Building Legislative Frameworks

Domestication of the Financial Action Task Force Recommendations*

*Tshepo Mokgothu***

Abstract

As the international financial framework develops it has brought with it dynamic national legislative reforms. The article establishes how the domestication of the Financial Action Task Force (FATF) Recommendations directly affects national legislative processes as the FATF mandate does not have due regard to national legislative drafting processes when setting up obligations for domestication. The article tests the FATF Recommendations against conventional legislative drafting processes and identifies that, the proposed structures created by the FAFT do not conform to traditional legislative drafting processes. Due regard to functionality and efficacy is foregone for compliance. It presents the experience of three countries which have domesticated the FATF Recommendations and proves that the speed at which compliance is required leads to entropic legislative drafting practices which affects harmonisation of national legislation.

Keywords: domestication, legislative processes, functionality, efficacy.

A Introduction

> The value of the organisation (FATF) to the security of our nations and integrity of the international financial system has never been more clear. – Marshall Billingslea[1]

The Financial Action Task Force (FATF) is an intergovernmental policymaking body which sets international standards to combat money laundering and terrorist financing. The FATF promotes the adoption and implementation of regulatory and operational measures for combating money laundering, terrorism financing and other related threats to the integrity and stability of the

* The article is based on a thesis (supervised by Prof. Helen Xanthaki) defended in 2020.

** Tshepo Mokgothu, LLB (University of Botswana), LLM (University of Kent) is a recipient of the Joint Master in Parliamentary Procedures and Legislative Drafting and a Senior Legislative Drafter at The Attorney General's Chambers in Botswana.

1 Assistant Secretary for Terrorist Financing U.S. Department of the Treasury.

doi: 10.5553/EJLR/138723702020022000003

international financial system.[2] As a global response to financial crimes, it further assesses and monitors compliance of countries with its standards and responds to new and emerging threats.[3]

The role and function of the FATF cannot be overemphasized nor can its major achievements in developing a uniform international financial framework[4] with regard to counter-terrorist financing (CFT) and anti-money laundering (AML). However, it is vital to assess whether its progress and accomplishments have proven to be building blocks within the national financial legal regulatory framework. In the FATF's effort to generate political pressure for national legislative and regulatory reforms, fractures have emerged in its structure, which have affected its domestication.

Conventionally, legislative drafting theory focuses on technical legislative drafting, which informs building legislative frameworks. This may be attributed to the fact that legislative drafters are architects of legislation who focus on policy and drafting instructions. Legislative drafting theory often overlooks the impact international instruments have on the legislative drafting processes, the legislative drafter and national legislation.[5] Failure to discuss the impact of international instruments has resulted in shortcomings and challenges of their domestication. In the case of the FATF, parliaments and legislative drafters have been left with the daunting task of domesticating unprecedented pieces of legislation, which are inharmonious with national legislation, a misfit to the statute book and ineffective.

This article hypothesizes that the FATF mandate does not have due regard to national legislative drafting processes when setting up obligations for domestication. This leads to oversight of efficacy during the drafting process. It results in the failure to build effective national legislative frameworks, especially where such obligations are imposed on a country. To prove this, the article discusses the conventional methods of building effective legislative frameworks and how the FATF mandate and structure dictate its proposed national legislative framework to its member states. The article further proves that the domestication of the FATF mandate leads to entropic legislative drafting practices which affect the harmonization of a country's national legislation and legislation that fails the functionality test. A qualitative methodology is adopted to analyse traditional legislative drafting concepts by Thronton, Seidman and Seidman and Xanthaki to prove that the desired outcomes of the FATF mandate cannot be effectively implemented without a clear understanding of the

2 'FATF Explained | Global NPO Coalition on FATF', available at: https://fatfplatform.org/context/fatf-explained/.

3 'Introduction to the FATF', available at: www.fatf-gafi.org/media/fatf/documents/brochuresannualreports/Introduction%20to%20the%20FATF.pdf.

4 Includes global financial structures such as the World Bank and International Monetary Fund and Central Banks. However, the FATF policy monitors and evaluates financial crimes within global financial structures.

5 H. Xanthaki, *Drafting Legislation: Art and Technology for Regulation,* London, Hart Publishing, 2014, p. 169; the only main text which addresses domestication of international instruments.

European Journal of Law Reform 2020 (22) 3
doi: 10.5553/EJLR/138723702020022000003

legislative drafting process. A comparative approach is later assumed to the effects of domestication of the FATF Recommendations to the hypothesis.

The first section examines legislative drafting theories on building legislative frameworks. It introduces the FATF mandate and national obligations for domestication of a financial regulatory framework. It assesses the FATF and its Recommendations, which are vital components of the international financial system. The part illustrates and stresses the inherent FATF structural anomalies, which are catalysts for entropic domestication. It assesses the various approaches that may facilitate effective national legislation, which is in harmony with national legislation and the aims of international instruments. It does this by interrogating the role of efficacy and effectiveness within the legislative drafting process. It discusses how the fragmentation of the FATF has led to tensions and contradictions and how the FATF may need to reassess its approach as an international regulator in the international financial system to allow for better regulation at the national level. It highlights how country sanctions have been used as an ultimatum to promote rapid responses by jurisdictions to comply with the FATF mandate, which contributes to the failure of legislation. It further looks at legal transplants and comparative law approaches, which assist in building legislative frameworks for better regulation.

The second section addresses domestication of the FATF Recommendations and looks at Botswana's application of the FATF Recommendations. Botswana is currently one of the 12 countries in the 'other monitored jurisdictions' list. It briefly highlights lessons learnt from the United Kingdom (UK) and Australia in applying the FATF Recommendations and whether their national legislative frameworks have been successfully implemented. All three jurisdictions have a common law legal system and lessons may be learnt from those who have already implemented the FATF Recommendations.

The article concludes that the current mandate of the FATF was not designed with due regard to the domestication of its Recommendations predominantly in dualist member states. The FATF mandate does not take building functional legislative frameworks into account, particularly the role of the legislative drafter. The continuous evolution of the Recommendations and the requirement to have expansive national regulatory reform has the effect of causing significant harm not just to the sovereignty of independent jurisdictions but to national legal frameworks. There may be a need for the FATF to re-evaluate its mandate if it intends to have effective regulation of the international financial system within national legislative frameworks. Finally, the Annex discusses the realist drafting approach for domestication of international instruments. It applies the approach to the FATF Recommendations to determine whether domestication may produce the desired outcomes.

B Building Legislative Frameworks

The drafter is an architect of social structures, an expert in the design of frameworks of collaborations for all kinds of purposes, a specialist in the high

> art of speaking to the future, knowing when and how to try and bind it and when not to try at all.[6] – Helen Xanthaki

This section discusses the traditional legislative rite of passage for building legislative frameworks and analyses whether the structures and processes required by the FATF can be applied to facilitate building national legislative systems, which provide better regulation within national financial regulation. It presents Thornton's legislative drafting process within the realm of building legislative frameworks and assesses whether the FATF mandate considers the legislative drafting stages. The section highlights that the efficacy of legislation facilitates better regulation and looks at the FATF structural fragmentation as a hindrance to achieving functional legislative frameworks. It evaluates theories on how legislation fails and attributes the FATF countermeasures as a component for entropic legislative drafting practices. It illustrates that transplants are generally an undesired ultimatum in legislative drafting processes when building legislative frameworks. The comparative method will be utilized to assess the circumstances in which legislative transplants can be implemented and whether the speed at which the FATF mandate is domesticated encourages the use of legislative transplants.

Building legislative frameworks is a craft that has countless variables and stakeholders who work together through the legislative process to achieve a desired outcome. The ultimate aim is to manage how society behaves as this is what determines the quality of governance.[7] Development and social change cannot be undertaken within a state without institutional change and repetitive patterns of social behaviour. To do so, the law is used as a tool to transform institutions. Institutional legislative theory illustrates that other than the law there are numerous factors which affect human behaviour. It provides that these factors may essentially affect the application of the law. Critics also maintain that the text of the law is subjective and open to interpretation, which invariably affects its implementation.[8] These factors develop a sequence of events which once identified may be harnessed to facilitate the legislative process to create transformative legislation and institutions.

Seidman and Seidman propose that unless legislative drafters design a bill which can be effectively implemented and which is likely to induce the appropriate behaviour, parliament will not pass laws that will effect social behavioural change.[9] This analysis is based on the role of legislative drafters in development and social change. It further acknowledges that it is the role of the drafter to determine not just the structure and form of a bill but how the new bill fits into the legislative scheme and whether other pieces of legislation may need

6 H. Xanthaki, *Thornton's Legislative Drafting,* London, 5th ed., Bloomsbury Professional, 2013, pp. 142-143.

7 A. Seidman & R.B. Seidman, 'Law, Social Change, and Development: The Fatal Race', *in Africa's Challenge: Using Law for Good Governance and Development,* Asmara, Africa World Press, 2007, p. 21.

8 *Ibid.*

9 *Ibid.*, p. 23.

European Journal of Law Reform 2020 (22) 3
doi: 10.5553/EJLR/138723702020022000003

to be amended or repealed to give effect to the new legislative framework. The structure and the form of the bill determine its effectiveness and all these are based on the drafter's assessments of the constraints and resources within the state. To transform institutions, the government has to create an enabling environment within existing institutions through equitable allocation of resources to key stakeholders.[10]

Without effective laws, policy is meaningless.[11] The strategic role of the legislative dafter is the creation of functional legislative frameworks.[12] Functional legislative frameworks are instrumental in the development of the economy and society because laws are able to change the behaviour of both the public and the state.[13] For functional legislative frameworks to work within any country, it is essential to know which type of regulatory mechanism results in changing behaviours. One of the proposed views is that, although the role of a drafter is limited in the policy stage of the legislative drafting process, the drafter does shape and mould the policy into legislation.[14] The legislative drafting process involves identifying and resolving policy issues.[15] To effect transformative institutions through the law, a legislative drafter must firstly understand the *status quo* and not just what the desired impact should be.[16] It is for this reason that the institutionalist legislative theory calls for a problem-solving methodology, which affects both the design and substance of a bill and facilitates institutional transformation and development.

Generally, there are defined gaps between policy and draft bills just as much as the detail within a bill is unknown by both the drafter and the policymakers until a draft bill has been prepared.[17] These gaps and spaces are filled in not only by style and form but by the instruments of behavioural change in each institution. Seidman and Seidman propose that to understand social problems, one should not look to individual behaviours but to the repetitive patterns of behaviours in relevant social roles.[18] True social engineering may be realized when institutions are intentionally changed by altering their normative forms through laws.[19] For this, the law can be used to overcome social problems.[20]

10 A. Seidman, R. Seidman & N. Abeyesekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters,* London, Kluwer Law International, 2001, p. 9.
11 *Ibid.*, p. 31.
12 Xanthaki, 2014, p. 142.
13 A. Seidman & R.B. Seidman, *State and Law in the Development Process: Problem-Solving and Institutional Change in the Third World,* London, 1st ed., Palgrave Macmillan, 1994, p. 1.
14 C. Stefanou, 'Drafters, Drafting and the Policy Process', *in Drafting Legislation: A Modern Approach,* Aldershot, Ashgate, 2008.
15 C. Stefanou, 'Is Legislative Drafting a Form of Communication?', *in Book Enhancing Legislative Drafting in the Commonwealth: A Wealth of Innovation,* London, Taylor & Francis Group, 2015.
16 Seidman & Seidman, 2007, p. 45.
17 Seidman *et al.*, 2001, pp. 26-27.
18 Seidman & Seidman, 1994, p. 40.
19 *Ibid.*, p. 41.
20 *Ibid.*; R. Pound, *Social Control Through Law,* Oxford, Oxford University Press, 1942.

doi: 10.5553/EJLR/138723702020022000003

I Financial Action Task Force Background

The international policymaking authority on money laundering, the FATF, was established in July 1989[21] by the G7 Summit.[22] The FATF is an intergovernmental structure which was initially set up to combat organized criminal and narcotics financial flows.[23] Unlike most international organizations and regional organizations, the FATF has a distinct organizational structure. Initially the FATF applied a limited scope of objectives, which were to implement the United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances 1988 (Vienna Convention) that encompassed strengthening national legal and financial systems to combat money laundering as a result of narcotics financial flows.[24] The original FATF mandate was concise and predictable, which meant that it was measurable. The task to evaluate and assess the FATF has since developed into an intricate and complex dynamic. Currently, the FATF has 39 members (37 jurisdictions and 2 regional organizations) and associate members through FATF-Styled Regional Bodies (FSRBs). Over 200 jurisdictions worldwide have committed to implement the FATF Recommendations.

In addition to its core mandate of AML, the FATF in 2001 incorporated efforts to combat terrorist financing. Eleven years later, efforts to counter the financing of proliferation of weapons of mass destruction were added to the growing mandate. The FATF Ministers in April 2019 gave the FATF an open-ended mandate to strengthen the capacity to respond to threats in all member countries.[25] The expansion of the FATF mandate has resulted in the judgement of AML systems on the basis of their positive contribution towards the international financial system.[26] This illustrates that the FATF has had an effective impact on the international financial system for matters pertaining to money laundering. Chaikin argues that AML systems are challenging and this has also caused the rapid evolution of the FATF.[27] Financial systems evolve rapidly and are dynamic. As a result, the international financial system has been responsive through increased regulation by the FATF.

21 G7/G8 Summit, 'Paris Summit Economic Declaration', 1989, para. 53, available at: www.g8.utoronto.ca/summit/1989paris/communique/index.html.

22 "Convene a financial action task force from Summit participants and other countries interested in these problems. Its mandate is to assess the results of cooperation already undertaken in order to prevent the utilization of the banking system and financial institutions for the purpose of money laundering, and to consider additional preventive efforts in this field, including the adaptation of the legal and regulatory systems so as to enhance multilateral judicial assistance." Paris Summit Economic Declaration.

23 FATF, 'Financial Action Task Force 30 Years', 2019, p. 9, available at: www.fatf-gafi.org/media/fatf/documents/brochuresannualreports/FATF30-(1989-2019).pdf.

24 D. Chaikin, 'A Critical Analysis of the Effectiveness of Anti-Money Laundering Measures with Reference to Australia', *in* C. King, C. Walker and J. Gurulé (eds.), *The Palgrave Handbook of Criminal and Terrorism Financing Law*, Vol. 1, Cham, Palgrave Macmillan, 2018, p. 294.

25 FATF, 'Financial Action Task Force: Mandate', 2019, available at: www.fatf-gafi.org/media/fatf/content/images/FATF-Ministerial-Declaration-Mandate.pdf.

26 Chaikin, 2018, p. 294.

27 *Ibid.*

European Journal of Law Reform 2020 (22) 3
doi: 10.5553/EJLR/138723702020022000003

> The FATF's current mandate:
>
> sets standards and to promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and the financing of proliferation, and other related threats to the integrity of the international financial system.[28]

The FATF collaborates with various international stakeholders to systemically detect national vulnerabilities to protect the international financial system. The FATF Recommendations therefore set up regulatory frameworks for member countries to implement. The objective is for countries to adopt and implement the international standards into their environment. The measures include the need for the countries to identify risks and to develop policies and domestic coordination; to actively pursue money laundering, terrorist financing and the financing of proliferation; to apply preventive measures for the financial sector and other designated sectors; establish powers and responsibilities for the competent authorities and other institutional measure, to enhance transparency and availability of beneficial ownership information of legal persons and arrangements; and facilitate international cooperation.[29]

It has been proposed that the new name of the FATF standards "International Standards on Combating Money Laundering and the Financing of Terrorism and Nuclear Proliferation" relays the complexity that the FATF has created with the expansion of its mandate.[30] Chaikin argues that the identification of the AML system has since become 'problematic'.[31] The expansion of the FATF mandate beyond the combating of laundering of drug money to encompass criminal behaviour that threatens the integrity of the financial system has added complex dynamics. The complex dynamics may be identified in the merging of diverse and critical topics in international law under the mandate of one institution.

The FATF structure has been touted as a successful global network which pursues the money to find and destroy criminal business; this diminishes the economic potential of illicit activities.[32] The FATF is a classic example of "institutional entrepreneurship"[33] which is an organization which brings about networked incremental change. It has been successful in effecting change in non-member countries and predominantly appears to be an excellent organizational model for international legal reform.

28 FATF, 'The FATF Recommendations (2012-2019): International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation', available at: www.fatf-gafi.org/recommendations.html.

29 FATF, 'Financial Action Task Force: Mandate', 2019, p. 26.

30 Chaikin, 2018, p. 294.

31 *Ibid.*

32 A.P. Jakobi, 'Global Networks Against Crime: Using the Financial Action Task Force as a Model?', *International Journal*, Vol. 70, 2015, pp. 391, 397.

33 *Ibid.*, p. 404.

As of 2013, countries undergo peer review mechanisms, which assess technical compliance and effectiveness with the FATF Recommendations in terms of the FATF Methodology.[34] Technical compliance is an assessment which is based on the implementation of the FATF Recommendations that include the framework of laws, enforceable means and the existence of powers and procedures of competent authorities.[35] Technical compliance has five levels of compliance: compliant (no shortcomings); largely compliant (minor shortcomings); partially compliant (moderate shortcomings); non-compliant (major shortcomings); and not applicable (requirement does not apply).[36] Effectiveness, "The extent to which the defined outcomes are achieved", is the second assessment which provides a paradigm of the country's implementation of the FATF Recommendations and how they work in practice. Effectiveness has four levels of compliance: high (minor improvements needed); substantial (moderate improvements needed); moderate (major improvements needed); and low (fundamental improvements needed).[37]

The mandate of the FATF and its evolving nature means that its structure changes over time as do its obligations on member states. The automatic reforms at the international level do not take into account each member state's behavioural patterns to determine whether the new reforms will automatically be adaptable or functional in the national legal frameworks to effect transformative change. The role of the legislative drafter in building legislative frameworks is not taken into account as the legislative drafter role to decide which instrument and what structure is necessary to achieve the desired outcome is diminished.

The application of the FATF Recommendations in national legislative frameworks has to go through the traditional legislative path, which facilitates the transformation of existing institutions to effect social change. It is therefore the role of the implementing jurisdiction to ensure that appropriate policies are set up to facilitate the legislative process.

II The Drafting Process

To build legislative frameworks, policy must be transformed into legislation through the legislative drafting process. The legislative drafting process, in terms of Thornton, has five stages: (1) understanding, (2) analysis, (3) design, (4) composition and development and (5) scrutiny and testing.[38] The process involves numerous stakeholders with various roles, such as the instructing officer who has a duty to provide clear policy direction, the legislative drafter who has the role to convert the policy into effective legislation, parliament that passes the

34 C. Walker, C. King & J. Gurulé, 'Criminal and Terrorism Financing Law: An Introduction', *in* C. King, C. Walker and J. Gurulé (eds.), *The Palgrave Handbook of Criminal and Terrorism Financing Law*, Vol. 1, Cham, Palgrave Macmillan, 2018, p. 7.

35 FATF, 'Methodology for Assessing Compliance with the FAFT Recommendations and the Effectiveness of AML/CFT Systems (2013-2019)', 2019 available at: www.fatf-gafi.org/publications/mutualevaluations/documents/fatf-methodology.html.

36 *Ibid.*, p. 14.

37 *Ibid.*

38 Xanthaki, 2013, p. 145.

European Journal of Law Reform 2020 (22) 3
doi: 10.5553/EJLR/138723702020022000003

draft legislation into law, the implementing officers who have to administer and enforce the legislation and the judiciary that has to interpret the law. Each stakeholder is essential in building effective legislative frameworks.

The legislative drafter within the context of the legislative process is the key stakeholder in the process as the legislative drafter must observe the five stages to produce a legislative solution. To this end, the legislative drafter must prepare a legislative plan which should analyse five components: (1) the existing law, (2) the necessity of the legislation, (3) potential danger areas, (4) policy options and preferred legislative solution and (5) the practical implications of the legislative proposal.[39] This process facilitates the drafting of quality legislation, which fit within the statute book. This is because sufficient time is afforded to ensure that effectiveness is achieved by following the traditional legislative drafting steps in the legislative drafting process. If these steps are either not observed or hurried, this shall be to the detriment of the new legislation and the statute book as uncertainty arises due to duplicated regulations and conflict of laws, which affect enforcement and efficacy.

The FATF Recommendations recognize that, "countries have diverse legal, administrative and operational frameworks and different financial systems", and therefore, countries cannot have identical measures to counter threats.[40] On this basis, the Recommendations are set to be international standards, which countries are to adopt through measures of their particular circumstance.[41] The FATF Recommendations do not just call for action on the 'follow the money' approach and cooperation; they ask for monitoring and criminalization of broad offences from money transfers to declarations of assets. They also call for the setting up of numerous competent national bodies such as law enforcement agencies, which trace and confiscate proceeds of crime, and the establishment of Financial Intelligence Units (FIUs).[42] These and more areas are a tip of the iceberg on issues that the FATF addresses. What makes the maze even more complex is that every jurisdiction adopts these standards to its regulatory framework on the basis of their current legislation and legislative drafting capacity.[43] Despite provision to adapt the Recommendations on the basis of each legal system, it is worth noting that Thornton's five stages require prioritization by the implementing department. Each stage of the process must be exhausted before legislation can be passed. Furthermore, a legislative plan must be set up to ensure that the proposed legislative plan may be implementable without any conflicts to existing laws and that the introduced legislation is implementable.

The follow the money approach is a modern criminal financial law principle which requires the overhaul of the conventional criminal law processes. As this is a fundamentally legal principle, it will require initial research into how the

39 Xanthaki, 2014, p. 44.

40 FATF, *supra* note 35, p. 6.

41 *Ibid.*

42 FATF, 2019, Recommendation 29.

43 This includes the pressure to implement the United Nations Convention against Transnational Organized Crime (Palermo Convention) 2000, the United Nations Convention against Corruption 2003 and the Terrorist Financing Convention 1999, to name a few.

principle may be adapted to a legal system. This process will extend to all the components of the FATF mandate, which undergo domestication. The pertinent issue is whether sufficient time is afforded for the domestication of legislation through the traditional legislative processes?

III Efficacy

> Law, however, is not a free good in unlimited supply. It comes in a very short supply, crafted only with difficulty. Effective policy finds expression not in the statements of a policy maker, but in the product of the legislative drafter.[44]

The extent of achievement of the desired outcome in regulation is called efficacy.[45] Efficacy is not about the quality of legislation or the skill of the legislative drafter alone but encompasses other stakeholders who may not apply and enforce the legislation adequately; it also includes misdirected judicial application, which may be a result of bad policy.[46] It is the role of the legislative drafter to breach all the boundaries when preparing legislation to facilitate the achievement of efficacy in the legislative process.

When building legislative frameworks, a vital component that has been used to ascertain functional systems is effectiveness. The measure seeks to ensure that the legislative drafting process has been successful and that the aims for which the legislation has been created are achieved. Mousmouti asserts that as policy translators, legislative drafters determine the link between substance and form, which makes up the purpose of the law.[47] Legislative drafters further determine the effectiveness of legislation by identifying and understanding the four fundamental elements: objectives, content, context and results.[48] She highlights that effectiveness is not a measure of perfection but rather the ability of a legislative drafter to do the best they can within the limits of their system.

Building legislative frameworks requires that efficacy and effectiveness are understood as building blocks within legal systems. It necessitates the construction of systems which are not just developed for compliance with international instruments or regulatory response to public matters but rather systems which will have the effect of ensuring development and better regulation of society.

The fragmentation of the FATF mandate directly affects the efficacy of legislation domesticated under its mandate. Fragmentation in this context is not solely on the basis of the FATF's large spectrum and classification of issues but on the regimes departure from traditional criminal financial mechanisms.

44 A. Seidman & R.B. Seidman, 'Between Policy and Implementation: Legislative Drafting for Development', *in* C. Stefanou and H. Xanthaki (eds.), *Drafting Legislation: A Modern Approach,* Aldershot, Ashgate, 2008, p. 318.

45 Xanthaki, 2014, p. 5.

46 *Ibid.*, p. 6.

47 M. Mousmouti, *Designing Effective Legislation,* Cheltenham Edward Elgar, 2019, p. xii.

48 *Ibid.*, pp. 12-13.

European Journal of Law Reform 2020 (22) 3
doi: 10.5553/EJLR/138723702020022000003

Fragmentation refers to the layers created by the evolution of the FATF, which builds up pockets of financial crimes within the international financial legal system. Rather than a clear and coherent international regime such as the original mandate of the FATF to address money laundering matters and to follow the money, the FATF has introduced a 'mobile assemblage'.[49] The FATF is a malleable assemblage, which responds to emerging issues such as the Syrian conflict zones. As exemplified historically, the FATF has been engaging responsive mechanisms to internationally pressing matters which have financial impact.

The FATF as the main coordinator for the international financial framework on money laundering and financing of terrorist activities and proliferation of weapons of mass destruction has created a rather complex landscape of regulation.[50] This is motivated through FIUs, which have formed new transnational cooperation ensuring banking compliance and by increasing the scope for law enforcement to intervene in case any risk and potential threats arise. These emerging developments, which have been introduced by the FATF Recommendations, generated discussions around tensions and contradictions between the international regime and national frameworks as well as the powers and the role of banks and financial institutions. All financial institutions and any relevant stakeholder within the framework have been given the duty and discretion to manage and assess the risk of suspicious transactions. The second layer is the sharing of client information amongst financial institutions without regard to the client's privacy on the basis of disrupting potential threats. The third layer of tensions and contradictions is that of the privacy of financial clients, the stringent regulation of non-profit organizations and the de-risking mechanism of dispelling clients from the financial sector.[51]

It may be time to review the effectiveness of the FATF objectives to align them with criminal justice goals of national legislation, which would offer "a more powerful unifying self-synchronisation enabler for coordinated action".[52] Pol posits that there is a distinction between "law-in-the-books" and "law-in-action" and this can be proved through the gaps between what has been promised and what has actually been achieved.[53] This is illustrated by the continued flows of illicit money and terrorist activities around the world despite implementation of the FATF Recommendations. The FATF outcomes are often ambiguous and lack measurability because they focus on processes and not the impact, effect or consequence of the policy.[54]

49 M. de Goede, 'Counter-Terrorism Financing Assemblages After 9/11', *in* C. King, C. Walker and J. Gurulé (eds.), *The Palgrave Handbook of Criminal and Terrorism Financing Law*, Vol. 2, Cham, Palgrave Macmillan, 2018, pp. 771-772.

50 *Ibid.*

51 *Ibid.*, p. 757.

52 R.F. Pol, 'Anti-Money Laundering Effectiveness: Assessing Outcomes or Ticking Boxes?', *Journal of Money Laundering Control*, Vol. 21, 2018, pp. 215, 225.

53 *Ibid.*, p. 216.

54 *Ibid.*, p. 220.

In the FATF labyrinth, fragmentation raises the need to domesticate vast legislative reforms consecutively. The threat of overlooking fundamental elements of effectiveness and efficacy is looming large because of competing interests within the FATF mandate. The legislative drafter must therefore take into account the main objectives of the proposed legislative reforms and work within the confines of their environment. This dynamic inescapably affects the efficacy of the proposed reforms.

IV How Legislation Fails

> [S]o closely do form and substance, words and thought, link with each other that a drafter should separate them only for pedagogical purposes and peril.[55]

It is proposed that the failure to translate policy into effectively implementable legislation is based on three principles; that legislative drafters deal with form and not substance, the weakness of the drafting institutions and ignorance with regard to the methodology of translation.[56] It is further provided that legislative failure can be linked with the conceptual design of the legislative solution, its communication and its implementation.[57] Both observations are correct in that Seidman and Seidman deal with the classical approaches to legislative drafting, which focus on the technique and environment where the legislation will be applied.[58] However, Mousmouti brings in a modern approach which calls for the design and communication of legislation.

Seidman and Seidman propose three entropic practices, which may affect the effective application of legislation.[59] These practices are likely to contribute towards the ineptitude of legislation. The first practice is the drafting of legislation which satisfies many stakeholders with divergent demands. The second practice is drafting laws which prescribe behaviours directly opposed to the addressed behaviours and the third practice is where foreign law is copied and pasted. The entropic practices are generally the starting point when assessing the effectiveness of legislation as this allows for better reforms to build transformative institutions. Trial and error is another practice that is considered as one of the reasons why laws fail.[60] This is because rather than dealing with the social problem, the trial and error approach produces legislation, which may not have a direct effect and may require monitoring and evaluation before any changes are realized. Entropic practices and the trial and error approach should be avoided when drafting effective legislation. They may further be utilized due to traditional legislative drafting practices, which called for the drafter to pay attention to the form and not the substance of the bill. Further components which attribute to the failure of legislation are resources which are imperative in

55 Seidman *et al.*, 2001, p. 26.
56 *Ibid.*, p. 29.
57 Mousmouti, 2019, p. 131.
58 Seidman *et al.*, 2001, p. 40.
59 *Ibid.*
60 Seidman & Seidman, 2007, p. 27.

European Journal of Law Reform 2020 (22) 3
doi: 10.5553/EJLR/138723702020022000003

the drafting process. A legislative drafter needs a theory and methodology to facilitate the production of a draft bill.[61] Drafters require time to find and reduce the gap between the law's reach and its grasp.

Once a clear policy has been identified and the environment is ascertained, it is up to the skill of the legislative drafter to draft a law that works.[62] Three valuable questions, "First, will a proposed bill likely work? Second, does the bill conform to the imperatives of the 'Rule of Law'? Third, will the bill advance the 'public interest'?" must be considered.[63] Most of the causes of the failures highlighted above are attributed to the skill and resources made available to the drafter. However, the most crucial of all the factors discussed particularly where the skills and the resources are available is time. Time is important because it gives the drafter the ability to produce a desirable draft bill and also allows for the process of feedback between the policymakers and the drafter to confirm the final draft bill which is presented to parliament. Without time, the draft bill does not undergo sufficient interrogation from the drafters, policymakers and implementers.

The FATF frameworks seem to fall within the entropic drafting failures because the FATF has many stakeholders who cover various subjects with divergent mechanisms of application and enforcement. The FATF's response to all financial matters also makes its policy diverse and its aims ambiguous. The speed at which all the areas of the FATF are required to be implemented within all jurisdictions will inevitably lead to copy and paste and trial and error for the sake of compliance. It is for these reasons that time is critical during the legislative process and a substantive component, which if not observed, leads to the failure of legislation.

The strongest and probably the most effective measure an international institution may use to advance its aims against its members is sanctions. The implementation of countermeasures through a "black list" was rejected by both the FATF and the European Parliament in 1990 with the hope that public and peer pressure amongst states would be adequate.[64] It was envisaged that all jurisdictions needed time to make the policies and legislation and therefore the application of countermeasures were delayed.[65] However, for the first time, ten years later, the FATF in the "Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Anti-Money Laundering Measures" considered the future use of countermeasures, which would lead to "black listing".[66] At this point, all these measures were for money laundering–associated

61 *Ibid.*, p. 28.
62 Seidman & Seidman, 2008, p. 318.
63 *Ibid.*, p. 315.
64 G. Stressens, 'The FATF "Black List" of Non-Cooperative Countries or Territories', *Leiden Journal of International Law*, Vol. 14, 2004, pp. 199, 206.
65 *Ibid.*
66 FATF, 'Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Anti-Money Laundering Measures', 2000, available at: www.fatf-gafi.org/media/fatf/documents/reports/1999%202000%20NCCT%20ENG.pdf.

systems. However, the evolution of the FATF mandate by extension applies to terrorist financing and proliferation of weapons.

The FATF believes its measures are as strong as its weakest country. This is based on the fact that criminals are prone to use countries with weak AML/CTF controls to circumvent international financial regulation.[67] The FATF has made it a key objective to identify vulnerable countries. The FATF guarantees reviews for countries where threats, vulnerabilities or particular risks have been identified. A country may be reviewed if it falls under the following three categories: (1) the country is not a member of FATF-style regional body or hampers timely publication of mutual evaluation; (2) if the country is identified by a FATF-style regional body as having threats of money laundering, terrorist financing or proliferation financing risk; or (3) the country has attained a poor result in a mutual evaluation.[68]

The FATF issues two public documents three times a year in February, June and October at the end of each plenary meeting which publicly lists countries with weak AML/CTF regime who are referred to as Non-Cooperative Countries or Territories.[69] The first public document called the FATF's Public Statement, firstly, lists countries with significant strategic deficiencies and requests all jurisdictions to apply sanctions. Secondly, the Public Statement lists countries which the FATF calls on its members to apply enhanced due diligence measures, which address deficiencies associated with those countries. The second public document is the Improving Global AML/CTF Compliance: On-going Process, which lists countries that have made high level commitments with the FATF to develop an action plan to manage strategic weaknesses. Where a country does not make sufficient progress, they may be moved from the second public document to the first to increase pressure for compliance. The FATF believes that public warnings ensure that "countries move swiftly to make significant improvements".[70] Countries listed in the Public Statement are subject to countermeasures, which include enhanced due diligence on identified failures and systematic reporting of transactions and limitation or prohibition of financial transactions with the jurisdiction.

Unlike most international instruments, the FATF has distinct countermeasures that may result in substantial economic effects on developing states. The FATF's robust pose on AML was a stark contrast against the cooperative attitude of Organisation for Economic Co-operation and Development (OECD) in tax matters.[71] That is to say that the methods used by the FATF to facilitate compliance by member states were severe as compared to the techniques used by other similar institutions. It has also been observed that

67 FATF, 'High-Risk and Other Monitored Jurisdictions', available at: www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/more/more-on-high-risk-and-non-cooperative-jurisdictions.html?hf=10&b=0&s=desc(fatf_releasedate) (last accessed 26 November 2019).

68 *Ibid.*

69 *Ibid.*

70 *Ibid.*

71 Stressens, p. 206.

European Journal of Law Reform 2020 (22) 3
doi: 10.5553/EJLR/138723702020022000003

some governments have lost elections because of submission to FATF demands.[72] This illustrates that there are far-reaching consequences, which arise as a result of the operation of countermeasures. Rather than pressurize countries, the FATF compels and forces countries to adhere to the FATF Recommendations or to face countermeasures. The FATF sanctions have attracted criticism, especially from the financial institutions that have to be mindful to monitor and comply with regulators and public statements, as failure to comply may lead to delisting.[73] The development of the FATF sanctions has evolved drastically because it has been driven by tragic events rather than decision-making through the UN Security Council.[74] What remains is that the pressure to swiftly make significant improvements within the FATF context could mean the accelerated drafting of national legislation to avert countermeasures, which may be detrimental to national legislative frameworks.

The ultimatum set by the FATF for countermeasures on failure of countries to meet the FATF obligation directly affects the process of domestication. The first element is time, which compromises both the quality and functionality of legislation. The second element is the imminent threat of countermeasures, which affects the effectiveness of legislation and inevitably efficacy. The domestication of the FATF mandate is thus prone to failure on the basis of the constraints that have been placed on countries.

V Transplants

> A rule that induces one sort of behaviour in one time or place will only serendipitously induce similar behaviour at another time or place.[75]

If the effectiveness of the law is dependent on the environment where it is implemented, then an adopted law will only be effective within an environment that has similar constraints and resources.[76] It is evident that there are no universal values and that values are learnt through traditions.[77] In the same breath, bills may be drafted through reason, which is not based on culture and upbringing but rather on logic and reason. Thus the conception of an idea to impose a legislative reform is mostly based on the environment where the legislative reform is envisaged and that there must be reasoning and logic before concepts are applied.

72 *Ibid.*, p. 208.

73 N. Ryder, R. Thomas & G. Wedd, 'The Financial War on Terrorism: A Critical Review of the United Kingdom's Counter-Terrorist Financing Strategies', *in* C. King, C. Walker and J. Gurulé (eds.), *The Palgrave Handbook of Criminal and Terrorism Financing Law*, Vol. 2, Cham, Palgrave Macmillan, 2018, p. 792.

74 K. Prost, 'The Intersection of AML/SFT and Security Council Sanctions', *in* C. King, C. Walker and J. Gurulé (eds.), *The Palgrave Handbook of Criminal and Terrorism Financing Law*, Vol. 2, Cham, Palgrave Macmillan, 2018, p. 921.

75 Seidman *et al.*, 2001, p. 40.

76 Seidman & Seidman, 2007, p. 30.

77 *Ibid.*, p. 32.

To adequately understand the application of international instruments in various jurisdictions, comparative law may be utilized to assess whether domestication of the same concept is possible for all. Comparative law, to some extent, is subjective.[78] Watson declares that it is superficial. There are many variables to consider before one can reach a platform where they can even begin to compare. If the nature of comparative law is obvious, then the comparison should not only be of legal rules and procedures but should be an "examination of equivalent rules and procedures in at least one other system".[79]

"Variations in the political, moral, social and economic values" make it difficult for any two societies to have the same legal problems except probably at a technical level.[80] To address a problem, the weight of investigations generally starts with the comparability of the problem, followed by the comparability of the law, which is sociological and not legal. Watson proposes that comparative law "is the study of the relationship of one legal system and its rules with another"; it is concerned with the legal history relationship between systems.[81] Comparative law is the nature of legal development.[82] Legal history and the relationship between systems facilitates an understanding of not only how systems can exert influence on others but also the implications of incompatible modifications. The biggest threat in comparative law is getting the foreign law wrong. Getting the context wrong and insufficient knowledge of compared systems and the desire to be systematic can also be detrimental because the chosen topic may not have a proper relationship. The greatest threat to comparative law is the desire to identify the exact same common patterns in different systems.

> At times it is as if a comparative anatomist were to say that lions and ants are similar and are at a comparable level of development since both are warm-blooded, have six legs and are always winged.[83]

Watson therefore denies that it is possible to propose a legal theory which is applicable to unrelated societies. There are many variables which should be considered and identifying simple legal points of departure will not suffice. He provides that development of the subjects may never be at the same point. Similar situations in different systems may bring out different results. This is to say that, despite application of the same regulation to different systems, the outcome realized may be completely parallel. The understanding of comparative law may be used to facilitate the creation of international standards which are applied in divergent legal systems. Watson's comparative approach allows us to understand at a basic level why it is sometimes difficult to apply the same legal concepts in all jurisdictions and to have the same outcome. It leads us to

78 A. Watson, *Legal Transplants: An Approach to Comparative Law,* Athens, 2nd ed., The University of Georgia Press, 1993, p. 11.
79 *Ibid.*, p. 2.
80 *Ibid.*, p. 4.
81 *Ibid.*, p. 6.
82 *Ibid.*, p. 7.
83 *Ibid.*, p. 12.

European Journal of Law Reform 2020 (22) 3
doi: 10.5553/EJLR/138723702020022000003

interrogate whether the FATF methodology is functional because it prescribes both technical compliance and effectiveness. According to Watson, the FATF Recommendations and methodology as revised will not be implementable as they cannot produce the same results in different environments. Despite having room to adopt the FATF Recommendations to the circumstances of each jurisdiction, the concepts will not produce the same results and the uniformity of international and international financial laws will not be realized.

Following the assessment of comparative paradigms, Xanthaki holds that the reception of foreign transplants "is not a matter of nationality but of usefulness and need".[84] Despite having regard to the typical comparative approach of like against like, and similarities and differences, the essence of transplants is the desire to create an environment where similar productive systems may be incorporated to enhance development. She argues that transplants may come in under conditions of similarity, to enhance our understanding of the law or to explain similarities and differences. Following the analysis on the concepts of transplants, Xanthaki finally concludes that the test for transferability is *functionality* of institutions, solutions and texts.[85] However, after reaching this conclusion, she further asserts that it is paramount to identify a common factor which can serve as a glue to allow transferability between institutions. She identifies the glue as *effectiveness*.[86] In this context, what is distinct from Xanthaki's approach to transplants is not just legislation but concepts and ideas that mould behaviours that receiving jurisdictions must have institutions which are able to implement transplants effectively.

> ... copying law assumes that, regardless of differing country circumstances, the law's verbal prescriptions alone shape behaviours.[87]

However, Seidman and Seidman advocate for the 'Law of Non-Transferability of Law'. This is a principle which provides that the law addresses specific stakeholders who make choices based on the parameters of the law within institutions and that these are affected by constraints and resources within each environment. The principle proposes that some of these factors may be non-legal, which ensures that each stakeholder response will differ depending on their environment, which inevitably means that the same laws applied in different places 'will not likely induce the same behaviour'.[88] It is on this basis that the same paint brush cannot be used to address the same social problem in different places as there are different variables which will apply once a proposed law comes into effect. They propose that development cannot be realized through copying other legal models but rather copying institutions.[89] The transferability of legal

84 H. Xanthaki, 'On Transferability of Legislative Solutions: The Functionality Test', *in* C. Stefanou and H. Xanthaki (eds.), *Drafting Legislation: A Modern Approach,* Aldershot, Ashgate, 2008, p. 2.
85 *Ibid.*
86 *Ibid.*, p. 17.
87 Seidman *et al.*, 2001, p. 41.
88 Seidman & Seidman, 1994, p. 46.
89 *Ibid.*

models is rather the prerogative of a legislative drafter to design detailed provisions, which are adapted to the environment where the law will be implemented. It is further the role of the drafter to ensure that a bill, once passed into law, will achieve the objectives for which it is intended.[90] Without clear objectives and relevant structural consideration in policies, 'the instrumental use of law whistles with the wind'.[91]

A desired result in one jurisdiction may require legislation while in another jurisdiction legislation may not be required. Similarly, the same infrastructure may not be necessary for one jurisdiction as with another to produce desired outcomes. What has been uncovered over time is that the same legislation which has been effective in one place may not be as effective in another place and these are the challenges which drafters and academics must grapple with. Xanthaki brings us closer to this solution in that the effectiveness and functionality of the law must be of paramount concern in legislative transplants. The FATF model promotes legislative transplants as it provides both technical compliance and effectiveness. However, effectiveness cannot be guaranteed if the drafter is not afforded time and given the latitude to build functional legislative frameworks.

Based on the above discussion, the FATF therefore should not prescribe both technical compliance and effectiveness to assess the implementation of the Recommendations. This is grounded on the tradition that the technical compliance or the drafting of legislation should be left to the legislative drafter on how legislative frameworks should be built to establish effectiveness. The hands of the legislative drafter to build effective legislation are tied up in the expectation to fulfil specific technical compliance and effectiveness by the FATF standards. The FATF methodology should rather follow effectiveness of the Recommendations based on the principles which are administered by each jurisdiction and surrender the technical compliance to be determined by member states.

C Domestication of the FATF Recommendations

This section discusses how international agreements are domesticated and how building legislative frameworks fits within the process. It presents traditional domestication principles and discusses the expectation of the FATF obligations. It presents three case studies of countries which are in the process of domestication or have implemented the FATF Recommendations. It discerns the recent Botswana experience in implementing its obligations within two years. It proceeds to discuss the Australian and UK experiences from their domestication of the FATF. The section introduces the realist approach to domestication of international obligations and how it facilitates building legislative frameworks.

The relationship between international law and national law is what generates the discussion of domestication of legislation. The status and role of

90 Seidman & Seidman, 2008, p. 296.
91 *Ibid.*, p. 307.

European Journal of Law Reform 2020 (22) 3
doi: 10.5553/EJLR/138723702020022000003

international law within states is determined by the legal system and practice of each state.[92] Both international and national laws are differentiated generally by their application. This is to say that international law is directed by the participation and collective will of sovereign powers to undertake obligations in respect of other sovereigns. However, national law is internally directed to the national will.[93] Some legislative transplants are a result of domestication of international instruments.

Monism and dualism approaches are the two theoretical classifications which describe how international law is implemented by states. Dualism calls for complete internal sovereignty, which imparts a notion of consent before international law may be applied.[94] Tshosa posits Anzoilotti's principle on dualism, which provides that each system is distinct and will not give rise to a conflict because national law is designed to be obeyed by citizens and international law conditioned by the *pacta suntan servanda* principle, which illustrates that international law governs the conduct of States.[95] He further addresses the notion that both international and national law are supreme in their own sphere and that, from a dualist perspective, where there may be a conflict, national law is superior. Dualism makes it the prerogative of a state to decide whether it implements international law through domestication.

Monism, also known as the doctrine of automatic incorporation, maintains that both international law and national law are one universal system.[96] Modern monists suggest that the true subjects of international law are individual citizens and not the state. However, in the same light, monism and dualism are not cast in stone and their relationship may be blended dependent on how both are applied in each circumstance.[97] He proposes that intermediary classifications may be proposed based on the application of the two systems. Tshosa describes the harmonization approach as another proposed classification of domestication. The harmonization approach provides that neither international law nor national law is superior but both are applied in a coordinated manner without any conflicts. The harmonization approach has a dominant monist component in that it assumes that international law forms part of national law. However, the harmonization approach departs from the monist approach where it does not claim a hierarchy of the two legal systems, that is to say that national law is inferior to international law.

The essential component of domestication is that, commonly, it is the prerogative of sovereign states to determine how to domesticate international instruments within their jurisdictions. The FATF is an international institution which predominantly enforces the monist approach on its members as it

92 O. Tshosa, *National Law and International Human Rights Law: Cases of Botswana, Namibia and Zimbabwe*, Ashgate, 2001, p. 12.
93 *Ibid.*, p. 4.
94 *Ibid.*
95 *Ibid.*, p. 5.
96 *Ibid.*, p. 6.
97 *Ibid.*

considers national legislation subordinate to the Recommendations. Wherever a conflict arises, the Recommendations are applied and not national law.

> In fact, according to monism, the international legal order determines the territorial and temporal spheres of validity of the national legal order, thus, making possible for co-existence of a multitude of states.[98]

There is an inference generally that treaties are taken as lay drafts in some instance for the purposes of domestication. However, this concept is quickly revisited when drafters begin to apply the effectiveness test.[99] The nature of international texts is that they are generally ineffective for the purposes of national implementation due to their vague and incomplete nature.[100] However, in the context of the FATF Recommendations, there is a departure from the norm in that the Recommendations are designed and drafted as drafting instructions rather than broad and vague concepts. What should be addressed is how the FATF can create international standards that can be incorporated into national law to improve effectiveness and functionality of national legal systems.[101] The model of the FATF does not afford a broad enough spectrum for countries to determine how to apply the Recommendations to their legislative frameworks.

I Application of FATF Recommendations

1 Botswana

Botswana was one of the first four countries in the world to sign the 1999 United Nation Convention for the Suppression of Financing of Terrorism.[102] In some context, this may be seen as a move towards showing the country's commitment to suppressing the financing of terrorism. However, despite this effort, today Botswana finds itself on the FATF other monitored jurisdiction list for failure to effectively implement the FATF Recommendations.

Botswana's first evaluation on the implementation of the FATF Recommendations was conducted by the World Bank in 2007 with the 2004 AML/CTF Methodology. The evaluation established that, despite ratifying all 12 conventions relating to terrorism and terrorist financing, none of the international obligations had been domesticated.[103] The evaluation acknowledged that fundamental components of the AML regime had been addressed. The evaluation further identified challenges in the implementation of the AML regime as well as the failure to implement components of the AML preventive regime provided by the FATF Recommendations, which included the failure to establish

98 *Ibid.*, p. 8.
99 Xanthaki, 2014, p. 171.
100 *Ibid.*, p. 172.
101 Tshosa, 2001, p. 10.
102 The other three countries were Sri Lanka, the UK and Uzbekistan.
103 World Bank, 'Mutual Evaluation/Detailed Assessment Report: Anti Money Laundering and Combating the Financing of Terrorism Republic of Botswana', 2007, available at: https://esaamlg.org/reports/botswana_detailed_report.pdf.

European Journal of Law Reform 2020 (22) 3
doi: 10.5553/EJLR/138723702020022000003

an FIU and a legislative and regulatory framework to implement UN Security Council Resolutions 1267 and 1373 to allow for freezing of assets. The report discussed Botswana's failure to undertake a money laundering risk and vulnerability assessment due to fragmented statistical information. It noted development concerns realized by Botswana as a middle-income country and its dedication to fighting the HIV/AIDS pandemic. However, the report proposed that despite resource constraints, Botswana should mobilize effective resources dedicated to AML. Out of the 40 Recommendations, 3 were compliant, 6 largely compliant, 13 partially compliant, 17 non-compliant and 1 was not applicable.[104] The additional 9 Recommendations were all rated non-compliant.

Botswana is one of the 18 members of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), which was established in 1999.[105] ESAAMLG, like other FSRBs, is committed to promoting the implementation of the FATF Recommendations and in 2010 became an associate member of the FATF. The second evaluation was conducted ten years later in 2017 by ESAAMLG and provided that the AML/CTF regime had still not been developed and competent authorities were in the process of understanding their roles and building capacity to manage AML/CTF. The varied levels of capacity and resources between stakeholders significantly affected Botswana's ratings. Despite sound legal frameworks, there were deficiencies identified in matters of CTF and in the Financial Intelligence Act. Out of the 40 Recommendations, none was rated compliant, 2 were rated largely compliant, 14 partially compliant, 23 non-compliant and 1 was not applicable.[106] Following the decline of Botswana's performance on the implementation of the FATF standards, Botswana was placed on the other monitored countries list.

Botswana completed its first National Risk Assessment (NRA) following the completion of the second evaluation. High priority areas were identified, which included: the development of a national policy and strategy on AML/CTF, introduction and amendment of relevant legislation, enhanced supervision and enforcement of AML law, capacity building in AML investigations and detection, introduction of automated systems, improved national cooperation amongst supervisory authorities and improved international cooperation.[107] The response to both the second Mutual Evaluation Report (MER) and the NRA led to an influx of legislative activity, which saw the passing of over 20 acts of parliament in one meeting of parliament.[108] All the acts that were passed were related to the FATF Recommendations. These include the Financial Intelligence (Amendment) Act

104 Recommendation 22 on foreign branches and subsidiaries is not applicable in the Botswana context.

105 'ESAAMLG – History About', available at: www.esaamlg.org/index.php/about_esaamlg_history (last accessed 19 November 2019).

106 Recommendation 17 on reliance on third parties was not applicable because the FIA in Botswana is not permitted to use third parties or introduced businesses to undertake customer due diligence on their behalf.

107 'The National Risk Assessment Report for the Republic of Botswana' (Financial Intelligence Agency 2017).

108 Government Gazette Extraordinary 2018, 257.

2018, Proceeds and Instrument of Crime (Amendment) Act 2018, Counter-Terrorism (Amendment) Act 2018, Banking (Amendment) Act 2018, Illicit Traffic in Narcotics Drugs and Psychotropic Substance Act 2018, Chemical Weapons (Prohibition) Act 2018, Nuclear Weapons (Prohibition) Act 2018, to name a few. The legislative reform was done within a year following the 2017 evaluation.

The 1st Follow-Up Report and Request for Technical Compliance Re-Rating in 2019 analysed the progress of Botswana in addressing technical compliance deficiencies identified in the 2017 MER. It also assessed Botswana's progress in implementing the new FATF Recommendations 2, 5, 7, 8, 18 and 21.[109] The report was primarily concerned with technical compliance and not effectiveness. The follow-up report resulted in the rerating of 32 Recommendations while 7 Recommendations[110] did not qualify for rerating. The final update from the rerating showed that out of the 40 Recommendations, 6 were compliant, 13 largely compliant, 17 partially compliant, 3 non-compliant and 1 was not applicable.[111]

The President of the Republic Botswana in the 2019 State of the Nation stated that Botswana had passed 25 Acts in 2018 in order to comply with the FATF Recommendations and that the Financial Intelligence Act, the Trust Property Act, the Counter-Terrorism Regulations and the Financial Intelligence Regulations were being amended to close the gaps identified during the rerating and that these would be submitted to ESAAMLG for a second request to rerate in the April 2020 meeting.[112] Should Botswana not achieve significant compliance at the subsequent rerating, this will result with its status remaining under the other monitored jurisdictions list until substantial strides are recognized towards compliance.

Botswana's experience demonstrates how the standard methods of domestication of traditional international obligations have been superseded by the methods of the FATF regime. It is no longer about the level of commitment of sovereign states but how governments reform regulation within the prescribed time limits to meet their international obligations. It demonstrates that legislation can swiftly pass through parliament flouting due process to meet international obligations. The legislative process is prejudiced during the drafting process as entropic practices will emerge due to time constraints and parliament is deprived of scrutinizing legislation.

109 ESAAMLG, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: Botswana 1st Enhanced Follow-up Report & Technical Compliance Re-Rating', 2019, available at: https://esaamlg.org/reports/FUR%20Botswana-April%202019.pdf.

110 Recommendations 2, 8, 18, 22, 34 and 37.

111 Recommendation 17 was not applicable.

112 M. Masisi, 'State of The Nation Address 2019', *Google Docs*, 2019, available at: https://drive.google.com/file/d/1SXnGsTBYfKvKgpfbTnZVvjjSp0CDcwU/view?usp=sharing&fbclid=IwAR29Cj6YaQSuzRTd64jAdugAoLx2f-CMN1Dh60AYXGoFQRwnyEYrXFiqZtU&usp=embed_facebook (last accessed 18 November 2019).

doi: 10.5553/EJLR/138723702020022000003

2 Australia

Prior to 2001, Australia did not have any specific antiterrorism legislation in place. This may be attributed to the fact that the Hope Report in 1979[113] concluded that domestic intelligence gatherings and law enforcement bodies had been given adequate powers within the existing legislative framework.[114] The Report established that the need for specialized antiterrorism laws was not necessary as all terrorist acts were ordinary crimes with the exception that they carried political motives. Michaelsen and Goldbarsht observe that since the 2001 events and the Bali bombings in 2002, over 55 new statutes at the federal level have been passed to date. The new laws are often urgent and have significant impact on traditional due process.[115] Incoherencies across various statutes as well as overlaps and contradictory provisions have been observed because the provisions are based on international legal and political obligations.[116] They posit that most of the adopted measures introduced where for compliance with FATF standards which are non-binding. They are concerned that substantive legislative reform has been "prescribed by an international institution with little democratic legitimacy and accountability".[117] They submit that the application of the FATF standards in Australia demonstrates that the FATF encourages domestic legislative initiatives to be shaped by the executive and the legislature acting as a rubber stamp to the proposed reforms. Michaelsen and Goldbarsht advance that this process "may corrupt the legislative process and risk erosion of the legitimacy of the domestically adopted norms themselves".[118]

What has been worrisome is that despite charges against some individuals, there have been extremely low convictions, which mystifies the effectiveness of the Australian framework.[119] Michaelsen and Goldbarsht are concerned that there is limited proof, which suggests that the proceeds of crime legislation in Australia have been used in the context of CFT. They observe that impractical legislative provisions may hinder effective prosecution and that terrorist financing in Australia is limited or that the legislation may be so effective as to deter terrorist financing.[120]

It is observed that Australia has undergone similar conditions of passing numerous laws within a limited period to meet the FATF standards. The passing of bulk legislation within short periods is therefore a common phenomenon for compliance with the FATF Recommendations. The Australian experience further illustrates that despite having legislation which already addresses policy concerns,

113 The Holdrich Inquiry (1986) the Gibbs Committee (1987-1991), the Codd Review (1992) and the Honan and Thompson Review (1993) all confirmed the position in the Hope Report.

114 C. Michaelsen & D. Goldbarsht, 'Legal and Regulatory Approaches to Counter-Terrorism Financing: The Case of Australia', *in* C. King, C. Walker and J. Gurulé (eds.), *The Palgrave Handbook of Criminal and Terrorism Financing Law*, Vol. 2, Cham, Palgrave Macmillan, 2018, p. 808.

115 *Ibid.*

116 *Ibid.*, p. 824.

117 *Ibid.*

118 *Ibid.*, p. 825.

119 *Ibid.*

120 *Ibid.*, p. 826.

the FATF dictates that more legislation is drafted and both the legislative drafter and the legislative process is overlooked.

3 United Kingdom

Unlike Botswana and Australia, the UK has a history of development of AML/CTF legislation. The Northern Ireland (Emergency Provisions) Act 1973 and the Prevention of Terrorism (Temporary Provisions) Act 1974 were the UK's initial legislative steps towards counterterrorism efforts.[121] These were followed by the Drug Trafficking Offences Act 1987, which became the Drug Trafficking Act of 1994, the Criminal Justice Act 1988 and the Proceeds of Crime Act 1995.[122] As the legislation was ineffective, a review recommended that an Asset Confiscation Agency should be created. Both money laundering and the confiscation were consolidated into the Proceeds of Crime Act 2002 and drug-related measures were incorporated into the Prevention of Terrorism (Amendment Act) 1989.

Despite the head start with regulation of the FATF-related legislation, Ryder, Thomas and Webb demonstrate that the UK's response to the 9/11 was the introduction of a bulk of "draconian and controversial counter-terrorist legislation".[123] They question whether this response was necessary as its application has brought few prosecutions for terrorist financing and the freezing of assets has proven to be "an ancillary rather than a central part of the fight against terrorism".[124] They conclude that despite all the measures taken by the UK, there are still questions on the effectiveness of the implementation of the FATF Standards.[125]

As a country which has established national legislative systems on AML/CTF, the UK should generally not have difficulties with the application of the FATF standards and should be one of the first countries to look to for results on the effective application of the FATF standards. However, scholars[126] still find that there are insufficient data and that the application of the FATF standards cannot be measured.

The FATF mandate promotes the requirement for countries to acknowledge that they must set specific political priorities, allocate high proportions of national resources and generate endless legislation to keep up with the FATF Recommendations such as the National Security Strategy and Strategic Defence and Security Review 2015: A Secure and Prosperous United Kingdom, which ranks terrorism as a tier 1 national security threat.[127] While international agencies play an important role in AML, including the International Monetary

121 Ryder *et al.*, 2018, p. 784.
122 *Ibid.*, p. 785.
123 *Ibid.*, p. 786.
124 *Ibid.*, p. 789.
125 *Ibid.*, p. 796.
126 *Ibid.*, p. 786.
127 Walker *et al.*, 2018, pp. 2-3.

European Journal of Law Reform 2020 (22) 3
doi: 10.5553/EJLR/138723702020022000003

Fund, World Bank, MONEYVAL[128] and the Egmont Group,[129] what has become clear is that internationally the FATF is regarded as the 'global standard setter' through the Recommendations.[130] It is on this basis that the fragmentation of the FATF should be considered closely to ensure that its aims work together.

The case studies depict the FATF as an organization that has influence and affects national legislative frameworks. They unveil and confirm that the time availed for compliance is limited to exhaust the traditional legislative drafting processes to build effective and functional legislative reforms.

II Realistic Approach

Xanthaki recommends a realistic approach to domestication as this will ensure a level of compliance with international law.[131] This can be done by determining the objective aims of the international instrument and the effective drafting of identified aims. The realist approach proposes four techniques for domestication; the first is a balanced legislative text which encompasses both the compliant text and additional elements; she argues that this can facilitate effectiveness for national interest. The second technique is the drafting of a legislative text which domesticates the international instrument by redrafting specific provisions which must be domesticated and may also apply specific articles within the international instrument, which illustrate that effective domestication has taken place. The third technique is to delicately express that the legislative text wishes to achieve compliance with the international instrument and this allows the international instrument to be applied through interpretation. Fourth and finally, the international instrument may be attached as a schedule to the legislative instrument which elegantly incorporates the international instrument. The realistic approach captures numerous ways in which a state may wish to domesticate an international instrument. The realistic approach describes some of the approaches which a legislative drafter may consider in domestication. It demonstrates that once the legislative drafter has identified the principles within the international instrument, they may apply the approach where there is no conflict with national law.

The levels and mechanisms provided by the realist approach illustrate that there is room for manoeuvre during domestication to allow the legislative drafter to execute their role in developing functional legal frameworks. The principles within the international instruments form part of the policy for the drafted legislation. The law determines the parameters upon which policies may be implemented.[132] Policies which do not honour the limits of the law do not succeed.[133]

128 The Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism.

129 The Egmont Group provides a platform for the secure exchange of expertise and financial intelligence to combat money laundering and terrorist financing.

130 *Ibid.*, p. 7.

131 Xanthaki, 2014, p. 172.

132 Seidman & Seidman, 1994, p. 2.

133 *Ibid.*

doi: 10.5553/EJLR/138723702020022000003

> Questions about the limits of legislative action, about its ability to create new types of man and types of culture are as practically cogent as they are theoretically illuminating. (Malinowski 1941:1237)[134]

Seidman and Seidman provide that development is not a goal to be reached but a process which bridges "between reach and grasp, between promise and actuality".[135] On this basis it would appear that development or reform cannot be based on basic principles or modelled into defined parameters. Seidman and Seidman further propose that there is a 'Law of Reproductive Institutions', which in short provides that there are set repetitive behaviours within societies (institutions) and that unless institutions change the society does not change.[136] It is on this principle that they further provide that the state has the power to introduce planned institutional change and, where the state does not provide for change, the institutions will change without the conscious decision of the society.[137] They ultimately provide that where the law does not change institutions remain the same.[138] After one of the realist approaches has been identified during domestication, it is up to the legislative drafter to apply the law of reproductive institutions to certify that the institutions are responsive and that this results in the development of society. The realist approach should not just be viewed as a means for compliance with international institutions but also as a step in the legislative design process.

The Law of Reproductive Institutions buttresses the view that the FATF should not dictate technical compliance but rather focus on effectiveness. It should be upon the state to determine how to build its institutions based on their repetitive behaviours to determine how to introduce planned institutional change.

To establish measures adopted to each country means that the domestication of the FATF Recommendations in every country will fundamentally be different especially based on observations from comparative law. This is based on the assumption that each country would adopt the Recommendations to their own circumstances. However, the manner in which the Recommendations have been drafted also dictates to the various jurisdictions how to adopt the Recommendations. This essentially means that despite the declaration that the international standards may be adopted to particular circumstances, in practice there is insufficient space to adopt but rather to directly implement.

One illustration of this is the requirement to establish powers and responsibilities for competent authorities. This generally means that some of the Recommendations prescribe measures rather than provide standards which may be adopted to every jurisdiction. It is observed that the FATF Recommendations may be confined to the initial drafting approach, which states that a legislative

134 *Ibid.*
135 *Ibid.*, p. 25.
136 *Ibid.*, pp. 38-39.
137 *Ibid.*
138 *Ibid.*

European Journal of Law Reform 2020 (22) 3
doi: 10.5553/EJLR/138723702020022000003

drafter's role is form and not substance. The FATF Methodology further demonstrates that the outcomes are based on technical compliance and effectiveness. This does not take efficacy into account because had efficacy been considered, the objectives of the FATF Recommendations would be different and allow the traditional legislative process to take effect, which inevitably gives way to better regulation.

As a global financial standard setter, it is worthwhile for the FATF to review its mandate. It may be advisable to limit the scope of the FATF to monitoring and supervisory procedures rather than to facilitate the implementation of broad financial criminal objectives in an effort to ensure the efficient and effective implementation of its mandate. This observation is based on the fragmentation of the regime and the requirement for the FATF Recommendations to be implemented swiftly.

It is difficult to assess the impact of the FATF, especially on the basis of its ever evolving nature, sources and methodologies.[139] Fragmentation of the objectives of the FATF also creates a broad scope for one who wants to assess the impact. The follow the money trail has proved to not be as effective because the money trail does not always provide concrete evidence as in the case of terrorists who generally live modest lives and do not utilize large sums to finance their criminal activity.[140] The policy goals of follow the money make it difficult to measure because they are not easy to reduce to measurable indicators.[141] The impact of the FATF however within this article points to the impact of the FATF on national legislation through the disruption of the traditional legislative processes. Firstly, the requirement to domesticate bulk legislation and secondly the requirement to do so within time frames set by the FATF. The impact does not only affect sovereignty but affects the quality of legislation and the structures which are set up within a limited time frame.

D Conclusion

This article set out to prove that the FATF mandate does not have due regards to national legislative processes when setting obligations for member states. The article has proven that the FATF has not considered the conventional legislative processes nor has it considered the classical approach to building national legislative frameworks. This was proven by applying the FATF mandate to theories of building legislative frameworks. It has also been established that the new FATF methodology takes away the role and ability of the legislative drafter to build functional legislative frameworks. Furthermore, this article has acknowledged that the FATF does not have due regard for dualist member states as the nature of domestication is to draft legislation, which requires time. The

139 C. Walker, 'Counter-Terrorism Financing: An Overview', *in* C. King, C. Walker and J. Gurulé (eds.), *The Palgrave Handbook of Criminal and Terrorism Financing Law*, Vol. 2, Cham, Palgrave Macmillan, 2018, p. 748.

140 *Ibid.*, p. 737.

141 De Goede, 2018, p. 765.

article illustrated through Botswana, Australia and the UK that the application of the FATF Recommendations is generally rushed, which results in entropic legislative drafting practices. The high priority given to the FATF and imminent countermeasures have resulted in the flouting of traditional legislative drafting processes at the cost of the integrity of the statute book. This calls for the FATF to re-evaluate its mandate if it intends to have effective regulation of the international financial system within national legislative frameworks.

The FATF has morphed over time and continues to expand its mandate. Its evolution has led to its fragmentation, which has directly affected its domestication for its member states. It has developed compliance mechanisms, which impose countermeasures on non-compliant jurisdictions. Although this has formulated effective application of international standards, it has not taken the legislative process into account and the role of the legislative drafter in building legislative frameworks for development. It has emerged that the FATF has not incorporated legislative drafting processes within its obligations in order to ensure that when legislation is drafted, sufficient time and resources are applied to legal reforms for an effective legislative framework.

Technical compliance and effectiveness appear to deal with the main objective of following the money by certifying that all the structures and systems of the financial system are in sync. However, when both assessments are applied to outcomes, these affect the legislative process as they do not permit the legislative drafter to apply the functionality test to the legal principles during the drafting process. If technical compliance is dictated, then effectiveness cannot be demanded because technical compliance in different environments will breed divergent outcomes. It is therefore proposed that effectiveness should be the only method of assessment because it is enforceable in different environments. The application of effectiveness gives the legislative drafter the latitude to build functional legislative frameworks for compliance. The FATF Recommendations should apply modern legislative drafting principles to create the scope for the role of the legislative drafter to independently create the structures which work based on repetitive patterns of social behaviour.

The legislative drafter's role within the context of domestication is to ensure that the imposed regulatory mechanisms are appropriate for application and implementation in the national legal framework.[142] After all is said and done, legal rules, whether international or national, should be made and applied to facilitate practical solutions to human problems.[143] The theory of the relationship of the law to development is pertinent in promoting efficacy in building legislative frameworks.[144] The time to evaluate the FATF based on its impact on national legal frameworks is upon us. The FATF is a dynamic institution with influence and power. It is important that checks and balances are adopted because *fiat jūstitia ruat cælum*.

142 Xanthaki, 2014, p. 173.
143 Tshosa, 2001, p. 11.
144 Seidman & Seidman, 1994, p. 52.

European Journal of Law Reform 2020 (22) 3
doi: 10.5553/EJLR/138723702020022000003