THE PROPRIETY OF ADVOCATES AS REPORTING INSTITUTIONS UNDER ANTI-MONEY LAUNDERING LAWS IN KENYA

BY

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Declaration

I, Doreen Akinyi Okwiri, declare that this thesis is my own unaided work. It is submitted in fulfilment of the requirements of the degree of Master of Laws (LL.M.) in the Faculty of Law at the University of Nairobi. It has not been submitted before for any degree or examination in this or any other university.

DOREEN AKINYI OKWIRI (G62/34357/2019)

Signature…….……Date……

This research project has been submitted for examination with my approval as the University Supervisor

DR. CONSTANCE GIKONYO

Signature…  Date 10/12/21

Dedication

This thesis is dedicated to my Fiancé, Dr. M'mene and daughter, Heri Kavai M'mene who have been my support and source of encouragement throughout this research and life in general. I am honestly grateful to Dr M'mene who has always reminded me to work hard for the things that I aspire to achieve.

I also dedicate this work to my parents, Richard and Pamela and my siblings who have loved me unconditionally and encouraged me to work hard.

Acknowledgement

I wish to thank my supervisor, Dr. Constance Gikonyo, for her overwhelming support and guidance throughout this work. I must admit that it was not easy at the beginning when all seemed impossible but through her dedication, constant critique, efficiency and amazing turnaround time in her reviews and feedback, we managed to complete this work. Thank you Daktari!

My sincere thanks to God almighty for the strength, health and opportunity to complete this work.

Lastly, I acknowledge and appreciate the LL.M class of 2019 for their moral support throughout this work.

Abstract

Kenya as well as other members of FATF have made steps geared towards attainment of FATF set standards. In that regard, Kenya enacted the Proceeds of crime and Anti-money laundering Act (POCAMLA). POCAMLA establishes financial reporting centre, AML Advisory Board, Assets Recovery Agency; and provides for reporting institutions and obligations. These provisions notwithstanding, Kenya was still classified as a high-risk jurisdiction. FATF made recommendations aimed at expanding the scope of Designated Non-Financial Business and Professions (DNFBP) to include advocates.

The scope of DNFBP under POCAMLA has been said to be narrow and excludes advocates, Efforts to have advocates included as part of DNFBP have been initiated severally but subsequently aborted after much resistance. Resistance to the changes by advocates are premised on the assertion that these amendments are contrary to the rules of evidence; and that they gravely impinge on the principle of advocate- client privilege. This paper explores this stalemate and establishes through benchmarking other jurisdictions, best practices which can guide Kenya in implementing FATF recommendations.

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List of Abbreviation

ABA	America Bar Association
AML	Anti-Money Laundering
CBK	Central Bank of Kenya
CDD	Customer due diligence
CMA	Capital Markets Authority
CTF	Counter-Terrorism Financing
DCI	Directorate of Criminal Investigations
DNFBP	Designated Non-Financial Business and Professions
DPP	Director of Public Prosecutions
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group.
EU	European Union
FATF	Financial Action Task Force
FRC	Financial Reporting Centre
INCSR	International Narcotics Control Strategy Report
INL	Bureau of International Narcotics and Law Enforcement Affairs
LSK	Law Society of Kenya
ML	Money Laundry
PCMLTFA	Proceeds of Crime (Money Laundering) and Terrorist Financing Act
PEP	Politically exposed Person
POCAMLA	Proceeds of Crime and Anti-Money Laundering Act

RBA	Risk-Based Approach
SOPPEC	Standards of Professional Practice and Ethical Conduct
SRA	Solicitor Regulation Authority
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
USA	United States of America

List of cases

Bowman v Fels (2005) 1 WLR 3083

Canada (Attorney General) v. Federation of Law Societies of Canada [2015] 1 S.C.R. 401.

Equity Bank (Kenya) Limited v Don Ogalloh Riaro & another Civil Appeal 133 of 2017 [2019] eKLR. (11 Oct 2019)

Federation of Law Society of Canada v Canada Attorney General [2013] BCCA 147.

Ismail Mzee Ismail v Republic Criminal Appeal 86 of 2013 [2015] eKLR (22 May 2015)

Michaud v. France 6 December 2012, ECtHR, App. No. 12323/11.

Mohammed Salim Balala & Anor vs Tor Allan Safaris Ltd Civil Appeal 28 of 2014 [2015] eKLR (23 Apr 2015)

Ordre des barreaux francophones et Germanophone and Others v. Conseil des ministers European Court of Justice, case C-305/05, Judgment of 26 June 2007

R v Da Silva, (2006) EWCA CRIM 1654

R v Plant ... R v Plant, [1993] 3 S.C.R. 281

United States of America V. Allen Landerman (167 F.3d 895 (5th Cir. 1999)

United States of America v. Luis A. Flores Appellant, 454 F.3d 149 (3d Cir. 2006)

List of statutes

Bank Secrecy Act 1970 (USA)

Canada's 1984 Charter of Rights and Freedoms

Criminal Code of Canada.

Drug Trafficking Offences Act 1986 (UK)

Proceeds of Crime (money laundering) Act 2000 (CANADA)

Proceeds of crime and Anti-money laundering Act, 2009 CAP. 59B (Kenya)

The Money Laundering Control Act of 1986 (Public Law 99-570 USA)

Treaties and conventions

European Convention for the Protection of Human Rights and Fundamental Freedoms (Adopted in Rome on 4 November 1950 and came into force on 3 September 1953) ETS 5

Treaty on European Union (Consolidated Version), Treaty of Maastricht , 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, (Adopted in Vienna on 19 December 1988 and came into force 11 November 1990)

CHAPTER 1: INTRODUCTION

1.0. Background

Money laundering is portrayed as infusion of misguidedly acquired assets into the monetary framework with the purpose of darkening the wellspring of the assets or its origin by cleaning to make it legal, the money is mostly obtained from criminal activities, it can also be describes as mechanisms and techniques that conceal illegal origin of assets;[1] and utilization of those assets as though they were legitimate by involving the least amount of inspection while also affording the least risk of detection.[2] It divided into three stages namely- placement, layering, and integration.[3] It has a number of negative impacts. First, it undermines global financial institutions and legal framework.[4] Second, at the domestic level, it makes banks vulnerable to criminal channels robbing them of customer confidence.[5] Third, it not only hampers capital flow in domestic economies, but also exposes legal systems to porosity thereby creating a breeding ground for other criminal offences such as corruption.[6]

According to United Nations, the total amount that is illegally acquired through money laundering is estimated to be between 2% and 5% of the worldwide Gross Domestic Product (GDP).[7] In Kenya, it is estimated that Kshs. 40 billion is lost to illicit financial flow annually.[8] The above demonstrates that the fight against money laundering ought to be heightened. In that

[1] Johannes Dumbacher, 'The Fight against Money Laundering' (1995) 30 Intereconomics 177.
[2] Killian J McCarthy, 'Why Do Some States Tolerate Money Laundering? On the Competition for Illegal Money', *Chapters* (Edward Elgar Publishing 2013) <https://ideas.repec.org/h/elg/eechap/14442_10.html> accessed 17 November 2019.
[3] Ioana Livescu, 'The Link between Money Laundering and Corruption Is the Fight Effective?' (Masters Thesis, Tilburg University Law School 2017) <http://arno.uvt.nl/show.cgi?fid=142895> accessed 17 November 2017.
[4] International Monetary Fund, 'The IMF and the Fight Against Money Laundering and the Financing of Terrorism' (2017) <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/31/Fight-Against-Money-Laundering-the-Financing-of-Terrorism>.
[5] Vandana Ajay Kumar, 'Money Laundering: Concept, Significance and Its Impact' (2012) 4 European Journal of Business and Management 113.
[6] John McDowell and Gary Novis, 'The Consequences of Money Laundering and Financial Crime' (2001) 6 Economic Perspectives 6.
[7] Farhat Ansaril, 'Financial Action Task Force's (FATF) "Risk Based Approach" a Tool or Myth to Fight against Money Laundering and Terrorist Financing.' (masters, University of Essex 2019) <http://repository.essex.ac.uk/26963/> accessed 19 April 2021.
[8] Tiberius Barasa, 'Illicit Financial Flows in Kenya: Mapping of the Literature and Synthesis of the Evidence' <https://www.pasgr.org/wp-content/uploads/2018/09/Kenya-Illicit-Financial-Flows-Report.pdf> accessed 17 November 2019.

regard, mechanisms to curb money laundering have been developed both domestically and internationally. At the global plane exists, Financial Action Task Force (FAFT) and United Nations Office on Drugs and Crime (UNODC). UNODC on one part has developed Global Programme against Money-Laundering, which it utilizes to aid members of UN in combatting Money laundering.[9]

FATF on the second part has an expansive role and holds a very kernel position.[10] Since its establishment in 1989, it has not only recommended Anti-Money Laundering (AML) measures but also monitors compliance by member state with its recommendations.[11] Based on its 2013 report, FATF reported that Advocates are susceptible and vulnerable to acts of money laundering and terrorism financing acts, FATF issued suggestions to broaden the scope of Designated Non-Financial Business and Professions (DNFBP).[12] Consequently; recommendation 16 (FATF 2003) proposed that member states ought to include advocates as part of DNFBP, which recommendation it expects compliance in efforts to boost global synergy in the fight against money laundering.[13]

Kenya together with other member states of FATF have made steps geared towards attainment of FATF set standards. In that regard, Kenya took a significant step forward when it passed the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA). POCAMLA adopts an all-offences definition of money laundering; establishes financial reporting centre, AML Advisory Board, Assets Recovery Agency; and provides for reporting institutions and obligations.[14] These provisions notwithstanding, Kenya was still considered a high-risk country.[15] Consequently, Kenyan government has reviewed POCAMLA in a bid update it to the required standards with

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[9] United Nations Office on Drugs and Crime, 'UNODC on money-laundering and countering the financing of terrorism,'< https://www.unodc.org/unodc/en/money-laundering/index.html> accessed 16th March 2020.

[10] FATF, '25 Years and Beyond' <http://www.fatf-gafi.org/media/fatf/documents/brochuresannualreports/FATF%2025%20years.pdf> accessed 29 February 2020.

[11] Michael J Anderson and Tracy A Anderson, 'Anti-Money Laundering: History and Current Developments' (2015) 30 J. INT'L BANKING L. & REG. 521.

[12] Zaiton Hamin and others, 'Reporting Obligation of Lawyers under the AML/ATF Law in Malaysia' (2015) 170 Procedia - Social and Behavioral Sciences 409.

[13] Constance Gikonyo, 'The Legal Profession in Kenya and Its Anti-Money Laundering Obligations or Lack Thereof' (2019) 22 Journal of Money Laundering Control 247.

[14] BIS central bankers' speeches, 'Njuguna Ndung'u: Brief Remarks on Kenya's Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Regime' 2.

[15] Grace Zhao, 'Kenya's Removal from FATF's Gray List Doesn't Mean Much « Global Financial Integrity' (*Global Financial Integrity*, 14 July 2014) <https://gfintegrity.org/kenyas-removal-fatf-gray-list/> accessed 22 March 2020.

the fruits being removal of Kenya from the jurisdictions that have been registered as high-risk in 2014.[16]

Reporting obligations can be defined as the burden placed on reporting institutions to identify and report potentially suspicious activities.The reporting obligation under the POCAMLA as well as regulations requires that, reporting institutions: report all transactions that are paid in cash where the transaction involved is US $ 10,000 or more as well as all transactions that are suspicious. Furthermore, the aforementioned institutions must undertake risk assessments, have money laundering reporting officers, and conduct customer due diligence. Compliance with above requirements are to be implemented by FRC, CBK, Director of Public Prosecutions (DPP) as well as Directorate of Criminal Investigation (DCI). Whereas the FRC supervises compliance by all reporting institutions; CBK has a specific mandate to supervise compliance by the banks. Recently; five banks were fined by CBK,[17] and their staff totalling to twenty charged with various offences for failing to adhere to the reporting obligation.[18]

The scope of DNFBP under POCAMLA has been said to be narrow and excludes advocates, the position this study considers unclear.[19] Efforts to have advocates included as part of DNFBP was initiated via drafting of Proceeds of a Bill known as the Crime and Anti-Money Laundering (Amendment) Bill, 2015. POCAMLA, 2015 expanded the extent of DNFBP to incorporate gambling clubs (counting on the web gambling clubs), land offices, valuable metals and valuable stone vendors, bookkeepers, non-administrative associations, and some other business or calling that the Minister of Finance, on the exhortation of the FRC, considers powerless against tax evasion.[20]

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[16] ibid.

[17] By Valentine Kondo, 'CBK Upholds Fines on Five Commercial Lenders over NYS Scandal' (16 November 2018) <https://www.standardmedia.co.ke/business/business-news/article/2001302913/five-banks-to-pay-dearly-over-conduct-in-nys-scam> accessed 1 November 2020.

[18] Brian Wasuna, '20 Kenya Bank Officials Face Charges for Laundering in NYS Scam' (*The East African*, 8 February 2019) <https://www.theeastafrican.co.kehttps://www.theeastafrican.co.ke/tea/business/20-kenya-bank-officials-face-charges-for-laundering-in-nys-scam-1412008> accessed 16 March 2020.

[19] Geoffrey Mosoku, 'Kenya Risks Sanctions on Cash Handling Rules' (*The Standard*, 17 November 2019) <https://www.standardmedia.co.ke/article/2001344037/kenya-risks-sanctions-on-cash-handling-rules> accessed 17 November 2019.

[20] Global Legal Monitor, 'Kenya: Anti-Money Laundering Law Amended' (24 March 2017) <//www.loc.gov/law/foreign-news/article/kenya-anti-money-laundering-law-amended/> accessed 19 April 2021.

The proposed amendment Act attracted resistance from some Advocates who have argued that the amendments would greatly affect the practice of law and the traditional role of lawyers; they are contrary to the rules of evidence; and that they gravely impinge on the principle of advocate-client privilege, leading to attempt to incorporate them via Finance Act, 2019 being aborted.[21] Consequently, Kenya was mentioned in the International Narcotics and Law Enforcement Affairs report that it is vulnerable to financial fraud;[22] Mr. Saitoti Maika, FRC director- general, opined that failure to include Advocates as part of DNFBP may lead to Kenya being classified as a high-risk jurisdiction.[23]

Kenya is a member of ESAAMLG, which organization composes seven members who participate in self-assessment concerning compliance with FATF Recommendations.[24] Thus far; among the members of ESAAMLG, Kenya has not included advocates as part of DNFBP.[25] Therefore, despite the spirited resistance, inclusion of advocates as part of DNFBP is not a matter of if but when.

With the above background, This study will examine if the inclusion of Advocates as a reporting institution under Kenya's anti-money laundering laws is appropriate in order to combat money laundering and other related activities while also maintaining public trust in the judicial system in so far as the advocate's professional and ethical duties are concerned.

1.1. Statement of problem

FAFT report done in 2013 concluded that advocates are vulnerable to money launderers and should be designated as part of reporting institutions. This research seeks to analyse whether the amendment of section 48 of POCAMLA aimed to designate advocates as reporting institutions will assist in curbing money laundering and other related crimes while also maintain

[21] Geoffrey Mosoku, 'Ojienda Rejects Anti-Money Laundering Law on Advocates - The Standard' (19 June 2019) <https://www.standardmedia.co.ke/business/article/2001330458/ojienda-rejects-anti-money-laundering-law-on-advocates> accessed 17 November 2019.

[22] Brian Ngugi, 'US Puts Kenya on List of Cash Laundering Hotspots' (*Business Daily*, 1 April 2019) <https://www.businessdailyafrica.comhttps://www.businessdailyafrica.com/bd/news/us-puts-kenya-on-list-of-cash-laundering-hotspots-2244562> accessed 19 March 2020.

[23] Mosoku (n 19).

[24] FATF, 'Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG)', 2019 < https://www.fatf-gafi.org/pages/easternandsouthernafricaanti-moneylaunderinggroupesaamlg.html > accessed 19th March 2020.

[25] Geoffrey Mosoku (n 21).

community trust in the justice system in so far as the advocate-client confidentiality principle which provides that advocates must keep confidential all information related to representation of a client.

Justification and significance of the study

Currently there are debates as to whether or not inclusion of advocates as part of reporting institution is practical and effective in preventing and controlling money laundering; legal profession is exploring unfamiliar territory of money laundering in pursuit of jurisprudence to find the relationship between advocate –client relationship and money laundering. This study therefore seeks to balance between the need for heightening the fight against money laundering and advocate-client relationship. It will seek to make a practical and scholarly contribution and to precipitate further study and discussions.

This research paper also discusses the reporting obligation of Advocates under Anti-Money Laundering Legal Framework. It appreciates the global perspective as well lessons from other jurisdictions. These may culminate in legislative and policy changes and advance the academic discourse and debate on Advocates as reporting institutions thus a boost to the fight against money laundering.

Further, Money laundering and fear based oppressor financing tasks have unquestionable adverse results for a country's monetary steadiness [26]. FAFT's function has therefore been to set out worldwide standards and recommendations that can be applied by different institutions to prevent and control money laundering. This research paper will analyse FATF regulations that affect the legal profession; analyse the role of lawyers as frontline for FAFT in line with the said regulations and lastly, handle the clashes between roles, regulations and ambiguities within AML/CTF regulations in order to make a determination as to which way Kenya should adopt. This will therefore shed light on how lawyers ought to be treated to help in controlling and preventing ML.

[26] International Monetary Fund, 'Statement by IMF Managing Director Christine Lagarde on Barbados' (*IMF*) <https://www.imf.org/en/News/Articles/2018/06/01/pr18213-statement-by-imf-managing-director-christine-lagarde-on-barbados> accessed 30 October 2020.

This research paper is a provocative tool that informs further and future discussions. It will inform further scholarly studies and research by acting as a source of information to future researchers. Its findings provoke action by policy makers who will as of necessity take in the lessons. The implementation of the recommendations of this study will not require much save for the need by the relevant authorities to review the current policy and legal framework to meet the contemporary needs as well ensure illumination of the existing penumbras that have raised discussions leading to divergence of opinion.

1.2. Statement of Objective

The reason for this study is to decide if it is suitable to include advocates as members of reporting foundations in the battle against illegal tax avoidance and coordinated wrongdoing while also maintaining public trust in the justice system in so far as advocates professional and ethical duties are concerned. The Specific objectives are:

1. To analyse the perspective on reporting obligation;
2. To analyse the scope of reporting institutions;
3. To analyse the nature advocate-client relationship;
4. To analyse the impact of reporting obligation on advocates professional and ethical duties; and
5. To benchmark the situation in Kenya to that in Canada, UK and USA.

1.3. Research Questions

These are the issues that this review expects to respond to:

1. What are the global perspectives placed on the reporting obligation?
2. What is the scope for reporting institutions?
3. Whether inclusion of advocates as reporting institutions erodes advocate –client confidentiality principle?

4. Whether or not reporting obligation conflicts advocates professional and ethical duties?
5. Whether reporting obligation strenuous and turn advocates to investigative police officers?
6. What lessons to be drawn from USA, UK and Canada?

1.4. Theoretical Framework

The hypothetical system of this exploration depends on three main theories, firstly is the John Rawls' theory of distributive justice which recommends that for justice to prevail, there is need for cooperation between the conflicting sides, Secondly, this study adopts the sociological school of thought which recommends that is it important to take into account the prevailing social factors in enacting laws and statutes, lastly, the stakeholder theory which propagate that there is need to involve the people whom a law seeks to govern in order to give their views and reactions

1.4.1. Distributive Justice

John Rawls' hypothesis of distributive equity, as per Rawls, is about the fitting method for organizing government and society. As per Rawls, equity is the primary guidelines of society, inside which individuals who unavoidably have various arrangements of qualities and objectives in life exist together, collaborate to make social and individual merchandise inside society.

Rawls hypothesis depends on the possibility that society is an arrangement of collaboration for shared benefit between people. All things considered, it is set apart by the two struggles of contrasting sentiments and a personality of imparted insights.

As indicated by Rawls, standards of equity ought to characterize the proper dissemination and weights of social co-activity. His hypothesis, focuses on individual privileges and opportunity over the general great of the local area. Social and monetary imbalances are to be organized so they are both to the best advantage of the least advantaged and appended to workplaces and positions open to all under states of reasonable correspondence and opportunity.

This research adopts this theory as it marks the point of convergence between individual rights of privacy and confidentiality vis a vis communal rights of security and economic development. This theory recommends that there is need to balance between the fight against money laundering by designating advocates as reporting institutions for the good of the society and at the same time guarding to a significant degree the advocate –client confidentiality.

1.4.2. Sociological Jurisprudence

Secondly, this study also adopts sociological school of thought; social contract theory. The social contract theory on the first part was propounded by Plato, Thomas Hobbes, and John Locke.[27] The three proponents adopted distinguishable conception of social contract theory. According to Plato, human beings are naturally inclined to do injustice to others and at the same time cushion themselves against injustice.[28] To avoid these extremes, justice exists.

Hobbes built upon Plato's views and opined that human beings naturally exhibit self-interest.[29] Consequently, they surrender absolute authority to the monarch to alleviate the brutal nature of the society.[30] John Locke disagreed with Hobbes on the aspect that state of nature is brutish and that monarch should have absolute authority.[31] He opined that the state of nature is governed by law of God; to him a government must guarantee wellbeing of the people and protect their property.[32] He concluded that government that acts against the interest of the people ought to be resisted.

This theory is relevant and is adopted by this study because it suggests that a government has its role, which is protection of property and wellbeing of the citizenry; It therefore follows that the role of government to safeguard society in general my come into conflict with the responsibility of advocates to safeguard individuals' welfare. In as far as money laundry is concerned the confidential relationship between advocates and their clients may stand in the way of government's investigative efforts in a bid to realize the duty it owes society. A such, a reliable

[27] Celeste Friend, 'Social Contract Theory', *Internet Encyclopedia of Philosophy* (2004) <https://philpapers.org/rec/FRISCT> accessed 19 March 2020.
[28] ibid.
[29] Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge University Press 1988).
[30] ibid.
[31] John Locke, Ian Shapiro and John Locke, *Two Treatises of Government: And a Letter Concerning Toleration* (Yale University Press 2003).
[32] ibid.

system of categorizing priorities and determining which take precedent and in what circumstances is inferred in this theory.

Sociological school of thought on the second part, was propounded by Auguste Comte, Von Jhering, Mx Weber, Von Erhrlich, Emile Durkheim and Roscoe Pound.[33] It suggests combining legal and sociological ideas and concepts. It promotes the idea that law is intertwined with individuals' regular routines in the public arena and that law and public activity are experimentally intertwine.[34]

The differentiation between "law in books" and "law in real life " is critical, according to Roscoe Pound."[35] He said that there is a conflict between the two, and that law is a social engineering tool whose goal is to build an efficient society with the greatest possible satisfaction of interests and the least amount of friction. Furthermore, he said that law should be used to define and safeguard specific interests that humans strive to satisfy individually or collectively. He claims that an interest is legally protected by bestowing legal rights upon it; he arranges interests as individual, public, and social, and cases that when they struggle, they should be adjusted against one another on a similar stage.[36]

Max Weber said that there is a conflict between the two, and that law is a social engineering tool whose goal is to build an efficient society with the greatest possible satisfaction of interests and the least amount of friction. Furthermore, he said that law should be used to define and safeguard specific interests that humans strive to satisfy individually or collectively. He claims that an interest is legally protected by bestowing legal rights upon it; he categorizes interests as individual, public, and social, and claims that when they conflict, they must be balanced against each other on the same platform.

Emile Durkheim considers law and morality to be nearly interchangeable, claiming that law is produced from and communicates society's ethical quality. He guarantees that wrongdoing is characterized by society's shared awareness; that a demonstration is criminal since it stuns

[33] EG Nalbandian, 'Introductory Concepts of Sociological Jurisprudence: Jhering, Durkheim and Ehrlich' (2010) 4 Mizan Law Review 348.
[34] ibid.
[35] Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (3rd ed, New York : Oxford University Press 2012).
[36] ibid.

society's shared perspective; and that discipline is a fundamental demonstration of reprisal against the people who disrupt explicit cultural guidelines of direct.

Von Jhering highlights the role of law as an instrument for meeting human society's requirements,[37] According to him, in society, there will always be a conflict between social objectives and each individual's selfish goals, and the state should use coercion to reconcile the two. According to Jhering, the success of a legal procedure is determined by how well it establishes a proper balance between opposing society and private interests.

Ultimately, these proponents agree that; law originates from the society, and must be interpreted in social context.[38] As a result, law does not explain itself, but rather sees law as a social organization that can be improved by human exertion and the quest for such changes. Law emphasizes the social purposes of law over sanctions, and legal conceptions should be utilized as guides to socially acceptable outcomes than than rigid restrictions.

1.4.3. Stake Holder theory

Lastly, the Stake holder theory which was first described Dr Edward Freeman. The common good theory on the other hand was first Articulated by Adam Smith. Stakeholder theory and common good on the last part, suggests that stakeholders are supposed to be of primary consideration by an organization.[39] To them, stakeholders must be accorded fairness, honesty as well as generosity as a way of boosting the success of an organization.[40] In their view, when stakeholders are accorded proper treatment and are highly regarded, they reciprocate by making all efforts to ensure that the goals of an organization is realized.[41] The proponents of stakeholder theory define stakeholders to be individuals or groups that an organization depends on in attainment of its objectives.[42]

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[37] Dennis Lloyd Baron Lloyd of Hampstead, *Lloyd's Introduction to Jurisprudence* (Stevens 1985).
[38] ibid.
[39] R Edward Freeman, *Strategic Management: A Stakeholder Approach* (Cambridge University Press 2010).
[40] Jeffrey S Harrison and Douglas A Bosse, 'How Much Is Too Much? The Limits to Generous Treatment of Stakeholders' (2013) 56 Business Horizons 313.
[41] Freeman, *Strategic Management* (n 39).
[42] R Freeman, *Edward/Harrison, Jeffrey S./Wicks, Andrew C.(2007): Managing for Stakeholders–Survival, Reputation and Success* (New Haven, CT: Yale University Press).

This theory is relevant in this study two aspects. First, the definition of stakeholders in an organization reflects advocates as critical players in AML. Second and last, AML in the words of the proponents of stakeholder theory make take into account the interest of the advocates. Taking account of the interest of advocates in the context of this study underscores the need to ensure that advocates undertake their roles without compromising on the client.

1.5. Research Methodology

Fieldwork and doctrinal research were used to perform this study. Primary data was obtained by conducting interviews with the individuals selected, this method of data collecting was chosen because the study's goal is to evaluate how including advocates as part of reporting institutions will assist in curbing money laundering and other related crimes while also maintaining communal trust in the justice system in so far as advocate-client relationship is concerned. A sample population was interviewed to determine inclusion of advocates as part of reporting obligation will attain the objectives of this research.

An assistant was used to collect primary data.[43] This was necessary for clarity, adequate data collection which ultimately led to flow of information. The sample size was 40 interviewees, who were chosen for the interviews based on a stratified sampling procedure. Participants were categorised and selected randomly, the individuals included judges, magistrates, advocates, legal officers, law students, lecturers and other members of the society.

The interviews were of both gender with 42% being male and 58% being female drawn in Nairobi, Kiambu and Machakos counties.

There was a structured questionnaire that contained all the questions that are relevant and covered all the issues that we sought to investigate in this study, this questionnaire was first tested in a mock interview that was conducted with family members one being a doctor and the

[43] Stive Ochieng wasonga , a law student from Moi University,on pupillage, awaiting admission to the bar.

other being a judicial officer who made the required revisions to ensure that the questions were structured in such a way that they caught what we wanted to test.

In the analysis and data gathering, all interviewees were ensured of confidentiality, interviewees were also given the liberty to consent to the interview. In order to safeguard the people who took part in the process, we used fictitious names instead of actual names of interviewees in the final analysis and presentation of the data.

Letters of introduction were sent to the people who would be interviewed, along with a questionnaire, some of the interviewees requested for a referral letter from the school to show that the purpose for the interview was strictly academic, Unfortunately, we were unable to obtain the letter in time for the interviews by the time this data was being collected because of lack of directions as to who was in charge of signing the said letter and the outbreak of covid-19 shortly thereafter. Following that, follow-up phone calls and physical visits to the offices of the prospective interviewers were undertaken in order to secure interview appointments. Both the introductory letter and the interviewees' questionnaire are provided as annexures.

Notably, this research targeted 40 interviewees and among the forty, only one advocate who works as a legal officer in a parastatal in Nairobi sent a regret email to the effect that she was unavailable for the interview as she was immediately required to report to Mombasa for official duties.

We estimated that each interviewee would take at least twenty five minutes but this turned out to be unrealistic, some of the interviwees had a lot to say that we took longer than others who were strict on time that we only took ten minutes.

Some of interviewees especially Advocates, legal officers, magistrates, judges really opposed the topic and from their responses they were biased and took the position that advocates should not be included as part of reporting institutions from the onset, The majority of them recognized that money laundering has an economic impact and that advocates are vulnerable to money laundering, they however refused to accept designation of advocates as reporting institutions.

To supplement the primary data obtained this research also employs doctrinal methodology. It looks at the Constitution, statutes, international law, subsidiary legislations, law reports, government policy papers, textbooks, local and international journals, case law, articles, research papers, theses, newspapers, and magazines that deal with money laundering. In particular, the primary source relied on in this research will be the POCAMLA and the enabling Regulations along with the FATF Recommendations. This methodology is critical in addressing the questions enumerated under the research questions as it permits appreciation of the global perspective as well as lessons from other jurisdictions.

1.6. Literature Review

This section is segmented into three sections, namely- writings that support why advocates should be included as part of reporting institutions; Writings that oppose inclusion; writings that advocates as police officers under reporting obligation; and the challenges in complying with the reporting obligation.

1.6.1. Review of literature in support of inclusion of advocates

Gikonyo Constance; Hamin, Zaiton, Normah Omar, Wan Rosalili Wan Rosli, and Saslina Kamaruddin; Cummings Lawton and Paul Stepnowsky; and FATF in its report in 2013 supported the need to have advocates classified as reporting institutions. Gikonyo Constance, on the first part discussed AML in Kenya with specific focus on whether advocates ought to be

enjoined as reporting institutions.[44] She concluded that lawyers ought to be included as reporting institutions based on FATF 2013 report, as a way of boosting AML.[45] Her recommendations are acceptable to the extent that they offer a balance between public interest and confidentiality that underpins advocate-client relationship, her study however offer solutions for practical implementation of the FATF recommendations in Kenya .

Hamin, Zaiton, Normah Omar, Wan Rosalili Wan Rosli, and Saslina Kamaruddin on the second part, discussed the reporting obligation bestowed on lawyers under Malaysian laws.[46] They relied on statutory framework of Malaysia and noted that whereas the obligation is statutory, compliance by lawyers was negligible due to client confidentiality principle.[47] Whereas their study is relevant to the extent that it recognizes the primacy of advocate-client confidentiality principle in advocate-client relationship, it maintained that reporting obligation on the advocates is appropriate, which conclusion this study opposes because Malaysian laws are more advanced and practical in implementing reporting requirements than in Kenya.

Cummings Lawton and Paul Stepnowsky on their part, conducted an empirical study on whether attorneys facilitate money laundering;[48] they established that a number of instances supported claims that attorneys are sometimes utilized by money launderers.[49] It is their conclusion that regulations that requires attorneys to comply with anti-money laundering laws must take into account client-advocate confidentiality.[50] Whereas their conclusion is adopted by this study, it is distinguishable in that it was based in laws of USA which are more advanced in the area.

FATF on its part, in its report in 2013 established that the legal profession is vulnerable to money laundering according to data obtained from some jurisdictions including USA, UK, Canada among others excluding African states;[51] it was also established that members of the legal

[44] Gikonyo, 'The Legal Profession in Kenya and Its Anti-Money Laundering Obligations or Lack Thereof' (n 13).
[45] ibid.
[46] Hamin and others (n 12).
[47] ibid.
[48] Lawton P Cummings and Paul T Stepnowsky, 'My Brother's Keeper: An Empirical Study of Attorney Facilitation of Money Laundering through Commercial Transactions' (2011) 2011 Journal of the Professional Lawyer 1.
[49] ibid.
[50] ibid.
[51] Financial Action Task Force (last), 'Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals' (2013) <http://www.fatf-

profession are very much delimited due to attendant ethical obligations as well as professional rules.[52] The analysis stated that the regulatory framework and constitution of various countries fundamentally affect the execution of hostile to tax evasion laws.[53] Whereas the report concluded that advocates should be enjoined as reporting institutions, this study appreciates the same by analysing the legal framework of Kenya and bench marks other jurisdiction to see how best the law society of Kenya can implement Anti ML laws that touch on advocates.

Opposition to inclusion of advocates as reporting institutions

Mugarura Norman opposes the idea of reporting obligation albeit impliedly; his researched based on reports by a number of banks and concluded that banks operate in a fluid environment under the regimes against ML and TF since they must balance their interest.[54] However, he did not provide recommendations that improves the dilemma faced by banks.[55] His study was based on banks viewpoint as opposed to this study which focuses on the fluid environment that advocates are likely to face if incorporated as reporting institutions.

Axelrod Robert, wrote on criminality and suspicious activity reports.[56] He concludes that reliance on business acumen of institutions in the financial sector to identifying and report suspicious transactions faces confidentiality hurdles and turns banks into police officers; he recommended identification of criminal behaviour through systematic feedback.[57] His study is relevant in that it suggests as does this study that professions ought to stick to their lane of operation, this is important in analysing the best practices for implementation of FATF Recommendations, this will assist in understanding why self-regularization is important.

Challenges in the reporting obligation

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gafi.org/media/fatf/documents/reports/ml%20and%20tf%20vulnerabilities%20legal%20professionals.pdf> accessed 5 July 2020.

[52] ibid.

[53] ibid.

[54] Norman Mugarura, 'The Jeopardy of the Bank in Enforcement of Normative Anti-Money Laundering and Countering Financing of Terrorism Regimes' (2015) 18 Journal of Money Laundering Control 352.

[55] ibid.

[56] Robert Michael Axelrod, 'Criminality and Suspicious Activity Reports' (2017) 24 Journal of Financial Crime 461.

[57] ibid.

McKeefry Francis, Tabitha, and Mugarura Norman wrote on the challenges that are attendant to the reporting obligation. McKeefry Francis on first part wrote on the reporting obligation imposed on the legal profession concerning money laundering.[58] He concluded that compliance costs is not proportional to the benefits and that the obligation conflicted with the ethical duties of advocates.[59] Despite being focused on the legal system of New Zealand, his decision is critical to this review since it endeavours to answer a portion of the exploration inquiries in this review.

Tabitha on the second part, discussed and established that anti-money laundering regulations have increased operation costs of banks.[60] Her study underscored the resources that must be employed in meeting the dictates of reporting obligation.[61] Her study however, can be distinguished with this study in that, the instant study focuses on the plight of advocates in meeting the requisite costs under Anti-money laundering laws.

Mugarura Norman explored the duty put on revealing establishments to do Customer Due Diligence (CDD) and the ramifications of its execution as an overall AML worldview in his research paper, citing FATF publications to support his points,[62] He concluded that customer due diligence is key and ought to be harmonized globally as part of boosting global synergy in preventing and controlling money laundering.[63] His study is relevant in that it underscores the fact that recommendations by FATF must be applied in context to serve the intended purposes.

1.6.2. Literature review conclusion

Despite the different persuasions of the contributors, they all seem to agree in the fundamental issue, which is the conflict between public interest and advocate-client confidentiality. The supporters of inclusion of advocates as reporting institutions, propose that a balance has to be struck between public interest and advocate-client confidentiality. Hamin, Zaiton et al in

[58] Francis McKeefry, 'Hung out to Dry: Regulatory Concerns about Imposing Anti-Money Laundering Obligations on Legal Professions' <http://researcharchive.vuw.ac.nz/handle/10063/6317> accessed 5 June 2020.
[59] ibid.
[60] Tabitha Mugechi Michugu, 'The Impact of Anti-Money Laundering Regulations on Financial Performance in Kenyan Banks: A Case Study of Chase Bank' (masters, United States International University-Africa 2016) <http://41.204.183.105/handle/11732/2666> accessed 3 November 2020.
[61] ibid.
[62] Norman Mugarura, 'Customer Due Diligence (CDD) Mandate and the Propensity of Its Application as a Global AML Paradigm' (2014) 17 Journal of Money Laundering Control 76.
[63] ibid.

particular use the Malaysian laws to propose a system that would prioritize public interest without undue prejudice to advocate client confidentiality. On the other hand, the opposing literature indicates that the reporting obligations would interfere with the ethical duties of advocates and that the costs incurred in compliance costs are not corresponding to the benefits.

Having considered the approaches taken concerning the issues, its worth emphasizing that Not so much has been written in Kenya in regards to inclusion of Advocates as part of the reporting institutions. This could be mainly because the subject of money laundering is new and less explored. The above establishes literature gap that this study seeks to fill in order to implement the FATF Recommendations ; add value to the existing literature ; and be reference in the future in terms of legislative and regulatory framework.

1.7. Hypothesis

This study is based on three (3) as follows:

1. That advocates should not be part of reporting institutions because it erodes the traditional nature of their work which requires advocates to provide legal services to clients of whatever class; and

2. That reporting obligation affect advocates professional and ethical obligation specifically that there exists an advocate- client confidentiality which is paramount;

1.8. Chapter Breakdown

There are five (5) chapters in this research paper.

Chapter One proceeds to express the destinations that the review looks to satisfy, the examination questions that are hazy to the review, the hypothesis that the study seeks to prove, theoretical framework, literature review, and research methodology after introducing the topic and providing a background of what money laundering is as well as current regulations in place to prevent money laundering.

Chapter Two highlights global as well as regional position on reporting obligation as concerns advocates on AML. The chapter highlights the origin and efforts of FATF in curbing money

laundering both on a global scale and on a local level, it also touches on the issue of advocates as reporting institutions.

Chapter three discusses the Kenyan position on advocates' reporting obligation. It also looks at what is required of Kenya on an overall scale as far as battling illegal tax avoidance, also as Kenya's present risk-based approach in so far as inclusion of advocates as part of reporting institutions is concerned.

Chapter four benchmarks the situation in Kenya to that in Canada, U.K and USA and provides the findings on what are the best practices adopted by the three different countries , it further gives insight on which practice Kenya can emulate.

CHAPTER 2: THE GLOBAL AND REGIONAL POSITION ON REPORTING OBLIGATION AS CONCERNS ADVOCATES

2.0. Introduction

In 1981 during an annual forum for heads of states of richest industrialized countries, also known as "Summit of the Arch" that was attended by countries like Italy, United Kingdom, France, , Japan, United Kingdom, USA and West Germany, the members converged to discuss a number of pressing economic issues involving International trade[1]. Towards the end of the meeting, the leaders of the said countries agreed that there was a need for creating Financial Action Task Force (FATF) on tax evasion (ML) whose object was to help with organizing endeavors that would help in the counteraction of illegal tax avoidance in both worldwide and homegrown monetary frameworks. "Moscow Communique" was adopted a decade later primarily employing 'Gatekeeper" initiative.

The initiative aimed to engage gatekeepers such as lawyers, notaries, trust, real estate agents, auditors and other non-designated non-financial and business and professionals (DNFBP) who in one way or the other take part and aid in transactions that include development of cash in both homegrown and worldwide monetary frameworks. FATF endeavors in checking illegal tax avoidance and financing of psychological warfare exercises by requiring that advocates and members of the legal profession be listed as part of DNFBP continues to face a lot of opposition by members of the legal profession who argue that it creates unparalleled challenges to the nature of the legal profession particularly duty in so far as advocates-client privilege, duty of confidentiality, legal services delivery and overall the traditional practice of law in a society.

Kenya has not included legal professions as part of DNFBP mainly because of overwhelming resistance by the legal professionals, FATF therefore continues to exert its political pressure on Kenya and other member states to force commitment concerning against illegal tax avoidance and battling financing of psychological warfare exercises on the lawful calling.

[1] Kevin L Shepherd, 'Guardians at the Gate: The Gatekeeper Initiative and the Risk-Based Approach for Transactional Lawyers' (2008) 43 Real Property, Trust and Estate Law Journal 607.

This section thusly will survey the beginning of FATF as well as its purpose, it also discusses the upshot of the recommendations authored by FATF that touch on the legal profession in order to give a clear picture of FATF effort in the battle against money laundering. It commences by providing a global perspective that traces the source of global synergy in battle against laundering of money. Moreover, this chapter also contextualizes what the role of FATF is by delving into its establishment, structure, mandate, challenges, reports, recommendations and the journey in construction of risk-based approach for lawyers and how they have trickled down to the regional level.

2.1. Origin and overview of FATF structure

Prior to the establishment of FATF, AML was confined to domestic jurisdictions. USA was among the first countries to make money laundering illegal and criminalized it under Bank Secrecy Act 1970.[2] UK and Switzerland followed suit in 1991 and 1990 respectively.[3] Realizing the need to take the fight to the international level; in 1978, USA formed Bureau of International Narcotics and Law Enforcement Affairs (INL), whose mandate was to evaluate AML in more than 200 states via International Narcotics Control Strategy Report (INCSR).[4] This paved way for a twofold concerted and coordinated effort at the global arena leading to a number of steps in terms of both hard law and soft law.[5]

First, as part of soft law measures, FATF was established in 1989.[6] Second and last, as part of hard law efforts, a number of conventions were concluded such as: United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 September,1988 entered into force 11Th November 1990), United Nations convention against Transnational organized Crime (entered into force 29th December, 2003); and Council of Europe

[2] Michael J Anderson and Tracey A Anderson, 'Anti-Money Laundering: History and Current Developments' 11.
[3] ibid.
[4] ibid.
[5] Leonardo Borlini and Francesco Montanaro, 'The Evolution of the EU Law against Criminal Finance: The Hardening of FATF Standard within the EU' (2016) 48 Georgetown Journal of International Law 1009.
[6] Johannes Dumbacher, 'The Fight against Money Laundering' (1995) 30 Intereconomics 177.

Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 1990.[7]

Money laundering is the connection between crime and what amounts to illicit economies, these two intertwine in a way that is dangerous.[8] . FATF is at the core of the battle against illegal tax avoidance and Terrorism financing. It was set and made official in the year 1989 by the G-7 summit which bestowed it with the mandate of reviewing and suggesting further measures to be employed in combating money laundering.[9] Its structure composes: the plenary; the President and Vice-President; the Steering Group; and the Secretariat.[10] The plenary is the main organ and consists of member states; it sets the manner of conduct of affairs, approves FATF budget, and decides on the holders of the office of the president and the vice president as well as the secretariat.[11] Other organs such as steering group and the secretariat play a complimentary role to the plenary.[12]

FATF is recognized for its recommendations which are internationally recognized as standards for combating money laundering and terrorism financing, these recommendations are directed towards different categories of 'gatekeepers' that are in one way or another better placed to assist or inhibit money laundering and terrorist financing and other related crimes. Its membership has grown from 16 to 39 member states, 2 International organizations and several organizations with observer status[13] the implementation of FATF recommendations therefore sweeps across the globe and thus far implemented by more than 190 countries, International Monetary Fund and World Bank.[14]

The Criteria for admitting a country to be a member of FATF are that: first, a county must have completely dedicated it self at the political level to carry out the 40 proposals within a time

[7] Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (1st edn, Cambridge University Press 2000).
[8] ibid.
[9] FATF, 'About - Financial Action Task Force (FATF)' (18 April 2020) <https://www.fatf-gafi.org/about/> accessed 18 April 2020.
[10] ibid.
[11] ibid.
[12] ibid.
[13] FATF, '25 Years and Beyond' <http://www.fatf-gafi.org/media/fatf/documents/brochuresannualreports/FATF%2025%20years.pdf> accessed 29 February 2020.
[14] ibid.

frame that is normally at least three years and to also undergo two rounds of mutual evaluations as well as annual self-assessment exercises; second, a nation should likewise be a functioning individual from applicable FATF-style provincial body; third, a country must show that it is strategically an important country; fourth, a country must have already condemned drug dealing and other genuine violations; last, a country must have already obligated institutions that deal in finance to report strange or dubious exchanges.[15]

In order to determine compliance by its member states, FAFT has based its reliance on annual – self assessment and periodic mutual evaluations which are undertaken by its competent experts. It also lacks enforcement capabilities but can suspend a member state which fails to adhere and comply with its own guidelines.[16]

FATF works under style local bodies which are nine in total, they bodies are:

- Asia/Pacific Group (APG);
- Caribbean Financial Action Task Force (CFATF);
- Eurasian Group (EAG);
- Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG);
- Focal Africa Anti-Money Laundering Group (GABAC);
- Latin America Anti-Money Laundering Group (GAFILAT);
- West Africa Money Laundering Group (GIABA);
- Center East and North Africa Financial Action Task Force (MENAFATF); and
- Board of Europe Anti-Money Laundering Group (MONEYVAL).

[15] Mohsen Adollahi, 'The Structure and Function of the Financial Action Task Force' (PHD thesis, Lorestan University) <https://lu.ac.ir/usersfiles/386909445087.5852841.9154511.pdf> accessed 19 April 2020.

[16] James K Jackson, 'The Financial Action Task Force: An Overview' (Congressional Research Service) <https://fas.org/sgp/crs/misc/RS21904.pdf> accessed 27 April 2020.

Scope and mandate of FATF's in prevention of money laundering

The Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention) was signed in 1988. concluded with the central aim of depriving criminals of drug proceeds.[17] The Vienna Convention's preamble states that its central focus was to deny people engaging in illicit traffic and proceeds of criminal activities motivation to do so. Pursuant to its mandate, FATF issued the first 40 recommendations in 1990.[18] These recommendations were narrow in scope and were limited in nature as they focused on proceeds of drug offences, in keeping with the offences under Article 3 of Vienna Convention 1988.[19]

FATF in 1996 widened its mandate to cover proceeds of all serious offences; as well as development of standards to be applied in the battle against terrorist financing in 2001.[20] Due to change in times and sophistication of the measures employed by money launderers, FATF reviewed its initial (1996 and 2001) recommendations in 2003,[21] subsequently in 2012, 2013, 2015, 2016, 2017 and updated them into the latest version in 2019.[22]

Thus far, FATF deals with an array of issues including strengthening global safeguard and maintenance of the probity of financial systems. Moreover, its jurisdiction extends to new emerging threats from financing of weapons of mass to tougher measures on corruption aimed at deepening Global surveillance of evolving criminal and terrorist risks, as well as the development of more effective solutions partnerships within private sectors among states and support efforts to raise standards.[23]

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[17] Organization of American State, OAS, 'CICAD: Anti-Money Laundering' <http://www.cicad.oas.org/Main/Template.asp?File=/lavado_activos/default_eng.asp> accessed 12 April 2020.

[18] Robin Booth and others, *Money Laundering Law and Regulation: A Practical Guide* (OUP Oxford 2011).

[19] ibid.

[20] Financial Action Task Force, 'FATF Standards - 40 Recommendations' (2003) <http://www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20-%2040%20Recommendations%20rc.pdf> accessed 20 November 2020.

[21] FATF/OECD, 'FATF (2012-2019), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation (Updated 2019)' <www.fatf-gafi.org/recommendations.html>.

[22] Will Kenton, 'Financial Action Task Force (FATF)' (*Investopedia*, 13 January 2020) <https://www.investopedia.com/terms/f/financial-action-task-force-fatf.asp> accessed 12 April 2020.

[23] ibid.

Since its establishment to date, FATF has centralized its function in the battle against Money laundering and terrorism financing.[24] Its role is thus fourfold. Firstly, it sets standards that are internationally recognized and promotes practical implementation of regulations and workable measures to battle terrorist financing, human trafficking, tax evasion and other related dangers that posture to the honesty and uprightness of worldwide monetary framework. It is therefore worthy to note that the cash flow involved in these vices are in the billions, for example, it is estimated that proceeds that are collected from activities involving human trafficking has increased to USD 150 billion in 2018 from USD 32 billion in 2011.[25]

Secondly, it assesses compliance with its recommendations.[26] The role FATF in this regard is said involve monitoring progress of member states in implementation of necessary measures, reviewing techniques and counter-measure ,promotion of implementation of measures globally. FATF additionally teams up with other global partners to reveal public level weaknesses to shield the worldwide monetary framework from misuse.[27] Thirdly, it conducts typology studies on terrorism financing and money laundering.[28] FATF keeps two separate lists of countries: the grey list which include countries have flaws in their anti-money laundering/counter-terrorist financing (AML/CTF) systems, but are committed to devise a strategy to remedy and Blacklist which include counties that have loopholes and are not committed to doing anything. Other nations are being urged by the FATF to implement additional due diligence and countermeasures, raising the cost of doing business with the country and, in certain cases, terminating ties entirely.

Lastly, it responds to trends and emerging issues on its area of jurisdiction.[29] FATF closely monitors the evolution of new methods that are being developed by money launders for Proceeds from criminal activity are used to fund illegal activities. The Financial Action Task Force (FATF) has conducted a study on Hawalas' vulnerability to money laundering and terrorist financing as a result of their usage of nonbank settlement techniques. further, The FATF also

[24] Mark T Nance, 'The Regime That FATF Built: An Introduction to the Financial Action Task Force' (2018) 69 Crime, Law and Social Change 109.
[25] FATF (n 9).
[26] ibid.
[27] ibid.
[28] ibid.
[29] ibid.

looked into the diamond trade's money laundering vulnerabilities and hazards, including production, rough diamond sales, cutting and polishing, jewelry manufacturing, and jewelry retailing.[30]

In close conference with the private entities, FATF developed and adopted a risk-based approach (RBA) that is very essential in order to implement its recommendations. RBA allows one to be able to detect a person who poses a high danger of money laundering or terrorist financing, as well as establish ways to counteract the vices. It entails using certain factors to assess a business; adopting certain control measures to implement control to handle the identified risks; keeping a client's identification or beneficial ownership information of a client up dated ;and monitoring a client's financial transaction that pose higher risks of money laundering[31].

It therefore goes without saying that a risk-based strategy is inherent part among the suggestions which encourage member states to conduct proper know your customer due diligence that involve, identifying , assessing and understanding risks posed by money laundering and terrorist financing and thereafter take into account the most appropriate measures to address such risks. The standards require member states and regions to condemn illegal tax avoidance pair with global law. The standards also require states to confiscate and freeze terrorist assets or proceeds of such crimes and create an intelligence unit to collect, analyse and evaluate any transaction that they may be deemed suspicious and to ensure total compliance in line with the standards.

Since its establishment to date, the central role of FATF is the fight against money laundering and financing of terrorism.[32] Its role is thus fourfold. Firstly, sets international standards as concerns measures that ought to be adopted to combat money laundering.[33] Secondly, assessment of compliance with its recommendations.[34] Thirdly, it conducts typology studies on

[30] Jackson (n 16).
[31] Financial Intelligence Unit Belize, 'Risk Based Approach – Financial Intelligence Unit' <https://fiubelize.org/risk-based-approach/> accessed 9 May 2020.
[32] Nance (n 24).
[33] ibid.
[34] FATF, 'Financial Taskforce mandate', (2012-2020) < https://www.fatf-gafi.org/media/fatf/documents/FINAL%20FATF%20MANDATE%202012-2020.pdf > accessed 15th April 2020.

terrorism financing and money laundering.[35] Fourthly and lastly, it responds to trends and emerging issues on its area of jurisdiction.[36]

In view of the mandate described above, the glaring challenge that FATF faces concerns the implementation of its recommendations. The recommendations may at times involve development in law and procedures that may be take prolonged periods to be implemented by countries, further, the recommendations are non-binding and without legal effect, they rely on the goodwill of the member states.[37] Another challenge faced by FATF is that due to advancement in technology, criminal are able to utilize technological efficiencies in navigating legislations enacted pursuant to FATF recommendations.[38]

At the implementation level, member states are faced with difficulties in understanding exactly the meaning of the recommendations and how to judge its performance in line with the recommendations which are revised periodically with the emergence of new money laundering trends that keep evolving daily.

2.2. Development of FATF recommendations on Advocates

International treaties that are concerned with financial crimes indirectly draw legal advisors and individuals from the legitimate calling in the battle against illegal tax avoidance, this is partly because lawyers are presumably entangled in transactions tainted by criminals. The direct inclusion of lawyers in prevention of money laundering therefore was FATF's brain child owing to its.[39] Most states when drafting anti-money laundering laws rely on the recommendations and measure put in place by FATF. FATF is thus mandated to look into evolving trends on money laundering and to make appropriate recommendations.

The influence that FATF has in the global determination and framing money laundering comes from its early works, firstly it released the forty (40) recommendations on prevention of ML in the 1990 and supplemented with 8 recommendations which were specifically designed to

[35] Ibid.
[36] Ibid
[37] FATF (n 13).
[38] ibid.
[39] 'FATF-GAFI.ORG - Financial Action Task Force (FATF)' <http://www.fatf-gafi.org/> accessed 3 November 2020.

prevent terrorist finance and later consolidated them into a set of 40 in 2012.[40] The developments over the years have been systematic as discussed below;-

2.2.1. FATF Recommendations 1990(forty recommendations)

Barely a year after the formation of FATF by the G-7 member states, a well detailed financial plan aimed at curbing money laundering was birthed, the forty recommendations, it provided basic structure for the battle against money laundering and its effort was to be applicable universally.[41] The forty recommendations were divided into 4 major sections: role of legal systems in a country to battle ML; the job of the monetary framework; necessary measure to combat ML/TF; and international cooperation.[42]

Recommendation one provides for criminalization of money laundering by countries and its application to all serious offences.[43] Recommendations 2 and 3 describe how a country should adapt its legal system to battle illegal tax avoidance and psychological oppression financing, and they advocate the Vienna and Palermo treaties' procedures for managing tax evasion and psychological oppression financing circumstances.[44]

Recommendations 4 all through to 25 dealt with what measures should be undertaken, from record keeping, paying special attention to large transactions to conducting proper due diligence, these precautions are obligated upon om the financial institutions and DNFBP in battling illegal tax avoidance and terrorist financing. Suggestions 13 through 15 give that monetary establishments are commanded to divulge any suspicion of money laundering that they suspect is a proceed of money laundering or criminal activity to the financial intelligence unit and that they are protected by law and barred by law from divulging that fact, recommendation 16 makes the above provisions applicable to DNFBP.[45]

[40] Michelle M Gallant, 'Lawyers and Money Laundering Regulation: Testing the Limits of Secrecy in Canada' [2013] SSRN Electronic Journal <http://www.ssrn.com/abstract=2336219> accessed 15 June 2020.
[41] 'Financial Action Task Force on Money Laundering Report 1990 - 1991' (1991) <http://www.fatf-gafi.org/media/fatf/documents/reports/1990%201991%20ENG.pdf> accessed 15 June 2020.
[42] ibid.
[43] Ibid.
[44] Ibid.
[45] Ibid.

Recommendations 33 and 34 emphasize the importance of ensuring that legal persons are not improperly employed and that legal arrangements are transparent to forestall tax evasion and terrorist financing, this can only be achieved by countries in ensuring that precautions are taken to ensure that legal arrangements are not unlawfully used by money launderers.[46]

2.2.2. FATF Recommendation 1996

Recommendations were reviewed in 1996 by FATF to consider the new trends and evolving money laundering activities, There was a distinguishable and observable trend in the expanding use, by tax criminals , of organizations which were not financially related, there was increased use of bureau de change and professions that were non-financial.[47] There was keen interest and attention to money laundering threats where perpetrators used new ways which involved participation of financial services experts in the private sector.

These new development therefore made it clear that law enforcement and regulators needed to devise ways to look ahead in order to Identify prospective issues and new difficulties. Collaboration with the business world.[48] Similarly, with connection to S.W.I.F.T., the FATF resolved the issue of recognizing the requesting customer in electronic assets moves and looked into measures to improve feedback to financial institutions..[49]

2.2.3. FATF Recommendation 2003

The first revisions were done in 1996 and 2001; both had no bearing on the legal profession. Whereas the 1996 extended the extent of FATF order to incorporate generally genuine violations, the 2001 amendments introduced within FATF mandate the fight against terrorism.

2.2.4. FATF Recommendations 2003 (40 + 9 Recommendations)

After 1996 revision, the recommendations were further revised to provide additional interpretative notes to shed light on the application of certain recommendations and also

[46] Ibid.
[47] Financial Action Task Force, '1996-1997 Annual Report - Money Laundering' (21 July 1997) <https://cryptome.org/jya/fatf96-97.htm> accessed 27 April 2020.
[48] Ibid
[49] Ibid

provide guidance, it is also argued that the reasons for the revision was because money launderers had devised new techniques by using legal persons to make true ownership of their assets unrecognizable. Months after the September eleventh attack in the United States, the FATF extended its command to incorporate illegal intimidation financing. The outcome was that an expansion of eight uncommon suggestions to battle terrorism financing and organization ,the ninth recommendation was issued to address concerns with cash couriers.

The 2003 version also introduced a number of "gatekeepers" recommendations therefore diverting from the primary perpetrators to include other "gatekeepers" who whether in their professional duty or business aid in facilitating or avoidance of money laundering and financing terrorism.[50] Gatekeepers therefore, mean people and Lawyers, bookkeepers, realtors, valuable metals dealers, gambling clubs, and different experts, all together referred in the 40+9 recommendations as DNFBP

The Rationale for the inclusion is that FATF noted that there was growing worry that tax evasion plans include the utilization of experts (guards) through coordinated wrongdoing and different crooks to assist them with laundering cash through going about as monetary delegates or giving master exhortation. Recommendations require the businesses and professionals to adhere to due diligence requirements, maintain record keeping and report suspicious transactions without tipping off their customers/clients.[51] The Recommendations were deemed controversial in so far as Advocates and the legal profession are concerned in various fonts; - Firstly, it defined designated non-financial businesses and professions to include; lawyers, notaries, other legal professional and accountants. The recommendations stated under the glossary thus:

> Designated non-financial businesses and professions are defined to mean
>
> ("(e) Attorneys, legal officials, other free lawful specialists, and bookkeepers — this identifies with solitary experts, accomplices, or utilized experts inside proficient organizations."."

The proviso was as follows:

[50] Laurel S Terry, 'An Introduction to the Financial Action Task Force and Its 2008 Lawyer Guidance' (2010) 2010 Journal of the Professional Lawyer 3.
[51] Ibid.

*"*It isn't planned to allude to 'inner' experts who work for different kinds of associations, nor to experts who work for government offices, who may as of now be dependent upon hostile to tax evasion strategies."

It is noteworthy that the definition provides the scope of its application to avoid conflation that may arise in circumstances provided and contemplated by other legal and regulatory framework. Secondly, it introduced Due diligence and record-keeping obligation on non-financial businesses and professions. The obligation as provided under recommendations 5, 6, 8, 9, 10 and 11 was that, non-financial businesses and professions were to: identify and verify identity of customers; identify and verify beneficial owners; pay special attention to technological advancements; scrutinize transactions; maintain and keep necessary records for at-least 5 years; and investigate and elucidate the context of complex transactions.

It was recommended that client's expected industriousness and record-keeping commitments apply to the action being referred to Buying and selling land, for instance; overseeing customer cash, protections, or different resources; overseeing bank, reserve funds, or protections accounts; sorting out commitments for the development, activity, or the executives of organizations; and shaping, working, or overseeing legitimate people or plans, just as trading business elements.[52] This was in line with the fact that advocates offer a number of services that may never be utilized by criminals' hence futile and idle regulations.

Thirdly, Suspicious transactions should be reported, albeit this is subject to legal professional privilege.[53] Fourthly, it is provided under the recommendations that efforts taken by advocates to dissuade their clients from money laundering activities do not form part the offence of tipping off.[54] Fifthly, law firms and advocates are expected to develop internal policies, conduct training of staff, develop and implement audit systems.[55]

Lastly, recommendation 16 stated that matters that fall within the ambits of legal professional privilege should be defined by domestic legislations and that advocates may be allowed to report

[52] Recommendation number 12(d).
[53] Recommendation number 16(a).
[54] Recommendation 14.
[55] Recommendation 15.

suspicious transactions to their respective professional bodies provided that such bodies are linked with financial intelligence unit which is an equivalent of Financial Reporting Center.

Commentators have also criticized FATF on the 2003 recommendations arguing that FATF bluntly applied the recommendations on lawyers and legal profession without having any exact proof to show that legal counsellors are somehow ensnared in tax evasion and illegal intimidation financing exercises.[56]

2.2.5. FATF Recommendations 2012

FAFT undertook to review 2003 recommendations, which was necessitated by the need to have not only an up to date and beneficial regime but also that which takes cognizant of the past lessons and trends in money laundering.[57] As a result, the third revision was promulgated, precisely- the 2012 version.

The 2012 version was a fruit of a rigorous participatory process that brought together view by governments, individuals, private sector organizations as well as non-governmental organizations.[58]Among the issues that featured during public participation were; Customer due diligence, wire transfers, and politically individuals, vulnerable customers as examples of risk-based approaches.[59]

As opposed to the 2003 version, the 2012 one is more robust on a number fronts. First, it provides for extensive recommendations that clarify and augment the 2003 version.[60] For example, it provides for recommendations on: risk-based approach and urges coordination and cooperation among agencies of law enforcement to ensure synergy since Money laundering is a difficult issue that should be tended to.[61]

[56] Terry (n 51).
[57] FATF/OECD (n 21).
[58] FATF, 'Review of the FATF Standards and historical versions', (2019)< https://www.fatf-gafi.org/publications/fatfrecommendations/documents/review-and-history-of-fatf-standards.html > accessed 15th April 2020.
[59] Ibid.
[60] FATF/OECD (n 21).
[61] Ibid.

Second, it introduced a set of anti-money laundering duties that are preventative in nature on lawyers.[62] They contain measures such as maintenance of Due diligence techniques including keeping records, requiring customer identification, and more. The obligations are similar to the arrangements monetary establishments, for example, banks and credit associations, are subjected to.Be that as it may, the provision exempt lawyers in all cases however, it only applies to lawyers, notaries and independent professionals when performing specific responsibilities;

> "…at the point when they sort out for or complete arrangements for their customers including the accompanying exercises: land buys and deals; customer cash the board Securities or different resources are models. Association of commitments for the development, activity, or the executives of enterprises, the arrangement, activity, or the board of lawful people or plans, and the buying and selling of business elements[63]

Additionally, on the preventive measures, There are reporting obligations for any financial activity when there is a sensible doubt that the assets are identified with fear monger subsidizing or illegal tax avoidance.[64] Only lawyers who engage in the types of financial activity listed above are required to report suspicious transactions..[65]

The FATF's suggestions aim to distinguish between different types of legal tasks, the regulations target Attorneys who in one way or the other facilitate in monetary activity as opposed to the different types of legal work like litigation. The recommendations take cognizant of the way that Lawyers assume an essential part in the framework of social organization based on public obligations and to the client in their professional ethics and as such, taken into account explanation of the legal system's connection with attorneys thus offering the following measure of protection:

> " Assuming significant data is gotten in conditions that are qualified for proficient mystery or legitimate proficient advantage, lawyers are not compelled to disclose suspicious transactions." It is up to each country to decide whether issues are covered by

[62] Jared Wessel, 'The Financial Action Task Force: A Study in Balancing Sovereignty with Equality in Global Administrative Law' (2006) 13 Widener Law Review 169.
[63] Financial Action Task Force, 'FATF Standards - 40 Recommendations' (n 20) recommendation 22 (d).
[64] Ibid Recommendation 20.
[65] Ibid Recommendation 23.

lawful expert advantage or expert mystery. Typically, this would apply to data legal advisors. Public accountants and other free experts get data from or acquire data from their customers (a) in the course of determining their clients' legal positions, or (b) in the course of defending or representing that client in judicial, administrative, arbitration, or mediation proceedings."[66]

This in essence acknowledges the unique function of attorneys in the society as well as return, the same should be applied in reporting or identification requirements.[67] FATF appreciate that in order to effectively bind lawyers to the requirements, there is need for self-regulatory of lawyers conformity with the rule, which can be achieved through a self-administration structure rather than through a state-based body.[68]

Lastly, DNFBP must adopt observing frameworks to guarantee consistence with the administrative system, according to the FATF. Accordingly, Compliance is bolstered by appropriate penalties for any rule infractions.[69] Consistence should likewise consider the idea of the calling as well as confidentiality requirements.[70] Despite the clarity envisioned under the 2012 version, legal profession bodies in a number of countries still contested its provisions. This prompted a typology research as to whether advocates are vulnerable to money laundering as a number of bar association faulted FATF recommendations on the basis of lack of concrete evidence that advocates are powerless against tax evasion culminating to a 2013 typology report.[71]

According to the report, the methods utilized by money launderers and abetted by advocates are: Misuse of client funds; real estate purchases; trust and company formation; trust and company management; client affairs and introductions; specific lawsuits; and charity formation and management The research found a number of red flags. First concerned the identity of the client,

[66] Ibid Recommendation 23-interpretive Notes (DNFBP-other measures),1-4
[67] ibid Recommendation 28-Interpretive Notes 9 (regulation and supervision of DNFBP)
[68] Ibid Recommendation 28-(regulation and supervision of DNFBP).Suspicious transaction reporting and other forms of reporting, and other monitoring of compliance, may occur through the medium of self-regulatory authorities.
[69] Ibid Recommendation 35
[70] Ibid Recommendation 28-Interpretative notes
[71] FATF, 'Report on Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals,' (2013) < http://www.fatfgafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf > accessed 12th April 2020.

the client's representative, and documents presented.[72] Second, touched on the source of funds utilized by the client in the transactions in which he/she seeks services of an advocate. Third, was about the choice of the advocate, the expertise of the advocate on the instructed area, as well as amount of fees paid up front. Fourth and last, concerned the nature retainer and whether it concerned an unusual transaction.

The report concluded that advocates are powerless against tax evasion and failure to follow the FATF's guidelines is an act that constitutes a disincentive to the fight against money. Further, the report documented challenges to the implementation of the recommendations to include: lack of tools for identification; lack of understanding not only by advocates but also professional bodies; and differential interpretation of the import of implementation of the recommendations on human rights as well as ethical obligations.

2.2.6. 2015 Recommendations

In 2015 FATF did the fifth revision which came in form amendments. 2015 revision altered the provision of Interpretative Note to recommendation 5 by urging countries to criminalize financing traveling expenses of persons suspected of propagating terrorism.

2.2.7. 2016 Recommendations

This was followed by a sixth revision in 2016. The FATF Typology Report on the Risk of Terrorist Abuse of Non-Profit Organizations influenced the 2016 revision. it amended interpretative Note to recommendation 8 by introducing a requirement that Non-profit organizations be monitored and supervised. It is noteworthy that the fifth and sixth revisions did not affect the legal profession.

2.2.8. 2017 Recommendations

2017 saw a seventh revision. This version of Recommendations revised interpretative Note to Recommendation 18. It expanded its scope and gamut to include sharing of suspicious or unusual information with financial groups as well as subsidiaries of a financial institution.

[72] Ibid.

2.2.9. 2018 Recommendations

The eighth recommendations were promulgated in 2018. The 2018 version revised recommendation 2. As opposed to the older version, the 2018 version urged compliance with the right to privacy.

2.2.10. 2017 Recommendations

In 2019, FATF did the latest revision. The 2019 version of FATF Recommendations added interpretive Note to recommendation 15. Consequently, FATF recommendations and standards are to apply to virtual resources just as virtual resource specialist co-ops.

Whereas the above revisions and amendments sought to clear the air on the duties expected by Advocates under the gamut of FATF recommendations; they still face a number of criticism. First, whereas the conclusion on vulnerability of advocates was based on a study conducted in 23 jurisdictions, it was not spread across all the continents; for example, none of the jurisdictions was an African state.

Second, the recommendations are not definitive in that what amounts to suspicious transaction is not defined. Third, the duty is too strenuous to be conducted by legal professionals without turning them into investigative police officers. Fourth, the duty conflicts with the ethical duties of advocates and scares away clients compromising realization of the right to legal representation. Last, the duty as couched under AML is likely to lead to a break of both the right to confidentiality and the constitutional mandate of the Police Service.

2.3. FATF's Guidance on a Risk-Based Approach for legal Professionals

Efforts to clarify the import and tenor provide by the recommendations and for ease of their implementation by advocates and concerned professional bodies; FATF promulgated 2008 Guidance for Legal Professionals Using a Risk-Based Approach (RBA) after engagement with members in various private sectors. The guidance evolved from the first risk-based advice that was created by cooperation among FATF and the monetary foundations that led to adoption of the financial institution risk based guidance applicable to various DNFBP including advocates.

The theoretical and practical approach about the guidance was to guarantee that minimal resources are not wasted but are allocated to combat money laundering and Terrorist financing and that The allocation is done in the most efficient way feasible, with the largest risk receiving the most attention and differing from the norm. A guidelines based technique requires an attorney to keep specific laws, rules, or guidelines, paying little mind to the basic greatness or level of hazard.[73]

The genesis of The risk-based strategy for the legal profession dates back to a 2006 consultative conference in Amsterdam between the private sectors otherwise known as the DNFBP and FATF who at that time believed that it was difficult to apply the recommendations blindly to their private sectors. As a result, various forums were held between 2007 and 2008 to produce a customized risk based approached for the legal profession known as Lawyer Guidance. The guidance is a partnership between the Financial Action Task Force (FATF) and financial institutions.[74]

Subsequently, On September 7, 2007, gatherings between the private area and the FATF were directed in London.In Bern, In 2007, Switzerland was the host country, followed by Paris in 2008, London in June 2008, and Ottawa in September 2008. Some of the issues discussed in the meetings were that; Firstly, that the Financial institutions are not the same as the legal profession and therefore the risks faced by the legal profession are different from those faced by financial institutions, Secondly, that the guidance if adopted would impinge on the lawyer customer advantage and the obligation of customer secrecy which are governed by certain rules..

Third, there was scarcity of useful information on terrorist financing, making it difficult to make informed decisions. lawyers draft appropriate guidance applicable to that vice, Lastly, that imposing due diligence obligation on private and public advocates who have various roles would not be easy to implement since their roles vary in different transaction. These meeting helped in limiting and defining the number of difficulties and viable solutions to the Lawyer guidance's scope and content

[73] Financial Action Task Force, *RBA Guidance for Legal Professionals* (www Fatf-gafi org 2008).

[74] Financial Action Task Force, Guidance on the Risk-Based Approaches to combating money laundering and terrorist financing: High level principles and procedures (2007), <http://www.fatf-gafi.org/media/fatf/documents/reports/High%20Level%20Principles%20and%20Procedures.pdf> accessed on 23rd June, 2020.

In summary, The Legal professional guidance fora brought together concerned parties and stakeholders.[75] It espoused a common understanding of RBA, principles and good practices that underpin implementation of RBA.[76] As to the meaning of RBA, the guidance provided that it entails identification, analysis and mitigation of the risk.[77] Meaning, the measures proposed under the recommendations are not automatically applicable save for the presence of risk of money laundering.

As previously stated, FATF has no position to force laws on any ward, however it applies worldwide political tension on part states to order its enemy of tax evasion and against fear monger financing proposals. It is arguable that FATF's efforts to combat these vices pose a number of challenges to the advocate- client advantage, the obligation of classification, and the job of a legal counselor in an overall set of laws.[78]

Risk-based techniques ensure that the actions adopted to prevent or reduce money laundering and terrorist funding are proportional to the risks detected, allowing resources to be deployed in the most efficient manner possible. As opposed to the standard based methodology, which might prompt an emphasis on gathering administrative necessities rather than adequately battling tax evasion and terrorist financing, the principle advocates for resources to be directed according to needs so the most serious danger gets the most elevated consideration.[79]

The lawyer guidance has 125 numbered paragraphs that are taken from the financial institution guidance and applied to the DNFBP guidance paper as a template. It is addressed at a variety of audiences, both private and public, and discusses the risk factors that lawyers must consider when fostering a danger based framework and undertaking to distinguish exceptional provokes remarkable to the legitimate calling.[80]

The guidance therefore does not cover all legal representation or legal advice However, it only applies to lawyers when they prepare for and conduct transactions including one or more

[75] Financial Action Task Force, *RBA Guidance for Legal Professionals* (n 75).
[76] Ibid.
[77] Ibid.
[78] Gathoni Kimani, 'Gate Keeping on Anti Money Laundering and Counter Terrorist Financing: A Case for the Kenyan Advocate' (2018) 3 Creative Connect International 21.
[79] Ibid.
[80] Lawyer guidance note 105

transaction-oriented activities listed in lawyer guidelines by reference to recommendation 12.of the 40 + recommendations that involve;-[81], buying and selling of real estate, managing client money, securities, managing a client's banks ,savings , organization of contribution for creation, operation or managing of company, creation, operation ,managing of legal persons or buying and selling of business. Consequently, the point of departure is that the need to perform CDD requirements on a client only applies when the service sought involve the preparation and carrying out of transaction for a client that concern one or more of the specified activities that falls within the ambit of recommendation 12 of the recommendations thus a lawyer will develop his/her risk reference to determine whether or not a client possesses a higher risk and if affirmed, then the lawyer should determine mitigating factors that affect the determination.

2.3.1. The types of risks, circumstances, and variables that influence them

The forty suggestions for legal professionals addressed risk in three main areas: customer due diligence (CDD), internal control mechanisms for legal professions and businesses, and the approach to oversight and monitoring of legal professionals.[82] Country and geographic risks, customer risks, and risk linked with the particular service sought are the three most typically utilized factors.[83]

2.3.1.1. Country and geographic risk

The lawyer guidance provides that there is no consensus among designated authorities, self-regulatory organization and legal professionals on whether a transaction ties to a particular geographical area represents a higher risk.[84]The guidance also identifies the countries that's pose higher risks such as countries that are subject to sanctions, embargoes or other similar level of corruption and criminal activities and therefore they include the client's domicile, location of transaction and source of funds.

[81] Lawyer guidance note 105
[82] Financial Action Task Force, 'FATF Standards - 40 Recommendations' (n 20).
[83] Lawyer guidance note 105, FATF also acknowledge that no universally accepted set of risk categories exist.
[84] Lawyer guidance note 105 .

2.3.1.2. Client Risk

The lawyer guidance acknowledges that evaluating the potential of a client or categories of clients representing a tax evasion or fear based oppressor financing hazard is fundamental in building and executing a general danger based methodology. As indicated by the direction, the attorney should foster higher danger models to decide if a customer represents a higher danger, and assuming the legal advisor establishes that the potential customer represents a higher danger, the legal counselor should decide if any alleviating variables might influence that assurance.[85]

The advice indicates scenarios in which a client's actions may indicate a higher risk. PEPs are among the higher-risk behaviors.[86] Customers who make it hard to distinguish the genuine advantageous proprietor or controlling interests on time, like utilization of lawful people or courses of action, candidates offers or carrier shares; that are money and money comparable concentrated organizations, including cash administrations organizations and club, good cause and other not-revenue driven associations; that are money and money identical serious organizations, including cash administrations organizations and club, good cause and other not-revenue driven associations,Clients who use financial intermediaries, institutions, or legal professionals who are not subject to ML/CTF laws or authorities; clients who have been previously convicted of economic crimes or who instruct a lawyer with actual knowledge of such conviction to carry out specified activities on their behalf; Clients who do not have a known address or who have various addresses for no apparent reason; usage of legal entities or arrangements.[87]

Lawyer guidance concede that PEP representation presents potentially difficult issues and as such, It necessitates increased diligence. If the client is PEP, the guidance also includes information about circumstances in which PEP does not fit into either of the above categories but is nevertheless involved with a client. According to the guidance, in such a situation, the lawyer

[85] ibid

[86] A Politically Exposed Person (PEP) is defined by FATF as an individual who is or has been entrusted with a prominent public function. Due to their position and influence, it is recognized that man PEPs are in positions that potentially can be abused for the purpose of committing money laundering (ML) offences and related predicate offences.

[87] Lawyer Guidance para 109

must assess risk in light of all relevant facts, including but not limited to the nature of the client-PEP relationship, the type of the client, and the legal services sought..[88]

2.3.1.3. Service Risk

The term "service risk" refers to the potential dangers associated with legal practitioners' services. The Lawyer advice recognizes that lawyers provide a wide range of services and that the risk-based approach's one-size-fits-all character does not apply to all of them. The guidance specifies eighteen (18) distinct considerations that a lawyer must consider when assessing the risks associated with providing one of the identified activities. However, no single condition can guarantee a higher risk situation.

For transactional lawyers such as real estate lawyers several risk factors are particular important As an example, in the act of closing a business deal, legal experts who operate as financial intermediaries oversee the receipt and transportation of funds through accounts under their control, this may not per se constitute higher risk hence there is need for other risk factors need to be considered. A risk factor particular to real estate lawyer for example would be where a client transfers property between parties within an abnormal short time without any obvious legal, commercial, or economic justification. This in essence offers lawyers to access whether the transaction is legitimate and not related to money laundering or terrorism funding.

One service risk element requires lawyers to analyze the appropriateness of the consideration in a transaction that falls under the purview of a specific activity. "Transaction where it is immediately obvious to the legal practitioner that there is inadequate consideration, such as when the client does not give reasons for the amount of the consideration," according to the guidance."

Another service risk factor requires lawyers to Examine regardless of whether a customer's solicitation for secrecy is remarkable or strange. The Lawyer rule characterizes administration hazard as "administrations that have been intentionally provided or depend on simple obscurity in the customer personality or members that is ordinary under the conditions and experience of the lawful specialist." Although the development of a layered possession structure with the end goal of authentic duty and obligation protection might be normal practice for able conditional

[88] Ibid para, 109

direction, the direction sees it as a danger factor for less complex advice with deficient involvement with comparable layered plans.

Variables that my affect Risk

When a legal counselor distinguishes and gets to the nation, customer, and administration hazard components, the legal advisor should likewise consider whether any factors influence the danger evaluation. The legal counselor direction cautions that different legal practitioners have varying practices, sizes, scales, and expertise. FATF perceives the difficulty and absurdity of a one-size-fits-all way to deal with having a successful danger based framework because legal practice spans from global to solitary practice.

As such, the guidance appreciates and recommends that Sole practitioners are not expected to commit the same level of resources to developing, implementing, and managing a reasonable risk-based approach as major legal firms. According to the FATF, all lawyers must determine whether the client and proposed work are unusual, dangerous, or suspicious in the context of the lawyer's customized and specific practice. As a result, lawyer guidance outlines thirteen elements that may have an upward or downward impact on risk assessment, and if one or more variables exist, the lawyer may be obliged to do expanded CDD and monitoring, or the CDD and monitoring may be lowered, adjusted, or simplified.

A risk variable pertains to the unique client and type of job in question. The frequency or longevity of a customer relationship is considered a risk factor, and it is assumed that a long-term relationship with frequent clients is less risky. The Lawyer Guidance acknowledges that lawyers are professionals who tend to develop a strong client relationship which allows a lawyer to identify a potential money laundering issues in early process, on the other hand, a short-term client relationship can suggest risks but that type of risk should not be applied mechanically.

The guidance has also provided a number of indicators that require a lawyer to be keen, for example, a politically exposed person would pose higher risk, holding money in stakeholders account, concealing properties in fictitious companies, evading tax and so much more, all these factors constitute a higher risk and the guidance has also provided things to consider to avoid being entangled in the launderer’s scheme such as avoiding cash transactions.

On principles, the guidance engendered five principles that were deemed of paramount importance, namely- conducting national risk assessment for understanding and responding to threats and vulnerabilities; promulgation of laws and regulations that incorporate RBA; designing monitoring mechanism that reflect RBA; identification of main participants; efficient information exchange between private and public sector. On the last aspect which was good practices, the guidance elucidated on what must be taken to account in coming up with internal policies, training guidelines and audit system.

Despite the clarity envisioned under the 2008 guidance it is not clear as to whether or not the need to perform CDD requirements on a client apply to other transactions that are not listed as specified activities in the recommendations. The lawyer guidance does not specify what constitutes promptly clear deficient thought and recommends that the legal counselor might be needed to demand that the customer distinguish authentic explanations behind the measure of the thought, some deals that fall inside the extent of a predetermined action classification, a legal advisor's capacity to assess the ampleness of thought might be confounded, and the lawyers guidance is unclear on whether objective or subordinate consideration should be used.

2008 RBA guidance was revised in 2019 hence promulgation of the 2019 version. The 2019 RBA guidance expounded on the 2008 guidance.[89] It detailed the meaning of RBA taking into account the challenges and benefits.[90] Furthermore, it gave extensive details concerning: risk identification; client due diligence measures; factors that influence risk; documentation of risk assessments; risk mitigation; internal control measures; vetting and recruitment of staff; and education, training and awareness.[91] Lastly, It offered recommendations to the supervisory authority, which is responsible for ensuring that all legal and regulatory measures are followed.[92]

RBA is criticised for being focused on the consequences or impact of the acts and omissions that constitute money laundering and that Advocates should focus on.[93] Meaning other acts that are

[89] FATF, 'Guidance for a Risk-Based Approach for Legal Professionals,' (2019) FATF, Paris < www.fatf-gafi.org/publications/documents/Guidance-RBA-legal-professionals.html > accessed 12th April 2020.
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Andrew Nicholls, 'The Challenges and Benefits of Risk-Based Regulation in Achieving Scheme Outcomes' [2015] Institute of Actuaries of Australia 18.

even though illegal and prohibitive under AML should be discarded if the harm they cause is negligible.

2.4. Regional perspective

At the regional level, Kenya is a member of the Anti-Money Laundering Group of Eastern and Southern Africa (ESAAMLG). ESAAMLG monitors implementation and compliance with FATF recommendations.[94] In its Mutual Evaluation Report (2011), it noted that Kenya had fully complied with one recommendation, not complied with twenty three recommendations and partially met the dictates of fifteen recommendations.[95] In 2014, it was reported that Kenya had made progress and were exempted from reporting on a number of recommendations save on recommendations 12, 16, 21, 24, and 33.[96] In 2017, ESAAMLG noted specifically concerning the legal profession that; Kenya had not made any efforts to classify advocates and certified public accountants as reporting institutions.[97] It therefore urged that Kenya should move fast in putting in place the requisite legislative and regulatory measures and make annual reports to ESAAMLG on the same.[98]

2.5. Conclusion

The lawyer guidance emanates from the tag of war between FATF and the legal professions in order to keep off "goalkeeper initiative" which the legal profession see as a corruption of the client-attorney privileged and confidentiality, The guidance is not perfect but has its own shortcomings as highlighted above and continues to factor in various new challenges that may emanate in the future in so far as the inclusion of advocates as reporting institution is concerned, further, FATF continues to engage the legal profession in a bid to come up with practical guidelines to respond to the new techniques devised by money launderers.

The recommendations concerning advocates are sufficiently expounded and ripe for implementation by the members of FATF. Moreover, the tenor and purport is that advocates are

[94] 'ESAAMLG - About' <https://www.esaamlg.org/index.php/about_what_we_do> accessed 30 March 2021.
[95] FATF/OECD and ESAAMLG, 'Mutual Evaluation Report: South Africa' (2009) <https://www.fatf-gafi.org> accessed 12 September 2020.
[96] Ibid.
[97] 'ESAAMLG - About' (n 98).
[98] Ibid.

according to FATF Money laundering is a risk and member states are urged to enact legislations classifying advocates as designated non-financial businesses and professions bound to adhere with the regulations that are promulgated to curb ML.

Lawyer guidance brings to play all lawyers as well as bar associations and it is incumbent upon them to formulate good practices for enactment of a risk based approaches, to that end, there is need for collaborations among law associations to come up with set of good practices to protect their advocate -client confidentiality as well as business realities of global economy to combat ML and Terrorism financing.

Chapter 3 of this research will discuss the Kenyan position by discussing the extent advocates are aid ML in Kenya, risk based approaches and what the international community expects from Kenya.

CHAPTER 3: KENYAN POSITION ON ADVOCATES' REPORTING OBLIGATION

3.0. Introduction

In 2010, Kenyan media reported a scandal in which the Nairobi city council purchased a cemetery land at an inflated price. The 'Cemetery scandal' as it was known involved purchase of a piece of land in mavoko for development of a public burial site to accommodate the increasing number of deaths in Nairobi. According to Kenya anti-corruption commission, corrupt officials inflated the actual value of the land from Kshs. 30 Million to Kshs. 283 Million.[1] A few lawyers were mentioned for aiding the fraudulent transaction by drawing up an agreement for sale and receiving the purchase price and distributing to various beneficiaries.

In 2018, some top lawyers and senior state counsel were named as suspects in forgery of land title deed to obtain loans from Central Bank of Africa totalling to kshs.449 million; the Director of Criminal Prosecution stated that the fraud was easily carried out because of the collusion among the Bank's staff and the Advocates named in the scandal making it easy to move the money out of the bank. In their defense, one of the advocate handling the securitization indicated that one of the transaction for a loan worth Kshs. 260 Million was handled by one of his conveyancing clerk who had since left his firm, his utterances was received with a lot of disbelief because the amount in question was of high value and high-risk to allow a mere clerk to handle.[2]

Last but not least, in the famous charterhouse bank scandal, it was discovered that during the illegal bank activities, A sum of Kshs. 312 Million was transferred to a lawyers account's which was opened, operated transacted with and closed within a period of one (1) week, it is reported

[1] Kamau Muthoni, 'Intrigues into City Hall Conspiracy to Defraud the Dead - The Standard' <https://www.standardmedia.co.ke/kenya/article/2001286058/intrigues-into-city-hall-conspiracy-to-defraud-the-dead> accessed 30 June 2018.

[2] Galgallo Fayo, 'Top Lawyer Faces Arrest over Sh450m CBA Loans Fraud' (*Business Daily*, 28 June 2018) <https://www.businessdailyafrica.comhttps://www.businessdailyafrica.com/bd/corporate/companies/top-lawyer-faces-arrest-over-sh450m-cba-loans-fraud-2208754> accessed 1 July 2020.

that the Advocate in question held the money in his account having offered illegal services and knew that the money was a result of fishy and legally unsanctioned activities.[3]

The above highlighted scandals is just a tip of the iceberg, as it is probable that many more have not been detected. As a result of the compounded cases, in may 2018, the legal professionals woke up to news that there was a proposal to amend some sections of POCAMLA that would require lawyers to file financial reports with the Financial Reporting Centre.[4]

In order to remedy the situation, the law has resorted by designating Lawyers, notaries, and other legal professionals who are self-employed as reporting institutions. The amendment therefore would obligate lawyers and NDFBPs to report Securities and other assets, real estate purchases and sales, bank administration, savings and securities accounts, and the organization of contributions for the formation, management, and operation of businesses. It has been argued by scholars that the amendment would compromise the advocate-client confidentiality which is at the centre of the relationship of trust and confidence between an advocate and the client.[5]

The legal profession in Kenya led by senior counsel Professor Tom Ojienda, strongly opposed the proposed amendments making it mandatory for lawyers to report questionable transactions involving their clients. Among the issues raised by the senior counsel were that the amendments: violated the client- advocate confidentiality rule; were unconstitutional and violated the provisions of the Law society of Kenya Act, Evidence Act and offended the practice of law generally.[6] As a result, the legal profession in Kenya is in confusion as to whether or not inclusion of advocates as part of DNFBP will serve the greater purpose it was intended to or it will erode the ethical practice obligations bestowed on lawyers.

In light of the above backdrop, this chapter discusses the Kenyan position in so far as addition of advocates as reporting institutions and their obligations under legal regimes concerning money

[3] Lorenzo Bagnoli and Lorenzo Bodrero, 'Charter House Bank: A Money Laundering Machine' (*correctiv.org*, 16 April 2015) <https://correctiv.org/en/latest-stories/mafia-en/2015/04/16/charter-house-bank-a-money-laundering-machine/> accessed 1 July 2020.

[4] Gathoni Kimani, 'Gate Keeping on Anti Money Laundering and Counter Terrorist Financing: A Case for the Kenyan Advocate' (2018) 3 Creative Connect International 21.

[5] Ibid

[6] David Mwere, 'Kenya: MPs Oppose Law on Financial Reporting By Lawyers' *The Nation* (Nairobi, 19 September 2019) <https://allafrica.com/stories/201909190503.html> accessed 1 July 2020.

laundering. The chapter begins by looking at what the international community expects of Kenya, it then proceeds to discuss the extent of lawyers involvement in financial activity and money laundering; it further examines the trajectory and convergence of lawyers and money laundering in Kenya and outlines the risk based approaches that Kenya has adopted and lastly, concludes on the chapter.

3.1. The Kenyan position on classification of advocates as NDFBP

The Kenyan anti money laundering regime is drawn from development drawn from international framework, which was as a consequence of international events. Globally, the beginning of anti-money laundering laws emanated from the fact that the states acknowledged the overwhelming negative impacts brought about by activities of organized crimes such as narcotics trafficking and human trafficking which negatively affect a society in a variety of ways.[7]

Owing to the characteristic and transnational nature of money laundering, there was a need to come up with a uniform response towards the fight of money laundering; consequently, offences like corruption and terrorism have been classified as potential source of illicit money and in order to curb such vices, confiscating of proceeds of such crimes and making it hard to launder money is said to slow down the urge to engage in organized crimes.[8]

Kenya is in actively participating in anti-money laundering efforts, accordingly, Kenya has marked and sanctioned all UN anti-money laundering conventions and Terrorist financing, regionally, Kenya is a member of the Eastern and Southern Africa Money Laundering Group (EAAMLG) whose objectives include but not limited to adopting and implementing of the 40 recommendations, applying money laundering measures and implementing anti-money laundering measures.

The struggle against corruption, as well as other issues of organized crime in Kenya has been for a long time left to the hands of the police and judiciary who investigate, prosecute and convict perpetrators respectively, However, both the police and judiciary departments have for a long

[7] Constance Gikonyo, 'Detection Mechanisms under Kenya's Anti-Money Laundering Regime: Omissions and Loopholes' (2018) 21 Journal of Money Laundering Control 59.

[8] 'Wolfsberg Anti-Money Laundering Principles for Correspondent Banking' (2014) <https://www.wolfsberg-principles.com/sites/default/files/wb/Wolfsberg-Correspondent-Banking-Principles-2014.pdf> accessed 3 July 2020.

time been faced with corruption allegations and laxity which is a major a setback in the battle against coordinated wrongdoing.[9]

In 2009, Kenya enacted the Proceeds of crime and Anti-Money Laundering Act (POCAMLA) and supplemented it with the Proceeds of Crime and Anti Money Laundering regulation (POCAMLR) 2013. The act and its regulation provide a comprehensive lawful and administrative structure for fighting tax evasion and fear based oppressor financing related offences.[10] Prior to enactment of the statute and legislation, offences relating to money laundering were dealt with under various statutes such as the penal code, criminal procedure and Narcotics drugs and Psychotropic substance (Control) act which were not comprehensive and direct compared to what POCAMLA seeks to address.

Sections 3,4 and 7 of the Proceeds of Crime and Anti-Money Laundering Act, 2009 detail the specifics of the money laundering offenses, section 3 gives a wide range of acts that encompasses Money laundering ,section 4 give the period of committing money laundering crime and section 7 makes it clear that knowingly facilitating financial promotion constitute to money laundering. While the above sections give a general application of ML, section **2 of POCAMLA** defines A financial institution and a designated nonfinancial business or profession as reporting institutions.

Advocates are undoubtedly categorized as assigned non-monetary business and calling because as Section 2 provides; they do not engage in accepting deposits and payment of funds, neither do they lend nor engage in financial leasing among other activities expected of financial institutions. As a result, NDFPBS are defined as follows:

(a) gambling clubs (counting web club); (b) land offices; (c) managing in valuable metals; (d) managing in valuable stones; (e) bookkeepers who are sole experts, accomplices, or workers inside proficient firms; (f) non-administrative associations; (fa) trust and friends administration

[9] Peter Warutere, 'Detecting and Investigating Money Laundering in Kenya' [2006] Money Laundering Experience. ISS Monograph Series <https://www.academia.edu/download/44206399/04_warutere.pdf> accessed 8 July 2020.
[10] Constance Gikonyo, 'The Legal Profession in Kenya and Its Anti-Money Laundering Obligations or Lack Thereof' (2019) 22 Journal of Money Laundering Control 247.

providers; and (g) any other business or profession in which the Minister, on the advice of the Centre, declares that there is a risk of money laundering.;[11]

The letter of Section 2 above does not expressly include Advocates as part of reporting institutions. Applied holistically however, advocates may be deemed vulnerable to money laundering and classified as designated non-financial business and profession by the Cabinet Secretary is in charge of financial matters. based on opinion rendered by Financial Reporting Centre.[12] Thus far, the mandate bestowed on the Cabinet Secretary above has not been implemented.

Section 17 of POCAMLA on the second part states that the arrangements of the Act supplant any commitment of mystery or other limitation on data exposure forced by some other law. It subsequently absolves any person complying with provision from liability stemming from breach of secrecy or non-disclosure obligations. Whereas, the import of Section 17 was to espouse an overriding obligation that pierces any secrecy obligation, it is watered down by section 18 of POCAMLA which exempts the legal profession with respect to confidential information shared between an advocate and a client except by order of the court. Even then, subsection 4 exempts an advocate from complying with an order in breach of subsection 2, which is delivering counsel to the customer in the course and with the end goal of the promoter's expert work or related to and with the end goal of any legitimate activities for the customer's sake.

Seized with application of Section 18 of POCAMLA, the Court of Appeal in *Equity Bank (Kenya) Limited v Don Ogalloh Riaro & another***;** pronounced itself affirming that the Section deals with advocate client privilege and by extension privileged information, but not bank customer or bank third party relationship.[13]

Some legal authors have canvassed Section 18 of POCAMLA, analysed confidentiality principle as well as legal professional privilege and concluded that, POCAMLA does not include advocates as part of reporting institutions and proceeded to suggest that they should be classified

[11] Section 2 of POCAMLA.
[12] Clause g of the definition of designated non-financial business and profession under Section 2 of POCAMLA.
[13] *(Kenya) Limited v Don Ogalloh Riaro & another* [2019] eKLR.

as reporting institutions.[14] Their analysis finds support under **Part IV** of POCAMLA, which provides for the obligations that attend the reporting obligation. Section 48 of POCAMLA is very instructive in that regard, it has an overarching provision, which provides in mandatory terms that the reporting obligations under part IV of POCAMLA are to apply to accountants and trust or company service provider.

Additionally, the reasoning is supported by the efforts that were hatched by Parliament to amend POCAMLA through Finance Bill, 2019 to expressly classify advocates as reporting institutions. It's worth mentioning that if the law were devoid of lacunae, efforts to have it reviewed would not have been initiated. The Bill under **Section 50** sought to amend the definition of DNFBP to include Advocates, notaries, and other lone practitioners, partners, or employees of professional firms are all independent legal professionals. The Bill under section 51 also provided for insertion of the words " supporters, legal officials, and other free legitimate specialists" just after "bookkeepers" showing up in the introduction of Section 48 of the Proceeds of Crime and Anti-Money Laundering Act, 2009".

The Bill was however passed into law after Section 50 and 51 were truncated. This ran in tandem with the expectations of those in fervent opposition of inclusion of Advocates such as Tom Ojienda (Senior Counsel) and James Mwamu (former President of the East Africa Law Society) who argued that inclusion of Advocates as reporting institutions would; erode advocate-client privilege, water down the right to fair hearing by encouraging self-incrimination, and make Advocates the agents of Directorate of Criminal Investigation against the Constitution.[15] On these premises, Ojienda and Mwamu agreed with Gikonyo's findings that advocates are not reporting institutions within the meaning of POCAMLA and they frown upon any suggestion or efforts to classify Advocates as reporting institutions.

It is noteworthy that, POCAMLA invites varied interpretations as to obligations of advocates, one being that held by Gikonyo, Mwamu and Ojienda and another position that POCAMLA is unclear as to whether advocates are reporting institutions and thus provides for an obligation that

[14] Gikonyo (n 10).

[15] Justus Ochieng, 'Tom Ojienda Asks Parliament to Withdraw Finance Bill' (*Beaking Kenya News*) <https://www.breakingkenyanews.com/2019/06/tom-ojienda-asks-parliament-to-withdraw.html> accessed 14 July 2020.

is limited in scope. The later position which this thesis seeks to address. The position that POCAMLA does not include advocates as reporting institutions stems from strict and literal interpretation of POCAMLA that does not sit well with the modernity and the applicable principle which is a legal interpretation that is done with a specific goal in mind. The Appellate court , in *Ismail Mzee Ismail v Republic*, paraphrased thus:

> On page 173 of Cross on Statutory Interpretation 3rd Edition, the author states: 'The courts nowadays often use a purposive approach even to the construction of penal acts.' The assumption of strict construction is just an incidental aid for resolving complex matters for the most part.[16]

The above pronouncement provides a pathway within which interpretation of POCAMLA can aptly be made in so far as it applies to Advocates. Being that Section 18 of POCAMLA is the provision that invites dichotomy in interpretation, and being that it is similar to **Section 134 of Evidence Act**; consideration must be made to judicial construction of Section 134 of Evidence Act. Section 134 of The Evidence Act stipulates that privileged information must not be disclosed except if it's communication is in order to achieve an illegal goal.

Faced with matters advocate-client privilege, the Court of Appeal in *Mohammed Salim Balala & Anor vs Tor Allan Safaris Ltd (2015) e KLR*, held that the only exception to the breach of the advocate and the client privilege is where information exchanged encourages an illicit reason or where a backer discovers that the information given to the client was used to actually perpetrate a wrongdoing. Therefore the reading of Section 134 and the pronouncement of the court of Appeal above points to three exceptions to advocate-client privilege. First, where the communication is aimed at perpetrating crime. Second, where the communication has been utilized to commit a crime. Thirdly and lastly, where the client consents, because the principle in this regard is that the client, not the Advocate, has the privilege.

The above exceptions are emphasized under the Code of Conduct Ethics (Law Society of Kenya Digest of Professional Conduct and Etiquette). The digest provides under section 20 (b) (iii) that fraud or crime are excluded from privileged information. In the same line, Code of Standards of

[16] *Ismail Mzee Ismail v Republic* [2015] eKLR.

Professional Practice and Ethical Conduct section 106 and 107 emphasize on the critical nature of confidentiality of advocate-client communication. This, it espouses, is really important determinant public faith and confidence in the organization of equity, just as the lawful calling's independence

The purposive interpretation of Section 18 of POCAMLA and in light of Section 134 of Evidence Act as well as Law Society of Kenya Digest of Professional Conduct and Etiquette and Code of Standards of Professional Practice and Ethical Conduct reveals that, the privilege of the lawyers and by extension advocate-client confidentiality are protected under the law. However, illegalities within the client-attorney confidentiality are excluded from this protection.

On the one hand, legal professional privilege is defined under Code of Standards of Professional Practice and Ethical Conduct, section 110, as a matter of legal privilege that safeguards lawyers from coercion to give information or communication whether in judicial or other proceedings that relates to the advocate and client and the advocate may be called as a witness in relation to the communication so made. Section 112 on the other hand defines Advocate-client confidentiality to cover correspondence between the Advocate and the client regarding the advice delivered and representation by the Advocate for the client. The Principle of confidentiality is thus greater and its scope is even wider compared to that of legal professional privilege.

Accordingly, it would be erroneous to conclude that Advocates are shielded from reporting on matters regarding their clients that perpetuate ML or that have been used to commit ML. The correct position and that which is adopted by this thesis is that advocates are reporting institutions on matters falling beyond the scope of legal professional privilege. A High court Judge may, on an application made to his court, an advocate may be ordered to provide information in response to an investigation conducted under the Act. that has been made available to him that related to any transaction that is under, the information only becomes privilege only if it is confined to giving advice.

Having made the above finding, it is in order that Law Society of Kenya Anti-Money Laundering Guidance for legal professionals is analysed. The guidelines are meant for use by the legal profession in Kenya in meeting the dictates of POCAMLA and regulations made thereunder.

Whereas the intention of the guidelines at their promulgation is to adequately equip advocates to shield themselves from risks associated with money laundering; the guidelines do not clarify on the application of legal professional privilege within Section 18 of POCAMLA.

For instance, guideline 15.6 provides that Advocates will not be liable for failing to disclose suspicious activity in situations where the matter depends on advocate client privilege as it lies within exemptions provided under Section 18 of POCAMLA and the LSK Code. It is inescapable, therefore, that the Kenyan position regarding the reporting obligation is restricted to matters falling beyond the scope of legal professional privilege; which privilege has not been adequately defined under anti-money laundering legal regime.

3.2. Risk Based approach as applicable to the legal profession in Kenya

In efforts to elucidate the tenor of the implementation mechanisms of its recommendations, FATF has emphasized application of Risk Based Approach (RBA). In so doing, it promulgated guidelines, namely- FATF Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing (2007); and Risk Based Approach (RBA) Guidance for Legal Professionals 2008. The guidelines expound on what constitutes RBA. According to the guidelines, especially the 2007 one, RBA is twofold. In the first instance, risk of money laundering must be identified.[17] Therefore, identification of risk is imperative under RBA approach. The second is to the effect that once a risk has been identified, commensurate resources must be allocated towards alleviating, arresting or cubing the risk.[18] These two limbs, if adequately employed, the result is definitely application of resources on priority basis and with appropriate outcomes.

Over above the explanation under the 2007 guidelines, the 2008 guidelines which addressed the legal professionals introduced a three-pronged approach to RBA. It detailed that, there must be risk assessment; promulgation of regulations; and establishment of good practice measures to implemented by the legal professionals.[19] The essence of RBA is that the policy makers are involved, when it comes to responding to enforcement measures, there are two basic safe

[17] GAFI FATF, *Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing* (June 2007).
[18] Ibid.
[19] Financial Action Task Force, *RBA Guidance for Legal Professionals* (www Fatf-gafi org 2008).

strategies: establishing knowledge-based norms and expressly mandating gatekeepers to apply cost-effective policing tactics.

According to the 40 + recommendations, RBA allows member states to approve set of measures that are much more flexible and target their own resource effectively, and to take precautions that are proportional to the danger, RBA's application is thus a precondition for the enactment of an efficacious FATF standards . The heart of lawyer guidance therefore is that its prominence is based on well-developed good practice for the implementation of effective risk-based approach. RBA as explained above is not only evident in the provisions of POCAMLA and regulations thereunder but also the following acts and regulations: -

3.2.1. The Law society of Kenya

As a professional body, the law society of Kenya was created in order to regulate the behaviour of its members, it main objectives are to improve the standards of behaviour and learning of its members; to ease acquisition of legal knowledge by its members and others; and to represent, protect and assist its members in their practice and otherwise.

Anti-Money Laundering Guidance for Legal Practitioners on the last part is based on RBA. First, under Section 8, it adopts the explanation of RBA as espoused under FATF guidelines. Section 8 requires, legal professionals to implement suitable efforts to mitigate the risks of money laundering, to periodically update and review such measures overtime. Second and last, legal professionals are implored to put into action advanced due diligence processes with regards to high-risk clients.[20]

LSK by virtue of its powers therefore has the powers to formulate a risk based practice that is in tandem with the guidance to allow approaches to customer due diligence that are voluntary, this approach is likely to educate the legal profession of the risks involved in money laundering and terrorist financing and the legal requirements, the benefit of it all is that lawyers will directly have a say in the formulation since the guidelines so formulated will be limited to risks faced by lawyers in their practice.

[20] Law Society of Kenya Anti-Money Laundering Guidance for Legal Practitioners, Guideline 4.5

3.2.2. POCAMLA

POCAMLA on its part, makes reference to RBA in a number of provisions. First, under Section 2 on the interpretation to be accorded to designated non-financial business and profession; the cabinet secretary in charge of the ministry of finance is mandated to, upon concurrence with Financial Reporting Centre, assess the risk of vulnerability to money laundering and designate any business and profession.

Second, section 45A demands that reporting institutions apply advanced client due diligence on businesses that emanate or relate to high-risk countries, which measures must be proportional to the risk in question. Last, section 134 calls on the cabinet secretary to enact legislation that protects high-risk customers and clients

3.2.3. Proceeds of crime and anti-money laundering regulations, 2013, CBK and CMA

Proceeds of Crime and Anti-Money Laundering Regulations, 2013 provides for RBA under **Regulations 6**. Regulation 6 makes it mandatory for the reporting institution to conduct risk assessment, put in place mitigating measures, and annually update the measures in tandem with changing times. Moreover, apart from developing internal control measures;[21] advanced client due diligence is demanded of transactions that relate to high-risk jurisdictions.[22]

CBK is obligated to issue guidelines for anti-money laundering and anti-terrorist financing crimes, It can therefore provide guidelines that touch on the following in a bid to curb the vices;

a) The requirement for determining the location and dwelling of a client, as well as the basis of funds in the transaction, additionally, lawyers are required to identify a residence or main place of business of a client and take note of the extraterritorial transactions.

b) Practice measure and caution that Lawyers should to take into account such as by avoiding handling cash transactions , investigate the transaction's source of funds and the client's source of wealth.[23]

[21] Proceeds of Crime and Anti-Money Laundering Regulations, 2013; Regulation 9
[22]Ibid, Regulation 18
[23] Financial Action Task Force (n 19).

Section 5 of the Capital Markets Authority Act establishes CMA.[24]As a securities regulator it develops guidelines that provide material requirements as a basis for every claim of fraud under securities law.

In transactional cases, a lawyer may possibly skewed towards a client's directional objectives to the detriment of precision and neglect to halt a previously established plan, CMA as a regulator could adopt or come up with a rule that requires the services of a securities lawyer to affirm that the lawyer has examined the non-monetaryl information disclosed in openly available reports and believes that the claims are correct and that the lawyer believes there is no material omission.[25][26] This certification could also Incorporate an assertion expressing that the lawyer led all sensible requests important to set up a due constancy obligation.

3.3. Conclusion

This chapter has discussed and made three findings. First, it established that the international community through FATF and regional community through ESAAMLG have noted the deficiency of the Kenyan legal regime on money laundering and expects that going forward, Advocates are classified as reporting institutions. Second, it has been established that the position of the law thus far on the reporting obligation for Advocates is limited in scope and unclear. Lastly, we have been able to establish that RBA has been adopted and domesticated in our statutes and regulations.

From the findings above, it is inescapable that POCAMLA and regulations thereunder as well as Law Society of Kenya Anti-Money Laundering Guidance for Legal Practitioners have lacunae that risk utilization by criminals to prevent laundering legal regime. It is also evident that the legal profession is an easy target to money laundering and terrorist financing, as such, there is need for a consultative process to ensure a regime is developed that helps lawyers identify the risks that they face in the professional duties and reduce their coverage to money laundering activities.

[24] Capital Markets Authority Act Cap 485 A laws of Kenya
[25] Kimani (n 4).
[26] Gathoni Kimani " Gatekeeping on anti money laundering and Counter Terrorist Financing: A case for the Kenyan Advocate" South Asian Law & Economics Review https://thelawbrigade.com/wp-content/uploads/2019/06/Gathoni-Kimani.pdf > Accessed on 1st July, 2020>

Lastly, there is need for clarity to be made in law as to whether or not legal professionals should be included, in black and white as part of designated non-financial business subject to lessons captured under Chapter 4 of this thesis which will try to bench mark and draw a few lessons from other jurisdictions that have developed their legal systems.

CHAPTER 4: BENCHMARKING OF ADVOCATES REPORTING OBLIGATIONS IN KENYA TO THAT IN USA, CANADA AND UNITED KINGDOM.

4.0. Introduction

This section expands on the ideas presented in section 3; it benchmarks the reporting obligation in Kenyan compare themselves to those in the United States of America (USA), Canada, and the United Kingdom (UK) ,it also discusses findings and draws lessons that if emulated will ameliorate our system in efforts geared towards curbing money laundering.

The selection of three above named jurisdictions was informed by a number of parameters. First, their rank in the global index in so far as the battle against Terrorist financing and tax evasion and the danger and weakness to illegal tax avoidance are concerned is worth emulating.[1] The three jurisdictions have a developed money laundering risk based approach that is better than average globally, precisely- whereas Kenya posts a risk of 7.18 and ranks number 9 in terms risky jurisdictions globally; Canada ranks number 94 with a risk of 4.68, United States ranks number 100 with a risk of 4.57, and UK ranks number 116 with a risk of 4.02.[2] Moreover, these jurisdictions are deemed less vulnerable to money laundering.[3]

Second, the countries have sophisticated mechanisms that they have continued to use in the battle against illegal tax avoidance and different types of monetary wrongdoing, legal regimes are mature and ripe for the hitherto herculean task in other jurisdictions such as Kenya among other sub-Saharan states that have thus far been declared as hotspots.[4]

Third and last, the position registered by their respective bar associations and judicial pronouncements in so far as the reporting obligation of the Advocates under Anti-Money

[1] Basel Institute on Governance, 'Basel AML Index 2019' (2019) <https://baselgovernance.org/sites/default/files/2019-08/Basel%20AML%20Index%202019.pdf> accessed 26 March 2021.

[2] 'Basel AML Index 2020' (*Basel Institute on Governance*) <https://baselgovernance.org/news/basel-aml-index-2020-released-today> accessed 26 March 2021.

[3] ibid

[4] 'USA AML Report' (*knowyourcountry*) <https://www.knowyourcountry.com/usa1111> accessed 21 September 2020.

Laundering Regulations are concerned.[5] As demonstrated herein, whereas countries in North America being, USA and Canada have resisted the reporting obligations; Countries in Europe that are represented by United Kingdom in this thesis have welcomed the reporting obligations as adumbrated under FATF recommendation.[6] This dichotomy or divergence of position with regards to the subject matter interrogated in this thesis is worth considering for possible and targeted lessons.

This chapter is dichotomized into four parts. The first part, considers Canada's legal regime on dvocates' reporting obligation, the findings and the lessons therein. The second part, discusses United Kingdom's regulations on Advocates reporting obligation, the findings and the relevant lessons that can be drawn. The third part canvasses USA's regulations on Advocates' reporting obligation, the findings and the lessons therein. The fourth part sums up the findings and the lessons in the Chapter in the buildup for the next chapter which delves into the recommendations and conclusion.

4.1. Canada

Efforts to curb money laundering in Canada have been on top gear since the implementation of FATF recommendations dawned on the government. As early as 1989, around the same time when FATF was still at the infancy stage, the Canadian governed had already appreciated the dangers and negativities that attend money laundering and made a bold move to have it proscribed under *Criminal Code of Canada, Part XII.2*.[7]

To incentivize compliance with its dictates on Money laundering for ease of compliance and implementation; the Criminal Code of Canada encapsulated immunity on both civil and criminal liabilities to persons who have voluntarily surrendered to authorities on matters touching on

[5] Nathanael Tilahun Ali, 'States' Varied Compliance with International Anti-Money Laundering Standards for Legal Professionals' (2019) 88 Nordic Journal of International Law 280.
[6] ibid
[7] Daniel P Murphy, 'Canada's Laws on Money Laundering and Proceeds of Crime: The International Context' (2003) 7 Journal of Money Laundering Control 50.

money laundering.[8] This was aimed at making compliance with money laundering regulations an attractive venture that would be embraced with ease.

An Act to Combat the Laundering of Proceeds of Crime was passed in 1991.. It engendered a number of provisions which were aimed at incorporating the private sector into the fight against money laundering legal regime; Canadian government having realized that private sector was a key and indispensable stakeholder whose efforts would revamp the fight against money laundering.[9]

Private sector Players such as credit unions and banks were under the said Act, expected to maintain customers records and to report to the government large and/or suspicious transactions.[10] It was anticipated that with the above duty bestowed on the banks, a pool of information regarding their customers would be established with the purposes of uncovering the banks' customers sources of income and to ensure ease of access to information which was noted as a positive move towards lessening the burden often shouldered by the investigative agencies.[11]

In light of changing times, sophistication of mechanisms employed by criminals, and the global pressure, *Proceeds of Crime (money laundering) Act 2000* was promulgated hoping that it would better the Anti-Money laundering regime than its precursor Acts.[12] It was thought that it would provide relevant legal framework within which money laundering would be tamed.

The Act engendered essential principles that underpin the fight against money laundering being; due diligence on customers particularly identification of customers and record keeping requirements, which efforts did not escape the notice of the FATF which expressed its accolade and satisfaction as to the right trajectory assumed by the government of Canada.[13] Its

[8] Sabina Mihaescu, 'The Anti-Money Laundering Complex in Canada – A Private-Public Approach to Governance. The Compliance Role of Financial Institutions' [2012] uOttawa Research <http://ruor.uottawa.ca/handle/10393/23872> accessed 5 April 2020.
[9] ibid
[10] Ibid.
[11] Ibid.
[12] Murphy (n 7).
[13] Ibid.

implementation was smooth and largely successful due to lack of the many privacy rules and laws that exist as of current.[14]

Subsequently, the environment within which Anti-money laundering legal regime operated shifted and became very bleak and obfuscated. This was attributed to, first, the surge in the legislations that guaranteed confidentiality among legal relationships for example a banker customer relationship and the right to privacy which was already a guaranteed and an enshrined right under *section 8 of Canada's Charter of Rights and Freedoms, enacted in 1984*.

Second, the Holding in *R. v. Plant*,[15] wherein the Court was seized with interpretation and application *section 8 of the Charter of rights and freedoms*. The Court analyzed the facts, the circumstances of the case as well as Section 8 of the Charter of rights and freedoms and pronounced itself emphasizing the mandatory need to comply with its provisions lest an act or omission is deemed by the court as null and void, illegal and devoid of the force of law.

In the premises, it was opined that *The Proceeds of Crime (Money Laundering) Act,law that prohibits the laundering of* was ripe for review in light of the fact that its implementation hinged on voluntary reporting which was substantially derogated and watered down by privacy rules. It was accordingly untenable legal regime akin to a toothless dog incapable of scaring possible money launderer leave alone biting as it were. In an effort to fortify its position as a jurisdiction that complies with the recommendations passed by FATF and to maintain the good name it had previously endeared itself; the Canadian government promulgated Proceeds of Crime (Money Laundering) and Terrorist Financing Act (hereinafter referred to as 'PCMLTFA').

This piece of legislation which was enacted in 2000 and came into force in 2001. It obliged Advocates to abide by the reporting obligations as provided under *Section 33* of the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations. The section also provides for, the application of the Act to the Advocates was limited to circumstances where there was

[14] Ibid.
[15] *R v Plant* [1993] Supreme Court of Canada 22606, 3 SCR 281.

financial transaction other than receiving or paying professional fees,disbursments, expenses other than their employer .[16]

Under the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations Advocates and law firms were duty bound to: - engage in identification and verification of their clients' information as captured by the provisions of *Section 59.4*; keep record involving financial transactions of their clients *Sections 33.4 read together with 33.5*; report suspicious transactions and cash transactions that meet or surpass cash transactions of CAN$10,000 threshold; and establish AML/CFT program. *Section 64* of the Regulations exempted information protected under solicitor-client privilege from the reporting obligation.

Despite accolade registered by FATF in as far as inclusion of Advocates and law firms as reporting obligation was concerned; The Federation of Law Societies of Canada, in liaison with the Canadian Bar Association propelled fervent opposition of the said reporting obligation leading to court battles.[17] Consequently, a constitutional challenge to the Act and regulations thereunder found itself at the High Court where it was appealed all the way to the Supreme Court.. Seized with the matter which fell before him seeking his rendition and pronouncement, **Cromwell J**. in *Canada (Attorney General) v. Federation of Law Societies of Canada*,[18] that found the provisions unconstitutional. The determination was that Section 9 of the Charter of Rights and Freedoms guarantees the right to be free from unjustified searches and seizures as well as section 7 which provided that a person will not be dispossessed of their right unless according to principal of fundamental justice was unjustifiably limited.

In essence, the judge noted that advocate client confidentiality is imperative in the administration of justice. To his mind, confidentiality principle is the hallmark of legal representation which principle if derogated, administration of justice is handicapped. He also noted that the right to privacy cannot be unjustifiably be taken away.[19] His pronouncement, read holistically reveals that effective legal representation hinges on commitment which can only be achieved through client-advocate confidentiality.

[16] of Proceeds of Crime (Money Laundering) and Terrorist Financing Act, s 33.3
[17] Zaiton Hamin and others, 'Reporting Obligation of Lawyers under the AML/ATF Law in Malaysia' (2015) 170 Procedia - Social and Behavioral Sciences 409.
[18] *Canada (Attorney General) v. Federation of Law Societies of Canada* [2015] 1 S.C.R. 401.
[19] ibid.

Also, of note and worth underscoring is the finding and holding of the Court of Appeal Judges, which finding was not tinkered with by the Supreme Court, that the reporting obligation exposes Advocates to conflict that barricades effective legal representation. It was stated by the Court of Appeal in *Federation of Law Society of Canada v Canada Attorney General,*[20] it was decided that provisions seeking to obligate advocates to be reporting institutions were not consistent with the principle of bar independence which is a fundamental principal of justice. The provisions would place legal advisors in an undesirable conflict of interest arising from the advocates own liberty interests, state's interest, and clients' interests effectively these obligations would turn lawyers into state agents.

As a consequence of the findings of the Court, the Advocates were rested from the yolk and the burden of reporting obligations that they shouldered for more than a decade. Noting the magnitude of the impacts of money laundering, Canada's Federation of Law Societies swung into action by promulgating a Guidance for its Legal Profession to guard the legal profession from being a lucrative avenue and a safe haven for money launderers.[21]

The guidance above adopts a more strict approach in implementation of the recommendations and provides inter alia for:- instead of a reporting threshold of CAN$ 10,000 Advocates are barred from receiving cash amounting to CAN$ 7,500 from one client either paid in a single payment or through a series of payments; and identification and verification rules that are more stricter than those proposed either by FATF or enacted under Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA) and the regulations thereunder.

In terms of the Canadian anti-money laundering regime, the conclusion is that it does not designate Advocates as reporting institutions as recommended by FATF, the inclusion having been annulled by the Supreme Court. The reasons for the aforesaid annulment are inter alia: advocate- client confidentiality which forms the basis of effective legal representation; the right to privacy as entrenched in The United Nations Charter of Human Rights and Freedoms; and limitation of advocates-client confidentiality and the right to privacy must be legally fashioned

[20] *Federation of Law Society of Canada v Canada Attorney General* [2013] BCCA 147.

[21] Anti-Money Laundering and Terrorist Financing Working Group, 'Guidance for the Legal Profession' (2019) < https://flsc.ca/wp-content/uploads/2019/02/Guidance-Legal-Profession-REV-Feb-2019.pdf > accessed 5th September 2020.

and circumscribed such that such circumscription is acceptable and tenable within the democratic space.

Regulation of advocates has therefore been left to the law societies (Canada's Federation of Law Societies and Canada Bar Association), the guidance enacted by Canada is prepared on behalf of Canadian law societies by the federation, as such, they have developed appropriate regulations whose provisions are stricter than FATF recommendations and regulations governing other sectors. For example, the regulations describe the legal profession's role in order to prevent ease of falling into money laundering and terrorist financing activities. The guidance also gives a description of the context of Money laundering and terrorist financing which are defined as well as the roots of these crimes and how to avoid them. It also sets the legal professionals' duties as per the model Rules that were approved by the Federation for adoption by the societies, it also contains red flags and real-life instances. Lastly, at the conclusion of the guidance there are resources which are to benefit the legal profession, it is expected that more resources will be added. These regulations are localized towards the situations that are attendant to the Advocates.

The Canadian legal regime on anti-money laundering is therefore premised on the following; first, independence of the bar as critical consideration in so far as legal representation is concerned. Second, that independence of the bar guarantees effective legal representation. Third, that the independence of the bar is the cornerstone of the commitment of advocates to their clients' causes and a tool to ensure administration of justice is not compromised.

Fourth, that the legal profession is better allowed to self-regulate itself as it avoids the conflict and the dilemma that the advocates have to grapple with under anti-money laundering legal regime. Fifth, self-regulation provides for a more sophisticated, appropriate and targeted regulations that attract ease of compliance. Sixth, the right to privacy ought only to be limited on justifiable grounds. Seventh and last, any limitation to the right to privacy and advocate-client confidentiality must be acceptable within the democratic society that is, the limitation must be the only reasonable avenue achievable in the circumstances.

4.2. United Kingdom

The united Kingdom has been part and member of the European Union (hence referred to as EU member) since its infancy; that was in 1973 when it was still referred to as European Economic Community.[22] Since its inception, EU through its establishing laws being - The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) are the two treaties which govern European Union (TFEU) and has evolved to an advanced and mature institution whose laws hold sway in laws enacted nationally by the member states.[23]

Pursuant to the establishing laws and the cooperation that members states have exhibited over time, integration levels at the EU has been stellar and a school of ideas on integration that other regional organizations have and continue to implement.[24] In spite of the fact that UK has voted through a referendum and exited the EU, the earlier stages of evolution of anti-money laundering laws to date reflect the laws and policies promulgated by European Parliament.

The enactment of Anti-Money Laundering regulations in United Kingdom conform with directives given under the auspices of the EU being that the integration level at the EU is such that its directive regarding enactment of FATF recommendation so as to reduce money laundering deeds and the bearing it has with relation to financial developments is binding on the member states.[25] The first directive regarding money laundering followed the initial recommendations issued by FATF in 1991 which entailed making money laundering a criminal offence ,the Criminal Justice Act of 1991 and Drug Trafficking Act of 1994 were afterwards passed into local statutes and money laundering regulation followed in 1993 . The Recommendation concerned financial institutions. The financial institutions in UK were

[22] Grzegorz Ronek, 'Britain's Membership in the European Communities and the European Union' (2013) 42 Polish Political Science Yearbook 218.

[23] HM Government, 'Rights and obligations of European Union membership', (2016) < www.gov.uk/government/publications > accessed 24th September 2020.

[24] Archil Chochia, 'Models of European Integration: Georgia's Economic and Political Transition' (Tallin University of Technology; School of Economics and Business Administration 2013) <https://www.researchgate.net/profile/Archil-Chochia/publication/322231536_Models_of_European_Integration_Georgia%27s_Economic_and_Political_Transition/links/5a4cdaf8458515a6bc6d8e32/Models-of-European-Integration-Georgias-Economic-and-Political-Transition.pdf> accessed 24 September 2020.

[25] ibid

consequently directed to confirm the identity of their customers, record their details, train staff, and report suspicious activities as required by directions given by EU.[26]

Following the 1996 revision of FATF recommendations, The EU issued a second directive on money laundering, the directive widened the extent of reporting obligation to cover Designated Non-Financial Businesses and Professions (hereinafter referred to as **'**DNFBP**'**) including members of the legal profession to be held accountable by Anti-Money Laundering Regulations (AMLR).[27] The edict was received differently by members of EU.

In some states such as Belgium and France the directive to have advocates as gatekeepers was opposed. In Belgium, legal battle was waged through the case of *Ordre des barreaux francophones et Germanophone and Others v. Conseil des ministres*,[28] wherein Belgian bars impugned the directive on the ground that it was affront to and an antithesis to *Articles 6 and 6(2) of the European Convention on Human Rights, as well as Article 6(2) of the Treaty on European Union* enshrines fair trial. The case was unsuccessful as the Court was of the view that the directive did not impinge on a person's right to a fair hearing. The judge's reasoning was that the only time the obligation of information and cooperation applies is in instances where lawyers are involved in assisting their customer with the planning or execution of specific transactions which are mostly financial transactions.

In the same vein, in France, the directive to impose the reporting obligation on the Advocates was challenged in *Michaud v. France*.[29] The Ground relied upon by the French lawyers was the right to fair hearing and confidentiality under the *European Convention and Treaty on European Union*, and Advocate-client secrecy would be violated. The court upheld the directive noting that it neither infringed on the right to a fair trial nor privacy. It was particularly noted that the directive was intended to be applied to lawyers who are interested in assisting their clients in the preparation or execution of certain sorts of transactions especially the ones that involve financial movement, transactions whose general context is outside the precincts of judicial proceedings.

[26] Tim Edmonds, 'Money Laundering Law' [2021] House of Commons Library <https://commonslibrary.parliament.uk/research-briefings/sn02592/> accessed 6 September 2020.
[27] Ibid.
[28] European Court of Justice, case C-305/05, Judgment of 26 June 2007.
[29] *Michaud v. France* 6 December 2012, ECtHR, App. No. 12323/11.

Further, it was the holding of the Court that Advocate-Client secrecy is not inviolable and can be limited.

The above cases are in important in the UK law and jurisprudence because they make us understand the equilibrium between the battle against international delinquencies and need to protect fundamental freedoms and human rights and therefore, the cases as discussed arrive at a conclusion that members of the legal profession are obligated to report transactions that are suspicious that relate to their clients in accordance with the EU laws. In short, the decisions put into perspective that European Directives are part of a set of international tools, and that money laundering must be combated on a global scale.[30]

Following judgment by European Court of Justice that limitation of advocate-client secrecy, the right to a fair trial and confidentiality were well within the grid tenable within the democratic space. UK was quick to implement the directive via an amendment to Proceeds of Crimes Act, 2002 ('POCA') despite concerns registered by stakeholders who in their considered view insisted on the importance of fair hearing, the right to privacy as well as advocate-client secrecy.

Financial institutions on the first part were concerned about the reporting threshold which was set at £10,000. Lawyers on second part were concerned about confidentiality principle and the costs of implementations of the directive. They registered their fears that advocate-secrecy principle would be violated and that implementation of the directive was capital intensive. These grievances were tested in Court in *Bowman v Fels.*[31] In Bowman's case, the Court of Appeal considered provisions of section 328 of POCA as to whether the section applied covered the conduct of legal professionals that are engaged in ordinary conduct of litigation, Secondly, that the section does not apply or have any effect on legal profession privilege and exceptions that allow lawyers to access documents that are disclosed in litigation process; and finally, the Court also held that Section 328 was not envisioned to apply to members of the legal profession drafting or implementing mutually agreed-upon agreements or It drew a distinction between consenting and non-consensual steps when it was provided in a litigation environment which

[30] Sara De Vido, 'Anti-Money Laundering Measures Versus European Union Fundamental Freedoms and Human Rights in the Recent Jurisprudence of the European Court of Human Rights and the European Court of Justice' (2015) 16 German Law Journal 1271.
[31] *Bowman v Fels* (2005) 1 WLR 3083.

included settlement in ordinary litigious context and conventional arrangement free of proceedings.

In summary, he Court of Appeal insisted that legal professional privilege is a critical aspect of fair hearing, however it adopted the position held by European Court of Justice that reporting obligation did not violate legal professional privilege. Whereas the lawyers were dissatisfied noting that their concerns were not adequately addressed, the importance that the battle against money laundering carries held sway as well as became a golden thread hence diminished resistance. Consequently, Money Laundering Regulations 1993 and 2001 were reviewed to be in consonance with the POCA.

The third directive was issued in 2005 and implemented by UK through the enactment of Money laundering regulations 2007, terrorism act 2000 and POCA 2002(amendment) Regulations 2007. The rules enacted in 2017 highlighted what measures are required and essential for the regulated sector when it comes to money laundering prevention as well as degree of customer due dilligence. Courtesy of the amendments, the lawyers were under duty as well as other DNFBP to: - conduct internal controls and communication; prepare and maintain identification procedures; recognize and report suspicious transactions; train staff in the law firms; keep record of clients and their activities.[32]

The obligation bestowed on the lawyers to report of on information within their knowledge that they either know, suspect or have reasons to believe that a person in engaged in an act of money laundering is mandatory. Penal consequences attach for failure to honor the obligation to make a report. However, lawyers are exempt from the reporting obligation in two instances which instances have been held by Courts in upholding pronouncements of the Court of Justice of the European Union are connected to judicial proceedings. Firstly, when litigating on behalf of a client as well aptly captured in *Bowman v Fels* by the appellate court.[33]

Secondly, if information received by a lawyer in privileged circumstances. Privileged circumstances has been explained to include: - if the statement is meant for gaining or pursuing legal counsel or the information is connected to some legal proceedings except that if the

[32] ibid.
[33] ibid

information is aimed at perpetration of fraud the lawyers is under duty to report.[34] Thirdly, and lastly, compliance with the guidance of the law society.

In *R v Da Silva,*[35] the Court addressed its mind to what constitutes suspicious transaction under Anti-Money Laundering regulations. It opined that suspicion ought to be firmly grounded. On the concerns the reporting obligation impacts a free and fair trial, the Court of Justice of the European Union held that the regulations are with regards specific transactions and not all transactions, moreover the fears of client-lawyer confidentiality are unfounded in light of protection accorded to legal privileged information.

Compared to Canada, the UK has portrayed enthusiasm in inaugurating necessary regulations to ensure total application of FATF recommendations which make them outstanding in money laundering regulations in relation to legal professionals. For example, Money laundering regulators approved the Law Society of the United Kingdom as the supervisory regulator in 2017 and believe in the UK government's objectives for a better and more successful anti-money laundering regime.

Further, UK's solicitors are actively engaged and contributed to the establishment of the guidance in relation to members and initiation of a welcoming relationship between the solicitors and the government and law enforcers, it has also a number of contributions to UK legislation and policy initiatives concerning money laundering and its regulation.

Lastly, there is establishment of solicitor regulation authority (SRA) that acts as a regulatory body to deal with activities related to laundering of money by members of the legal profession it also watches to ensure that there is compliance on the part of solicitors on their responsibilities.

The finding in as far as UK is concerned is that lawyers are designated as reporting institutions and failure to adhere the reporting requirement attracts penal consequences. Moreover, the courts In *R vs Da Silva* have defined what constitutes suspicious transactions and allayed fears of client-lawyer confidentiality being limited in a manner that negates fair hearing, the court in this case had to consider and interpret the meaning of 'suspect'. It confirmed that a mere feeling of

[34] Edmonds (n 26).
[35] *R v Da Silva* (2006) EWCA CRIM 1654.

vagueness or unease does not amount sufficiently to constitute suspicion but rather there is need to be more fanciful. Simply put, as a matter of law, the jury must distinguish between reaching judgments based on solid circumstantial evidence and speculative conclusions. As a result, juries are warned that speculating in a case is little more than guessing or concocting theories without supporting evidence, and that this is an unsupportable basis for a conviction.[36] The Courts have voiced the position that reporting obligation as a limitation to fair hearing, right to privacy and legal profession privilege is acceptable within the democratic space being that the limitation envisioned is not broad but depends on the circumstances that an Advocate is faced with

UK's reasons are premised on a number of issues, firstly, that the legal profession privilege as opposed to client-lawyer confidentiality is supposed to be protected; secondly, that proportionate violation of lawyer-client confidentiality in the public good does not violate fair hearing and if at there is any violation, the same is acceptable and tenable within the democratic space; and doubts in law are only founded and rightfully addressed once tested by a court of law and a definitive interpretation rendered.

4.3. United States of America

Efforts to bring Advocates under the purview of Anti-Money Laundering Regime in USA commenced way back in 2000, where the role of gatekeepers in money laundering such as lawyers and accountants was discussed in a view to developing an appropriate strategy in fighting tax evasion. Around the same time, the Deputy Secretary, in his presentation to the Congressional House Committee on Banking and Financial Services, the US Department of the Treasury.[37] The deputy secretary suggested to the House Committee that watertight regulations ought to be enacted to insulate services of professionals from being used as a conduit to perpetrate money laundering.[38] America Bar Association (hereinafter referred to as 'ABA') put a fight and resisted all the efforts made to have Attorneys as reporting institutions.

[36] Chris Vigrass and Liza Robley, 'Bowman v Fels: The Implications | Adjudication Society' (May 2006) <https://www.adjudication.org/resources/articles/bowman-v-fels-implications> accessed 4 September 2020.
[37] Hearing on Offshore Money Laundering Before the House Committee on Banking and Financial Services, 106th Cong. 30 (2000) (statement of Stuart Eizenstat, Deputy Secretary, United States Department of the Treasury).
[38] Ibid.

Consequently, FATF 2006 3rd Mutual Evaluation Report to execute FATF proposals noted that whereas USA had substantial compliance with the requirements to implement FATF recommendations; its only glaring failure that exposed its Anti-Money Laundering Regime to vulnerability was exclusion of attorneys from the reporting obligation.

As a response to global criticism that was registered via the 2006 mutual report, in 2007, Senator Carl Levin attempted to introduce legislations whose effects were to oblige advocates to shoulder reporting obligations.[39] He introduced legislation that would establish a reliable corporate register and make incorrect information about a corporation's beneficial ownership illegal. body; and broadening of the meaning of monetary foundation under Bank Secrecy Act to incorporate any individual of a legal entity be it a company, trust, partnership among others.[40] These proposals did not see the light of the day due to strong case against them that was zealously put forward by ABA. ABA argued based on a number of factors.

First, it was its case that the fact that attorneys are accountable to the Courts and can be punished by state supreme courts is enough gag against their engagement in money laundering.[41] The In this case, the American Bar Association cited constitutional concerns about the Sixth Amendment's provision to successful direction in criminal procedures, just as the Tenth Amendment's limitation of administrative authority over legal counselors to the states. Second, it was ABA's position that the imminent fear of prosecution bars attorneys from perpetrating money laundering.[42] The ABA argued that no sound lawyer would knowingly perpetrate money laundering activities knowing the repercussions for doing so, As a result, they recommended that lawyers would be more aware if they had a greater understanding of how criminals might take advantage of their services. and therefore there was need for education first . Third ABA was of the view that there exists a voluntary guidance to compliance with money laundering legal regime and there is no need for legislation on the same subject.[43] The American Bar Association contends that obligatory revealing for legal counselors would endanger the significant

[39] ICLG, 'Brooker and Cohen Anti-Money-Laundering' (2018) < https://www.gibsondunn.com/wp-content/uploads/2018/06/Brooker-and-Cohen-Anti-Money-Laundering-2018-ICGL-2018.pdf > accessed 5th September 2020.
[40] ibid
[41] Ibid.
[42] Ibid.
[43] Ibid.

detachment between the legal profession and the government, and thus opposes guidelines that would influence the "relationship of trust" among lawyers and customers, which it depicts as a "bedrock of the United States organization of equity and law and order." According to the American Bar Association, such laws would jeopardize an attorney's duty of secrecy and commitment to a client which might lead to a decline of a number of clients seeking legal advice.

Fourth, it was ABA's belief that existence Rules of Professional Conduct which are standardized and similar across jurisdictions is sufficient regulations.[44] Their argument was that they are not willing to be subjected to a different and mandatory regulations as this would create an innate irreconcilable situation, raising worries regarding customer withdrawal and negligence chances when a client is reported. but they prefer to apply the existing rules just like other jurisdictions. Fifth, ABA noted that for instances of unwitting perpetration of money laundering, attorneys are better educated that have a law passed that obliges their compliance , Further, that Lawyers are now presented to extreme moral commitments and authorization, according to the ABA, and are required to encourage their clients to follow the law under existing ethical norms. and not otherwise. Sixth, ABA buttressed its case by forming a Team on Gatekeeper Regulation and the Profession which it mandated to draft for promulgation a voluntary Good Practices Guidance for Lawyers to Detect and Combat Money laundering and Terrorism Financing.[45] The gatekeeper task force stated in a supporting report that the gudance isn't planned to be an assertion of the norm of care that attorneys ought to follow when managing illegal tax avoidance and psychological militant financing, yet rather to fill in as an asset for legal advisors to use in fostering their own deliberate danger based methodologies. Seventh, ABA doubted the evidence relied upon by FATF to determine vulnerability of Advocates to Money laundering.[46] The ABA, for example, stated that the ambiguity of the term "suspicious " and the intricacy of AML administrative plans might make legal advisors either over-report or decrease portrayal. The ABA additionally expressed that the expenses of consistence will probably raise the expense of

[44] Ibid.

[45] David L Hudson Jr, 'ABA Endorses Guidance for Lawyers on Fighting Money Laundering and Terrorist Financing' (2013) 99 ABAJ 64.

[46] Lawton P Cummings and Paul T Stepnowsky, 'My Brother's Keeper: An Empirical Study of Attorney Facilitation of Money Laundering through Commercial Transactions' (2011) 2011 Journal of the Professional Lawyer 1.

legitimate administrations, and that there is an absence of proof supporting the advantages of AML enactment affecting lawyers.

In 2013, as part of its typology studies in monitoring trends in money laundering and to come up with sophisticated proposals and recommendations in response; The FATF conducted a typology research on the legal profession's vulnerabilities and came up with a report which confirmed that indeed the legal profession is susceptible to money laundering and is a possible conduit for criminals.[47] This informed the move by FATF to encourage states to comply with its 2003 recommendations which required Advocates to be included as part of designated non-financial reporting institutions.[48]

In 2016, FATF Mutual Evaluation Report noted as did the 2006 one that USA complied with all recommendations except the one requiring designation of attorneys as reporting institutions. Noting the ramifications of such reports, the clamor for enactment of a federal legislation regulate the legal profession through AML initiatives was revitalized. In 2017, The Incorporation Transparency and Law Enforcement Assistance Act was reintroduced. This was also resisted by ABA raising a number of grounds.

First, ABA relied on the need to respect the independence of the bar which is guaranteed under the 10th Amendment to the Constitution.[49] Second, ABA relied on Attorney-client confidentiality which demands trust between an attorney and his/her clients. Third, ABA noted that it would create conflict of interest among attorneys. Fourth, ABA argued that the word 'suspicious' as used under Anti-Money Laundering Regime has not been defined and may lead to either underreporting or overreporting as a result of the inevitable misinterpretation. Fifth, ABA decried the attendant costs and noted that it would be very costly to sole practitioners. Last, ABA fronted the idea that ethical regulations are sufficient to curb money laundering among Advocates.

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[47] FATF Typologies Report 2013 < http://www.fatf-gafi.org/topics/methodsandtrends/documents/mltfvulnerabilities-legal-professionals.html > accessed 6th September 2020.

[48] Ibid.

[49] Katie Benson, Colin King and Clive Walker, *Assets, Crimes and the State: Innovation in 21st Century Legal Responses* (Routledge 2020).

As part of showing its commitment to internal regulation mechanisms; ABA, in liaison with The European Council of Bars and Law Societies and the International Bar Association participated in promulgation of A Lawyer's Guide to Detecting and Preventing Money Laundering 2014.[50] Moreover, it revamped its earlier Good Practices Guidance and Formal Opinion on Due Diligence for Clients in Compliance with FATF Recommendations.

The legal profession in the United States has taken the lead in the fight against money laundering by supporting the government's efforts. For example, a number of legal organizations, such as the Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing ("Guidance"), have been intensely engaged with endeavors to instruct U.S. attorneys about tax evasion and psychological oppressor financing. Numerous instructive endeavors have been coordinated towards attorneys who practice the five exercises laid out in Recommendation 22 to arrive at legal advisors who practice land, trusts, and homes.

In the FATF RBA Guidance for Legal Professionals, nations were approached to make direction for their legal advisors. The Guidance outlines the legal profession's reaction in the United States and contains more specific information than the FATF RBA. The Guidance proposes that a lawyer address inquiries regarding the idea of the customer, the countries in question, and the kind of administration a customer needs during the client intake process, similar to the FATF RBA. These customer, topography, and administration hazard factors should define the extent of a lawyer's due diligence.[51]

Despite the successful resistance against gatekeeper regulations; Attorneys in USA are not shielded from other AML laws. For example, in *United States of America v. Luis A. Flores;*[52] Flores' conviction and sentence were affirmed by the Appellate court. The appellant in this case was approached by a German client who misrepresented himself as a worthy business man . Flores being an attorney in Queens Borough of New York City as a sole proprietor, incorporated a number of companies for the German Client and nominated himself as head of those companies.Several transactions were carried about by the companies and without investigating

[50] A Lawyer's Guide to Detecting and Preventing Money Laundering < https://www.actec.org/assets/1/6/A-Lawyers-Guide-to-Detecting-and-Preventing-Money-Laundering-October-2014.pdf > accessed 6th September 2020.
[51] Laurel S Terry, 'An Introduction to the Financial Action Task Force and Its 2008 Lawyer Guidance' (2010) 2010 Journal of the Professional Lawyer 3.
[52] *United States of America v. Luis A. Flores* Appellant, 454 F.3d 149 (3d Cir. 2006)

the source of their financing, Flores was tried for three offences, namely- Three charges of money laundering in violation of 18 U.S.C. 1957, as well as one count of conspiracy to arrange currency transactions in violation of 18 U.S.C. 371. Flores was "willfully blind" to his client's illegal acts, according to the government's hypothesis. The defence then again, asserted that the Client had deceived Flores into thinking he was a genuine financial specialist, and that Flores was his customer's accidental casualty rather than a co-schemer. Flores took an interest in the tax evasion plot either deliberately or with tenacious visual impairment, as per the decision and was given a 32 (32) months' detainment term.

In a similar vein, in United States of America v. Allen Landerman, the facts of the case are that a few organizations were shaped to showcase oil and gas boring ventures, which activities were promoted using composed plans sent to possible financial backers and the organizations' business specialists calling likely financial backers. The outlines included swelled quotes for penetrating the wells, just as deceptions of different people taking part in the tasks and false cases that particular people directed work for the organizations. Walter Humbert Cushman, who claimed to be only a consultant but was actually the company's owner; Rodney Lee Holloman, who was engaged with setting up the organizations yet generally worked at the drill destinations; Allen Landerman, who was a lawyer addressing the organizations; David Dewayne Hanks, who evaluated a boring apparatus and worked as a sales manager; and Randall Boyd Zeigler, who was in charge of interviewing and hiring sales brokers for the companies.[53]

Cushman and Landerman were overheard discussing how $23,000 (a $15,000 check and a $8,000 check) from Cushman would be routed through Landerman's client trust account and then to another firm to be utilized to open a second tanning parlor on one occasion. Several investors claimed that if they had known the genuine proprietors of the company, who had criminal past, they would not have put resources into the oil and gas projects.[54]

Landerman was viewed to be unquestionably blameworthy on two charges of tax evasion and one count of trick to submit mail, wire, and money laundering by a jury. Landerman made three arguments in his appeal. To start with, he guaranteed that the locale court blundered in condemning him under the tax evasion rule by considering the general sum lost in the false plan

[53] ibid
[54] Ibid

rather than simply the sum he washed. Second, Landerman asserted that the region court violated its limits when it denied his movement for a descending takeoff from the rules forced sentence. Landerman also claimed that the district court made a mistake in awarding the $10,000 fine.It was held that all of the Money obtained through the plan during Landerman's involvement was laundered, and Landerman was reasonably aware of the laundering. Since he aided in the formation of a dummy business to conceal monies obtained fraudulently and therefore it makes him responsible for the entire amount laundered. Landerman was convicted and sentenced to 135 months in prison and supervised release for three years and a fine of $10,000 imposed.[55] Subsequently then, attorneys are required to undertake due diligence on financial transactions as they are not immune to prosecution once established they participated in ML

The finding as regards Anti-money laundering legislation in the United States is that it does not specify attorneys as reporting institutions as recommended by FATF. However, that does not mean that under other AML laws, Attorneys are shielded from criminal culpability when they fail to investigate sources of their clients' funds and interrogate transactions that they conduct for their clients. Moreover, utilization of an attorney as a conduit by clients is proscribed. Additionally, ABA has developed Good practice Guidance that incorporates FATF recommendations that are tailored to suit the legal profession.

The USA anti-money laundering regime is thus premised on the fact that gatekeeping role is not the only regulatory mechanism that binds advocates to participate in curbing money laundering; independence of the bar as critical as a critical pillar in fair trial, client-advocate confidentiality grounds loyalty between a client and attorney, and internal regulations that are tailored towards Advocates unique areas of practice.

4.4. Findings of the benchmarking and the implication for Kenya.

Whereas, UK has a refined legal regime that is replete with renditions of the Court on a number of factors which USA is still grappling with and Canada Supreme Court having sided with its law society; USA and Canada present the best regime that would better serve the Kenyan situation. This is fortified by the fact that the Law Society of Kenya has already developed guidance on money laundering which tailor is made to serve the legal profession albeit with a

[55] Ibid

number of loopholes and grey areas that require clarification. The law society guidance attempts to self-regulate the legal profession by imposing obligation on the legal professionals to emplace measures that will enable compliance with POCAMLA and safeguard against misuse against clients account and other illegal transactions.

The guidance is therefore marred with shortcomings which are arguable, for example, the guidance seeks to subject to duplicity of roles therefore complicating the entire process, lawyers are required to investigate client accounts that are also under the watch of the financial institutions. Secondly, it is argued that the requirement on small businesses and their attorney ln imposes burdensome, expensive, and unworkable reporting requirements which raises serious privacy concerns. There is a requirement that businesses are to disclose information and also to continue update the information so provided, this provision is likely to lead to an increase in cybersecurity breaches ,misuse and disclosures that are not authorize, the resultant effect of noncompliance is civil and criminal penalties; lastly, due to the fiduciary duty held by the advocate towards the law firm, if the above provisions are applied , It would result in a major conflict of interest that may lead to a client losing Justice and trust in the reporting law firm and ultimately legal profession would be jeopardized.[56]

Despite the fact that the said guidance is not as comprehensive as those in Canada where for example, Lawyers have been required to report on the basis of limiting the bar's independence and eroding the lawyer–client privilege. Section 7 of the Charter of Rights and Freedoms of Canada safeguards a singular's independence and legitimate privileges from government acts in Canada, It ensures the individual's on the right track to life, freedom, and security. As a result, money laundering legislation weakened the attorney-client relationship and destroyed the solicitor-client privilege.[57]

Despite the fact that the direction urged in this case is that which is assumed by USA and Canada, an aspect that UK has addressed that the Kenyan system can replicate is the move to

[56] Njaramba E Gichuki, 'The Conflict between Anti-Money Laundering Reporting Obligations and the Doctrine of Confidentiality for Legal Practitioners in Kenya' (2020) ahead-of-print Journal of Money Laundering Control <https://doi.org/10.1108/JMLC-05-2020-0055> accessed 30 March 2021.
[57] Ibid

have concerns leveled against the reporting obligation tested and addressed in court so that legally sound directions are given.

4.5. Conclusion

In conclusion, having benchmarked the Kenyan reporting obligation to that of three jurisdictions which jurisdictions have impeccable records and measures put in place in the battle against money laundering; it is inescapable that Canada and USA present a compelling case that is worth emulating. This is because in Kenya, The entitlement to legal counsel has not yet been completely realized. in Kenya, therefore any attempt that sounds as a claw back is likely to drown the hopes that exist thus far. Moreover, fair hearing as envisioned under Article 25 is non-derogable and efforts such as legal representation that see to its achievement must be jealously guarded. Also, of importance, is the right to privacy that ought only to be violated in a manner that is conceivable within the scope and the test of limitation of rights encapsulated under Article 24 of the Constitution.

CHAPTER 5: FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.0.Introduction

The main focus of this research is interrogating the propriety of advocates as reporting institutions under the AML in Kenya. This is motivated by the fact that lawyers are susceptible and targeted by money launders to be used to undertake money laundering activities, lawyers also have an important function to play to reduce harsh economic effects of ML.[1]

Currently, Kenya is currently taking place reviewing its laws against money laundering and to designate lawyers as part of DNFBP, this move has been opposed by advocates and legal practitioners who argue that if advocates are included as reporting institutions, this would prejudice the primary goal of client –advocate relationship as it seeks to erode the advocate – client confidentiality that is the primary focus , Further, the advocates have argued that inclusion of advocate as reporting institution erodes the traditional aspect of legal practice as it seeks to compel members of the profession to be state agents and report suspicious activities of their client to the relevant government agency.

This research therefore undertook to assess the legal framework that support the battle against money laundering by analyzing the FAFT recommendations which are global standards for anti-money laundering compliance, provisions of POCAMLA which is Kenya's Anti Money Laundering Law Regime that make it a criminal offence for anyone involved in acts of Money laundering , it also discussed the Evidence Act on how evidence is obtained and dealt with as well as offer interpretations on Money laundering issues as provided in the act, Lastly, the paper analyzed the Law Society of Kenya Anti-Money Laundering Guidance for Legal Practitioners which seeks to offer solutions to the problem by offering a self-regulation mechanism.

Another dimension undertaken by this research was to benchmark and consider three jurisdictions namely – CANADA, USA and UK for obvious reasons that they have a better developed legal systems that offer insight to the research problem as well as to borrow a few

[1] Kennedy Otieno Pambo, 'Designating Lawyers as Reporting Entities under the Kenya's Anti-Money Laundering Regime' (2021) 23 Journal of Money Laundering Control 637.

lessons on how well they have tackled the issue of advocates designation as reporting institutions.

The motivation to pursue the above tangent is instigated firstly by the indisputable need to better AML in a targeted effort to curb money laundering. Secondly, FAFT recommendations which despite spirited resistance urge designation of advocates as reporting institutions. Third, divergence of opinion as to whether POCAMLA, Evidence Act and Law Society of Kenya Anti-Money Laundering Guidance for Legal Practitioners are already designating advocates as reporting institutions in light of the construction that is to be made out of Advocate-Client Relationship and Legal Profession Privilege. Third, divergence of opinion on the implication of designation of Advocates as reporting institutions on key pillars of fair hearing such as legal representation. Fourth, attempts by Parliament to amend POCAMLA to include advocates as reporting institutions. Lastly the divergence positions in other jurisdictions.

These issues evidence existing gaps that needed to be filled. This research explored these issues with a principal aim of suggesting far reaching solutions which are covered in this Chapter.

5.1.Key findings

Chapter 1 under research questions paused six questions thereby setting the grid for this research paper. The first question was on the global perspective on the reporting obligation in so far as the advocates are concerned. It was established in Chapter 2 based on the key role played by FATF and ESAAMLG on the Kenya legal regime that it is required that advocates are designated as reporting institutions. The basis for the above suggestion was established to be a 2013 report authored by FATF. Moreover, it was established that despite the 2013 report being criticized, it gave birth to RBA guidance which required implementation by states including Kenya.

The second question was on the scope of reporting institutions under POCAMLA. This question was addressed in Chapter 3 with reference to Section 2, 17, 18 and 48 of POCAMLA. Section 2 was construed to mandate the cabinet secretary for Finance with designation powers. In that regard, it was found that the law under Section 2 has given a go ahead and what remained was implementation, which at the time of writing the research had not been done. However, the wording of section 17, 18 and 48 of POCAMLA was interpreted to cast doubts as whether

Parliament had clear intention of designating advocates as reporting institutions as they clearly focus on specific sectors that they target. It was thus found that POCAMLA is unclear.

The third question was on whether inclusion of advocates as reporting institutions erodes client-advocate relationship. This question was interrogated under Chapter 3. Reference was made to fair hearing and the important role that legal representation plays in achieving the purposes of fair hearing. It was found that the privilege arising out of advocate-client relationship is not irrevocable, there are exemptions to the privilege and as such, a client can waive the privilege at any time. It is contended that this freedom is conferred to the client and not the attorney and that attorney can only disclose information put to the advocate's attention only if there is enough evidence or information to establish that a crime or fraud has occurred. Accordingly, The primary purpose of the professional privilege is to ensure that competent legal counsel can be obtained without fear that the information that is disclosed to the legal professional can be disclosed at any given time. As a result, the goal is to promote the constitutionally guaranteed right to access to justice, rather than to promote crime.

Fourth question was on whether reporting obligation conflicts advocates professional and ethical duties. In interrogating this question, two critical principles, namely- advocate client confidentiality and legal profession Privilege were discussed. Reference in that regard was made to Section 18 of POCAMLA, Section 134 of Evidence Act, Code of Conduct Ethics (Law Society of Kenya Digest of Professional Conduct and Etiquette) and Law Society of Kenya Anti-Money Laundering Guidance for Legal Practitioners. Reference was also made to case law as well as publications by scholars which established that the law only protects legal profession privilege and not the broad concept of advocate-client confidentiality.

Moreover, it was found that what is protected is legal profession privilege is still difficult to identify. It was established that such a finding lends credence to an argument that actually advocates are already reporting institutions and that is why Law Society of Kenya Anti-Money Laundering Guidance for Legal Practitioners have been promulgated.

The fifth question was on whether reporting obligation is strenuous and turns advocates to investigative police officers. In answering this question under Chapter 3, reference was made to RBA as conceived by FATF and Law Society of Kenya Anti-Money Laundering Guidance for

Legal Practitioners which established that resources and the expertise that goes into implementing the dictates of the Guidance are enormous. Moreover, it was established that the tenor of the Guidance is give the advocates a role akin to curved out and donated to the police service under the Constitution.

The six and the last question was on the lessons that can be drawn from USA, UK and Canada. It was established that Canada and USA presented a compelling case that is worth emulating. The reason for emulating Canada and USA was that the two jurisdictions have declined the invitation to designate advocates as reporting institutions. The reason for resisting designation of advocates was found to be the importance of legal representation in fair hearing. It was established that in Kenya, the right to legal representation has not yet been fully realized, an attempt to scare clients from advocates in the name of having the classified as reporting institutions is a claw back that has the potential of extinguishing the hopes that exist thus far.

It was also found that whereas, UK has a refined legal regime that is replete with renditions of the Court on a number of factors which USA is still grappling with and Canada Supreme Court having sided with its law society; it was found that the Kenyan system can replicate UK's move by having the reporting obligation tested and addressed in court so that legally sound directions are given.

5.2.Importance of the findings

The contribution that this research makes to the existing literature cannot be gainsaid. First, by pointing out the criticism that has been leveled against the reports on vulnerability of advocates to Money Laundering, it provokes further studies on the issue for cogent findings that advocates can relate in efforts to have them on board in this critical fight that is envisioned under AML. Second, by interrogating the scope of the reporting obligation and pointing out the varied interpretations that arise out of Section 2, 17, 18 and 48 of POCAMLA, an invitation is made for further research and law reform for clarity in law.

Third, by discussing the reporting obligation and its implication on advocates' professional and ethical duties; this research paper provides a background upon which the two must be reconciled for a better outcome. This provokes scrutiny of the extent of these two critical issues to avoid

conundrum that exists and that spells fear among advocates denying them full participation in the battle against ML.

Fourth, in interrogating whether reporting obligation erodes client-advocate relationship; this research provokes investigation into the clients' perspective in designating advocates as reporting institutions. This takes into account, the fact that advocates chief concern other than the public interest is their clients.

Fifth, in interrogating whether reporting obligation is onerous and akin to usurpation of the functions given to the police officers; this research invites stakeholders to consider AML in a broad perspective in view of the fact that laws are meant to complement each other. Sixth and last, in discussing the positions taken by other jurisdictions and drawing lessons; this research invited stakeholders to appreciate solutions that have been tested and found to be viable.

5.3.Recommendations

The following are the recommendations that suggest solutions in light of the study in this research:

1. The legislative framework of anti-money laundering should be amended according to FATF's interpretive note recommendations 23. It is necessary to divide the functions of advocates between those involved in legal proceedings and the financial transactions advocates who are mainly legal counsel and conveyancers, As a result, the attorney - client privilege should only be used for conduct that fit within the scope of the privilege, the privilege does not apply to advocates who aid in financial transactions and not legal proceedings and litigants.

2. Publicize LSK anti money laundering guidance report among advocates and clients and have it widely discussed within the legal profession as way of sensitizing advocates so that they on-board from the outset, this will also enable advocates engage in discussions and sensitize their clients who will end up not shying away from legal representation as a consequence of the intended inclusion of advocates as reporting institutions.

3. LSK should also seek the Courts interpretation on what constitutes 'suspicious transactions' and the applicable test. Given the devastating effects of ML on both the economy and the potential repercussions to a complicit advocate. A clear threshold for advocates needs to be articulated to avoid the dangers of burdening the FRC with false positives, while at the same time making sure to reliably flag potential ML activities.

4. Review Law Society of Kenya Anti-Money Laundering Guidance for Legal Practitioners to define what is meant by suspicious transactions. Given the evolving nature of ML in employing new technologies and techniques, it is not enough to outline a basic threshold of what suspicious transactions entail, rather constant review of the guidelines needs to be done to establish they are up to date.

5. Seek interpretation of Section 2, 17, 18 and 48 of POCAMLA before the Court. The question for the court would be to categorically state whether Advocates are reporting institutions and what is the scope of their reporting obligations in light of the advocate client confidentiality and advocate professional privilege. These sections have been subject to varied and conflicting interpretations as has been demonstrated in chapter 3.

6. Review POCAMLA in light of the courts' interpretation of Sections 2, 17, 18 and 48 of POCAMLA and Section 134 of Evidence Act so as to crystalize the intended consequences of these provisions on advocates.

5.4.Conclusion

This research set out to establish the propriety of advocates as reporting institutions under the AML in Kenya, given their culpability and susceptibility to the tactful maneuvers of money launderers and their potential in mitigating the harsh economic effects of money laundering. The study accomplished this by interrogating the legal provisions in Kenya, their purposive and strict interpretations, vis-à-vis those in the USA, Canada, UK, France and Belgium. The analysis found best practices that can be employed in Kenya. Practices which strike the delicate but necessary balance between reporting obligations and advocate professional privilege; by extension advocate-client privilege. The precedent from Belgium and France for instance indicate that reporting obligations for advocates were legal in as far as they were limited in scope

to execution of transactions of a financial nature. This would neither make advocates extension of the state nor would it make them complicit actors to money laundry. This ultimately implies, it is possible for advocates to aid in the fight money laundry without explicitly adopting the conventional obligations of reporting institutions.

The research also established the necessity of reviewing AML laws from time to time to respond to the changing circumstances and sophistication of the modes utilized by money launderers. FATF plays a very key role in promulgating recommendations based on its reports, which reports demand implementation by states. However, it must be noted that the localized problems sometimes are not captured at the global perspective hence the need for autochthonous solutions. That informs the suggestion in this research that there is need for a domestic report that will in turn inform review of Law Society of Kenya Anti-Money Laundering Guidance for Legal Practitioners.

There is no doubt that AML envisions an all-inclusive fight. It is therefore critical that each party plays its role. That begins by understanding the position that one has to occupy. Understanding the position can only stem from clarity in law hence the need as recommended herein to have the law tested in courts for a legally sound rendition. Such a rendition can only be helpful if it balances the advocate's perspective, clients' perspective to that of other stakeholders. This undoubtedly will achieve an all-inclusive fight with a likelihood of success. None the less, it is without a doubt that Kenyan anti ML regime which is discussed in this research totally criminalized money laundering, it also makes it an offence for an advocate to assist a client in laundering money.

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ANNEXTURE A:

Topic of Study : Propriety of inclusion of advocates as reporting institutions under Anti Money laundering Laws in Kenya

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Supervisor: Prof. Constance Gikonyo

INTRODUCTION

Greetings, Sir/Madame

I take this opportunity to express my gratitude for accepting my invitation to participate in this interview. I am a University of Nairobi postgraduate student at the School of Law, Parklands. I'm currently pursuing a master's degree in law. In partial fulfillment of the requirements of the course, I am required to conduct a research paper on propriety of inclusion of advocates as reporting institutions in kenya under the anti-money laundering laws

As a result, this questionnaire will be used as part of my research in analyzing the effectiveness of inclusion of advocates as part of reporting institutions by; analyzing the perspective and scope of reporting institutions; analyzing whether inclusion of advocates as reporting institutions will impinge on the nature of advocate –client relationship; analyze whether there is any impact of reporting obligation on the professional and ethical duties on advocates; review and recommend the best way to involve advocates in the battle against money laundering while whilst simultaneously maintain public trust in the judicial system in kenya.

Kindly note that any information you may provide in this research will be treated with the utmost discretion and will not be utilized for any other reason other than this project paper, I also confirm that your identity will remain anonymous and that your response in the interview will be recorded in the questionnaire.

I intend to take approximately 25 Minutes of your time.in case you have any questions, kindly feel free to contact me directly through the contact or email address provided above.

Do you accept to take part in the research? Yes ..... No.....

Please sign below:

(Accept/decline)

ANNEXTURE B

SECTION 1: BACKGROUND INFORMATION

Name _____

((If a name is given, it will be kept private.)

Age: _____ Sex: (Male/Female)

Occupation _____ Date of employment/engagement _____

Date of interview: _____

Start time for the interview_____ End _____

Language of interview, if not English _____

SECTION 2: GENERAL QUESTIONS ABOUT MONEY LAUNDERING

1. What do you understand about money laundering?

2. What does FATF mean in money laundering ?

3. Are you aware that the FATF in its 2013 recommendations proposed that advocates should be included as part of reporting institutions such as banks, real estate agents, casinos among others?

SECTION 3: INCLUSION OF ADVOCATES AS REPORTING INSTITUTIONS

a) Do you think that advocates are involved in money laundering activities? Why?

b) What do you understand by the term ‘Reporting institutions” under money laundering laws?

c) What do you think reporting institutions do in the fight against money laundering?

d) Do you think there is global responsibility for the inclusion of Advocates/Lawyers as part of reporting institution? Why?

SECTION 4: ROLE OF ADVOCATES ARE REPORTING INSTITUTIONS AND ADVOCATE-CLIENT RELATIONSHIP

1. What is your understanding of the relationship between an advocate-client?.

2. Do you think if advocates are included as reporting institutions it will affect how they relate with their client?

3. Do you think if advocates are included as reporting institutions it will conflict with their professional duty and ethics ?\

4. Do you think if advocates are included as reporting institutions they will role will be like that of police officers in meddling with their client affairs? Explain your answer.

SECTION 5: ADDRESSING NEED FOR INCLUSION OF ADVOCATES

1. Are you aware that FATF recommended that advocates should be included as part of reporting institutions?

2. Do you support support this recommendation? Why?

3. How best do you think advocates should be handled in order to safe guard the professional duties as well as help in curbing money laundering activities?

4. Do you think we can pick a few lessons from other jurisdictions on the subject?

5. Do you think Law society of Kenya can help in proposing viable solutions to the issue?

11. Do you have anything else you'd want to say?

Our conversation has come to an end. I'd want to express my gratitude for taking the time to participate in this interview. Good morning/evening.

APPENDIX 1

SCHEDULE OF INTERVIEWS

PARTICIPANT NO.	ANONYMITY	SEX	INTERVIEW LOCATION	PARTICIPANT'S PROFESSION	DATE OF THE INTERVIEW
1.	Susan	Female	Nairobi	Legal officer	17th February, 2020
2.	Alice	Female	Nairobi	Advocate	17th February, 2020
3.	Geoffrey	Male	Machakos	Advocate	18th February, 2020
4.	Derik	Male	Nairobi	Advocate	17th February, 2020
5.	Alfred	Male	Limuru	Advocate	19th February, 2020
6.	Givans	Male	Limuru	Advocate	19th February, 2020
7.	David	Male	Machakos	Advocate	18th February, 2020
8.	Murage	Female	Nairobi	Advocate	17th February, 2020
9.	Hellen	Female	Nairobi	Businesslady	17th February, 2020
10.	Andrew	Male	Nairobi	Business man	17th February, 2020

11.	Ivy	Female	Nairobi	Legal officer	17th February, 2020
12.	Selestine	Female	Limuru	Lecturer of law	20th February, 2020
13.	Amos	Male	Limuru	Lecturer	20th February, 2020
14.	Linda	Female	Machakos	Judge	21st February, 2020
15.	Agnes	Female	Athi river	Magistrate	21st February, 2020
16.	Damaris	Female	Limuru	Magistrate	24th February, 2020
17.	Jemima	Female	Machakos	Magistrate	21st February, 2020
18.	Allan	Male	Nairobi	Judge	25th February, 2020
19.	Margaret	Female	Nairobi	Judge	25th February, 2020
20.	Kemboi	Female	Nairobi	Magistrate	25th February, 2020
21.	Wanjiru	Female	Nairobi	Judge	25th February, 2020
22.	Atieno	Female	Nairobi	Law student	25th February, 2020

23.	Adhiambo	Female	Nairobi	Lawyer	26th February, 2020
24.	Mwashigadi	Female	Nairobi	Lawyer	26th February, 2020
25.	Jeremiah	Male	Nairobi	Law student	26th February, 2020
26.	Martin	Male	Kiambu	Businessman	27th February, 2020
27.	Kioko	Male	Kiambu	Credit officer	27th February, 2020
28.	jelagat	Female	Kiambu	Credit officer	27th February, 2020
29.	Wafula	Male	Machakos	Procurement officer	28th February, 2020
30.	Wekesa	Male	Machakos	Judge	28th February, 2020
31.	Patrick	Male	Machakos	Magistrate	28th February, 2020
32.	Sharon	Female	Machakos	Advocate	28th February, 2020
33.	Habbakuk	Male	Limuru	Advocate	2nd March, 2020
34.	Scovia	Female	Limuru	Advocate	2nd March, 2020

35.	Scolastica	Female	Limuru	Advocate	2nd March, 2020
36.	Jane	Female	Limuru	Advocate	2nd March, 2020
37.	Monica	Female	Kiambu	Advocate	3rd March, 2020
38.	Ericka	Female	Kiambu	Advocate	3rd March, 2020
39.	Maimuna	Female	Nairobi	Advocate	4th March, 2020