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**Inclusion of Lawyers as Reporting Entities for Money Laundering in Kenya:
Implementation Challenges and Way Forward**

By



**Inclusion of Lawyers as Reporting Entities for Money Laundering in Kenya:
Implementation Challenges and Way Forward**

By

JUDY WANJIKU GITARI

133941

Submitted in Partial Fulfilment of the Requirements for the Degree of Master of Laws

at Strathmore University



October 2022

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ABSTRACT

This research examines the implementation challenges faced by the legal profession in Kenya in complying with their intended gatekeeping role, in an effort to detect and prevent furtherance of money laundering activities. The importance of their role comes into play mainly because of the professional privilege they possess and their predisposition to be misused by criminals as there is an unwritten assurance that their illegal dealings shall be kept confidential, in acquiescence to their ethical obligations. Despite their vulnerability, the anti-money laundering framework in Kenya is not robust and has been subjected to numerous challenges hindering effective implementation. Accordingly, this study shall rely on the Constitution of Kenya, relevant statutes, regulations, journal articles, internet sources as well as case law to investigate the main enforcement obstacles and assess how they can be overcome along with determining whether it is possible to enforce compliance without infringing on the professional duties of lawyers. Additionally, this research examines the degree of compliance of the FATF recommendations within the legal professions in USA, United Kingdom and Malaysia. It also looks at what lessons Kenya can learn from these jurisdictions and what practical steps can be taken to assist in bridging the implementation gap. Moreover, this research shall demonstrate that the susceptibility to use lawyers to launder money is very high. It shall also highlight the importance of including the legal profession in drafting money-laundering legislation and appreciate why this legislation should also take their duties to uphold rule of law into consideration. Finally, this research gives recommendations focused on the way forward towards a fully compliant bar with their reporting role.



TABLE OF CONTENTS

Contents

DECLARATION	ii
ABSTRACT	iii
TABLE OF CONTENTS	iv
LIST OF ABBREVIATIONS	vi
LIST OF CASES	vii
LIST OF STATUTES	viii
ACKNOWLEDGEMENTS	x
CHAPTER ONE	1
1. INTRODUCTION	1
1.1. Background of the Study/Introduction	1
1.2. Statement of the Problem	5
1.3. Objectives of the Study	6
1.4. Hypothesis	6
1.5. Justification of the Study	7
1.6. Research Questions	7
1.7. Theoretical Framework	7
1.8. Literature Review	13
1.9. Research Methodology	18
2.0 Limitations	18
2.1 Chapter Breakdown	19
CHAPTER TWO	20
THE LEGAL AND REGULATORY FRAMEWORK GOVERNING THE INCLUSION OF LAWYERS AS REPORTING ENTITIES FOR MONEY LAUNDERING IN KENYA	20
2. Introduction	20
2.1 The International Anti-Money Laundering Instruments	20
2.1.1 The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (Vienna Convention)	21
2.1.2 The United Nations Convention against Transnational Organized Crime and the Protocols thereto 2000 (Palermo Convention)	22
2.1.3 United Nations Convention against Corruption (UNCAC)	24
2.1.4 Financial Action Task Force (FATF) Recommendations for Lawyers	25
2.2 How Kenya Has Ratified the FATF Recommendations	28
2.3 Conclusion	38
CHAPTER THREE	41

LEARNING LESSONS FROM MALAYSIA, USA & UK	41
3. Introduction.....	41
3.1 The international recognition of the risks and vulnerabilities associated with money laundering.....	41
3.2 Malaysia.....	42
3.2.1 Inclusion of Lawyers as DNFBPs in Malaysia	42
3.2.2 The challenges faced by lawyers in Malaysia in implementing the FATF recommendation 16	44
3.2.3 Lessons that Kenya can learn from Malaysia	47
3.3 United States of America (USA)	47
3.4.1 Inclusion of Lawyers as DNFBPs in the USA	47
3.4.2 The challenges faced by lawyers in the USA in implementing the FATF recommendation 16	50
3.4.3 Lessons that Kenya can learn from the USA.....	51
3.4 United Kingdom (UK).....	52
3.4.1 Inclusion of Lawyers as DNFBPs in the UK.....	52
3.4.2 The challenges faced by lawyers in the UK in implementing the FATF recommendation 16	52
3.4.3 Lessons Kenya can learn from the UK:	55
3.5 Conclusion.....	56
CHAPTER FOUR.....	57
CONCLUSION AND RECOMMENDATIONS.....	57
4. INTRODUCTION.....	57
4.1 FINDINGS	57
4.2 IMPORTANCE OF THE FINDINGS	59
4.3 RECOMMENDATIONS	59
4.3.1. Abolish the mutual evaluations reported by FATF	59
4.3.2. Maintenance of a public registry of beneficial ownership.....	60
4.3.3. Enforcing Due Diligence Measures to imitate those models used by banking institutions.....	60
4.3.4. Provide assistance to LSK to supervise AML in Kenya	61
4.3.5. Training Lawyers in Kenya on Anti Money Laundering issues.....	61
4.3.6. Aligning AML laws with other laws governing the legal profession in Kenya....	62
4.3.7. Protection of the Legal Profession from the arms of the Law.....	62
4.4 CONCLUSION.....	62
Appendix A: Similarity Report	70
Appendix B: Ethical Clearance Confirmation	71

LIST OF ABBREVIATIONS

AML- Anti-Money Laundering

CBK- Central Bank of Kenya

CDD- Customer Due Diligence

DNFBPs- Designated Non-Financial Businesses and Professions

EACC- Ethics and Anti-Corruption Commission

ECDD- Enhanced Customer Due Diligence

ESAAMLG- Eastern and Southern Africa Money Laundering Group

FATF- Financial Action Task Force

FRC- Financial Reporting Centre

IMLN-International Money Laundering Information Network

KYC- Know Your Customer

KRA- Kenya Revenue Authority

ML/TF- Money Laundering/Terrorism Financing

ML- Money Laundering

POCAMLA - Proceeds of Crime and Anti-Laundering Act 2009

POCAMLR -Proceeds of Crime and Anti-Laundering Regulations

RBA- Risk Based Approach

UNCITRAL-United Nations Commission on International Trade Law

UNSC-United Nations Security Council

UNTOC- United Nations Convention against Transnational Organized Crime

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Hirschowitz Flionis v Bartlett, 2006 (3) SA 575 (SCA) Para 30.
Law Society of British Columbia v Canada 2001 (BCSC) 1593
Minister of Safety and Security v Bennet & Others (302/06) [2007] ZASCA 139; 2009 (2) SACR 17 (SCA); 2007 JDR 1138 (SCA); [2008] 2 All SA 26 (SCA) (8 November 2007)
Miranda v Arizona 384 US 436 (1966)
Mwaura Kabata v Honorable Attorney General & Others (Petition Number 005 of 2022)
Shah & another v HSBC Private Bank (UK) Limited [2011] EWCA Civ 1154
S v Safatsa and Others, 1988 (1) SA 868 (A) at 885-6
S v Hattingh, Unreported, Bloemfontein Regional Court, Case Number 17/518/10
S v Lwane 1966 (2) SA 433 (A)
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Advocate Ordinance Sabah (Malaysia)
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Anti-Money Laundering and Anti-Terrorism Financing Act (AMLATFA) 2001 (Malaysia)
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Bank Secrecy Act of 1970 (USA)
Criminal Procedure Act 51 of 1977 (South Africa)
Drug Trafficking Act 1994 (United Kingdom)
Enforcement of Justice Act 1991 (United Kingdom)
Internal Revenue Code 1986 (USA)
Legal Profession (Amendment) Act 2013 (Malaysia)
Money Laundering Regulation 1993(United Kingdom)
Money Laundering Control Act 1986 Patriot Act (USA)
Patriot Act 2001 (USA)
Proceeds of Crime Act 2002 (Amendment) Regulations 2007 (POCA Regulations) (United Kingdom)
United Nations Convention against Illicit Transfer in Narcotic Drugs and Psychotropic Substances, 1988
United Nations Convention against Corruption (UNCAC)
United Nations Convention against Transnational Organized Crime (UNTOC)
UK Proceeds of Crime Act and Money Laundering Regulation, 2003 (United Kingdom)
The International Money Laundering Information Network (IMLN)
The Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007(United Kingdom)

Regional Instruments

Advocates Act
Constitution of Kenya, 2010
Finance Bill (2019)
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Proceeds of Crime and Anti Money Laundering (Amendment) Act 2021



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CHAPTER ONE

1. INTRODUCTION

1.1. Background of the Study/Introduction

Money laundering is an unsanctioned practice that affects most countries, going by the number of reported cases globally.¹ It is defined as the process whereby proceeds are made to appear as legitimate despite having been obtained illegally and concealed to avoid tracing back or finding the source of such proceeds.²

It is apt to say that money laundering is not a new phenomenon but rather one which has existed in the past. In the olden days' money was being deposited in banks without the need to ascertain or verify the sources of money, other purchased luxurious goods while some applied it in dealing drugs.³

The process of money laundering is used by criminals to clean dirty money which was acquired by them through illegal activities and the monies are then placed in legitimate banking systems to be utilized as sanctioned income. It can be likened to transnational organizations of crimes which results in its economic advantage. The phenomena that is money laundering cannot be limited to one definition but the most occurring factor is the conduct of sophisticated endeavors which results in financial gain by concealing the origin of affluence.⁴

Concealing of the aforesaid funds takes place in a complex system which includes three stages including; the placement stage whereby the money yielded from the crime is introduced to a financial institution or by the illegal acquisition of assets whereby there is separation of the illegal offence;⁵ the layering stage where the source of the 'placed' funds are concealed, destroyed and enigmatic; and lastly the integration stage whereby the proceeds are re-infused into the legitimate financial and economic system and further invested.⁶

Developing countries' economies are rapidly growing posing a challenge of controlling financial crimes.⁷ Majority of developing economies have been identified as jurisdictions of concern in regards

¹ Raweh B A, Erbao C and Shihadeh F, 'Review the literature and theories on anti-money laundering', 5, Asian Development Policy Review, (2017), 140-147.

² Section 3, 'The Proceeds of Crime and Anti-Money Laundering Act (Act No.9 of 2009).

³ Lucian R.D, 'The concept of money laundering in global economy' International Journal of Trade, Economics and Finance (2010), 354.

⁴ Georgiva N, 'Concept, definition and characteristics of the money laundering phenomenon' Journal of Process Management- New Technologies International, Vol 8 No.2, (2020), 24.

⁵ Korejo M S, Rajamanickam R and Said M H, 'The concept of money laundering: a quest for legal definition' 24 Journal of Money Laundering Control, (2021), 727.

⁶ Broek M v.d, 'Preventing money laundering: A Legal study on the effectiveness of supervision in the european union', eleven international publishing, (2015), The Netherlands, 1.

⁷ Patel H and Thakkar B S., 'Money laundering among globalized world', in Hector Cuadra-Montiel (ed), Globalization- Approaches to Diversity, InTech, 2012, 163.

to laundering money.⁸ For instance, Kenya is predominantly known as the financial hub of East Africa characterized with its ever growing sophisticated economy.⁹ The rise of mobile money utilization in a widespread cash based economy, has placed Kenya and other African countries on the map in the global financial sector.¹⁰ However, it is difficult to ignore that its inclusion in the global spectrum has facilitated the susceptibility to economic crimes such as money laundering which greatly undermines financial integrity.¹¹

To reduce the adverse long-term effects such as depleting the financial and economic power of a country, the fight against money laundering has been placed as priority in the international spectrum. With this in mind, it is imperative for every State to enforce regulation and ensure effective supervision of financial transactions, in an endeavor to fight money laundering activities.¹²

The history of criminalizing money laundering can be traced back to 1986 when the United States enacted the Money Laundering Control Act.¹³ Thereafter, as money laundering attained a global status, the Financial Action Task Force (FATF), together with its agencies was established to prevent money laundering activities by setting applicable global detection and reporting standards. After the terrorist attack 9/11, the recommendations by the FATF were revised to include combatting terrorism financing. Finally, in 2010, the role of the FATF was focused on specialized professionals who are susceptible to perpetuate money laundering activities.

We may deduce that the FATF has a strategic role in combatting money laundering. The importance of this role was reiterated by the United Nations Security Council in March 2019.¹⁴ Additionally, the UNSCR 2462 resolution sensitized member states on the importance of complying with the FATF recommendations. It also urged the members to be committed to implementing the aforesaid recommendations and be well equipped with the proper tools to fight money laundering in their respective jurisdictions.¹⁵

⁸ Bureau of International Narcotics and Law Enforcement Affairs, 'International Narcotics Control Strategy Report-Money Laundering', Vol II, 2 March 2020, at United States of America, 14.

⁹ United States Department of State, 'Bureau of International Narcotics and Law Enforcement Affairs 'International Narcotics Control Strategy Report', II, Money Laundering [2019], 198, 126.

¹⁰ M Kersop and SF du Toit, 'Anti-Money laundering regulations and the effective use of mobile money in South Africa – Part 2*' 18, Potchefstroom Electronic Law Journal (2015), 1636-1645.

¹¹ United States Department of Treasury, 'Money Laundering', <https://home.treasury.gov/policy-issues/terrorism-and-illicit-finance/money-laundering>, on 4 August 2020.

¹² Broek, 'Preventing Money Laundering: A Legal Study on the Effectiveness of Supervision in the European Union', 2.

¹³ The Money Laundering Control Act, 1986

¹⁴ UNSC Res 2462 (28 March 2019) UN Doc S/RES/2462, 1-8.

¹⁵ UNSC Res (2462) (28 March 2019), 1-8.

To this end, research has shown how the fight against money laundering is a global affair and has proved the significance of combatting the flow of dirty money. Notably, studies have also demonstrated that money laundering does not primarily exist on its own and may be facilitated by other bodies and persons such as the legal profession.¹⁶ The Financial Action Task Force (FATF) typology report¹⁷ asserted that the legal profession has become highly vulnerable and attractive to money laundering as privileged transactions such as, 'sale and purchase of real estate, managing client's money in trust accounts and creation of companies' interalia may be used to facilitate money laundering activities.¹⁸

Furthermore, the unique role of lawyers in the society cannot be undermined. In reality, lawyers are legally trained and acquire specialized skills which are relevant in preparing regulations, instituting court proceedings on behalf of their clients, establishing democratic values and participate in legislation lobbying, all which may not be performed by a lay person.¹⁹

Accordingly, the FATF recommended the inclusion of lawyers as one of Designated Non-Financial Businesses and Professions (DNFBPs) under recommendation 16, obligating lawyers to conduct thorough due diligence in accepting briefs; reporting suspicious transactions to the Financial Reporting Centre (FRC); maintaining client records and establishing reporting procedures in their companies and private firms.²⁰ The reporting obligations include; cash transaction reporting,²¹ the duty to monitor and report suspicious activity,²² conducting thorough client due diligence,²³ maintaining client records²⁴ and designing internal reporting procedures.²⁵ This recommendation is viewed to be highly controversial and only a few member states have implemented the same.²⁶ The reporting obligations such as due diligence, should not be disregarded. According to Frieze, at the

¹⁶Crofts P, 'Review: What went wrong with money laundering law? By Peter Alldridge', 29, *Current Issues in Criminal Justice* (2017), 191.

¹⁷ Financial Action Task Force, "Money laundering and counter terrorist financing vulnerabilities of legal professionals", (2013a) Paris, France available at: www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf, on 26 January 2020.

¹⁸ Hatchard J, 'legal practitioners as potential money launderers: Beneficial ownership transparency and PEPs: Solicitors Regulation Authority v Sharif (2019)', 31, *The Denning Law Journal*, (2020), 189.

¹⁹ Zacharias F C, 'The Lawyer's role in a contemporary democracy, promoting social change and political values, true confessions about the role of lawyers in a democracy' 77, *Fordham Law Review*, (2009), 1601.

²⁰ Financial Action Task Force Standards '40 Recommendations", <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>, on 29 January 2020.

²¹ Section 34, The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2017.

²² Section 44, The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2017.

²³ Section 45, The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2017.

²⁴ Section 46, The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2017.

²⁵ Section 47, The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2017.

²⁶ Omar N and Hajudin H, 'FATF recommendations related to DNFBPs on anti-money laundering assessment' 3, *Journal of Economics, Business and Management*, (2015) 158.

point of commencing any legal transaction knowing one's client is very important and usually involves deeper research.²⁷

Domestically, Kenya has made several attempts to fulfil and adopt recommendation 16. The first attempt was made in 2007, during the drafting of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) which sought to include lawyers, real-estate agents, casinos amongst others as DNFBPs. However, when the POCAMLA came into force in 2009, it failed to include the legal profession and notaries from the list of DNFBPs.²⁸The reasons stated under the National Assembly Official Report for their expungement was that it contradicted existing legislation on the legal professions' obligations to maintain confidentiality and requiring them to report suspicious activities to the FRC goes against the essence of their profession which is, the advocate-client privilege.²⁹

The second attempt was made by the Statute Law (Miscellaneous Amendments) Bill in 2018 when it proposed to amend section 2 and 48 of the POCAMLA designating lawyers as DNFBPs. However, the motion was rejected in parliament owing to the lack of capacity of the miscellaneous amendments to handle the immense implications that would arise from such enforcement.³⁰Lastly, the final attempt was made in 2019, whereby the aforesaid sections were re-introduced to be amended under the Finance Bill.³¹ In the final stages of enacting the Finance Act, 2019, their inclusion was once again omitted.³²

The abortive attempt to implement and enforce regulations posing lawyers as reporting entities includes lack of awareness of their attractiveness to money laundering. Secondly, the proposed obligation to monitor their client's activities is contradictory to the client advocate relationship and thus goes against their ethical obligations. Thirdly, the profession views gatekeeping as a duplication of efforts as there are mechanisms that already exist to report suspicious activities. Finally, lawyers oppose this role as they consider it to be delegation by the government of its reporting duty.³³

Kenya being a member country of Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), a sub agency of the Financial Action Task Force, is expected to implement various

²⁷ Frieze S A, 'Know your clients' 29, *Commercial Law World* (2015), 20.

²⁸ *Proceeds of Crime and Money Laundering Act* (2012).

²⁹ http://info.mzalendo.com/hansard/sitting/national_assembly/2009-12-10-14-30-00 10 December 2019, on 3 August 2020

³⁰ Pambo K O, 'Designating lawyers as reporting entities under the Kenya's anti-money laundering regime', *Journal of Money Laundering Control*, (2020), 6.

³¹Section 50 and 51, 'Finance Bill' (2019) http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2019/FinanceBill_2019.pdf on 3 August 2020

³² *Finance Act* (No.23 of 2019).

³³ Kamaruddin S, Hamin Z, 'Lawyers' predicaments in complying with the anti-money laundering law in Malaysia', 26, *Journal of Financial Crime*, (2019), 583-596.

international anti-money laundering standards as given by the agency including designating the legal profession, which is highly exposed to the risks of money laundering activities, as Designated Non-Financial Business and Professions (DNFBPs) to monitor and report suspicious activities when engaging with their clients.

Moreover, Kenya is committed to international law as evidenced in Article 2 (6) of the Constitution which provides that, ratification of a treaty forms part of our laws. In this regard, we have an obligation to implement the provisions of the United Nations Convention against Transnational Organized Crime (UNTOC) as embodied in the Proceeds of Crime and Anti-Money Laundering Act. Additionally, it is required to implement the recommendations of the FATF.

Most recently, Kenya has appreciated the potential harsh consequences of failing to recognize their impact in enabling money laundering activities and has taken affirmative measures towards compliance with the FATF recommendations.

The above was demonstrated in January 2022, when the President of Kenya signed into law the Proceeds of Crime and Anti Money Laundering Amendment Act, 2021 which when read together with the Principal Act has designated advocates, notaries and other independent legal professionals including partners, sole lawyers and employees of professional firms as reporting entities; and designated the Law Society of Kenya as the supervisory body for this new role.

The importance of regulating the profession together with its impact is tremendous. Conceivably, imposing such compulsions whilst maintaining the dignity of the profession calls into question how the law can create the balance to ensure that the legal profession is not overwhelmed by the contemporary duties as reporters of money laundering activities.

1.2. Statement of the Problem

The vulnerability of the legal profession to money laundering activities and its fundamental role in gatekeeping in Kenya, has played a major role in including legal practitioners as a Designated Non-Financial Businesses and Professions. In the past, this inclusion has continuously been opposed due to professional ethical conflict between anti-money laundering reporting obligations and confidentiality and advocate-client privileges, posing a challenge to implementation of the FATF recommendation. Furthermore, there is not enough studies on how to overcome these implementation challenges which leaves a disparity as to how the recommendations can be less burdening to the legal profession as well as allowing the profession to enjoy its rightful privileges.

Certainly, the legal profession is still opposed to this duty citing various challenges of implementation and some have made court applications seeking conservatory orders to stop the implementation of the sections of the Proceeds of Crime and Anti Money Laundering Amendment Act, 2021 from taking effect.

Accordingly, this research shall focus on the challenges in implementing the directive of designating lawyers as DNFBP's as well the hindrances and obstacles faced. It shall also study and determine the issues arising and propose the way forward on what Kenya has to do to overcome the obstacles of implementation.

1.3. Objectives of the Study

The general aim of the research is to make a case for the need to reform Kenya's anti-money laundering regime by amending its current legal framework and policies, to ensure effective implementation of FATF recommendation to include the legal profession as DNFBPs and how the profession can be cushioned to undertake the fight against money laundering.

The study will also focus on the following objectives:

- a) To assess the importance of including the legal profession as DNFBPs.
- b) To identify the challenges hindering the comprehensive implementation of the FATF recommendation of lawyers being gatekeepers of money laundering in Kenya.
- c) To determine the necessary reforms that can be adopted in Kenya's AML regime when including lawyers as DNFBPs.

1.4. Hypothesis

1. the legal profession's vulnerability is very high as it is not obligated to report any suspicious activities.
2. the professions' ethical obligations of maintaining attorney client privilege in all transactions, has largely contributed to the inability to implement the FATF lawyer regulations.

1.5. Justification of the Study

Recent studies have shown that criminals have shifted their targets of money laundering activities from financial institutions to the legal profession due to the confidentiality protection and strict compliance of the anti-money laundering regulation in the financial sector.³⁴

The anti-money laundering regime in Kenya, has now included the legal profession which as reporting entities which will reduce their appeal to money launderers. This has been a controversial topic as scholars have observed that mechanism to fight money laundering all already in existence in the financial sector and the inclusion of lawyers is only duplicating efforts, amongst other challenges. In this view, it is paramount to identify the challenges that obstruct implementation along with the proposed cures to the existing gap.

This research seeks to propose reforms of the current AML regulation in Kenya to policy makers, legislators and legal practitioners. Furthermore, the study will put emphasis on the role of the legal profession in perpetrating or fighting money laundering and will inspire them to champion positive amendments to the recent AML legislation and its control in Kenya, ensuring that the ethics imposed on the legal profession is respected even as they are discharging their gatekeeping role.

1.6. Research Questions

This paper answers the following questions:

- (a) Is it important and necessary to include the legal profession as reporting entities?
- (b) What are the challenges that hinder the comprehensive implementation of the FATF recommendation of lawyers being gatekeepers of money laundering?
- (c) What approach to implementation would cushion the legal profession and encourage responsibility in their role as reporting entities?

1.7. Theoretical Framework

1.7.1 Public Interest Theory

The main theoretical framework underlying this research is the public interest theory of regulation. The principle of holding lawyers accountable for their contribution to money laundering and avoiding justification to this obligation, is examined by the thoughts of Arthur Cecil Pigou. The theory suggests that, regulation is instituted by officials to counteract market failures and maximize the common

³⁴Choo K K R, 'Designated non-financial businesses and professionals: A Review and analysis of recent financial action task force on money laundering mutual evaluation reports' 27, Security Journal (2014),2.

good.³⁵ To put it more simply, it proposes that regulators possess adequate information and power to promote and preserve public interest. Pigou, in his book 'The Economic Welfare', argued that government intervention is justified as regulation ensures the welfare of a society is promoted in contrast with advancing the interests of well-organized stakeholders.³⁶ At times, the regulators may conduct a cost benefit analysis to determine the best practical laws that serve and benefits the public.

We can say that, the public interest theory assumes that markets and businesses are doomed to fail if neglected and further proposes that government regulation is free of charge. Moreover, it presupposes that regulators have sufficient information and enforcement powers to effectively promote the public interest. Pertaining to this study, regulators in Kenya such as the Law Society of Kenya have the power to regulate the legal profession and require it to be gatekeepers of money laundering activities, as this theory suggest that lack of such regulation may lead to the failure of the society. This is because, as discussed above, to amend the inequitable practices that promote concealment of funds, regulation should be supplied to cater for the demand from the public for their interests to be taken into account.³⁷

While this assumption may be optimistic, the public interest theories of regulation have been the object of criticism. Firstly, the hypothesis that government regulation is efficient or effective, is deemed to have been invalidated by empirical research. Secondly, it has also been argued that it is impossible to test or refute the public interest theories of regulation since they are incomplete. Thirdly, the formation of public preferences and the translation of these interests into welfare maximizing regulatory measures lacks from these theories.³⁸ Lastly, facts are observed in social reality which are not well accounted for by public interest theories.

Conversely, due to the ethical obligations to maintain confidentiality when dealing with their clients and their respective properties, advocates are empowered to escape their public duty to report suspicious activities linked with money laundering. This denotes that the legal profession is somewhat dominant in the regulatory processes as it only furthers its own self-interests as supported by the private interest theory.

³⁵ Bailey J and Thomas D, 'Regulating away competition: The effect of regulation on entrepreneurship and employment' Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, (September 2015), 5.

³⁶ Shleifer A, 'Understanding regulation', 11, European Financial Management (2005),439.

³⁷ Masur J S, Posner E A, 'Toward a pigouvian state' ,164, University of Pennsylvania Law Review,(2015), 93.

³⁸ Posner A, Theories of economic regulation") The Bell Journal of Economics and Management Science, 5 (2), (1974), 335-358.

The private interest theories explain regulation from the conduct of interest groups³⁹ such as firms, consumers, regulators, legislators, unions and DNFBPs among others. This theory assumes that in the course of time, regulation comes to serve the interests of the industry involved. Legislators usually require agencies to regulate an industry if abuse of a dominant position is detected.⁴⁰ In the course of time, other political priorities appear on the agenda and the monitoring of the regulatory agency by legislators is relaxed. The agency then tends to avoid conflicts with the regulated entities because it is dependent on them for its existence.⁴¹ This theory is not clear as to why an industry succeeds in subjecting an agency to its interests but cannot prevent its coming into existence. Perhaps this has also contributed to the legal entities turning a blind eye on regulation of the legal fraternity by requiring them to act as reporting bodies.

In this view, confidentiality and attorney-client privilege principles have been identified as amongst the hurdles of effective implementation of the lawyer's regulations as recommended by the FATF. Due to the nature of the profession, the relationship between a lawyer and their client is confidential.⁴² Moreover, this position has been reiterated by the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct.⁴³ Many studies have argued that the duty of confidentiality overrides disclosure requirements and that the same may not be diluted as it would undermine the constitutional rights of the client to a fair trial⁴⁴ as well as public confidence in the sanctity of the advocate-client relationship.

The equitable doctrine of confidentiality seeks to protect confidential information provided by one party to another in circumstances which import an obligation not to disclose that information or to use it for unauthorized purposes. Therefore, the rationale underlying the protection of confidential information is that a diverse range of commercial, professional and other relationships require confidentiality in order to function effectively and that the protection of these relationships will serve the public interest.⁴⁵ The rationale for the doctrine of confidentiality in law practice can be found in the decision by Jessel M.R. in the Chancery Division in **Anderson v. Bank of British Columbia**.⁴⁶

39 Hertog J, Review of Economic Theories of Regulation, Jalling C Koopmans Research Institute, 2010.

40 Hertog J, Review of Economic Theories of Regulation, Jalling C Koopmans Research Institute, 2010.

41 Ludwig M, *A Critique of Interventionism*, Foundation of Economic Education, 1996.

42 *Anderson v Bank of British Columbia* (1876) 2 Chancery Division, 644.

43 Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct, on 6 January 2021.

44 Article 50, The Constitution of Kenya (2010).

45 Koomen, K., "A review of the English public interest defence and the options for Australia", Queensland University of Technology Law Journal, (1994), 56.

46 (1876) 2 Ch d 644.

However, it is important to note that there are circumstances in which courts will refuse to protect information given pursuant to an express or implied duty of confidence on the basis that to do so would be contrary to other public interests, for instance, where the party to whom the duty of confidence is owed is not a government, the circumstances in which information may be disclosed and to whom is the subject of continuing judicial debate and has been so for over a century.

The Doctrine of Confidentiality is one of the oldest doctrines and yet it faces vast controversy.⁴⁷ With the recent developments in technology and law, various individuals are using legal professionals to further money laundering activities which sabotages the fight against money laundering and aids the criminals to be sheltered through the confidentiality doctrine. We may deduce that confidentiality and privilege seek to protect natural justice as envisaged in article 31 and 35 of the Constitution of Kenya in regards to privacy and access to information.⁴⁸

Nonetheless, the Public Interest Theory of Regulation seeks to encourage the legislators in Kenya to change lawyers' actions and mannerisms by drafting and enforcing legislation that overrides the confidentiality principle to a certain extent thereby allowing the profession to disclose and report suspicious activities, as a matter of public interest justification.

Many lawyers are persistent in opposing their anti-money laundering obligation. However, not all dispute it and the split in inclination of the same could be based on two philosophical outlooks. On one side, the legal practitioners who oppose their reporting obligation assert that their duty is solely to administer justice and not to fight crime. Further, they emphasize that their anti-money laundering role should not challenge their professional duties.

On the contrary, those who support the obligations argue that they not only have a duty to their clients but they also have a responsibility to undertake positive actions at all costs even if they may require a lawyer to breach the confidentiality rule, for the common good to be achieved.⁴⁹

This theory also considers the externalities of cost benefit analysis. Those who oppose the role suggest that the costs of obligating the legal profession to report may be too high especially for the private firms while proposers believe that the costs applied to establish reporting mechanisms will be beneficial to the public. According to Pigou, the benefits of implementation should outweigh the

⁴⁷ Heather, F.D., "Attorney-client confidentiality: a new approach", 4 No. 3, Hofstra Law Review, (1976), 685.

⁴⁸ Article 31 and 35, Constitution of Kenya (2010).

⁴⁹ Ali N T, 'States' Varied compliance with international anti-money laundering standards for legal professionals', 88, Nordic Journal of International Law (2019), 297.

costs.⁵⁰ This study shows that these costs may seem high at the commencement of implementation but will be beneficial in the end, as it projects reduction of money laundering in the global spectrum.

1.7.2 Transparency-Stability theory

Regulation of a state is vital as it ensures continuity and 'saneness'. It would be difficult to imagine what kind of society Kenya would be without regulations governing business and even personal relationships. As Gichuki N.E (2020), rightly put it, regulation is not only for public interests but it also serves private interests.⁵¹ He also asserts that the main aim of regulating any jurisdiction is to ensure that conflicts that arise are well resolved and promoting transparency in all institutions as well as individuals. In the same breathe; Tadesse (2006) adores regulation for the sole reason that it achieves efficient allocation of resources by applying a higher degree of transparency and disclosure in dispersing relevant information.⁵²

Money laundering is an economic crime that threatens to destabilize our economy. According to the Public Interest Theory, if a natural person or a company has knowledge that a transaction they have handled or have come across, depicts money laundering, then such information should be shared with the relevant authorities to enable its investigations. Thus, this theory in respect to this study advocates for disclosure of information by the legal profession if it is in the interest of the public good, as the citizens of a particular jurisdiction have a right to receive such information.⁵³

Therefore, the public interest theory advises that, in order for money laundering to be curbed, disclosure by reporting entities should be enforced and thus supports lawyers being included as DNFBPs. Conversely, this research investigates whether such obligations imposed on law firms are excessive especially if they are already many reporting entities such as banks, which could only lead to dilution of valuable information.⁵⁴

Additionally, the public interest theory is contrasted with the theory of absolute confidentiality, which throws a spanner in to the works. The very same theory that champions disclosure by lawyers cannot

⁵⁰ Pigou A C, 'The economics of welfare', Macmillan & Company Limited (1932), 329.

⁵¹ Gichuki N.E, 'The conflict between anti-money laundering reporting obligations and the doctrine of confidentiality for legal practitioners in Kenya' ahead-of-print *Journal of Money Laundering Control*, (2020).

⁵² Tadesse S, "Economic value of regulated disclosure: evidence from the banking, sector", *Journal of Accounting and Public Policy*, (2006).

⁵³ Yeandle M., Mainelli M., Berendt A. and Healy B., "Anti-money laundering, Prentice-Hall, engle wood cliffs, requirements: Costs, benefits and perceptions", Institute of Chartered Accountants in England and Wales and the Corporation of London City, Research Series No. 6, (2005).

⁵⁴ Becker G.S, "Crime and punishment: an economic approach", 76 No. 2, *Journal of Political Economy*, (1968), 169-217.

ignore the duty of a lawyer to maintain confidentiality, in order to maintain confidence in the legal profession and protect the advocate client relationship. Confidentiality in the legal profession is highly regarded and cannot be disputed. Dean Monroe Freedman, a strong proposer of this theory, holds the view that a third party who is innocent should not be subdued.⁵⁵ Concisely, this theory suggests that the primary role of an advocate is to protect their clients' interest first and the same should not be limited.

He envisions one exception to the duty of confidentiality: the very life of an innocent third party must not be subordinated. As per the discussions above, this theory is in favour of the advocates who oppose their role in combatting money laundering as their mandate is to protect their clients' interests at all times and thus this role should not be limited in any way as it absolves the very essence of the legal practice.

1.7.3 Utilitarianism theory

This theory was developed by Jeremy Bentham and Stuart Mill who determined that in life, an individual is motivated by either avoiding pain or the quest to be happy. The theory looks at the consequences of actions taken, that is, what is right and what is wrong. It does not encompass one's individual interests but looks at the society's interest.⁵⁶ According to Bentham, human rights should not overpower public good and thus is against those who oppose the gatekeeping role, as regards legal professional privilege, as privilege exists to foster communication between advocates and their clients. Nevertheless, he proposes that information obtained from a client should not be withheld if its stands to benefit a guilty party.⁵⁷

At this standpoint, this theory does not support lawyers' justification of avoiding their inclusion as DNFBPs due to the attorney-client privilege. Furthermore, it insinuates that the professional privilege should not outweigh wrongdoing that is intentional because of the background knowledge that their communication is sealed. Lastly, it also maintains that some advocates apply confidentiality incorrectly as they remain silent on issues that are illegal despite being aware and allowing crime to be sustained.

1.7.4 The deterrence theory

To deter means to punish, sanction or penalize as applied by the legal authority or the state heads. This theory was developed by Jeremy Bentham and Cesare Beccaria who believed that punishing

⁵⁵ Freedman M, "The professional responsibility of the criminal defence lawyer: the three hardest questions", 64 No. 8, Michigan Law Review, (1966), 1469.

⁵⁶ Harsanyi J.C. , "Choice welfare", 12-4, Social Choice and Welfare, (1995), 319.

⁵⁷ Fischel D.R, "Lawyers and confidentiality", The University of Chicago Law Review, 65, 1 (1998), 22.

people for wrongdoing achieved the goal of a society, which is to limit crime.⁵⁸ Accordingly, Proceeds of Crime and Anti-Money Laundering Act aims to deter crime by imposing punishment for those who are found guilty of money laundering. It provides for confiscation of property obtained from illegal activities and this instills fear to criminals, deterring them from committing crime in the first place.

The main pitfall of this theory is that some of the consequences of money laundering is that the sentencing is not proportionate to seriousness of the crimes and thus do not sufficiently deter crimes.⁵⁹ The relevance of this theory to this study is that, money laundering has been criminalized in Kenya and thus several laws have been promulgated as a way to hinder furtherance of this crime and to attempt to curb it completely.

1.8. Literature Review

1.8.1 the proponents of the inclusion of lawyers as DNFBPs

According to the United Nations, the global estimate of money laundering in a year constitutes \$800 billion - \$2 trillion in current US dollars and or two to five percent of global GDP.⁶⁰ Corruption and fueling organized crimes are recognized as some of the obstructive effects that emanate from money laundering.⁶¹ As earlier discussed, the FATF report classifies the legal profession as a high-risk target for laundering of money. The report concludes that the specialized legal and notarial skills of the legal profession to complete various transactions makes them vulnerable to criminals in their ML activities. Utama affirmed this where he explained that, legal professionals can easily manipulate the system by using their specific knowledge and skill set.⁶²

For the reason that lawyers are extremely vulnerable to the aforesaid activities, it⁶³ is crucial for them to be included as DNFBPs. The profession enjoys expertise which is applicable in complex and privileged commercial transactions. With this in mind, many criminals are taking advantage and turning to the profession to facilitate their crimes, due to the privileged relationship they form with

⁵⁸ J Mitchell Miller, *21st Century Criminology*, (Thousand Oaks, Calif: Sage, 2008) (Volume 2), 236.

⁵⁹ Cassella D, "Terrorism and the financial sector: Are the right prosecutorial tools being used?" 7,3 *Journal of Money Laundering Control*, (2004), 281-285.

⁶⁰United Nations: Office on Drugs and Crime, 'Money-Laundering and Globalization', <https://www.unodc.org/unodc/en/money-laundering/globalization.html>, on 14 August 2020.

⁶¹United Nations: Office on Drugs and Crime 'Introduction to Money-Laundering' <https://www.unodc.org/unodc/en/money-laundering/introduction.html?ref=menu> on 14 August 2020.

⁶²Financial Action Task Force, "Money laundering and counter terrorist financing vulnerabilities of legal professionals", (2013a), at Paris, France available at: www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf, on 26 January 2020.'

⁶³Utama P, 'Gatekeepers' roles as a fundamental key in money laundering', 6, *Indonesia Law Review* (2016), 186.

their legal representatives. As Gikonyo explains, lack of regulation inclusion of lawyers as reporting entities may continue encourage criminals to exploit and abuse the professional privilege.⁶⁴

What is more, the profession should not proceed to ignore their role in facilitating this offence as they are at the center of the money laundering menace. Terry agrees that indeed the profession should be regulated by including them as DNFBPs noting that lack of regulation continues to offer a breeding ground for money laundering activities due to the professions' attractiveness.⁶⁵ Mniwasa, goes further to explain that the disguise of illicit funds is easily assisted the profession knowingly and unknowingly. Firstly, he argues that a lawyer is in a position to create offshore accounts on behalf of their clients and maintain their monies through the trust accounts. Secondly, he observes that shell companies created by lawyers are occasionally utilized for purchase of real estate, which are less suspicious activities. Thirdly, he asserts that lawyers offer legal opinions that facilitate the activities for laundering money. Lastly, he confirms that lawyers hinder investigations when they invoke the privilege and confidentiality principles.⁶⁶

Needless to mention, we can deduce that the legal profession has in fact, a significant involvement in aiding and protecting the concealment of illegally obtained proceeds, which then undermines the integrity of the profession.⁶⁷ All the same, as demonstrated by Newsbury, unless States address the exemption of lawyers as DNFBPs, criminals will continue to be motivated to exploit the profession and shall remain vulnerable whilst straining the whole essence of the AML response.⁶⁸ Additionally, Hatchard reiterates this position and discusses that failure to fulfil the AML obligations may lead the profession to face dire consequences.⁶⁹

Notably, even as we highlight the vulnerability of the legal profession, it is important to point out that some lawyers lack awareness of their attractiveness. It would be meaningless to enforce recommendation 16. Agreeably, Go, Benarkah and Simanjuntak, all propose that the lack of information on the impact of the profession in money laundering dilutes the importance of

⁶⁴ Gikonyo C, 'The legal profession in Kenya and its anti-money laundering obligations or lack thereof,' 22, *Journal of Money Laundering Control* (2019), 248.

⁶⁵ Terry L.S and Robles J.C.L., 'The Relevance of FATF's Recommendations and Fourth Round of Mutual Evaluations to the Legal Profession', 42, *Fordham International Law Journal* (2018), 630.

⁶⁶ Mniwasa E. E, 'Tackling money laundering in Tanzania: Are private legal practitioners crime enablers or ineffectual and reluctant gatekeepers?', (ahead-of-print), *Journal of Money Laundering Control* (2020), <https://doi.org/10.1108/JMLC-03-2020-0028> on 12 August 2020.

⁶⁷ Mniwasa E. E, 'Tackling money laundering in Tanzania: Are private legal practitioners crime enablers or ineffectual and reluctant gatekeepers', 7.

⁶⁸ Newbury M, 'Designated non-financial businesses and professions: The weak link in Australia's AML/CTF Regime', 20, *Journal of Money Laundering Control* (2017), 247.

⁶⁹ Hatchard J, 'Legal practitioners as potential money launderers: Beneficial ownership transparency and PEPs: *Solicitors Regulation Authority v Sharif* (2019)', 189.

implementing the reporting obligations.⁷⁰ Possibly, some legal professionals lack knowledge in this area and may be able to protect themselves from nefarious clients. As Lukito suggests, training lawyers in matters money laundering is crucial, to enable them to have a complete understanding of the risks associated with the conducting of financial crimes in the course of their businesses.

It is also noteworthy that most lawyers do not necessarily care to know the source of legal fees as received from their clients even if funds advanced are dirty monies, so long as their fees are fully settled. The profession should not proceed with such contrived ignorance. Duri even goes further to evaluate the probability of a lawyers being money launderers, when they accept dirty money as fees.⁷¹ To add on to this, Hamman and Koen propose that in a bid to curb the assent of receiving legal fees from proceeds of crime, such lawyers should be criminalized for accepting dirty money.⁷²

While there has been much research on the inclusion of lawyers as gatekeepers, few researchers have taken into consideration the various obstacles of implementation and its possible reforms. Studies have shown that the main issue barring effective implementation of FATF lawyer regulations is grounded on the principle of attorney-client privilege. Helgesson and Morth illustrate that lawyers' in general are reluctant to comply with AML obligations because the essence of their occupation to serve their client's interests and maintain confidentiality, jeopardizes the requirement of reporting.⁷³

Another major challenge influencing the inclusion of lawyers as reporting entities is the issue of the high costs involved in establishing an efficient implementation mechanism. Hamin, et.al, evaluate and determine that imposing reporting obligations in small and middle-sized firms may not be practicable, as it will financially burden the firms, which would negate the purpose of establishing their business in the first place.⁷⁴

When we think of legislation, parliament first comes to mind. When it comes to the legal profession in Kenya, the Law Society of Kenya (LSK) occurs to us. If the regulator is not supportive in enhancing

⁷⁰Go L, Benarkah N and Simanjuntak Y. N, 'Legal professions as the reporting parties in anti-money laundering regime: how can professions actively contribute?' 54, SHS Web of Conferences (2018), 5.

⁷¹ Duri J, 'Dirty money as legal fees in Namibia and Zimbabwe: Are lawyers laundering proceeds of crime'? 23 Journal of Money Laundering Control (2020), 315.

⁷² Hamman A and Koen R, 'Pecunia Non Olet: Dirty money as legal fees', 1, Journal of Anti-Corruption Law (2017), 116.

⁷³ Helgesson K S and Mörth U, 'Client privilege, compliance and the rule of law: Swedish lawyers and money laundering prevention', 69, Crime, Law and Social Change (2018), 229.

⁷⁴ Hamin Z, Othman M B and Kamaruddin S, 'When money is the reason: preliminary evidence of legal business compliance with anti-money laundering (AML) obligations.', 25, Pertanika Journal of Social Sciences and Humanities (2017), 154.

the role of lawyers as Gatekeepers, compliance is impeded as reporting obligations are not conferred. Kamaruddin and Hamin deduce that this also applies in Malaysia.⁷⁵

1.8.2 the opposers of the inclusion of the legal profession as DNFBPs

We have established that lawyers should be included as DNFBPs because of their vulnerability to money laundering. Notwithstanding this position, some authors are opposed to such enforcement for one reason or another. For example, Gichuki chooses to justify that lawyers should not be required to report suspicious activities mainly due to their duty to their client to maintain confidentiality of which should not be breached, but his discussion fails to address the vulnerability and misuse of their role.⁷⁶

Some lawyers' outlook on this issue is that, the government has a duty to combat money laundering and the legal profession has absolutely no business in being their watchdog or fight crime instead, they have a duty to represent their client's interest. This position has been echoed by the American Bar Association (ABA) which vehemently opposes the reporting obligation noting that, acceptance of the said duty would undermine the independence of the profession and reduce it to a mere reporting government agency.⁷⁷

Similarly, Kamarrudin, Othman and Hamin, agree with the erosion of independence. The authors further contend that, a lawyer is also exposed to criminal prosecution or even a malpractice suit whereby he proceeds to offer legal services to a client who is unaware of the filing of a suspicious report.⁷⁸ Go and Benarkah, also discuss the impact of the code of conduct regulating the profession and its contribution towards the inability to implement the FATF recommendation, as it requires revealing confidential information if one suspects their client.⁷⁹

Throughout the literature, there is consistent evidence that combatting money laundering is paramount in any state. Additionally, overcoming implementation challenges, can actively contribute towards fighting money laundering. However, despite the importance of enforcing lawyer AML obligations, Kenya has experienced the aforementioned hurdles in regards to implementation and is in a gridlock on the way forward. It is evident that the vulnerability of the legal profession cannot be

⁷⁵Kamaruddin and Hamin, 'Lawyers' predicaments in complying with the anti-money laundering law in Malaysia', 587-588.

⁷⁶Gichuki N E, 'The conflict between anti-money laundering reporting obligations and the doctrine of confidentiality for legal practitioners in Kenya', (ahead-of-print), *Journal of Money Laundering Control* (2020), 5,8.

⁷⁷The American Bar Association, 'Gatekeeper regulations on attorneys,' https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/bank_secretcy_act_on 5 August 2020.

⁷⁸Hamin Z, Kamaruddin S and Rosil W R W, "'Trust me; I'm your lawyer": Lawyers' reporting duty under AML/ATF law in Malaysia,' 3, *Journal of ASIAN Behavioural Studies* (2018),4-6.

⁷⁹Go L and Benarkah N, 'Quo vadis legal profession participation in anti-money laundering', 22, *Journal of Money Laundering Control* (2019), 764.

disputed. However, when it comes to implementation there exists different perspectives, that is those who are for such inclusion and those who oppose the obligation entirely. This study insists that the implementation gap should be bridged.

Nonetheless, lawyers should not justify their attorney client privilege against the fight against money laundering. When it comes to recommendations such as client due diligence, the same should not be resisted as it set good standards in the profession.⁸⁰

To sum up briefly, whereas Kenya may benefit from amending the AML laws to increase support and incite compliance by the legal profession such amendment may not be sufficient. Perhaps we should borrow and learn from other jurisdictions, as Pambo maintains, unless harmony is achieved between the duty to act as reporting entities and advocate client relationship, most legal practitioners will continue to oppose their obligation to report. The suggested reforms in this paper are mirrored in Pambo's thoughts. Namely, he recommends lifting the veil of confidentiality to disclose illegal financial activities. Further, he proposes dissemination of information in respect to money laundering to raise awareness to the vulnerability of the legal profession.

As for LSK, they should consider working directly with policy makers to ensure that the reporting obligations do not superfluously infringe upon lawyers' duties to clients as a way of striking a balance. Maguchu, outlines that once the regulator is involved in the legislation, it eases up stringent obligations that would stiffen the essential duties and at the same time maintain the rule of law.⁸¹ Rather as Gikonyo suggests, the drafting of the provisions including lawyers as DNFBPs can be done in such a manner that the disclosure requirements do not breach their professional duties.⁸²

Another way to resolve the implementation challenge may be criminalizing the offence including measures such striking off a lawyer from the roll of advocates if found guilty of facilitating proceeds of crime. Middleton and Levi suggest that, criminal sanctions for lawyers who breach the money laundering obligations should be introduced as a way to deter money laundering activities by the legal professionals.⁸³In addition to the aforementioned reforms, uniformity of AML laws, as suggested by Keesoony may be beneficial in strengthening the AML regime altogether and consequently

⁸⁰ Sahl J P, 'Lawyer Ethics and the Financial Action Task Force: A call to action Part I: combating threats to the international financial system: The Financial Action Task Force', 59, *New York Law School Law Review* (2014), 484.

⁸¹Maguchu, 'Money laundering, lawyers and president's intervention in Zimbabwe', 20, *Journal of Money Laundering Control*, (2017), 139.

⁸²Gikonyo C, 'Detection mechanisms under Kenya's anti-money laundering regime: omissions and loopholes', 21, *Journal of Money Laundering Control* (2018), 66.

⁸³Middleton D and Levi M, 'Let Sleeping Lawyers Lie: Organized crime, lawyers and the regulation of legal services, 55, *The British Journal of Criminology* (2015), 649, 650.

detering criminals from money laundering.⁸⁴ In conclusion, it may be appropriate to indicate that these proposals and other reforms to be discussed in detail may bring Kenya closer to fully implementing FATF recommendation 16 and propel as towards a 'money laundering free' state.⁸⁵

1.9. Research Methodology

This study is underpinned on a doctrinal legal research, which will interrogate the law using primary sources such as the Constitution, statutes and regulations. It shall also analyze secondary sources namely, relevant journal articles, books, internet sources and newspaper articles.

This research also undertakes an assessment of how United States and Malaysia champion self-regulation, as indicated by several scholars, which strongly resists the inclusion of the legal profession as DNFBPs and identifies their respective arguments to the extent that the recommendations are acceptable. In contrast, this paper shall also investigate the public interest rule as applied in the United Kingdom, a common law country, in the effective compliance with the international law regulations on reporting obligations, all while maintaining the dignity of the profession. Kenya may learn lessons from the USA and Malaysia based on the unusual relation between international law compliance and the domestic laws. Kenya may also learn from the UK on various reforms that we may adopt to ensure effective implementation of lawyer obligations. This study relies majorly on these jurisdictions for the reasons stated above and supported by the fact that a lot of literature surrounding lawyers and their reporting role, has been reported by numerous scholars.

Further, this research intended to undertake a socio legal research through the qualitative methods. However, the attempt to gather information from lawyers and law firms in Kenya did not bear fruits, as they were not forthcoming with information. In the foregoing, the intended data collection was frustrated and thus reliance of this research shall solely be on the doctrinal legal approach.

2.0 Limitations

The qualitative research has been limited by various circumstances. To begin with, the nature of disclosure required by partners in law firms made the potential interviewees uncomfortable. The intended parties were not open to divulge sensitive data that pertained to their clients.

⁸⁴ Keesoony S, 'International anti-money laundering laws: The problems with enforcement',19, Journal of Money Laundering Control (2016), 132.

⁸⁵ Pambo K O, 'Designating lawyers as reporting entities under the Kenya's anti-money laundering regime, Journal of Money Laundering Control, 2020, 9,10.

Their hesitation could be attributed to the fear of being perceived in a negative light, more particularly as they clients they represent or those who they wish to represent in future, might come across the information given and shy away from approaching such a lawyer and or a law firm.

In the second place, restrictions imposed by the global pandemic, COVID-19, made fieldwork unfeasible and impeded the opportunity to obtain an insightful perspective in respect to the challenges that law firm's face in considering their inclusion to be reporting entities.

To redress this challenge, this research shall solely focus on the qualitative research based on the data, which is readily available by analyzing the legal framework for AML reporting in Kenya. Overall, the research will be predicated on written texts and not interviews, which limits the information gathered to a time specific period.

2.1 Chapter Breakdown

Chapter One gives a background to the area of study. The problem of the statement of the study; the significance of the research; the research objectives and questions; the literature review; the theoretical framework within which the research is based; research hypothesis and research methodology are well indicated and outlined.

Chapter Two analyzes the legal and regulatory framework of money laundering regime in Kenya. It explains what the reporting obligations of the legal profession entails. It also outlines what Kenya has attempted to do. Finally, it interrogates the issues arising that hinder proper implementation of the role of lawyers in anti-money laundering.

Chapter Three discusses how the United Kingdom, United States and Malaysia have approached the FATF recommendations on categorizing the legal profession as DNFBPs. It identifies what lessons Kenya can learn.

Chapter Four gives a synopsis of the findings and conclusion of the research. Recommendations are made on the way forward to ensure effective implementation of designating lawyers as reporting entities in Kenya's anti-money laundering regime.

CHAPTER TWO

THE LEGAL AND REGULATORY FRAMEWORK GOVERNING THE INCLUSION OF LAWYERS AS REPORTING ENTITIES FOR MONEY LAUNDERING IN KENYA

2. Introduction

According to the Financial Action Task Force (FATF), lawyers and other professionals who offer legal and financial advice have become the common element in complex money laundering schemes. Because of the nature services they provide, advocates may become vulnerable to exposure to money laundering activity in the course of representing their clients since there is no central authority for reporting by lawyer.¹

As a result, an advocate or legal firm can be involved knowingly or unknowingly in money laundering and /or financing of terrorism activities thus exposing them to legal, operational and reputational risks. It is therefore important that advocates are equipped with the necessary tools, knowledge, guidance to enable them protect themselves from the risks associated for the offence of money laundering, and terrorist financing in dealings with their clients and to enable them handle cases of money laundering and represent their clients effectively.

In recognition of this risk, legal professionals are designated as reporting entities under the FATF recommendations. This chapter explores the international and national measures that are in place to prevent lawyers from exploitation as money laundering channels. It also examines the constraints placed on the profession by these measures and the effect it has on lawyers in the exercise of their profession.

2.1 The International Anti-Money Laundering Instruments

As we discuss the international instruments that govern money laundering, the study acknowledges that Kenya through its Constitution backs international laws by recommending implementation of those laws especially those laws applicable to govern global issues such as, economic crimes. For instance, Article 132 (i) (c) (iii) of the Constitution of Kenya echoes the international obligations to fight corruption as it requires the President to submit reports to the National Assembly for debate, showing the progress that Kenya has made towards fulfilling international obligations.² The

¹ Financial Action Task Force on Money Laundering, Review to identify non-cooperative countries or territories; increasing the worldwide effectiveness of anti-money laundering measures, 22 June 2001 3-6; Financial Action Task Force on Money Laundering, 2 July 2004, 6 and Financial Action Task Force Report, Money Laundering and Terrorist Financing vulnerabilities of the legal profession, June 2013, 13.

² Article 132, Constitution of Kenya (2010).

alternative views that exist on whether Kenya is a dualist or monist State required ratifying of international instruments. On the one hand, some scholars believe that Kenya has shifted from dualist to monist while others are of the opinion that the Constitution does not expressly state whether Kenya is a dualist or monist. For example, in the case of *Beatrice Wanjiku & Anor Vs. Attorney General & Anor (2012)Eklr*, the learned judge Majanja held that, ratifying international in the best interest of the society and in good faith is not intended that such international treaties be superior to legislation that is enacted locally and that local legislation has precedence over the international laws. This study shall determine whether the FATF recommendations are superior to the laws governing the legal profession in Kenya.

Nonetheless, the infliction of the obligations to submit reports on international laws compliance, acts as an oversight to the Executive arm of Kenya by holding the President accountable for updating the law regimes against corruption and other universal troubles. Bearing this in mind, this research shall explore relevant international instruments that are specific to corruption and examines the extent to which Kenya has endorsed them.

2.1.1 The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (Vienna Convention)³

The criminalization of money laundering was initiated through the Vienna Convention that was held in 1988, which compelled its member states to unite and combat money-laundering practices by regulating the various sectors susceptible to it.⁴ It augmented the obligations of states to forbid money laundering and eradicate laws such as the bank secrecy laws that interfered with legal assistance.⁵ Additionally, the convention also provided for the confiscation of criminal assets, thus making crime less profitable.⁶

This convention was primarily concerned with outlawing drug trafficking in the global spectrum by championing regulation that would govern such illegal activities. As such, the regulation would define what money laundering entailed and provide for penalties if a person is found guilty of a money laundering offence.⁷ For instance, the acquisition of property through illegal means and the attempt to conceal the history of the purchase or the origin of the resources applied to purchase the property

³ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), Treaty Series, vol. 1582, p. 95

⁴ Article 3, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

⁵ Article 3, 5 and 7, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

⁶ The preamble, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

⁷ Article 3(b) (i), United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

and or being in possession of goods and property from proceeds of crime amounted to an act of money laundering.

Indeed, it is not only the conversion of the property that is criminalized, but also the concealment of the fact that the property is derived from an offence.⁸ Moreover, the Vienna convention regulates mutual legal assistance,⁹ covers other forms of co-operation and tracing of the proceeds of crime,¹⁰ and encourages international co-operation among signatory states and also allows for information to be distributed across international borders when requests for mutual legal assistance are made.

Although the Vienna Convention does not expressly refer to legal practitioners, it initiated the notion that client confidentiality could be eroded, a possibility which subsequently was extended to the legal profession.¹¹ It challenged the agreements between financial institutions and their clients which stipulated that certain confidential information should not be disclosed to third parties, and provided that confidential information should be disclosed by financial institutions in order to fight crime.¹²

Banks could no longer use confidentiality as an excuse not to divulge certain information. Article 5(3) strictly prohibits countries from invoking bank secrecy provisions. Each state party or relevant authority is authorized to order a bank to make available financial or commercial records of customers for examination before a local judge.

The framework for combatting drug use in Kenya, Narcotic Drugs and Psychotropic Substances (Control) Act (2012), has provided for criminalization of money laundering and defined the occurring incidences under section 50 of the Act. Furthermore, the POCAMLA 2009 has echoed the objectives of this convention as it defines property in the same way that the Vienna convention has and refers to concealment of property obtained illegally, inside and outside Kenya's jurisdiction.

2.1.2 The United Nations Convention against Transnational Organized Crime and the Protocols thereto 2000 (Palermo Convention)¹³

In comparison to the Vienna Convention, the Palermo Convention extended the scope of ML offences beyond drug trafficking and related offences. The offences set out remain the key focus of global AML initiatives and calls on all states parties to enact laws which criminalize the intentional

8 Article 3(b) (i), United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

9 Article 7, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

10 Article 9, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

11 Recommendation 16, Financial Action Task Force.

12 Articles 5(3) and 7(5), United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

13 UNGA, United Nations Convention Against Transnational Organized Crime , UN A/RES/55/25 (15 November 2000).

conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action.¹⁴ This provision applies also to the acquisition of such criminal property and it includes an attempt to commit ML. The Convention also criminalizes corruption and it implicitly endorses the FATF Recommendations by encouraging states to comply with internationally established standards in combating organized crime.¹⁵

Article 6 is phrased similarly to Article 3 of the Vienna Convention, and it refers to the conversion or the transfer of property, with the knowledge that such property is the proceeds of crime, in order to hide its criminal origins.¹⁶ Parties to this Convention are compelled to co-operate in certain instances and are required to co-operate in the tracking of suspects who are involved in money laundering and in the tracing of the benefits of crime.¹⁷ The Convention obligates parties to establish legislative measures to give effect to their conventional obligations.¹⁸ Important for the legal profession are the money laundering control measures contained in Article 7 of the Convention.¹⁹ It provides that each State Party shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions.

UNCTOC is the convention, which initiates the legal profession's involvement in combating money laundering. Reference is made to lawyers by implication in Article 7, which imposes a duty on non-financial institutions to report suspicious transactions.²⁰ However, it is Article 31, which refers particularly to the role of lawyers and notaries in combating money laundering. Paragraph 2 provides that State Parties shall endeavor, in accordance with fundamental principles of their domestic law, to reduce existing or future opportunities for organized criminal groups to participate in lawful markets with proceeds of crime, through appropriate legislative, administrative or other measures. Lawyers ought to be employed as part of the armory to combat money laundering. This idea is included in the

14 Art 6(1) (a), UNGA, United Nations Convention Against Transnational Organized Crime.

15 Art 7(3), UNGA, United Nations Convention Against Transnational Organized Crime.

16 Article 6 (a) (i), (a) (ii) and 6 (b) (i), UNGA, United Nations Convention Against Transnational Organized Crime.

17 Articles 16 and 18, UNGA, United Nations Convention Against Transnational Organized Crime.

18 Article 7(2), UNGA, United Nations Convention Against Transnational Organized Crime.

19 Article 7(1) (a), UNGA, United Nations Convention Against Transnational Organized Crime.

20 Article 7(2), UNGA, United Nations Convention Against Transnational Organized Crime .

KYC requirement, the STRs and explicitly in Article 31(2) (b). Lawyers are to assist in the reduction of existing or future opportunities for criminals to launder the proceeds of crime.

The establishment of the Financial Reporting Centre by section 21 of the POCAMLA 2009 has shown that Kenya is in fact compliant with the Palermo convention requirement to develop a supervisory body that oversees and deters money-laundering activities. It is also the nation center for suspicious transaction reporting.

2.1.3 United Nations Convention against Corruption (UNCAC)

UNCAC²¹ was the first global instrument that addressed the issue of corruption nationally and internationally and required states to implement corruption prevention and criminalization measures in both the public and private sector. In relation to this research, it criminalizes the use of proceeds from corruption practices.²² Although UNCAC does expressly deal with the obligation of lawyers to combat money laundering, some of its provisions are relevant to the legal profession. For instance, Article 23(1) (a) (i) is equivalent to Article 3(b) (i) of the Vienna Convention for the reason that it tackles the concealment of proceeds from crimes of corruption and it refers to having knowledge that the property has been derived from a crime. It implies that an individual who alters the property to camouflage its illegal source or assists the perpetrator of the predicate offence shall be held liable for such an offence. In this regard, a lawyer who is aware of the illicit origin of his client's income will fall in this category.²³

Further, a lawyer who has knowledge of the illegal provenance of the money with which he is paid his legal fees could be implicated in this manner. Liability encompasses all kinds of participation in the commission of money laundering offences including association with and conspiracy to commit such offences, as well as aiding, abetting, facilitating and counselling their commission and therefore would make it theoretically possible, with proper evidence having been adduced, to prosecute and convict lawyers who assist criminals on how to launder the proceeds of their crimes.²⁴

Other UNCAC articles also refer to duties of lawyers by implication. The convention refers to customer and beneficial ownership, record keeping, monitoring of cash movements and the reporting of suspicious activities, all of which apply to lawyers.²⁵ In order to prevent and detect the transfers of proceeds from offences, the UNCAC requires that every member state put measures in place for

21 UNGA, United Nations Convention against Corruption, UN A/RES/58/4 (31 October 2003).

22 Article 23 and Article 24, UNGA, United Nations Convention against Corruption.

23 Article 23(1) (a) (i), UNGA, United Nations Convention against Corruption.

24 Article 23, UNGA, United Nations Convention against Corruption.

25 Article 14, UNGA, United Nations Convention against Corruption.

financial institutions to verify the identity of customers and to determine the identity of beneficial owners of funds²⁶ by ensuring the reporting entities file suspicious transaction reports when necessary.²⁷ Additionally, each State Party is required to implement measures to prevent banks that have no physical presence and that are not affiliated with a regulated financial group from being established in their regions.²⁸ Article 52(5) regulates the establishment of effective financial disclosure systems and the creation of appropriate sanctions for non-compliance.²⁹ Impliedly, the UNCAC also places certain duties on the legal profession to be vigilant against corruption and money laundering.³⁰

As this research reflects on UNCAC, section 47 of the Anti-corruption and Economic Crimes Act denotes that a person who is deals with or assists with the handling of property that is suspected to have been acquired through illegal means shall be criminally liable for such an offence. Further section 322 of the penal code deems an individual as guilty for knowingly handling, receiving, retains stolen goods.

In light of the above, we may rightfully say that money laundering is criminalized by the above sections of the Kenyan law. As such, the legal profession is bound to some extent, in ensuring that they do not assist, handle or retain stolen funds in any way may be held criminally liable.

2.1.4 Financial Action Task Force (FATF) Recommendations for Lawyers

The United Nations has recognized the FATF Recommendations as the universal standard for anti-money laundering compliance. Initially, the FATF Recommendations made no mention of advocates and certified public secretaries but this position changed when the G7 finance ministers, in their report to the heads of state and government meeting in Okinawa, Japan, July 2002, called upon the FATF to revise its Recommendations and examine the position of “gatekeepers” to the financial system, namely, professionals such as lawyers and also the need for the legal profession to be involved in the fight against money laundering.³¹

In light of this, the FATF came up with the revised version, Recommendations 40, of which provisions relied on the EU Directive 2001. These recommendations, introduced lawyers as gatekeepers

²⁶ Article 52(1), UNGA, United Nations Convention against Corruption.

²⁷ Article 14(1) (a), UNGA, United Nations Convention against Corruption.

²⁸ Article 52(4), UNGA, United Nations Convention against Corruption.

²⁹ Article 52(5), UNGA, United Nations Convention against Corruption.

³⁰ Article 58, UNGA, United Nations Convention against Corruption.

³¹ The Financial Action Task Force (2001-2) Report paragraph 32.

unequivocally for the very first time.³² Apart from their vulnerability, lawyers can be intermediaries for money launderers as well as offer expert legal advice.

In this view and in specific reference to legal professionals, the FATF issued a Guidance Note, which was to shepherd the advocates as they find their way around the implementation of their new role. One example that was included in the guidance note was the proposal for lawyers to adopt a risk-based approach at the time of conducting client due diligence and the level of verification is dependent on risk, that is, the higher levels of verification were applicable to the greater risks.³³ Likewise, legal professionals were expected to institute systems and measures that would detect and prevent money laundering and terrorist financing operations that could potentially arise from the professional relationships with their clients.³⁴

These systems will then identify and mitigate money laundering and terrorist financing risks before they progress into an illegality, thus reducing the expansion of these economic crimes.³⁵ Advocates are to carry out a risk assessment of their clients based on various risk categories such as country or geographic risk, client risk, and risks associated with the particular service offered. The weight given to these risk categories (individually or in combination) in assessing the overall risk of potential money laundering or terrorist financing may vary from one legal professional and/or firm to another, particularly given the size, sophistication, nature and scope of services offered by the legal professional and/or firm. A significant factor to consider is whether the client and proposed work would be unusual, risky or suspicious for the particular legal professional with a higher standard of controls.³⁶

Furthermore, issues such as suspicious reporting transactions, CDDs and mandate of DNFBPs as AML gatekeepers were also factored in the recommendations.³⁷ The FATF recognized the tactical role that the legal profession could play in reducing or avoiding the ill intentions of money launderers.³⁸ The concern was that criminals could make use of “gatekeeper professionals” such as lawyers to help them launder their ill-gotten gains by acting as intermediaries or by giving the criminals expert legal advice.³⁹

³² Recommendation 12 & 16, Financial Action Task Force, 40 Recommendations (2003).

³³ Recommendation 1, Financial Action Task Force.

³⁴ Recommendation 6, Financial Action Task Force

³⁵ Recommendation 22 (d), Financial Action Task Force.

³⁶ Recommendation 23 (a), Financial Action Task Force Recommendations (2012-2019).

³⁷ Financial Action Task Force (2002) Consultation Paper Paragraph 5 at 3.

³⁸ Financial Action Task Force (2002) Consultation Paper Paragraph 5 at 3.

³⁹ Financial Action Task Force (2001), Financial Action Task Force (2006), Financial Action Task Force (2007) Financial Action Task Force (2013).

It should be noted that the objective of the record-keeping requirements is to make it easier for government officials to probe and prosecute violations. Lawyers, notaries, and other independent legal professionals, as DNFBPs, are subject to customer due diligence and record-keeping requirements when they prepare or execute transactions for a client.⁴⁰

Lawyers are not only under an obligation to file STRs when representing clients, but also not to divulge the making of the STRs to their clients which has affected the legal profession and its capacity and willingness to represent a certain group of clients.⁴¹ These provisions are applicable only to lawyers in private practice meaning that they exclude in-house counsel and refer to “legal privilege” but it is not stipulated clearly when and how legal privilege applies during suspicious transaction reporting.⁴² Lawyers are, therefore, not required to file STRs in matters covered by professional secrecy or legal professional privilege.⁴³

Interestingly, the FATF in 2019 reviewed its guidance note to the legal profession and their obligation to report suspicious activities due to the dynamic nature of the private sector engagement and the concerns regarding reporting.⁴⁴ In the eventuality that a lawyer seeks to report a suspicious transaction and fears the repercussions that could arise, they could include the protections as listed under recommendation 21 to avoid civil liability for compliance with their reporting obligation in good faith.

On the other hand, the IBA’s International Principles on Conduct for Lawyers asserts that clients’ interests are paramount but an advocate owes a duty to court and should act in the interest of justice, overriding the confidentiality justification.⁴⁵ Similarly, the same principle is echoed in the CCBE Code of Conduct for European lawyers⁴⁶ and the ABA Model Rule of Professional Conduct 3.3, in which certain specific obligations to the tribunal take precedence over obligations to that of clients.⁴⁷

In the previous section, we have discussed that Kenya is a member of the Eastern and Southern African Anti-Money Laundering Group, which gives it access to the FATF by providing an avenue

⁴⁰ Recommendation 22(d), Financial Action Task Force (2012).

⁴¹ Recommendation 14, Financial Action Task Force (2012).

⁴² Terry LS “An introduction to the financial action task force and its 2008 lawyer guidance, *Journal of the Professional Lawyer*, (2010), 3-67.

⁴³ Recommendation 16, Financial Action Task Force (2003).

⁴⁴ Guidance for a Risk-Based Approach Guidance for Legal Professionals, Financial Action Task Force, 2019.

⁴⁵ International Bar Association. “Commentary on IBA International Principles on Conduct for the Legal Profession.” 28 May 2011

⁴⁶ Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers”. 2013. https://www.ccbe.eu/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf

⁴⁷ The ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 463 in May 2013 dealing with the ethical dimensions of the ABA’s *voluntary* AML good practice guidance and noting the tensions between compliance with AML obligations and the duty of confidentiality that lawyers owe to their clients.

whereby domestic issues of concern may be elevated to the FATF. In alternate years, the ESAAMLG conducts evaluations to assess the progress of compliance with the FATF recommendations of its member countries.

To eradicate money laundering, cooperative efforts should be applied by not only the financial institutions and DNFBPs but should also include attempts of the Governments. In this view, the FATF has recommended that States should adopt the actions to curb money laundering as those contemplated in the Vienna and Palermo conventions. For instance, the legislature in Kenya should empower authorities who are qualified to impound property and proceeds obtained from money laundering offences. (Recommendation 1).

As a benchmark, the post progress evaluation report as undertaken by the Eastern and Southern African Anti-Money Laundering Group in 2018, Kenya was considered to be compliant for 1 and largely compliant for 24 of the FATF 40 + 9 Recommendations.⁴⁸ Additionally, as reported by the FATF list of countries, Kenya is yet to be recognized as a country that has strategic AML resources.⁴⁹

Noteworthy, this position may change as Kenya has now signed into law the Proceeds of Crime and Anti Money Laundering (Amendment) Act 2021, fully ratifying the FATF recommendations by including lawyers as DNFBPs.

2.2 How Kenya Has Ratified the FATF Recommendations

The vulnerability of the legal profession has been discussed in the previous chapters and to reiterate, it is mainly because they possess skills and professional privilege that can be used to launder money without detection from the regulation authorities. Launderers are cognizant of these benefits and thus place reliance on the legal profession privilege and secrecy to undertake and continue with the illegal transactions which shall be protected from any inquiries and prosecution against them.⁵⁰

Unquestionably, the legal profession is involved in privileged transactions such as incorporation of companies or shell companies, trusts, buying and selling of real property, managing client accounts, litigation and creation and management of charities.⁵¹ In all these affairs, it is evident that lump sums of money is traded and could be a hotbed for money laundering. Consequently, regulation was tightened and expanded to include lawyers as DNFBPs through the FATF gatekeepers' initiative, as

⁴⁸ Eastern and Southern Africa Anti-Money Laundering Group, First Round Mutual Evaluation-Post Evaluation Progress Report Kenya (2018), <https://www.esaamlg.org/reports/Progress%20Report%20Kenya-2018> on 12 November 2021.

⁴⁹ <https://www.knowyourcountry.com/kenya1111> on 21 December, 2021

⁵⁰ FATF 2013, Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals.

⁵¹ Lim, F. E., Anti-Money Laundering Initiatives: Ramifications on the Legal Profession, (2004) ASEAN Law Association Conference 2003.

they have the ability to impact their present and future clients and assist in deterring potential wrongdoing.⁵²

Another factor that attracts launderers to lawyers is the fact that an accused has a right to legal representation. Although lawyers have a role to play in combating money laundering and should be attentive to the fact that they can be accessories to money laundering, the person who is charged with the offence of money laundering, as any other accused, is entitled to legal representation as it is a universally guaranteed right.⁵³

The right to counsel guarantees the implementation of the prerogative against self-incrimination.⁵⁴. Under the Constitution of Kenya 2010, the right to legal representation was given a new lease of life. Legal representation is not only a right but the state has been put to task to ensure that it is guaranteed where substantial injustice will occur. The Constitution recognizes defense by counsel of one's choice and being informed of this right promptly. It further expounds the right to a fair hearing by entrenching the right to have an advocate assigned to the accused person by state and at state expense, if substantial justice would result.⁵⁵

This study shall examine the money laundering regime in Kenya by assessing various statutes that have expressly sanction money laundering activities.

2.2.1 The Proceeds of Crime and Anti-Money laundering (Amendment) Act, 2022

This act seeks to amend the POCAMLA 2009 and make variations that are intended to tackle the money laundering problem that is eminent in Kenya and strengthen legislation by addressing existing loopholes and widening the scope of persons who are considered to be watch keepers.

For instance, and perhaps the most relevant section to this study is the inclusion of lawyers, notaries and legal professionals that are independent as reporting persons under section 2 of the amendment act. The reporting persons are mandated to report suspicious transactions related to money laundering activities during the course of their conduct of business.

The gatekeeping role of lawyers particularized some transactions done on behalf of their clients whereby they expected to be vigilant in detecting money laundering. Section 48 of the act listed the

⁵² FATF 2013, Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals.

⁵³ Article 14(3)(d) The International Covenant on Civil and Political Rights (1966), Article 6(3) The European Convention on Human Rights, Article 8(2) of the American Convention on Human Rights (1969) and Article 7 of the African Charter on Human and People's Rights.

⁵⁴ *Miranda v Arizona* 384 US 436 (1966) and *S v Lwane* 1966 (2) SA 433 (A). Section 203 of the Criminal Procedure Act 51 of 1977; Section 35(3) (j) of the Constitution of 1996. Steytler (1998: 335).

⁵⁵ Article 50(h)

same to include; the sale and purchase of real estate; client account management; banking and securities account management; creating or managing companies; and the sale and purchase of legal arrangements and business entities.⁵⁶

Notably, the act criminalizes the failure to report suspicious activities by providing for criminal liability for professions who fail to comply. Further, the act requires that the reporting obligation is not solely reliant on the managing partner of a professional law firm but also a duty of staff members working under such a firm to report client transactions to the FRC.⁵⁷

The introduction of these new sections has caused an uproar within the legal fraternity in Kenya. The implementation of the act is not absolute as Justice Makau in *Mwaura Kabata v Honorable Attorney General & Others (Petition Number 005 of 2022)*, issued conservatory orders halting the operationalization of the sections including lawyers as DNFbps. The final and nerve wracking outcome of the case shall determine the precedent to be adhered to when it comes to the reporting obligation assigned to the legal profession in Kenya.

2.2.2 The Proceeds of Crime and Anti-Money laundering Act of 2009 (POCAML)

Since the POCAML, 2022 has a conservatory order in place, reliance is still being placed on the POCAML 2009 which defines reporting institutions as financial institutions and designated non-financial businesses and professions,⁵⁸ which definition excludes law firms and law firms staff unlike in the amendment act. Therefore, under this act, professional law firms are not obligated to report suspicious client transactions to the FRC.

Kenya has implemented AML preventive measures through the application of the Proceeds of Crime and Anti-Money Laundering Act 2009 (POCAML), which came into operation on 28 June 2010. AML obligations⁵⁹ are mandatory, as failure to comply with any of these obligations is an offence.⁶⁰

The POCAML provided for and designated various institutions to act as AML supervisory bodies. The FRC is the main supervisory body especially for those DNFbps that are unregulated or self-regulate. To limit the risk of displacement to other sectors, the supervision also covers accountants,

⁵⁶ <https://wamaeallen.com/legal-update-the-proceeds-of-crime-and-anti-money-laundering-amendment-act-2022/> on 22 December, 2021.

⁵⁷ Nigel Shaw & Jean Makaka: The Proceeds of Crime and Anti-money Laundering (Amendment) Bill 2021, https://www.ensafrica.com/news/detail/5030/the-proceeds-of-crime-and-anti-money-launderi?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration on 22 December 2021.

⁵⁸ Section 2, The Proceeds of Crime and Anti-Money Laundering Act of (2009).

⁵⁹ Section 44, 45 and 46 of the Proceeds of Crime and Anti-Money Laundering Act (2009).

⁶⁰ Section 11 of the Proceeds of Crime and Anti-Money Laundering Act (2009).

lawyers, estate agents⁶¹ and any business accepting large cash amounts, like car dealers, auction houses, art galleries and jewelers.

Although the Act overrides any laws restricting disclosure of information and any confidentiality obligation,⁶² it is important to highlight that this Act does not create any obligations specific to lawyers with respect to due diligence and reporting money-laundering activities of their clients, neither is the legal profession listed as a reporting institution in the Act. It recognizes and justifies this exclusion by application of the advocate-client privilege.⁶³ All the same, this provision is only applicable in regards to giving of advice to the client in the course and for purposes of the professional employment of the advocate or in connection and for the purpose of any legal proceedings on behalf of the client.⁶⁴

Despite the foregoing, the Act also states that, the High Court may, on application, order an advocate to disclose information available to him in respect of any transaction or dealing relating to the matter under investigation. Nonetheless, it is asserted that the same shall not require an advocate to comply with an order to the extent that such compliance would be in breach of privileged information.⁶⁵ The provisions of Subsections 3 and 4 are both confusing and contradictory to the general principle, but they can be treated as exceptions to the main rule.

Moreover, the Act also provides for anonymity.⁶⁶ It underscores that where any information relating to an offence under the Act is received by the Financial Reporting Centre (FRC) or an authorized officer, the information and the identity of the person giving the information shall be kept confidential.⁶⁷ Additionally, the Act places emphasis on reporting of suspicious activities relating to money laundering to the FRC in the prescribed form and, in any event, within 7 days of the date the transaction or activity that is considered to be suspicious occurred.⁶⁸

Although the thought process of keeping the suspicious reporter anonymous is merited, the advocate will only be anonymous in theory and not in practice. This is because, a client that confided in an advocate, or a client that is involved in a transaction with an advocate would know exactly who he has given his information and brief to. As such, after being reported, the client would obviously be

⁶¹ The EU was in fact the first body to introduce rules concerning the inclusion of lawyers and accountants in relation to reporting requirements. This forms part of the second EU Directive. The FATF included these professions later (Information retrieved from interview with an AML professional, June 2004)

⁶² Section 17, The Proceeds of Crime and Anti-Money Laundering Act of (2009).

⁶³ Section 18 of the Proceeds of Crime and Anti Money Laundering Act (2009).

⁶⁴ Section 18 (2), The Proceeds of Crime and Anti-Money Laundering Act of 2009.

⁶⁵ Section 18 (3) & Section 18 (4), The Proceeds of Crime and Anti-Money Laundering Act of 2009.

⁶⁶ The Proceeds of Crime and Anti-Money Laundering Act of 2009, Section 20.

⁶⁷ The Proceeds of Crime and Anti-Money Laundering Act of 2009, Section 21.

⁶⁸ Section 44 (2), The Proceeds of Crime and Anti-Money Laundering Act of (2009).

able to tell that the advocate broke the confidence and reported him. As such, the anonymity provision is flawed if it were to apply to legal professionals.

Nonetheless, the POCAMLA has continually faced opposition mainly due to the application of the legal professional privilege especially in communication with a client. Undeniably, this privilege is safeguarded under section 134 of the Evidence Act which grants the profession privilege of maintaining information received from their clients as confidential. Lawyers have argued that their duty to report suspicious transaction is tantamount to a breach of privilege. On the other hand, it restricts this privilege and provides for situations in which a lawyer will be required to yield confidential information. The scenarios include where the communication between an advocate and client is for furthering criminal activities and if the client consents for such information to be released.⁶⁹

It has also been challenged due to the lack of clear guidance specifically tailored for the legal profession which then brings about uncertainty. The role of guiding lawyers is assigned to the Law Society of Kenya, which is mandated to supervise the profession as a whole and ensure effective implementation of AML laws. Regrettably, tasking the LSK with supervision of AML may not be viable due to the various roles it plays. This study assesses the strength of the Law Society of Kenya to multitask and limit money laundering in the legal profession despite its lack of manpower. It may be difficult for the Society to successfully discharge its normal obligations and it may not be able to fully focus on guiding the bar of Kenya towards fighting money laundering.

Lastly, for implementation of POCAMLA the staff in the legal firms need to be well trained on the regulations and also the procedures and policies governing AML. Again, one size fits all approach cannot work in training, as training is specific to a particular organization. This means that, without a precedent on training and guidance, a lot of time is placed on trying to train staff instead of employing efforts to achieve the organization's goals. Thus, compliance is avoided.

2.2.1 The Financial Reporting Centre (FRC)

Part III of POCAMLA establishes the FRC as a body corporate, with perpetual succession and a common seal hence becoming a juristic person which can institute legal proceedings, own property and enter into contracts, among other functions, in furtherance of its objectives.⁷⁰ The Financial Reporting Centre (FRC) receives reports from reporting agencies and assists in the identification of the proceeds of crime and the combating of money laundering.⁷¹

⁶⁹ The Evidence Act (2014), Laws of Kenya

⁷⁰ Section 21, The Proceeds of Crime and Anti-Money Laundering Act (2009).

⁷¹ Section 23, The Proceeds of Crime and Anti-Money Laundering Act (2009).

Reporting institutions include financial institutions and Designated Non-Financial Businesses and Professions (DNFBPs).⁷² The Act prescribes obligations for Reporting Institutions including putting measures in place to combat money laundering, registering with the Financial Reporting Centre, and submitting specified reports thereof.⁷³ All reporting institutions are obligated under section 45 of the POCAMLA 2009 to verify their customers through Customer Due Diligence (CDD) and Know Your Customer (KYC) systems by maintaining records and requesting for identification details.⁷⁴

Where the sector is regulated, the FRC in conjunction with the regulator ensures that the relevant institutions enforce the anti-money laundering laws. In contrast, in the unregulated sectors the FRC collaborates closely with the reporting institution or person.

In particular regards to CDD, advocates are advised to conduct face to face interviews with high risk clients. However, this should not insinuate that interviews held through the prevalent electronic communication channels equates a high risk of illegalities. Legal firms should nonetheless set up efficacious mechanisms to identify their clients even if briefs are taken up electronically.⁷⁵

Additionally, the legal practitioners should ensure that their anti- money laundering systems are constantly upgraded to be on a par with the evolving new technologies, such as MPESA which is a common platform for mobile money, operating software, communication applications and virtual platforms, which can be used to facilitate money laundering activities.

Similarly, lawyers should ensure that money laundering risks are assessed before establishing new technology that will be used for service delivery as well as a new legal service. After concluding and issuing reports obtained from the assessments, they should avail such information to the FRC or supervisory bodies upon request.

Many lawyers have defended their role in protecting client's information and have rejected their role of reporting. Agreeably due to their professional privilege, they are bound not to reveal any

⁷² Gikonyo, C., "Detection mechanisms under Kenya's anti-money laundering regime: omissions and loopholes", 67.

⁷³ Sections 44 & 48, The Proceeds of Crime and Anti-Money Laundering Act, (2009).

⁷⁴ Section 45, The Proceeds of Crime and Anti-Money Laundering Act (2009).

⁷⁵ According to the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct 2017. Advocates should carry out the following specific measures to mitigate the risk posed by such clients of non-face-to face transactions: Certification of identity documents presented; Requisition of additional documents to complement those required for face-to-face clients such as identity details for third parties involved in a transaction, indemnities, bank references and Swift Transfer Remittance advice with clear details of the sender, and remitting bank which can be independently verified by the advocates bankers; Completion of on-line questionnaires for new applications that require a wide range information capable of independent verification such as confirmation with a government department or other relevant authority; Independent contact with the client by the law firm and requiring the payment of any amounts through an account in the client's name with a bank; More frequent update of the information on clients of non-face-to-face transactions and the refusal of the legal brief without face-to-face contact or in the event of inability to verify the information furnished for high risk clients, in extreme cases.

information about a client and their funds without their authorization. Even if advocates are safeguarded by the confidentiality principle, it should be noted that an advocate cannot claim this principle if it is proved that they are accomplices to unlawful conduct of a client.⁷⁶ Over and above that, CDD checks impact the provision of legal services business in that, clients approach lawyers mostly because they require urgent intervention and representation. Such urgency is depleted as conducting CDD takes quite a great deal of time to complete which inconveniences the client. In such a case, the client may be pressed to look for another lawyer who is able to assist them expeditiously and the CDD conducting firm, loses business, as well as, risks its reputation. Therefore, compliance in legal firms has seen to be taken as the firm is a “pain”. Certainly, most lawyers fail to comply due to such issues and opt not adhere to enhanced CDD requirements for the benefit of their business.⁷⁷

Likewise, the costs involved in setting up efficient procedures and measures to detect money laundering are quite high, such as carrying out risk assessments, which dooms the gatekeeping initiative from the beginning. Imposing such costs on privately owned legal firms negates their essence as it excessively places a financial burden that they should not have to bear as there are already existing government agencies tasked with the role of identifying illegal transactions.

2.2.2 The Anti-Money Laundering Advisory Board (AMLAB)

The composition of AMLAB includes reporting institutions, supervisory bodies and law enforcement agencies and its profile is enhanced also by the fact that the Cabinet Secretary can appoint two persons from the private sector. It enhances proper co-ordination in formulating and implementing AML policies and has powers to co-opt experts in AML to participate in its deliberations.⁷⁸ Unfortunately, one of its deficiencies is that it omits representatives from the Law Society of Kenya and the gambling industry, who remain vulnerable to ML.⁷⁹

It is crucial for AMLAB to be constituted adequately as the Cabinet Secretary has the discretion to appoint two members from the private sector who act in their individual capacity and not as institutional representatives and does not adequately provide for representation in case of their absence.⁸⁰ AMLABs main functions include, advising the Cabinet Secretary on best practices and policies in AML, advising the FRC on its powers and functions in combating ML and creating a

⁷⁶ Section 87, The Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct 2017.

⁷⁷ Zavoli I, King C, 'The challenges of implementing AML regulation: An empirical analysis', 84 *The Modern Law Review*, (2021), 760.

⁷⁸ Sec 49(4), The Proceeds of Crime and Anti Money Laundering Act (2009).

⁷⁹ In the UK, the Money Laundering Advisory Committee goes an extra step to include representatives from the gambling industry, the law society and the surveyors. See Booth R, 'Implementation of the new money laundering law and regulation' in Farrel S, Bastable G and Yeo N, *Money laundering law and regulation: A practical guide*, Oxford University Press, (2011), 25.

⁸⁰ Section 49(2), The Proceeds of Crime and Anti Money Laundering Act (2009).

forum for consultation among the FRC, state organs, supervisory bodies and reporting institutions.⁸¹ Through these consultations, the government can devise responsive anti-corruption policies that take into account the views of stakeholders.⁸²

2.2.3 The Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct 2017⁸³

Despite the existence of legal professional privilege these codes of conduct limit the extent of the accorded privilege. Section 88, of the code of standards asserts that lawyers who are culpable of professional misconduct stand to lose the protection provided for them under the confidentiality principle. For instance, those who knowingly help or actively participate in financial crimes and money laundering cannot purport to invoke the legal professional privilege.

The code of standards also warns against being an accessory to driving criminal activities especially since the profession is highly exposed. In essence, lawyers handle client accounts which are confidential and perhaps the most attractive for conducting criminal activities, thus, the practice rules advice lawyers to vigilant at all times and to commemorate various directives in relation to anti-money laundering laws and rules.⁸⁴

Apart from this, the practice rules also advise legal firms to include KYC systems to be able to accurately identify their clients and their source of funds. Further, while the KYC systems are vital, firms are also advised to take additional steps including keeping records of all client transactions and inquire on the source of funds if they are doubtful. Lastly, doubt is not easily shaken. If an advocate does not fully trust a transaction they may refuse to represent such a client in accordance the AML rules and regulations.⁸⁵

The common law which is the adopted legal system in Kenya provides for confidentiality whereby communication between an advocate and his client is privileged. The purpose of this privilege, as echoed in **S v Safatsa**, is to promote the operation of the legal system and as a tool of open communication between a lawyer and his client.⁸⁶ Additionally, sections 105-116 of the code of conduct provides that communications between clients and their advocates are safeguarded under legal professional privilege and confidentiality principles.

⁸¹ Section 50, The Proceeds of Crime and Anti Money Laundering Act (2009).

⁸² Booth, 'Implementation of the new money laundering law and regulation', 24.

⁸³ Kenya Gazette Notice No. 5212 Vol. CXIX- No. 69.

⁸⁴ Section 88, The Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct (2017).

⁸⁵ Section 92, The Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct (2017)

⁸⁶ S v Safatsa and Others, 1988 (1) SA 868 (A) at 885-6.

Again, the attorney client privilege accords lawyers' the privilege of keeping communication with the client a secret. In the case of *Three Rivers District Council & Others [2006] EWHC 816* , it was held that professional privilege is absolute and it is not possible to override it even in the application of public interest justification. Additionally, the privilege gives clients a sense of security against the possibility of being scrutinized by the police and agency bodies, making it easier for advocates to discharge their legal skills and assist their clients without fear, suspicion and tension.⁸⁷

Such privileged information may only be disclosed with the express consent of their clients.⁸⁸ Legal clients have a general assumption that since their communication with their advocates is confidential it transcends to privilege. However, this is not the correct position as privilege and confidentiality are two different principles.⁸⁹This research examines why privilege is only relevant to ensure that the client gives his lawyers all relevant information about a case and not only the facts that favor their case.⁹⁰

Moreover, the case of *Minister of Safety and Security v Bennet & Others* echoed the doctrine which categorizes legal professional privilege as a fundamental right. Further, it discussed that the communication was not only limited to ongoing litigation but also to communication which was to seek legal advice.⁹¹Nonetheless, lawyers should sensitize themselves on the instances in which the legal professional privilege can be challenged and be aware of when this privilege can be exploited by launderers who share information and expect the lawyers not to disclose such information to the police and courts.⁹²

Most importantly, the relationship between an advocates and his client is fiduciary in nature, creating an obligation for advocates to keep all information received confidential. The right of privacy is also envisaged under the Constitution of Kenya, guarding ones private affairs.⁹³Notwithstanding this right, just like any other rights safeguarded by the Constitution, privacy and confidentiality can be restricted through legislation. In the same way, lawyers are expected to be aware of the limitations of legal professional privilege as they appreciate their role to report suspicious transactions to the FRC.

87 Zeffert DT & Paizes AP 'The South African law of evidence,' Lexis Nexis Butterworth (2009).

88 *Thint Property Limited v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others [2008] ZACC 13 and A Company and Two Others v The Commissioner for the South African Revenue Services Western Cape High Court, Case No 16360/2013 [2014] ZAWCHC 33.*

89 Schwikkard PJ & Van der Merwe SE, 'Principles of evidence', *Journal of South African Law*, Vol. 2 (2017), 3.

90 Bellengere A et al, *The Law of Evidence in South Africa (Basic Principles)* Oxford: University Press, (2013).

91 Bellengere, *The Law of Evidence in South Africa (Basic Principles)*,308.

92 *Law Society of British Columbia v Canada 2001 (BCSC) 1593, Federation of Law Societies of Canada v Canada 2011 (BCSC) 1270 and Federation of Law Societies of Canada v Canada 2013 (BCCA) 147.*

⁹³Article 28 and 31, Constitution of Kenya 2010.

2.2.4 The LSK Guidelines on Application of the Proceeds of Crime and Anti Money Laundering Act, 2019.⁹⁴

These guidelines were formulated by the LSK to impose the gatekeeping role on the legal profession and compelling them to set up appropriate measures and systems in compliance with POCAMLA. As such, the rationale for putting up the measures and systems is that it shields the client account being used to motivate illegal transaction or money laundering.⁹⁵

An Advocate is deemed to be a trustee of client's funds and other property in his possession or under his control.⁹⁶ Notably, the client accounts are at the centre of attraction for the carrying out of money laundering transaction, due to their nature.⁹⁷ As regards benchmarking the respectable standing of a legal firm, the client account is a true indicator of its credibility.⁹⁸ Admittedly, this qualifies trust accounts as very enticing and easy to manipulate and conceal the dirty money.⁹⁹ This study is inclined to agree with Hamman J as he examines and equates the client account as a one stop laundromat; whereby illegally obtained funds is entered through a system to be cleaned and comes out as clean legitimate money.¹⁰⁰

As such, this study examines the manner in which the client account may transform from being a safe haven for their client's moneys and turn into a channel to launder money. This can be illustrated by circumstances whereby a lawyer is compensated by a criminal group to launder money on their behalf or the lawyer herself can also use this accounts for her own illegal transactions. Moreover, this money may be placed in the client account to purchase a non-existing asset and the client then receives back, the already cleaned dirty money.¹⁰¹

In light of the immediate discussion above, we can deduce that the client account is an excellent tool for concealment of illegally obtained funds from the regulators and government officials. The lack of mandated transparency is precisely why it is targeted by money launderers.

Concisely, advocates have a duty of care and confidentiality to their client as obligated by the Advocates (Accounts) Rules, the Advocates (Accountants Certificates) Rules and the Advocates

⁹⁴ The Law Society of Kenya, Anti money laundering guidelines for legal practitioners.

⁹⁵ Gichuki N.E, 'The conflict between anti-money laundering reporting obligations and the doctrine of confidentiality for legal practitioners in Kenya.'

⁹⁶ Section 81, The Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct (2017).

⁹⁷ Recommendation 4, Financial Action Task Force Report 2013

⁹⁸ Hirschowitz Flionis v Bartlett, 2006 (3) SA 575 (SCA) Para 30.

⁹⁹ Shepherd KL, "USA Patriot Act and the Gatekeeper Initiative: Surprising implications for transactional lawyers ", Probate & Property, (2002), 26-30.

¹⁰⁰ Hamman AJ & Koen RA "Cave Pecuniam: Lawyers as launderers" Volume, 15(5) Potchefstroom Electronic Law Journal, 2012, 69-100.

¹⁰¹ United States v Foster 835 F. Supp.360 (1993). S v Hattingh, Unreported, Bloemfontein Regional Court, Case Number 17/518/10.

(Deposit Interest) Rules. In spite of their privileged duty, lawyers should be more aware of the possibility of money laundering through their clients account. It may be arduous to inspect all sources of funds of their clients but it is necessary to identify warning signals pertaining to some transactions and interrogate further.

2.3 Conclusion

The gatekeepers' initiative imposed the reporting obligations on lawyers requiring lawyers to disclose confidential information conveyed by their clients raises the challenge of implementing this role while observing their ethical duties safeguarded by the Legal Professional Privilege.¹⁰² This issue was encountered with protests from various international bar associations such as the American Bar Association (ABA) and the Council of Bars which claimed that this obligation threatened the independence of the bar by discharging government duties.¹⁰³ Similarly, the Law Societies of Europe (CCBE) opposed the reporting obligation on the basis of breach of confidentiality.

Furthermore, the reporting initiative erodes the innocence of lawyer-client privilege as consulting a lawyer in confidence would not be appreciated.¹⁰⁴ Indeed, it would also make advocates suspicious of every client they interact with, which will in turn lower the confidence levels in the client to confide in their advocates and affect the discharging of lawyers' roles in representing the said clients.¹⁰⁵

In addition, at a practical level, firms face on a daily basis, the challenge of assessing information revealed on due diligence exercises and determining whether it gives rise to a money-laundering reporting obligation.¹⁰⁶ The outcome of this reporting duty will place lawyers in a conflicting position and as a result, full and frank disclosure could not be done, thereby undermining the confidence in legal representation and the legal system.

Aside from the FATF recommendations, which are specific to AML, there are other international legal instruments that directly and indirectly address money laundering and other forms of transnational organized crime that obligates states to take steps to combat them in their own territories or cooperate towards multilateral efforts. Kenya is party to all these treaties and has also adopted the

¹⁰² Shepherd, K.L., Guardians at the Gate: The gatekeeper initiative and the risk-based approach for transactional lawyers,' Real Property, Trust and Estate Law Journal, (2012), 43.

¹⁰³ Lim, F. E., anti-money laundering initiatives: Ramifications on the legal profession, ASEAN Law Association Conference (2004).

¹⁰⁴ Kirby, D. J., The European Union's gatekeeper initiative: The European Union enlists lawyers in the fight against money laundering and terrorist financing, Hofstra Law Review, (2008), 261.

¹⁰⁵ Kirby, D. J., The European Union's gatekeeper initiative: The European Union enlists lawyers in the fight against money laundering and terrorist financing, 261.

¹⁰⁶ Chamberlain, M. & Travers, 'The proceeds of crime act 2002 – fmlc highlights key legal uncertainties, Journal of International Banking and Financial Law, (2004), 11, 435.

FATF recommendations and it has a duty to implement these measures by creating a domestic framework for their adherence.

As discussed above, Kenya's Constitution has a uniquely strong commitment to international law, in that, any treaty or convention ratified by the country forms part of the law in Kenya.¹⁰⁷ In addition, it obligates the President to take the lead in championing the country's international legal obligations and requires him to report annually to the National Assembly on the progress made by the country in fulfilling these obligations.¹⁰⁸

Another challenge would be authorizing LSK to be the supervisory body to ensure implementation of AML obligations in the legal profession. However, the LSK as it is does not have the requisite capacity to monitor the profession and ensure adherence to the regulations governing AML.¹⁰⁹

Accordingly, this chapter observes that, by requiring law firms to be reporting institutions, the government is placing the burden of enforcement of the laws on the citizens, as it is the law firms and individual advocates who have to bear the costs that are associated with the reporting of clients as they would also give to train their staff on identifying money laundering risks. It is unjust for legislation to increasingly transfer the enforcement obligations from the government to private persons.

By allowing this, the government is privatizing law enforcement and lawyers have to assume the role of policemen which leads to a conflict of interest because the reporting of clients leads to conflict between the reporting advocate and the law firm that he works at. An advocate has a fiduciary duty towards his law firm, and as such these provisions lead to a matter of gross conflict of interest. The client would lose faith in the reporting law firm, and justice would be at risk.

The new amendment to the POCAMLA designating the legal practitioners as reporters of ML activities, as discussed above, has been rejected by local lawyers in Kenya through their application to have the Act re-amended. Some have felt that this is a foreign law and they did not involve legal person in the private sector. The final verdict by the courts of Kenya will set the precedent on how the profession is expected to implement their additional role of being gatekeepers of money laundering activities.

¹⁰⁷ Article 2(6) of the Constitution of Kenya (2010).

¹⁰⁸ Article 132 (1) (c) (iii), The Constitution of Kenya (2010).

¹⁰⁹ Gikonyo C, 'The legal profession in Kenya and its anti-money laundering obligations or lack thereof,' 287.

Overall, the lawyer's inclusion as DNFBPs is strategic albeit the challenges faced in the effective implementation of the AML obligations. This research shall study the various alternatives that could assist in the enforcement of the reporting obligation whilst maintaining the sanctity of the legal profession and aiding it in the carrying of their roles.

The next chapter discusses how the United Kingdom, United States and Malaysia have approached the FATF recommendations on categorizing the legal profession as DNFBPs and identifies what lessons Kenya can learn.



CHAPTER THREE

LEARNING LESSONS FROM MALAYSIA, USA & UK

3. Introduction

The previous chapter examined the national and international legal regimes that have been instituted for the sole purpose of ensuring that lawyers are qualified as reporting entities and not accessories to money laundering crimes. It also considered the limitations of discharging their professional duties in adherence to those systems. Additionally, it also discussed the various challenges encountered in the implementation of the legal and regulatory framework directing the inclusion of advocates as gatekeepers of money laundering activities in Kenya.

Accordingly, this research determined the vulnerability of lawyers to be at an all-time high due to their privilege as they could advise on how illegal transactions can be effected in a manner which reduces the risk of detection. This study also asserts that the launderers are well aware that the legal profession is not heavily regulated like the financial institutions and thus glimpses at an avenue to use them as a channel to store their illicit proceeds especially in the undetectable client accounts.

Moreover, this research also appreciates the imposition of the reporting obligation on the legal profession by the FATF to all member states. Notably, even huge states such as Europe, USA and Asia are not immune from such abuse and implementation challenges. In this regard, this chapter will show how Malaysia, United Kingdom and the United States of America have approached the FATF recommendations (40+1) on categorizing the legal profession as DNFBPs and identifies the lessons that Kenya can learn from them. These jurisdictions in particular, have particularly vocalized the issues facing the legal profession in respect to including them as DNFBPs as well as championed for self-regulation as a means of ensuring effective implementation.

3.1 The international recognition of the risks and vulnerabilities associated with money laundering

The creation of the FATF in the late 1980s is proof enough that the vulnerabilities and risks in respect to money laundering are recognized and have been existent for a long period of time. Globally, member countries are expected to comply with the international standards on anti-money laundering and anti-financing of terrorism as proposed by the Financial Action Task Force (FATF) and therefore money laundering activities are monitored through the stipulated recommendations.

Interestingly, the FATF recommendations are sector specific, in that, the inclusion of lawyers as DNFBPs are specific to legal professionals employed by legal firms this is despite the fact that the FATF through their assessments have noted the diversity and variation of the legal practices in different jurisdictions.¹ The regulatory body has also observed that implementation has not been fully executed especially since a significant part of the legal profession has not been included in combatting money laundering.²

For this reason, this study suggests that the regulatory body championing the fight against money laundering should appreciate the diversity of the legal profession in their respective territories when assessing the risks concerning the diverse legal profession practices. Consequently, in acknowledging the overlooked section of those lawyers not employed in professional firms, several governments worldwide are now expected to scrutinize whether it is vital to spread the reporting obligation to independent lawyers.³ The FATF also issued guidance notes to assist DNFBPs in comprehending their roles.⁴

This research shall analyze the countries below to determine the best practice approach in minimizing the implementation challenges faced by the legal profession in stopping money laundering efforts.

3.2 Malaysia

3.2.1 Inclusion of Lawyers as DNFBPs in Malaysia

The legal professionals in Malaysia are regulated based on locality of the lawyer, that is, East or West Malaysia and under the Legal Profession (Amendment) Act 2013⁵, Advocate Ordinance Sabah⁶ and the Advocate Ordinance Sarawak⁷. Prior to admission to the Bar, they are subjected to appropriate market entry controls in which they are required to fulfil the agreed requirements under their respective governing legislation. Practicing certificates are subsequently issued by the High

¹ Financial Action Task Force, Global money laundering and terrorist financing threat assessment, July 2010.

² Financial Action Task Force, Global money laundering and terrorist financing threat assessment.

³ For an Australian example, Choo K-K R, Smith R G, Walters J & Bricknell S. 'Perceptions of money laundering and financing of terrorism in a sample of the Australian legal profession, in Research and Public Policy Series, Australian Institute of Criminology, Canberra, 2011.

⁴ The range of FATF Guidance papers include the legal profession (October 2008); accountants (June 2008); dealers in precious metals and stones (June 2008); the real estate sector (June 2008) and trust and company service providers (June 2008).

⁵ Legal Profession (Amendment) Act 2013 Act (A1455), Laws of Malaysia.

⁶ Advocate Ordinance Sabah 2017.

⁷ Advocate Ordinance Sarawak, (Cap 110) 1958 .

Court of Malaysia and High Court of Sabah and Sarawak, that is, Bar Council Malaysia (BC)⁸ and Sabah Law Society (SLS)⁹ as well as Advocates Association of Sarawak (AAS).¹⁰

The lawyers in Malaysia have been included as reporting entities since 2004 in adherence to their Anti-Money Laundering and Anti-Terrorism Financing Act (AMLATFA) 2001.¹¹ Section 14 of the Act obligates the lawyers to report suspicious activities to the Financial Intelligence Unit (FIU) which was established by section 8 of the Act. Further the Act stipulates that the Bank Negara Malaysia (BNM) shall supervise the DNFBPs and other financial institutions activities and ensure compliance with AML/CFT laws.¹²

Later, their laws were amended to create new offences which constitute an illegality under AML laws and enacted a law in the style of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act (AMLATFPUAA).¹³ For example, Section 4 of the AMLATFPUAA, was amended to include the scenario where an individual who has participated in a transaction that involves process from an unlawful transaction, whether directly or indirectly, constituted a money laundering offence.¹⁴

For effective prevention of money laundering activities the FATF deems fit that financial institutions and DNFBPs should at the first instance, assess the risks associated with each customer and categorize the said clients as either low risk or high risk. The risk assessment proposed is achieved by conducting customer due diligence which verifies the identity of the client. Additionally, the FATF suggests for categorization of clients into either high risk clients or low risk clients while ensuring that enhanced due diligence methods are employed for high risk clients and simplified CDD measures are adopted for low risk clients.¹⁵

The BNM in Malaysia, is the authority mandated to implement enhanced due diligence or risk based approach when supervising the legal profession and is also guided by the results obtained from National Risk Assessment (NRA). BNM distinguishes the mode of risk based supervision subject to

⁸ Malaysian Bar, <https://www.malaysianbar.org.my/> on 7 April 2022.

⁹ Sabah Law Society, <https://www.sabahlawsociety.org/> on 7 April 2022.

¹⁰ Advocates Association of Sarawak, <http://www.sarawak-advocates.org.my/>, on 7 April 2022.

¹¹ Anti-Money Laundering and Anti-Terrorism Financing Act (AMLATFA) 2001, Act 613, Laws of Malaysia.

¹² Section 14, Anti-Money Laundering and Anti-Terrorism Financing Act (AMLATFA).

¹³ Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act, 2001.

¹⁴ Section 4, Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act.

¹⁵ Recommendation 10, Financial Action Task Force Recommendations 2012, <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> on 21 April 2021.

the on-site examinations they conduct, off-site monitoring and supervisory outreach activities as well as the risk based framework for DNFBPs and other financial institutions.¹⁶

Another key issue in preventing money laundering, is the requirement for DNFBPs to maintain client records collected from the CDD exercise for at least 5 years after the transaction is complete or relationship between a lawyer and client has terminated.¹⁷

In Malaysia the Bar Council requires lawyers to report any transaction that they encounter to be suspicious in the carrying out of their legal duties especially when acting in the capacity of directors and secretaries of a legal professional firm. Failure to report suspicious activities is sanctioned under Section 4 (1) of the AMLATFPUAA which imposes a maximum penalty of RM250 or imprisonment or both for neglecting to file such reports.¹⁸ The Bar Council provided a guidance note on which transactions are deemed to be suspicious and they included; the use of several deposit accounts, conduct which is inconsistent with the client profile and large amounts and frequency of currency conversion.¹⁹

In respect to the practicality of supervision by the BNM, Kamaruddin and Hamin (2019) raised a very important question. They pondered whether it was practical to monitor all client accounts and legal professional firms in Malaysia for compliance to be effected.

3.2.2 The challenges faced by lawyers in Malaysia in implementing the FATF recommendation 16

When it comes to implementation challenges, the Malaysian Bar is not an exemption. Koh (2013) highlighted some of challenges faced by the legal professionals in complying with the AML/ATF law in Malaysia. He referred to the FIU report that was done in 2011 which concluded that legal firms' compliance with AML laws was quite flimsy despite being involved in numerous legal transactions that are likely to raise suspicion. Further, he showed through the Compliance Report done in 2011 highlighted the fact that only 61% of the professional firms adopted the Customer Due Diligence requirements. In addition to this, only 1810 firms out of 4585 legal firms in Malaysia comply with AML guidelines despite being aware of the regulations imposed by the Bank of Malaysia.²⁰

¹⁶ Marzunisham Omar, 'Shifting the tide towards endemic - Money Laundering/Terrorist Financing risks and challenges', AML/CFT Compliance Conference, Kuala Lumpur, 1 December, 2021, 3.

¹⁷ Recommendation 11, Financial Action Task Force Recommendations 2012, <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> on 21 April 2021.

¹⁸Section 4 (1), Anti-Money Laundering and Anti-Terrorism Financing Act (AMLATFA).

¹⁹ Bank Negara Malaysia, Anti-Money Laundering and Counter Financing Terrorism Sectoral Guidelines 6 for Designated Non-Financial Business and Profession, 2007.

²⁰ Koh, K, H., 'Designated non-financial businesses & professions' paper presented at 5th International Conference on Financial Crime and Terrorism Financing, The Majestic Hotel, Kuala Lumpur, Malaysia, 2013.

Following this discussion, this study proposes that only a third of the legal profession have complied with CDD requirements in Malaysia. This position was also qualified by Koh where he agreed that Bank Negara noted the weakness in the legal profession conducting CDD especially on high risk clients. In addition to this, the lawyers find CDD quite burdensome as they are faced with the constant quagmire of consistently asking themselves which transactions are suspicious and are to be reported and which ones aren't. ²¹

Furthermore, the AML compliance in the Malaysian Bar is low due to the lack of awareness as to how to identify risks and monitor the same due to the ethical duties to their clients also imposed on them. Again, the legal profession in Malaysia along with many legal persons, view their responsibilities as to facilitate justice and transactions rather than to question and regulate their clients. They also wish to avoid conflict of interest where they are designated to release confidential information pertaining to their clients, to government agencies. ²²

Moreover, this study also noted from Koh that the legal professional privilege stood to be justified which could erode the essence of engaging an advocate to act on their behalf in secret and trusting that this information shared shall not be used against them. Besides, according to statistics in Malaysia, 90% of those firms had less than 5 lawyers. As such, levying such small firms to set up measures and mechanisms to detect money laundering would be burdensome and returns on investment is not justifiable. Also, requiring firms with 5 people or less to have a compliance department would be next to impossible as such a small firm may not have available resources to set up such a system and stand to lose revenue by installing such a system.

Basically, apart from legal professional privilege, client confidentiality and business rationality, the cost benefit analysis also plays a major role in the defiance of lawyers to take up their AML obligations. In most Malaysian law firms, the costs involved in setting up AML mechanism defeat the purpose and the available manpower would rather focus on their legal work rather than reporting which leads to implementation difficulties. ²³

In other words, this study has shown that the AML framework and implementation challenges are similar to Kenya's. Firstly, all DNFBPs are supervised and governed by Anti-Money Laundering, Anti-

²¹ Hamin Z, Kamaruddin S and Rosil WN, "Trust me; I'm your lawyer": Lawyers' reporting duty under AML/ATF law in Malaysia' 3 Journal of ASIAN Behavioural Studies, (2018),5.

²² Kamaruddin S and Hamin Z, 'Lawyers' predicaments in complying with the anti-money laundering law in Malaysia', 26 Journal of Financial Crime, (2019), 587.

²³ Hamin Z , Othman B.M and Kamaruddin S, 'When money is the reason: preliminary evidence of legal business compliance with anti-money laundering (aml) obligations' 25, Pertanika Journal of Social Sciences and Humanities, (2017), 155.

Terrorism Financing and Proceeds of Unlawful Activities Act, 2001. Secondly, Bank Negara Malaysia (BNM) which is the FIU is tasked with ensuring compliance with AML laws and is authorized to sanction those who are in breach of the requirements. Lastly, Malaysia has also effected implementation by applying the staged approach which initially looks at STR and thereafter, the CDD internal measures and record keeping commitments.²⁴

Therefore, this research concludes that the legal practitioners in Malaysia are aware of their vulnerability to money launderers. Despite this awareness, most are not keen to comply with the CDD and record keeping requirements.²⁵ Further, the impact of this role on their legal profession is viewed in a negative light and has been a controversial subject thus compelling most lawyers to be inclined to maintaining confidentiality of their clients in adherence to the legal professional privilege rather than police their clients.²⁶

The AML compliance has greatly been opposed by lawyers in Malaysia as they are more concerned with legal professionalism and preserving the ethics which are required by the Bar Council upon taking oath to become an advocate. This research has also shown that they strongly object this role as it merely seems to be a delegated duty from the government of which should primarily remain as a government responsibility.²⁷ Undoubtedly, the gatekeeper initiative has been met with tension in most jurisdictions as imposing the reporting obligation has legal impediments which prevents effective implementation of this duty.²⁸

The same tensions are felt in Malaysia. This was evidenced by the APG Mutual Evaluation Report 2007 which showed that there were extremely low levels of reporting suspicious activities by their clients and the same could be attributed to the limited evidence to show the success of Suspicious Transaction Reporting systems in Malaysia in compliance with FATF Recommendation 16.²⁹ Due to the conflict with their professional duties, it can be noted that the lawyers in Malaysia have failed to report suspicious transactions

²⁴ Asia/Pacific Group on Money Laundering (APG) – Mutual Evaluation Report on Malaysia. Adopted 25 July 2007, pp. 6.

²⁵ Kamaruddin S, Hamin Z, 'Lawyers' predicaments in complying with the anti-money laundering law in Malaysia', 26 *Journal of Financial Crime*, (2019), 590.

²⁶ Kamaruddin S, Hamin Z, 'Lawyers' predicaments in complying with the anti-money laundering law in Malaysia', 592.

²⁷ Kamaruddin S, Hamin Z, 'Lawyers' predicaments in complying with the anti-money laundering law in Malaysia', 594.

²⁸ Hamin Z, Omar N, Rosli WRW, Kamaruddin S, 'Reporting obligation of lawyers under the AML/ATF law in Malaysia' 170 *Procedia - Social and Behavioral Sciences*, (2015), 413, 414.

²⁹ Asia / Pacific Group On Money Laundering, <http://www.apgml.org/mutual-evaluations/documents/default.aspx?s=date&c=8b7763bf-7f8b-45c2-b5c7-d783638f3354&pcPage=3> on 26 April 2022.

As for solutions in dealing with the implementation gap, Kamaruddin and Hamin (2003) proposed that the Malaysian government equip itself with effective measures which would detect money laundering rather than placing unnecessary pressure on regulators and supervisory bodies. Apart from this, they also examined the possibility of combating money laundering by arresting it at the bank level, which would require banks to upgrade their systems to detect illegal transactions beforehand.

Finally, they suggest that since those found guilty of aiding and participating in money laundering are subjected to forfeiture of goods and money, the burden of proof should be lowered as it is particularly difficult to ascertain that money and or property was acquired through money laundering.³⁰

3.2.3 Lessons that Kenya can learn from Malaysia

From the discussions above, it is evident that Malaysia is still facing challenges in implementing the FATF recommendation 16. However, some of the scholars have presented possible solutions to bridge the implementation gap. In light of this, Kenya can carefully assess and adopt the recommendations as proposed by Kamaruddin and Hamin (2003) by attempting to impose the reporting duty mainly to the government and financial sectors which all actively involved in the exchange of the money and expunge the burden from a profession that is grappling to observe their professional roles.

3.3 United States of America (USA)

3.4.1 Inclusion of Lawyers as DNFBPs in the USA

The USA is a co-founder of the Financial Action Task Force (FATF) and has been impactful towards the efforts to eradicate money laundering and terrorism financing. As a member, USA is not obligated to comply with the recommendations issued by the FATF but there is an implied term that failure to adhere to the rules, suffices as a ground for them to be expelled from such membership.³¹

Historically, the US government had already made attempts to curtail money laundering by enactment of section 6050I (a) of the Internal Revenue Code which requires all US citizens to report to the Internal Revenue Service (IRS) if they receive more than \$10,000 in cash, including lawyers and staggering such payments to avoid the IRS was considered an offence.³²This move to fight

³⁰ Kamaruddin S, Hamin Z, 'Lawyers' predicaments in complying with the anti-money laundering law in Malaysia', 593.

³¹ Michael Rosen, "Combatting threats to the international financial system: The financial action task force symposium", New York, April 25 2014.

³² 26 U.S. Code § 6050I - Returns relating to cash received in trade or business, etc.', <https://www.law.cornell.edu/uscode/text/26/6050I> on 9 January 2022.

money laundering was enhanced by introduction of additional laws to tackle money laundering thus, the Anti-Money laundering framework in the USA consist of various legislation including the Bank Secrecy Act³³, the Money Laundering Control Act³⁴ and the Patriot Act³⁵, which have criminalized money laundering and terrorist financing.

This research has found out that the vulnerability of the legal profession has been apparent in the USA as some lawyers have masterminded money laundering activities while others have facilitated the acquisition of illicit funds through their clients. However, those who have been found guilty of these offences, have been convicted which ascertains the fact that lawyers in the USA are regulated by criminal law.³⁶

To protect the profession and to show positive steps that the ABA has taken towards encouraging lawyers to combat money laundering, it developed the ABA model rules through which rules 1.1³⁷, 1.2 (d)³⁸ and 1.16 (a)³⁹ imposed a duty on lawyers to conduct thorough investigations through enhanced due diligence on their client's before taking up their briefs.

Further, noting the attractiveness of lawyers to money launderers, in 2002, the American Bar Association (ABA) board of governors also instituted the ABA task force on gatekeeper regulation and the profession. Its main mandate was to facilitate and epitomize the legal professional ethics by upholding the attorney client privilege in the application of anti-money laundering initiatives by the US government and other regulatory bodies.⁴⁰

In 2013, the FATF typology report acknowledged the positive aggression employed in the USA who have prosecuted and convicted lawyers who participated in money laundering activities. Additionally,

³³Bank Secrecy Act (BSA), <https://www.occ.treas.gov/topics/supervision-and-examination/bsa/index-bsa>. on 9 January 2022.

³⁴ William J Hughes, 'H.R.5077 - 99th Congress (1985-1986): Money Laundering Control Act of 1986' (22 July 1986).

³⁵ The Patriots Act, 2001, <https://www.congress.gov/107/plaws/publ56/PLAW-107publ56.pdf> on 9 January 2022.

³⁶Terry L.S, 'U.S. legal profession efforts to combat money laundering and terrorist financing' 59 New York Law School Law Review', (2014), 489.

³⁷America Bar Association Model Rule 1.1: Competence; established a duty of competence for lawyers to have relevant facts about their clients. https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/ on 9 January 2022.

³⁸ America Bar Association Model Rule 1.2 (d): requires that lawyers shall not counsel a client to knowingly engage in criminal and fraudulent activities' https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_2_scope_of_representation_allocation_of_authority_between_client_lawyer/ on January 9 2022.

³⁹ America Bar Association Model Rule 1.16: empowers advocates to decline briefs from clients if the particular case is against the legal profession's conduct. https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_16_declining_or_terminating_representation/ on 9 January 2022.

⁴⁰ American Bar Association, Task Force on Gatekeeper Regulation and the Profession https://www.americanbar.org/groups/criminal_justice/gatekeeper/ on 9 January 2022.

the ABA also subjected those convicted to professional discipline by revoking their practicing licenses for a period of time.⁴¹ This confirmed that lawyers in the US are not only subject to criminal laws but are also answerable to disciplinary sanctions.

When it came to implementation of the inclusion of lawyers as DNFBPs in the US, there were obvious challenges in the reporting obligation placed on the US lawyers and thus necessitated the FATF to develop a guidance note to effect the risk based approach when onboarding clients and avoid being subordinated to or aiding illegal activities. Apart from this, the ABA also adopted its Voluntary Good Practices Guidance for lawyers not only to detect money laundering but to also help lawyers have a better understanding of the Risk Based Approach guidance.⁴²

From the discussions above, this research has identified the various efforts by the US government and regulatory bodies towards supporting the role of the legal profession in preventing money laundering within the profession. The same may be summarized as follows; Firstly, the ABA in its reports commences each paragraph reiterating its support to the government in the fight against money laundering and the reports accompanying its resolutions also depict its understanding of the seriousness of money laundering issues as it makes reference to the National Money Laundering Strategy Report.⁴³

Secondly, the US has enhanced their efforts towards educating advocates on their vulnerabilities to launderers. As an observation, the lawyers may understand the rules but may not be fully alert to transactions that constitute illegalities and thus developing the RBA guidance note was beneficial as they were advised to be aware of situations where conflict of interest may arise and shift their focus to clients who are considered as high risk. The spread of awareness was stretched to all lawyers by being addressed during the continued legal education sessions, in articles, in case discussions and various policy statements on AML.⁴⁴

Thirdly, the guidance note developed by FATF on RBA has encouraged lawyers on the US to categorize their clients and those who are high risk should go through a more intense due diligence process and if uncomfortable, they should decline taking up instructions from that client. Reduced

⁴¹ Financial Action Task Force Report, Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals, June 2013 <http://www.Fatf-Gafi.Org/Media/Fatf/Documents/Reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.Pdf> on 26 January 2020.

⁴² Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing - Resources, <https://www.actec.org/resources/voluntary-detect-and-combat-money-laundering/> on 9 January 2022.

⁴³ Laurel S Terry, 'U.S. Legal Profession Efforts to Combat Money Laundering and Terrorist Financing' 59 New York Law School Law Review (2014) 59 New York Law School Law Review 487.

⁴⁴ Terry L.S, 'U.S. legal profession efforts to combat money laundering and terrorist financing', 501.

customer due diligence is advisable for those clients who are already subjected to intense AML rules such as public listed companies and banks.⁴⁵

3.4.2 The challenges faced by lawyers in the USA in implementing the FATF recommendation 16

Nonetheless, despite all the positive steps towards creating a strong AML regime in the US, the ABA has consistently barred the regulation to include lawyers as DNFBPs as it goes against their principles of confidentiality and attorney client privilege and according to them, regulating the bar should be designed to protect the legal profession from state interference not the other way around. An example of the challenges faced in implementing AML directives by the legal profession was exemplified through the FATF 2018 Consolidated Tables of Assessment Ratings as it qualified that the US was not compliant in 2 areas, that is, recommendation 22 on due diligence and recommendation 23 on suspicious reporting, thus recommended the DNFBPs to be regulated by the Bank Secrecy Act and the Patriots Act, to promote due diligence within the business of law firms.⁴⁶

Most recently, the Ethics Committee of the ABA issued the formal ethics opinion 491 as a response to continuous complaints regarding the erosion of the advocates client relationship. Its main concern was that the FATF insists on lawyers as DNFBPs and references Panama Papers, Pandora Papers, 60 minutes' global witness expose as the main justification for requiring the profession to be part of the professionals involved in fighting money laundering but does not appreciate the challenges in implementing such a role due to the uniqueness of the services that the legal profession provides. In this regard, the opinion was solely based on seeking to expound the duties of a lawyer in carrying out due diligence and proposed to add guidance for the application of rules 1., 1.2 and 1.16.⁴⁷

Based on observation of the AML regime in the US, this study is inclined to agree with the sentiments of Osborne to some extent. According to Osborne, the FATF is misguided by placing significance of advocates to money laundering problems. He explains that there is no connection between the diagnosed problem and the cure proposed, as the FATF attempts to regulate the legal profession in order to diminish the actions of very few lawyers who are not in touch with their integrity and are bound to continue to ignore any regulations and guidance in respect to illicit activities.⁴⁸ He further

⁴⁵ Terry L.S, 'U.S. legal profession efforts to combat money laundering and terrorist financing', 508.

⁴⁶ Financial Action Task Force- 2016 (MER-United-States-2016), <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>, on 11 April 2022.

⁴⁷ American Bar Association Formal Opinion-491, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-491.pdf on 9 January 2022.

⁴⁸ Osborne D.E, 'The financial action task force and the legal profession part i: Combating threats to the international financial system: the financial action task force', 59 New York Law School Law Review, (2014),425.

implied that the FATF is infringing on the profession's liberties and placing a financial burden on DNFBPs which defeats the purpose of involving them as gatekeepers.⁴⁹

Moreover, he asserts that the FATF is mandated to champion the fight against money laundering globally but the body is not supervised neither is it licensed to address ML/CFT issues and continues to do so without confronting the financial implications, without thinking of the merits of its arguments and its willful insensibility to the reality and practical repercussions of its function.⁵⁰

His views are echoed and can be highlighted as common apprehension amongst legal professionals in the US in complying with the FATF recommendations. The mutual evaluations express frustrations in the lack of implementation of the reporting role by lawyers, in comparison to the other DNFBPs. Be that as it may, the legal professionals are also disgruntled by the lack of appreciation of their duties to their clients and their mandate to maintain the sanctity of the legal system as evidences in the undermining approaches adopted by the FATF.⁵¹

In conclusion, this goes to show that the legal profession in the US is facing some of the implementation challenges that are faced in Kenya, such as the cost of enhanced due diligence and the conflicting interests of their role as reports of money laundering activities and maintaining confidentiality while applying legal professional privilege when dealing with their clients.

3.4.3 Lessons that Kenya can learn from the USA

This study suggests that lawyers should be involved in combatting money laundering but not in the counterproductive ways it has been in the past years. Accordingly, the US has made it a priority to educate lawyers through CPD and articles about their vulnerability to money laundering and create awareness of their reporting role. The Law Society of Kenya can initiate the discussions on vulnerability and create awareness of their role through alerts and creating topics around this area that focus on AML for CPD seminars.

Additionally, the Law Society of Kenya borrowing a leaf from the ABA, can assist the legal profession in debunking the mystery of what the risk based approach involves and guide the lawyers in how to conduct such assessments.

⁴⁹ Osborne D.E, 'The financial action task force and the legal profession part i: Combating threats to the international financial system: the financial action task force', 429.

⁵⁰ Osborne D.E, 'The financial action task force and the legal profession part i: Combating threats to the international financial system: the financial action task force', 431.

⁵¹ Terry L.S, Robles J.C.L, 'The relevance of fatf's recommendations and fourth round of mutual evaluations to the legal profession' 42 Fordham International Law Journal, (2018), 684.

3.4 United Kingdom (UK)

3.4.1 Inclusion of Lawyers as DNFBPs in the UK

As a former member of the EU, the United Kingdom was obligated to adhere to directives issued by the EU on the FATF recommendations implementation to curb money laundering. The first directive issued by the EU was in 1991 which officially criminalized money laundering by the enactment of the Enforcement of Justice Act 1991⁵², Money Laundering Regulation 1993⁵³ and the Drug Trafficking Act 1994⁵⁴.

Thereafter, the EU issued a 2nd directive in 2001⁵⁵ to ensure that the offences in money laundering applied to DNFBPs and assented to the UK Proceeds of Crime Act and Money Laundering Regulation, 2003, as the nature of legal services rendered to clients by advocates underscored the reasoning behind their inclusion. Not long after the 2nd directive, it issued a 3rd directive which was primarily to take up the cudgels for enhanced due diligence by proposing the application of the risk based approach when conducting due diligence on a client. This was effected by signing into law, Money Laundering Regulations 2007⁵⁶, Terrorism Act 2000 (Amendment) Regulations (TACT regulations)⁵⁷, Proceeds of Crime Act 2002 (Amendment) Regulations 2007 (POCA Regulations)⁵⁸.

Finally, the 4th money laundering directive was issued in 2017 which improved the laws governing the illegal activities and the Money Laundering Terrorism Financing and Transfer of Funds (information on the Payer) Regulations 2017 was promulgated. Its main mandate was to remove any ambiguities present in the previously issued directives and enhance rules and regulations governing money laundering and terrorism financing across EU member states.⁵⁹

3.4.2 The challenges faced by lawyers in the UK in implementing the FATF recommendation 16

Conceivably, a challenge that presented itself in the implementation of EU directives on money laundering in the UK, was highlighted in the case of *Shah & Another v HSBC Bank Private Bank*, whereby a bank customer had a valid cause of action under the private law remedies, as the bank had filed suspicious activity reports to the serious organized crime agency and delayed their

⁵² The Criminal Justice Act 1991.

⁵³ The Money Laundering Regulations 1993.

⁵⁴ The Drug Trafficking Act 1994.

⁵⁵ Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering - Commission Declaration, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0097>, on 3 January 2022.

⁵⁶ The Money Laundering Regulations 2007.

⁵⁷ The Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007.

⁵⁸ Proceeds of Crime Act 2002 (Amendment) Regulations 2007.

⁵⁹ Directive (EU) 2015/849 (4th Anti-money laundering directive, AMLD), <https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX%3A32015L0849>, on 7 April 2022.

transactions. The issue arising was that a gatekeeper is essentially not supposed to notify their customer or client that they have filed a SAR against them as it would be deemed to be a forewarning and interfering with the investigations that were to take place. In this case, if a law firm files and delays a client's transaction, they could be sued for failing to disclose the filing that has occurred. Nonetheless, the Court of Appeal clarified that law firms need not to show the suspicion was reasonable provided that the suspicion was not a gut feeling or an irrational response and further explained that the firms are not required to communicate delays occasioned by such filings, to their clients.⁶⁰

Another challenge was the interpretation and effect of section 328 of the POCA 2002 which provided that knowingly aiding the acquisition and control of property purchased and or obtained through criminal arrangements on behalf of another, constituted a money laundering offence. The definition meant that lawyers were subjected to fall under this section by merely receiving legal fees which is expected during and after conclusion of a brief. The question then was, what actually constituted an arrangement?⁶¹ To settle the minds of solicitors, the supreme court in *Bowman v Fels* held that the ordinary conduct of a lawyer in litigation was excluded from section 328.⁶²

Overall, when observing the UK's money laundering regulatory framework, this study asserts that they are definitely a gold standard in implementation of the FATF recommendations especially in regards to the legal profession. The Law Society is the legal professional representative for advocates practicing in both Wales and England. The Law Society has been tasked with the supervisory authority over the practicing advocates and firms, which efforts are geared towards a strong and successful regime for combatting money laundering.⁶³

The Law Society does not carry out its mandate on its own as it has entrusted the Solicitors Regulation Authority (SRA) to regulate the legal profession and guide the advocates in discharging their duties in detecting and preventing money laundering. In addition to this, implementation of the reporting obligations has been made easier as the AML laws in the UK do not overwhelm the

⁶⁰ Shah & another v HSBC Private Bank (UK) Limited [2011] EWCA Civ 1154.

⁶¹ Hamin Z., 'Recent changes to the AML/CFT law in Malaysia', Volume 20/Issue 1, 26 European Journal of Law and Economics, (2008), 3.

⁶² 2005, EWC, Civ. 226.

⁶³ Malish, R. , 'Regulation of UK lawyers as gatekeepers for Anti-Money Laundering—The UK as a Leader in anti-money laundering regulations(2017b), <https://www.niceactimize.com/blog/Regulation-of-UK-lawyers-as-gatekeepers-for-AML-538>

relegation of the advocate client relationship and neither does it create a space to breach confidentiality.⁶⁴

The SRA embodying its role, applies both quantitative and qualitative risk assessment to determine the extent of exposure of money laundering in the legal firms and takes into consideration; the alleged breach, the intensity of the accusation and the ability to investigate the aforesaid breach with the information provided. Furthermore, it decides on the supervisory approach applicable by assigning legal firms with a risk rating and generate a firm profile bases on the foregoing.⁶⁵

This can be illustrated by regulation 31 (3) of the Money Laundering Regulations which exempts a lawyers' obligation to report suspicious activities, if they are in the course of ascertaining the legal position of a matter for a client and defending them in a litigious matter.⁶⁶ Moreover, section 330 (6) (b), (10) and (11) of the POCA 2002, recognizes the privilege accorded to the communication between a client and their lawyers and the lawyer is absolved from relaying the confidential information.⁶⁷

Further, in the UK, legislators have intentionally and actively involved the legal professionals in the amendments to AML regulations which creates a harmonious working relationship between the government and the lawyers in the UK. Recently, the Legal Sector Affinity Group (LSAG) revised and modified the anti-money laundering guidance rules applicable to the legal sector as a result of recommendation for review issued by the EU 5th Directive. This guidance note replaces the Law Society's guidance.⁶⁸

The intention of the new guidance note was to ensure compliance with AML laws and provide mechanisms to mitigate certain risks as well as impose sanctions for failure to adhere to Money Laundering Terrorism Financing and Transfer of Funds (information on the Payer) Regulations 2017.⁶⁹ In addition to this, it also proposes the risk based approach to be applied and focus on greater risk areas. The guidance also required that legal professional firms to set up polices and controls which would mitigate risks at the risk assessment stages instead of a later time. Moreover, it

⁶⁴ Eboibi F. E, & Mac-Barangob I, 'Global eradication of money laundering and immunity for legal practitioners under the Nigerian money laundering regulation: Lessons from the United Kingdom' 10 Beijing Law Review, (2019), 772.

⁶⁵ Solicitors Regulation Authority (SRA)-Firm Risk Assessments - Guidance (25 November 2019) <https://www.sra.org.uk/solicitors/guidance/firm-risk-assessments/>, on 7 April 2022.

⁶⁶ The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017', <https://www.legislation.gov.uk/uksi/2017/692/regulation/31/made>, on 7 April 2022.

⁶⁷ Proceeds of Crime Act 2002.

⁶⁸ Anti-Money Laundering (AMLD V) - Directive (EU) 2018/843 https://ec.europa.eu/info/law/anti-money-laundering-amlv-directive-eu-2018-843_en, on 7 April 2022.

⁶⁹ The Money Laundering Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

suggested for legal firms to appoint a Manager and a money laundering officer to specifically oversee compliance of AML Laws. Lastly, it put forward the requirement of establishing an independent audit department which should be tasked with examining the effectiveness of the controls and measures of AML compliance and make recommendations to the systems, if applicable.⁷⁰

3.4.3 Lessons Kenya can learn from the UK:

If we consider AML regime in Kenya and place it in comparison to the UK, it is quite evident that the legal profession and Kenyan government lack a cordial relationship as most advocates have complained that they are involved in legislation despite the impact that such a harmonious relationship. Possibly, Kenya would be closer to achieving gold standard of AML implementations if the government encourages self-regulation in regards to AML and fostering an amicable relationship with the legal profession.

Secondly, the legal profession in Kenya may feel unsupported with the LSK which is the supervisory and regulatory body. Kenya can learn how the relationship between LSK and the profession can be stable as this would encourage compliance if the two functions are working together for the greater good. Thirdly, Kenya should ardently involve advocates in the legislative process more, just like in the UK, and enforce AML legislation that buttresses the keen intention of the legislators to be that which includes laws as beneficiaries of the AML regime.

Fourthly, the AML laws in Kenya should be concise and clear indicating the specific transactions that the legal practitioners can be involved in and define what exactly entails a suspicious activity, proof enough to report such a transaction. Fifthly, Hatchard J (2019) demonstrated the atrocious effect to the legal profession's reputation where a lawyer is found guilty of aiding in money laundering activities by manipulating their skills and offering advice to avoid detection especially in the opening of offshore companies. As such, he proposed that states establish a public registry of beneficial ownership to keep a register of owners and those with control of a company.⁷¹

Recently, the Kenyan government has required for all companies to register the beneficial owners and are barred from transacting without such registration. If all countries require this information, offshore companies may not continue to be a vehicle to launder money as criminals would be skeptical to provide information on those offshore companies. Feasibly, this study proposes that

⁷⁰Anti-Money Laundering Guidance, <https://www.lawsociety.org.uk/topics/anti-money-laundering/anti-money-laundering-guidance> on 7 April 2022.

⁷¹ Hatchard J, 'Legal practitioners as potential money launderers: Beneficial ownership transparency and PEPs: Solicitors Regulation Authority v Sharif (2019)' 31 The Denning Law Journal, (2020), 196.

Kenya should consider a complete overhaul on its AML regulations to mirror those of the UK for it to be able to tackle some of the implementation challenges.

3.5 Conclusion

This study concludes that most jurisdictions in the global spectrum including the U.S., U.K and Malaysia are aware of the vulnerability of the legal profession to money launderers and have made steps towards implementing the FATF recommendations to curtail this problem by enhancing their AML legislation. Notably, the gatekeepers' initiative imposed on the legal profession in their course of business, has been met with opposition from lawyers and its implementation has been a cause of tension in numerous states.

The common debate amongst the countries in respect to the implementation challenges discussed in this chapter, is based on the advocate-client privilege and confidentiality principles versus their duty to disclose and report suspicious transactions. This is because lawyers view the legal professional privilege as absolute and at the core of their professional ethics.

Nonetheless, morality should be upheld first before application of professional privilege justifications by the lawyers. Concurrently, as Gichuki observed, many other professional observe confidentiality and the same is waived in special circumstances and so lawyers are not so special to protect their professional ethics.

Ultimately, this study asserts that, the duty of confidentiality affects the society as whole. This protection is for the benefit of the clients and not the lawyers. As stated in *Hickman v Taylor*, taking away this privilege would occasion a great injustice to the legal profession and would only serve to demoralize them.⁷²

The next chapter shall provide a synopsis of the implementation challenges and give possible solutions that could be used to overcome the challenges and create an effective system for the legal profession to be actively involved in curtailing money laundering activities but also protect the sanctity and the values inculcated by respecting the legal professional privilege.

⁷² *Hickman v. Taylor* - 329 U.S. 495, 67 S. Ct. 385 (1947)
<https://www.lexisnexis.com/community/casebrief/p/casebrief-hickman-v-taylor>, on 26 April 2022.

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

4. INTRODUCTION

The vulnerability of the legal profession to money launderers in Kenya has been demonstrated by this study. Such attractiveness to the profession, has been the crux for their inclusion as reporting entities in an effort to curb the widespread organized criminal activities being propagated by lawyers, due to the professional privilege they enjoy. This privilege has proven to be a hindrance to the effective implementation of the gatekeeper role. Additionally, as suggested by Bentham, the legal professional privilege benefits lawyers who know the truth and choose to keep quiet and withhold information to the detriment of the society.

The legal profession in Kenya has been adamant in rejecting their role as DNFBPs and rely on confidentiality privileges to avoid this mandate and this omission has directly contributed to their appeal to the criminals. The risks of money laundering is too high to be ignored and thus why this research dives in and investigates the implementation challenges faced by the legal profession in Kenya. Furthermore, it aims to identify effective strategies that would bridge the existing gap in legal professionals' adherence to their reporting obligation such as suggestions of amending the legal framework and policies, which should be tailored to fit their professional ethics requirements as well as their gatekeeper duties.

4.1 FINDINGS

As asserted throughout this research, the legal profession has become a target for facilitating money laundering and the question that remains is how then the legal profession in Kenya can be empowered to comfortably discharge their professional obligations whilst observing their suspicious activity-reporting role.

Money laundering is a global struggle and it's a fight against criminals that cannot be successful if the most vulnerable profession, that is the legal profession, is left out in this battle. Kenya has taken significant steps towards criminalizing the offence of money laundering through the enactment of an anti-money-laundering legal and institutional framework. The peak of its progress has been characterized by the enactment of the Proceeds of Crime and Anti-Money laundering (Amendment) Act 2021, which has expressly provided for and required the legal profession to be categorized as DNFBPs.

This study acknowledges that the laws of Kenya require strict compliance that can prove to be burdensome to lawyers and other reporting entities. For instance, the requirement of enhanced due

diligence and employing a designated anti money laundering officer in legal firms, is a costly affair and is not viable especially for small and middle sized law firms. The reporting role has also been challenged due to the nature of business conducted in law firms, as lawyers will be burdened with the thoughts and constantly asking themselves which dealings seem to be suspicious and which ones, do not.

The FATF has appreciated that the implementation of its recommendations by the legal professions worldwide has not been fully effective due to challenges encountered. This is because of the lack of understanding of the various roles undertaken by legal professionals within their respective economy when assessing the vulnerabilities and risks concerning their professional sectors. A one-size fits all legislation is bound to fail as it fails to appreciate how different professionals undertake their duties. As such, this study finds that generalizing DNFBPs and including lawyers, is an uphill tasks as other professionals do not enjoy the legal privilege and its begs the question as to how lawyers are expected to fully comply.

Furthermore, this research has identified the fact that scholars and authorities are not able to present a clear perception of the nature of their involvement in such activities. This could depict that their role in money laundering activities is a phenomenon that is yet to be fully grasped by the regulators and authorities. Despite the lack of understanding, legislations and policies have been passed and stipulated expectation on the legal profession including that lawyers are to report any suspicious activities they encounter to prevent furtherance of money laundering activities. Apart from in-depth research into the actual involvement of the legal profession in facilitating money laundering, the FATF should also consider the day-to-day obligations of the lawyers and identify laws that are in line with their ethical rules of practice.

Therefore, for the FATF to optimize implementation, should ensure wiling compliance by lawyers and this can be achieved by understanding the place of legal professional privilege in the legal system. It should be focused on the aspect of advocate-client relationship. Additionally, if these recommendations are accompanied with sanctions for failure to comply, it shows overreliance on the legal profession to report which seems to be a misdirection of the law and an intrusion to their private practice as opposed to limiting the circulation of money laundering activities.

4.2 IMPORTANCE OF THE FINDINGS

This research has outlined the implementation gaps that have hindered effective implementation of the FATF recommendation to report suspicious activities. It is important to identify the challenges for recommendations to be proposed. Below, and for the benefit of legislators, researchers, scholars and the legal fraternity, this research proposes the following key recommendations that Kenya should consider to kill two birds with one stone. One, to ensure that lawyers are comfortable in taking up their reporting role and two, to improve the anti-money laundering legal and regulatory framework.

4.3 RECOMMENDATIONS

Upon studying and analyzing various literature and legislations, this study does not recommend the inclusion of lawyers as gatekeepers of money laundering unless the FATF bridges the challenges faced by the profession in effecting its recommendations. As much as the legal profession remains the most targeted profession, imposing this role on lawyers greatly undermines their ethical duties to maintain the advocate client privilege. It also places a financial burden financially by requiring them to set up procedures and mechanisms, which is not justifiable and further forces them to investigate their clients rather than represent their needs.

Nonetheless, as discussed in the previous chapters, money launderers feel safer to carry out the criminal activities under the safeguards bestowed upon lawyers. The money laundering phenomena is likely to continue if the profession is not somewhat involved in the fight against money laundering. However, as aforementioned, this may only be achieved if the professions' interest are also put into consideration. In this view, this research proposes the following recommendations with the purpose of bridging the gap that exists in effective implementation of including lawyers as DNFBPs.

4.3.1. Abolish the mutual evaluations reported by FATF

This research is in agreement with Terry L S (2019), where the authors proposed to eradicate anti money laundering evaluations, all together. Her perspective was that the legal profession is frustrated by the lack of acknowledgement of their role to uphold the rule of law and their advocate-client relationship is undermined. Similarly, the FATF Mutual Evaluation reports show dissatisfaction with the failures of the legal profession to comply with their gatekeeping role in comparison to other DNFBPs.

Perhaps the first step and main recommendation of this research, is for the FATF and money laundering regulators to distinguish lawyers from the other DNFBPs like precious metal dealers et al, because their professional duties require a higher standard of professionalism and ethical standards. Recognizing their predicaments in finding balance between reporting suspicious activities and maintaining their legal professional privilege can go a long way in attempting to reduce the negative notion of their reporting duty and eliminate their anxiety in complying with the FATF recommendations.

The FATF should also be open to receiving constructive feedback indicating its strengths and weakness and propose a radical approach to resolve the weak areas. If the FATF was open to such mechanisms, the harmonious relationship with the legal profession could be fostered which will result in reduced rates of money laundering activities.

4.3.2. Maintenance of a public registry of beneficial ownership

Accurate and timely information on the beneficial ownership of companies should be a mandatory requirement and this information should be easily accessible to competent authorities. What this does is, to ensure that the government has access to information about all directors, shareholders of a given company and can be able to trace their assets and how they were acquired. Such information should be mandatory and imposed in all states to ensure that they have a register of all persons opening accounts in their respective jurisdictions and be alert to suspicious shell companies incorporated and report the same to the relevant authority.

Since 2020, the Government of Kenya has imposed regulations requiring the filing of ownership of companies. This is a positive step towards book keeping which records all relevant data of a company and assists in tracing its transactions. Money laundering is a global problem and thus the public register of companies should also be made a requirement in other states, to ensure that there is full disclosure of ownership and creates indicators where certain companies have been opened to primarily drive money laundering activities and ensure the same is curtailed.

4.3.3. Enforcing Due Diligence Measures to imitate those models used by banking institutions

Most of the financial institutions in Kenya have complied with AML requirements of enhanced due diligence. Law firms should emulate the same and set up proper structures that are able to detect suspicious transactions.

As this research discussed in the previous chapters, one of the implementation challenge has been the cost of complying with recommendation 16. Law firms in Kenya are privately owned, with few staff and thus imposing the cost of enhanced due diligence structures is not commercially feasible.

This study proposes that the government of Kenya take up this role of detecting money laundering to be transferred to the financial institutions, which already have systems in compliance with AML as the banks are more firm in terms of finances.

Alternatively, professional sanctions for failure to set up proper CDD and KYC systems in law firms should be increased and enforced to defaulters, which may deter those who are avoiding this obligation.

4.3.4. Provide assistance to LSK to supervise AML in Kenya

The LSK is the supervisory body of the legal profession in Kenya. With the mushrooming of law firms in all directions, LSK is bombarded with regulation and ensuring compliance in all aspects as required by law. It would then be burdensome to expect LSK to supervise all law firms and to also ascertain the level of compliance with the anti-money laundering laws.

This research recommends for the creation of a supervisory body specific to money laundering in the legal profession. This body would essentially be tasked with the day to day supervision and assist the LSK in that capacity. For example, it would ensure that all middle sized law firms have appointed an anti-money laundering officer as well as confirming that they have mechanisms in place for detecting and preventing money laundering.

4.3.5. Training Lawyers in Kenya on Anti Money Laundering issues

The vulnerability of the legal professions to money launders is a widely known issue. The implementation problem may arise due to the lack of training of the legal profession in money laundering matters. Undeniably, the laws criminalizing money laundering are in existence, however, the practicality of reporting required by the legal profession may not be well known. This study proposes that the LSK, acknowledging the profession's vulnerability, should be pro- active in educating lawyers on how they can curb this economic crime.

For instance, such training may be done by selecting various topics touching on money laundering and the legal profession such as CDD and KYC, to be discussed during the Continuous Professional Development sessions. Apart from creating awareness, it would also ensure that lawyers are not confused when reporting and understanding what is expected from them under the FATF recommendations. The legal profession in Kenya should research more and understand the stages of money laundering and how it is facilitated and such findings should be publicized and shared in legal platforms that are accessible by a majority of lawyers, as it would serve as a reminder of their reporting obligation.

4.3.6. Aligning AML laws with other laws governing the legal profession in Kenya

This study has determined that the biggest challenge hindering implementation of the FATF recommendation is the debate on the advocate-client relationships and the automatic privilege thereon. Accordingly, this study asserts that the AML laws and regulations should be reviewed and amended to reflect and take into consideration the legal limitations that are imposed on lawyers due to their duties. The legal professionals in Kenya take an oath upon admission to the bar, to defend and act justly. If the FATF and in consultation with legal experts, can review their inclusion of DNFBPs and design laws and regulations that respect and align with the laws governing lawyers, implementation should then not be opposed and it would ensure that money laundering activities are greatly reduced.

4.3.7. Protection of the Legal Profession from the arms of the Law

This study has shown that the legal profession in Kenya is hesitant to comply with the FATF recommendation because of the fear of being at the wrong side of the law. A client may sue a lawyer for non-performance yet the advocate on the other hand, has reported the said client for suspicious transactions, hence unable to proceed with a particular brief.

4.4 CONCLUSION

Agreeably, there has been an apparent shift by money launderers from financial institutions to the legal profession because the banking sector bullet proofed their transactions and notify the FRC of suspicious transactions. Conversely, such enforcement is yet to be placed on the legal profession in totality due to the various challenges.

As discussed, money laundering shall continue to be a problem in Kenya if not curtailed by professions that are likely to be targets to launder money. However, this research appreciates the difficult position that advocates are placed in as there is no assurance of client confidentiality, which is the very core of legal services, business rationality and cost benefit, in adherence to their reporting role, which deters them from complying.

The conflict that arises is then, how can we protect the lawyers in Kenya from such arbitrary suits when performing their reporting obligations. Protecting the legal profession in Kenya from the long arm of the law in exercising their reporting role could potentially dilute their rigidity to accept their gatekeeper role. The Government of Kenya has indebtedness to the FATF to ensure that the AML

framework and policies are adhered to and as such it should consider coming up with new laws that protect the lawyers from such court processes and maintain the importance of suspicious reporting.



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Appendix A: Similarity Report



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14th March 2022

Mrs Gitari, Judy
judy.gitari@strathmore.edu

Dear Mrs Gitari,

RE: Inclusion of Lawyers as Reporting Entities For Money Laundering In Kenya: Implementation Challenges And Way Forward

This is to inform you that SU-IERC has reviewed and **approved** your above **SU masters'** research proposal. Your application reference number is **SU-IERC1256/21**. The approval period is **11th March 2022 to 10th March 2023**.

This approval is subject to compliance with the following requirements:

- i. Only approved documents including (informed consents, study instruments, MTA) will be used
- ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-IERC.
- iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-IERC within 48 hours of notification
- iv. Any changes, anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-IERC within 48 hours
- v. Clearance for export of biological specimens must be obtained from relevant institutions.
- vi. Submission of a request for renewal of approval at least 60 days prior to expiry of the approval period. Attach a comprehensive progress report to support the renewal.
- vii. Submission of an executive summary report within 90 days upon completion of the study to SU-IERC.

Prior to commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology, and Innovation (NACOSTI) <https://research-portal.nacosti.go.ke/> and obtain other clearances needed.

Yours sincerely,



for: **Dr Ben
Ngoye,
Secretary;
SU-IERC**

**Cc: Prof Fred
Were,
Chairperson;
SU-IERC**

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