Annual Pricing Rate (APR) of some Kenyan digital lenders is as follows: Fuliza (Operated by Safaricom): 148.5%, Branch and Tala: 180%, Kopa Chapaaa; 621%, M-Shwari: 90%, KCB M-Pesa (the lowest): 44%, Timiza: 73.9% and Stawi Loan: 75%. The loan may appear cheap at the outset, but when the cost is annualised and the total Annual Pricing Rate calculated as a percentage of the weekly or bi-weekly repayments, the rate is phenomenally huge.

Borrowing through mobile devices can sometimes “feel different”, tempting and addictive.[43] Research has shown that sometimes consumers of these services apply for the loans without any

[43] Simone, S., “The Persistent Power of Behavioral Change: Long-Run Impacts of Temporary Savings Subsidies for the Poor”, 10 (3) *American Economic Journal: Applied Economics*, pp. 67-100.

intentional purpose for it. They can borrow, misuse the money, and repay. Then borrow again and the cycle continues.[44] In the end, they believe that the more they borrow and repay within the required time, the faster their credit score grows. The net effect is that the Annual Pricing Rate (APR) of the loan rises tremendously. The urge to borrow is sometimes ignited by promotion messages that some lenders have developed in the recent past.[45] Research has shown that these lenders send such messages as: "you have qualified for XX Shillings! To accept your loan call or SMS 07123456." Since different borrowers have different perceptions for these loans, and the purpose for which they borrow the money also varies from borrower to borrower, lenders always have borrowers willing to apply for credit, provided they are creditworthy.[46]

Due to the rising cost of digital credit in the country and the disparate consumer economic behaviours, most borrowers do not fully repay their loans and are therefore reported to Credit Reference Bureaus (CRBs). There are currently three CRBs, TransUnion, Creditinfo and Metropol. Banks in Kenya are required to report the credit rating of their customers to the three CRBs. The report can be either positive or negative. Therefore, a loan that has been promptly repaid should attract a positive rating and report. An

---

[44] Mazer, R., and Fiorillo, A., "Digital Credit: Consumer Protection for M-Shwari and M-Pawa Users", 2015. Available at <https://www.cgap.org/blog/digital-credit-consumer-protection-m-shwari-and-m-pawa-users>, (accessed on 18 October 2020).

[45] Dupas, P., and Robinson, J., "Savings Constraints and Microenterprise Development: Evidence from a Field Experiment in Kenya", 5(1), *American Economic Journal: Applied Economics* 2013, pp. 163–192.

[46] Brindisi, A., "In Conversation with FAI: David McKenzie on Mental Accounting in Development Research", 2014. Available at <https://www.financialaccess.org/blog/2015/7/31/in-conversation-with-fai-david-mckenzie-on-mental-accounting-in-development-research>, (accessed on 18 October 2020).

unpaid loan or one that has been repaid past the deadline attracts a negative rating and report.

Deposit Taking Saccos (DTS) registered under the Sacco Societies Act[47] are also required to submit credit ratings of their customers. Non-bank digital lenders can voluntarily submit such reports to the CRBs but are not mandated by law to do that. Whereas the positive or negative credit scores by banks must appear in all the three CRBs in the country, credit scores by non-bank digital lenders may only appear in one of the three. Borrowers from multiple non-bank digital lenders must provide their scores from all the three CRBs to certify their credit scores. These discrepancies in credit reporting mean that borrowers looking for better lenders or bigger credit may not leverage their credit scores. In October 2020, the Central Bank of Kenya ejected 337 digital lenders from CRB listing for being "unregulated".[48] Some of the digital lenders that were ejected are Tala and Branch. This analysis provides the foundation for analysing the attempts at regulating the digital lending industry in Kenya.

4.4 Recent Attempts at Regulation

In 2018, the number of digital lenders in the country rose sharply, with banks in the country also joining the digital lending market. For example, by March 2018, Equity Bank had disbursed approximately \$0.57 billion through Equitel, the bank's digital lending product.[49]

---

[47] No 14 of 2008.

[48] Guguyu, O., "337 digital mobile lenders ejected from CRB listing", 2020. Available at <https://www.businessdailyafrica.com/bd/markets/market-news/337-digital-mobile-lenders-ejected-from-crb-listing-2463294>. (accessed on 18 October 2020).

[49] Mwaniki, C., "Equitel's transactions pass Sh. 500bn on higher values", 2019. Available at <https://www.businessdailyafrica.com/markets/marketnews/Equitel-

Further to this, Kenya Commercial Bank started providing 90% of its loans through the bank's digital lending product, KCB M-Pesa.[50] Further, by the end of 2018, M-Shwari had disbursed approximately $2.3 billion since 2012. It is noted that this was the first digital lending product in the country. Still in 2018, regulatory bodies in the country like the Central Bank of Kenya, Insurance Regulatory Authority, Capital Markets Authority, and the Sacco Societies Regulatory Authority started expressing concerns over the rising number of unregulated digital lenders in the country. Preliminary approaches to addressing these concerns included the drafting of the Data Protection and Privacy Bill, 2018 which was passed into law in 2019.

Based on the rising concerns that in the absence of effective regulation of the digital lending market the sector could undermine the gains made by the mobile payments sector, the National Treasury drafted and published the Financial Markets Conduct Bill of 2018. The purpose of the Bill was to "promote a fair, non-discriminatory marketplace for access to credit, to provide for the establishment of uniform practices and standards in relation to the conduct of providers of financial products and financial services"[51] and would apply to all players in the financial markets, including digital lenders. While announcing the publication of the Bill, the Principal Secretary of the National Treasury, Dr. Kamau Thugge, noted that "The draft Bill aims at creating effective financial consumer protection, making credit more accessible and at the

---

transactions-surpass-Sh500bn/3815534-5045182-15d7w0/index.html>. (Accessed on 18 October 2020).

[50] KCB, "Integrated Report and Financial Statements", 2018. Available at <https://kcbgroup.com/wp-content/uploads/2019/05/KCB-Group-Integrated-Report-and-Financial-Statements-2018.pdf>, (accessed on 18 October 2020.

[51] See Long Title of the Financial Markets Conduct Bill, 2018.

same time supports financial innovation and competition."[52] The Bill also introduced regulatory bodies such as the Financial Markets Conduct Authority, the Financial Sector Ombudsman, the Conduct Compensation Fund Board and the Financial Services Tribunal. In particular, the Financial Markets Conduct Authority would supervise the financial conduct of providers of financial services in the country, and such providers would be required to apply to the Authority to be licenced to operate in Kenya.[53] The Authority would also set maximum interest rates for all lenders. Clearly, this Bill would have been the perfect remedy to the regulatory gaps existing in the digital lending market now.

However, two years after the Bill was published, it has never been passed to law. Discussions on the Bill have since been halted, as a result of the opposition it received from several quarters. The Central Bank of Kenya through an address delivered by the Governor, Dr. Patrick Njoroge, expressed concerns that the Central bank of Kenya "was under attack from anonymous sources who want to tie its hands in enforcing regulations."[54] He felt that the law would make the Central Bank a "toothless dog". Thus, the law would undermine the Bank's role of supervising and regulating the financial sector in the country.[55] This paper will show later that the

---

[52] See Syekei, J., "Kenyan Regulatory Net Widens to Include Fintech Lenders", 2018. Available at <https://www.bowmanslaw.com/insights/intellectual-property/kenyan-regulatory-net-widens-to-include-fintech-lenders/>, (accessed on 18 October 2020).

[53] Part 2 of the Act.

[54] Alushula, P., "We are under attack, Central Bank boss claims over new Bill", 2018. Available at <https://www.standardmedia.co.ke/business/article/2001282264/we-are-under-attack-central-bank-boss-claims-over-new-bill>, (accessed on 18 October 2020.

[55] See Article 231(2) of the Constitution which provides that the CBK is responsible for formulating monetary policy, promoting price stability and issuing currency and Article 231(3) of the Constitution which provides that the CBK shall not be under

sentiments by the Central Bank of Kenya's Governor were misguided because the approach by the National Treasury at regulating the conduct of players in the financial sector has successfully been applied in other jurisdictions, the best example being Australia.

In 2019, 11 digital lenders formed and incorporated the Digital Lenders Association of Kenya (DLAK) to set ethical and professional standards in the industry. The 11 founding members were Tala, Alternative Circle, Stawika Capital, Zenka Finance, MyCredit, Okolea, Lpesa, Four Kings Investment, Kuwazo Capital and Finance Plan. The same year, DLAK prepared a Code of Conduct to set acceptable standards of conduct by all Digital Lending Institutions (DLI), with a view to ensuring a high standard of service and the highest possible level of satisfaction for Consumers who have received or plan to receive digital loans under consumer credit.[56] In the same year 2019, the Central bank of Kenya released the Kenya Banking Sector Charter 2019 which for the first time made it mandatory for digital products to be informed about terms and conditions through the USSD messaging service.[57] The charter was issued pursuant to Section 33(4) of the Banking Act and Section 48(2A) of the Microfinance Act, which empowers the Central Bank of Kenya to issue directions with respect to the standards to be adhered to by an institution in the conduct of its

---

the direction or control of any person or authority in the exercise of its powers or in the performance of its functions.

[56] See DLAK, "Code of Conduct for Responsible Lending for the Digital Lending Institutions", 2019. Available at <https://www.dlak.co.ke/uploads/1/9/8/3/19835783/dlak_code_of_conduct.pdf>, (accessed on 18 October 2020.

[57] The Kenya Banking Sector Charter, 2019, available at <https://www.centralbank.go.ke/wp-content/uploads/2020/03/Kenya-Banking-Sector-Charter-2019.pdf>, (accessed on 18 October 2020).

business in Kenya.[58] For digital products, the Charter states that the provision of the abridged version of the terms and conditions to consumers using Unstructured Supplementary Service Data (USSD) format is critical before acceptance of the product. This targets the enhancement of fairness and transparency in digital lending.

Furthermore in 2019, the Central Bank of Kenya received a parliamentary resolution requesting the regulator to develop regulatory guidelines for digital lenders and in the same year, nominated Member of Parliament sponsored The Central Bank of Kenya (Amendment) Bill, 2020 in the National Assembly. The Bill was later passed into law in 2020. The Act amends the Central Bank of Kenya Act of 2014 as section 4A to empower the Central Bank of Kenya to regulate and supervise the conduct of providers of digital financial products and services.[59] It also empowers the Bank to regulate and supervise the conduct of digital credit providers and digital credit service providers.

The Central Bank of Kenya is therefore now empowered to regulate digital lenders in the country through this law. However, several questions remain unanswered. For example, will the Bank also license new digital lenders intending to join the industry? Will the Bank collaborate with App Stores to ensure that lenders that are not licensed are not accommodated in the App Stores? Will the Bank carry out a post-mortem of the existing digital lenders that are currently operating in the country to ensure that they are licensed and operate within the confines of the law? How is this sector

[58] See the preamble to the Charter.
[59] Section 2 of the Central Bank of Kenya (Amendment) Bill, 2020.

regulated in other countries? This paper will explore how financial regulation is done in Australia.

6. THE TWIN PEAKS MODEL OF FINANCIAL REGULATION: LESSONS FROM AUSTRALIA

Since 1998, most countries that are members of the Organisation for Economic Co-operation and Development have changed their architecture of financial regulation.[60] Reasons behind the change include the repercussions of the global financial crisis, the increasing challenge of regulating large financial conglomerates, and the growing complexity of financial products brought about by modern technology. The Twin Peaks model[61] of financial regulation was pioneered in Australia and separates financial regulation into two functions: prudential regulation and market conduct regulation (aimed at protecting the consumer).[62] Separate regulators oversee each of these functions.

The Twin Peaks model of financial regulation is anchored on two approaches: the first one is the institutional approach which is concerned with the form of the financial institution, that is, e.g. a bank, insurer or a securities firm. One regulator oversees the supervision of the institutions and their activities. Since the regulator regulates all the activities that institutions in this industry, it may be difficult to coordinate all the activities carried out by the

---

[60] Hengel, M.V., Hilbers, P., and Schoenmaker, D., "Experiences with the Dutch Twin-peaks model: Lessons for Europe" in Haan Kellermann and Vries (eds), *Financial Supervision in the 21st Century* Springer Berlin Heidelberg, 2013, p. 188.
[61] Originally proposed by Taylor in Taylor, M.W., *"Twin Peaks": A regulatory structure for the new century*, (no. 20), Centre for the Study of Financial Innovation, 1995.
[62] For more about the "Twin Peaks" model, see Schmulow, A.D., "The Four Methods of Financial System Regulation: An International Comparative Survey", 26(3) *Journal of Banking and Finance Law and Practice*, 2015. 26(3) 151-72.

institutions because of the complexity of those activities. An example would be a bank operating in the finance industry. The Central Bank would therefore regulate all the financial activities of the bank, including deposits, interests, incorporation, insurance, etc. There is also the sectoral or operational approach which focuses on regulating institutions according to the business they carry out.[63] This way, a bank can be regulated by the Central Bank, the Insurance Regulatory Authority (on insurance matters), the Registrar of Companies (because banks are also companies), etc. This creates a huge regulatory overlap between the relevant regulators.

The second approach is the "unified" or "super-regulator" approach creates a single regulator to oversee both the prudential soundness of financial institutions and their conduct.[64] The United Kingdom championed this approach when it was moving towards the Twin Peaks model of financial regulation. One major problem with this approach is that regulating both the prudential and conduct aspects of financial institutions may require different approaches to regulating different businesses and one regulator may find it difficult to differentiating between these different types of institutions.[65] In Kenya, for example, the Central Bank of Kenya may find it difficult to regulate both the institutional and behavioural aspects of financial institutions in the country as there are many of them. The

---

[63] See Group of Thirty, "The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace", 2008. Available at <https://group30.org/images/uploads/publications/G30_StructureFinancialSupervision2008.pdf> (accessed on 24 May 2020).

[64] Godwin, A., "The twin peaks model of financial regulation and reform in South Africa", 11(4) *Law and Financial Markets Review*, 2017 pp. 151-53.

[65] Llewellyn, D., "Institutional Structure of Financial Regulation and Supervision: The Basic Rules", Paper presented at a World Bank seminar Aligning Supervisory Structures with Country Needs, Washington DC, 6 and 7 June 2006.

recent entrants, digital lenders, for example may be challenging to regulate as they operate with apps that are uploaded on App Stores and downloaded from there by customers. They may, therefore, operate even without regulation and close business when they are done. This has happened with Kenyan digital lenders severally.

The Twin Peaks model has several advantages. First, each of the two peak regulators has a clear mandate that does not overlap with the other. There is therefore efficiency of service. Secondly, there is less danger that one aspect of financial regulation, such as institutional regulation, will take centre stage at the expense of the other, that is, financial conduct.[66] In Kenya for example, institutional regulation takes centre stage at the expense of market conduct regulation. Thirdly, this model is more suitable to regulating the growing complexity of financial markets. It is also better suited to dealing with the conflict that may arise with a super regulator. When the UK joint Committee was introducing the draft Financial Services Bill (JCFSB) in 2010, it noted as follows:

> [T]he evidence of the recent financial crisis suggests that mixing functions can contribute to a lack of focus on rising macro-prudential risk and difficulties in moving to a "war footing" when that risk becomes substantial. In addition, the incentives are different. For example, consumer protection can be well served by keeping a bank open, while stability is well served by closing it.[67]

---

[66] Financial Stability Board, "Peer Review of the United Kingdom", 2013, Report. Available at <https://www.fsb.org/wp-content/uploads/r_130910.pdf>, (accessed on 24 May 2021). Pp. 7–8.

[67] House of Commons, Treasury Committee, "Financial Regulation: A preliminary consideration of the Government's proposals", 1 *Seventh Report of Session* 2010–11, p. 83.

The Twin Peaks model has disadvantages too. For example, it may create regulatory overlaps between the two regulators. In 2013, it was noted in the UK that "approximately 2,000 firms [would] be subject to dual regulation."[68] This could then lead to poor information sharing and pose a considerable burden on the regulated entities and by extension the government.[69] The other disadvantage is that coordinating both peaks of regulation may pose a serious challenge which may impede the entire regulatory process. The coordination may not be seamless after all. Most jurisdictions making use of this model have not been without challenges.[70]

The regulators in Australia are the Australian Prudential Regulation Authority (APRA) which enforces prudential regulation, the Australian Securities and Investments Commission (ASIC) which oversees market conduct and consumer protection, and the Reserve Bank of Australia (RBA) which is the lender of last resort and has the overall responsibility for financial system stability. This system was introduced in Australia in 1998 following recommendations by the Wallis Inquiry.[71] This introduction in

---

[68] Financial Stability Board, *above, note* 66.

[69] JCFSB, Report, together with formal minutes and appendices, HL Paper 236, HC 1447, p. 285.

[70] See New Zealand Treasury, "Financial Sector Regulatory Agencies – Regulatory Impact Statement", 2010, available at <http://www.treasury.govt.nz/publications/informationreleases/ris/pdfs/ris-med-fsra-sep10.pdf/view>, (accessed on 19 October 2020).

[71] The Report recommended the establishment of a Corporations and Financial Services Commission (CFSC), later ASIC, and the creation of the Australian Prudential Regulation Commission (APRC), later APRA. However, the original work was not from Australia. See Taylor, M.W., 1995, and subsequently: Taylor, M.W., "Peak Practice: How to reform the UK's regulatory system", 23 *Centre for the Study of Financial Innovation*, 1996; Taylor, M.W., "Twin Peaks' Revisited: A second chance for regulatory reform", 89 *Centre for the Study of Financial Innovation*, 2009; Taylor, M.W., "The Road from "Twin Peaks" - and the Way

Australia, the model has been adopted in such other countries as the United Kingdom, New Zealand, Netherlands, South Africa, and France and Germany which are implementing elements of the system.

The cornerstone of this model is the separation of the consumer protection function from the system stability function.[72] APRA is responsible for developing prudential regulation and guidelines to financial institutions in the country. It does so through the policy frameworks and blueprints developed by the Reserve Bank. ASIC monitors the conduct of financial institutions in the country to ensure that they operate within the law and that their operations do not infringe on consumer rights. The Reserve Bank cannot practically oversee all these activities in the finance industry.

The closest Kenya has come to this Twin Peaks model of financial regulation is in 2018 when the Treasury drafted the Financial Markets Conduct Bill of 2018. The Bill was to apply to all players in the finance industry and introduced regulatory bodies such as the Financial Markets Conduct Authority, the Financial Sector Ombudsman, the Conduct Compensation Fund Board and the Financial Services Tribunal. In particular, the Financial Markets Conduct Authority was to supervise the financial conduct of providers of financial services in the country, and such providers will be required to apply to the Authority to be licenced to operate in

---

Back", 16(1) *Connecticut Insurance Law Journal*, 2009-2010; and Taylor, M.W., "Welcome to Twin Peaks", *Central Banking Journal.*

[72] Wallis, S., and Beerworth, B., "Overview, Introduction", p. 29ff; Taylor, M.W., *above, note* 71, p. 1; Taylor, M.W., "Regulatory reform after the financial crisis - Twin Peaks Revisited", Oxford, UK, in *Law and Finance Senior Practitioner Lectures*, 2011.

Kenya.[73] The Bill has never been introduced in parliament ever since, hence the Twin Model is not yet operative in Kenya.

7. CONCLUSION

Through the Central Bank of Kenya (Amendment) Act, 2020, the Central Bank of Kenya has been empowered to regulate the digital lending industry. The Act amends section 4A of the Central Bank of Kenya Act, Cap 80, by inserting new paragraphs to empower the Bank to regulate digital financial products in the country. However, the nature of this industry means that the Bank is not adequately empowered to regulate it. It is conceded that the Bank can indeed regulate digital financial products that are sold by mainstream banks in the country, for example, Equity Bank's Eazzy Loan app, Kenya Commercial Bank's KCB M-Pesa, and Commercial Bank of Africa's M-Shwari. However, it is a huge challenge for the Bank to regulate unlicensed digital financial products that are currently operating in the country. These lenders upload their apps on App Stores and pull them down at will. They are still able to conduct their business in the country even without being licensed by the Bank.

Whereas the Bank can regulate the finance aspect of the business, several aspects remain unregulated, for example, licensing, app permissions, data protection, privacy, dignity, consumer protection, and pricing of loans. One way of enhancing the regulation of this industry, especially for the unlicensed digital lending business, is by enacting the Financial Markets Conduct Bill of 2018 to law. Passing this law would introduce the Twin Peaks model of financial regulation that is being applied in other countries like Australia, United Kingdom and South Africa. The role of the Central Bank of Kenya in regulating the finance aspect of financial institutions will

[73] Part 2 of the Act.

remain intact, while an additional regulator that will take care of market conduct and consumer protection will be introduced. Until then, digital lenders in the country are likely to remain the shylocks that this paper has alluded to.