Deliberative Democracy within Transgovernmental Networks - A Case Study of the Financial Action Task Force

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Abstract

In this thesis, I explain democratic deficits within the Financial Action Task Force ('FATF') on three grounds: (1) deliberations within the FATF are not protected by procedural rules of fairness sufficient for a democratic process; (2) the FATF does not respect the principle of reciprocity; and (3) non-profit organizations ('NPOs') cannot hold the FATF to overall democratic control. To defend my argument, I adopt deliberative democratic theory – critical theory's approach to democracy – as my conceptual framework to analyze the FATF as a transnational political unit. As such, I combine the principles of discourse theory[1] and also the substantive principle of reciprocity[2] both of which, I argue, are essential elements of deliberative democratic theory.

Dans ce mémoire, j'explique les déficits démocratiques du Groupe d'Action Financière ('GAFI') pour les raisons suivantes : (1) les délibérations dans le GAFI ne sont pas protégées par les règles procédurales nécessaires pour la justice; (2) le GAFI ne respecte pas le fondement de la réciprocité; et (3) les organismes à but non lucratif ne peuvent pas fournir de contrôle démocratique général sur le GAFI. Pour défendre mon argument, j'adopte la théorie de la démocratie délibératif – une approche essentielle à la démocratie – telle est mon analyse conceptuelle pour analyser le GAFI comme une unité politique transnationale. En tant que tel, je combine la théorie du discours[3] et le substantiel fondement de la réciprocité,[4] qui, je l'affirme, sont des principes essentiels de la théorie démocratie délibératif.

[1] Jürgen Habermas, *Between Facts and Norms*: *Contributions to a Discourse Theory of Law and Democracy*. (Cambridge: MIT Press, 1996).
[2] Gutmann, Amy, and Dennis Thompson *Democracy and Disagreement*. (Cambridge: Harvard University Press, 1996); see also "Deliberative Democracy Beyond Process" in James S. Fishkin and Peter Laslett ed, *Debating Deliberative Democracy* (Oxford: Blackwell Publishing, 2003).
[3] Habermas, *supra* note 1.
[4] Gutmann and Thompson, *supra* note 2.

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CHAPTER 1

1. Introduction:

In this thesis, I explain democratic deficits within the Financial Action Task Force ('FATF') on three grounds: (1) deliberations within the FATF are not protected by procedural rules of fairness sufficient for a democratic process; (2) the FATF does not respect the principle of reciprocity; and (3) non-profit organizations ('NPOs') cannot hold the FATF to overall democratic control. To defend my argument, I adopt deliberative democratic theory – critical theory's approach to democracy – as my conceptual framework to analyze the FATF as a transnational political unit. As such, I combine the principles of discourse theory[5] and also the substantive principle of reciprocity[6] both of which, I argue, are essential elements of deliberative democratic theory.

First, Habermas's discourse theory defines democracy by emphasizing deliberations among citizens that generate collective choice outcome, which is transformed into legitimate political authority through channels protected by procedural rules of fairness. In other words, according to the discourse theory, both the deliberations and procedural rules are essentials of deliberative democratic theory. Generating laws through deliberations among citizens is important because such a process of law generation gives the sense of solidarity to those bound by the laws. Procedural rules are crucial because they provide fair conditions in which deliberations progress on equal and free terms. In line with this free and equal participatory standard, I argue that the FATF Standards are not democratically legitimate because even if

[5] Habermas, *supra* note 1. See also Habermas, Jürgen *The Theory of Communicative Action I*: *Reason and the Rationalization of Society (*Boston*:* Beacon Press, 1984); *The Theory of Communicative Action II*: *Lifeworld and System (*Boston: Beacon Press, 1987).
[6]Gutmann, Amy, and Dennis Thompson, *supra* note 2.

all the affected interests[7] participate in deliberations that generate the Standards, there is no set of procedural rules to provide fair conditions within which deliberations can be restricted.

Second, the principle of reciprocity emphasizes the importance of justifying reasons for mutually binding laws. Accordingly, no law should be binding unless those that are affected by it or their representatives, have been given justifiable reasons.[8] Since, laws generated must be provided with justifiable reasons, the principle of reciprocity prevents autocratic regimes, which can be free to adopt mutually binding laws simply by satisfying procedural rules of fairness. To elaborate, the principle of reciprocity is a substantive principle of the deliberative democratic theory. This principle requires that a political argumentation that takes place within deliberation process be mutually acceptable by the participants to the deliberation.[9] In other words, those bound by laws must have mutually agreed to them. In order for the mutual agreement to exist, those affected or their representatives must be given reasons. The reasons must be justified; hence simply reason-giving does not suffice.[10] In accordance with this outline of deliberative democracy, I demonstrate that the FATF Standards do not respect the principle of reciprocity. Neither the FATF Members nor the Associate Members are provided with justifiable reasons for the drastic norms within the Standards. Reasons can only be justifiable if they satisfy the principle of reciprocity. .

Third, I explain how non-profit organizations ('NPOs') lack the overall ability to hold transnational networks such as the FATF to democratic control. Since studies on the NPOs have linked deliberations among citizens to the NPOs, it has been argued by scholars that the NPOs should also be able to democratize transnational governance even if transnational space

[7] Here I mean to say those that are affected or their representatives by the FATF Standards do not effectively contribute to the input such as the Associate Members and non-members. I will talk about the Associate Members in chapter 2.
[8] Here again 'affected' and their representatives.
[9] Two or more people who communicative, argument are, in effect, participating within a deliberation.
[10] Gutmann and Thompson, *supra*, note 2.

does not have a government style political system.[11] However, there are other studies on the role of NPOs' in authenticating democracy that illustrate how their role is problematic, as issue salience is the most important determinant in NPOs' decisions to contest transnational discourses.[12] In light of the issue salience, I demonstrate how although the NPOs have the ability to deliberatively democratize the FATF, their role in democratizing the overall Standards is limited. Accordingly, by building on the existing literature, I explain how the Standards do neither satisfy the procedural rules of fairness in line with the discourse theory nor the principle of reciprocity in line with substantive principles of justice. I demonstrate my point through an intensive single case study of the FATF.

Most of the previous studies on transnational democracy concentrated on major official international financial institutions. Therefore, my study is important because it explains democratic deficits within an informal transgovernmental network, in particular the FATF, through the critical theory to deliberative democracy. I demonstrate how the FATF can actually shrewdly obviate the democratic deficit problem by simply electing to devise *soft norms*[13] instead of formal rules that are ratified as binding international instruments. Soft norms are otherwise known as soft law and they are weaker than hard law in terms of obligation, precision, and delegation.[14] The FATF soft norms are officially non-binding, therefore allow a club of nations to agree to the terms, thereby satisfying the procedural rules in line with their Mandate. However, as I demonstrate further below, the FATF afterwards

[11] Dryzek, John S, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford: Oxford University Press, 2002).
[12] Alemdar, Zeynep. "Civil Society and Intergovernmental Organizations: Turkish Domestic Organizations Exercising Influence via the European Union." PhD thesis Order No. 3167861 University of Kentucky, 2005. Ann Arbor: *ProQuest.* Web. 14 Dec. 2015.
[13] Kenneth W. Abbott & Duncan Snidal, "Hard and Soft Law in International Governance" (2000) 54 INT'L ORG at 421, 422.
[14] *Ibid.*

pressures other countries, who have not in fact participated in the decision-making process, to accept it's Standards under the pretense that the norms are actually Recommendations.

2. Overview:

In Chapter 2, I introduce the problem of democratic deficit with the FATF. Thereafter, I explain how globalization plays a role in modern challenges to democracy. I review previous literature on the effects of globalization on transnational democracy. Furthermore, in Chapter 3, I discuss in depth the conceptual framework of deliberative democracy. I explain how scholars are divided on the ability of deliberative democratic theory to keep political systems to democratic control. Some scholars claim that deliberations are capable of making political systems more democratic. However, others argue that the ability to deliberate is a limited resource, hence only those capable can actually deliberate. Deliberations can be used to manipulate political argumentation. By agreeing with the latter camp, I explain how deliberations alone do not keep political systems to democratic control. In fact, deliberations must be conditioned within a set of procedural rules that provide fair and equal terms for the participants. I explain how Habermas's discourse theory revolutionizes the way we think of democracy and how deliberative democracy requires the aid of the positive law.

I further explain, how scholars such as John Rawls and his camp including Gutmann and Thompson, on the other hand, call for the inclusion of substantive principles of justice into a deliberative democratic theory they claim that deliberations should be restricted within substantive principles of justice such as the principle of reciprocity[15] and "public reason"[16] for a deliberative democracy to be attainable. However, some scholars argue how, restricting deliberations within substantive principles of justice, as Dryzek argues, would defeat the very

[15] Gutmann and Thompson, *supra*, note 2.
[16] Rawls, John. *A Theory of Justice*. Cambridge, (MA: Belknap Press of Harvard University Press, 1971).

purpose of democratic deliberations.[17] I explain how, according to Gutmann and Thompson, restricting the content of deliberations within substantive principles of justice would not, in any way, defeat the very purpose of deliberative democracy. Provisionality of substantive principles of justice would enable any future conflicts as to the right substantive principles of justice from arising. A substantive principle of justice that has been determined on a reasonable standard by the prevailing authorities could equally be changed or amended by future authorities through deliberations. In this way, even substantive principles of justice can be deliberated, and the purpose of deliberative democracy would not thus be defeated.

Similarly, I explain how if a deliberative democratic theory contained substantive principles of justice that could restrict the content of deliberations, the distorting influence of extra-constitutional agents[18] would not pose a problem. If a mutually binding law had to respect principles of substantive justice hence not simply satisfy formal procedural rules to be made into law then it would be difficult to enact unjust laws that would infringe the rights of minorities or less powerful transnational actors. Accordingly, I argue that whatever terminology the scholars use or however they separate substantive principles of justice from procedural rules of fairness in a deliberative democratic model, their argument leads to one result. As such, deliberative democratic theory requires that a political system should respect both the substantive principles of justice and procedural rules of fairness.

In Chapter 4, I use the conceptual framework of deliberative democracy that I explained in Chapter 3 to explore whether deliberations within the FATF are protected by procedural rules of fairness. I also examine whether the FATF respects the principles of reciprocity. Lastly, in chapter 5, I demonstrate whether NPOs, a type of CSOs, play a role in

[17] Dryzek, *supra*, note 11.
[18] Lindblom, Charles E. *Politics and Markets: The World's Political Economic Systems* (New York: Basic Books, 1977). According to Lindblom extraconstitutional agents consist of corporations, businesses and transnational actors. They are called extraconstitutional because national constitutions do not capture them.

keeping the FATF in compliance with the principle of reciprocity. Lastly, I conclude Chapter 5 by demonstrating the limited role of the NPOs in keeping the FATF to democratic control. Even though, the NPOs play a role in challenging transnational norms, which challenge brings the norms in conformity to the principle of reciprocity, I explain how this role is determined by the issue salience.

3. Research Methodology:

I conducted this study using a single case research method in order to test the critical theory's explanation of deliberative democracy within transnational space. The single case method allows me to look intensively at the existing problem – democratic deficits within transnational space – in the context of global AML/CFT regime. Besides, a single case study method has other important advantages over cross-case studies in that a single case method allows an investigator to test many hypotheses a bounded field.[19]There is more room for authorial intervention in a single case study. Nonetheless, the aim is not to empirically confirm or refute the existing hypotheses but rather to explain and elucidate deficits in democratic governance of the global AML/CFT regime by applying deliberative democratic theory.

The main limitation of this research study, however, consists of the outcome being dependent on a single example and hence may not be generalized in its application. Indeed, there are scholars who claim that single case studies are unreliable, subjective, biased, and loosely framed nongeneralizable theories. Also, single case studies have been critiqued as informal, dependent on too many variables, unpredictable, and concluding in casual determinism.[20] Although these scholars do not oppose single case studies per se, they are

[19] Ragin, Charles C, and Howard S. Becker. *What Is a Case? Exploring the Foundations of Social Inquiry*. (Cambridge: Cambridge University Press, 1992).
[20] Geddes, Barbara "How the Cases You Choose Affect the Answers You Get: Selection Bias in Comparative Politics" (1990) 2 Political Analysis at 131-150; Geddes, Barbara, *Paradigms and Sand Castles: Theory Building*

nevertheless critical of the single case study research.[21] In fact, in the fields of law and political sciences, research using a single case study has been described as being on the softer side of hard disciplines. Hence they have been relegated as nonsystematic, nonrigorous and nonpositivist. Therefore, the case study method suffers from high mistrust by the academic community in all disciplines including social sciences.

Some of the weakness of the case study method depends on the following issues posed according to Gerring: " (1) whether the goal of the research is hypothesis testing or hypothesis generating, (2) whether internal and external validities are prioritized (3) whether insight into casual mechanisms or casual effects is more valuable, (4) whether the scope of casual inference is deep or broad, (5) whether the population of cases under study is heterogeneous or homogeneous, (6) whether the casual relationship of interest is weak or strong, (7) whether useful variation on key parameters within the population is rare or common, and (8) whether the available data is concentrated or dispersed."[22]

Therefore, according to Gerring, a case study research methodology has its own merits and those that overly criticize it simply underestimate the method. A case study method allows a researcher to perform more qualitative research rather than quantitative.[23] There are in fact tools and ways of successful implementation of a case study methodology. In line with John Gerring's hypothesis, I employ a case study method. Therefore, my case study method does not utilize an interpretive case study that requires a descriptive task of gathering information through interviews, surveys, and so forth. Rather, I critically analyze the work of the FATF using principles of deliberative democracy.

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and Research Design in Comparative Politics (Ann Arbor: University of Michigan Press, 2003); King, Gary, Robert O. Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research*. (Princeton: Princeton University Press, 1994).

[21] Gerring, John. *Case Study Research: Principles and Practices* (New York: Cambridge University Press, 2007).

[22] *Ibid*.

[23] *Ibid*.

First it is necessary to define what a case study method entails. John Gerring defines a case study method in the following way: 'A case is a spatially delimited phenomenon observed at a single point in time and over some period of time'. A case consists of types of phenomenon that a researcher endeavors to explain. In my thesis, I accordingly use concepts developed by critical theory of deliberative democracy to explain the phenomenon described as democratic deficit within unofficial transnational political units.[24] The case study method allows me to elucidate the behavior of one political unit, namely the FATF. Temporal boundaries to my case study are assumed, which comprise a period between 1989 and 2015 – the establishment of the FATF up to the date of completion of this thesis. In addition to temporal boundaries, I have also utilized a *within-case analysis*, which allows me to analyze a variety of within-case evidence in an attempt to analyze one primary unit – the FATF.[25] Therefore, my analysis of within-case evidence comprises study of relationships between the countries of the North and South, other transnational political units, and the CSOs.

The *within-case single case* study allows my study to shed light on a problem associated with a class of cases in similar population – unofficial transnational political units that generate soft norms. Therefore, I intend to concentrate intensively on one particular case in order to better understand the democratic challenges within a class of similar cases. The reason why I have not chosen to carry out a *cross-case study* is that I intend to intensively concentrate on one particular phenomenon. Again, a case study method allows me to ascertain, as much as possible, the traits, phenomenon, and other qualities of a particular instance.[26]

[24] Gerring, *supra* note 21.
[25] Lipset, Seymour M, Martin A. Trow, James S. Coleman, and Clark Kerr, *Union Democracy: The Internal Politics of the International Typographical Union* (Glencoe: Free Press, 1956).
[26] Giddings, Franklin H "The Study of Cases" (1924) 2.5 *Journal of Social Forces* at 643-646.

Thus, the most important distinguishing feature about a case study method is that it relies on specific lens for its evidence, even if at times examining several cases whilst providing a general explanation applicable to those similar cases in its population. The single case study method underlying my thesis also allows, several observations rather than one or two, a range which would not have been possible with *cross-case study* method. To this end, I have identified three root causes shaping the failure of the FATF to achieve democratic legitimacy: (1) lack of a set of well-defined procedural rules; (2) disrespect for the principle of reciprocity; and (3) CSOs/NPOs involvement not ensuring the FATF Standards are democratically legitimate.[27]

I have chosen the specific case study, the FATF, because the FATF can be identified as a deviant and extreme instance compared to the population of similar cases, due to the FATF's Standards existing in the form of soft law. Nonetheless, the Standards strictly bind more than 180 countries of the globe. That spectrum of influence is why it is important to study the FATF on its own and, intensively. However, this special focus does not imply that I have not reflected and observed other cases from similar population. I will refer to these cases in passing, but the main focus will be on the FATF as it is substantially different in its governance mechanism than the rest of the transnational political units.

[27] Gerring, *supra* note 21.

CHAPTER 2

1. Stating the Problem:

The Anti-Money Laundering ("AML") regime was established as response to global illicit drug trafficking problems, which initially became as a US domestic problem.[28] For decades the US regarded illicit drugs such as cocaine, heroin and opium as evils that threatened its 'national security,' and only recently has redefined the drug problem as a 'public health' issue. So in 1971 the illicit drug problem reached its culmination point after which US president Nixon declared 'war on drugs'. This rhetoric was translated into the US prohibitionist policy, which enabled the US government to securitize the drug trafficking problem as a 'national security' issue in order to intervene militarily in the Andean region, the hub of illicit drug cultivation and production. After a long battle with the drug cartels, the US 'war on drugs' policy was only partially successful at best, because it did not eliminate the problem but rather distributed the drug cultivation and production into different countries in the Andean region.[29]

The major global implication of the US's domestic anti-drug policy was the establishment of the global AML regime through an intergovernmental agency in 1989, which became known as the FATF.[30] Consequently, with the US's initiative the first seeds of the follow-the-money approach were planted within transnational space, which involved identifying and seizing monies that are suspected to be proceeds of criminal activities, especially those connected with narco-trafficking. The follow-the-money approach was set up

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[28] Bruce M. Bagley, "Drug Trafficking and Organized Crime in Latin America and the Caribbean in the Twenty-First Century Challenges to Democracy" in Bagley, Bruce M, and Jonathan D. Rosen eds *Drug Trafficking, Organized Crime, and Violence in the Americas Today* (Gainesville: University Press of Florida, 2015) at 4.
[29] *Ibid*, pp. 4-14.
[30] *Financial Action Task Force Mandate*, 20 April, 2012, (2012), [FATF], online < http://www.fatf-gafi.org/media/fatf/documents/FINAL%20FATF%20MANDATE%202012-2020.pdf> (last accessed 15-07-2015).

with a view to implement the objectives envisaged by the *Vienna Convention*,[31] which was ratified by more than 180 countries. In other words, the FATF under its Mandate[32] enables better collaboration among its Members and Associate Members in order to combat money laundering, mainly from drug-related activities, whilst at the same time see through the proper implementation of the *Vienna Convention* and other international anti-drug trafficking instruments. [33]

Therefore, today the FATF generates global norms and controls the AML regime that comprises prevention of money-laundering, financing of terrorism, and prevention of financing of proliferation of weapons of mass destruction offences. Apart from the *Vienna Convention* 1988, the FATF also oversees the global implementation of the *Palermo Convention* 2000,[34] the *United Nations Convention against Corruption* 2003,[35] and the *Terrorist Financing Convention* 1999,[36] and where applicable the *Council of Europe Convention on Cybercrime* 2001,[37] the *Inter-American Convention against Terrorism* 2002,[38]

[31]*United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 19 December 1988, GA Res No. 42/111, (1988), [ECOSOC], online <https://www.unodc.org/unodc/en/treaties/illicit-trafficking.html; https://www.unodc.org/pdf/convention_1988_en.pdf>, (last accessed 2-11-15).
[32] The Mandate, *supra* note 30.
[33] *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, February 2012, FATF Recommendations, (2012), [FATF], online:< http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf>, (last accessed 2-11-15), *see* Recommendation 36.
[34]*United Nations Convention against Transnational Organized Crime*, 8 January 2001, GA Res No. A/RES/55/25, (2001), [UNGA], online < https://www.unodc.org/unodc/treaties/CTOC/ > (last accessed 2-11-15).
[35]*United Nations Convention Against Corruption*, 31 October 2003, GA Res No. A/58/422, (2003), [UNGA], online < https://www.unodc.org/unodc/en/treaties/CAC/> (last accessed 2-11-15).
[36]*International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, GA Res No. 38349, (1999), [UNGA], online: https://www.unodc.org/documents/treaties (last accessed 2-11-15).
[37]Council of Europe, *Convention on Cybercrime*, 23 November 2001, CETS No.185, (2001) [Council of Europe], online: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185> (last accessed 2-11-15).
[38]Permanent Council, *Inter-American Convention against Terrorist*, AG/RES. 1840 (XXXII-O/02), (2002), [OAS].online < http://www.oas.org/xxxiiga/english/docs_en/docs_items/agres1840_02.htm> (last accessed 2-11-15).

and the *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism* 2005.[39]

In the aftermath of the September 11th attacks in New York, the FATF convened to reassess its Mandate and the AML regime with a view to extend its norms to combating and countering of terrorist financing ('CFT'). Thus the AML regime was integrated together with the CFT regime and became known as the AML/CFT regime and currently representing the financial industry's global Best Practice Standards.[40] Henceforth, I refer to the AML/CFT regime as the Standards, and at times the two nomenclatures will be used interchangeably. Recently in 2008, the FATF extended their Standards' coverage to prevention of proliferation of weapons of mass destruction.[41] The Standards require that countries should have in place financial sanctions against countries that pose threats from proliferation of weapons of mass destructions when the UN Security Council calls for such an action.[42]

Therefore, the FATF was created with the Mandate to combat money laundering, later terrorist financing, and recently the prevention of proliferation of weapons of mass destruction. Its Mandate is as follows:

"To set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system." [43]

Initially, the FATF was established by the national Ministries of G7 countries and later expanded its membership to include 32 industrialized countries and two international

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[39] *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism*, 16 May 2005, CETS No. 198, (2005) [Council of Europe], online: < http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/141> (last accessed 2-11-15), *see* also Council of Europe *Convention on the Prevention of Terrorism*, 16 May 2005, CETS No. 196, (2005) [Council of Europe], http://www.coe.int/en/web/conventions/full-list/-/conventions/> (last accessed 2-11-15).
[40] Recommendation 5 *supra* note 33.
[41] Recommendation 7 *supra* note 33
[42] *Ibid.*
[43] Online: <http://www.fatf-gafi.org/pages/aboutus/ (last accessed 2-11-15).

organizations. It has been in operation since 1989 and set to continue until 2020, after which, if the FATF Members wish so, its Mandate can be renewed to operate further.[44] Currently, the FATF consists of a network of thirty four industrialized countries and two transnational organizations.[45] It also has two observer countries and many observer international organizations.[46] The FATF Members, the Associate Members, and the Observers meet three times a year through plenary sessions in order to make policy decisions and reforms as well as perform typologies exercises[47] concerning the combatting of money laundering, financing of terrorism and prevention of proliferation of weapons of mass destruction. It is posited that the FATF strengthens collaboration between the Members, the Associate Members as well as the global epistemic communities to preserve the integrity of the global financial system.[48] However, the FATF still maintains a club-like network, which does not support effective

[44] The Mandate, *supra* note 30.

[45] The Members are as follows: Argentina, Brazil, Canada, France, Germany, Belgium, Luxemburg, Switzerland, Denmark, Norway, Sweden, Kingdom of the Netherlands, Italy, Greece, Turkey, Japan, Peoples Republic of China, India, Australia, New Zealand, South Korea, Spain, Portugal, Finland, Russian Federation, Ireland, Iceland, United Kingdom, United States, Austria, South Africa, Singapore, Hong Kong, Mexico and European Commission, Gulf Co-operation Council, available at: http://www.fatf-gafi.org/pages/aboutus/membersandobservers/#d.en.3147 (last accessed 23-07-15).

[46] The Observer countries are: Malaysia and Saudi Arabia; The observer organizations are: African Development Bank; Anti-Money Laundering Liaison Committee of the Franc Zone (CLAB) [French]; Asian Development Bank; Basel Committee on Banking Supervision (BCBS); Commonwealth Secretariat; Egmont Group of Financial Intelligence Units; European Bank for Reconstruction and Development (EBRD); European Central Bank (ECB); Eurojust; Europol; Group of International Finance Centre Supervisors (GIFCS) [formerly the Offshore Group of Banking Supervisors - OGBS]; Inter-American Development Bank (IDB); International Association of Insurance Supervisors (IAIS);International Monetary Fund (IMF); International Organisation of Securities Commissions (IOSCO); Interpol, Interpol/Money Laundering[English]; Organization of American States / Inter-American Committee Against Terrorism (OAS/CICTE); Organization of American States / Inter-American Drug; Abuse Control Commission (OAS/CICAD); Organisation for Economic Co-operation and Development (OECD); Organization for Security and Co-operation in Europe (OSCE); Task Force on Money Laundering in Central Africa (GABAC); United Nations Office on Drugs and Crime (UNODC); United Nations Counter-Terrorism Committee Executive Directorate (UNCTED); The Analytical Support and Sanctions Monitoring Team to the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities; The Expert Group to the Security Council Committee established pursuant to resolution 1540 (2004); Panel of Experts to the Security Council Committee established pursuant to resolution 1718 (2006); Panel of Experts established pursuant to Security Council resolution 1929 (2010); The Al-Qaida and Taliban Sanctions Committee (1267 Committee); World Bank; World Customs Organization (WCO), available at: http://www.fatf-gafi.org/pages/aboutus/membersandobservers/#d.en.3147 (last accessed 23-07-15).

[47] Typologies exercises basically explain new ways and types of money laundering and financing of terrorism techniques.

[48] Kenneth S. Blazejewski, "The FATF and its Institutional Partners: Improving the Effectiveness and Accountability of Transgovernmental Networks," (2008) 22:1 Temp. Int'l & Comp. L.J at 4.

participation of Associate Members in its decision-making process, since the membership is not open to all.[49] It is reserved to only those countries that are strategically important.

The FATF membership consists of bureaucrats[50] from its Member countries (and two international institutions), who are not directly accountable to the electorate in their respective countries.[51] It is the bureaucrats of thirty four countries as well as the two Member organizations within the FATF that decide the content of the Standards. They are technocrats with substantial knowledge in the fields that concern the FATF's work.[52] These technocrats meet three times a year, through Plenary Meetings and discuss the Standards with a view to further revise or update them if need be. These norms then are implemented within nearly 180 countries in the world. Financial centers, banks and professional organizations such as law firms and, accountancy offices must comply with the Standards.[53]

However, I argue that the input into the Standards does not come from all those countries that should implement the regime and are thus affected by the Standards. In fact, it is only the thirty four most industrialized nations and two transnational organizations that decide the contents of the Standards.[54] I argue that this exclusivity makes the Standards democratically illegitimate because it is not decided through the effective participation[55] of the transnational affected interests or their representatives[56] within the FATF's deliberations. Let me explain further how the FATF generates its Standards and what implications it has on the transnational democracy.

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[49] The Mandate, *supra* note 30.
[50] The Mandate, *supra* note 30.
[51] Keohane, Robert O. "Accountability in World Politics" (2006) 29.2 *Scandinavian Political Studies* at 75-87. Generally speaking, Keohane defines accountability as an ability of the affected interests to constrain the authority of their representatives.
[52] Blazejewski, *supra* note 48.
[53] Recommendations, *supra* note 33.
[54] The Mandate, *supra* note 30.
[55] In line with the deliberative democratic theory that I explain in chapters 3 and 4.
[56] Here I mean to refer to the Associate Members and non-members.

The FATF produces its Standards through what is known as Recommendations,[57] henceforth used interchangeably. So far the FATF has issued the Forty Recommendations in 1990[58] and revised them in 1996,[59] and in 2003,[60] to address the issues of terrorist financing and most recently in 2012[61] to extend its coverage to prevention of proliferation of weapons of mass destruction. The FATF's Forty Recommendations are nonbinding but are meant to be persuasive policies aimed at combatting the problems related to the financing of organized crimes. Even though the Standards are drafted carefully with the language that uses *should*, one should not be beguiled by this choice of language. I argue that even though the choice of language only makes the Standards appear officially nonbinding, it is a misperception to see it that way because the FATF coerces countries,[62] in particular, the Associate Members and third countries, to strictly implement the FATF Standards.

Ann-Marie Slaughter explains that the FATF uses officially nonbinding language to enable the FATF Members to make decisions in flexible ways without the need for a lengthy ratification process associated with binding international legal instruments.[63] Kal Raustiala explains that the FATF Recommendations come as pledges; hence are different from hard law and do not possess the shallowness of softer norms. He posits that even though Recommendations come as soft law, they nevertheless require deep commitment from the

[57] The Mandate, *supra* note 30.
[58] *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, February 2012, FATF Recommendations, (2012), [FATF], online: < http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201990.pdf> (last accessed 23-07-15).
[59] *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, 1996, FATF Recommendations, (1996), [FATF], online: FATF < http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201996.pdf> (last accessed 23-07-15).
[60] *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, 2003, FATF Recommendations, (2003), [FATF], online: FATF < http://www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20-%2040%20Recommendations%20rc.pdf> (last accessed 23-07-15).
[61] Recommendations, *supra* note 33.
[62] Recommendation 6, *ibid*.
[63] Slaughter, Anne-Marie. *A New World Order* (Princeton: Princeton University Press, 2004).

pledgees. Besides the deep commitment, the implementation of soft law is controlled through the FATF peer reviews and typologies exercises.[64] Furthermore, some scholars claim that through soft law the FATF is able to produce high-quality norms at a lesser cost.[65]

The nonbinding document allows the thirty six FATF Members to make flexible decisions, and afterwards pressure nearly 180 countries to implement it using different methods such as coercion, and even blacklisting, a practice which has only recently been abolished.[66] Others argue that the technocrats representing the FATF Members and Member organizations, draft comprehensive policies that target the prevention of laundering money, financing terrorism, and proliferation. The FATF is able to edit and update the Standards or edit the Interpretative Notes on a regular basis. Therefore, the FATF enjoys the flexibility necessary in the Standards as criminals refine their ways of laundering money, financing terrorism or enabling the proliferation.[67]

The Standards provide a standard framework of measures that countries should domestically implement to protect their financial systems. Since countries have different legal cultures and systems, the FATF, to a limited extent, envisages that the Standards be adapted to reflect these differences. However, when adapting the Standards to national differences there are certain limitations that the FATF anticipates of countries. The FATF anticipates countries to focus on the following aims when developing domestic policies: (1) identifying risks; (2) pursuing money laundering, terrorist financing and the financing of proliferation; (3) applying preventive measures for different sectors; (4) creating new executive authorities with

[64] Kal Raustiala, "Form and Substance in International Agreements" (2005) 99 AM. J. INT'L L at 581, 581-85.
[65] Kenneth W. Abbott & Duncan Snidal, "Hard and Soft Law in International Governance," (2000) 54 INT'L ORG at 421, 422.
[66] Though the practice of blacklisting has been abolished, the FATF replaced it with Non-Cooperative Jurisdiction classification that can have some harsh implications.
[67] Blazejewski, *supra* note 48.

extra powers; (5) enhancing the transparency of ownership (especially beneficial) of companies and other legal persons; (6) assisting transnational collaboration on these issues.[68]

The Standards come together with Interpretive Notes as well as a Glossary. The FATF envisages that the norms developed by its Standards are implemented by all its Members as well as the Associate Members[69] that make up the FATF-Style Regional Bodies ("FSRB"). The Associate Members must make sure that the FATF Standards embodied in the Recommendations are rigorously implemented within their jurisdictions. The FATF controls the process of implementation through an annual self-evaluation process among both the Members and Associate Members. The annual self-evaluation process allows the Members and the Associate Members to prepare reports on compliance levels of respective countries. Further, the peer evaluation process, whereby the Members and the Associate Members evaluate each other, oversees the compliance with the regime.[70] The FATF can sanction non-compliance.[71] With regards to its Members, this punitive action could range from requiring a progress report to as drastic a measure as suspension from the FATF membership.[72] In relation to the Associate Members and the third countries, the FATF uses Non-Cooperative Countries and Territories classification to sanction that country.[73]

One of the most important objectives of the Standards is that it requires countries to ensure criminalization of money laundering from the widest range of predicate offences on the basis of the *Vienna Convention* and the *Palermo Convention*.[74] The Standards require

[68] Recommendations, *supra* note 33.
[69] The Mandate *supra* note 30.
[70] *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems*, February 2013, FATF Report, (2013), [FATF], online <http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf> (last accessed 23-07-15).
[71] Recommendation 6, *supra* note 62.
[72] *Ibid*.
[73] *Ibid.*
[74] Recommendation 3, *supra* note 33.

countries to review the adequacy of their domestic laws concerning NPOs and bring these laws under compliance with the Standards, as it has been suggested by the FATF that these entities are vulnerable to abuse by terrorists.[75] According to the Standards, terrorist organizations can pretend to be legitimate NPOs, or exploit the legitimate NPOs for the purposes of terrorist financing, or conceal the clandestine diversion of funds for terrorism purposes, though the funds originally were intended for legitimate purposes by the NPOs.[76] This type of exaggeration of danger to NPOs has serious implications on the NPO sector because the changes in law as required by the Standards interferes with the fundamental rights of the legitimate NPOs.

The Standards require a development of a risk based approach ('RBA') in countries implementing the Standards.[77] Accordingly, the RBA should be the essential foundation in combating money laundering, terrorist financing, and proliferation of weapons of mass destruction. Under the RBA, some countries may have tighter measures and others less so, depending on the risk that a particular country is faced with.[78] The RBA envisages countries to ensure better domestic and transnational cooperation and collaboration by ensuring that appropriate state institutions such as Financial Intelligence Units ('FIU') are created and are given extra powers if need be.[79] The Standards envisage that some countries are under higher-risk from terrorist financing. Therefore, the Standards require financial institutions apply more enhanced Customer Due Diligence ('CDD') measures when dealing with the higher-risk countries. Although the Standards recommend countries to take countermeasures[80] proportionate to the risks, proportionality test is not provided. Financial institutions and countries are nonetheless expected to be ready and equipped to apply effective

[75] Recommendation 8, *supra* note 33.
[76] *Ibid*.
[77] The Mandate, *supra* note 30.
[78] Recommendation 1, *supra* note 33.
[79] Recommendation 2, *supra* note 33.
[80] Financial sanctions.

countermeasures without relying on the FATF's aid, if they are posed with such contingencies from and within higher-risk countries.[81]

Furthermore, the Standards necessitate countries to create special law enforcement authorities that should have unlimited and unrestricted access to demand, obtain, and disseminate information in order to be able to carry out their investigations of money laundering, financing of terrorism and proliferation.[82] I contend that the wording of the Standards is constructed in such a way that the use of such power does not entail the law enforcement authorities to conform to the privacy laws.[83] Another serious concern relates to the fact that special law enforcement agencies are given wide powers to confiscate, seize and freeze property that has not yet been proven to be linked to a specific terrorist activity or money laundering predicate, which is contrary to the Universal Declaration of Human Rights.[84] Under the Standards his property can be confiscated, frozen, and seized even though his guilt has not been proven, if the special authorities suspect that his property is either the proceeds of criminal activities or potential funds for financing of terrorism and proliferation. The exercise of this authority also extends transnationally.[85] These gross violations of the UNDH articles amounts to also the disrespect of the principle of reciprocity.

Likewise, the Standards enable transnational confiscation, freezing, seizure of property, and assets as well as arrest of individuals suspected to be linked to criminal or terrorist activities without strictly complying with the dual criminality requirement. Dual criminality requirement entails that in order to make a request of confiscation, freezing or

[81] Recommendation 19, *supra* note 33.
[82] *See* for example Articles 8 and 10 of *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, CETS No. 5, (1950), [Council of Europe]; *see* also Article 12 of the *Universal Declaration of Human Rights*, GA Res No. 217 (III), 3rd Sess, Supp No 13, UN Doc A/810, (1948), [UNGAOR].
[83] *Ibid.*
[84] *Ibid*, articles 9, 10, and 11 of UDHR.
[85] *Ibid*.

seizure of property or arrest of individuals the foreign authorities establish that the basis of their request is classified in the same class of offences in both jurisdictions. As an illustration, a foreign authority can only request to confiscate property suspected to be as a result of tax evasion, if that tax evasion offence is also classified as an indictable offence in the jurisdiction where the property is located. However, under the Standards that requirement is relaxed. Countries can therefore make such requests even if a particular offence in one country is classified as an indictable offence, while in another only a summary offence.

Therefore, I contend that the FATF suffers from democratic deficits contrary to what Blazejewski argues namely regardless of the availability of different mechanisms of accountability through which the Associate Members can restrict the FATF Members. Grant and Keohane explain that the problems with accountability can be resolved by identifying different mechanisms of accountability in transnational fora, which consist of the following: reputational, supervisory, and fiscal. All these can be relevant in transnational space.[86] In consequence, Blazejewski argues that the FATF has resolved its accountability flaws by partnering with other transnational institutions. In particular, Blazejewski claims that the FATF was able to accomplish this because the represented are able to hold the FATF accountable indirectly through the FATF's close collaboration with other transnational organizations.[87] In addition to that indirect accountability, Blazejewski argues the FATF has allowed much more participation from its FSRBs since 1998.[88] Thus he argues, the FATF Recommendations are produced through direct participation of the Associate Members and nonmembers[89]

[86] Keohane, *supra* note 51.
[87] Blazejewski, *supra* note 48.
[88] *Ibid*.
[89] *Ibid*.

Nonetheless, the abovementioned mechanisms of accountability do not restore the effectiveness of direct accountability of the representatives to the global electorate. Electorate at nation state level are not capable of sanctioning the representatives at transnational space for any illegitimate use of authority in transnational space. Representatives will not be under constraint by the electorate, as the latter will not be able to reelect the transnational representatives.[90] In other words, the absence of a constraint that entails reelections of the representatives creates problems for democracy in transnational space, if we anchor transnational politics to conventional representative democracy. Ann-Marie Slaughter rightly argues that transgovernmental networks are a network of exclusive organizations which are not transparent and do not include those that are affected by their decisions.[91]

However, I argue that the FATF's biggest democratic illegitimacy stems from two other root causes: the lack of proper procedural rules and the disrespect of the principle of reciprocity. First, the FATF is not deliberatively democratic because it does not provide fair conditions within which deliberations and hence decision-making can take place. I claim that participation at the FATF decision-making process does not make the FATF Standards more democratic, because the participation is not effective. Second, the Standards violate substantive principles of justice, especially the principle of reciprocity.[92] According to Gutmann and Thompson reciprocity is the core principle of democracy. Reciprocity holds that citizens must provide justifications for the mutually binding laws that they collectively enact. The aim of the deliberative democratic theory that takes reciprocity seriously is to help citizens agree by providing justifications to each other. Justification does not merely entail providing each other with reasons that others just happen to accept. It entails providing

[90] Ruth W. Grant & Robert 0. Keohane, "Accountability and Abuses of Power in World Politics" (2005) 99 AM. POL. SC. Rev at 29.
[91] Anne-Marie Slaughter, "The Accountability of Government Networks|" (2001) 8 IND. J. GLOBAL LEGAL STUD at 347, 363; *A New World Order* (Princeton: Princeton University Press, 2004)
[92] In line with Amy Gutmann and Dennis Thompson's theory, *supra* note 2.

reasons that go on to justify them. The process of justification is necessarily a substantive issue and not merely a procedural standard. Therefore, mutual justification requires reference to moral and political values. I posit that this makes both the output and the input of the Standards democratically illegitimate.

Nearly180 countries that implement the Standards do not participate effectively in the decision-making process of the Standards. The fact that the Standards are a soft law, and therefore not binding, but only recommended, is a disguise. I thus argue that even though in theory the Associate Members as well as the third countries *should* implement the Standards, in practice they *must* make sure to implement them, contrary to the argument made by Blazejewski.[93] The Associate Members have no other choice but to implement the Standards[94] since the FATF uses coercion in the form of sanctions against non-compliance.[95] Developing countries thus are under increasing pressure from the FATF because implementing the Standards has financial implications on their financial systems.

Accordingly, since the FATF's Mandate does not set out fair procedural rules in relation to its Associate Members, and the nonmembers, the FATF Standards cannot be democratically legitimate. Even if the FATF has enabled participation of all those affected or their representatives and hence claim that the input in the Standards is democratic, the participation still suffers from democratic deficits because it lacks the protection of rights and obligations under the procedural fairness rules required to protect effective input for effective democracy. The source of democratic problems associated with the FATF lies in the phenomenon known as globalization. Let me explain how.

[93] Blazejewski, *supra* note 48.
[94] As I will demonstrate in Chapter 5.
[95] Recommendation 19, *supra* note 33.

2. Globalization and global governance:

Due to 'thickening' of globalization, we no longer have a sovereign nation state in the Westphalian sense.[96] Political and economic interdependence of nation states on each other has redefined the global political systems of governance. Therefore, the isolated nation state governments that are separated from each other territorially are currently becoming a political concept and a new system of governance that defies borders is emerging.[97] This global governance has occasioned a convergence of policies and norms at transnational level and has resulted in the formation of new political actors that set the global agendas.[98] Therefore, nation states are no longer the main actors in policy decisions. Instead, political actors such as multinationals, transnational organizations, transgovernmental agencies and CSOs have emerged as important policy contributors [99]

In fact, the notion of a nation state has changed to a substantial extent as a result of globalization and emergence of global political actors. A nation state can no longer be considered as a unitary actor, but rather a unit that collaborates in a complex process that incorporates multitudes of global actors and associations, whether governmental or non-governmental.[100]

Here I will briefly introduce the nature and role of transgovernmental coalitions in global politics to set the stage for the discussion of deliberative democracy in the next sections. So what is a transgovernmental agency and why are they established? Keohane and

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[96] Anne-Marie Slaughter, *supra* note 91; *see* also Dahl, Robert A. 1956. *A Preface to Democratic Theory*. (Chicago: University of Chicago Press, 1956); *Democracy and its Critics* (New Haven: Yale University Press, 1989).
[97] Rosenau, James N, and Mary Durfee, *Thinking Theory Thoroughly: Coherent Approaches to an Incoherent World* (Boulder: Westview Press, 1995).
[98] *Ibid*.
[99] Keohane, Robert O, and Joseph S. Nye, "Transgovernmental Relations and International Organizations" (1974) 27.1 *World Politics* at 39-62; Keohane, Robert O. *Power and Governance in a Partially Globalized World* (London: Routledge, 2002).
[100] Smith, Jackie, Charles Chatfield, and Ron Pagnucco, *Transnational Social Movements and Global Politics: Solidarity Beyond the State* (Syracuse, N.Y: Syracuse University Press, 1997).

Nye argue that governmental sub-units coordinate their policies by forming transgovernmental coalitions in order to influence the policies of their respective governments. [101] The transgovernmental agencies provide more enhanced ways of communication among transnational actors. Keohane and Nye posit that the two most crucial reasons for the establishment of transgovernmental agencies, is, first, that transnational actors can collaborate directly with each other, and, second, two or more transnational actors sharing similar interests can build an alliance to influence the transnational politics.[102] Transnational organizations including transgovernmental networks operate independently of their member states. They influence global politics through their ability to make impersonal rules, which they use to regulate, constitute and construct the social world. In other words, the transnational organizations including transgovernmental networks reshape new models of global social interaction.[103]

Equally, transgovernmental agencies can influence domestic nation state policies through transgovernmental collaboration.[104] Transgovernmental collaboration can take place between domestic bureaucrats at any level, whether through ministers, regulators, police, intelligence agents, or even the members of the judiciary.[105] Also, transnational coalitions provide a platform for developing transnational actors' knowledge and expertise at a particular field. In other words, the transgovernmental agencies influence nation states' preferences by providing an opportunity to gain better knowledge. Transgovernmental coalitions redefine problems and provide venues for better solutions.[106]

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[101] Robert Keohane and Joseph Nye, *supra* note 99.
[102] *Ibid*.
[103] Barnett, Michael N, and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca: Cornell University Press, 2004).
[104] Simmons, Beth A, and Richard H. Steinberg, *International Law and International Relations* (Cambridge: Cambridge University Press, 2007).
[105] Anne-Marie Slaughter, *supra* note 91.
[106] Haas, Ernst B, *When Knowledge Is Power: Three Models of Change in International Organizations*. (Berkeley: University of California Press, 1990).

In addition, nation states use transgovernmental coalitions to institutionalize their activities, such as resolving international issues and reaching consensus.[107] Therefore, transgovernmental coalitions become useful devices for the nation states in this respect.[108] Transnational agencies thus, have been claimed to benefit the common good.[109] Some observers contend that transnational politics is a system made up of order through the international law and organizations.[110]

Moreover, there is a consensus among most scholars that the conventional aggregative model of democracy should not be the model of democratic theory to analyze transnational governance. According to Robert Dahl, today's political systems of government have grown too large, and so it has become almost impossible to hear all those affected by the decisions.[111] Therefore, today's aggregative model of democracy has been modified to suite the demands of today's political systems. In effect, representative democracy is the model of democracy practiced by almost most of the major liberal democratic nations.[112] However, within transnational space there is no global *demos*, hence anchoring it to representative democracy may not be helpful. Besides, within transnational space, the societal actors are individual countries and not people.[113] By analogy, Dryzek claims that it is possible to authenticate sufficient democratization within transnational governance by not analyzing transnational governance in the same way as nation state government model.[114]

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[107] Abbott, Kenneth, and Duncan Snidal, "International 'standards' and International Governance" (2001) 8.3 *Journal of European Public Policy* at 345-370.
[108] Rosenau, *supra* note 97.
[109] *See* Mitrany, David, *The Functional Theory of Politics* (London: Published on behalf of] London School of Economics & Political Science [by] M. Robertson, 1975); *see* also Ashworth, Lucian M, and David Long. *New Perspectives on International Functionalism* (New York: St. Martin's Press, 1999).
[110] Ruggie, John, "Multilateralism: The Anatomy of an Institution," (1992) 46 International Organization at 561–98; *see* also Rosenau, *supra* note 97.
[111] Robert A. Dahl, *supra* note 96.
[112] Mill, John Stuart, "Tocqueville on Democracy in America" in Gertrude Himmelfarb ed., *John Stuart Mill, Essays on Politics and Culture* (New York: Doubleday, 1962 [1835]) at 171–213.
[113] Held, *supra* note 112.
[114] Dryzek, *supra* note 11.

In consequence, there is a general consensus within scholarly community that the most suitable model of democratic theory appropriate for democratizing transnational space is the deliberative democratic model. This is due, as I mentioned earlier, to the fact that transnational space lacks a unified *demos* and a nation state style institutional frameworks that are protected within constitutional structures. Transnational space does not have any territorial boundaries. So there cannot be a question of transnational sovereignty as in conventional nation state sense.[115] According to Dryzek, deliberations are capable of democratizing transnational political units because they do not require identity, nor national boundaries. John Dryzek claims that deliberations are more conducive to democratizing transnational political governance.[116] He claims that governance is different from government. Governance is a collection of political units networking with each in order to solve common problems. So transnational political system is a collection of governance.

Conversely, it is argued that since transnational governance does not have constitutional structures that guarantee rights and obligations of the affected interests or their transnational representatives, it is impossible for transnational political units to be referred to as democratic.[117] I agree that the transnational politics is anarchical where the most important priority for nation states is their survival in the face of hostilities.[118] Accordingly, since there is no global *demos* who can participate in global elections, leaders of transnational institutions are elected by nation state executives who cannot act as representatives of nation state demos. These representatives in the transnational fora operate one step removed from the electorate.[119] In addition to that, although deliberations have value in democratizing political

[115] Held, *supra* note 112; *see* also Dahl *supra* note 96.
[116] Dryzek, *supra* note 11.
[117] *See* generally Philip Alston, "The Myopia of the Handmaidens: International Lawyers and Globalization" (1997) 8 EUR. J. INT'L L at 435; Anne-Marie Slaughter, *supra* note 91.
[118] Waltz, Kenneth. 1979. Theory of International Politics. Reading, Mass.: Addison-Wesley.
[119] See generally Held, David. 1987. *Models of Democracy*. Cambridge: Polity; Held, David. 1995. *Democracy and the Global Order: From the Nation State to Cosmopolitan Governance*. Cambridge: Polity; *See* also Dahl *supra* note 96 and Ruth Grant and Robert Keohane, *supra* note 90.

systems, simply deliberating does not suffice. Deliberations must also be protected within a set of procedural rules as well as substantive principles of justice.[120]

To resolve the democratic deficits within transnational space, David Held and others propose a long list of procedural and substantive changes to transnational political units in order to establish a 'cosmopolitan democracy'.[121] Some of the changes that Held proposes are regionalization; cross-national referenda; international courts with stronger discretion; a global legal system; a global parliament; stronger international economic institutions that are substantially intervened and controlled politically in order to secure basic incomes for citizens; control of investment instruments through application of social criteria; and military authorities that in the longer run would lead to demilitarization. Held's democratic model for a global democracy takes its roots from the conventional model of nation state democracy because he emphasizes the importance of fundamental liberal democratic canons.[122] In other words, the canons of democratic principles that Held acknowledges as essential require that democracy can exist only within governments and hence not within other types of political units that exist in governance.[123]

By analogy, I will explain in Chapters 3 that, deliberations are not capable of democratizing political units unless deliberative democratic theory contains both procedural rules and substantive principles of justice. Since neither of these is fully established within transnational space, especially in the FATF context, deliberative democratic model cannot authenticate democracy within deliberations in transnational political units such as the FATF.

[120] Habermas, *supra* note 1.
[121] *See* Archibugi, Daniele, and David Held, *supra* note 112.
[122] Held, 1995, *supra* note 123.
[123] *Ibid* p.235.

Conclusion:

In conclusion, in this chapter I briefly introduced the problems with the FATF Standards. In particular, I explained how the FATF's governance suffers from democratic deficits when anchored to the deliberative democratic model because neither the input nor the output of the Standards can be democratically legitimised. The input of the Standards cannot be democratic because the FATF Mandate does not enable effective participation of the affected interests or their transnational representatives within deliberations that generate the Standards. In order for the participation to be effective, deliberations must be protected within a set of procedural rules as I will explain in Chapter 3.

I also explained how the output of the Standards suffers from democratic deficits because it does not conform to the principle of reciprocity, as I will explain in Chapter 3. As an illustration, the Standards require countries to provide executive branches with unrestricted and unlimited access to obtain and disseminate information. The FATF requires countries to enable special law enforcement authorities to transnationally confiscate, freeze and seize property without having to link it to a specific criminal activity or an act of terrorism. Additionally, I pinpoint how the RBA[124] creates different standards by which different countries are treated. Countries will be treated differently depending on the objective perspective of whether a country is deemed a higher-risk. Moreover, I briefly summarized how the NPO[125] sector is also restricted because the Standards put unnecessary pressure on the NPOs by considering them as a vulnerable sector that can easily be abused by terrorist organizations.

I also explained the causes of transnational democratic deficits. In particular, I explained that the changes to the global political units are brought about by the 'thickening' of

[124] Risk Based Approach.
[125] Non-Profit Organization.

globalization, which has rearranged the traditional nation state architecture. In line with thickening globalization, I posited that we no longer have nation states acting unitarily as sovereign nation states, but rather through collaboration with other nation states as well as with myriads of new political actors. Transnational political units have become important venues for global governance. Therefore, these changes raise some important questions about democracy. Scholars are divided into as to whether transnational space suffers from democratic deficits.

Those that claim transnational democracy exists argue that transnational governance must be anchored to the deliberative democratic model more than any other model of democracy. According to these scholars, the deliberative democratic model defies borders, regional *demos*, and even constitutional structures, because the essential feature of the model is deliberation. Therefore, they claim that since transnational norms are generated through deliberations, transnational democratization can be authenticated as it stands. However, in Chapter 3 I explain how transnational governance cannot democratically be legitimised even if we anchor it to the deliberative democratic model because deliberations that are not restricted within a set of procedural rules or the principles of justice, can be manipulated

Finally, I explained briefly how the Standards' input cannot be democratically legitimised due to its failure to include effectively all the affected interests, namely the transnational representatives. Besides that, I pointed out how the output of the Standards cannot be democratically legitimised due to its interference with fundamental rights of the affected interests or their transnational representatives.

CHAPTER 3

1. A conceptual framework – deliberative democracy:

In this chapter, I explain whether deliberations are capable of democratizing political units. The first reference to the concept of deliberations as a democratic device was made in the 1980s by Joseph Bessette in the context of an interpretation of the US constitution within the US Congress.[126] Later, deliberations within judiciary were emphasized.[127] So what is deliberative democracy? How can it keep political units answerable to democratic control? The most crucial feature of deliberative democracy is that actors participating in deliberations are open to be persuaded by argumentation of other actors and hence change their minds and their preferences as a result of reflections induced by these deliberative practices. The persuasion cannot be coerced or threatened. It must be based on reasoned alternative argumentation which participants with their free will accept or reject.[128]

It has been claimed that deliberations are capable of keeping political actors to democratic control, especially in transnational space. In particular, it is suggested that deliberations in the form of *contestation of discourses* are conducive to authenticating democracy.[129] Likewise, others have argued that it is important to reach decisions on consensual basis in transnational space, especially when matters such as environment are concerned. Otherwise, it is impossible to agree on controversial matters. More knowledgeable actors should be able to decide on behalf of less knowledgeable actors. The less knowledgeable actors can be provided with argumentation.[130] So long as deliberations are not

[126] Bessette, Joseph M, "Deliberative Democracy: The Majoritarian Principle in Republican Government" in Robert A. Goldwin and William A. Shambra eds *How Democratic is the Constitution?* (Washington: American Enterprise Institute, 1994) at 02–16.
[127] Rawls, John, "The Idea of an Overlapping Consensus" (1987) 7 Oxford Journal of Legal Studies at 1–25. 1989.
[128] Dryzek, *supra* note 11.
[129] Dryzek, *supra* note 11.
[130] Ian Shapiro, *Democratic Justice* (New Haven: Yale University Press 1999) pp. 12, 80-1, 92, 116, and 132.

negative sum deliberations that can have significant costs and are a waste of time, they can be valuable to democracy.[131]

Other scholars argue against the apparently inherent democratic value of deliberations by claiming that all such deliberations can be manipulated. According to this argument, difference in capacities among the deliberators can distort the democratic authenticity of deliberations.[132] The claim is based on the assumption that because of the wide difference in deliberative capacities of deliberators, especially within liberalism, deliberative democracy is illusory. However, others simply consider that it should be the job of the parliament to deliberate, as they are the most able.[133] These arguments rest on the common assumption that it is impossible to deliberate across a wide range of differences in power, status and material capabilities of political participants engaged in deliberations.[134] Nevertheless, deliberations across difference have been shown to work fine.[135] It is possible to deliberate effectively even across great differences through contesting discourses.[136] Therefore, difference is welcomed in deliberations. Without difference, there would be no effective deliberation.

Although deliberations across difference have been shown to work fine, the actual practice of deliberations can be turned into a strategic device to reach certain end goals

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[131] Ian Shapiro "Optimal Deliberation?" in James S. Fishkin and Peter Laslett eds *Debating Deliberative Democracy*, (Cornwall: Blackwell Publishing, 2003) at 121; *see*: for general discussion: Ian Shapiro, *Democratic Justice* (New Haven: Yale University Press 1999) pp. 12, 80-1, 92, 116, and 132.

[132] See generally Lynn Sanders, "Against Deliberation" (1997) 25 Political Theory at 347–76; Young, Iris Marion, "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship" (1989) 99 Ethics, at 250–74, and *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1992); "Social Groups in Associative Democracy" (1996) 20:529 Politics and Society, at 34; and "Communication and the Other: Beyond Deliberative Democracy" in Seyla Benhabib ed, *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press, 1997) at 120–35; "Difference as a Resource for Democratic Communication" in James Bohman and William Rehg eds, *Deliberative Democracy* (Cambridge: MIT Press, 1998) at 383–406; "Inclusive Political Communication: Greeting, Rhetoric and Storytelling in the Context of Political Argument." Paper presented at the Annual Meeting of the American Political Science Association, Boston. (p.190); *see* also Young, Oran R, *International Governance: Protecting the Environment in a Stateless Society* (Ithaca: Cornell University Press, 1994).

[133] Estlund, David. 1993 "Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence," (1993) 71: 1437 Texas Law Review, at 77.

[134] Sanders *supra* note 132; *see* also Young *supra* note 131

[135] Mill, *supra* note 113.

[136] Dryzek, *supra* note 11.

narrowly controlled by deliberators. This skillful manipulation is especially true for transnational space because deliberations become more strategic as transnational politics is described as a matter of survival of the fittest.[137] A strategic interaction is defined as a situation where the result of one participant's choice depends on the choice of another participant to the deliberations.

As an illustration, A's decision to ratify an international instrument will depend on what B is willing to offer A in return; hence A must ratify the instrument to enable B to offer that which A wants. The choices of both the A and B depend on each other's actions. This is how the rational choice theorists regard the deliberative process. The rational choice theorists assume that individual preferences and views do not change through deliberations, because speech, especially political, is not capable of changing the preferences of another. According to Austen-Smith,[138] the only role that a political speech plays is to provide the listener with information. Since, political speech in deliberations is uttered with strategic purposes, hence the participants to deliberations use argumentations selectively in order to convey information that they want the listener to have but not that which the speaker does not favor.

The listeners themselves as rational strategists, realize this narrative sophistication and in effect select the part of the information that is the most beneficial from their perspective. In this fashion, the listeners will choose which information to believe and which not to.[139] Austen-Smith claims that the speech-maker does not get punished generally for misinformation, even though such misinformation in deliberations have been shown to be costly. [140] However, the misinformation is later corroborated hence the speech-maker's lies

[137] Austen-Smith, David, "Information Transmission in Debate" (1990) 34 American Journal of Political Science, 124-52; "Strategic Models of Talk in Political Decision-Making" (1992) 13 International Political Science Review at 45–58; *See* also William H. Riker. 1987 "Asymmetric Information and the Coherence of Legislation" (1987) 81 American Political Science Review at 897–918.
[138] *Ibid*, Austen Smith.
[139] *Ibid*.
[140] Here I mean to say costly because misinformation can be damaging to reputation.

are brought to surface sooner or later in national politics. Consequently, in national politics the cost of misinformation is burdensome.[141] However, the same mechanism of accountability may not be true for transnational public officials as they take their decisions anonymously, so even if lies are brought to surface, there would be no one to blame. Besides, the fact that transnational public officials are not directly accountable to the national electorate further exacerbates the tendency to deliberate strategically in transnational space, even if it means supplying misinformation.[142]

While, strategic political interaction in deliberations certainly reduces the democratic value of deliberations,[143] the concept known as communicative rationality helps to endorse deliberative democracy, especially in transnational space.[144] Additionally, some studies indicate that the role of deliberations does not only convey information about certain issues, but also curbs strategic interaction.[145] If the domain of preferences that can be deliberated is restricted,[146] preferences that are rightly determined prior to political interaction do not change in the context of deliberative interaction.[147] Consequently, I argue that deliberations are not capable of democratically controlling transnational political units unless they are restricted within procedural rules of fairness and substantive principles of justice.

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[141] Mackie, Gerry, "Models of Democratic Deliberation." 1995 Paper presented to the Annual Meeting of the American Political Science Association, Chicago; "Science against Democracy: The Aggregation Model" 1998 Unpublished paper, University of Chicago; "All Men are Liars: Is Deliberation Meaningless?" in Jon Elster ed, *Deliberative Democracy* (New York: Cambridge University Press, 1996) at 97–122.
[142] *Ibid*.
[143] *Ibid*.
[144] Vanberg and Buchanan, Brennan, Geoffrey, "Politics with Romance: Towards a Theory of Democratic Socialism," in Alan Hamlin and Philip Pettit (eds.), *The Good Polity: Normative Analysis of the State*. (Oxford: Basil Blackwell, 1989) at 49–66; Buchanan, James M, "Then and Now, 1961–1986: From Delusion to Dystopia" (1986) Paper presented at the Institute for Humane Studies, George Mason University; Vanberg, Viktor, and James M. Buchanan, "Interest and Theories in Constitutional Choice," (1989) 1 Journal of Theoretical Politics at 49–62.
[145] *Ibid*.
[146] *Infra*.
[147] Claus Offe, "Micro-Aspects of Democratic Theory: What Makes for the Deliberative Competence of Citizens?" in Axel Hadenius (ed.), *Democracy's Victory and Crisis* (Cambridge: Cambridge University Press, 1997) at 81–104; Offe, Claus, *Contradictions of the Welfare State*. Cambridge, (Mass: MIT Press; 1984.); "New Social Movements: Challenging the Boundaries of Institutional Politics," (1985) 52 Social Research at 817–68.

Crucially, however, critical theorists were among the first democratic scholars to promote deliberations within larger publics.[148] Restricting the venue[149] of deliberations is necessary because the capacity to deliberate is a limited resource and thus not everybody can deliberate so reasons of economy dictate that most issues and occasions cannot and should not receive this sort of treatment. However, it is argued that only great crises of the state include an all people deliberations.[150] There have been those that have argued that deliberative practice should be restricted to constitution-making as a matter for specification informed only by moral and legal philosophy.[151] Some have emphasized the requirement of deliberations in the legislature.[152] It has been claimed that since democratic deliberations can only occur among equals when participants regard one another as equals, deliberations must be conditioned so as to provide a fair playing ground. Therefore, deliberative democracy requires commitments to a set of substantive liberal political principles.[153]

So, for critical theorists[154] individual citizen participation in deliberations is as important as in constitution-making. But the most important factor in the value of deliberations to democracy comes from restricting the content of deliberations so that more resourceful deliberators do not manipulate the less resourceful actors within deliberations. To this end, the deliberative function of the US Constitution lies not in the opportunities it

[148] Sunstein, Cass, *The Partial Constitution*. Cambridge, (Mass.: Harvard University Press, 1993).
[149] Venue here means place where deliberations take place, such as the official state institutions or general public. It is also divided into two: the weak public sphere (non-official venue) and the strong public sphere (official venue).
[150] Ackerman, Bruce. 1991. *We the People, i. Foundations*. Cambridge, Mass.: Harvard University Press.
[151] *Ibid*.
[152] Joseph Bessette, supra note 125; see also Uhr, John, *Deliberative Democracy in Australia*. (Melbourne: Cambridge University Press, 1998).
[153] Cohen, Joshua. 1998 "Deliberation and Democratic Legitimacy" in Alan Hamlin and Philip Pettit (eds.), *The Good Polity: Normative Analysis of the State* (Oxford: Basil Blackwell, 1998) at 17–34; "Procedure and Substance in Deliberative Democracy" in Seyla Benhabib ed, *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press, 1996) at 95–119; and Joel Rogers, "Secondary Associations and Democratic Governance" (1992) 20 Politics and Society, at 393–472.
[154] Critical theorists emphasize that citizens must communicatively democratize political systems, since they believe that citizens have the deliberative capacity.

specifies for deliberations within governmental structures, but rather in the broader public realm which it protects.[155]

I consequently, argue that a proper deliberative democratic theory that contains both substantive principles of justice such as reciprocity and procedural rules of fairness is essential for transnational deliberations to be democratic. According to Habermas deliberations must be protected by the default rules that provide equal and free conditions for the deliberators.[156] As Gutmann and Thompson posit, it is impossible to achieve a fully democratically legitimate system simply by satisfying the formal procedural rules, since majority (or more powerful transnational actors) can just adopt laws that would infringe minority (less powerful transnational actors) groups' rights simply by satisfying the formal procedural rules.[157]

As an illustration, Gutmann and Thompson argue that the British public may vote to deny certain medical treatment to minorities of South Asian origin. Yet such a law would be democratically legitimate because satisfying the formal procedural rules would suffice to legitimise that particular law. However, the substantive principle of justice such as the principle of reciprocity would prevent such an unjust law because it would disallow a majority from passing it on the basis that a law that denies treatment to a certain group would be an unjust law. Hence a deliberative democratic theory should include both substantive principles and procedural rules. Citizens must be able to deliberate any issue but the content of such deliberations must be couched within the substantive principles of justice. Citizens must not be able to deliberate in favor of taking decisions that would violate minority's[158] substantive rights simply based on their racial heritage.[159] In the next section, I will explain

[155] Cass Sunstein, *supra*, note 151.
[156] Habermas, *supra* note 1.
[157] Gutmann and Thompson in *Deliberating Democracy*, *supra* note 2, at 31.
[158] In this case, less powerful transnational actors.
[159] I will explore this issue in section 3.

why procedural rules are essential in keeping deliberations more democratic.[160] In section 3, I will explain why the principle of reciprocity is essential for deliberative democratic theory.

2. Discourse theory to democracy:

To begin with, Habermas[161] argues that deliberations are not capable of making political systems more democratic unless they are protected by positive law. Habermas claims that the ordinary people involved in day to day conversations provide the strongest democratic legitimation of political power. According to Habermas's discourse theory, democracy is attained through communicative power. He calls this a discourse theory to democracy. Discourse is a social and language practice through which common sense is made of the world. Any type of discourse will contain assumptions, contentions, prejudices, dispositions and capabilities. Participants to the political discourse engage because they want to improve their lives through political action. Every participant to the discourse has some kind of self-interest.[162]

These participants also have some kind of presupposed ideas of the world around them and of the other participants in relation to them. They presuppose that every other participant has equal power and capabilities. Habermas argues that in order for a legal program to be democratically legitimated and hence a democratic political system, it must be deliberated through communicative power by the populace in the weak public sphere. Here the weak public sphere means a venue outside formal state institutions where deliberations among ordinary populace take place such as daily interactions among people, work, cafes and media.

[160] Habermas, *supra*, note 1.
[161] *Ibid*.
[162] Christopher Zurn, "Discourse Theory to Law" in Fultner's, Barbara. *Jürgen Habermas: Key Concepts*. (Durham, England: Acumen, 2011) at 151.

Furthermore, Habermas's theory goes on to show that communication among the free citizens can produce democratic norms and shape political traditions from within regimes.[163]

Habermas claims that deliberative democracy involves an interpretive process that he refers to as a *rationally reconstructive process*.[164] The rationally reconstructive process of interpretation of democracy is a fallible account of the practice of deliberations and does not necessarily entail interpreting the obvious. As an illustration, the decisions of participants to a political discourse can be rationally reconstructed to demonstrate to all other the participants the mirror image of the decisions. This can be done through the eyes of the theorist. In this way, the theorist is able to show to the participants in deliberations what they by themselves are not able to see due to a lack of expertise or understanding of a particular issue. Thus the rationally reconstructive process involves an inner reconstruction of practices showing what the participants would do if they had specific knowledge, data, and full understanding of what is needed to achieve their goal in the political discourse. The inner reconstruction of practices, in turn, involves showing to the participants the unseen aspects of the task.[165]

In an increasingly globalized world, where plurality of cultures, religions and perspectives, hence a lack of stable and *common lifeworld* background of shared understandings, Habermas explains that the citizens must increasingly resort to negotiating the terms of their common interactions to determine their lives. When Habermas refers to common lifeworld he means to say that previously the Western society shared common, stable and shared moral, religious, social norms, and traditions and customs that rested in religious doctrines, moral codes and God. These religious doctrines and moral codes once were the authority for citizens in coordinating their social interactions. So for Habermas it is precisely the action of deliberations among the ordinary citizens that coordinates their day to

[163] Zurn, *supra* note 162.
[164] *Ibíd*.
[165] *Ibíd*.

day social interactions. Due to lack of the previous authorities in the modern Western common lifeworld as a result of globalization and immigration, the citizens must rely on the practice of communicative power coupled with positive law to coordinate their social interaction.[166]

Although communicative action is risky and burdensome in comparison to organizational capacities of the previous authorities such as religion and morality, in the modern society citizens must nevertheless rely on the communicative action to determine their interactions. Habermas refers to this situation as a functionally differentiated subsystem of purposive-rational action[167] whereby the Western society has been modernized. This *functional differentiation* is the direct result of increasing human interactions across borders through travel, commerce or other cross-border interactions. The functional differentiation, in turn, has led to the disappearance of the previous authorities from the common lifeworld. The disappearance of the previous authorities that coordinated social interaction such as the Church, guilds and the nobility from the common lifeworld prompted the need to rearrange the social institutions in order to enable a better social interaction. Habermas refers to this phenomenon as a *cultural rationalization*. It is precisely this cultural rationalization[168] that drives the individuals of the modernized society to rely on the power of communication to guide and coordinate their social interaction.

Due to disturbance of the common lifeworld by the processes of cultural rationalization and functional differentiation, the role of positive law is increasingly required to coordinate the individual relationships. To elaborate, positive law is indispensable in the modernized Western society to govern and coordinate social interaction. Since moral and religious doctrines no longer regulate social interaction, without positive law the citizens

[166] Zurn, *supra* note 162.
[167] *Ibid*.
[168] *Ibid*.

would be tyrannized by power and money. According to Habermasian discourse theory, legal systems foster social integration in the face of disruptions brought about by cultural rationalization and functional differentiation. The way in which the modern positive law is able to foster social integration happens through its establishment of a stable social environment.[169]

Thus, law does what communicative power cannot do by itself – it organizes cooperation and relationships within a society. As a result of disruption by cultural rationalization and functional differentiation, whereby every individual sees each other as a commodity to be used to further one's goals openly, political systems require binding laws that are in effect created by those that are subject to them. In other words, modern positive legal systems organize relationships and guarantee certain rights such as contractual rights and, property rights through private law. Through the public law rights, positive law organizes constitutional, administrative and criminal law domains. The behavior to openly pursue money and power at the expense of others thus cannot be carried out without the aid of the positive law. Consequently, positive law is able to compensate for the disappearance of moral and religious authorities from the common lifeworld.[170]

However, besides the political and economic systems that allow pursuit of money and power effectively, the laws that allow such behavior must be legitimised. The citizens must believe that they had participated in the making of such laws. Law's legitimacy today cannot be sourced to metaphysical elements such as God or a Sovereign ruler. Nor can the legitimacy be fully attributed to sovereign state's coercive powers. Habermas claims that the only way modern positive law can be legitimated is if the law simultaneously interacts with a system of

[169] Zurn, *supra* note 162.
[170] *Ibid*.

collectively binding positive law and the common lifeworld. The system of collectively binding positive law can only be formed through the communicative power of citizens.[171]

The solidarity among the people must lead to their mutual recognition that they have agreed to the laws by which they are bound. The solidarity realized though communicative power is one of the three sources of social integration in the modernized society alongside money and power. Those subject to positive law must feel as if they have authored it for positive law to acquire its democratic legitimacy. In the modernized Western society the best way citizens can author positive law is through their effective participation, which can happen through democratic deliberations. In Habermas's point of view deliberations can be democratic through communicative power among the citizens that are then translated into a legal system through the aid of the positive law. Accordingly, in order for the positive law to be both effective and legitimate, the law must be able to link solidarity, – communicative power, with functionality, – capital. The communicative power and functional differentiation are thus two forms of social integration in the modernized society.[172]

To reiterate, positive law – a set of procedural rules – acts as a transformative device between communicative power and administrative power. Positive law transforms communicative power into a binding legal system. Positive law allows communicative action to control processes of extreme functional differentiation – the pursuits of self-interest such as money and power. Controlling processes of extreme functional differentiation would restrict the pursuits of self-interests. Through the solidarity of communicative power, the citizens generate collective choice that, in turn, through the medium of positive law becomes binding

[171] Zurn, *supra* note 162.
[172] *Ibid*.

legal programs. For Habermas, positive law therefore has an emancipatory significance in the modernized Western society.[173]

In conclusion, Habermas's discourse theory emphasizes that for deliberative democracy to flourish, collective choice must be made through the communicative action of citizens. However, communicative action alone cannot achieve total social integration due to loss of authorities from the common lifeworld as a result of functional differentiation and cultural rationalization. Apart from communicative action, deliberations must be conditioned within a set of procedural rules in order to enable a better social integration. Positive law is therefore essential to enable better social integration. However, positive law itself must be generated through popular solidarity in order for the citizens to accept and submit to it. In this way, political power can also be legitimised because positive law is able to transform the collective choice into legitimate political power.

Nonetheless, critics claim that by confining deliberations to a set of procedural rules, Habermas's discourse theory does not envisage the distorting influence of the extra-constitutional agents.[174] In this view, public officials are influenced by the extra-constitutional agents when making decisions regarding which argumentation to choose. This argument is somewhat similar to those that claim inequality in resources and ability to deliberate could actually lead to manipulation of deliberations. However, distorting influence that extra-constitutional agents might exert on deliberations can actually be resolved by restricting the

[173] Zurn, *supra* note 162.
[174] Lindblom, Charles E. 1965. *The Intelligence of Democracy: Decision Making Through Mutual Adjustment.* (New York: Free Press, 1965); *Politics and Markets: The World's Political-Economic Systems* (New York: Basic Books, 1977); "The Market as Prison" (1982) 44 Journal of Politics at 324–36. Lindblom claims that corporations, transnational agencies or other similar legal persons whose rights and obligations are not expressed in the constitutions of modern liberal democracies. As an illustration, a constitution would normally not provide that corporations have the right to life, speech, assembly, vote or etc., in the same way as it would in relation to its adult citizen. In this way, corporations remain outside constitutional structures per se. So these extra-constitutional agents are able to influence state officials by leading them to choose an argumentation that would represent the formers' interests.

content of deliberations in advance.[175] This restriction will be the point of discussion in the next section.

3. Principle of reciprocity:

In this section, I explain how deliberations can be manipulated if their content is not restricted within substantive principles of justice. Generally, according to proceduralists a deliberative democratic theory must not contain principles of substantive justice within which the content of deliberations be restricted, except in so far as necessary to keep a reasonably democratic due process. Constitutions of developed liberal democracies provide a good example here. In Canada, the Charter of Rights contains some substantive principles of justice in addition to procedural rules, such as the freedom to choose. The freedom to choose is a substantive issue and it is necessary to keep a reasonably due process. The proceduralists argue that deliberative democratic theory should not contain more substantive principles than necessary for achieving minimal due process.[176]

If certain substantive principles of justice restrict deliberations among citizens then questions of moral and political values of the democratic theorists would interfere with a fair democratic process. This argument is based on moral and political grounds. According to the argument from moral authority, the moral judgement of democratic theorists should not determine the content of democratic principles of citizens. If a democratic theory contained substantive principles of justice, it would improperly pre-empt the moral norms of citizens. Adding moral values within deliberative democratic theory is not democratic. Therefore, a purely procedural deliberative democratic theory should not include a moral formula against which laws must be anchored.[177]

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[175] Amy Gutmann and Dennis Thompson, "Deliberative Democracy Beyond Process" in James S. Fishkin and Peter Laslett ed, *Debating Deliberative Democracy* (Oxford: Blackwell Publishing, 2003).
[176] *Ibid*.
[177] *Ibid*.

According to the argument from political authority, substantive principles would pre-empt the political sovereignty of citizens. There is no formula for political values, and creating such a formula would defeat the purpose of the deliberative democracy. Every individual has different political values, and that is precisely why deliberating is important to determine collective political values. It is thus claimed that it would be unfair for deliberative democratic theorists to impose only their individualistic political values onto a deliberative democratic theory. So a deliberative democratic theory that contains substantive principles would interfere with due democratic processes. Citizens or transnational representatives would no longer be able to deliberate issues freely because their deliberations would be restricted political norms of the democratic theorists. In effect, it would mean that the democratic theorists would predetermine the content of substantive principles of justice. As a result deliberations would not be able to democratize political units.[178]

On the other hand, scholars such as John Rawls and his camp propose a set of political or substantive principles of justice that form part of a deliberative democratic theory. Rawls argues that substantive principles should restrict the content of deliberations. Rawls claims that restricting the content of deliberations to only procedural rules would lead to an unjust collective outcome, even if it was reached through the process of deliberations. However, if deliberations were to be couched within restrictions, the dominant discourse in deliberations would likely favor the 'common good' rather than particular interests. So the more powerful actors in transnational space would not be able to deliberate outcomes that are unjust vis-à-vis the less powerful actors in transnational space by simply complying with formal procedural rules of fairness.[179]

[178] Jürgen Habermas "Justice, Inclusion, and Deliberative Democracy"1989; Jack Knight and Stephen Macedo, 1999; *See*: Cass Sunstein, *supra*, note 151; Iris Young, *supra* note 131.
[179] John Rawls, *supra* note 16.

To put it differently, a deliberative democratic theory that requires citizens not to deliberate social and political issues in the broadest possible manner is more effective than a theory that would allow unrestricted freedom to deliberate. Citizens' deliberations must be restricted in a way that should respect principles of substantive justice. As an illustration, a majority of citizens or their representatives should not be able to deliberate in favor of racial inequality by reaching a collective outcome that would deny certain rights to minorities or their representatives based on their race, or ethnicity. In fact, a democratic theory that requires compliance with only procedural rules of fairness could bring about such unjust results. Furthermore, Rawls believes that restricting the content of deliberations can resolve some of the harsh realities associated with liberalism, namely pursuit of self-interest. These restrictions, as he claims, must be imposed by a common understanding of what is reasonable. John Rawls calls it a common *public reason*. His notion of public reason dictates that participants to the deliberations are equal and free. The equality and freedom of the deliberative participants must thus be the starting point at which deliberations can commence. Rawls claims that political arguments must be couched within public reason. The notion of public reason would allow participants to enter deliberations from the point of ignorance of status, power, privileges, biases and knowledge. He also claims that a framework of constitutional democratic institutions that specifies the setting for deliberative legislative bodies' are necessary for deliberative democracy.[180]

Benhabib explains what Rawls had in mind when he referred to public reason, by pointing out that public reason for Rawls was an ideal within which the content of arguments had to be restricted. Thus, as Benhabib explains, for Rawls arguments must be couched in terms capable of acceptance by all members of the polity, ruling out both material self-interest and partial worldviews as reasons and motives. Rawls's understanding of deliberations was

[180] *Ibid*.

not a social or interactive activity, but rather that public reason can be undertaken by a solitary thinker. This is a type of deliberation in deliberative democracy but only in terms of weighing of arguments in the mind, and not testing them in real political interaction, which is exactly the opposite of the argument presented by Amy Gutmann and Dennis Thompson. Another distinguishing explanation of Rawls's deliberative theory is that Rawls implied that all individuals would reason in the same way if the starting point for deliberation was stripped of the difference, such as pursuit of self-interest.[181] Rawls's argument implies that all individuals ultimately reach similar conclusions. His theory of public reason is thus singular and produces consensus.[182]

Amy Gutmann and Dennis Thompson[183] argue that a deliberative democratic theory that restricts the content of deliberations to pure procedure fails because its principles cannot claim to treat citizens as free and equal. A deliberative democratic theory is able to provide freedom and equality to all citizens through principles of fairness, reciprocity or mutual respect. For Gutmann and Thompson, substantive principles of justice, especially of reciprocity, is important for a proper deliberative democratic theory. The principle of reciprocity holds that citizens are under obligation to each other to provide justifications for mutually binding laws that have been enacted on the basis of collective choice. The principle of reciprocity entails that substantive principles of justice such as publicity, accountability, basic liberty, basic and fair opportunity should form part of a deliberative democratic theory. These principles are essential for citizens to mutually justify laws. Mutual justification does not simply mean that the transnational representatives can just offer reasons for making

[181] Benhabib, Seyla, "Communicative Ethics and Contemporary Controversies in Practical Philosophy", in Seyla Benhabib and Fred Dallmayr eds, *The Communicative Ethics Controversy* (Cambridge, Mass.: MIT Press, 1990); "Introduction: The Democratic Moment and the Problem of Difference" in Seyla Benhabib ed, *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press, 1996) at 3–18; "Toward a Deliberative Model of Democratic Legitimacy" in Seyla Benhabib ed, *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press,1996) at 67–94.
[182] Dryzek, *supra* note 11.
[183] Gutmann and Thompson, *supra* note 176.

decisions. It means providing proper reasons that in fact constitute justification for the decisions taken.[184]

Gutmann and Thompson's view of the deliberative democratic model slightly deviates from that of Rawls's. Unlike Rawlsian theory of public reason, whereby justification is hypothetical and assumes that every participant to deliberations thinks in a similar fashion, Gutmann and Thompson's mutual reason-giving is not hypothetical. The process of mutual reason-giving must actually endure actual political deliberations, which should take place in public forums, hence not only in private premises of philosophers. The reason-giving would not only make laws legitimate but also just, because citizens would feel that their views have been taken into account during the actual process of deliberations. Therefore, citizens who can accept and reject reasons that have been provided for the adopted laws would become subjects of those laws. The reasons provided for the adopted laws cannot bind citizens unless the citizens are able to accept or reject them without coercion.[185]

I argue that juxtaposed against Gutmann and Thompsons' theory Rawls's hypothetical reasoning, cannot equal the level of legitimacy and justness attained as a result of actual mutual reason-giving. In actual mutual reason-giving citizens would be able to weigh facts and balance values in the context of particular issues. To borrow the words of Gutmann and Thompson, reciprocity has the same value to justice in political systems as replication to truth in science. Achieving justice necessitates respecting the principle of reciprocity among citizens' deliberations. Simply deliberating without respecting the principle of reciprocity, does not suffice to establish justice for proper democratic systems. According to the principle of reciprocity, the denial of rights to certain groups cannot be held to be just, simply because a particular group accepted those laws as binding. They may have agreed to them only because

[184] Gutmann and Thompson, *supra* note 176.
[185] *Ibid*.

they were coerced by more powerful groups. Therefore, a democratic theory that includes substantive principles of justice such as of reciprocity would prevent unjust laws from being democratically legitimised.[186]

A set of procedural rules alone is unable to protect citizens from the power of business because for governments businesses are essential for them to function properly. Although Habermas's discourse theory, explains how positive law is essential in providing fair conditions for deliberations to be more democratic, it leaves citizens exposed manipulation by more powerful societal actors simply because the latter could formally satisfy the formal rules and yet influence deliberations that could lead to unjust results. Conversely, I postulate that Gutmann and Thompson's theory provides a buffer to deliberations that are already conditioned within a set of default rules. This buffer prevents power difference to allow manipulation of the weaker societal actors. Such a deliberative democratic theory would restrict the content of deliberations to the principle of reciprocity that would require mutual reason-giving before any law is made legitimate.

Gutmann and Thompson rightly argue against segregation of procedural and substantive principles of justice in a deliberative democratic theory. They rightly claim that a deliberative democratic theory that does not include substantive principles justice, cannot be a proper deliberative democracy. Even if laws that have been produced by satisfying formal procedural rules, they cannot be said to flow from mutual justification. Those who are denied, say basic opportunities – an implied principle of reciprocity – cannot be said to have agreed to the laws since they are not able to reasonably reject them. A deliberative democratic theory can only be truly democratic if "fair terms of social cooperation"[187] enable those affected to give one another mutually acceptable reasons to justify the laws that they have agreed to.

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[186] Gutmann and Thompson, *supra* note 176.
[187] John Rawls's terms.

Therefore, Gutmann and Thompson's explanation of deliberative democratic theory rightly deviates from the other democratic theories in that their theory considers a process of mutual reason-giving as essential in order to justify laws that have been adopted.[188]

Nonetheless, John Dryzek is not convinced by this theory. He argues against restricting the content of deliberations within substantive principles of justice. He argues that restricting the content of deliberations would actually defeat the purpose of democratic deliberations. He postulates that if deliberations were couched within domains that would restrict their content so as to exclude argumentation about i.e. racism, discrimination, slavery, then every participant to the deliberations would apparently need to be informed in advance of the restriction. In his thinking, this advance notification would mean that some means of devising the reasonable restriction would be necessary. For Dryzek the reasonable standard must somehow be determined by itself, a condition not subject to deliberations. He doubts whether a reasonable standard can be determined.[189]

I argue that these reasons should not be a bar to including substantive principles of reciprocity within a deliberative democratic theory in line with Gutmann and Thompson's hypothesis. Gutmann and Thompson postulate that determining the reasonable standard of the substantive principle of reciprocity is not difficult. A reasonable standard can be determined in the same way as one would determine a set of procedural rules. The reasonable standard of substantive principles of justice would be provisional and open to being amended if at some later point in time new facts or new perspectives change social perceptions of justice. In fact, contrary to Dryzek's argument Gutmann and Thompson rightly argue that once the reasonable standard has been determined, it nevertheless can be changed by later authorities in line with changing societies. They claim that these changes can themselves be undertaken through

[188] Gutmann and Thompson, *supra* note 176.
[189] Dryzek, *supra* note 11.

deliberations. To this end, in chapter 5 I explain how upon finding of new facts the NPOs were able to make Recommendation 8 conform to the principle of reciprocity.

I acknowledge that the principle of reciprocity will not be amenable to deliberations once the reasonable standard has been determined, because reciprocity's very purpose is to restrict the content of deliberations. But later authorities with different moral norms are not barred from deliberating different substantive principles of justice, other than the principle of reciprocity as Gutmann and Thompson suggest. According to Gutmann and Thompson determining the reasonable standard would be analogous to amending constitutions. As a matter of fact, constitutions that have been determined by previous generations are amenable to be amended by later generations. However, as long as the prevailing constitutional norms provide restriction to the content of deliberations, they enable more just social integration. By analogy, Gutmann and Thompson argue that the principle of reciprocity will restrict the content of deliberations, hence produce more just collective choice outcome. Similarly, if and when needed, the principle of reciprocity can also be amended by later generations through deliberations.[190] In this consultative way, I argue that in order for transnational norms to be deliberatively democratic they must be created through deliberations that are protected by procedural rules of fairness and at the same time their contents must be couched within the principle of reciprocity.

Conclusion:

In conclusion, I argue that deliberations that are not subject to substantive principles of justice as well as procedural rules of fairness cannot be democratic. In other words, for deliberations to be democratic they must be protected by procedural rules of fairness, which must themselves be established as a result of deliberations and whose contents must in turn be

[190] Gutmann and Thompson, *supra* note 176.

restricted within substantive principles of justice. In this way, the affected interests or their representatives deliberate issues that become acceptable norms through the protection of procedural rules of fairness. This process also produces political power that is democratically legitimate. Restricting the content of deliberations within substantive principles of reciprocity prevents autocratic regimes to come to power simply by satisfying the procedural rules of fairness.

Furthermore, determining the reasonable standard through which substantive principles of justice can be decided, should not pose a major problem. In fact, substantive principles of justice can be determined through deliberative process by one generation and amenable to be amended by later generations. In the next chapter, I explain deliberative democratic deficits of the FATF by anchoring its governance against a deliberative democratic theory which contains both procedural rules of fairness as well as the principle of reciprocity. To this end, I demonstrate how the FATF Standards are not democratic even though they are produced through deliberations.

CHAPTER 4

1. A case study:

In this chapter, I provide a case study of the FATF in light of the conceptual framework of the deliberative democratic theory and the principle of reciprocity – a substantive principle of justice of deliberative democracy. I demonstrate how the overall FATF Standards are not kept to democratic control due to two central deficiencies such as: (1) lack of proper procedural rules to provide fair conditions for deliberations and (2) the nonconformity with the principle of reciprocity.

2. Does the FATF Mandate enable a fair democratic process?

The FATF generates the Standards for the global AML/CFT regime with an objective to protect the integrity of the global financial system. Henceforth I refer to the AML/CFT regime as the Standards. The norms that form part of the Standards are determined by the FATF's Plenary, the Steering Group and other working groups. The FATF's Steering Group researches and develops its methods and then reports them to the FATF's Plenary. The Plenary is an important decision-making body. In fact, it is the body that determines what goes into the Standards on the advice of the Steering Group. Furthermore, the Plenary's decisions concerning the Standards are reached on a consensus basis among the FATF Member jurisdictions and organizations.[191] In this way, the Plenary determines the Standards, other guidance and reports that have been generated by the FATF's working groups including the Steering Group.[192]

The Plenary decides the status of the FATF-Style Regional Bodies ('FSRBs') as well as of its Observers.[193] Besides that discretionary power, it is responsible for other matters

[191] Sections 18, 19, and 20, Part II, of the Mandate, *supra* note 30.
[192] Section 20 (d), 20, Part II, *supra* note 30.
[193] *Ibid*, Section 20 (e).

governing the FATF's affairs.[194] The Plenary controls the attendance of both the open and closed sessions of the Plenary Meetings. Generally, these sessions are open for Associate Members, the countries who make up the FSRBs.[195] The Plenary has authority to set up working groups to support the work of the FATF.[196] The Associate Members can participate in these working groups.[197] The FATF President is appointed by the Plenary from among its Members for a period of one year.[198] The President represents the FATF, its main spokesperson.[199] Thus, the President owes a duty solely to the FATF Members.[200] Although, the Associate Members can become members of the Steering Group, the FATF Presidency cannot be appointed from among the Associate Members.

The decision-making process in relation to the Standards is strictly carried out on a consensus basis among the FATF Members after the issues have been deliberated in one of the FATFs' discussion platforms. Participation in the Meetings is open to the FATF Members, the Associate Members,[201] and the Observers. These participants attend the Meetings, listen to the argumentation put forward by the Steering Group as well as other participants. The participants also listen to each other's argumentation and provide reasons for their opinions as such. In addition to that, in order to enable more wide-reaching global participation, the FATF established the FSRBs which, in turn, host their own annual meetings covering related regional issues.[202] As I have already mentioned above, the FSRBs consist of

[194] The Mandate, section 20 (f), *supra* note 30.
[195] *Ibid*, Section 22, Part II.
[196] *Ibid*, Section 26.
[197] *Ibid*, Section, 28. Note that the current working groups consist of Working Group on Evaluations and Implementation (WGEI), Working Group on Money Laundering and Terrorist Financing (WGTM); Working Group on Typologies (WGTYP); International Co-operation Review Group (ICRG); *see*: the list of current working groups in Annex D of the Mandate, available at: http://www.fatf-gafi.org/media/fatf/documents/FINAL%20FATF%20MANDATE%202012-2020.pdf, (last visited: 24-11-15).
[198] *Ibid*, Section 31.
[199] *Ibid*, Section 33.
[200] *Ibid*, Section 34.
[201] These consist of over 180 countries who are not directly the Members of the FATF. But they belong to eight FATF-Style Regional Bodies. In this way they represent the global community at the FATF.
[202] The eight Regional Bodies are the Asian/Pacific Group on Money Laundering ('APG'); the Council of Europe Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures (formerly PC-R-

the FATF non-member countries and they are made up of the Associate Members. Besides that, the membership of the FSRBs is open to any country located in the same region provided they commit to comply with the Standards and also have demonstrated such willingness.[203]

At the outset, the Standards can be said to be developed with the inclusion of all the representatives by its terms, namely the FATF Members, the Associate Members and the Observers because Standards are generated through the participation of all the representatives. Both the Plenary's open and closed Meetings are open for attendance by all the representatives including the Associate Members. Additionally, the Associate Members hold

EV) [hereinafter MONEYVAL]; the Financial Action Task Force on Money Laundering in South America [hereinafter GAFISUD]; the Middle East and North Africa Financial Action Task Force [hereinafter MENAFATF]; the Eurasian Group of combating money laundering and financing of terrorism [hereinafter EAG]; the Eastern and South African Anti-Money Laundering Group [hereinafter ESAAMLG]; Caribbean Financial Action Task Force [hereinafter CFATF]; and the Intergovernmental Action Group against Money-Laundering in Africa [hereinafter GIABA]. FATF Members and Observers. *See* also Annex B of the FATF Mandate, *supra* note 30.

[203] There are 136 countries that are Associate Members of the FATF under the umbrella known as FATF-Style Regional Bodies. They are: Afghanistan, Albania, Algeria, Andorra, Anguilla, Antigua & Barbuda, Armenia, Aruba, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Benin, Bermuda, Bolivia, Bosnia and Herzegovina, Botswana, British Virgin Islands, Brunei Darussalam, Bulgaria, Burkina Faso, Cambodia, Cape Verde, Cayman Islands, Chile, Chinese Taipei, Colombia, Cook Islands, Costa Rica, Cote d'Ivoire, Croatia, Cyprus, Czech Republic, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Fiji, Gambia, Georgia, Ghana, Grenada, Guatemala, Guinea Bissau, Guinea Conakry, Guyana, Haiti, Honduras, Hungary, India, Indonesia, Jamaica, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Liechtenstein, Lithuania, Macau China, Malawi, Malaysia, Mali, Malta, Marshall Islands, Mauritius, Moldova, Monaco, Mongolia, Montserrat, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherland Antilles, Nicaragua, Niger, Nigeria, Niue, Oman, Pakistan, Palau, Panama, Paraguay, Peru, Philippines, Poland, Qatar, Republic of Korea, Romania, Samoa, San Marino, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Slovakia, Slovenia, Sri Lanka, St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines, Suriname, Swaziland, Syria, Tajikistan, Tanzania, Thailand. The former Yugoslav Republic of Macedonia, Togo, Tonga, Trinidad & Tobago, Tunisia, Turks & Caicos Islands, Uganda, Ukraine, United Arab Emirates, Uruguay, Uzbekistan, Vanuatu, Venezuela, Yemen, Zambia, and Zimbabwe; *See* also the FATF Members and Observers, APG, Members and Observers, available at: http://www.fatf-gafi.org/document/19/0,3343,en_32250379_32236869_34354899__1_11,00.html, (last visited: 23-07-15); MONEYVAL, Members and Observers, http://www.fatfgafi.org/document/46/0,3343,en_32250379_32236869_34355246_Ll_1_1,00.html, (last visited: 23-07-15); GAFISUD, Members and Observers, http://www.fatfgafi. org/document/35/0,3343,en_32250379 _32236869 34355875_Ll1_1,00.html, (last visited July. 23, 2015); MENAFATF, Members and Observers, http://www.fatfgafi.org/document/ll /0,3343,en 32250379 32236869_34864395_1 _1_11,00.html, (last visited on: 23-07-15); EAG, Members and Observers, http://www.eurasiangroup.org/index-4.html, (last visited: 23-07-15); ESAAMLG, Members and Observers, http://www.fatfgafi.org/document/4/0,3343,en 3225037932236869 34355780_1 1_1_1,00.html, (last visited July. 23, 2015); CFATF, Members and Observers, http://www.fatfgafi.org/document/28/0,3343,en_32250379 -32236869_34355164_1111,00.html, (last visited: 23-07-15); Intergovernmental Action Group against Money-Laundering in Africa, Members and Observers, http://www.fatf-gafi.org/document/60/0,3343,en_32250379_32236869_34393596 lII,00.html, (last visited: 23-07-15).

their own regional annual Meetings in order to enable better regional participation.[204] However, I argue that participation of the Associate Members in the Plenary's deliberations is not effective; hence the Standards are not developed in a democratically legitimate manner. Let me explain how.

First, the relationship between the Associate Members and the FATF Members is governed by the FATF's 2012-2020 Mandate.[205] According to section 10 of the Mandate:

"The relationship between the FATF Members and its Associate Members is governed by a set of high level principles."[206]

However, the Mandate does not further explain nor define what these *high level principles* are. There is a separate Document called High-Level Principles and Objectives for FATF and FSRBs,[207] henceforth referred to as the Document, which is meant to clarify the high level principles. According to this Document, the relationship of the FATF Members and the Associate Members is governed by a set of high-level principles that consist of unrestricted access to documents both confidential and non-confidential. Again, both the FATF Members and the Associate Members should have unrestricted ability to join working groups, conferences, training and consultations.[208] Both the FATF Members and the Associate Members are allowed to have unrestricted access to join events and to participate in mutual evaluations.[209] The Document also states that access to Plenary Meetings by both the FATF Members and the Associate Members should be free.[210]

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[204] *High-Level Principles and Objectives for FATF and FSRBs*, October 2012, (2012), [FATF], Part B, online: <http://www.fatf-gafi.org/media/fatf/documents/High-Level%20Principles%20and%20Objectives%20for%20FATF%20and%20FSRBs.pdf> (last accessed 15-07-2015).
[205] Section 10, Part II, the Mandate, *supra* note 30.
[206] The Mandate, *supra* note 30.
[207] Part A, *ibid*.
[208] Part A (a), *ibid*.
[209] Part A (b), (c), (d), and (e), *ibid*.
[210] Part A (f), (g), (h), (i), (j), (k), (l) and (m), *ibid*.

In relation to the governance structure of the FATF Members and Associate Members the Document provides that these two bodies are freestanding and do not stand in bureaucratic order.[211] However, it further states that the Associate Members should agree to implement the FATF Recommendations (Standards) within a reasonable timeframe.[212] Furthermore, the Document provides that the body[213] should observe its Mandate and other written agreements that set out the objectives of the body and thereby commit the Associate Members to implementing the Standards.[214] In other words, the Document that is supposed to define the high-level principles on which the relationship of the FATF Members and the Associate Members are based, does no more than refer back to the Mandate. Therefore, the Document does not define the high-level principles per se. The only function that it performs is to repeat what has already been laid down in the Mandate.[215]

As a result of this strange self-referential circularity, I argue that the relationship between the Associate Members and the FATF Members is governed by a set of ambiguous and overbroad principles. Recall that this is a problem from democratic legitimacy point of view because according to the discourse theory that I have explained in Chapter 3, mutually binding laws must be generated through solidarity of the affected interests or their representatives participating in deliberations that are protected by a set of default rules. The laws must be generated through the effective inclusion of all the affected interests of their representatives.[216] By analogy, the interaction between the Associate Members and the FATF Members must be protected by a set of defined default rules which must themselves be generated through communicative action among the citizens. Only then can the Mandate be accepted as mutually binding because the transnational representatives will have created it in

[211] The Mandate, *supra* note 30.
[212] Part B (p), *supra* note 30.
[213] The FATF and the FSRBs.
[214] Part B (q), *ibid.*
[215] Part B, (q), (r), (s), (t), (u), and (v), *ibid.*
[216] *See* Habermas's discourse theory in Chapter 3, section 2.

solidarity. Solidarity among the FATF Members and the Associate Members would democratically legitimise the Mandate.

Default rules would provide fair conditions for deliberations. A set of well-defined default rules would achieve what communicative rationality by itself cannot, because transnational representatives would know exactly of their rights and duties vis-à-vis each other. It is true that the Associate Members participate in the Plenary's deliberations, but according to the discourse theory such a participation is not enough. Participation must be effective. Participation will be effective only if the participants are protected by a set of procedurals rules that treat them as equal and free deliberators. In other words, deliberative participation must be carried out within conditions that enable a fair democratic process.[217] It does not suffice for the FATF or the Plenary to claim that the Standards are generated through the inclusion of the Associate Members. The inclusion of the Associate Members is ineffective because the Associate Members do not know exactly of their rights and duties in relation to the FATF Members. So they are not equal and free deliberators in relation to the FATF Members.

Simply allowing participation within deliberations is not enough to make deliberations democratic. Participation must also be on equal terms. To elaborate, deliberative participants must be treated as equal and free. This condition can only be achieved through a set of procedural rules that provide fair conditions for a deliberative democratic process. Providing fair conditions is important as it would enable a more democratic social integration subsequent to the loss of previous authorities such as moral codes or religion from the common lifeworld.[218] Nonexistence of such authorities in the common lifeworld are especially true in the transnational context. Therefore, since the relationship between the

[217] *Ibid*.
[218] *Ibid*.

FATF Members and the Associate Members is governed by a set of procedural rules it does not provide social integration sufficient for a reasonably fair democratic process.

Likewise, according to section 48 of the Mandate, there is no intention to create any legal rights or obligations among the Members and the Associate Members.[219] Nevertheless, the language of the Mandate utilizes obligatory verbs vis-à-vis the Associate Members.[220] According to the Mandate no country can become an Associate Member unless it commits itself to implementing the Standards, other guidance and policies determined by the Plenary and the Steering Group. In fact, the Plenary that decides whether a country is eligible to join an FSRB or not.[221] The Plenary also has the power to decide as to whom will participate in the Plenary Meetings as Associate Members.[222]

The Associate Members collaborate and, to some extent, participate in the FATF's decision-making process for the purposes of generating the Standards. But such participation must be pursuant to the Associate Members' committal to accept the Standards that the FATF determines in relation to combating money laundering, financing of terrorism and prevention of proliferation of weapons of mass destruction.[223] I argue that the Associate Members commit themselves to effectively implementing the Standards in their respective jurisdictions even before they get to participate in the deliberative process that generates the Standards. This type of committal to norms without having the opportunity to accept or to reject them non-coercively, causes another problem from democratic legitimacy point of view.

Recall that the discourse theory requires that participants to deliberations must enter deliberations with intrinsic pragmatic presuppositions of generalizability, equality, freedom

[219] Section 48, Part IV, *supra* note 30.
[220] And to some extent in relation to the FATF Members as well. But my purpose here is to discuss the situation of the most disadvantaged within the FATF. And they are the Associate Members.
[221] Section 11, *ibid*.
[222] *Ibid*.
[223] Section 12 (a), Part II, *ibid*.

and reciprocity.[224] It is not necessary that they should be aware of these presuppositions, though they might, but it is important for the theorist to be able to point them out when he analyzes their deliberations. As the Mandate obliges the candidates for Associate Membership to comply with the Standards in advance, it creates double standards to the disadvantage of the Associate Members. The Associate Members have no choice but to commit to implement the Standards. Because of this, I argue that the Habermasian pragmatic presuppositions cannot hold true when the Associate Members and the FATF Members deliberate the Standards. The Mandate pre-empts such presuppositions by treating participants differently. So the FATF Members are always in a superior position in relation to the Associate Members, as the FATF Members are the sole decision-makers. Similarly, the FATF Members also get to determine who qualifies as an Associate Member. The Associate Members cannot be said to be equal and free in relation to the FATF Members in deliberations that generate the Standards. So the FATF deliberations are manipulated by the more powerful deliberators.

Furthermore, it is true that the Associate Members and nonmember jurisdictions may not have any technical knowledge of the issues relating to the Standards. The peer review procedures as well as annual typologies exercises are carried out with an objective to educate the Associate Members. It is accepted that the representatives from the FATF Member jurisdictions are technocrats with substantial knowledge in the field of AML/CFT. Therefore, it is reasonable to assume that the Standards are decided on the basis of expertise.[225] A rationally reconstructive process[226] becomes relevant in explaining the legitimacy of the relationship between the FATF Members and the Associate Members. In order to legitimise the Standards it is necessary to dissect the argumentations by the FATF technocrats used for legitimising the Standards. If upon dissection of such argumentations, it is possible to show to

[224] *See* Chapter 3, section 2.
[225] In line with the arguments put forward by Ian Shapiro, *supra* note 130.
[226] Refer to Habermas's discourse theory in section 2 of Chapter 3.

the Associate Members the mirror image of what the technocrats understand and the Standards can be reasonably acceptable, it satisfies the rationally reconstructive process.

If it is possible from a theorist's point of view, to find the Standards as reasonably acceptable by the Associate Members even if they have not contributed to its decision-making process as the Associate Members do not have the same level of expertise as the FATF technocrats, they would have decided in the same manner, then the Standards would be deliberatively democratic. However, I argue that the Standards cannot reasonably be accepted even upon rational reconstructive process because the justifications do not respect the principle of reciprocity.[227] Let me explain how.

3. Do the Standards respect the principle of reciprocity?

In this section, I demonstrate whether the Standards respect the principle of reciprocity. Recall that according to Amy Gutmann and Dennis Thompson a deliberative democratic theory must contain substantive principles of justice, in particular the principle of reciprocity. Accordingly, it is important for me to explain whether the Standards respect the principle of reciprocity. In the previous section, I demonstrated that deliberations within the FATF platforms are not protected by procedural rules of fairness sufficient for a due democratic process. I explained how the Associate Members did not participate effectively. Thus the input of the Standards could be regarded as democratically illegitimate. In this section, I want to explore how the Standards disrespect the principle of reciprocity and in this way demonstrate how also the output of the Standards cannot be democratically legitimate.

I will explain how the Associate Members and other transnational societal actors are not given an opportunity to reasonably accept or reject the Standards. It is true that the Associate Members deliberate within the FATF platforms that collectively generate the

[227] I discuss the principle of reciprocity in section 3 below.

Standards. But as I have shown in the previous section their participation is not effective. What follows from this ineffective participation is that simply accepting to be bound by the Standards does not make the Standards democratically legitimate. The Associate Members are not given a reasonable opportunity to accept or to reject the Standards in line with the principle of reciprocity.

The principle of reciprocity holds that participants to deliberations are mutually bound by laws only when it is possible to demonstrate that such mutually binding laws are capable of being reasonably accepted by all the deliberative participants. It is necessary for the participants to provide reasons for the norms to which they want other participants to be bound. Besides the reasons, the binding laws must be justified. Simply providing reasons does not suffice. I claim that neither the Associate Members nor the other societal actors are given justifiable reasons by the FATF Members for the drastic norms within the Standards. I demonstrate below how certain norms within the Standards cannot be held to be reasonably acceptable by the Associate Members or other transnational societal actors. I, further explore the Standards to pinpoint how they disrespect the principle of reciprocity. Although the list is not meant to be exhaustive, I have identified eight Recommendations within the Standards that disrespect the principle of reciprocity. They are Recommendations 5, 6, 19, 22, 29, 31, 37, and 38 respectively.

4. Recommendation 5:

According to Recommendation 5 countries should have measures in place to prosecute and criminalize terrorist financing in line with the Terrorist Financing Convention.[228] This precautionary policy means that countries should have authority to prosecute and

[228] Council of Europe *Convention on the Prevention of Terrorism*, 16 May 2005, CETS No. 196, (2005) [Council of Europe], online: http://www.europarl.europa.eu/document/activities/cont/200803/20080305ATT22972/20080305ATT22972EN.pdf (last accessed 15-07-2015).

criminalize any financing suspected to be of or for the purposes of a terrorist activity, a terrorist organization as well as an individual terrorists regardless of the fact that funds in question cannot be linked to a specific terrorist activity.[229] And these offences should be classified as money laundering predicates.[230] To be more specific, the FATF dictates that countries should enact laws that will criminalize any financing of any activity suspected to be a terrorist activity or a terrorist individual even if there is no specific link that the funds in question are actually linked to a specific terrorist activity. In order to understand the full scope of Recommendation 5, one also needs to grasp the objectives of Recommendation 6. These two Recommendations must thus be read together.

5. Recommendation 6:

Recommendation 6 was initially intended to target *Al Qaida* and any entity or individual linked to it.[231] However, under *United Nations Security Council Resolution ('UNSC) 1373*, Recommendation 6 extends to any terrorist organization or individual linked to such an organization.[232] Since *Al Qaida* is beyond the scope of this thesis, I analyze the implications of Recommendation 6 in *UNSC Resolution 1373* context only. To this end, the main purpose of Recommendation 6 is to require countries to implement targeted financial sanctions against any entity or persons[233] in accordance with the *UNSC Resolutions*[234] that deal with prevention and suppression of terrorism and terrorist financing. Countries should have in place policies consisting of targeted financial sanctions in the form of freezing

[229] Interpretive Note to Recommendation 5, Part B, subsection 5 (b), *supra* note 33.
[230] *Ibid*.
[231] UN Security Council, Resolution 1267, 15 October 1999, Sess 4051, S/RES/1267 15, (1999), [UNSC], available at: http://www.refworld.org/docid/3b00f2298> online: (last accessed 15-07-2015).
[232] Interpretive Note to Recommendation 6, Part E, subsections 13 (c), (i), (ii) and (iii), supra note 30.
[233] Any persons or entity designated by the United Nations Security Council under Chapter VII of the Charter of the United Nations, as required by Security Council resolution 1267 (1999) and its successor resolutions3; or (ii) any person or entity designated by that country pursuant to Security Council resolution 1373 (2001).
[234] Security Council Resolution [on threats to international peace and security caused by terrorist acts], 28 September 2001, S/RES/1373, (2001), [UNSC]; *see* also UNSC Resolution 1267 [1999] and its successors, *supra* note 231.

without delay any funds or assets suspected of terrorist financing or terrorist activities.[235] These targeted financial sanctions require that countries must freeze without delay any funds or assets that have been suspected of such threats if there is reasonable grounds to believe or to suspect that an entity or an individual is involved in terrorist financing.[236] Frankly speaking, Recommendation 6 requires that countries should freeze without delay any funds that are suspected to be associated with terrorist financing based on reasonable grounds.[237]

As an illustration, according to Recommendation 6, a transfer of university fees, say from parents located in a country such as Iran[238] to their son in the UK, would amount to reasonable grounds to suspect financing of terrorist activity, because Iran is classified as a higher-risk country by the FATF. [239] Hence this type of transfer of funds could be both criminalized in line with Recommendation 5 and also financially sanctioned in line with Recommendation 6. Recommendation 6 further requires countries to have financial sanctions in administrative and civil proceedings parallel to criminal sanctions by authorities without actually proving that there is a specific link to terrorist activity or an individual.[240] In effect, an individual can be prosecuted and criminalized even if he or his funds have not been proven to be linked to a specific terrorist act in line with Recommendation 5. It also follows that the assets of this individual will be frozen without delay in line with Recommendation 6. As a result, Recommendations 5 and 6 can be used by countries to prosecute and criminalize individuals as well as to freeze their assets in expeditious manner simply because the

[235] Recommendation 6, *supra* note 33.
[236] *Ibid*.
[237] Interpretive note to Recommendation 5, B (5), *supra* note 33.
[238] *See* Iran classified as a higher-risk jurisdiction by the FATF, in FATF Report on *Higher-Risk and Non-Cooperative Jurisdictions*, 29 October, 2015, FATF Report, (2015), [FATF], online < http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/documents/fatfstatement-28february2008.html>; *see* also the FATF's Public Statement on Iran, available at: http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/documents/public-statement-october-2015.html, (last visited: 02-12-15).
[239] The FATF defines *risk* as: "the ability of a threat to exploit a vulnerability. For there to be a risk, both a threat and a vulnerability must be present"; see: Recommendation 19 for details of assessing risk by the FATF, *supra* note 33.
[240] Interpretive note to Recommendation 5, B (8), *supra* note 33.

authorities have reasonable grounds to suspect that a terrorist link is possible, though they cannot prove the existence of such a specific link.

Therefore, Recommendation 5 does not uphold the principle of reciprocity as it requires prosecution and criminalization of financing of any activity or individual without a specific link to a terrorist activity. This cannot reasonably be accepted by those that are affected. Recommendation 6 further requires enforcing administrative and civil sanctions such as confiscation, freezing and seizure of property without proving specific link to a terrorist activity. Criminalization of an activity in the absence of a specific link cannot reasonably be accepted by, say Muslim minorities or citizens from countries classified as higher-risk by the FATF.

6. **Recommendation 19**:

Recommendation 19 is meant to target higher-risk countries. However, Recommendation 19 itself does not define what type of country could be classified as higher-risk, as the FATF and FSRBs determine such risk by assessing a country's profile in line with the FATF's Methodology.[241] It states that FATF Members and the Associate Members should have countermeasures in place so as to sanction higher-risk countries when such need is called for by the FATF. It also provides that countries can use countermeasures against higher-risk countries on their own initiative. Accordingly, global financial institutions come under obligation to apply the drastic countermeasures vis-à-vis a higher-risk country. So if a particular country does not implement the Standards in accordance with the Methodology, the

[241] *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems*, February 2013, FATF Report, (2013), [FATF], online < http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf> (last accessed 15-07-2015).

FATF issues a number of warnings, after which it classifies the country as a Higher-Risk and Non-Cooperative Jurisdiction.[242]

Global financial institutions are also under obligation to take drastic countermeasures when they are dealing with higher-risk countries or financial institutions from higher-risk countries. These countermeasures range widely: from refusing the establishment of subsidiaries and branches of financial institutions originating in higher-risk countries, prohibiting financial institutions from establishing branches or subsidiaries in higher-risk countries, limiting business relationships with persons or financial institutions that have been identified to be from higher-risk countries, prohibiting financial institutions from dealing with any third parties in higher-risk countries, and/or requiring financial institutions to amend or even to terminate correspondent relationships with financial institutions from higher-risk countries.[243]

Therefore, Recommendation 19 seriously undermines the principle of reciprocity. According to Recommendation 19, a country can be classified as a higher-risk country simply because it does not implement the Standards or does not implement them properly. But this hypothetical non-compliant country is not given a reasonable opportunity to accept or to reject the Standards. Nor is it provided with justifiable reasons for such drastic countermeasures by the FATF. Therefore, I claim that there are only two choices left for the global South. They can either join one of the eight FSRBs or they can remain as non-compliant countries and be classified as higher-risk. If they become an Associate Member by joining one of the FSRBs, they have to commit to implement the Standards. If they choose to remain as a non-compliant country they have to deal with the implications of being severed from the global financial system. In either of these situations a country from the global South is not given a reasonable

[242] Report on *Higher-Risk and Non-Cooperative Jurisdictions*, *supra* note 238.
[243] Interpretive Note to Recommendation 19, *supra* note 33.

opportunity to accept or to reject the Standards. Nor is it provided with justifiable reasons. Such a country is therefore coerced by the Standards to comply.

7. <u>Recommendation 22</u>:

Recommendation 22 requires independent professionals such as lawyers, notaries, and other independent legal professionals as well as accountants to perform Customer Due Diligence ('CDD') and record-keeping when carrying out transactions for their clients.[244] In particular, lawyers, notaries and other independent professionals come under a requirement to make suspicious activity reports ('SARs') if they engage in any financial transaction on behalf of their clients. The FATF makes it an obligation for countries to enforce rules regarding the SARs by extending the making of SARs reporting these independent professionals.[245]

The requirement to make a SARs report has serious implications on the duty of confidentiality between lawyers and their clients. Whereas, the law previously protected lawyers' duty of confidentiality to their clients, under the legal changes brought about as a result of Recommendation 22, that duty is shaken. In other words, lawyers are required to make a SARs report if they suspect that their clients' funds are proceeds of predicate offences to money laundering and terrorist financing. The *mens rea* of suspicion is an objective test[246] that puts lawyers under heavier duty because the law will test their *mens rea* in comparison to whether a reasonable lawyer would have suspected or not.[247]

In this way, I posit that Recommendation 22 is not in compliance with the principle of reciprocity because it requires the members of the global Law Societies to forego the duty of confidentiality, an essential principle of due process and justice. The global Law Societies are not given a reasonable opportunity to accept or to reject such norms. Even if they were given

[244] Recommendation 22, *supra* note 33.
[245] *Ibid*.
[246] As opposed to subjective test.
[247] At least in the UK.

such an opportunity, they could not have reasonably accepted this norm because it severely restricts practice of their profession.

8. <u>Recommendation 29</u>:

Recommendation 29 requires both the FATF Members and the Associate Members to set up special departments called financial intelligence units ('FIUs') at the national level, in order to enable national collaboration between financial institutions and a single national point. The FIUs should be responsible for receiving and analyzing SARs reports, and any other information pertaining to crimes of money laundering, its predicate offences and terrorist financing as well as proliferation. Recommendation 29 necessitates that national FIUs should have unrestricted access to the widest possible information whether it pertains to finance, administration and law enforcement, from public sources, or commercial data, in order for the FIUs to be able to operate effectively in view of their goals.[248] The FATF envisages that the FIUs should be able to independently develop policies to combat money laundering and terrorist financing in line with the money laundering and terrorist financing trends and patterns that they identify while analyzing available data provided by competent authorities. [249]

Additionally, the FIUs should be able to spontaneously disseminate information upon request from competent authorities, where there are grounds to suspect money laundering and its related predicate offences and terrorist financing. This authority should be exercised independently of any other body within national state architectures. In addition to this power, the FIUs are also given discretion to disseminate information to the requesting authority or to conduct further analysis of the information. This discretion to disseminate information means

[248] Recommendation 29, *supra* note 33.
[249] Interpretive note to Recommendation 29, (A) and (B), *supra* note 33.

that the FIUs have enormous powers over other governmental departments.[250] Furthermore, the FIUs must be independent in carrying out their operations,[251] hence subrogating their activities such as requesting, disseminating and collecting information from the courts' role.

In consequence, Recommendation 29 disrespects the principle of reciprocity, because it requires national jurisdictions to give extra powers to the FIUs to independently develop enforceable policies as they find new criminal trends. This type of legislative power exercised by a body other than the legislature, interferes with lawmaking at the parliamentary level. Recommendation 29 encourages encroachment on the role of legislature. Hence Recommendation 29 disrupts the separation of powers necessary in democratic systems. Also Recommendation 29 necessitates national jurisdictions to give the FIUs extra powers in order to enable them to have access to unrestricted and unlimited information. These powers contradict the privacy and data protection laws in two ways.

Primarily, Recommendation 29 contradicts the reciprocity rule because it requires encroachment on legislature. This encroachment in effect interferes with the rule of law and due process. It runs counter to the principle of reciprocity because there cannot be justification for norms that interfere with the rule of law and due process. Most importantly, Recommendation 29 disrespects the principle of reciprocity because there cannot be justification for a norm that empowers an executive branch to have access to unlimited information and then disseminate such information without any restriction in the absence of a proper court order. So Recommendation 29 interferes with citizens' liberty. Because of this encroachment on the legislature and the liberty of citizens, Recommendation 29 cannot reasonably be accepted. Therefore, Recommendation 29 contradicts the principle of reciprocity.

[250] Interpretive note to Recommendation 29, (C) and (D), *supra* note 33.
[251] Interpretive note to Recommendation 29, (E), *supra* note 33.

9. **Recommendation 31**:

Recommendation 31 obliges countries to create special law enforcement authorities, aside from national prosecutorial and police authorities, which specifically should investigate money laundering and related predicate offences as well as terrorist financing and financing of proliferation of weapons of mass destruction. Recommendation 31 necessitates countries to implement changes in their national state architectures in order to enable these law enforcement authorities to operate effectively. Such law enforcement authorities should be able to perform as follows:

> "Expeditiously identify, trace and initiate actions to freeze and seize assets that are or may become, subject to confiscation, or are suspected of being proceeds of predicate crimes."[252]

As we can see, Recommendation 31 requires countries to give broad powers to special law enforcement authorities to compulsorily obtain access to all documentation and information for the purposes of investigations and prosecutions. This power also extends to search of persons and premises in order to take witness statements or for seizure of evidence. Besides the power to search and seize, Recommendation 31 requires that these special law enforcement authorities should be able to, without restriction, collaborate with each other transnationally.[253] Special law enforcement authorities are given other broad powers when dealing with obtaining of information in relation to suspected offences of money laundering and its predicate offences as well as terrorist financing.[254]

In relation to this, Recommendation 31 requires countries to give the special law enforcement authorities' extra powers to demand and obtain information whether evidentiary

[252] Recommendation 31, *supra* note 33.
[253] *Ibid*.
[254] *Ibid.*

or prosecutorial without a court order, on a compulsory basis. The investigative techniques envisaged by Recommendation 31 are as follows:

> "Undercover operations, intercepting communications, accessing computer systems."[255]

Any identification of possible proceeds of money laundering and its predicates upon such investigative techniques should be without prior notification to the owner.[256] Recommendation 31 requires that special law enforcement agencies should be able to search, confiscate, seize as well as demand and obtain any evidence for the purposes of prosecution without actually obtaining a court order. On top of that, special law enforcement agencies should be able to obtain and demand any information in any conceivable ways that range from undercover operations, intercepting communications and accessing computer systems without prior notification to the owner. In the same arbitrary fashion, Recommendation 31 requires special law enforcement agencies to search persons and properties in an expeditious manner. Recommendation 31 paves the way for more powerful FATF Members to have free and full access to become involved in investigations within the FATF Associate Members.

In consequence, Recommendation 31 disrespects the principle of reciprocity because it requires the obtaining of information, and search of persons and premises without conforming to the rule of law and due process. It encourages obtaining of information through techniques that grossly violate the privacy laws. There is no justification for this of type empowerment of executive branches. Recommendation 31 does not have any justifiable reasons for such drastic measures. It therefore unjustifiably restricts the freedom and liberty of individuals. It also runs counter to the principle of superiority of the rule of law and due process. Therefore, it interferes with the core principle of democracy, namely reciprocity.

[255] *Ibid.*
[256] *Ibid*.

10. Recommendation 37:

Recommendation 37 requires countries not to obstruct any legal assistance to each other. Hence countries must provide the widest possible ranges of mutual legal assistance concerning money laundering and its predicates or terrorist financing investigations and proceedings, and should not refuse such legal assistance on grounds of fiscal matters, or on grounds of national laws requiring professional duty of confidentiality in relation to professionals such as lawyers and accountants. Accordingly, countries should implement necessary legal changes in order to enable such transnational legal assistance and cooperation.[257] In satisfying the transnational legal assistance requirement, the absence of a dual criminality should not be an obstacle.[258]

Furthermore, Recommendation 37 provides that if dual criminality is required in providing the mutual legal assistance, it should be deemed satisfied even if a particular offence is classified differently within two countries.[259] Normally, when making transnational mutual legal assistance or extradition requests, dual criminality must be satisfied. A satisfaction of the dual criminality requirement can happen only if two jurisdictions classify an offence in question as belonging to the same category of offences. However under Recommendation 37, even if a particular offence is not deemed as an indictable offence in a country A, under Recommendation 37 the country A is still obliged to give legal assistance in the investigation by a country B. As an illustration, countries that do not consider income tax evasion as an indictable offence are still required to give legal assistance, say to the UK, where income tax evasion is a predicate offence of money laundering triable on indictment.[260]

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[257] Recommendation 37, *supra* note 33.
[258] Interpretive Note to Recommendation 37, *supra* note 33.
[259] *Ibid*.
[260] *Proceeds of Crime Act*, 2002 (UK), c 29, online< http://www.legislation.gov.uk/ukpga/2002/29/data.pdf> (last accessed 15-07-2015).

In consequence, Recommendation 37 interferes with the dual criminality requirement by necessitating countries to provide legal assistance to each other, by lifting the legal hurdles in their respective jurisdictions. An offence need not be classified in the same category of offences in two different countries in order for one country seeking legal assistance to demand legal assistance from another country. So Recommendation 37 conflicts with the principle of reciprocity, because Recommendation 37 entails countries to run counter to their legal traditions. Also it necessitates countries to go against the will of their constituents because having an offence classified differently has deep rooted reasons that is particular to a given country. Accordingly, by removing the dual criminality requirement Recommendation 37 coercively imposes norms that represent the interests of the FATF Members upon the Associate Members.

11. <u>Recommendation 38</u>:

According to Recommendation 38 law enforcement authorities should be allowed the following powers:

> "To confiscate and freeze property, assets through non-conviction-based confiscation proceedings unless it is contrary to fundamental principles of law in that country."[261]

However, Recommendation 38 does not clarify or define these *fundamental principles of law*. Fundamental principles of law could have a wide-ranging definition in different jurisdictions. Recommendation 38 further states that countries should be able to provide mutual legal assistance on non-conviction-based confiscation proceedings to foreign countries at a minimum in the following situations:

[261] Recommendation 38, *supra* note 33.

"A perpetrator is unavailable by reason of death, flight, absence or when the perpetrator is unknown."[262]

In other words, the non-conviction-based confiscation proceedings require law enforcement authorities, at a minimum, to confiscate and, freeze property and assets when such request is made by a foreign country, without actually proving that such property is in fact the proceeds of criminal activity, if for some reason the perpetrator is unknown or in flight or for some other reason unavailable to be tried in court. The Interpretive Note to Recommendation 38 leaves it open for countries to exercise confiscation, freezing of assets on non-conviction based confiscation proceedings in other situations that could be extended to mean even when a perpetrator is known and, available, but not convicted because the criteria for non-conviction based confiscation proceedings is not to violate the fundamental principles of law. In this uncertain fashion, I argue that as long as a country's undefined fundamental principles of law are not contravened, an exercise of authority by law enforcement authorities in confiscating, seizing and freezing property on non-conviction based confiscation proceedings is possible even when a perpetrator is available and known.

So, under Recommendation 38, law enforcement authorities will mostly be able to confiscate and, freeze property and assets on non-conviction-based confiscation proceedings because countries are incentivized to extend their authority to confiscate even in situations where the perpetrator is known and available but has not yet been convicted. Consequently, Recommendation 38 runs counter to the principle of reciprocity because it is unjust to establish laws that will allow executive branches to confiscate, seize and freeze property that has not actually been proven to be related to or proceeds of predicate offences of money laundering, financing of terrorist activities or proliferation of weapons of mass destruction.

[262] Interpretive Note to Recommendation 38, *supra* note 33.

Recommendation 38 violates the principle of supremacy of the rule of law and disrupts the due process, interfering with basic freedoms and liberties of citizens.

In sum, the Standards overall require legal changes counter to the rule of law and due process within national legal systems. As I have illustrated above, these changes violate the principles of both substantive and procedural rules in line with the deliberative democratic theory discussed in chapter 3. Primarily, the Standards enable seizure and confiscation of property or assets on non-conviction-based confiscation proceedings without having to prove the guilt of a suspected individual who is the owner of the suspected criminal proceeds. Furthermore, the Standards make it possible for special law enforcement authorities to search persons and premises without a court order as it requires countries to have the authority to respond to such requests in an expeditious manner. The special law enforcement authorities are able to search, obtain, demand and disseminate any information including evidentiary material, without any restrictions and without having to obtain a court order. Similarly, the FIUs are given judicial powers and this disturbs the balance of separation of powers crucial for a democratic system.

Conclusion:

In conclusion, the input of the Standards cannot be democratically legitimised because, first, the Mandate does not define the relationship between the FATF Members and Associate Members through a set of procedural rules. On the contrary, the relationship is defined in very broad and ambiguous terms such as high level principles. This is abstract, ambiguous and overbroad. It could be interpreted in any number of ways. Second, the Mandate does not create legal rights and obligations among the Members and Associate Members. Hence, it is purely an informal agreement.

However, the Mandate makes it an obligation on the Associate Members to commit to accept all of the Standards if they want to join one of the FSRBs. By joining the FSRBs, they get to participate in the FATF Plenary Meetings, the working groups and other closed and open meetings but without an ability to influence the actual norms that go into the Standards. According to the Mandate the Standards are strictly determined by the FATF Members on a consensual basis. Therefore, the Associate Members are excluded from actually determining the final Standards to which they are bound from the start.

This order of norm generation is problematic from democratic legitimacy point of view. The FATF Members get to decide the Standards exclusively, but the Associate Members which are made up of approximately 180 countries become bound by them. If we anchor the governance of the FATF to the deliberative democratic theory that I have explained in chapters 3, the Standards cannot be democratically legitimised. The Mandate does not establish a set of well-defined procedural rules that provide proper conditions within which the FATF deliberations should be restricted to. It is true that the Associate Members deliberate within the FATF platforms, by either participating in Plenary Meetings or joining Steering Groups but their participation is not effective.

Moreover, the Mandate creates an obligation on the Associate Members to commit to accept the Standards if they want to join the FSRB. It does not give a reasonable opportunity to the Associate Members to accept or reject the norms within the Standards. The Mandate creates a situation whereby the Associate Members get to participate in the FATF deliberations by gaining the right to attend the Plenary Meetings and joining the Steering Group but their voices do not count because it is the FATF Members who determine by consensus the actual outcome of deliberations. The Mandate does not treat the Associate Members as free participants to the FATF deliberations because it does not provide them with an opportunity to choose to accept or to reject the norms in the Standards.

In sum, the Mandate pre-empts pragmatic presuppositions by treating the Members and the Associate Members in double standards. The FATF Members and the Associate Members do not presuppose that they are deliberating on equal, generalizable, free and reciprocal terms. The Mandate predetermines the decision-makers from the start. In this way, the Standards are not generated by all those that are bound it. With the exception of MONEYVAL, all other FRSBs adopt the FATF's Forty Recommendations and Nine Special Recommendations instead of devising their own Standards.

CHAPTER 5

1. CSOs' role in transnational democracy:

In this chapter, I explain how the NPOs are incapable of keeping the FATF to overall democratic control. Before that, it is important to understand the civil society organizations' ('CSOs') role for the following reasons. It has been claimed that since there is no *demos* in transnational space, CSOs, to some extent, represent the global *demos*, since CSOs are linked to a public sphere.[263] According to this argument, CSOs are a kind of public sphere in their own right, where it is claimed that members deliberate to democratize both domestic and transnational political units. In fact, scholars that are influenced by the Habermasian theory emphasize deliberations in the public sphere and link it to the concept of civil societies.[264] Hence, there is consensus among scholars that public spheres can be linked to the concept of CSOs.[265]

Moreover, Martin Janicke defines CSOs as a public action in response to failure in either the state or the economy. He claims that CSOs are a social interaction that is not linked nor controlled by the state or the capitalist economy.[266] Equally, John Dryzek claims that CSOs can pressure private or state actors hence keep them subject to democratic control. By pressuring private economic actors such as corporations, CSOs can bypass government action. Consequently, Dryzek argues that transnational CSOs can play a crucial role in keeping transnational democratic control. They democratize transnational political units by controlling

[263] Recall Habermas's two spheres where deliberations take place.
[264] *See* generally Bohman, James *Public Deliberation: Pluralism, Complexity, and Democracy* (Cambridge: MIT Press, 1996); Dryzek, John S, *Discursive Democracy: Politics, Policy, and Political Science* (Cambridge: Cambridge University Press, 1990).
[265] Cohen, Jean, *Changing Paradigms of Citizenship and the Exclusiveness of the Demos* (Toronto: Faculty of Law, University of Toronto, 1998); Civil *Society and Political Theory* (Cambridge: MIT Press, 1992); Arato, Andrew. 1993 "Interpreting 1989" (1993) 60 Social Research at 609–46.
[266] Jänicke, Martin, "Democracy as a Condition for Environmental Policy Success: The Importance of Non-Institutional Factors" in William M. Lafferty and James Meadowcroft eds, *Democracy and the Environment: Problems and Prospects* (Cheltenham: Edward Elgar, 1996) at 71–85.

the content and the relative weight of contesting discourses. The degree to which such shifts are amenable to democratic control, of course, changes from a type of discourse.[267]

Other studies demonstrate that CSOs are not strong enough to challenge the policies set by their governments if regimes are autocratic and repressive. Keck and Sikkink demonstrate that it is normally those CSOs whose voices are suppressed in the country of their origin that appeal to transnational organizations for help. They seek collaboration in the transnational space.[268] In other words, it is those CSOs that are without recourse in their home counties that seek the aid and collaboration of transnational organizations to benefit their own preferences. Furthermore, transnational NGOs and domestic CSOs influence the preferences of transgovernmental networks' as well as those of their states' by supporting certain moral values.[269] According to Grant and Keohane, countries that are members to transgovernmental networks will, at times, act in line with moral values because of the pressure they feel under the reputational accountability.[270]

However, these arguments limit other reasons that may prompt CSOs to appeal to the transnational institutions for collaboration.[271] In other words, the abovementioned studies do not consider the reasons behind the appeal of those CSOs from advanced liberal democracies. Those studies have examined CSOs from less liberal and developing democracies. The ability of CSOs that originate in advanced liberal democracies to challenge their governments' policies is different. There are certain conditions under which the domestic CSOs choose to take their preferences to the Inter-Governmental Organizations ('IGOs') directly. The

[267] Dryzek, *supra* note 11.
[268] Keck, Margaret E, and Kathryn Sikkink. *Activists Beyond Borders: Advocacy Networks in International Politics*. Ithaca, N.Y: Cornell University Press, 1998. Print.
[269] Keck, Margaret E, and Kathryn Sikkink *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, N.Y: Cornell University Press, 1998)
[270] Grant and Keohane, *supra* note 90.
[271] Evangelista, Matthew. *Unarmed Forces: The Transnational Movement to End the Cold War*. Ithaca, NY: Cornell University Press, 1999. Print.

conditions under which CSOs are willing to appeal to transnational organizations include the domestic environment, that is, – whether and to what extent the CSOs' rights are guaranteed by the domestic constitutions, the available resources and size of CSOs, and the issue salience.[272] Therefore, CSOs can pressure their countries to adopt new policies by promoting policy debates that are more favorable for their positions. I demonstrate in sections 2 and 3 how although the NPOs caused Recommendation 8 to comply with the principle of reciprocity, they cannot keep the overall Standards to full deliberative democratic control due to issue salience.

2. Can NPOs democratize the overall content of the Standards?

In this section, I explain how the non-profit organizations ('NPOs'), a type of CSOs, support the value of the principle of reciprocity by challenging the Standards, though that challenge it is not sufficient to keep the overall Standards under democratic control. The role of NPOs becomes important in helping us identify the value of the principle of reciprocity in relation to the output of the Standards. Principally, it is important to note that it is more likely that NPOs among all other CSOs would likely form a political will to challenge the Standards, because they are mainly established as charitable organizations that operate through monetary donations. The reason for NPO resistance is that the Standards affects, and to a certain extent disrupts, the ability of charitable organizations to transfer funds back and forth between different countries for humanitarian purposes. Therefore, in the context of the Standards I will only refer only to NPOs as a type of CSOs.

Recall that the FATF is an intergovernmental agency with a fixed life span[273] and is not a formally established institution. Even if the FATF lacks the formal institutional status, its Standards is accepted as the Best Practice Standards by almost 180 countries in the world.

[272] Alemdar, *supra* note 12.
[273] Currently fixed to operate until 2020.

Therefore, I explain how the NPOs support the value of reciprocity by challenging the Standards. Their challenge provides them with an opportunity to analyze the justifications for the norms adopted by the Standards.

Briefly, in April 2013, the FATF held its first meeting with a coalition of NPOs in London. This was the FATF's first direct engagement with the NPOs. In June 2015 in Brisbane, a coalition of NPOs consisting of the Charity and Security Network ('CSN'),[274] the European Center for Not-for-Profit Law ('ECNL'),[275] the European Foundation Centre ('EFC'),[276] Human Security Collective ('HSC')[277] and the International Center for Not-for-Profit Law ('ICNL')[278] met the second time with the FATF.[279] The consultation that took place in Brisbane was mainly concerning the content of one particular Recommendation, namely the Recommendation 8.[280]

Recommendation 8 requires countries to review and control their NPOs sector, on an ad hoc basis, with the aim of preventing an abuse of NPOs for the purposes of financing terrorism. The main objective of Recommendation 8 is to ensure that NPOs are not misused for the purposes of financing terrorist activities by terrorist organizations by posing as legitimate entities; or by exploiting legitimate NPOs for such purposes; or by obscuring the clandestine diversion of funds intended initially for legitimate purposes by the donors, but instead diverted for terrorist purposes.[281] In other words, Recommendation 8 restricted the NPOs' activity in serious ways. This affected the NPOs' work substantially since their work

[274] Charity and Security, online < http://www.charityandsecurity.org/> (last accessed 15-07-2015).
[275] European Center for Non-Profit-Law, online <http://ecnl.org/> (last accessed 15-07-2015).
[276] European Foundation Center, online < http://www.efc.be/> (last accessed 15-07-2015).
[277] Human Security Collective, online < http://www.hscollective.org/> (last accessed 15-07-2015).
[278] International Center for Non-Profit Law, online < http://www.icnl.org/> (last accessed 15-07-2015).
[279] FATF Formalized Consultation, online <http://fatfplatform.org/announcement/annual-formalised-consultation-with-npos-agreed-at-fatf-plenary/> (last accessed 15-07-2015).; *see also* the Press Release, online < http://fatfplatform.org/wp-content/uploads/2015/07/2015-07-Financial-Action-Task-Force-says-yes-to-formalised-annual-consultation-with-NPOs.pdf> (last accessed 15-07-2015).
[280] Recommendation 8, *supra* note 33.
[281] Interpretive Note to Recommendation 8, para 3, *supra* note 33.

consisted of collecting money through donations and transferring between bank accounts to fund humanitarian activities. Clearly, Recommendation 8 restricted the NPOs' livelihoods and disrupted their operations.

The first direct FATF engagement with a coalition of NPOs took place precisely to prevent Recommendation 8 from being implemented in ways that would disrupt legitimate charitable activity by the NPOs.[282] The second and third meetings between the FATF and the NPOs, which took place in March and June 2015 were aimed to further revise the content of Recommendation 8. Following these three meetings, in a meeting in Paris on September 2015, the coalition of NPOs submitted a proposal for a text revision of the FATF's Recommendation 8 and its Interpretive Note. The coalition of NPOs in this way required changes in the wording of Recommendation 8.[283] I argue that the list of proposals submitted to the FATF implicitly called for the organization to respect the principle of reciprocity. Let me explain how.

The NPOs requested the FATF to review and update the wording of Recommendation 8 and the Best Practice Paper that comes with it. I will address some of the most important changes that the NPOs called for below. Although the list here is not exhaustive, I discuss the most relevant ones in order to demonstrate how the NPOs' engagement with the FATF arose precisely to make Recommendation 8 comply with the principle of reciprocity.

3. Recommendation 8:

To begin with, the NPOs held a consultation with the FATF specifically to point out that the terms of Recommendation 8 were overbroad, and that they did not reflect the reality

[282] Online: http://www.fatf-gafi.org/publications/?hf=10&b=0&s=desc(fatf_releasedate)> (last accessed 15-07-2015).
[283] Outdated text of Recommendation 8, *supra* note 33. *See* also the list of NPOs proposals to the FATF, online < http://fatfplatform.org/wp-content/uploads/2015/10/Outdated-Text-in-FATF-R8-and-its-Interpretive-Note_final-draft.pdf> (last accessed 15-07-2015).

concerning the NPOs and were unfairly restrictive. The NPOs also provided reasons for their arguments that they justified. The NPOs explained that Recommendation 8 omitted the fact that the NPOs played a vital role not only in the global economy but also in enhancing global peace and justice. Since the wording of paragraph 7 b and paragraph 7 h of Best Practice Paper ('BPP') to Recommendation 8 implied a greater level of abuse of the NPO sector it created an erroneous impression that the NPO sector was in greater danger of being abused than other sectors. The NPOs pointed to evidence to suggest that they were in no greater danger of being abused than other sectors and businesses.[284]

Furthermore, the NPOs explained that the wording of paragraphs 9 to 15 of to BPP Recommendation 8 did not satisfy the Risk Based Approach ('RBA')[285] which the Standards envisaged. In other words, the NPOs posited that these paragraphs disallowed the assessment of possible terrorist activities on a context basis in accordance with RBA. They claimed that the RBA required an assessment of risks in relation to their contexts. Paragraphs 9 to 15 of the BPP violated this approach by stating that measures had to be taken to protect the NPO sector from terrorist financing risk. In other words, these paragraphs obliged countries to take measures in relation to the NPOs rather than suggested measures to be taken in certain situations by assessing a given risk. The NPOs justified their reasons by arguing that it was impossible to fully protect any sector from an abuse of terrorist financing.[286] Likewise, these paragraphs did not satisfy the proportionality test, as the NPOs pointed out, since they required that countries had to adopt measures to protect the NPO sector from terrorist abuse. The NPOs postulated that the wording of the paragraphs could imply that the counter terrorist

[284] *Best Practices on Combating the Abuse of Non-Profit Organisations*, June 2015, (2015), [FATF] *see* entire para 7b and 7h, online < http://www.fatf-gafi.org/media/fatf/documents/reports/BPP-combating-abuse-non-profit-organisations.pdf > (last accessed 15-07-2015); *see* also the list of proposals p. 2, online <http://www.charityandsecurity.org/system/files/Outdated%20Text%20in%20FATF%20R8%20and%20its%20Interpretive%20Note_final%20draft.pdf> (last accessed 15-07-2015).
[285] Risk-Based Approach.
[286] Para 9 to para 15, *supra* note 284.

financing regulations applied to the entire NPO sector, a sweeping misinterpretation that was disproportionate and violated the RBA.[287]

In the same fashion, the NPOs claimed that paragraphs 9 to 15 of the BPP did not emphasize the superiority of the rule of law and due process including requirement of an adequate notice of substance of charges and a meaningful opportunity to respond, as these paragraphs required that an immediate action had to be taken by countries to halt a possible terrorist activity or support provided by the NPOs.[288] They posited that the wording had to be changed so as to allow meaningful time for the NPOs to respond in order to implement Recommendation 8 properly. Additionally, they claimed that the rule of law and due process had to be respected when enforcing the actions required by Recommendation 8. They claimed that the fact that these paragraphs required countries to take immediate action without giving a reasonable notice and without respect of the rule of law and due process violated the principle of reciprocity. Consequently, there was no justification for such disproportionate exercise of executive power by the FATF over other societal actors such as the NPOs.

Similarly, the coalition of NPOs argued that the measures required by Recommendation 8 were overly broad in that they required countries to use all available sources of information in order to identify types and features of the NPOs that are prone to be abused by terrorist organizations. The NPOs posited that this requirement had to respect the restrictions placed by the privacy rights and reflect the RBA as well as the proportionality test. In this way, they claimed that information obtained from dubious or unreliable sources such as media should not be relied upon as evidence to suggest NPOs' vulnerability to abuse for the purposes of financing of terrorism. To this end, the NPOs demanded that only factual information should be considered as an acceptable source of information on which to base an

[287] *Ibid*
[288] *Ibid*.

enforcement action if need be.[289] Countries should only consider appropriate measures in line with the RBA.

I claim that the NPOs' proposal to require only factual information that should be used to enforce actions against them calls for the FATF to respect of the principle of reciprocity. Using all available information without selecting its proper source so as to enforce action specifically against the NPO sector is highly discriminative. Therefore, it does not respect the principle of reciprocity because the NPOs would not have accepted it had they been asked by the FATF. Additionally, the reasons provided by the FATF do not justify the discriminative norm.

Furthermore, the NPOs proposed to change the mandatory language used in some of the paragraphs in Recommendation 8 so as to align them with the RBA.[290] They explained that Recommendation 8[291] does not envisage a diverse range of approaches of how countries could mitigate risks. These risks could potentially be identified by the review of the NPO sector. In turn, the NPOs proposed a more effective approach. They suggested that the more effective approach should involve the following elements: "(a) ongoing outreach to the sector (b) proportionate and risk based supervision or monitoring c) effective investigation and information gathering and d) effective mechanisms for international cooperation. The following measures represent specific actions that countries should take with respect to each of these elements, in order to mitigate an identified risk of the sector." [292] Further, the NPOs suggested that the use of non-mandatory language in Recommendation 8 would allow different countries to be able to choose from a diverse number of effective approaches. In summary, the coalition of NPOs claimed that the overall wording of Recommendation 8 was

[289] *Best Practices on Combating the Abuse of Non-Profit Organisations, supra* note 284.
[290] *Ibid.*
[291] *Ibid*.
[292] *Ibid.*

inconsistent with the RBA. Therefore, I claim that the NPOs played a role in bringing the norms to conformity with the principle of reciprocity because they corrected the language of Recommendation 8 so that it became reasonably acceptable by the NPOs.

The NPOs also claimed that measures required by Recommendation 8 did not comply overall with the proportionality test. They argued that Recommendation 8 had to be changed so as to reflect that the NPOs were not the only sector that was under increased threat from terrorist abuse. They argued that there was evidence to back their claim. Equally, the mandatory language of Recommendation 8 was not in accordance with RBA and as countries were barred from choosing appropriate measures in response to terrorist activities that might abuse the legitimate NPOs. In this manner, the NPOs argued that their fundamental rights had been unnecessarily infringed by Recommendation 8, and they listed the causes and effects of these infringements. They provided detailed reasons as to why the wording of Recommendation 8 had infringed their rights. Lastly, they provided proper justifications. In this manner, the NPOs, perhaps without realising, called on the FATF to respect the principle of reciprocity and therefore required the FATF to update the wording of Recommendation 8 so as to make it reflect that principle.

In consequence, I claim that the NPOs deliberated with the FATF Members and democratized Recommendation 8. However, the NPOs had a narrower aim, and only deliberated with the FATF precisely because Recommendation 8 was of utmost importance for the NPOs' interests. Recall that Habermas's discourse theory claims that it is essential for communicative action developed in the weak public sphere[293] to be transformed into generalized norms in the strong public sphere[294] that can be acceptable by those that are

[293] General public venues where popular opinion formation takes place.
[294] Public offices such as parliament, judiciary where formal deliberations take place.

affected by the norms. Recall again that the strong public sphere[295] does in fact transform or translate the collective choice outcome into generalized norms. If we follow this proposition then it would mean that collective choice outcome generated in the weak public sphere, in this case within the NPOs, was translated into the updates within the Recommendation 8 in the FATF's plenary sessions after the NPOs interacted with the FATF Members. As a result, the NPOs' participation in these deliberations with the FATF has caused revisions to be made to the Recommendation 8.

The content of the updated Recommendation 8 has been produced through input by those that are affected or their representatives, by its norms. In other words, the coalition of NPOs represented multitudes within the global NPO sector, by having effectively participated within deliberations, democratically legitimized the Recommendation 8. This intervention is deliberative democracy in action. Recall that under Habermas's discourse theory of democracy, the deliberative participants listen to each other and, if need be, persuade each other with the most feasible argumentation. Recall again that what is important for Habermas's discourse theory is not whether the dominant argumentation be the best or the most right but that the participants to the deliberations have had the chance to listen and to participate in the communicative action of persuasion.

Additionally, participants must have had pragmatic presuppositions of each other such as equality, reciprocity, inclusion, and generalizability, which need not be explicit at the time of the deliberations. By analogy, the meetings between the NPOs and the FATF Members made the content of Recommendation 8 democratically legitimate because the parties had the chance to listen to each other and a chance to persuade each other. In the end, the NPOs managed to influence the FATF to update the content of Recommendation 8 to reflect their

[295] Official venues such as judiciary, parliament and other executive offices where popular opinion is transformed into reasonably acceptable norms.

list of proposals. Subsequent to this exchange of views, the FATF announced that it had updated the Interpretive Note to Recommendation 8 in order to reflect the proposals put forward by the NPOs.[296]

However, simply providing the deliberative participants with reasons does not amount to effective deliberation. Additionally, justifying the reasons is the most important element of deliberative democracy.[297] I postulate that through the submission of a list of proposals and provision of justifiable reasons, the NPOs caused Recommendation 8 to conform to the principle of reciprocity. In other words, the updated version of Recommendation 8 respects the principle of reciprocity because the deliberative participants had the chance to review and to agree to the terms of the mutually binding soft norms contained in Recommendation 8.

Nonetheless, the crucial question that remains is whether such an ad hoc NPO' participation is sufficient to keep the FATF's overall substantive work to democratic control. As the NPOs contested only one of the Recommendations within the 40+9 Recommendations, namely that which was the most salient from their perspective, the NPO's ability to keep a transnational political unit subject to an overall democratic control remains questionable. First, the NPOs form the political will to contest only those discourses that interest them. The NPO's participation in the FATF's decision-making takes place on an ad hoc basis, as and when the NPOs see it necessary from their perspective. In other words, the NPOs challenged the FATF's Recommendations only insofar as they consider it necessary to protect their interests. Therefore, it is only logical to deduce from this that the NPOs are only willing to participate in the FATF's decision-making so long as it suits their needs and interests and not to actually keep the FATF's overall substantive work subject to democratic control.

[296] *Best Practices on Combating the Abuse of Non-Profit Organisations*, *supra* note 284.
[297] Gutmann and Thompson, *supra* note 2.

With such limited motivation, the NPOs' challenge of the Standards took place on an ad hoc basis, as and when it was deemed necessary by the NPOs sector. This, context of action, in effect, reinforces Keck and Sikkink's argument that issue salience is the most important determinant of domestic CSO's appeal to Intergovernmental Organizations ('IGOs').[298] What we thus can deduct from this limited capacity of the NPOs is that they are unable to keep the overall Standards subject to democratic control. The FATF has produced 40+9 Recommendations with myriads of updates to them since its establishment in 1989 up to 2015. The NPOs have participated, and that only recently, in the FATF's deliberations concerning only one of those Recommendations. Therefore, the FATF's overall substantive work is not kept to democratic control through NPOs' role.

Second, the NPOs that contest the discourses rely on their freedoms within the country of their association. The coalition of NPOs that participated in the consultations with the FATF originated in advanced liberal democracies where fundamental rights of freedom of association and speech are protected by constitutional frameworks. As an illustration, the members of the coalition of NPOs that interacted with the FATF include the Charity and Security Network; the European Center for Non-Profit-Law; the European Foundation Center incorporated in Belgium; the Human Security Collective from the Netherlands; and the International Center for Non-Profit-Law from the USA. Although, my intention is not to carry out an in depth analysis of the rights and freedoms that these NPOs enjoy in their respective countries, it is sufficient to state that they originate in reasonably developed liberal democracies, where constitutional structures provide protection of NPOs' fundamental rights.

These NPOs do have indirect power over the Members of the FATF. They are able to influence the FATF's decisions specifically in relation to Recommendation 8 is through an

[298] Keck and Sikkink, *supra* note 268.

indirect mechanism of accountability. In other words, the NPOs are able to hold the FATF Members accountable through their ability to influence the general popular will in their respective countries. The NPOs can influence the popular will through deliberations in the weak public sphere in order to change the collective choice outcome which can vote the prevailing government out of office if it does not change its preferences.[299]

The coalition of NPOs has the ability to influence the general opinion formation within the FATF Member countries and this ability constrains the latter's authority, through a mechanism of accountability in their respective countries. Democratic legitimation of Recommendation 8 has been accomplished indirectly through the guarantee of fundamental rights provided by the FATF's Member countries. Recommendation 8 could not have been democratically legitimised if the coalition of NPOs had not any mechanism of accountability to constrain the FATF Members. Consequently, I argue that if the NPOs did not originate in the FATF Member countries they may not have as much an opportunity to influence the FATF.

Conclusion:

It is true that the NPOs managed to bring the content of Recommendation 8 in conformity with the principle of reciprocity. However, the NPOs do not have the ability to democratize the overall Standards because simply democratically legitimising Recommendation 8 does not make the overall global Standards democratic. In fact, the NPOs' challenge of Recommendation 8 only goes on to demonstrate that NPOs are incapable of keeping the FATF under overall democratic control. Recommendation 8 severely restricted the NPOs work. Therefore, issue salience was the most important determinant in the NPOs decision to challenge Recommendation 8. The FATF has adopted 40+9 Recommendations

[299] Here I mean to use Grant and Keohane's indirect mechanism of accountability.

through its Standards, so far since 1989, of which the NPO sector only challenged one. I presented in this thesis a long list of problems with the FATF Recommendations. So far, none has been challenged by the NPOs sector in general.

Furthermore, I explained how the FATF Mandate does not provide equal conditions for its Members and the Associate Members to deliberate the Standards on equal terms. The Mandate gives all the decision-making power to the FATF Members. It creates an obligation on the Associate Members by committing them to accept all of the norms before they can be accepted to join the FSRBs. In addition to that manipulation, the Standards do not conform to the principle of reciprocity because numerous Recommendations violate this core principle of democracy. In light of these deficiencies, the global AML/CFT regime cannot be democratically legitimate. Therefore, I claim that the overall FATF Standards are not democratically legitimate.

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