

States' Varied Compliance with International Anti-money Laundering Standards for Legal Professionals

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Abstract

Recent reforms in international anti-laundering regime install legal professionals as gatekeepers by requiring them to take certain due diligence measures and actively cooperate with the state. These requirements have generated controversy and varied compliance among states. The prevailing view in legal academia and profession is that compliance with these requirements is inversely related to the resilience of states' domestic rule of law system. The article critiques this view: the gatekeeping controversy is a debate taking place among different traditions of rule of law, and not creeping-in from outside the bounds of rule of law. By tracing policy documents, prominent judicial decisions and records of activities of legal professional associations, the article shows that states' divergent compliance is instead a function of (i) a split in the philosophical inclinations of judiciaries over how the legal profession serves the public interest, and (ii) a turf-war over the administration of the legal profession.

Keywords

anti-money laundering – the Financial Action Task Force (FATF) – legal professional privilege – gatekeeping – compliance and resistance

1 Introduction

In recent years, the international anti-money laundering (AML)¹ regime has come to encompass the standardisation of the activities of certain professions that are presumed to be particularly relevant to financial flows. The legal profession has been one of those regulated professions. The AML standards adopted by the Financial Action Task Force (FATF), the preeminent global standard setting body on the matter, require states to apply to the legal profession certain rules of conduct that have long been applicable in the financial industry.² This requirement specifically covers sole or firm-based legal practitioners, excluding “in-house” counsel in organisations or legal personnel working for government institutions.³ Such deployment of legal professionals in the fight against money laundering is emblematic of the larger move in global (security) governance to deploy an array of professionals as front-line executors, or “gatekeepers”,⁴ and turn the routine practices, materials and technologies at their disposal into law enforcement tools.⁵

There is a marked difference among the core FATF member states (i.e. Western advanced economies constituting the so-called “G7” states) in implementing the international AML requirements with respect to the legal profession. Some states (mostly European) are implementing it aggressively; others (mainly North American) are repeatedly found non-compliant.⁶ This divergence in

1 The research and writing of this article was undertaken during a research leave spent at the University of California, Berkeley, Center for the Study of Law and Society (CSLS) supported by a generous grant from the Niels Stensen Fellowship, the Netherlands. Money laundering is often governed in conjunction with terrorism financing. The reference and analysis in this article is only to money laundering for purposes of brevity, and also because terrorism financing raises some distinct issues relating to security-governance that money laundering does not.

2 Introduced in the 2003 revision of the 1990 FATF Recommendations, for all versions see <www.fatf-gafi.org>.

3 The 2012 FATF Recommendations, Glossary, p. 116.

4 R.H. Kraakman, ‘Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy’, 21 *J. L. ECON. & ORG.* (1986) pp. 53–104.

5 F. Johns, ‘Data, Detection, and the Redistribution of the Sensible in International Law’, 111:1 *American Journal of International Law* (2017) pp. 57–103; A. Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (University of Chicago Press, Chicago, 2011).

6 For an overview of compliance levels, see FATF, ‘Consolidated Table of Assessment Ratings’, (2017), <<http://www.fatf-gafi.org/media/fatf/documents/4th-Round-Ratings.pdf>>, visited on 21 November 2018.

compliance is remarkable as it occurs amongst states that are otherwise similarly committed to, and are the progenitors of, the global AML regime.⁷

The discourse in academic and practicing legal community largely construes this compliance divergence as reflective of the states' level of commitment to the rule of law.⁸ This discourse strongly criticises lawyers' gatekeeping role as a violation of legal professional privilege (also referred to as lawyer-client confidentiality).⁹ The common premise underpinning this criticism is the idea that legal professional privilege is absolute in a free and democratic society. The direct transposition of lawyers' gatekeeping role as stipulated by the FATF, this view holds, is an assault to rule of law in any system that claims to be free and democratic. Consequently, national variation in terms of instituting lawyers' AML gatekeeping role is explained as a function of the extent to which domestic forces of rule of law persevere in the face of international pressure from the FATF.

This article shows that the debate on lawyers' gatekeeping role is a matter that is grappled with and differently resolved *within* free and democratic systems, and not wholly antithetical to such systems. The variation in states' level of compliance with the FATF lawyer regulations, therefore, is not necessarily a function of domestic rule of law resilience. Instead, by tracing judicial decisions, the correspondence of lawyers' professional associations with the FATF and governments and policy documents, the article identifies two other key factors – one ideological, the other institutional – that played a role in shaping states' divergent legislative response to and jurisprudence on AML obligations of lawyers. These are: (i) the philosophical leanings of judiciaries in defining the public interest role of the legal profession, and (ii) the entrenchment of the concern for self-regulation of the legal profession. These findings point to broader realisation of the irregular relationship between domestic rule of law and international law compliance. Namely, that the domestic reception of an international rule is filtered by the degree of fit between the international legal

7 The G7 states are the original member states that established the FATF. For current membership and history of FATF, see www.fatf-gafi.com.

8 R.J. MacDonald, 'Money Laundering Regulation—What Can Be Learned from the Canadian Experience', *Journal of the Professional Lawyer* (2010) pp. 143–165 (MacDonald is the former vice-president and president of Federation of Law Societies of Canada); D.E. Osborne, 'The Financial Action Task Force and the Legal Profession', 59:3–4 *New York Law School Law Review* (2015) pp. 421–431 (Osborne is the former president of the American College of Trust and Estate Counsel, and vice-president of the International Academy of Estate and Trust Law).

9 On the semantic and conceptual variations surrounding legal professional privilege in different legal system, see J. Auburn (ed.), *Legal Professional Privilege: Law and Theory* (Hart Publishing, Oxford, 2000).

demand in question and what Martin Krygier calls the specific “rule of law traditions”¹⁰ in a particular jurisdiction.

2 Legal Professionals as AML Gatekeepers: States' Diverging Compliance

The gatekeeper role of legal professionals under the FATF regime entails, broadly speaking, two types of functions: the relatively passive role of conducting due diligence and the role of active cooperation with the state.¹¹ Legal professionals are required to take due diligence steps before entering into and throughout the duration of an engagement with a client. These steps are mainly identifying and verifying the client, identifying the beneficial (i.e. ultimate) ownership of financial transactions, understanding the nature and purpose of the business relationship with the client and continually monitoring it.¹² The other type of gatekeeper role, where lawyers are required to actively cooperate with the state, includes obligations of data collection, storage and transfer to the state (“record-keeping obligation”)¹³ and submission of suspicious activity reports, with the accompanying no-tipping off rule (“reporting obligation”).¹⁴ It is these active cooperation obligations that have triggered much academic debate on the limits of legal professional privilege in free and democratic societies, and met differing reception in national legal systems.

In European and several other member states of the FATF, lawyers' gatekeeping role, including the duty for active cooperation with the state, has been transposed into national legislation more or less automatically. The Fourth European Union (EU) Directive on money laundering and terrorism financing has provided such transposition across the Union.¹⁵ In some states, such as the UK, the transposing legislation has subjected lawyers to even stronger AML obligations than the international standards.¹⁶ Beyond the EU, the latest (fourth

10 M. Krygier, 'The Traditionality of Statutes', 11 *Ratio Juris* (1988) pp. 20–39.

11 The 2012 FATF Recommendations, paras. 22–23.

12 *Ibid.*, para. 10.

13 *Ibid.*, para. 11.

14 *Ibid.*, paras. 20–21.

15 Directive 2015/849 of the European Parliament and of the Council of 20 May 2015.

16 C. Tyre, 'Anti-Money Laundering Legislation: Implementation of the FATF Forty Recommendations in the European Union', *Journal of the Professional Lawyer* (2010) p. 74; The International Bar Association (IBA), American Bar Association (ABA), and the Council of Bars and Law Societies of Europe (CBLSE), *A Lawyers Guide to Detecting and Preventing Money Laundering*, October 2014, p. 14.

round) assessment of the implementation of FATF standards in 31 states globally shows that more than 4/5th were rated largely, partially or fully compliant with respect to the lawyer regulations.¹⁷

In contrast, there is a strong resistance to the FATF lawyer regulations in North America – the United States and Canada – where, in addition to vocal opposition from the profession, national transposing legislation is non-existent or actively blocked. In Mutual Evaluation Reports – the FATF’s main monitoring methodology – these pioneer member states are repeatedly found non-compliant with respect to transposing FATF’s customer identification, record keeping, reporting and no-tipping off clauses for the legal profession, and the state’s duty of supervision over the sector.¹⁸ Canada in particular has been subjected to FATF’s “follow-up” procedure, a monitoring step triggered before severe countermeasures could be invoked for non-compliance.¹⁹

This section brings to light the arguments animating these two camps of compliance by tracing prominent judicial cases from national and international courts. Sub-section 2.1 will show that national resistance to the FATF’s lawyer regulations is in the main construed by (international) law literature and the discourse within the legal professional community as a fight for rule of law in free and democratic societies. That is, the international regulatory push for lawyers’ gatekeeping role is perceived as an external threat that undermines lawyers’ role as rule of law actors. The sub-section will further show how this narrative is conveniently situated within a broader international law literature on domestic (constitutional) resistance to international rules, and the agency of local actors in “civilising” international law. The subsequent sub-section, section 2.2, will illustrate that this narrative is but only one perspective among two equally competing legal jurisprudence. This means, lawyers’ gatekeeping

17 FATF, ‘Consolidated Table of Assessment Ratings’ (2017) <<http://www.fatf-gafi.org/media/fatf/documents/4th-Round-Ratings.pdf>>, visited on 21 November 2018.

18 See e.g., FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures – United States* (Fourth Round Mutual Evaluation Report, December 2016); FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures – United States*, (Third Round Mutual Evaluation Report, June 2006); FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures – Canada* (Fourth Round Mutual Evaluation Report, September 2016); FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures – Canada* (Third Round Mutual Evaluation Report, February 2008), all available at <www.fatf-gafi.org>.

19 FATF, ‘Mutual Evaluation of Canada – 6th Follow-Up Report’, (2014), <<http://www.fatf-gafi.org/media/fatf/documents/reports/mer/FUR-Canada-2014.pdf>>, visited on 21 November 2018.

role is a matter that is grappled with and differently addressed within systems that equally claim allegiance to rule of law in a free and democratic society.

2.1 *Opposition to Gatekeeping as Domestic Rule of Law Resistance*

The national implementation of the active gatekeeping role of lawyers stipulated under FATF Recommendations – specifically, record-keeping and reporting obligations – has met outspoken resistance in (international) legal literature,²⁰ and from practising lawyers in the form of academic contributions,²¹ public advocacy and lobbying with governmental and intergovernmental bodies,²² and most importantly, legal challenges before national and international courts, which is discussed shortly. The common criticism is that the obligation to

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- 20 See, e.g., V. Mitsilegas and N. Vavoula, 'The Evolving EU Anti-Money Laundering Regime: Challenges for Fundamental Rights and Rule of Law', 23:2 *Maastricht Journal of European and Comparative Law* (2016) pp. 261–293; Z. Hamin, N. Omar, and S. Kamaruddin, 'FATF and Lawyers' Obligations under the AML/ATF Regime in Malaysia', 31 *Procedia Economics and Finance* (2015) 759–65; J. Komárek, 'Legal Professional Privilege and the EU's Fight against Money Laundering', 27 *Civil Justice Quarterly* (2008) 13–22; A. Hamman, 'The Impact of Anti-Money Laundering Legislation on the Legal Profession in South Africa', doctoral dissertation, University of the Western Cape (2016), available online at <http://etd.uwc.ac.za/xmlui/handle/11394/4766>, last accessed 21 November 2018;
- 21 K.L. Shepherd, 'The Gatekeeper Initiative and the Risk-Based Approach to Client Due Diligence: The Imperative for Voluntary Good Practices Guidance for U.S. Lawyers', *Journal of the Professional Lawyer* (2010) p. 87 (Shepherd is the former chair of ABA's Real Property Section, chair of the ABA Taskforce on Gatekeeper Regulation and the Profession, and president of the American College of Real Estate Lawyers); L.S. Terry, 'U.S. Legal Profession Efforts to Combat Money Laundering and Terrorist Financing', 60:3–4 *New York Law School Law Review* (2015) p. 493; N. M. Healy, E.J. Krauland, K.L. Shepherd, C. Stinebower, R.L. Fruehauf, W.P. Barry, W. Abraham, S. Nance, L. El-Sabaawi, and T. Capeloto, 'U.S. and International Anti-Money Laundering Developments', 43:2 *International Lawyer* (2009) pp. 795–809.
- 22 American Bar Association, American College of Trust and Estate Counsel, Council of Bars and Law Societies of Europe, Japan Federation of Bar Associations, Federation of Law Societies of Canada, Conseil National des Barreaux, Federation of European Bars, Self-regulatory Organisation of Swiss Lawyers and Notaries, 'Joint Statement by the International Legal Profession on the Fight Against Money-Laundering', (2003), <http://www.ccbe.org/NTCdocument/signed_statement_0301_1183723072.pdf>, visited on 21 November 2018; Andrew Galvin, 'Preservation of Legal Professional Privilege : Does the Draft AML Bill Go Far Enough?', 21:10 *Australian Banking and Finance Law Bulletin* (2006) 149–53; M. Bailes, 'Legal Practice: Anti-Money Laundering and Counter-Terrorism Financing: Regulating the Legal Profession', 39:8 *Bulletin of the Law Society of South Australia* (2017) pp. 8–9. For detailed history of the legal profession's engagement with the FATF see Shepherd, *supra* note 21, footnote 107 and accompanying text.

actively cooperate with the state jeopardises legal professional privilege (LPP), and thereby the administration of justice. This view held that the damage occurs through the erosion of specific legal norms that are widely recognised and constitute building blocks of LLP. These are “the relationship of trust between lawyers and client ... the rights of fair trial and protection of private and family life”.²³ The erosion of these norms is, the criticism holds, ultimately antithetical to the rule of law in a system that has any claim to freedom and democracy.

Such link between gatekeeping roles of lawyers and the threat to rule of law in free and democratic societies was successfully argued by legal professionals before courts of law in some states, leading to the revocation of national implementation of the FATF lawyer regulations.²⁴ The most publicised and consequential of these litigations was the *Federation of Law Societies* case in Canada, which culminated in 2015.²⁵

The *Federation of Law Societies* case is a 15-year long legal battle the Canadian Federation of Law Societies waged against Canada’s implementation of FATF rules towards lawyers. In this proceeding, the Federation sought to challenge the sections of the Canadian Proceeds of Crime Act²⁶ and Regulations²⁷ instituting active cooperation obligations on lawyers as unconstitutional. In both cases, lawyers specifically objected to collect and keep information on their clients and provide to governmental bodies – the Financial Transactions and Report Analysis Center of Canada.

The Supreme Court of Canada concurred with legal professionals in deciding that lawyers’ obligation to actively cooperate with the state undermines solicitor-client privilege and hence violates the constitutional principle of the independence of the bar.²⁸ The Court construed LPP as emanating from the

23 Mitsilegas and Vavoula, *supra* note 20, p. 273. See also, H. Xanthaki, ‘Lawyers’ Duties under the Draft EU Money Laundering Directive: Is Confidentiality a Thing of the Past?’, 5:2 *Journal of Money Laundering Control* (2001) pp. 105–107.

24 E.g. *Jamaican Bar Association v. The Attorney General and General Legal Counsel*, [2014] JMSC Civ. 179; *Nigeria Bar Association v. Attorney General of the Federation & Central Bank of Nigeria*, reported in Ndidi Ahiauzu, ‘Applicability of anti-money laundering laws to legal practitioners in Nigeria: NBA v. FGN & CBN’, 19:4 *Journal of Money Laundering Control* (2016) pp. 329–336.

25 *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401, judgment of 13 February 2015 [hereafter *Federation of Law Societies* case].

26 Proceeds of Crime (Money Laundering) and Terrorist Financing Act S.C. 2000, c.17.

27 Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations, SOR/2002–184.

28 *Federation of Law Societies* case, *supra* note 25.

duty of a lawyer to the client's cause.²⁹ This duty for undivided commitment of the lawyer, the Court reasoned, precluded any active collaboration with the state. It concluded that the obligation to collect and keep information on clients, for ready use by the state, puts lawyers as agents of the state.

The Supreme Court of Canada asserted that LPP "must remain as close to absolute as possible".³⁰ If exception must be made to this for the purposes of fighting money laundering, this exception must meet the "demonstrably justified in a free and democratic society" test.³¹ This means it must be ascertained that there exists no other reasonable alternative to obtaining information by requiring lawyers to collect and pass it to the government confidentially, i.e. without tipping-off their clients. And even if such exception were to be allowed, the Court added, it must be designed to be exercised through a case-by-case prior judicial scrutiny, and not automatically.³² This, the Court noted, would give lawyers an opportunity to claim LPP – and for a court to preserve it when the government's case was found inadequate – before the damage is already done. Even if active cooperation with the state were to be accepted as a necessary exception, the Court decided, the absence of these judicial safeguards renders the relevant provisions of Canadian Proceeds of crime Act ill-fit in a free and democratic society.

The decision of the Canadian Supreme Court was hailed as a principled defiance against the FATF, one that "people will still be talking about 50 years from now".³³ This narrative of rule of law resistance against an encroaching international AML regime echoes, and is amplified by, broader constitutionalist concerns in (international) legal literature. This literature engages global governance, particularly in security-related areas such as AML, from a position of Orwellian suspicion. That is, its key preoccupation is interrogating and resisting the trend of ever-intrusive and unaccountable global governance, particularly regimes that amass private data.³⁴ This position of suspicion is also often coupled with what Jan Klabbers has called the "best liberal tradition" of

29 *Ibid.*, paras. 28, 81, 82.

30 *Ibid.*, para. 44, citing *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209.

31 *Ibid.*, paras. 58–62, 114.

32 *Ibid.*, para. 54.

33 S. Fine, 'Lawyers Win Exemption from Money Laundering Law', *Globe & Mail*, 10 February 2015, <<https://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/lawyers-win-exemptions-from-money-laundering-law/article22984504/>>, visited on 21 November 2018.

34 L. Amore and M. de Goede, *Risk and the War on Terror* (Routledge, London, 2008); Johns, *supra* note 5.

assuming “courts as a-political actors” who could serve as last bastions of constitutionalism against a global assault.³⁵ In the post-9/11 context in particular, the legal debate has increasingly internalised the premise that international (security) governance has authoritarian tendency that needs to be resisted from below³⁶ – and that the role of lawyers and judiciaries is essential in this resistance.³⁷ Situated within this critical literature in global governance, the predominant view in the legal community (both academic and professional) that sees national resistance to FATF lawyer regulations as constitutional vigilance becomes easy to subscribe to. In other words, suspicion of an ever-encroaching global governance machine lends credence to the view that states that unreservedly comply with the FATF lawyer regulations do so by surrendering their constitutional value (if they ever have one) of preserving the rule of law in a free and democratic society. Such sentiment is reflected in statements such as when Jonathan Goldsmith, former secretary-general of Council of Bars and Law Societies of Europe lamented: “If only Europe would share Canada’s view that money laundering obligations are inconsistent with efforts to maintain lawyer-client confidentiality”.³⁸

Within this narrative, legal professionals, particularly those in North America that vehemently resisted FATF standards, are positioned as grassroots catalysts that influence states’ compliance for the good; or to use a socio-legal concept, as domestic actors that help “bring international law home” and keep

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- 35 J. Klabbers, ‘Disobeying the Security Council: Countermeasures against Wrongful Sanctions’, 8:2 *International Organizations Law Review* (2011) p. 485.
- 36 A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford Monographs in International Law, Oxford, Oxford University Press, 2011); C. Kreuder-Sonnen, and B. Zangl, ‘Which Post-Westphalia? International Organizations between Constitutionalism and Authoritarianism’, 21:3 *European Journal of International Relations* (2015) pp. 568–594; E. de Wet, ‘(Implicit) Judicial Favoring of Human Rights Over United Nations Security Council Sanctions: A Manifestation of International Constitutionalism?’, in F. Fabbrini and V.C. Jackson (eds.), *Constitutionalism Across Borders in the Struggle against Terrorism* (Edward Elgar Publishing, Cheltenham, 2016) pp. 35–51.
- 37 E.g., B. Dickson, ‘The Right of Access to a Lawyer in Terrorism Cases’, in A. Masferrer, and C. Walker, (eds.), *Counter-Terrorism, Human Rights and the Rule of Law: Crossing Legal Boundaries in Defence of the State*, (Cheltenham, Edward Elgar, 2013) pp. 189–211; H. Corell, ‘The Role of the Lawyer in Shaping Responses to the Security Imperative’, in A.M.S. de Frias, K. Samuel, and N. White (eds.), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford, 2012) pp. 284–301.
- 38 J. Goldsmith, ‘Money Laundering: Thank You, Canada!’, *The Law Society Gazette*, 20 February 2015, <<https://www.lawgazette.co.uk/comment-and-opinion/money-laundering-thank-you-canada/5046944.article>>, visited on 21 November 2018.

“bad” international law out.³⁹ That was precisely the claim being made particularly by American and Canadian lawyers, whose states are non-compliant with FATF lawyer regulations: they condescendingly criticised their European peers for not standing up to the FATF or the EU lawyer regulations firmly enough and for showing “bureaucratic attitude of deference to international organizations”.⁴⁰

Jurisprudence from across Europe, particularly from those core FATF and G7 member states that equally claim adherence to liberal political system as Canada, shows us, however, that non-compliance with FATF lawyer regulations cannot necessarily be interpreted as a win for rule of law, or vice versa. Contrary to the black-and-white presentation of lawyers’ gatekeeping obligation as an automatic assault on LLP and thereby rule of law, a survey of various judicial dealings on the matter reveals that the relationship between gatekeeping requirements and LLP/rule of law is not straightforward. Instead, it involves difficult, divisive questions that are commonplace within, and not by definition antithetical to, free and democratic systems.

2.2 *Support of Gatekeeping as Rule of Law Compatible*

Judiciaries in FATF’s core European member states have grappled with the tension between gatekeeping obligations of lawyers and the protection of LLP in a free and democratic society. These judiciaries arrived at a different conclusion than those reached by the Canadian court. These courts found that, within specified parameters, lawyers’ cooperation with the state to fight money laundering could be acceptable, and not wholly foreclosed as incompatible with rule of law in free and democratic systems.

This view is reflected in cases originating in Belgium (*Ordre des Barreaux* case, referred to the Court of Justice of the European Union),⁴¹ France (*Michaud v. France* case, brought before the European Court of Human

39 H. K. Koh, ‘Bringing International Law Home’, 35 *Houston L. Review* (1998) pp. 623–681; B. Oomen, *Rights for Others: The Slow Home-Coming of Human Rights in the Netherlands*, (Cambridge University Press, Cambridge, 2013); B.A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, Cambridge, 2009).

40 Osborne, *supra* note 8, p. 426.

41 *Ordre des barreaux francophones et germanophone and Others v. Conseil des ministres*, *European Court of Justice, case C-305/05, Judgment of 26 June 2007*. For detailed commentary on the case, see M. Luchtman and R. van der Hoeven, ‘Case C–305/05, *Ordre des barreaux francophones et germanophone et al. v. Conseil des Ministres*, judgment of the Court of Justice of 26 June 2007, Grand Chamber; [2007] ECR I–5305’ 461 *Common Market Law Review* (2009) pp. 301–318.

Rights)⁴² and the UK (*Bowman v. Fels* case, brought before the UK Court of Appeal).⁴³ In the *Ordre des Barreaux* case, Belgian Bars brought proceedings challenging the legality of the Belgian law that transposed the then Second EU Directive (Directive 2001/97) on anti-money laundering and terrorism financing.⁴⁴ The key claim was that lawyers' obligation to file suspicious transaction reports on their clients to the government under the Directive violates Article 6 of the European Convention on Human Rights and Article 6(2) of the Treaty on European Union, both of which stipulate the right to a fair trial. In *Michaud v. France*, similarly, a French lawyer challenged the transposition of the reporting obligation under the EU Directive based on Articles 6 (right to fair trial) and 8 (right to private and family life) of the above Convention.⁴⁵ The underlying argument in both cases was that reducing the scope of professional secrecy – by demanding lawyers to report on their clients – renders lawyers' loyalty divided between the government and their clients, and hence exposes clients to unfair trial.

The outcomes in these two cases are related as the ECtHR in *Michaud v. France* affirmed the decision of the French *Conseil d'Etat*, which in turn had relied on the reasoning of the ECJ in the *Ordre des Barreaux* case.⁴⁶ Both the ECJ and the ECtHR decided that lawyers' obligation to actively cooperate with the state on matters of money laundering was a proportionate measure acceptable within free and democratic societies. The ECJ clarified that the reporting obligation under the EU Directive is applicable only with respect to lawyers' activities falling under these two criteria: (1) when performing a specific set of advisory activities of "a financial nature or concerning real estate",⁴⁷ i.e. only

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

43 *Bowman v. Fels*, [2005] EWCA (Civ) 226, (3 March 2005)[41]–[42].

44 Currently, the Fourth Directive is in force, Directive 2015/849 of 20 May 2015, Official Journal L 141/73, 5 June 2015.

45 The applicant sought to challenge the legality of the internal regulation of the French National Council of lawyers that transposed the new additions to the French Monetary and Financial Code, which in turn transposed the Third EU Directive on money laundering and terrorism financing.

46 Further on the doctrinal interrelation of the two courts on the topic, see S. 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', 16:5 *German Law Review* (2015) pp. 1271–1292.

47 *Ordre des barreaux* case, *supra* note 41, para. 33. These are services relating to "the buying and selling of real estate or businesses, the management of funds, securities or other assets belonging to the client, the opening of current accounts, savings accounts or securities accounts, the organisation of the contributions required to create companies, the

when acting as financial intermediaries, and (2) when taking place in contexts “with no link to judicial proceedings”.⁴⁸ The court clarified that even in relation to these financial activities, the reporting obligation would become inapplicable the minute the lawyer is engaged in advisory service to determine whether or not to institute judicial proceedings.⁴⁹ In such cases, the lawyer would not be bound by the reporting obligation “regardless of whether the information has been received or obtained before, during or after the proceedings”.⁵⁰ That is, once consideration of the institution of a legal proceeding has begun, even activities that fall under the above two criteria would become exempt from the reporting obligation. The Court noted that the relevant EU Directive does make this exception, as do FATF rules,⁵¹ and therefore decided lawyers reporting obligation to be compatible with Article 6 ECHR.

The main criticism against taking the *Ordre des barreaux* case as a valid resolution of the gatekeeping versus LLP tension is that the issue in that case was defined narrowly from the angle of the right to trial only.⁵² The argument is that the ECJ's hands were tied, so to speak, as it had to decide on a narrowly framed question: had the Belgian court also made its reference based on the other grounds the applicant raised to challenge gatekeeping, such as the rights of the lawyer, the outcome might have been different. The problem with this argument is that another European court, the ECtHR, had precisely this opportunity, i.e. examining lawyers' AML reporting obligations from the perspective of the rights of the lawyers themselves and not only the client's right to fair trial, but arrived at a conclusion similar to that of the ECJ in *Ordre des barreaux*.

In *Michaud v. France*, the applicant submitted that lawyers' reporting obligations are unlawful because they violate the right to privacy of correspondence of the lawyer. The applicant further added that lawyers' privilege of secrecy “applied both to defence and to advisory activities and concerned all the activities of lawyers and the files they dealt with”, without exception.⁵³ The ECtHR

formation, administration or management of companies, or the formation, administration or management of trusts governed by a foreign legal system, or of any other similar structure”. *Ibid.*, para 97.

48 *Ibid.*

49 Tyre, *supra* note 16, p. 73.

50 *Ordre des barreaux* case, *supra* note 41, para. 34.

51 The 2012 FATF Recommendations, Interpretive Note to Recommendation 23.

52 Luchtman and Hoeven, *supra* note 41; M. Stouten and A. Tilleman, ‘Reporting Duty for Lawyers versus Legal Privilege – Unresolved Tension’, in B. Unger and D. van der Linde (eds.), *Research Handbook on Money Laundering* (Edward Elgar, Cheltenham, 2013) pp. 426–434; Komárek, *supra* note 20.

53 *Michaud v. France* case, *supra* note 42, para 59.

refuted these assertions, stating that while LPP is important for the administration of justice in a free and democratic society, it is not inviolable.⁵⁴ It remarked that the special constitutional essence attached to LLP is applicable with respect to lawyers' defence role, and not their other transactional roles, which could not be much different in their essence from the other similarly regulated professional services, such as accountants.⁵⁵

A further criticism against taking these two cases as reflecting a valid avenue of resolving the gatekeeping versus LLP tension is the argument that those cases were unfortunate results of the absence of a defined European-wide norm on LPP.⁵⁶ There is no ready norm on LPP as a distinctive principle, the argument goes, and therefore these European courts did a piecemeal treatment of the issue from whatever specific ground they were asked to. What discredits this criticism, however, is the fact that the issue has similarly been dealt with by a national court where LPP is protected as an independent constitutional principle, but the outcome has largely stayed the same.

In *Bowman v. Fels*, the UK Court of Appeal dealt with the question whether the reporting obligation of lawyers under the UK Proceeds of Crime Act⁵⁷ is applicable when the suspicious information in question is obtained under privileged circumstances from the other party in a litigation. The Court established that disclosure of such information to a third party, including the government, constitutes breach of LPP. Citing national precedent that goes as far back as 1560,⁵⁸ the Court asserted that LPP is a distinct and fundamental principle of rule of law in the UK.⁵⁹ The Court reasoned that for a lawyer to file suspicious activity report to the government in litigation-related circumstances, an exception to his or her LPP must have already been instituted by an express authorisation of Parliament. The contentious issue then was whether by establishing a relatively broad reporting obligation on lawyers under the Act⁶⁰ the UK Parliament instituted such an exception. The Court decided that it has not. It reasoned that LPP is such a fundamental principle that, absent an explicit language to that effect, Parliament cannot be said to have intended

54 *Ibid.*, para. 123.

55 *Ibid.*, para. 127.

56 Luchtman and van der Hoeven, *supra* note 41, p. 303.

57 UK Proceeds of Crime Act of 2002, section 328.

58 *Stradling v. Morgan* (1560) 1 Pl 199; *R v. Derby Magistrates' Court ex p B* [1996] 1 AC 487, para. 503–508; *Three Rivers DC v. Bank of England* (No 6) [2004] UKHL 48, [2004] 3 WLR 1274, para. 34; *R (Morgan Grenfell & Co Ltd) v. Special Commissioner for Income Tax* [2002] UKHL 21, [2003] 1 AC 563, para. 7–8.

59 *Bowman v. Fels* case, *supra* note 43, para. 78.

60 Tyre, *supra* note 16, p. 74.

to override LPP in relation to judicial proceedings, even while establishing a reporting obligation under the POCA.⁶¹

Having so strongly established the importance of LPP, the Appeals Court still concurred with the logic of ECJ and ECtHR in endorsing that such privilege is applicable only in connection with legal proceedings, beginning from initial steps taken to pursue legal proceedings up to those taken to execute final judgment or order. In general terms, the Court stated that the principles behind the notion of LPP are “virtually identical”⁶² under European Community law, ECHR law and UK domestic law. The celebration among the legal community in the UK in the wake of *Bowman v. Fels* was also half-hearted because it was obvious that the outcome only saved the profession from an even harsher version of AML obligations than was contained in FATF standards.⁶³

There is at least two further evidence of the concurrence of the UK Appeals Court with the European jurisprudence discussed above – and hence ultimately the FATF regime. First, the Court made a specific point to overturn a precedent, set by *P v. P* case of 2003,⁶⁴ which saw no distinction between the role of lawyers in proceeding-related contexts and outside of such contexts.⁶⁵ In *Bowman v. Fels* the Appeals Court underscored, similar to the ECJ and ECtHR, that these two roles are different in their nature, and that the *P v. P* decision is mistaken in finding that the reporting requirement under the POAC is applicable with respect to the proceedings-related functions of lawyers.⁶⁶ The Court removed, therefore, only a specific portion of lawyers' functions from the applicability of the reporting duties under POAC. Secondly, when articulating the

61 *Bowman v. Fels* case, *supra* note 43, para. 83.

62 *Ibid.*, para 82.

63 ‘Protecting a Privileged Position’, *The Law Society Gazette*, 18 March 2005, <<https://www.lawgazette.co.uk/news/protecting-a-privileged-position/43302.article>>, visited on 30 June 2018; P. Way, ‘Proceeds of Crime Act 2002 – the Impact of *Bowman v Fels*’, *Family Law Week*, March 2005, <<http://www.familylawweek.co.uk/site.aspx?i=ed261>>, visited on 21 November 2018; E. Powles, ‘All That Glisters is Not Gold: Laundering the UK Money Laundering Regime’, 65:1 *Cambridge Law Journal* (2006) pp. 40–43; M. Pace, ‘Litigators and Money Laundering after *Bowman v Fels*’, *Journal of Personal Injury Law* (2005) pp. 345–350.

64 *P v. P*, 8 October 2003, EWHC Fam 2260, Case No. FD02D00029; *See, Bowman v. Fels, supra* note 43, para. 64–49.

65 J. A. Terrill and M. A. Breslow, ‘The Role of Lawyers in Combating Money Laundering and Terrorist Financing: Lessons from the English Approach’, 60:3–4 *New York Law School Law Review* (2015) pp. 445; *P v. P* (Ancillary Relief: Proceeds of Crime), 8 October 2003, EWHC Fam 2260.

66 *Bowman v. Fels* case, *supra* note 43, para. 64–69.

central issue in the appeal – i.e. whether reporting obligation applies to conducts during legal proceedings – the Court went out of its way to add another issue: whether such obligation also applies “to any consensual steps taken or settlement reached during legal proceedings”.⁶⁷ This issue was not raised in the appeal, but the Court deemed it “not sensible” to ignore.⁶⁸ One, therefore, sees the Court making an effort to be comprehensive in carving out a portion of lawyers’ function, i.e. that which is connected to legal proceedings, in order to exclude it from the valid application of the reporting obligation for the purposes of fighting money laundering.

What the above-discussed judicial views show is that, for better or for worse, a particular understanding of the limits of LPP with respect to the investigation of financial crimes seems to be coalescing. This view reconciles lawyers’ gatekeeping role with their professional privileges by restricting the later to contexts that are detached from judicial proceedings. These judicial views affirm the working understanding at the FATF, EU and, according to the compliance patterns reported earlier,⁶⁹ most national governments. What this implies is that there is a majority global consensus – standing in direct contrast to that formed around the Canadian jurisprudence – which holds that lawyers’ active gatekeeping role, under defined circumstances, is not necessarily antithetical to the rule of law in free and democratic societies. This jurisprudential division is interesting as both camps are propounded by states that are both core FATF members (G7 members) and liberal democratic.

If the fight for or against rule of law does not characterise this national disparity in the reception of FATF’s lawyer regulations, what does then? The following sections propose that the explanation could lie in two other places: (i) divergence of a *philosophical nature* regarding the public interest role of lawyers, and (ii) the level of entrenchment of the concern for legal profession’s self-regulation. The common thread connecting these two sources is their attribute as reflections of specific “traditions” of rule of law, that is, institutional and normative contexts, but not the core essence of rule of law.

3 Drivers of Varied Compliance with FATF’s Lawyer Regulations

A close reading of the discourse and “legislative history” the FATF’s lawyer regulations and their national implementation shows us that states’ non-compliance

67 *Ibid.*, para. 52.

68 *Ibid.*

69 *Supra*, note 17 and accompanying text.

on the matter cannot simply be explained as a rule of law resistance from below. On the one hand, such resistance, as shown above in the discussion of the *Federation of Law Societies* case, raises important concerns regarding the integrity and independence of the legal profession that one could reasonably argue to be incompatible with expectations of rule of law in liberal democracies. On the other hand, the opposing camp can also be said to reasonably address the rule of law concern, as reflected in the reasoning of the European courts. There is an impasse: one side argues it is possible to make a distinction between lawyers' litigation and non-litigation roles, while the other side insists such distinction is artificial; one side argues constitutional protections of lawyers are near absolute, while the other side insists such protections are subject to numerous exceptions just as other constitutional principles, and so the debate goes on. The debate seems about rule of law, but it is also in a way not about rule of law per se.

Martin Krygier's and others' work on "traditions" of rule of law offers us a fitting perspective to make sense of this apparent contradiction.⁷⁰ The upshot of Krygier's insight is that the discourse and practice of rule of law is often as much about the contingent traditions, habits and ways of doing things that differ from place to place, as it is about the core content or essence of the concept. The essence of rule of law is the elimination of arbitrariness in the exercise of public power; how that is achieved is a matter contingent upon specific legal traditions. Much legal debate on rule of law, however, could be deceptively trapped in contestation over the later issue, that is, the specific institutions and legal rules deployed to serve the objective of eliminating arbitrariness. In Krygier's taking, legal institutions and rules are artefacts of traditions. Not only that, legal systems in their entirety could also be understood as traditions. This means, legal reasoning could often be infused with arguments arising from specificities of a tradition, which do not necessarily hold true in other places that equally claim adherence to the core content of rule of law. Untangling the proverbial wheat (i.e. essence of rule of law) from the chaff (i.e. legal

70 Representative works relied on here are, M. Krygier, 'Law as Tradition', 5:2 *Law and Philosophy* (1986) pp. 237–262; M. Krygier, 'Rule of Law (and Rechtsstaat)', in J.R. Silkenat et al. (eds.), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, Ius Gentium: Comparative Perspectives on Law and Justice 38 (Springer, Berlin, 2014), pp. 45–59; M. Krygier, 'The Traditionality of Statutes', 1:1 *Ratio Juris* (1988) pp. 20–39. Further, see B. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, Cambridge, 2004); B. Tamanaha, 'The History and Elements of the Rule of Law', *Singapore Journal of Legal Studies* (2012) pp. 232–247.

tradition it is embedded in) helps us see the “gatekeeping versus LLP/rule of law” debate as a similar contest over traditionally contingent features, but not the core content of rule of law. Specifically, the vehement resistance to FATF lawyer regulations, and the criticism of states that comply with those standards as abandoning rule of law, could be less about rule of law per se. Indeed, tracing primary and secondary documentary sources within the legal profession and scholarship, the following sections show that two other factors lie beneath the divide between the camps of resistance and support to the FATF regime: one is normative, the other institutional – but both tradition-specific.

The normative factor is a divergence of *legal philosophical outlook* underpinning the jurisprudence of either side of the courts discussed earlier – facilitating or blocking states’ compliance with the FATF on the matter. There is a philosophical split concerning the role of the legal profession with respect to the public interest. However, the diverging philosophical inclinations of judiciaries is not the sole explanation of the variation in states’ compliance with FATF. In the US, for example, there is so far no judicial involvement in the debate, but the state is as non-compliant as Canada where the judiciary has blocked the relevant legislation. This points to a second factor that fuelled the resistance to FATF lawyer regulations in both states: a peculiarly fierce preservation of *institutional independence* of the legal profession, which its members strived to defend, and policy-makers acquiesced into. The following sections elaborate these two factors in detail.

3.1.1 Philosophical Outlooks on the Public Interest Role of the Lawyer
The jurisprudential divergence with respect to the FATF lawyer regulations – i.e. those that resist (e.g. Canadian courts) and support (e.g. European courts) lawyers’ gatekeeper role – is rooted in philosophical difference regarding the role of the legal profession. Specifically, a difference of opinion concerning the relationship of the legal profession to the public interest. Both the resistance and the support camps proceed from the same premise: that the legal profession is not mere business but has a higher public interest function. The split occurs when spelling out what precisely is meant by the “public interest” in the context of legal service – a controversy that predates the FATF lawyer regulations.

The anti-gatekeeper view is rooted in a school of thought that provides a minimalist answer to the question, “how does a lawyer serve the public interest?”. This view holds that lawyers’ public interest role is performed by way of strictly serving the administration of justice, and not fighting crimes or aiding the state concerning any other public policy, and that lawyers serve the administration

of justice when they strictly serve the interests of their clients.⁷¹ The lawyer's role is, accordingly, to strictly represent and defend the client, subject only to the "crime-fraud" exception.⁷² This exception prohibits lawyers from involving in engagements that they know or suspect to involve crime or fraud. The emphasis here is that in cases of known or suspected criminality, the role of lawyers is generally to only dissociate themselves from engagements involving such criminality, but not to take positive actions to aid the state's policing efforts.⁷³ This view does not minimise the importance of the policing objective per se, but rather insists that lawyers' contribution should be limited to not posing an obstacle to or actively violating those goals.

The pro-gatekeeper camp similarly begins from the widely agreed premise that the legal profession serves the public interest, and is not mere trade – a matter also affirmed by the FATF.⁷⁴ From this premise, this view holds, it does not necessarily follow that lawyers should not be required to assume positive obligations to cooperate with the state in tackling crime. This camp is rooted in a school of thought that answers the question "how does a lawyer serve the public interest?" in more expansive terms. This view holds that lawyers fulfil the public interest not simply by staying loyal to their clients, but also by taking positive actions, including by breaking their loyalty to their clients' viewpoint if necessary. This view is based on the claim that client interests and public interests could directly clash, and when they do lawyers must side with the public.

If the profession is to truly serve the public interest, the pro-gatekeeping camp holds, the lawyer must also assume the role of a "statesman" that serves the "enlightened" self-interest of his clients.⁷⁵ This means that a lawyer must "develop some vision of the common good or public interest, and try to realise it

71 E.g., N. Finkelstein, E.A. Cherniak, C. Backhouse, J.D.A. Jackson, J.C. Major, M. Proulx, S. Block, J. Giles, S.L. Robins, D.W. Scott, and R. Simeon, 'Protecting the Public through an Independent Bar: The Task Force Report', in Law Society of Upper Canada, *In the Public Interest: the Report and Research Papers of the Law Society of Upper Canada's Task Force on the Rule of Law and the Independence of the Bar* (Irwin Law, Toronto, 2007) pp. 3-38.

72 E.g., ABA, "Model Rules of Professional Conduct", para. 1.2(d).

73 For a general study, see Law Society of Upper Canada, *supra* note 71.

74 FATF, *Risk Based Approach Guidance for Legal Professionals*, 23 October 2008, para. 11. Further, see, G. Giraudeau, 'The Principles of Confidentiality and Non-interference in Communications with Lawyers and Legal Advisers in Recent ICJ and ECHR Case Law', 2016 *ASIL Insights* (2016).

75 Terms borrowed from B.W. Heineman, *The Inside Counsel Revolution: Resolving the Partner-Guardian Tension* (American Bar Association/Ankerwycke, Chicago, 2016); B.W. Heineman, 'The General Counsel as the Lawyer-Statesman', Blue Paper of the Harvard law

in their practices, if necessary against the immediate wishes of their clients”.⁷⁶ What the FATF regime is doing, with the approval of judiciaries such as in Europe, is take one step further by defining this gatekeeper role of lawyers not just as enlightened self-restraint, but also as active cooperation with the state.

This leap is enabled by a bifurcated understanding of lawyers’ tasks. Contrary to the Canadian courts’ view, the European courts saw lawyers’ tasks as not monolithic, but falling into two categories: tasks “exclusive” to the profession and “shared” with other professions. This view holds that lawyers have exclusive professional mandate in the judicial sphere – i.e. legal representation and litigation-related services – and it is in this sphere that the public has an interest in shielding lawyers with privilege. Consequently, when lawyers perform shared tasks, i.e. activities that are indistinguishable from those performed by any financial intermediary, they are essentially giving a business advice, and not determining the legal position of their clients for the purpose of judicial proceedings.⁷⁷ For such shared tasks, the European courts held, there is no justice-related public interest. And when justice is not at stake, there is no rule of law concern to warrant professional privilege. This view holds that there is also policy absurdity in thinking otherwise: why would law-makers create an obvious loophole where a similar act would be shielded from oversight depending simply on which professional group it is handled by. In approving the EU (and indirectly FATF) AML regime on lawyers, therefore, these courts relied on the observation that that regime is designed to cover only a defined set of “shared” financial activities undertaken by lawyers.⁷⁸

The anti-gatekeeper camp sees this bifurcated view as too hypothetical, saying it is not easy or even possible to demarcate when non-litigation service ends and litigation service begins. The Council of Bars and Law Societies of Europe, intervening in *Michaud v. France* case, argued that “lawyers’ activities

School Program on the Legal Profession, available at <https://clp.law.harvard.edu/assets/General_Counsel_as_Lawyer-Statesman.pdf> , visited on 21 November 2018.

76 R. Gordon, ‘Corporate Law Practice as a Public Calling’, 49:2 *Maryland Law Review* (1990) p. 258. Fort similar literature, particularly with respect to corporate counsel, see e.g., R.B. Campbell, Jr. and E.R. Gaetke, ‘The Ethical Obligation of Transactional Lawyer to Act as Gatekeepers’, 56 *Rutgers L. Rev.* (2003) p. 9; F. Zacharias, ‘Lawyers as Gatekeepers’, 41:3 *San Diego Law Review* (2004) p. 1387.

77 *Michaud v. France* case, *supra* note 42, para. 127.

78 There activities are: a) buying and selling of real estate, b) managing of client money, securities or other assets, c) management of bank, savings, or securities accounts, d) organisation of contributions for the creation, operation or management of companies, and e) creation, operation or management of legal persons or arrangements, and buying and selling of business entities. See, FATF Guidance, *supra* note 74, para. 12.

were indivisible” between transactional and representational roles.⁷⁹ But more importantly, this view holds, even when not engaged in litigation services, conscripting lawyers into the state machinery takes away from the critical distance they must always keep. In the words of the Jamaican Supreme Court, which delivered a decision similar to the Canadian one, such conscription risks transforming lawyers “from independent standing ready to take on an over-bearing state on behalf of their clients to one where it becomes a proxy investigator against the client”.⁸⁰ The European Bar Human Rights Institute, also intervening in *Michaud*, asserted that the problem with the gatekeeping role lies fundamentally in unsettling a lawyer’s loyalty to clients, and the confidentiality that should apply in “all his activities and in respect of all his files”.⁸¹ The problem, in other words, is not merely what lawyers are being asked to do, but also where that would then put them vis-à-vis the state. In this sense, what North American lawyers claimed rather condescendingly might have a grain of truth in it – i.e. to accept an active gatekeeping role is to step into the shoes of, and defer to, the state (and international organisations states establish). This, according to the anti-gatekeeping view, is a slippery slope: “[I]t is money laundering today. It may be some other offence tomorrow”.⁸² Lawyers should not be bogged down into weighing public policy goals against their professional privilege each time an issue arises. Instead, this view holds, a lawyers’ place should be wholly elevated from the policy calculus and remain indifferent to it.

The core of the philosophical difference between the two camps is, therefore, fundamental. Put very simply, to the question “how does a lawyer serve the public interest?”, the anti-gatekeeping camp provides a fixed answer, i.e. “by staying true to client only!”, the pro-gatekeeper camp answers “it depends!”. Where the accepted view is that of the lawyer as single-minded in his loyalty to the client, the rule of law is said to demand the total shielding of the lawyer’s privileges from a competing public policy, and judicial opposition to the gatekeeper role of the legal profession exists. Where the accepted view holds the lawyer as a direct servant of public policy, with only certain functional privileges, what the rule of law demands cannot be stated in the abstract – instead, it matters what policy goal is at stake and whether the lawyer can help achieve that without jeopardising his privileged mission. This reflects the two camps’ perceptions of lawyers’ function as part of state politics or outside of

79 *Ibid.*, para. 75.

80 *Jamaica Bar Association case*, *supra* note 24, para. 62.

81 *Ibid.*, para. 86.

82 *Jamaica Bar Association case*, *supra* note 24, para 61.

it, respectively. These diverging outlooks are best captured as normative traditions, creeds believed and practiced differently in different societies.

3.2 *Fierce Tradition of Professional Independence*

Although practising lawyers seem to have a unified voice worldwide in opposing FATF lawyer regulations,⁸³ their voice was stronger and successful in frustrating state compliance in the US and Canada than anywhere else. The added fuel for the resistance in these states is a provincial, entrenched concern for self-regulation that resists any external regulation of the profession. This resistance is as much about *who* has required the gatekeeping obligations as it is about *what* is required. A key evidence of this observation is the fact that lawyers' professional associations from these states, while continuing to object to FATF's standards, went on to adopt self-regulation measures on AML that are mostly identical to the international standards. These associations adopted such and other measures precisely as a strategy of pre-empting the need for their national governments to formally transpose FATF standards.

Legal professional associations in Canada and the US showed tenacity in defence of this tradition, but equally importantly, their governments also relented and compromised their otherwise fierce regulatory stand on money laundering. The disparity in compliance reflected, therefore, not only the fact that the lawyers' view lacked the support of the judiciary in places like Europe, but also the fact that it gained tacit acquiescence from policy-makers in the US and Canada.

3.2.1 Canada

Canada's Federation of Law Societies adopted self-regulation measures that "effectively put into place the substance of the FATF Recommendations",⁸⁴ while at the same time challenging the constitutionality of the Proceeds of Crime and Terrorist Financing Act of 2000 that transposed FATF's standards into Canadian law. At the conclusion of the court battle, the president of the Federation, Ron MacDonald, indicated that what was at stake was not just the substance of the AML requirements. Rather, he stated, "all we're saying is that ... in order to protect the independence of the bar and solicitor-client privilege ... we should be doing it".⁸⁵

83 See, e.g., *supra* note 22.

84 P.D. Paton, 'Cooperation, Co-option or Coercion? The FATF Lawyer Guidance and Regulation of the Legal Profession', *Journal of the Professional Lawyer* (2010) p. 189.

85 J. Gray, 'Money-Laundering Rules Don't Apply to Lawyers: B.C. Court', *Globe & Mail*, 30 September 2011, <<https://www.theglobeandmail.com/report-on-business/industry-news/>

The Federation adopted the Model Rules on Client Identification and Verification that replicate the due diligence (know your client) requirements contained in FATF standards.⁸⁶ The Model Rules contained client identification and verification, record-keeping, beneficial ownership verification of businesses and monitoring of the nature of business relationship, just as the FATF due diligence standards stipulate.⁸⁷ Representatives of the Federation suggested that the Model Rules are in fact stricter than the FATF requirements.⁸⁸ Officers of the Federation have stated clearly that the Federation recognises these due diligence principles “as both necessary and appropriate”.⁸⁹ The Federation also mooted the applicability of a rule under the Proceeds of Crime Act of 2000 that would bring automatic government oversight on cash transactions above CAD 10,000 by prohibiting its members from undertaking any cash activity above CAD 7,500.⁹⁰ By adopting such self-regulatory measures that essentially replicate the FATF requirements, legal professionals have, to quote the Federation’s president again, “eliminated the need for federal regulation of the legal profession”.⁹¹

As hinted earlier, the success of these strategic efforts of the profession depended also on the tacit acquiescence of the government. The resistance from the profession was launched, in the form of multiple legal suits that were later merged into the *Federation of Law Societies* case, immediately after the adoption of the 2001 Regulation⁹² that extended the applicability of the 2000 Proceeds of Crime Act to the legal profession. In November 2001, an injunction was issued by the British Columbia Supreme Court halting the applicability of contested provisions to the legal profession.⁹³ In the 14 year period

the-law-page/money-laundering-rules-dont-apply-to-lawyers-bc-court/article596286/>, visited on 21 November 2018.

86 Federation of Law Societies of Canada, *Model Rule on Client Identification and Verification Requirements* (adopted 20 March 2008), and *Model Rule on Recordkeeping Requirements for Cash Transactions* (adopted July 2004), both available at <<http://flsc.ca/wp-content/uploads/2014/10/terror1.pdf>>, visited on 21 November 2018.

87 Compare with the 2012 FATA Recommendations, para. 10 and 11, read in conjunction with para. 22.

88 Statement of the then vice president and president elect of the Federation, Ronald J. MacDonald. See, Ronald J. MacDonald, ‘Money Laundering Regulation— What Can Be Learned from the Canadian Experience’, *Journal of the Professional Lawyer* (2010) p. 146.

89 *Ibid.*, p. 150.

90 Federation of Law Societies of Canada, *supra* note 86 (‘Cash Transactions’).

91 MacDonald, *supra* note 88, p. 149.

92 *Supra* note 25.

93 *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2011 BCSC 1270.

since that decision, what we see is a back-and-forth process of compromise on the part of both the government and the legal profession. In 2002 and 2003, the government sent conciliatory gestures by deciding to formally withhold the application of, and to ultimately repeal, the due diligence, record keeping and reporting obligations of lawyers throughout Canada until the merits of the legal challenge were decided upon.⁹⁴ The Court, in the meantime, kept adjourning the hearing of the case to subsequent dates by agreement of the parties, and ultimately in 2005 the case was adjourned indefinitely (*sine die*). It was remarked by some that at this point in time there was no definitive indication which side of the dispute the Supreme Court would ultimately fall on – both camps were said to be “staring over the precipice, with neither entirely prepared to bet on the eventual outcome”.⁹⁵ As much as the Court has underscored the importance of the legal professions’ demands, it has also indicated agreement with the public interest arguments raised by the government, including, interestingly, the argument that Canada’s need to comply with international rules (FATF standards) is in itself a public interest that needs to be juxtaposed against lawyers’ demands.⁹⁶

In subsequent years, the Federation initiated and adopted the AML measures discussed above. These steps were met by further compromise from the government strengthening the “uneasy truce”⁹⁷ with the profession: the legal profession was removed from a 2006 amendment to the Proceeds of Crime Act that required the automatic reporting of financial transactions and the prohibition of engagement with designated high risk customers such as politically exposed persons and correspondent banks.⁹⁸ These requirements are separate from those that were subject to judicial injunction in the then ongoing case, showing the government’s intentional acquiescence. Further indication of this intention is the fact that this measure was taken despite express objection by the auditor general of Canada that the measure results in a “serious gap” in regulatory coverage and non-compliance with FATF.⁹⁹

94 Finkelstein et al., *supra* note 71, pp. 34–36.

95 Paton, *supra* note 84, p. 189.

96 Dealt more directly by the lower court, i.e. the Appellate Court of British Columbia, *see, Federation of Law Societies of Canada v. Canada (Attorney General)*, 2013 BCCA 147, para. 41 and 156.

97 P.D. Paton, ‘The Independence of the Bar and the Public Interest: Lawyers as Gatekeepers, Whistleblowers, or Instruments of State Enforcement?’, in Law Society of Upper Canada, *supra* note 71, p. 178.

98 Bill C-25, S.C. (Canada) 2006, C. 12, para 10.1.

99 The Auditor General of Canada, *Report to the House of Commons: Chapter 2*, November 2004, paras. 2.30–2.33, 2.7, 2.95, and 2.98.

3.2.2 United States

In the United States, the American Bar Association (ABA), which has been vocal in resisting the FATF gatekeeper initiative, similarly adopted a pre-empting strategy of taking self-regulation measures that replicate the substance of FATF standards. As soon as it became clear that the FATF would proceed, despite initial objections, with the making of Guidelines extending the FATF Recommendations to the legal profession, the ABA decided to take steps that helped assuage the US government from transposing those FATF standards into federal law. By Recommendation 300 of 2008, the ABA House of Delegates launched a taskforce to follow-up with FATF and the US government on gatekeeper initiatives and to prepare a comparable voluntary guidance to its members, which was later adopted as the "Good Practice Guidance".¹⁰⁰

The Good Practice Guidance and another important document the ABA subsequently adopted, Formal Opinion 463 of 2013, both state that client due diligence obligations of lawyers are lawful and in fact encouraged.¹⁰¹ Several of the standards contained in the Guidance resemble the FATF standards, and were already in practice by lawyers in the US, albeit informally.¹⁰² This overlap of content shows that the resistance to the FATF's lawyer due diligence standards is also driven by non-substantive reasons. This reason is the need to keep the US federal legislature from engaging in the administration of the legal profession via the transposition of FATF obligations. The Good Practices Guidance itself states that "the Federal government is under pressure from FATF and others ... to adopt legislation implementing ... the [FATF] Recommendations relating to lawyers".¹⁰³ Representatives of the association have disclosed that this document is adopted with the hope that it "would obviate the need for Congress to enact legislation designed to impose a *rules-based* system on US lawyers".¹⁰⁴ Similar to the Guidance, a commentator who reported the making of Formal Opinion 463 notes that it was adopted "in response to legislation drafted by the U.S. Senate Committee on Homeland Security and Governmental

100 ABA, *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorism Financing* (Resolution 116 of August 2010).

101 *Ibid.*, p. 8; ABA, *Formal Opinion 463*, 23 May 2013, p. 2.

102 Terrill and Breslow, *supra* note 65, pp. 433–455.

103 ABA, American College of Trust and Estate Council, American College of Real Estate Lawyers, American College of Mortgage Attorneys, and American College of Commercial Finance Lawyers, *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing*, 23 April 2010, available at <www.americanbar.org>.

104 Shepherd, *supra* note 21, p. 98, emphasis added.

Affairs ... and recent efforts by the FATF to promulgate guidance for the legal profession regarding a risk-based approach to client due diligence".¹⁰⁵

While Canadian lawyers utilised litigation as a key tool of resistance to FATF lawyer regulations, the chosen tool of resistance in the US was an educational campaign. As part of the effort to "blunt"¹⁰⁶ the need for external regulation, the ABA and American College of Trust and Estate Counsel (ACTEC) engaged in activities to alert their membership of the "danger" that awaits them in the form of a federal transposition of FATF lawyer regulations. These associations devoted effort to raise the awareness of US lawyers to FATF standards and inculcate those standards into daily practice as the strategy of pre-empting the need for federal legislation on the matter.¹⁰⁷ Concerted effort was in organising educational symposiums,¹⁰⁸ preparing and disseminating teaching outlines,¹⁰⁹ guidance papers¹¹⁰ and instructions for local bar presidents to educate their bars through "whatever communications", and to "encourage" compliance to the voluntary self-regulations.¹¹¹ It was underscored by the leadership that for this pre-emptive effort to succeed, the US legal community needs to internalise the new AML standards of practice with "enthusiasm" and "participation".¹¹² This motivation was further revealed in the voices of a few critics from the

105 Healy et al., *supra* note 21, p. 796.

106 Osborne, *supra* note 8, p. 425.

107 S.N. Zack, 'Avoiding Unnecessary Federal Government Regulation of Lawyers', Letter from ABA President to Bar Presidents, 8 April 2011, <https://www.americanbar.org/content/dam/aba/uncategorized/2011/2011apro8_goodpractices_o.authcheckdam.pdf>, visited on 21 November 2018.

108 See, e.g., Proceedings of Symposium entitled 'Combating Threats to the International Financial System: The Financial Action Task Force', on 25 April 2013, 59:3 *New YN.Y.L. Sch. L. Rev.* (2014/15); American College of Real Estate Lawyers, 'Risky Business: Are You Unwittingly Helping Your Clients Launder Money?', Symposium, Jackson Hole, Wyoming, 19 February 2013.

109 Available upon request from ACTEC, available at <www.actec.org>.

110 ABA, IBA, and CBLSE, *A Lawyer's Guide to Detecting and Preventing Money Laundering* (October 2014); see, ABA, *Preliminary Reaction to the Typologies Draft* (Letter to FATF, 6 May 2013), <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013may8_gatekeeperregfatf_l.authcheckdam.pdf>, visited on 21 November 2018; ACTEC, *Recommendations of Good Practices for ACTEC Fellows Seeking to Detect and Combat Money Laundering*, 25 October 2005.

111 E.g. L.G. Bellows, 'Informing Your Bar Members about ABA Formal Ethics Opinion 463', Letter from ABA President to Bar Presidents, 31 July 2013, <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013jul31_abaformalopinion463_l.authcheckdam.pdf>, visited on 21 November 2018.

112 Osborne, *supra* note 8, p. 425.

leadership of those lawyer associations. John Sahl and the late Fred Zacharias, who served in the ABA's Professional Discipline Standing Committee and the American Association of Law Schools' Professional Responsibility Section, criticised their colleagues' tendency to dismiss "useful changes to the practice of law merely because external authorities drive those changes".¹¹³

Similar to Canada, the US government has also relented in order to accommodate the legal profession's concerns. The most significant indicator of this is the fact that so far the US has not adopted or initiated the adoption of legislation that transposes FATF lawyer regulations.¹¹⁴ For this, as mentioned at the beginning, the state has been scrutinised in two rounds of FATF mutual evaluations.¹¹⁵ In its latest mutual evaluation report, the FATF has urged the US to bring lawyers under the AML supervisory framework covering financial institutions "as a priority".¹¹⁶ The government's reluctance is also significant because the US is one of the most aggressive regulators in most other dimensions of fighting money laundering. In lieu of the legislative path, the government – in particular the mandated department, i.e. the Treasury – has followed the approach of close engagement with the legal community, including collaboration in educational efforts ranging from lawyer training to law school curriculum revisions.¹¹⁷ In this course, the Treasury Department has also taken the "unprecedented"¹¹⁸ gesture of endorsing the profession's self-regulation measures, in particular the ABA Good Practices Guidance, as a step relevant for the country's compliance with FATF standards. Duncan Osborne, then president of ACTEC and one of the few representatives of the US lawyers that negotiated with FATF, recounts:

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- 113 J.P. Sahl, 'Lawyer Ethics and the Financial Action Task Force: A Call to Action', 59 *N.Y.L. Sch. L. Rev.* (2014–15) p. 463; F. Zacharias, 'The Myth of Self-Regulation', 93 *Minn. L. Rev.* (2009) p. 1148.
- 114 Some confuse the Sabranes-Oxley Act of 2002 and the US Securities Exchange Commission Standards for Attorneys as AML instruments. These are instruments concerning securities, fraud and the protection of investors, not AML measures.
- 115 *Supra* notes 18–19 and accompanying text.
- 116 FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures – United States* (Fourth Round Mutual Evaluation Report), December 2016, p. 135.
- 117 M.A. Lindenberger, 'Into the Breach: Voluntary Compliance on Money Laundering Gets a Boost from the ABA and Treasury', *ABA Journal*, 1 October 2011; Shepherd, *supra* note 21, p. 665; Terry, *supra* note 21, p. 506.
- 118 ACTEC website, <<http://www.actec.org/resources/fatf-and-the-lawyers-role/>>, visited on 21 November 2018.

[T]he interactions with officials from the Treasury Department have differed markedly from those with the FATF bureaucrats. Treasury personnel have certainly not always agreed with representatives of U.S. lawyers, but their communications have been open, rational, and reasoned. These substantive and meaningful dialogues have helped all parties find common ground.¹¹⁹

In sum, the preceding discussion illustrates that the combined forces of the legal profession's vigilance for preserving self-regulation and government acquiescence in Canada and the US accounts for lessened compliance with FATF lawyer regulations compared to other parts of the world, in particular among EU member states, where the FATF regime is fully transposed into national legislation.

4 Conclusion

The imposition of international anti-money laundering obligations upon legal professionals, in particular the obligation to actively cooperate with the state through information exchange, has generated controversy and national variation in compliance: wider acceptance in places such as EU member states and stronger resistance in North America (the US and Canada). The former camp requires lawyers to actively cooperate with the state to fight money laundering while claiming to adequately protect legal professional privileges. The other camp sees a necessary collision and trade-off between these two goals, and has so far chosen to delay or not adopt the FATF's lawyer regulation. The divergent compliance among these states is quite remarkable because these states are the most important founding members of FATF (as "G7" states) that still spearhead its work, and simultaneously liberal democratic states that equally profess adherence to rule of law.

This article has critically assessed existing arguments deployed to justify and explain the national variation in transposing the international standards in this area. The existing argument, dominantly echoed in the legal professional and academic community, is that the compliance variation is a function of the level of resilience of states' rule of law system – non-compliance seen as a victory of domestic rule of forces against tyrannical global (security) governance.

The article has shown that this argument does not hold; the variation exists *within* systems that equally claim constitutional allegiance to rule of law

¹¹⁹ Osborne, *supra* note 8, p. 430.

in a free and democratic society. Jurisprudence, discourse and institutional practice on the matter in various states point to two important factors that discredit the rule of law-based explanation, and provide an alternative explanation: (1) the existence of legal philosophical divergence among states as to what rule of law requires with respect to lawyers' treatment in society concerning the question "in what ways do lawyers serve the public interest?", and (2) the variation in the strength of legal professionals' organised effort to preserve self-governance.

The philosophical divergence is essentially centred on the question "in what ways do lawyers serve the public interest?". Depending on their ideological inclinations in answering this question, judiciaries construed lawyers' gate-keeping role as compatible or incompatible with the rule of law. In addition, the quest for self-governance was fiercer and backed by tacit governmental acquiescence in some states. The dynamics of these two factors – i.e. ideological inclinations of judiciaries and professional self-interest of lawyers – shaped national and transnational jurisprudence in favour or against the gatekeeper role of lawyers. This observation unsettles the received understanding, particularly in global security governance literature, that views domestic actors as "civilisers" of an international regime by way of resisting the latter's anti-rule of law tendencies from below. It alerts us, instead, to question rule of law based justifications of (non-)compliance with international rules for possible infiltration of specific traditions within which such domestic actors operate – and that, more importantly, the infiltrating elements are not separate, ulterior goals exploiting rule of law as a cover, but rather legal philosophical and institutional preferences infused within sincerely held understandings of rule of law itself.¹²⁰

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