THE FIGHT AGAINST MONEY LAUNDERING VS LEGAL PROFESSIONAL PRIVILEGE IN KENYA'S ANTI-MONEY LAUNDERING REGIME: THE NEED TO DESIGNATE LEGAL PRACTITIONERS AS REPORTING ENTITIES

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DEDICATION

To God for the strength to do this dissertation. To my parents for their constant inspiration, support and sacrifice throughout this period.

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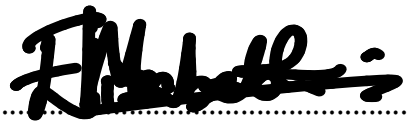
DECLARATION

I, WINNIE MATINDI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....W.N.M.....

Date: .....25/01/2020.....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: .....  .....

Elizabeth Mkamboi Lenjo

LIST OF ABBREVIATION

AML: Anti-Money Laundering

DNFBP's: Designated Non-Financial Businesses and Professions

FATF: Financial Action Task Force

FRC: Financial Reporting Centre

LSK: Law Society of Kenya

POCA: Proceeds of Crime Act

POCAMLA: Proceeds of Crime and Anti-Money Laundering Act

SRA: Solicitors Regulatory Authority

SOPPEC: Standard of Professional Practice and Ethical Conduct

STR: Suspicious Transaction Reports

LIST OF STATUTES AND SUBSIDIARY LEGISLATION

KENYA

Constitution of Kenya (2010)

Evidence Act (Cap 80) 2014

Law Society Code of Standard of Professional Practice and Ethical Conduct (2016)

Law Society of Kenya guidelines on the application of the proceeds of crime and anti-money laundering (2019)

Proceeds of Crime and Anti-Money Laundering Act (2013)

The Law Society of Kenya Digest of Professional Conduct and Etiquette (2000)

The Law Society of Kenya Digest of Professional Conduct and Etiquette (2000)

UNITED KINGDOM

Proceeds of Crime Act (2002)

Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations (2017)

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CHAPTER ONE: INTRODUCTION

1.1.Background of the study

The term "money laundering" has widely been defined as the process by which the illegitimate source of large amounts of money is disguised in order to legitimize the proceeds of crime.[1] This means that large amounts of money generated from criminal activities are made to appear to have come from a legitimate source.

The fight against money laundering dates back to the year 1990 when the Financial Action Task Force (FATF) an international intergovernmental body whose mandate is to develop and promote policies to protect the global financial system against money laundering, imposed upon financial institutions the role of policing money laundering.[2] However, over the years, criminals have engaged non-financial institutions such as legal practitioners as professional intermediaries for converting funds derived from money laundering operations due to the air of legitimacy provided by their services.[3] Consequently, in the year 2013, the Financial Action Task Force (FATF), published a typologies report highlighting the potential vulnerability of legal professionals to money laundering operations and in effect categorized them as Designated Non-Financial Businesses and Professions (DNFBP's) in its recommendations thus imposing upon such professionals the gatekeeper role to police the crime of money laundering.[4] The implication of this classification was that these professionals will have anti-money laundering obligations.[5] Similarly, member states of the Financial Action Task Force (FATF) were mandated to incorporate legal professionals as Designated Non-Financial Businesses and Professions (DNFBP's) in their domestic anti-money laundering legislations and enforce the implied obligations.

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[1] Vaithilingam S, 'Factors affecting money laundering: lessons for developing countries' 10 (3) Journal of Money Laundering Control, 2007, 354.

[2] Kamaruddin S and Hamin Z, 'Lawyers' predicament in complying with the anti-money laundering law in Malaysia' 26 (2), Journal of Money Laundering Control, 2019, 583.

[3] Abendano K.R, 'Role of Lawyers in the Fight against Money Laundering: Is a Reporting Requirement Appropriate, The Legislative Reform' 27 (2) Journal of Legislation, 2001, 463.

[4] Choo K.K.R, 'New payment methods: a review of 2010–2012 FATF mutual evaluation reports', 36 (1) Computers & Security, 2013, 12.

[5] Financial Action Task Force (FATF), *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals*, June 2013, 23.

Kenya, is an associate member of the Financial Action Task Force (FATF) by virtue of being a member state of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) whose main purpose is to combat money laundering operations in the region by implementing the Financial Task Force (FATF) recommendations taking into account the regional factors of different member states. However, the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) which largely contains Kenya's anti-money laundering regime fails to take cognizance of these recommendations. The act is particularly keen under sections 3, 4 and 7 to criminalise money laundering and in light of this criminalization it provides a comprehensive framework for reporting requirements as well as criminal and civil forfeiture of illegal proceeds. Consequently, the act under part III establishes the Financial Reporting Centre (FRC), a body corporate charged with the responsibility of receiving, analysing and interpreting reports of suspicious transactions.[6] In the context of the Financial Action Task Force (FATF) recommendations, section 2 of the act defines Designated Non-Financial Businesses Professions to mean casinos (including internet casinos); real estate agencies; businesses dealing in precious metals; businesses dealing in precious stones; accountants who are sole practitioners or are partners in their professional firms; non-governmental organizations; and such other business or profession in which the risk of money laundering exists as the cabinet secretary may on advice of the Financial Reporting Centre (FRC) declare.[7] Notably, since the act was assented to in the year 2009, the cabinet secretary has not gazetted any notice extending the reporting requirement to other professions. So the main question therefore is, why have legal professionals been excluded from the list of reporting entities as defined under section 2 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA).

This exclusion is strongly pivoted on the fact that the Financial Action Task Force (FATF) recommendations have strongly been opposed by legal practitioners who are of the opinion that the imposition of anti-money laundering obligations is not only onerous but also contradicts the ethics of the legal profession in respect to legal professional privilege and advocate-client confidentiality.[8] The legal professional privilege and advocate-client confidentiality has for a long time been considered sacrosanct and this ethical professional guideline has proven to be an

[6] Section 24, *Proceeds of Crime and Anti-Money Laundering Act* (Act No. 9 of 2009).
[7] Section 2, *Proceeds of Crime and Anti-Money Laundering Act* (Act No. 9 of 2009).
[8] Kamaruddin S, 'Lawyers' predicament in complying with the anti-money laundering law in Malaysia' 584.

obstacle to the implementation of an all-inclusive anti-money laundering regime. The rationale behind the protection of this privilege has for a long time been hinged on the fact that it fosters candid communication between clients and their advocates and consequently promotes broader public interests in the observance of law and also administration of justice. This particular position has been reiterated under article 50 of the constitution of Kenya which embodies the principle of natural justice and thus provides that every accused person has a right to a fair trial.[9] The underlying concept of a fair trial lies in affording the accused a number of rights including the right to a legal representative. This therefore means that by waiving the rule on legal professional privilege or advocate- client confidentiality, the client does not get to enjoy the right to a fair trial.[10] Attention is further drawn on the fact that any attempt directed towards weakening the legal professional privilege or the advocate-client confidentiality would be 'demoralizing' to the legal profession.[11]

However, as mentioned earlier, these professionals are susceptible to money laundering operations and a balance needs to be established between the fight against money laundering and the protection of the legal professional privilege and advocate-client confidentiality.

1.2.Statement of problem

The efforts to classify legal professionals as Designated Non-Financial Businesses or professions under Kenya's anti-money laundering regime dates back to the year 2007-2009 during the drafting and enactment of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA).[12] However, during the enactment of the aforementioned act, legal professionals were exempted from the list of reporting entities. According to the National Assembly Official Report (Hansard) dated 10 December 2009, conflict of interest and perceived contradictions with other existing statutes was indicated as the main reason for not including these professionals as reporting entities.[13]

[9] Article 50, *Constitution of Kenya* (2010).

[10] Njaramba E G, 'The conflict between anti-money laundering reporting obligations and the doctrine of confidentiality for legal practitioners in Kenya', Journal of Money Laundering Control, 2020, 3—https://www.emerald.com/insight/1368-5201.htm > on 23 August 2019.

[11] *Hickman v Taylor* (1947), The Supreme Court of the United States.

[12] Pambo O K, 'Designating lawyers as reporting entities under the Kenya's anti-laundering regime', Journal of Money Laundering Control, 2020, 4—https://www.emerald.com/insight/1368-5201.htm > on 23 August 2019.

[13] National Assembly Hansard Report, 10 December 2009, 24.

Notably, the proposed amendment was heavily condemned by legal practitioners citing assault to the legal professional privilege and a threat to the very existence of the legal profession.

In the year 2018, National Taskforce on Anti-Money Laundering and Combating the Financing of Terrorism (NTF) under Statute Law (Miscellaneous Amendments) Bill 2018, renewed the effort to amend the definition of Designated Non-Financial Businesses or Professions (DNFBP's) under section 2 and section 48 to include legal professionals. However, when the proposed bill was moved as a motion for debate in parliament, the proposed amendments to section 2 and 48 of Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) were deleted and it was indicated that there was need for wider stakeholder consultation.[14] Consequently, when the bill was ratified into law, legal professionals were once again expunged from the list of Designated Non-Financial Businesses or Professions.

In 2019, clause 50 and clause 51 of the Finance Bill 2019, proposed to amend section 2 and section 48 of POCAMLA to once again include legal professionals as reporting entities. Accordingly, parliamentarians rejected the proposed amendments on the grounds that designating legal professionals as reporting entities is not only unconstitutional to the extent that it contains obligations that limit the right to privacy guaranteed under article 31 of the Constitution of Kenya. But also, these amendments could potentially erode the settled doctrine of advocate-client confidentiality and legal professional privilege.[15]

Despite making spirited efforts in the year 2007, 2018 and lately 2019, it is quite obvious that Kenya has made little progress in its endeavor to categorise legal professionals as reporting entities. This deficiency in Kenya's legal framework was captured by the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) in the year 2011 during the first mutual evaluation for Kenya.[16] Subsequently, in the year 2019, during the 37th Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) task force of senior officials held in Arusha

[14] National Assembly Hansard Report, 15 November 2018, 16.
[15] National Assembly Hansard Report, 19 September 2019, 19.
[16] Eastern and Southern Africa anti money laundering group (ESAAMLG), 'Mutual Evaluation Report for the Republic of Kenya', 2011, 163.

Tanzania, it was observed that Kenya had made insufficient progress to address the deficiency captured in 2011, with respect to including legal professionals as reporting entities.[17]

This current legal position constitutes a major gap in Kenya's anti-money laundering regime. It is thus against this backdrop that this paper proposes an expansion of the definition of Designated Non-Financial Businesses or Professions (DNFBP's) as set out in section 2 of the Proceeds of Crime and Money Laundering Act (POCAMLA) to include advocates, notaries and other legal professionals who are sole practitioners, partners or employees within professional firms and company service providers. The effect of this inclusion would be the imposition of reporting duties upon the legal professionals.

1.3.Justification of the study

Kenya's susceptibility to money laundering operations has been heightened by factors which include the prevalent cases of corruption and the culture of impunity that has infiltrated the country's system. Cumulatively, these factors highly contribute towards an increase in the threat the country faces with respect to money laundering activities. Although the proceeds of crime that are culminated and hidden in a successful money laundering scheme may seem not to have a direct negative impact on identifiable victims, it is worth noting that its effects are disastrous to the country's overall economic development.[18] This impact is witnessed through the shift in demand for cash, escalated inflation and volatility of interests including exchange rates and diversion of investments to countries where the fight against money laundering is thriving.[19] Moreover, money laundering can potentially contribute to the breakdown of the rule of law and it further threatens a country's political stability and democracy.

Evidently, money laundering has proven to be a serious societal problem and given Kenya's vulnerability to these activities, it is thus necessary to have other viable money laundering preventive mechanisms and this includes enlisting legal professionals as reporting entities. However, as noted earlier, despite the spirited efforts, Kenya has made little progress to include legal professionals as reporting entities. This research paper is therefore dedicated to show the

[17] Pambo O K, 'Designating lawyers as reporting entities under the Kenya's anti-laundering regime', 7

[18] Keesoony S, 'International anti-money laundering laws: The problems with enforcement' 19 (2) Journal of Money Laundering Control, 2016, 131.

[19] Pambo O K, 'Designating lawyers as reporting entities under the Kenya's anti-laundering regime', Journal of Money Laundering Control, 2020, 4—https://www.emerald.com/insight/1368-5201.htm > on 23 August 2019.

importance of including legal practitioners as Designated Non-Financial Businesses and Professions (DNFBP's) by highlighting their vulnerability to money laundering operations, acknowledging the conflict that exists between legal professional privilege and the fight against money laundering, proposing ways in which this conflict can be reconciled and lastly indicate how the proposed inclusion of legal practitioners as reporting entities would have on the legal profession.

1.4.Statement of Objectives

The general objective of this research study is to propose the amendment of section 2 and section 48 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) to include legal professionals in the definition of Designated Non-Financial Businesses and Professions (DNFBP's) and determine whether this inclusion shall aid in the enhancement of preventive measures against money laundering. From this primary objective, specific objectives have been derived as follows:

i. To assess Kenya's regulatory framework governing legal professional privilege and advocate-client confidentiality and determine the extent to which these laws curtail the inclusion of legal practitioners' as reporting entities.
ii. To assess the factors that contribute to the susceptibility of legal professionals to money laundering operations.
iii. To assess the conflict that exists between the fight against money laundering and legal professional privilege and further assess how this conflict can be reconciled.
iv. To assess the direct consequences of including legal professionals as Designated Non-Financial Businesses and Professionals (DNFBP's).
v. To analyse the approach taken by other jurisdictions to reconcile the conflict between the fight against money laundering and the legal professional privilege and advocate-client privilege.

1.5.Research Questions

i. To what extent has Kenya adhered to the money laundering regulations set forth by FATF?
ii. How does the current legal framework governing legal professional privilege and advocate-client confidentiality curtail the efforts of including these professionals as DNFBP's?

iii. What are the factors that contribute towards the vulnerability of legal professionals to money laundering operations in Kenya?

iv. How are legal professionals used as enablers of money laundering activities?

v. Can a balance be created between the fight against money laundering and the legal professional privilege and advocate-client confidentiality?

vi. What are the implications of including legal professionals as reporting entities?

1.6.Literature Review

1.6.1. Theoretical framework

1.6.1.1.Natural law and positive law theory

Natural law theory whose main proponent was St Thomas Aquinas asserts that there are universal moral standards that are inherent in humankind and this forms the basis of a just society.[20] This theory posits that human beings are not taught natural law, but rather discover this law by consistently making choices for good instead of evil and this ultimately moulds an individual's moral virtue.[21] St Thomas Aquinas defines moral virtue as moral acts which if repeated beget in the actor certain habits of action and these are virtues or vices which are at the basis of human character.

Positive law theory on the other hand, was advanced by John Austin and its main goal was to transform law into a true science. More precisely, positive law is defined as a law that has been laid down by a will that has been so empowered to will.[22] This means that these laws are general commands issued by a sovereign to members of an independent political society, and backed up by credible threats of punishment or other adverse consequences in the event of non-compliance.[23]

In the context of this paper, section 2 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) criminalises money laundering making it a "wrong" in light of positive law. Section 48 of the same act has placed upon reporting obligations on a number of entities. However, section 48 of the same act fails to classify legal practitioners as reporting entities, thus no legal burden has

[20] Branden N, 'Free will, moral responsibility and the law' 42 (2) Southern California Law Review, 1969, 265.

[21] Finnis, J, *Natural Law Theories*, Oxford University Press, 1980, 13.

[22] Nonet P, 'What is positive law'? 100 (3) The Yale Law Journal, 1990, 267.

[23] George, Robert P, 'Recent criticism of natural law theory' 55 (4) University of Chicago Law Review, 1988, 1317.

been placed on advocates to report suspicious transactions amounting to money laundering.[24] This means that reliance is now placed on their moral virtue which is heavily dependent on their moral courage. When looking into moral courage it is important to note that it is associated with two core attributes.[25] First, it involves "the willingness to take a stand in defence of a conviction or principle, even when others do not".[26] Second, moral courage subjects the actor to a number of potential risks for taking the stand and this includes possible inconvenience, unpopularity, disapproval or in the case of legal practitioners loss of a client. Based on the aforementioned inhibitors of moral courage, a legal practitioner is more likely to turn a blind eye to the suspicious circumstances surrounding a client's transactions so as to protect his profession. Interestingly, failure on the advocate's part to report suspicious transactions to FRC would result in no legal consequences but a slight bruise to their moral virtue.

1.6.1.2.Utilitarianism theory

As a normative ethical theory advanced by Jeremy Bentham, utilitarianism suggests that individuals can decide what is morally right or otherwise by weighing up the consequences of their actions. As such, an individual's choice goes beyond the scope of their own interest and takes into account the interests of other people. In light of the above theory, Jeremy Bentham attacked the legal professional privilege by stating that it reduces the deterrent effect of the law by giving criminals an assurance that the unfavorable information they disclose to their lawyers would not be used against them in a court of law.[27] If we are to support Jeremy Bentham's argument, catering for legal professional privilege or advocate client confidentiality would be "wrong" as the legal professional knows the truth about his/her clients criminal behaviour but chooses to remain silent, thereby allowing the negative effects of their client's money laundering operations to impact the society.

1.6.1.3.Theory of 'crying wolf'

The theory of 'crying wolf' has been relied upon by persons opposing the inclusion of legal professionals as reporting entities. This theory proposes that excessive reporting, otherwise termed

[24] Njaramba E G, 'The conflict between anti-money laundering reporting obligations and the doctrine of confidentiality for legal practitioners in Kenya', 6.
[25] Eldred, Tigran W, 'Moral courage in indigent defense' 51 (1) New England Law Review, 2016, 98.
[26] Eldred, Tigran W, 'Moral courage in indigent defense', 99.
[27] Allen J, Grady M, Polsby D and Yashko M, 'A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine' 19 (2) The Journal of Legal Studies, 1990, 370.

as "crying wolf" can potentially dilute the information value of reports.[28] This position is supported by making reference to the fact that financial institutions such as banks already have an obligation to report suspicious transactions to the relevant government agencies, failure to which they are fined. This means that if this obligation is extended to legal professionals, the fear of being fined will result in such professionals reporting transactions that are less suspicious, thereby diluting the information value of reports.[29]

1.6.2. Empirical framework

Laurel S. Terry and Jose Carlos Robles in a journal titled '*The Relevance of FATF's Recommendations and Fourth Round of Mutual Evaluations to the Legal Profession*' posit that money laundering is notably a serious societal problem.[30] They support this argument by making reference to the list of countries that are members of the Financial Action Task Force (FATF) or its affiliate organizations. The authors make an assumption that by being members, these countries have agreed to abide by the Financial Action Task Force (FATF's) recommendations and their membership also demonstrates a global consensus that money laundering is a significant societal problem. The journal further recognises the vulnerability of legal professionals to money laundering by first highlighting the three stages of a money laundering operation which includes the placement stage, layering stage and integration stage. The authors argue that criminals who intend to launder their illicit proceeds would typically require the assistance of professionals to comprehend the complexities associated with the aforementioned stages.[31]

Ping He in a journal titled *'A Typological Study on Money Laundering'* sort to highlight the various money laundering techniques adopted by launderers and proposed countermeasures that can be implemented to fight against money laundering effectively and efficiently.[32] Particular attention is drawn on the technique where legal professionals are used to facilitate money laundering

[28] Gichuki N, 'The Conflict between anti-money laundering reporting obligations and the doctrine of confidentiality for legal practitioners in Kenya' Journal of Money Laundering Control, 2020, 5 - https://www.emerald.com/insight/1368-5201.htm on 20 October 2020.
[29] Gichuki N, 'The Conflict between anti-money laundering reporting obligations and the doctrine of confidentiality for legal practitioners in Kenya', 6.
[30] Terry, L. and Robles, J. "The relevance of FATF's recommendations and fourth round of mutual evaluations to the legal profession" 42 (2) Fordham International Law Journal, 2018, 627.
[31] Terry, L. and Robles, J. "The relevance of FATF's recommendations and fourth round of mutual evaluations to the legal profession", 635.
[32] He P, 'A Typological Study on Money Laundering' 13 (1) Journal of Money Laundering Control, 2010, 15.

operations. The author makes an attempt to outline the reasons why legal professionals have over the years become susceptible to money laundering operations which includes the following: firstly, he posits that money laundering is a complex and professional industry that can go beyond the comprehension and ability of an ordinary criminal. These complexities have resulted in such criminals turning to the expertise of legal practitioners or other professionals for assistance.[33] Secondly, legal professionals provide a plethora of services which are closely related to economic activities such as the buying and selling of property or creation of corporate vehicles among other activities which are of great value to money laundering operations.[34] Lastly, legal professional privilege accords money launderers a safety blanket to carry out their operations without the worry of their criminal operations being revealed to the relevant authorities.[35]

Prosper S. Maguchu in his journal titled '*Money Laundering, Lawyers and President's Intervention in Zimbabwe'* sets out to analyse the effects of including legal professionals as designated non-financial businesses and professions (DNFBPs).[36] He notes that the implication of this inclusion is as follows: legal professionals are required to report suspicious transactions by their client, apply Customer Due Diligence (CDD) otherwise referred to as know the customer procedures, monitor clients and lastly provide education, training and awareness to their legal team.[37] The author opines that while the effects of including legal professionals as designated non-financial businesses and professionals (DNFBPs) are laudable, certain measures must be put in place to ensure that the legal professional privilege owed to clients is not violated in the process. These measures include: firstly, the government and the law society of Zimbabwe need to conduct a baseline survey to determine the actual risk of legal professionals as gatekeepers. Secondly, the law society of Zimbabwe needs to establish the anti-money laundering task force and the ad hoc anti-money laundering committee to ensure the compliance of anti-money laundering regulations within the legal profession. Lastly, the author notes that there is no clear guidance concerning how a legal professional is to proceed after filing a suspicious transaction report. He therefore argues in this journal that in order to protect the public, the law should clearly state that upon filing a

[33] He P, 'A Typological Study on Money Laundering', 28.
[34] He P, 'A Typological Study on Money Laundering', 28.
[35] He P, 'A Typological Study on Money Laundering', 28.
[36] Maguchu P, 'Money Laundering, Lawyers and President's Intervention in Zimbabwe' 20 (2) Journal of Money Laundering Control, 2017, 138.
[37] Maguchu P, 'Money Laundering, Lawyers and President's Intervention in Zimbabwe' 138.

suspicious transaction report to the relevant authority, the legal professional in question should discontinue their relationship with the reported client.[38]

R. E. Bell in a journal titled *'The Prosecution of Lawyers for money laundering offences'* sort to highlight cases where legal professionals have successfully been convicted of money laundering offences.[39] Notably, the author posits that there are more convictions of money laundering in the United States than in the United Kingdom owing to the following reasons. First, the author notes that law enforcement agents in the United States gather evidence against legal professionals involved in money laundering operations through sting operations. Second, the use of accomplice evidence by law enforcement in the United States is much more common. This practice together with plea bargaining results in an accomplice trading information in respect of a dishonest legal practitioner to his own advantage.[40] Third, the author notes that there is a different prosecutorial discretion in the United States which thus results in frequent charges of money laundering against legal professions.

1.7.Hypothesis

This research paper will be premised on the following hypothesis:

i. Kenya's regulatory framework on legal professional privilege and advocate-client confidentiality has for a long time been used as a shield to expunge legal professionals as reporting entities.
ii. Legal professionals are susceptible to money laundering operations.
iii. The inclusion of legal professionals as DNFBP's will enhance the preventive measures against money laundering by increasing the monitoring and reporting avenues of money laundering operations.
iv. Kenya can draw incomparable practice from other jurisdictions that have included legal professionals as reporting entities.

[38] Maguchu P, 'Money Laundering, Lawyers and President's Intervention in Zimbabwe' 148.
[39] Bell R.E 'The Prosecution of Lawyers for Money Laundering offences' 6 (1) Journal of Money Laundering Control, 2002, 17.
[40] Bell R.E 'The Prosecution of Lawyers for Money Laundering offences' 18.

1.8.Research Methodology

The main research method adopted is the doctrinal legal research method. This means that the research will be developed through detailed analysis of secondary sources on money laundering which would include the use of statutes, legislations, government policy papers, law textbooks, local and international journals, articles, research papers, case law, newspaper and magazines and also relevant internet sources.

1.9.Limitations and delimitations

Due to the ongoing pandemic, this research paper has been limited to qualitative research and thus heavy reliance has been placed on existing literature. Further, this research paper makes reference to reported cases in the United States and not Kenyan case law because there are successful convictions of legal practitioners for money laundering in the United States whereas no legal professional has been convicted in Kenya for money laundering. However, this should not be mistaken to mean that Kenyan advocates have been immune to such illegal operations.

1.10. Chapter Breakdown

This research paper shall be divided into five chapters. Chapter one of the paper shall serve to introduce the problem statement and the overall objective of the paper which is anchored on the amendment of section 2 and 48 of POCAMLA to include legal professionals in the definition of DNFBP's.

Chapter two shall be centered on the review of Kenya's regulatory framework governing the principle of professional privilege and advocate-client confidentiality. This chapter takes cognizance of the fact that legal professional privilege and advocate-client confidentiality. The primary objective of this chapter is to analyse this framework and thus make an inquiry into the appropriateness or otherwise of these laws in safeguarding the legal professional privilege and advocate-client confidentiality within the sphere of Kenya's anti-money laundering regime.

Chapter three of the paper shall assess topics relating to the research questions. This part of the paper particularly triggers the discussion on the need to designate legal professionals as reporting entities by highlighting factors that contribute to the vulnerability of legal professionals to money laundering operations in Kenya. The chapter further acknowledges the conflict that exists between the fight against money laundering and the heavily guarded legal professional privilege and advocate-client confidentiality and proposes ways in which this conflict can be reconciled. The

chapter further assesses the implication of including legal professionals as reporting entities and further attempts to evaluate the possible challenges these professionals are likely to encounter once they are included as Designated Non-Financial Businesses or Professions (DNFBP's) under section 2 of the Proceeds of Crime and Anti-money Laundering Act.

Chapter four of the paper shall critically analyse the approach taken by other jurisdictions to harmonise the existing conflict between the fight against money laundering and the protection of the legal professional privilege and advocate-client confidentiality. Notably, the chapter shall only draw reference from countries that have listed legal professionals as reporting entities.

Lastly, chapter five of the paper shall present in a concise manner the main findings of the research and the implication these findings have on the research questions and consequently provide recommendations.

CHAPTER TWO: COMPREHENSIVE LEGAL FRAMEWORK ON THE LEGAL PROFESSIONAL PRIVILEGE WITHIN THE ANTI-MONEY LAUNDERING REALM

In general, the legal framework governing legal professional privilege and advocate client confidentiality in Kenya include; the Constitution of Kenya, Evidence Act, the Law Society of Kenya Digest of Professional Conduct and Etiquette, Law Society Code of Standard of Professional Practice and Ethical Conduct and the Law Society of Kenya guidelines on the application of the proceeds of crime and anti-money laundering.

This chapter will therefore endeavor to analyse these regulations in light of the Proceeds of Crime and Anti-money Laundering Act and thus make an inquiry into the appropriateness or otherwise of these laws within Kenya's anti-money laundering regime.

2.1.Advocates Act and the Law Society of Kenya Act

The Advocates Act and the Law society of Kenya Act are the two main statutes that govern the legal profession in Kenya. However, both regulations fail to mention any provisions on legal professional privilege and advocate-client confidentiality.

The Advocates act particularly highlights on matters relating to the qualification of an advocate to practice law in Kenya, the requirements for admission, requirements that warrant the conferment of the rank and dignity of senior counsel, the application, issuance and validity of practicing certificates, provisions with respect to unqualified persons acting as advocates and offences by advocates, provisions relating to remuneration of advocates, lastly the act makes provisions for the establishment of the complaints commission and the disciplinary tribunal.

Whereas, the Law Society of Kenya Act is explicitly concerned with the establishment of the law society of Kenya which the act indicates is a body corporate whose mandate is to advise and assist members of the legal profession, the government as well as the general public in all matters relating to the administration of justice in Kenya.[41] The act further highlights on matters relating to membership of the society, establishment and constitution of the council, provisions relating to other officers of the society, general meetings of the council and lastly provisions relating to the minutes, accounts and reports of the council.

2.2.Constitution of Kenya

The doctrine of advocate-client confidentiality and legal professional privilege is founded on article 31 of the Constitution of Kenya which provides that every person has the right to privacy and this includes the right not to have their private affairs unnecessarily required or revealed and the right not to have the privacy of their communication infringed.[42] The basis of this protection is anchored on the provision of article 19 (2) of the constitution which provides that recognition and

[41] Section 3, The Law Society of Kenya Act (cap 18) 2012.
[42] Article 31, Constitution of Kenya (2010).

protection of human rights and fundamental freedoms is aimed at preserving the dignity of individuals and communities with the ultimate goal of promoting social justice and the realisation of human maximum potential.[43] It is imperative to note that the doctrine of confidentiality and legal professional privilege has been likened to the right to privacy owing to the fiduciary nature of the relationship that exists between a client and a legal professional.[44] This essentially means that the client entrusts the legal practitioner with information that pertains to his private affairs with the assurance that the same shall be kept confidential.

However, the right to privacy which is the foundation of the advocate-client confidentiality and legal professional privilege is not absolute and can therefore be limited under expressed conditions under the law. This legal position is derived from a clear reading of article 25 of the constitution which highlights absolute rights and freedoms and the right to privacy has been expunged from the list. Accordingly, article 24 (1) of the constitution underlines the factors that should inform the limitation of the right to privacy and these includes: the nature of the right; the importance of the purpose of the limitation and most importantly the need to ensure that the enjoyment of the right in question does not prejudice the rights of others.[45] Article 24 (2) further makes provision for the factors that must be considered when limiting a right such as privacy by stating that any provision enacted or amended after the promulgation of the constitution must expressly stipulate the intention to limit a fundamental right and the extent of the limitation for the provision or proposed amendment to be valid.[46]

Seemingly, making reference to the aforementioned article, the right to privacy can be limited as long as the limitation is in compliance with the factors enlisted under article 24 (1) and (2). This therefore means that the proposed amendment to section 2 and 48 of Proceeds of crime and anti-money laundering act (POCAMLA) as indicated under clause 50 and 51 of the Finance Bill 2019 ought to have been accompanied by additional provisions. Consequently, these provisions would have stated the intention of the amendments to limit the right to privacy as guaranteed under article 31 of the constitution and the extent of this limitation in relation to the new category of

[43] Article 19 (2), *Constitution of Kenya* (2010).
[44] Salter DR and Ojwang JB, 'The advocate-client relationship: A Kenyan study in comparative context' 33 (4) The International and Comparative Law Quarterly, 1984, 914.
[45] Article 24 (1), *Constitution of Kenya* (2010).
[46] Article 24 (2), *Constitution of Kenya* (2010).

professionals it proposed to enlist as reporting entities under Proceeds of crime and anti-money laundering act (POCAMLA).

Failure of the proposed amendment to comply with the standard of disclosure set out under article 24 (1) and (2) rendered clause 50 and 51 of the Finance Bill procedurally defective.[47] To this end, the aforementioned analysis therefore serves as a fulcrum to this research study which proposes the designation of legal professionals as reporting entities.

2.3.Proceeds of Crime and Anti-Money Laundering Act

The Proceeds of crime and anti-money laundering act (POCAMLA) is the backbone of Kenya's anti-money laundering regime and it makes provision for the offence of money laundering and introduces measures for combating the offence.[48]

Section 17 of the act provides that the provisions of the act "shall override any obligation as to secrecy or other restriction on disclosure of information imposed by any other law or otherwise."[49] However, the act under Section 18 (1) places an exception to the legal professional privilege and advocate-client confidentiality. It provides that the requirement for disclosure shall not affect or be deemed to affect the relationship between a legal professional and his client with respect to communication of privilege information.[50] It is important to note that the aforementioned provision shall only apply in connection with the giving of legal advice or legal representation which is ordinarily considered the traditional role of legal professionals.[51] This provision thus creates a window of opportunity to obligate legal professionals to assume reporting obligations when acting on behalf of clients in financial and commercial transactions such as the buying or selling of real estate; managing of client money, securities or other assets; managing of bank, savings or securities accounts; organization of contributions for the creation operation or management of companies; or creation, operation or management of buying and selling of business entities or legal arrangements.

[47] National Assembly Hansard Report, 19 September 2019, 25.
[48] Section 3, *Proceed of Crime and Anti-money laundering Act* (2013).
[49] Section 17, *Proceed of Crime and Anti-money laundering Act* (2013).
[50] Section 18 (1), *Proceed of Crime and Anti-money laundering Act* (2013).
[51] Section 18 (2), *Proceed of Crime and Anti-money laundering Act* (2013).

2.4.The Evidence Act

Legal professional privilege as one of the evidentiary rules relies on the Evidence Act as one of its substantive laws. Section 134 of the act introduces the doctrine of legal professional privilege which prohibits legal practitioners from disclosing the following: any communication made to him by his client, the contents or conditions of any document with which he has become acquainted to in the course of his employment and lastly any advice given by him to his client.[52]

However, section 134 (1) (b) makes provision for exceptional circumstances under which the legal professional privilege is no longer protected and these includes: any communication made in furtherance of any illegal purpose or under circumstances where the legal practitioner observes that the client used the legal professional privilege to commit a crime.[53] A clear reading of the aforementioned section clearly indicates that legal professional privilege is not protected in the case of commission or omission of an act that amounts to illegality, fraud or when crime is committed or suspected to have been committed. This position was further reiterated in the case of *Descôteaux v. Mierzwinski*[54] where it was held that "communications which are criminal in themselves or that are made with a view to obtaining legal advice to facilitate the commission of a crime will not be privileged".

Section 3 of Proceed of Crime and Anti-money Laundering Act (POCAMLA) criminalises money laundering activities. This therefore means that in view of the foregoing, any communication or legal advice given by legal practitioners with a view to facilitate the commission of money laundering activities falls outside the protection of legal professional privilege and the said professional may be compelled to disclose the information relayed to the client.

2.5.The Law Society of Kenya Digest of Professional Conduct and Etiquette

The primary object of the Law Society of Kenya Digest of Professional Conduct and etiquette is to give guidance to legal professionals concerning their general professional conduct and the etiquette of the profession.

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[52] Section 134, Evidence Act (cap 80) 2014.
[53] Section 134 (1) (b), Evidence Act (cap 80) 2014.
[54] *Descôteaux v. Mierzwinski* (1982), The Supreme Court of Canada.

Rule 20 (b) (ii) of the digest categorically states that the object of the legal professional privilege, and its cardinal principle, is to ensure that the client is in a position to confide completely and without any reservation in their legal profession.[55]

While it is true that the protection of legal professional privilege and advocate-client confidentiality fosters an honest communication between the client and the legal practitioner, it is also true that this protection should not be exploited in furtherance of illegal activities such as money laundering. This position is clearly depicted under rule 20 (b) (iv) which states that there is no privilege with reference to communication made in furtherance of any crime or fraud.[56] This therefore means that this rule can be used to spearhead the intention of the Financial Action Task Force to include legal professionals as Designated Non-financial Businesses or Professions (DNFBP's) and thus place anti-money laundering obligations on these professionals.

2.6.Law Society Code of Standard of Professional Practice and Ethical Conduct (2016)

The Law Society Code of Standard of Professional Practice and Ethical Conduct (2016) was seen as an upheaval to the Digest at least on the face of things given that the Digest was issued in the year 2000 thus propelling the need to update and incorporate current regulatory concerns and trends in the practice of law in the country.

With respect to the advocate-client confidentiality which is at the center of this part of the paper, standard of professional practice and ethical conduct (SOPPEC) standard 7 makes provision for the communication between the advocate and the client.[57] The rule provides that the advocate-client communication is safeguarded under the doctrine of confidentiality which means that the legal practitioner has a professional duty not to disclose information received from or advice given to the client. The standard further indicates that any unnecessary disclosure of a client's confidential information amounts to a professional misconduct.[58] Notably, the rationale behind the standard is grounded on the fact that such protection afforded to clients is a crucial element of public trust and confidence in the administration of justice and ultimately the independence of the legal profession.

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[55] Rule 20 (b) (ii), *Law Society of Kenya Digest of Professional Conduct and etiquette* (2000).
[56] Rule 20 (b) (iv), *Law Society of Kenya Digest of Professional Conduct and etiquette* (2000).
[57] Standard 7, *The Law Society Code of Standard of Professional Practice and Ethical Conduct* (2016).
[58] Standard 7, *The Law Society Code of Standard of Professional Practice and Ethical Conduct* (2016).

However, standard of professional practice and ethical conduct SOPPEC-7 makes provisions for exceptional circumstances under which the legal professional privilege and advocate-client confidentiality does not apply. Particular attention has been drawn to the advocate's statutory and professional obligation to safeguard against the use of advocate client's account in furtherance of money laundering operations or any other unlawful financial transactions.[59] Accordingly, legal professionals are precluded from invoking the professional privilege or advocate-client confidentiality when assisting or abetting the unlawful activities of their clients.[60]

While it is true that the legal professional privilege and the advocate-client confidentiality must be nurtured, respected and protected by legal professionals, regulatory authorities and the general public. It is also important to take cognizance of the exceptional occurrences highlighted by SOPPEC-7 which creates a window of opportunity to implement the Financial Action Task Force (FATF) recommendation to include legal professionals as reporting entities.

2.7.Law Society of Kenya guidelines on the application of the proceeds of crime and anti-money laundering

In a concerted effort to self-regulate, the Law Society of Kenya formulated guidelines which imposes upon legal professionals the obligation to put in place systems and measures to further the object of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA). These guidelines are broadly divided into three parts: part I is essentially the preliminary of the guidelines and it encompasses the introduction, statutory basis and the reasons why and how legal professionals are vulnerable to money laundering activities; part II focuses on the general provisions for combating money laundering activities and the financing of terrorism. This part highlights relevant FATF recommendations and sections of POCAMLA; lastly, part III of the guidelines draws special attention to requirements that must be met by legal professionals when rendering legal services.

In light of the aforementioned guidelines, it is clear that legal professionals acknowledge their susceptibility to money laundering activities and are therefore willing to follow the aforementioned

[59] Standard 7, *The Law Society Code of Standard of Professional Practice and Ethical Conduct* (2016
[60] Standard 7, *The Law Society Code of Standard of Professional Practice and Ethical Conduct* (2016

guidelines to fight against money laundering in Kenya.[61] The profession, however, repels the idea of being enlisted as Designated Non-Financial Businesses or Professions under section 2 of the Proceeds of Crime and Anti-money Laundering Act because this would strip the profession of its independence owing to the fact that they will be required to report any suspicious transactions to the Financial Reporting Centre (FRC).

Although this effort has been applauded as a positive step towards the fight against money laundering in the country, it is important to consider guidelines as general, non-mandatory recommendations. There is therefore a need to list these professionals as reporting entities and place a legal burden on them to report suspicious transactions, failure to which they ought to face legal consequences.

[61] Njaramba E G, 'The conflict between anti-money laundering reporting obligations and the doctrine of confidentiality for legal practitioners in Kenya', Journal of Money Laundering Control, 2020, 3—https://www.emerald.com/insight/1368-5201.htm > on 21 October 2020.

CHAPTER THREE: RECONCILING THE CONFLICT BETWEEN ADVOCATES' ANTI-MONEY LAUNDERING REPORTING OBLIGATIONS AND THE DOCTRINE OF ADVOCATE-CLIENT CONFIDENTIALITY AND LEGAL PRIVILEGE

This chapter specifically focuses on how advocates can or have been used as enablers of laundering operations, with the aim of proposing their inclusion as Designated Non-Financial Businesses or Professions (DNFBP's) under section 2 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA). The chapter acknowledges the conflict that exists between the fight against money laundering and the legal professional privilege and thus proposes a solution to reconcile this conflict. Additionally, this part of the paper aims to trigger the discussion on the impact of including legal practitioners as reporting institutions under Kenya's anti-money laundering regime and further highlights the possible challenges these professionals are likely to face upon classification.

3.1.The extent of legal practitioners' vulnerability to money laundering

Literature depicts money laundering as a complex activity that involves many people, products, service providers and even different legal frameworks.[62] These complexities can go beyond the comprehension and ability of an ordinary criminal and it is for this reason that the skilled assistance of white-collar professionals has been sorted to construct and navigate through such complexities.[63] Legal practitioners have emerged a desirable set of professionals to be infiltrated or manipulated to act as enablers of money laundering activities, owing to a number of factors. Over and above the mere fact that advocates provide services through which criminals can launder illegal proceeds, the advocate-client privilege has particularly been an attractive feature that has drawn money launderers towards legal professionals.[64] Such confidentiality afforded to their clients favors the money launderer and ultimately protects the disclosure of their illegitimate activities. It is against this backdrop that the subsequent part of this paper seeks to highlight the

[62] Pambo O K, 'Designating lawyers as reporting entities under the Kenya's anti-laundering regime', Journal of Money Laundering Control, 2020, 4—https://www.emerald.com/insight/1368-5201.htm > on 21 October 2020.

[63] Njaramba E G, 'The conflict between anti-money laundering reporting obligations and the doctrine of confidentiality for legal practitioners in Kenya', Journal of Money Laundering Control, 2020, 3—https://www.emerald.com/insight/1368-5201.htm > on 21 October 2020.

[64] Mniwasa E E, 'Tackling money laundering in Tanzania: are private legal practitioners crime enablers or ineffectual and reluctant' Journal of Money Laundering Control, 2020, 5—https://www.emerald.com/insight/1368-5201.htm > on 21 October 2020.

principal stages of money laundering and the ways in which legal practitioners are used or have been used as enablers of money laundering activities.

As earlier mentioned, the fundamental goal of money laundering is to disconnect the proceeds of crime from its actual source and the entire process is directed towards turning the proceeds of crime into assets that appear legitimate.[65] This process has broadly been divided into three principal stages namely placement stage, layering stage and integration stage.[66] By placing reliance on reported cases in the United States, this part of the paper will seek to highlight how legal practitioners have been used as professional intermediaries in money laundering operations.

a. Placement Stage

The first stage of money laundering is primarily focused on putting the illegal money into the financial system. It involves changing the money derived from money laundering activities into a more transferable and less suspicious form. The use of client-trust accounts has proven to be an attractive method by money launderers because it is easier for the criminal to introduce illegal money into the financial system through an intermediary such as a legal practitioners. This could mean that clients that are notorious of money laundering activities may use the advocate client-trust account as a bank account into which they deposit illicit proceeds for onward transmission to other payees.[67]

In the case of *United States v Arditti* the defendant, an El Paso criminal defence lawyer during an introductory meeting was informed by the 'client' an undercover investigator that he must be trusted before the 'client' reveals the nature of his business. Arditti reassured the 'client' by mentioning the legal professional privilege clearly showing how this ethical guideline can be attractive to money launderers. Subsequently, the defendant proposed to open a bank account in the name of "V.R. Arditti Trust account number 3" with the intention of introducing laundered money into the financial system. No trust documents were prepared for the account, and the lawyer alone had signature authority and the code to validate any wire transfer thus giving Arditti the authority to manage the funds that flowed through it and conceal the identity of the 'client'.

[65] Utama P, 'Gatekeepers' roles as fundamental key in money laundering' 6(2) Indonesia Law Review, 2016, 4.
[66] Terry, L. and Robles, J. "The relevance of FATF's recommendations and fourth round of mutual evaluations to the legal profession", 635.
[67] Maguchu P, 'Money Laundering, lawyers and President's intervention in Zimbabwe', 142.

b. Layering Stage

This second stage of money laundering is centered on separating the proceeds from their criminal origin by moving the illegal money through a series of financial transactions such as wire transfers. This process makes it harder to trace the origin of the illegal money. One of the ways legal professionals step in at this stage is through setting up shell corporations with an accompanying bank account. Subsequently, the laundered money, assuming it had been channeled into a client-trust account would then be wired from the client-trust account into the corporation account.

In the case of *United States v Foster* the defendant proposed a scheme that included setting up a corporation in Liechtenstein with an accompanying bank account. He further proposed that he would then deposit the money provided by the clients into his client-trust account and ultimately into the corporation account in Liechtenstein via a wire transfer or cashier checks. Once the money has been deposited into the corporation account in Liechtenstein, the defendant assured the clients that they would have sole control of the money.

c. Integration Stage

The main objective of this last stage of money laundering is to establish an appearance of legal money. This final stage has been noted to be the culmination of a successful money laundering scheme. Legal practitioners come into play at the integration stage to integrate the laundered money into the legitimate economic and financial system or other integration system thus affording the criminal an opportunity to enjoy proceeds that appear legitimate.

Notably, one of the ways laundered money is integrated into a legitimate economic system is through the purchase of properties. In such a case, the most common technique used to hide criminal ownership of such properties particularly real properties is registering the ownership of such properties in the name of nominees. Reported cases indicate that legal professionals are often used by offenders to register the ownership of such properties and mortgages in the names of nominees, particularly relatives, friends or business associates. In certain cases, offenders have exploited the impenetrable shield offered by the advocate-client privilege and used their legal practitioners as nominees to conceal the true identity of the owner.

In the case of *United States v Calhoun* the manner and means that was used to culminate a successful money laundering scheme that is of particular interest in this part included: a) the use

of nominee bank accounts; b) the purchase of vehicles and having them registered under the names of nominees and c) remittance of checks under the name of the defendant rather than either of his 'clients' names.

3.2.Creating a balance between the fight against money laundering and legal professional privilege

The debate on whether to impose anti-money laundering reporting obligations on advocates has for a long time oscillated between two extreme positions. On the one hand, focus has been drawn on the general rule on legal professional privilege and on the other hand attention is drawn on the moral duty played by legal professionals in deterring criminal activities such as money laundering. This debate can be described as a double edged sword owing to the fact that if legal professionals undertake reporting obligation, it would be beneficial to the fight against money laundering in Kenya. In contrast, assuming this reporting obligation may be harmful to the fundamental principle of confidentiality and legal professional privilege which is the backbone of legal ethics. This therefore means that the key to resolving this conflict lies in seeking a proper balance between the conflicting interests. Outlined below are three potential options that can be used to establish the balance sought.

3.2.1. Nature of the professional activity

In order to reconcile the aforementioned conflict, the two broad professional activities provided by legal practitioners should be critically analyzed. The first category is the role relating to legal proceedings on behalf of clients, for instance, providing legal advice or representation. Under this category, it has been argued that these professionals are performing their traditional role of legal representation in a sphere where confidentiality is universally recognised as the backbone of legal ethics.[68] Consequently, the advocate-client confidentiality and the legal professional privilege should be accorded precedence in this division.

The second category has been likened to the business performed by financial entities, owing to the fact that in this category, legal professionals engage in activities such as buying or selling property, facilitation of financial transactions, creation of corporate vehicles or managing their clients'

[68] Pambo OK, 'Designating lawyers as reporting entities under the Kenya's anti-laundering regime', 9.

money, securities or other assets.[69] The anti-money laundering obligations as recommended by the Financial Action Task Force (FATF) falls perfectly under this category.[70] Recommendation 22 and 23 provides that the anti-money obligations set out in the recommendations shall apply to lawyers, notaries, other independent legal professionals and accountants when they prepare and carry out the following activities on behalf of the clients:

'buying and selling of real estate; management of client money, securities or other assets; management of bank, savings or securities accounts; organization of contributions for the Lawyers as reporting entities creation, operation or management of companies; creation, operation or management of legal persons or arrangements, and buying and selling of business entities'. .

Evidently, from the foregoing recommendation it is quite clear that particular emphasis is made on activities provided by advocates under the second category and not the first. This means that the legal professional privilege safeguarded under the first category shall continue to thrive and the fight against money laundering which is prevalent in the second category shall be achieved.[71] This paper thus proposes mandatory reporting obligations on legal professionals when acting on behalf of clients in financial and commercial transactions.

3.2.2. Establishment of a consultative process

In an effort to resolve the misalliance between the fight against money laundering and legal professional confidentiality, the best way forward would be to establish a consultative process which aims to bring together legal professionals and other stakeholders in developing an anti-money laundering model for legal professionals. This would not only ensure that a risk-based approach is incorporated to evaluate the vulnerability of the profession to money laundering operations. But also, incorporation of a cost-benefit analysis of the proposed measure which will ensure that the anti-money laundering model agreed upon is effective and efficient in addressing the fight against money laundering without necessarily undercutting both the constitutional rights of the client and public confidence in the sanctity of the advocate-client relationship.

[69] Ping H, 'Lawyers, notaries and accountants and money laundering' 9 (1) Journal of Money Laundering Control, 2006, 67.
[70] Pambo OK, 'Designating lawyers as reporting entities under the Kenya's anti-laundering regime', 9.
[71] Ping H, 'Lawyers, notaries and accountants and money laundering' 9 (1) Journal of Money Laundering Control, 2006, 67.

3.2.3. Reports of suspicious transactions ought to be made to the Law Society of Kenya

The unwillingness of legal professionals to be listed as Designated Non-Financial Businesses or Professions (DNFBP's) is somewhat grounded on the fact that when they are designated as reporting entities under section 2 of the Proceeds of Crime and Anti-money Laundering Act they will be supervised by the Financial Reporting Centre (FRC). Due to the existing doctrine of privilege in the profession and advocate-client confidentiality, the Financial Reporting Centre (FRC) is considered as an outsider, hence the intense opposition by legal practitioners.

In view of the aforementioned, a seemingly prudent solution to this would be to allow these professionals to communicate their suspicions of money laundering activities to the law society of Kenya, a professional statutory body established under section 3 of the Law Society of Kenya Act whose objective is to determine, maintain and enhance the standards of professional practice and ethical conduct for the legal profession in Kenya among other objectives. This solution has been satisfactorily highlighted under the interpretive note to the Financial Action Task Force (FATF) recommendation 23 which states that 'countries may allow lawyers, notaries, other independent legal professionals and accountants to be supervised by their self- regulatory bodies, provided that there are appropriate forms of cooperation between these organisations and the financial intelligence unit'.

This subsequently means that in the event that legal practitioners are designated as Designated Non-Financial Businesses or Professions (DNFBP's), the law society of Kenya shall become their supervisory body for purposes of receiving, analysing and interpreting reported suspicious information. This supervisory function shall be exercised by the law society of Kenya in liaison with the Financial Reporting Centre.

3.3.The Effect of including Legal Professionals as Designated Non-Financial Businesses or Professions

In an effort to bring more clarity to the contemporary discussion of including legal practitioners as Designated Non-Financial Businesses or Professions (DNFBP's), this part of the paper will seek to analyse the implication of categorizing legal professionals as reporting entities under section 2 of the Proceeds of crime and anti-money laundering act (POCAMLA).

Upon classification, legal professionals would be placed in the same category as reporting entities under the act and consequently, various reporting obligations will be imposed on them. This means

that these professionals will be required to ensure the following: to undertake the anti-money laundering risk assessments of clients as well as transactions, thorough screening and monitoring of existing and potential clients to establish their background and sources of their wealth, establish the origin of funds in the client account, put in place anti-money laundering policies and procedures, appoint a money laundering reporting officer, provide the relevant anti-money laundering training for their legal team, and file suspicious transactions reports and cash transactions equivalent to Kenya shillings one million or above to the Financial Reporting Centre (FRC).[72] Failure to adhere to the aforementioned obligations will result in the legal practitioner in question being charged and incurring penal consequences under the Proceeds of Crime and Anti-money Laundering Act (POCAMLA).

Overall, the categorization of legal professionals as reporting entities would ensure heightened awareness amongst legal professionals of the risk they face with respect to money laundering operations. This classification would also mean that Kenya's global perception as a partially compliant country with respect to the Financial Action Task Force (FATF) recommendations would change.

3.4.The possible challenges after inclusion of legal professionals as Designated Non-Financial Businesses or Professions

The proposal to enlist legal professionals as Designated Non-Financial Businesses or Professions (DNFBP's) under section 2 of the Proceeds of Crime and Anti-money Laundering Act (POCAMLA) could potentially be coupled with a plethora of problems.[73]

Subject to section 48 of the Proceeds of Crime and anti-money Laundering Act (POCAMLA), upon inclusion as reporting entities, legal professionals would be obligated to undertake customer due diligence which includes establishing a client's source of wealth.[74] However, a client can claim their right to privacy, and this could pose a potential barrier to obtaining this information.[75] Similarly, when starting a new client-advocate relationship, legal professionals may find asking questions with respect to source of wealth and other questions that would culminate a successful

[72] Gikonyo C, 'The legal profession in Kenya and its anti-money laundering obligations or lack thereof', 249.
[73] Gikonyo C, 'The legal profession in Kenya and its anti-money laundering obligations or lack thereof', 250.
[74] Section 48, *Proceed of Crime and Anti-money laundering Act* (2013).
[75] Gikonyo C, 'The legal profession in Kenya and its anti-money laundering obligations or lack thereof', 251.

customer due diligence a little intrusive. Consequently, these professionals would opt to avoid conducting any or a comprehensive customer due diligence so as to avoid jeopardising a potential new client relationship.[76] Further, subject to section 46 of the Proceeds of Crimes and Anti-money Laundering act (POCAMLA) these professionals would be required to establish and maintain customer records. This obligation would require hiring the services of specialists to establish and maintain the firm's database. Evidently, undertaking a comprehensive customer due diligence is a complex, time consuming and tedious process that requires investment in technology, additional manpower and finances.

As a measure of best practice, law firms would be required to provide the relevant anti-money laundering training for their legal team upon classification of legal professionals as reporting entities. Additionally, to implement a comprehensive anti-money laundering policy, it would be imperative for law firms to carry out a risk assessment exercise with the aim of determining the law firm's money laundering threat. The implementation of these anti-money laundering measures translates to added operational costs for the law firm.

If these issues are not satisfactorily addressed, they may impede the effectiveness of the reporting obligations imposed upon legal professionals once they are included as Designated Non-Financial Businesses or Professions (DNFBP's) under section 2 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA). The preceding chapter will therefore attempt to draw reference from other jurisdictions and highlight ways in which these problems have been addressed in these countries.

[76] Gikonyo C, 'The legal profession in Kenya and its anti-money laundering obligations or lack thereof', 251.

CHAPTER FOUR: A STUDY OF THE APPROACH TAKEN BY THE UNITED KINGDOM TO SUCCESSFULLY INCLUDE LEGAL PROFESSIONALS AS REPORTING ENTITIES

This chapter focuses on comparative lessons that Kenya can draw from the anti-money laundering regime adopted by the United Kingdom. This research paper has a keen interest on the United Kingdom not only because Kenya is a former British protectorate and most of its laws are heavily borrowed from this jurisdiction but also the United Kingdom has enlisted legal professionals as Designated Non-Financial Businesses or Professions (DNFBP's) within its anti-money laundering regime. Notably, the United Kingdom was a founding member of the Financial Action Task Force (FATF) and it is also a cooperating and supporting nation to the Eastern and South African Anti-Money Laundering Group.

4.1.Anti-Money Laundering Regulations Applicable to Legal Professionals in the United Kingdom

4.1.1. Proceeds of Crime Act 2002 (POCA)

The Proceeds of Crime Act (POCA) the primary anti-money laundering piece of legislation in the United Kingdom came into force in the year 2003 subject to the European Commission Directive 2001/97/EC which required member states to adopt a legislation imposing reporting obligations on non-financial businesses or professions such as legal practitioners. Schedule 9 of the Act outlines a list of 'regulated sectors' and this includes a firm or a sole legal practitioner engaging in financial or real property transactions such as such as buying and selling of property, the managing of client money, securities or other assets, the opening of bank, savings or securities accounts or the creation, operation or management of trusts, companies, charities or similar structures.[77] In light of this classification, section 330 of the Act criminalizes failure of legal professionals to disclose suspicious transactions to the National Crime agency which is the United Kingdom's lead agency against organised crime and economic crime.[78] Section 334 of the Act provides that a legal professional guilty of the offence set out under section 330 is liable to; on summary conviction, to

[77] Schedule 9, *Proceeds of Crime Act* (2002).
[78] Section 330 (1), *Proceeds of Crime Act* (2002).

imprisonment for a term not exceeding six months or a fine or both and on conviction on indictment, to imprisonment not exceeding five years or to a fine or to both.[79]

4.1.2. Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017

This Regulation came into force on 26 June 2017 as a replacement to Money Laundering Regulation 2007 which was previously in force. Regulation 8 notes that the Regulation is applicable to a list of persons otherwise referred to as "relevant persons" carrying on business in the United Kingdom and it includes independent legal professionals.[80] Notably, regulation 12 defines independent legal professionals to mean a firm or sole practitioner who by way of business provides legal services to another person when engaging in financial or real property transactions.[81] The regulation further outlines what constitutes financial or real property transactions to include the buying and selling of property, the managing of client money, securities or other assets, the opening of bank, savings or securities accounts or the creation, operation or management of trusts, companies, charities or similar structures.[82] A key element introduced by this Regulation is that "relevant persons" are obligated to adopt a more risk-based approach towards anti-money laundering. These include;

a. General risk-assessment – Regulation 18(1) provides that a 'relevant person' such as independent legal professionals must take necessary steps to identify and assess the business' potential exposure to money laundering operations with due regard to its size and nature of its business.[83]
b. Risk mitigation policies – Regulation 19 (1) states that 'relevant persons must establish and maintain policies proportionate to the risks identified in order to mitigate and manage effectively their exposure to money laundering operations.[84]

[79] Section 334 (2), *Proceeds of Crime Act* (2002).
[80] Regulation 8, *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations* (2017).
[81] Regulation 12 (1), *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations* (2017).
[82] Regulation 12 (1), *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations* (2017).
[83] Regulation 18 (1), *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations* (2017).
[84] Regulation 19 (1), *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations* (2017).

c. Level of due diligence – Regulation 27 provides that 'relevant persons' must apply customer due diligence measures such as identifying and verifying the identity of the client and also assess the purpose and nature of business relationship[85] if the person; establishes a business relationship; suspects money laundering; or doubts the accuracy or adequacy of information previously obtained for purposes of identification and verification.[86]

4.2.The steps taken by the United Kingdom to reconcile the conflict that exists between legal professional privilege and reporting obligations imposed upon legal practitioners

The legal professional privilege and advocate-client confidentiality have been the primary justification that legal professionals have used to challenge their inclusion as reporting entities under anti-money laundering laws. This part of the paper is therefore dedicated to analyse the approach taken by the United Kingdom to safeguard the essential aspect of legal professional privilege and advocate-client confidentiality while at the same time applying reporting obligations on legal professionals.

4.2.1. Reporting exemptions highlighted in the Proceeds of Crime Act (POCA)

Section 330 of the Proceeds of Crime Act criminalizes failure to disclose suspicious transactions to the relevant authority by regulated sectors under the Act such as legal professionals.[87] However, sub-section 6 of section 330 provides that a legal professional who suspects or has reasonable grounds to believe that another person is engaged in money laundering is exempted from making a money laundering report if such information came to him/her under privileged circumstances.[88] Subsection 7 further makes provisions on what constitutes "privileged circumstances" and it includes information communicated to a legal professional by a client in connections with the provision of legal advice, information communicated by a client seeking legal advice or information communicated in connection with contemplated legal proceedings or ongoing legal proceedings.[89] This means that legal professional privilege is accorded precedence over anti-

[85] Regulation 28, *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations* (2017).
[86] Regulation 27, *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations* (2017).

[87] Section 330, *Proceeds of Crime Act* (2002).
[88] Section 330 (6), *Proceeds of Crime Act* (2002).
[89] Section 330 (7), *Proceeds of Crime Act* (2002).

money laundering reporting obligations when the legal professional is engaging in his/her traditional role of legal representation.

4.2.2. Extensive definition of what constitutes legal professional privilege

Chapter 7 of the Anti-Money Laundering Guidance for the Legal Sector is dedicated to the explanation of what falls under the umbrella of legal professional privilege and what constitutes "privileged circumstances". The Guidance clearly states that the legal professional privilege only safeguards communications that fall under either the advice privilege or litigation privilege with the exception of advice given in furtherance of a crime or fraud. Paragraph 7.5 of the Guidance focuses on highlighting what constitutes "privileged circumstances" and it includes; the person in question is a legal advisor, the information communicated to this person relates to the giving of legal advice, the information relates to the seeking of legal advice or the information is in connection with actual or contemplated legal proceedings and lastly the information is not communicated with a view to further a criminal activity.

4.2.3. Nature of legal activities that attract anti-money laundering reporting obligations

The preceding chapter of this research paper was keen to indicate that there exists two broad professional activities provided by legal professionals. The chapter noted that the first category relates to the provision of legal advice or representation in which case legal professional privilege and attorney-client privilege is accorded priority. Whereas, the second category relates to financial or commercial transactions such as the buying and selling of property and hence susceptible to exploitation by money launderers. In light of this, Regulation 12 of Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, indicates that the Regulations will apply to independent legal professionals when engaging in financial transactions such as buying and selling of property, the managing of client money, securities or other assets, the opening of bank, savings or securities accounts or the creation, operation or management of trusts, companies, charities or similar structures.[90]

[90] Regulation 12 (1), *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations* (2017).

4.3. Measures put in place to ensure continued compliance of legal professionals with anti-money laundering reporting obligations in the United Kingdom

This part of the research paper acknowledges that legal professionals in the United Kingdom have been listed as Designated Non-Financial Businesses or Professions (DNFBP's) since the 2000's. With emerging risks and different trends since the 2000s, the researcher is keen to highlight measures put in place to ensure continued compliance of solicitors with the anti-money laundering reporting obligations.

4.3.1. Anti-money Laundering Guidance for the Legal Sector

In the year 2018, the Legal Sector Affinity Group, which comprises the Law Society and anti-money laundering supervisors for the legal sector, published a Guidance on anti-money laundering (AML). Subject to paragraph 1.5 of the Guidance, legal professionals in the United Kingdom are not obligated to follow this Guidance but abiding by this Guidance will make it easier for the legal practitioner to account for their actions to their regulatory body. Additionally, Section 330 (8) of the Proceeds of Crime Act (POCA) and Regulation 86(2) (b) of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 provides that, when assessing the criminal liability of an individual with respect to money laundering, the court is required to assess the extent of compliance with the Guidance.[91] While the Guidance may seem not to be legally binding, legal professionals are compelled to abide with it so as to substantiate their actions.

4.3.2. Disciplinary Action against Non-Compliant Legal Professionals

Subject to paragraph 10.3 of the Anti-money Laundering Guidance for the Legal Sector, failure to comply with the anti-money laundering obligations not only puts the legal professional at risk of committing criminal offence but also such conduct may constitute a breach of the solicitor's professional obligations and opens up the legal professional to a disciplinary action by their supervisory body.[92]

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[91] Regulation 86(2) (b), *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations* (2017).

[92] – < https://www.lawsociety.org.uk/topics/anti-money-laundering/anti-money-laundering-guidance > on 10 January 2021.

4.3.3. Sectoral Risk-Assessment Published by Solicitors Regulatory Authority

The Solicitors Regulatory Authority (SAR) is a regulatory body established in the year 2007 and charged with the responsibility of regulating professional conduct of solicitors practicing in Wales and England.[93] The Solicitors Regulatory Authority is therefore also responsible for the supervision of anti-money laundering within the legal profession. One of the ways this regulatory body carries out this function is by publishing an anti-money laundering sectoral risk assessment and ensuring it is updated regularly in line with emerging risks and trends. The contents of the risk-assessment include;

a. Product and service risk – which highlights the legal services that pose the highest risk of being exploited by money launderers such as conveyancing, client accounts and establishment or management of trusts, companies or charities.[94]
b. Client risk – which is keen to note that each client is different and subject to different risk-profiling. The warning signs of risky clients may include clients who request anonymity, clients whose identity cannot be verified or clients who are evasive about providing identification documents.[95]
c. Delivery channel risk – which notes that how a firm delivers its services can increase or reduce a firm's exposure to money laundering operations. What this means is that transparency tends to reduce exposure whereas complexity in the delivery channel increases a firm's risk to money laundering activities.[96]
d. Geographical risk – in which case the assessment report notes that firms need to pay attention to the jurisdiction in which services will be delivered, source and destination of funds as well as the location of the client. The Solicitors Regulatory Authority (SAR) notes that countries that have not implemented equivalent anti-money laundering standards to the United Kingdom and countries with substantial levels of corruption pose significant money laundering risks and proper cautionary measures should be implemented when dealing with such countries.[97]

[93] – < https://www.sra.org.uk/sra/how-we-work/reports/aml-risk-assessment/ > on 10 January 2021.
[94] – < https://www.sra.org.uk/sra/how-we-work/reports/aml-risk-assessment/ > on 10 January 2021.
[95] – < https://www.sra.org.uk/sra/how-we-work/reports/aml-risk-assessment/ > on 10 January 2021.
[96] – < https://www.sra.org.uk/sra/how-we-work/reports/aml-risk-assessment/ > on 10 January 2021.
[97] – < https://www.sra.org.uk/sra/how-we-work/reports/aml-risk-assessment/ > on 10 January 2021.

4.3.4. Routine Monitoring by the Solicitors Regulatory Authority

The function of this regulatory body with respect to anti-money laundering does not end with the publication of the sectoral risk-assessment report. The assessment report only forms a basis upon which individual firms will tailor and maintain their own risk-assessment having regard to regular updates.[98] The Authority's mandate therefore has to extend to routine monitoring to ensure compliance and this can be exercised through supervisory visits in which case the Authority will request to take a look at a firm's risk-assessment.

4.3.5. Practice Advice Service

The Practice advice service is essentially a free and confidential helpline that offers support on legal practice and procedure to members of the Law Society and their staff. Through the anti-money laundering hotline legal professionals in the United Kingdom can make inquiries on matters relating to customer due diligence, source of funds, and understanding the Legal Sector Affinity Group Anti-money Laundering Guidance for the Legal Sector.[99]

From the foregoing, Kenya can draw a comparative parallel from the anti-money laundering regime adopted by the United Kingdom.

[98] – < https://www.sra.org.uk/sra/how-we-work/reports/aml-risk-assessment/ > on 10 January 2021.

[99] – < https://www.lawsociety.org.uk/contact-or-visit-us/helplines> on 10 January 2021.

CHAPTER 5: RECOMMENDATIONS AND CONCLUSION

This research study was undertaken to propose the expansion of the definition of Designated Non-Financial Business Person's (DNFBP's) as set out in section 2 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) to include advocates, notaries and other legal professionals who are sole practitioners, partners or employees within professional firms and company service provider. The effect of this inclusion as indicated in the research paper would be to impose reporting obligations set out in section 48 of the Proceeds of Crime and Anti-Money Laundering Act. Accordingly, this final chapter of the study reviews the discussions and conclusion of the preceding chapters and subsequently outlines the recommendations and conclusion of this study

Recommendations

The primary recommendation of this research study is the amendment of section 2 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) to include legal professionals as Designated Non-Financial Businesses or Professions (DNFBP's) and ultimately assume the reporting obligations set out under section 48 of the Act. Outlined below are secondary recommendations that can also be implemented to alert members of the legal profession of their possible vulnerability to money laundering operations and aid in the ultimate fight against money laundering in Kenya.

Recognition of Money Laundering in the Advocates Act and the Law Society of Kenya Act

Chapter 2 of this research study noted that the Advocates Act and the Law Society of Kenya Act are the two main legal statutes that govern the legal profession in Kenya. However, after a thorough review of the same, the two regulations fail to make any provisions on money laundering.

In light of this statutory lacuna, this research study recommends the amendment of the Advocates Act to recognize willful participation in money laundering operations as an offence under part VIII of the Advocates Act. This amendment would mean that any legal professional who participates in money laundering operations shall be guilty of an offence under the Act.

This research paper further recommends the amendment of the Law Society of Kenya Act to recognize the fight against money laundering as one of the objects of the Society under section 4 of the Act. Upon inclusion, the Society will be mandated to take necessary steps that would contribute towards the fight against money laundering. These steps may include, publishing a sectoral risk assessment, ensuring legal professionals comply with the Law Society of Kenya guidelines on the application of the proceeds of crime and anti-money laundering and educating legal practitioners on their susceptibility to money laundering operations.

Compilation of "Red Flags" to be used to assess Possible Money Laundering Operations

The Law Society of Kenya should prepare a report compiling a list of "red flags" that could be used by legal professionals to help them identify possible money laundering activities. This compilation can broadly be divided into three categories namely; red flags with respect to the client, red flags in the context of services the advocate provides and lastly red flags in the context of a client's source of funds. In the first category where the focus is on the client, the Law Society of Kenya can focus on the client's behaviour or identity, for instance, the client is evasive or secretive and secondly, the concealment techniques used by the client such as reluctance to disclose information necessary to conduct the transaction. In the second category where attention is drawn on the services provided by the legal professional, the Society can highlight red flags with respect to services that appear attractive to money launderers. A good example would be the use of client accounts in which case legal professionals should be vigilant and take notice if a) the client tells the advocate that the funds are being wired from source A and at last minute changes the source of funds; b) the client requests the advocate to transfer money received into the client account back to its source, to a third party or to multiple recipients and; c) if the client is eager to transfer money into the client account at the very outset of instructing the legal professional. This last red flag is founded on the fact that legal professionals should only handle client's money in

relation to an ongoing legal work. In the last category where the focus is on client's funds, the Law Society of Kenya should compile a list of "red flags' with respect to a) size of client's funds b) source of funds and c) mode of payment.

The Law Society of Kenya Anti-money Laundering Helpline

The Law Society of Kenya can set up a free and confidential helpline that offers anti-money laundering support to legal professionals. Once this helpline is established, legal professionals can not only make queries with respect to understanding the Law Society of Kenya guidelines on the application of the proceeds of crime and anti-money laundering but also make queries with respect to the above-mentioned "red-flags". In addition to the helpline, the Law Society of Kenya can publish a monthly newsletter on their website dedicated to enlighten legal professionals on ways criminals take advantage of their services and ways they can prevent taking part unwittingly in money laundering operations.

Continuous Training and Education of Legal Professionals

The need to enhance the knowledge and skills of legal professionals with respect to money laundering activities cannot be overemphasized. While it is true that amending section 2 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) to include legal professionals will place reporting obligations on these professionals, there is still need to continuously enhance their knowledge and understanding of the risk they face with respect to money laundering operations. In light of this recommendation, the Law Society of Kenya can organize a considerable number of seminars that would be dedicated to enlighten advocates on their vulnerabilities to money laundering operations and mandate these professionals to attend at least one of these seminars.

Conclusion

Undeniably, Kenya is susceptible to money laundering activities and thus the need to elevate money laundering preventive mechanisms in the country.[100] From the foregoing analysis it is clear that the nature of the legal profession puts them in a better position to detect and report money laundering activities owing to the fact that they have the ability to see the entire picture and not

[100] Gikonyo C, 'The legal profession in Kenya and its anti-money laundering obligations or lack thereof', 249.

just a single isolated transaction.[101] This therefore means that legal practitioners could play a significant role in money laundering prevention and should be designated as reporting institutions and thus assume anti-money laundering obligations. This will not only increase avenues for the detection and prosecution of money laundering activities but also assist in sealing a significant statutory lacuna and further ensure that Kenya is in compliance with the FATF recommendations.[102]

[101] Ping H, 'Lawyers, notaries and accountants and money laundering' 9 (1) Journal of Money Laundering Control, 2006, 65.
[102] Gikonyo C, 'The legal profession in Kenya and its anti-money laundering obligations or lack thereof', 247.

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