

**DEMOCRATIC ACCOUNTABILITY IN A ‘DEMOS’ LESS GLOBAL SPACE:
EXPLORING SECOND BEST ALTERNATIVES**

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Abstract

Because of the pressures of globalisation, the architecture of the international legal system is undergoing a change and the nation-state’s role in shaping of international legal order has to a large extent been compromised with the entry of other non-state actors, such as civil society (non-governmental organisations) and international organizations. With non-state actors gaining in prominence, there is a proliferation of specialised regimes of international regulatory apparatus which have taken over areas which were traditionally under the province of nation-states. Consequently, the ‘State Consent’ model which legitimised international law, has been weakened and concerns as to an emerging ‘democracy deficit’ in the system have been raised. Proposals to replicate at the global level, democratic accountability mechanisms similar to the ones within the nation-state, seem infeasible and ‘second-order’ accountability models such as those of ‘surrogate’ accountability have been advocated. The present article highlights some of the problems with the standard accountability mechanisms, discusses the ‘pessimistic’, ‘cosmopolitan’ and ‘pluralist’ strands of thought that exist in the contemporary academic discourse surrounding the feasibility of democratic accountability mechanisms in the global space and analyses some of the innovative alternative models as have been proposed by the leading scholars.

Keywords : *Surrogate Accountability, Sovereignty, State Consent Model, Democracy Deficit, Participation and Delegation Model*

- I. Introduction: Globalization, Erosion of State Sovereignty and Accountability in the Global Space**
- II. Erosion of ‘State Sovereignty’ and the weakening of the ‘State Consent’ model**
- III. Democracy-Deficit: Calls for ‘Democratic Accountability’**
- IV. Accountability Mechanisms within the State: Can there be replication of the domestic model at the global level?**
- V. Standard Accountability Mechanisms**
- VI. Combating Inequality in Bargaining power: Surrogate Accountability Mechanism**
- VII. Conclusion**

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I. Introduction: Globalization, Erosion of State Sovereignty and Accountability in the Global Space

SOVEREIGN STATES as the first subjects of International Law with their widely recognised ‘international legal personality’ had traditionally been regarded as the omnipotent creators of International Law. For long, they were regarded as the only entities capable of holding rights and obligations in the international legal system and thus were regarded as its principal architects. However, today we live in the times of ‘globalisation’.

Globalisation has been described by Giddens as “an intensification of worldwide relationships which link distant localities in such a way that local happenings are shaped by events occurring many miles away and *vice versa*”.¹ According to David Held, globalization has “a profound effect on the concept of physical territory as an organizing principle for social, cultural, economic, or political relations.”² It entails the “trans-nationalisation of the connections taking place in the world.”³ Among the many ways in which globalisation is changing the world order, the most prominent remains the tremendous growth in the international flow of capital and labour, due to which, there is an increase in economic integration which has adversely impacted the ability of the nation states to regulate their domestic economies.

The intensification of globalisation has placed limitations on the independent conduct of domestic policies as the nation states have been forced to delegate much of their authority to international organizations and even private actors in the global sphere. It has furthered the role of international organisations in the conduct of inter-state relations. Areas such as human rights, environmental law and trade law which were earlier held to be in the exclusive domain of nation states, are now being increasingly regulated through specialised regimes of international regulatory apparatus, thus posing serious challenges to the sovereignty of the State. To quote examples, one may look at the WTO-recognized yet non-governmental International Electrotechnical Commission, which sets standards for thousands of electrical

¹ Anthony Giddens, *The Consequences of Modernity* 70 (Polity Press, Cambridge, 1991).

² David Held, Anthony Mc. Grew, *et al* (eds), *Global Transformations: Politics, Economics and Culture* (Stanford University Press, Stanford, 1999) as cited in Julian G. Ku and John Yoo, “Globalization and Sovereignty” 31 *Berkeley J. Int’l L* 212 (2013).

³ James Mittelman, “The Dynamics of Globalisation” in James Mittleman (ed.), *Globalisation: Critical Reflections* (Boulder Lynne Rienner Publishers, 1996).

and electronic products and components,⁴ the setting of standards on money laundering by the Financial Action Task Force, the Internet Corporation for Assigned Names and Numbers (ICANN), which is responsible for coordinating the maintenance and procedures of several databases related to the namespaces and numerical spaces of the Internet, or the private International Standardization Organization (ISO) which has adopted over 20,000 standards that harmonize product and process rules around the world.⁵ Similarly, the Greenhouse Gas Protocol Corporate Accounting and Reporting Standard, developed by two non-governmental organizations (NGOs), namely the World Resources Institute (WRI) and the World Business Council on Sustainable Development (WBCSD) has been widely adopted by emissions reporting schemes around the world.⁶

With the weakening of the position of the State at the global level, it is argued by some scholars that the ‘State consent’ model which legitimized international law, is under great stress and some go on to the extent of declaring the ‘State consent’ model to be broken.⁷

In the light of the waning sovereignty of States and rise of the non-state actors, there’s an accountability deficit in the system that has sprung up. Concerns have been raised as to the legitimacy of the global governance system that has emerged and there are increasing calls for the ‘democratization’ of the existing regime. However, since the replication of the conventional democratic set up based on the principle of representation is not practical at the global level, some scholars have advocated that accountability mechanisms though not strictly democratic, may serve as an alternative system, effective in checking the abuse of power. The present paper attempts to analyse some of the solutions that are being proposed to these accountability concerns and looks at the academic discourse surrounding the debate on the need for and viability of ‘democratic accountability’ in the global space in the wake of the alleged break down of the State consent model because of the State sovereignty crisis.

⁴ Tim Büthe, “Engineering Uncontestedness? The Origins and Institutional Development of the International Electrotechnical Commission (IEC)” 12 (3) *Business and Politics* (2010).

⁵ About Us, International Organization for Standardization, *available at*: <https://www.iso.org/about-us.html> (last visited on December, 27, 2020).

⁶ Jessica F Green, “Private Standards in the Climate Regime: The Greenhouse Gas Protocol” 12 *Business and Politics* 1-37 (2010).

⁷ See the succeeding section that explains the ‘State Consent Model’.

II. Erosion of ‘State Sovereignty’ and the weakening of the ‘State Consent’ model

Old Model (The Westphalian World Model)

In relation to international law, it is often argued that since there are no effective sanctions available in this domain, it remains to be quite weak. The adherence to international law is often rendered subject to the convenience of the State as they pursue their self-interest. States are free to contract with other States. Mutual promises are made by the States and international agreements are based on such mutually agreed upon obligations. Since treaty implementation by the States is mostly dependent on the procedures of domestic implementation such as ratification and approval requirements by the State legislature and the incorporation of the international law into their municipal law, it is perceived that the entire international law machinery is subject to ‘State consent’. Thus, “State’s consent to these international or thin transnational arrangements is perceived to be enough for legitimizing such legal state-of-affairs.”⁸

It is assumed, thus, relying on the State consent model, that since the network of international agreements and underlying law therein, is a product of the ‘autonomous will of the State’ in the Westphalian world, international law and institutions, subject to this ‘will’ are answerable to States.⁹ Further, as a fundamental feature of the ‘sovereign equality’ principle of the States, the treaty making power that vests with the State includes within it the power to withdraw itself from international obligations so incurred, thus there is no effective legal impediment if the State wishes to exit from the regime. The design and operation of the treaty exit clauses as governed by the Vienna Convention on the Law of Treaties (hereinafter, VCLT) is itself founded on the principle of State consent.¹⁰ The States are free to negotiate upon both the

⁸ Danielle Hanna Rached, “Doomed aspiration of pure instrumentality: Global Administrative Law and Accountability” 3 *Global Constitutionalism* 338 (2014).

⁹ *Id.*, at 348. For further reading on the role of ‘State consent’ as a legitimating device in international law, refer Matthew J. Lister, “The Legitimizing Role of Consent in International Law” Faculty Scholarship at Penn Law 317 (2011), available at: https://scholarship.law.upenn.edu/faculty_scholarship/317 and A. Guzman, “The Consent Problem in International Law” *UC Berkeley: Berkeley Program in Law and Economics* (2011), available at: <https://escholarship.org/uc/item/04x8x174> (last visited on Feb. 06, 2021).

¹⁰ Laurence R. Helfer, “Terminating Treaties” in Duncan Hollis (ed.), *The Oxford Guide to Treaties* 634-649 (Oxford University Press, 2012). Vienna Convention on the Law of Treaties, 1969, arts. 54, 56.

Art. 54 - Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

(a) in conformity with the provisions of the treaty; or
(b) at any time by consent of all the parties after consultation with the other contracting States.

substantive and procedural aspects pertaining to the termination of their relationship while deliberating upon the treaty exit clauses during the process of treaty making. In case of there being an absence of such clauses in a particular treaty, the same is governed by the provisions pertaining to termination, withdrawal and denunciation of treaties as contained in the VCLT which require the service of a twelve month notice by the State intending to withdraw from the treaty. However, the treaties between States and international organisations are outside the ambit of the VCLT and are governed by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which till date has not entered into force.¹¹ Other than the procedures as contained in the international law arena, there are separate treaty withdrawal mechanisms embedded in the different domestic legal systems that have to be complied with, which furthers the 'democratic' component of the State consent model.¹² In such a model thus, the issues of democratic accountability seem less concerning.

New Model (Post Westphalian Sovereignty Model)

The new realities of globalisation have led to some serious repercussions for the above discussed 'State-consent' model. The traditional model based on cooperation and consent of States has undergone a perceptible shift and the international regime has become more intrusive.

Because of the receding sovereignty of the States, with the emergence of multiple non-state actors, we have before us, the post-Westphalian era. The State centric model is now reshaped into a model based on multiple actors in the maze of international affairs. However, it would still not be correct to portray the State as 'just one actor' among these other multiple actors; though there's an attenuation of the State, it is still not a complete atrophy of the State that we see in the globalising world. There has indeed been a multiplication of sites of decision

Art. 56- Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal:

1. A treaty which contains no provision regarding its termination, and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

- (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
- (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

¹¹ Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, 1986.

¹² Laurence R. Helfer, Treaty Exit and Intra-Branch Conflict at the Interface of International and Domestic Law *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press, 2018); Lucas Kowalczyk, "The Nuclear Option: Domestic Treaty Withdrawal Mechanisms" 56 *VA. J. INT'L L.* 745 (2016).

making at the global level. The new regimes that have come up display an ability to bind States even against their will as these regimes may be too costly for States to be opted out. The several WTO agreements including TRIPS provide glaring examples of how the membership in such international organisations may hinder the free exercise of democratic domestic choices in economic, health and also other domains, thus severely affecting the economic sovereignty of the State. From the determination of the capital adequacy requirements to the trading regime for carbon emissions, the international regulatory regime is all pervasive. Thus, consent as the operational element in the whole legitimization discourse seems to be inadequate in the wake of the present-day challenges. What all this implies ultimately, is that the Westphalian legitimacy theory fails to provide sufficiently for the accountability concerns in the changed realities of the post-Westphalian era. The earlier model wherein through the mechanism of State consent, “a principal–agent transmission belt is set up, that is, the State delegates to international organizations nondiscretionary power and would keep intact its sovereign power while subjecting itself to international rules”¹³ has undergone a serious change.

Thus, there arise concerns pertaining to democratic accountability in this new framework since it is argued that the kinds of transnational institutions that have emerged are quite far removed away from the original act of State consent.¹⁴ There are calls for a re-evaluation of this legitimizing theory in international arena and the accountability discourse has taken centre-stage.

Further, the ‘non-democratic’ nature of this regime is something that has been the cause of much discussion and scholars are exploring the possibility of there being accountability mechanisms that are democratic in nature. Questions remain as to whether such democratic mechanisms are feasible and if feasible, whether they are desirable or not. In addition to this, interesting alternative models which propose solutions to the problem of the accountability deficit without focussing on the ‘democratic’ component are also evolving. The following section discusses these concerns and the different strands of thought that exist as to the possibility of there being a ‘democratic accountability’ framework in a ‘*demos*’ less space.

¹³ *Supra* note 8 at 351.

¹⁴ Oona A Hathaway, “International Delegation and State Sovereignty” 71 *Law & Contemp. Probs.* 115 (2008).

III. Democracy-Deficit: Calls for ‘Democratic Accountability’

Scholars in the field have pointed out that because of the wide-ranging regulatory powers that have been transferred to international organizations in the wake of globalisation, there has been a vesting of vast amount of power in the executive branches of a few powerful States, these few hegemonic States, are thus the system’s major framers. “The combination of such overly concentrated executive power and the international system’s relative lack of structural checks and balances that safeguard democratic deliberation and human rights in domestic settings”¹⁵, thus emerges as a pressing concern and the same has been referred to as the problem of the “democracy deficit” at the global level. This deficit may be understood better if one analyses how there has been an attenuation of the democratic mechanisms both within the State and beyond it.

The pressures of globalisation have led to the aggravation of the democracy deficit firstly, in the international arena where there is an increasing proliferation of regulatory apparatus that relies heavily on non-State actors and the lack of internal democratic mechanisms within the international institutions.¹⁶

Concerns about the internal democracy deficit within the international organisations have remained perennial. Ever since Robert Dahl made an assertion in his work about how international organisations would be nothing but “opaque ‘bureaucratic bargaining systems’ in essence, thus necessarily lacking mechanisms of democratic control and accountability”,¹⁷ the proposition has been put to test by several scholars and it cannot be denied that attempts at reformation of the existing set up have been undertaken.¹⁸ However, great inequality has persisted in the global-governance machinery which could be seen, say, in the weighted voting mechanisms of the institutions like the IMF and the World Bank, where the major

¹⁵ Eyal Benvenisti, “Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts” 102 *American J. Int’l L.* 241 (2008).

¹⁶ For discussion about how globalisation of the international legal system has led to erosion of economic and political independence of the third world countries because of the control over international institutions that is exercised by the first world, one may refer to TWAIL scholarship (Third World Approaches to International Law). TWAIL has emerged as an approach to understand the history, structure and process of international law from the perspective of third world states, and thus focuses upon issues such as threats of recolonisation and neoliberalism, perpetuation of the north south divide through the means of international legal system, etc.

B.S. Chimni, “Third World Approaches to International Law: A Manifesto” 8 *International Community Law Review* 3 (2006); Antony Anghie, *et. al.*(eds), *The Third World and International Order: Law, Politics and Globalization* (Martinus Nijhoff, Leiden, 2003).

¹⁷ Robert A. Dahl, “Can International Organizations Be Democratic?” in I. Shapiro and C. Hacker-Cordon (ed.), *Democracy’s Edges*, 19 (Cambridge University Press) 1999.

¹⁸ Casarões, Guilherme, Dawisson Belém Lopes, “Can International Organisations Be Democratic? A Reassessment” 41 *Contexto Internacional* 481 (2019).

financial powers control the executive boards of these organizations.¹⁹ Similarly, the instances of human right violations by the UN Peacekeeping forces leave us with the difficult questions about how and upon whom accountability is to be enforced and by whom.²⁰ Examples may also be taken in relation to the inequality in access and control over resources wherein we see the developed north *de facto* controlling the governance machinery as is evident in conventions such as the Antarctic Treaty. The Antarctic Treaty, 1959 though has as on date forty-five State Parties, however, out of these only the twenty-eight Consultative Parties have the right to participate in the decision making. This privilege is based on these countries being the original signatories to the treaty.²¹ Examples like these show the asymmetries of power that exist in the global framework. Also, concerns surround the mushrooming of multilateral institutions since it is argued that these multilateral institutions function in a manner that makes bypassing of the arduous processes of persuasive deliberation and consensus building through discussion, that are the hallmarks of democracy, quite easy. Lobbying by non-elected, non-governmental organizations, special interest pressure groups, advocacy groups, often occurs without the legislative deliberation and formal law making which again reflects the democracy deficit in the system.

¹⁹ Each member state of IMF has a quota that is fixed in accordance with its direct financial contribution to the organisation. It is expressed in relation to the Special Drawing Rights, or SDRs. These quotas determine its voting weight and representation of the member state in the Fund's Executive Board. There are 250 basic votes with each member state plus one additional vote for every 100,000 SDR of its quota.

To understand how the voting rights are dependent upon quotas fixed for the member states in the IMF, and how quotas are calculated - International Monetary Fund, *available at*: <https://www.imf.org/~media/Files/Factsheets/English/quotas.ashx> (last visited on Feb. 08, 2021).

The table depicting the quota and voting shares for all the IMF members may be accessed at <https://www.imf.org/external/np/sec/memdir/members.aspx> (last visited on Feb. 06, 2021).

For a discussion on how the weighted voting mechanisms promote the concentration of control of international financial institutions in the hands of the global north, see David Woodward, "IMF Voting Reform: Need, Opportunity and Options", (G-24 Discussion Paper Series, Research papers for the Intergovernmental Group of Twenty-Four on International Monetary Affairs and Development, UNCTAD, 2007) which mentions, "The result of the weighted voting system is that the developed countries, which account for 20 per cent of Fund members and 15 per cent of the world's population, have a substantial majority (60.4 per cent) of the votes. The developing countries, by contrast, are seriously under-represented relative to their share both of membership of population."

David P. Rapkin, Jonathan R. Strand, "Reforming the IMF's Weighted Voting System" 29 *World Economy* 249 (2006).

²⁰ Camila Domonoske, U.N. Admits Role in Haiti Cholera Outbreak That Has Killed Thousands *NPR*, August, 18, 2016, *available at*: <https://www.npr.org/sections/thetwo-way/2016/08/18/490468640/u-n-admits-role-in-haiti-cholera-outbreak-that-has-killed-thousands>; Elian Peltier, U.N. Peacekeepers in Haiti Said to Have Fathered Hundreds of Children *The New York Times*, December, 18, 2019, *available at*: <https://www.nytimes.com/2019/12/18/world/americas/haiti-un-peacekeepers.html> (last visited on Feb. 09, 2021).

²¹ Fabio Tronchetti, *The Exploitation of Natural Resources of the Moon and Other Celestial Bodies, A Proposal for a Legal Regime* 136 (Brill, 2009).

Moreover, national governments have been unable to resist external pressures and rather than taking up a strong position advancing their domestic interests, there has been a passive acceptance of the framework of norms and obligations as advanced in the international arena which is often eclipsed by the agendas of hegemonic powers.²² Further, many subjects which were earlier considered to be within the domain of domestic policy making are now addressed in supranational forums, such as those of financial regulation or food and drug safety standards.²³ In these supranational forums, it is the executive that has the leading role rather than the legislature which is traditionally regarded as the most ‘democratic’ branch of the nation State.

Secondly, there is a weakening of the democratic processes within the nation State due to phenomena like the rise of delegated legislation and the consequent widening ambit of the powers of the national executive and the escalation of the treaty regime wherein the domestic legislature, again has a role subordinate to the unelected, national executive.

Since the modern-day State has assumed the role of a ‘regulatory’ State, legislative functions are increasingly being delegated to the executive even at the domestic level. Thus, there is a ‘delegation revolution’.²⁴ Therefore, even within the domestic bounds, more and more policy making is moving into the hands of the unelected executive, thus being removed from the direct control of electorally accountable office holders.

Further, the escalation of the treaty regime and the increasing commitments thus made through the treaty power without even being ratified at home have also led to other concerns of the diminishing power of the democratic mechanisms within the State. Treaty making has since long remained the prerogative of the executive and though originally the treaty making

²² Eyal Benvenisti, “Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts” 102 *American J. Int’l L.* 241 (2008) wherein the author discusses examples such as of the global counter-terrorism measures that were launched post 9/11. Benvenisti contends that in the wake of the international pressure for putting stringent anti-terrorism measures in place, most domestic legislatures remained powerless, mute spectators, passing several draconian laws without deliberation, thus severely impairing the democratic process within the nation states. The article further discusses how the judicial branch at the domestic level has acted in resistance to such deferent attitude of the national legislature and executive.

²³ To regulate global food safety, the Codex Alimentarius Commission (CAC) was established in early November, 1961 by the Food and Agriculture Organization of the United Nations (FAO) which was joined by the World Health Organization (WHO) in June 1962. The Codex Alimentarius contains internationally recognized standards, codes of practice, guidelines relating to foods, food production, labelling, food additives and other aspects relating to food safety. Similarly, BASEL III norms lay down the global regulatory framework for banks, prescribing capital adequacy requirements in order to ensure that banks maintain sufficient levels of capital for managing their risks better.

²⁴ Devesh Kapur and Pratap Bhanu Mehta, “The Indian Parliament as an Institution of Accountability” *Democracy, Governance and Human Rights Programme Paper Number 23*, UN Research Institute for Social Development (2006) at 30.

power was confined to the limited power of the monarch to conclude war and peace agreements, the situation in the wake of modern-day pressures of international coordination and cooperation has drastically changed.²⁵ Qualitatively too, one can note the proliferation of treaty making covering diverse fields such as banking regulations, financial sector, telecommunication, terrorism and national security, cyber law, data protection, environmental protection, extradition, fisheries, food standards, health, human rights, intellectual property, investment, labour standards, taxation, trade, transport etc. This is a concerning development since while some countries have mechanisms for parliamentary approval and ratification of treaties as a constitutional requirement, the same is not true for all countries. For instance, under the framework of the Constitution of India, though the Parliament has the legislative competence to make laws relating to treaty making powers²⁶, no law has been enacted by the Parliament to regulate the manner of signing and ratification of treaties. Thus, entering into treaties since independence has been left solely to the executive. What is evident from the discussion is that with the changing dimensions of State both within and outside the domestic bounds, the notion of State consent as representing the autonomous will of the State has come under strain and it is argued that there has been an evasion of the democratic component in the existing accountability mechanisms.

On the other hand, if one takes into account the pragmatic considerations which exist in the world today, it is a given that such a multilateral regime is indispensable in contemporary times. Supporters of multilateralism argue that in the present world-order, policy goals are incapable of being realised by individual States without there being delegation and pooling of sovereignty. “Without reciprocal cooperation, governments cannot reach domestic goals such as slowing global warming, liberalizing the international economy, integrating communication systems, combating terrorism, and regulating multinational corporation.”²⁷

²⁵ Edward Keene, “The Treaty-Making Revolution of the Nineteenth Century”, 34 *Int’l Hist. Rev.* 475 (2012). Keene mentions, “...while treaties were being concluded at a rate of some 20–30 treaties a year in the 1790s, rather similar numbers to those that had existed since 1650, a century later this had risen nearly seven-fold to some 140–150 treaties per year, increasing to around 200 a year by the outbreak of World War I, and to over 1000 treaties by the end of the twentieth century.”

²⁶ The Constitution of India, art. 246 - Parliament is given exclusive power to make laws with respect to matters enumerated in List I of the Seventh Schedule of the Constitution. This list includes “entering into treaties and agreements with foreign countries and implementation of treaties, agreements and conventions with foreign countries.” ; Mario Mendez, “Constitutional review of treaties: Lessons for comparative constitutional design and practice” 15 *I-CON* 84 (2017).

²⁷ Robert O. Keohane, Stephen Macedo, *et.al.*, “Democracy-Enhancing Multilateralism” 63 *International Organization* 1 (2009).

Thus, the question as to the need for ‘democratic’ accountability in the present-day world has become very relevant. However, at the same time, it must be acknowledged that any utopian ideal of transforming the global governance framework into a “one person, one vote” system is neither feasible, nor desirable. The following section analyses how the spatial conception of democracy wherein one expects a territorial congruence between the well-defined bounded State and the mechanisms of democratic accountability is not a fit at the global level.

IV. Accountability Mechanisms within the State: Can there be replication of the domestic model at the global level?

Absence of a global government, a global electoral process or a global constitution pose significant challenges in the development of any functional ‘democratic accountability’ set up at the global level. Thus, it has been stressed by several scholars that these issues of absence of a global *demos*, the implausibility of global elections or of a global government point out to the need to move beyond the traditional ‘spatial’ idea of democracy. They warn against attempts of a simplistic appropriation and application of conventional democratic principles on to the global scale. What is in fact needed, is a visualisation of an accountability framework appropriate to the architecture of contemporary global politics. Scholars have been exploring possibilities to devise accountability mechanisms that are non-electoral in nature and thus not dependent on the existence of any global electorate, which may act as a check on the exercise of power in the global sphere.

Scholars like Robert Keohane and Ruth Grant have pointed out, “there is no global government but there is global governance: authoritative rule-making with expectations of obedience and anticipated negative consequences of disobedience”²⁸ thus, focussing on the need for development of accountability frameworks for the global level despite the lack of a traditional government set up.

Within the State, there can be two spatial coordinates of accountability, one along the vertical line wherein we see hierarchical relationships like that of principal and agent between the people and the government or through devices of territorial decentralisation like federal and state government, the other along horizontal lines which include the doctrine of separation of

²⁸ Ruth W. Grant and Robert O. Keohane, “Accountability and Abuses of Power in World Politics” 99 *American Political Science Review* 29 (2005).

power. The horizontal mechanisms are in contrast to the command-and-control or hierarchical way of organizing power and the accountability constraint here functions as an interbranch ‘checks and balances’.

These minimum accountability constraints found at the domestic level are missing at the global level and thus the possibility of abuse of power is higher in that realm. Without there being an effective constitutional system providing for an institutionalised mechanism for checks and balance, the danger of tyrannical exercise of power looms large. There is an absence of any democratic ‘legislative’ body which could serve as a forum for deliberation for formulation of instruments of general law. Since exercise of power in public law has to derive legitimacy from some democratic sources, this ‘institutional provenance’ is crucial to establish the legality of the exercise of that power.

It is at times proposed that this gap can be filled by the United Nations General Assembly or the Security Council. However, the UNGA resolutions do not enjoy the status of ‘law’. The most that they can be regarded as is evidence of customary international law. Similarly, UNSC resolutions at times have been proposed to approximate legislation closely.²⁹

However, one must point out that the nature of such resolutions passed by UNSC is not such that merits general application since these are only passed in urgent situations of crisis. Further, as is the case with UNGA, the closest these resolutions come to, is to reflect an evidence of customary international law, which is also subject to varying interpretations and thus to regard these as laws in the true sense would be fallacious.

²⁹ Usually in the light of Article 25 of the Charter of the UN which provides: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” The question as to determining whether a particular provision of a Security Council resolution is legally binding on member states or not was answered by the International Court of Justice in 1971 in the Namibia advisory opinion wherein it specified that “The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.”; *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, International Court of Justice (ICJ), June 21, 1971, available at: <https://www.refworld.org/cases,ICJ,4023a2531.html> (last visited on Feb. 02, 2021); Dan Joyner, “Legal Bindingness of Security Council Resolutions Generally, and Resolution 2334 on the Israeli Settlements in Particular” *EJIL:Talk! Blog of the European Journal of International Law*, January 9, 2017, available at: <https://www.ejiltalk.org/legal-bindingness-of-security-council-resolutions-generally-and-resolution-2334-on-the-israeli-settlements-in-particular/> (last visited on June 1, 2021).

Similarly, it is noted that there is nothing even remotely resembling an executive branch at the global level. Coming to the third branch, though there is no unified judicial branch yet, there are several international tribunals and courts like the ICJ, ICC, the WTO dispute resolution body etc. at the global level. The compression of time and space that has resulted from globalisation has indeed led to an increased communication between these organs as well as between different national courts at domestic level, a phenomenon which is described by Anne Marie Slaughter as trans-judicial communication. This transnational dialogue that has resulted in ‘cross-fertilisation’ within the legal systems makes scholars like Slaughter hopeful as to the possibility of emergence of a global legal order.³⁰ However, despite the growing interconnectedness, endeavours envisaging a global legal order remain largely unrealistic and impractical.

Thus, it is amply clear that devoid of the institutional set up that is available at the local level, the challenges of governance in the global sphere need to be dealt with through an appropriate mechanism to ensure goals of accountability. In the words of Danielle Rached:³¹

Unlike the domestic, the global context is considered ‘highly imperfect’, ‘defective’ and ‘nonideal’ for political action. Hierarchical metaphors, like the irresistible pyramidal image, do not work. The global context, so to say, lacks the ‘burden of the whole’, a transnational sovereign that carries, like the State, the ultimate general responsibility for actions, one that takes binding collective decisions and that has the power to coercively enforce them. Without a centralized government, there are a variety of power-holders who relate to each other in non-hierarchical ways. For this very reason, in such domain, ‘there is no single “problem of global accountability”’; there are many’.

In response to these multiple accountability problems that have arisen, several strands of thought have emerged as a possible solution to the issue. The major lines of thought are sometimes described as the ‘pessimistic, cosmopolitan and the pluralist’.

Pessimistic opinion holders hold the view that in global politics, the pre-requisites of democratic accountability are absent. There’s no clear mechanism to link the power wielders within a bounded political community to any ‘*demos*’ (common populace) and it is highly unlikely that such a mechanism or such a global *demos* would emerge in the current future.

³⁰ Anne-Marie Slaughter, “A Typology of Transjudicial Communication” 29 *U. Rich. L. Rev.* 99 (1994).

³¹ *Supra* note 8 at 347.

Thus, for them it is impossible to conceive of democratic accountability beyond the boundaries of the State. Cosmopolitans, on the other hand, are more optimistic and believe in the potential of adaptation of the traditional models of democratic accountability and their global application and for this they suggest overlapping and multi-layered institutional forms which could serve to restore the symmetry between rulers and ruled at all levels of governance.³²

Pluralists hold the third opinion which is based on the view that due to the stark contrast that exists between the nation-state set up and the global space, the standard notions of democratic accountability are unsuitable globally and they favour an ecumenical approach. They de-emphasise on the 'democratic' component in accountability mechanisms and find it more appropriate for the global realm, to have in place a system which though may not be conventionally democratic but which could effectively restrain abuse of power. According to this view,³³

Strict analogies from domestic democratic politics should be regarded with scepticism, and we should resist the temptation to narrow the issue of accountability to that of democratic control. Ingenuity in devising effective mechanisms, and the ability to synchronize their operation, will be more important for controlling abuses of power than a single-minded and mechanical application of the ideals of democracy.

Interesting alternative models have also been proposed which talk about changing the onus from 'who should hold power to account' to 'why power must be accountable in democracy'. Michael Goodhart proposes a model of global democratic accountability to 'norms' derived from the core democratic principles of freedom and equality, thus steering away from the focus on the specific agents/ 'demos' and offering a pragmatic alternative to the above described models.³⁴ An elaboration on all these models with their pros and cons is beyond the scope of this work but the different models that are emerging indicate the pressing need to reassess the traditional accountability models in international law that are based on the sovereignty of State and State consent and which have become insufficient and inadequate to deal with the challenges.

³² Michael Goodhart, "Democratic Accountability in Global Politics: Norms, not Agents" 73 *The Journal of Politics* 45 (2011).

³³ *Supra* note 28.

³⁴ *Supra* note 32.

The following section discusses the standard accountability model that exist at the global level and alternative ‘second order’ models that have been proposed as solutions to the problem arising out of the lack of a global ‘*demos*’ and the inequality of bargaining power that exists between the different actors in the global space.

V. Standard Accountability Mechanisms

What is ‘Accountability’?

Before analysing the standard model of accountability, it is desirable that one understands what the term accountability implies in the context of power relations at the global level. The term ‘accountability’ as described by Keohane and Grant refers to the “right of one set of actors to hold the other set of actors, to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met.”³⁵ Thus, expressed in terms of a power relationship between the two set of actors, power wielders and accountability holders, any accountability mechanism rests on the legitimacy of “(1) the operative standards for accountability and (2) the authority of the parties to the relationship (one to exercise particular powers and the other to hold them to account)”.³⁶

According to the above understanding of the mechanism, one can identify three main elements in any standard accountability mechanism: standards, information and sanctions.³⁷ In the first stage, standards have to be determined which are the yardstick/touchstone on the parameter of which the power wielder is to be judged/evaluated. These standards might be rules, norms, outcomes, or procedures. The power wielder has to adhere to these standards, in contravention of which he would have to bear the possibility of sanctions at the third stage. However, in order to determine if there has been sufficient compliance by the power wielder, the accountability holder requires ‘information’. Thus, information becomes a crucial element linking the standards and the sanctions that follow in the case of non-adherence to the standards. The issue of information is at times tricky in the case of these power relationships since most times, it is the power wielders who hold the most credible and accurate information. However, their interests would dictate that any information which would expose

³⁵ *Supra* note 28 at 29.

³⁶ *Ibid.*

³⁷ *Ibid.*

them to the possibility of sanctions is held concealed, thus leading to a tendency of non-disclosure of this information. On the other hand, one can also argue that power wielders have both moral and strategic reasons to disclose to the accountability holders, the information as to the adherence to the standards. “The moral reason is that accountability holders deserve to know whether a power wielder has complied with its obligations to them.”³⁸ The strategic reason would be the need and the incentive that exists for the power wielder to explain activities to the accountability holder to avoid being subject to the sanctions. Jennifer Rubenstein in her research paper uses the following representation to elucidate a standard accountability model thus explaining the relationship involving information, standards and sanctions, between the accountability holder and the power wielder.

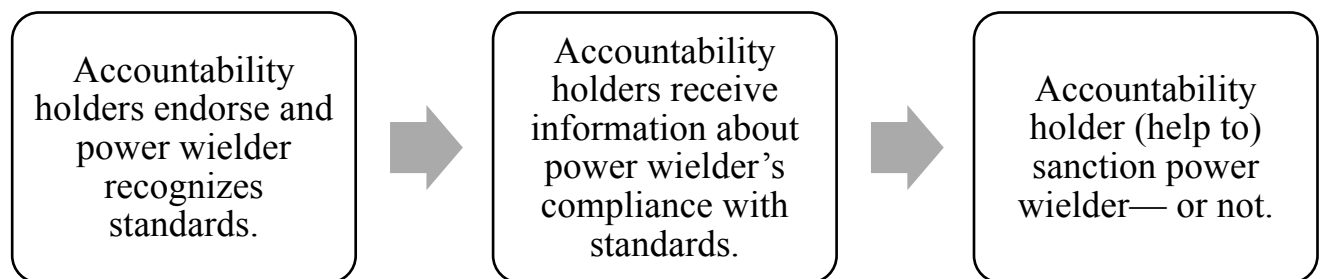


Figure 1. Standard Accountability Model

Source: Jennifer Rubenstein, “Accountability in an Unequal World”, 69 *The Journal of Politics* 616 (2007).

To give some examples wherein we see these three elements at play are:

Electoral accountability: In a system of electoral accountability, the political office holder is subject to standards as held by the voters in a particular constituency and they risk being voted out of office if they fail to promote the preferences of the voters.

Market-based accountability: Market based accountability works based on the reaction of customers in the market to the practices of any company. If the company engages in labour exploitative practices, the customers by boycotting the company can effectively sanction the company and hold them accountable.

³⁸ Jennifer Rubenstein, “Accountability in an Unequal World” 69 *The Journal of Politics* 616 (2007).

Attempts at transposing such accountability models on to the global realm, reveal the difficulties and the inherent challenges therein. As has been discussed in the previous sections, the lack of a global electorate makes it impractical to think of electoral accountability mechanisms in the global space. Though interesting examples such as of the global internet-based election held by ICANN exist, the practical viability of replication of such examples at a wider scale is almost nil.³⁹

Traditionally, in the State consent model, States had been regarded as the entities that shall hold actors such as the international organisations accountable. Thus, the vertical link between the power wielders and the accountability holder State would remain intact. However, with the weakening of the State consent model, and the rise of global regulatory apparatus, the vertical relationship stands disrupted. Further, because of the widespread inequality between the different actors in the international realm, the ability of the State to act as an effective accountability holder stands impaired. But if the State has lost its position as the representative of domestic interests and has failed to act as an adequate accountability holder, who should the accountability holder be? The following section discusses the question in detail and traces how there has been a departure from the vertical mechanisms and the move towards the pluralist models of accountability in the present-day world.

Who gets to be the ‘Accountability Holder’? - Models of ‘Democratic’ Accountability

In the standard models of accountability, who should be the accountability holder is an important question to be answered. In models of ‘democratic’ accountability, these are answered based on the concept of the ‘popular will’. Grant and Keohane have identified two main principles that should explain the basis of identification of accountability holders in any ‘democratic accountability’ model. These are: The principle of participation and that of delegation.

Participation Model (All Affected Principle)

By participation they refer to the ‘all affected’ principle which provides that all those who are affected by decisions have a right to hold the rulers accountable—it may be either direct

³⁹ In October, 2000, the Internet Corporation for Assigned Names and Numbers conducted its first online election wherein 76,000 people registered as voters in order to elect five of its nineteen directors. The same though can hardly be said to resemble the actual, democratic electoral process, however, such instances reflect how concerns of accountability have led to such efforts by international organisations so as to display their commitment to goals of transparency and accountability.

accountability or through the manner of elections and plebiscites.⁴⁰ Thus, according to this principle, consequent upon their status as those affected by the power wielders' decisions, there results a right in their favour to hold the power wielders accountable.

Delegation Model (Constituent Sovereignty Principle)

The second principle which rests on the premise of 'delegation' is based on the idea of constitutive authority. Citizens as a part of 'social contract' part with their liberty and surrender it to the State, wherein they entrust their power to the government, which is to be exercised by the government in a fiduciary capacity, akin to a relationship with a trustee.⁴¹ This is known as the 'constituent sovereignty' principle.

Inadequacy of the two models to resolve the accountability crisis at the global level

Both the models as discussed above justify the familiar understanding of democracy as people's rule. Thus, democratic accountability mechanisms rely on the idea of vesting the power to sanction the power wielder in the hands of either the entity that is affected by the actions of the power wielder or the entity that had delegated the authority to the power wielder. Such an account is based in the traditional conception of accountability mechanisms as are found at the domestic level where there is a '*demos*' or a political community that acts together to hold the power wielder accountable. Keohane and Grant in their paper dealing with the abuse of power in world politics discuss how this participation-delegation principle fails to work at the global level. They highlight that many power-wielders in world politics cannot be regarded as delegates in any sense.

The acquisition of power by these actors is not a result of any delegation by the people. They write, "States, subunits of States, multinational firms, and NGOs were all created either without any act of authorization at all or without having been authorized to act by any set of entities even remotely representative of the world population as a whole. Only international organizations had their authority to act in the international arena explicitly conferred on them—in this case by States."⁴² However, even in case of international organisations, one may contend relying on the argument of the weakening of the State consent model that any effective, true delegation has not taken place. One cannot base their accountability mechanisms on delegation principles in the global arena since it would amount to

⁴⁰ *Supra* note 28.

⁴¹ *Ibid.*

⁴² *Supra* note 28 at 33.

overlooking the accountability deficits of those power-wielders, such as States, multinational firms, and NGOs, that do not depend for their existence on delegation.

Similarly, employing the ‘all affected’ principle to operationalise the accountability model would require mechanisms like a global electorate and elections and creation of a global ‘democratic’ government which as discussed above is not a feasible proposition. In relation to this problem, the three strands of thought (pluralist, cosmopolitan and pessimists) have already been discussed. It has been shown that ambitious proposals to establish democratic accountability at the global level similar to the domestic set up of democratic nation states, founder because of the problem of the lack of ‘*demos*’.

Such analogical comparisons with the domestic level are not suitable since at the State level, all those who are subject to the laws of the polity are regarded to be ‘as affected’ and thus entitled to hold the power wielder accountable. However, such a right to participation in global politics as an affected party remains largely ambiguous. Keohane and Grant give the following example: ⁴³

If being affected by a decision were sufficient to support a right to participate in decision-making, anyone who buys gasoline would be entitled to participate in OPEC’s deliberations, and anyone affected by world interest rates, to participate in discussions at the Federal Reserve or the European Central Bank. In the absence of a public whose boundaries are defined by participation in a polity, it is very difficult to specify either who should be entitled to participate or how they would do so.

Thus, the major hurdle while formulating such accountability mechanisms, remains, which is the absence of any global community which shares a sense of ‘common destiny’ and this is known as the ‘no *demos*’ problem.

The Cosmopolitan Dream

The no *demos* problem as has been discussed above, has been widely acknowledged by political scientists and scholars of international law alike. For the Cosmopolitans, this absence of a global *demos* or the global democratic institutions are merely structural problems. They argue that there can be a new global democratic order. Further, the existing regime can be democratized through innovations such as “government by consent” which can

⁴³ *Ibid.*

be realised through devices of voting and representation. David Held, a leading cosmopolitan advocate asserts that “those significantly affected by public decisions, issues, or processes, should, *ceteris paribus*, have an equal opportunity, directly or indirectly through elected representatives, to influence and shape them”.⁴⁴ He envisages a hugely ambitious system wherein there are democratic mechanisms for the “regulation of global markets, a representative Security Council, and an international convention to consolidate humanitarian law (in the short term) and the taming of global markets, a global antitrust authority, mandatory standards for labour, the environment, and corporate behaviour, democratization of national and supranational governance (multilevel citizenship) through regional and global representation, a global constitutional convention, an international tax mechanism, an array of human rights courts, and permanent peace-making and peace-keeping forces (long term).”⁴⁵

However, such an ambitious proposal creates onerous demands on the existing system, the fulfilment of which, in the near future, remains largely a pipedream.

Pluralist Models- Is Democracy Overrated?

As explained above, as opposed to the cosmopolitan and pessimistic approach that take two extreme positions, pluralists advocate recognizing new possibilities for accountability which do not dwell on the popular principles of representative democratic participation. They argue that “accountability is only one way of constraining power; that there are many forms of accountability that are not particularly unique to democracy; and that there are various ways of conceiving of democratic accountability”.⁴⁶ Thus, because the idea of a perfectly democratic world order is highly utopic and overly demanding, Keohane and other pluralists give up on democratic accountability and suggest alternate forms of accountability. The different versions of accountability models as proposed by the pluralists are discussed below:

Hierarchical Accountability:

Most of the organisations present at the global level almost necessarily have a hierarchical structure, and some mechanism wherein those holding superior positions can remove subordinates from office. This mechanism thus, can be exercised by the superior officials over the subordinate employees so as to restrain the abuse of any discretionary power by them.

⁴⁴ David Held, “Cosmopolitanism: Globalisation tamed?” 29 *Review of International Studies* 471 (2003).

⁴⁵ *Supra* note 28 at 48.

⁴⁶ *Supra* note 28 at 41.

Supervisory Accountability:

Supervisory accountability refers to the model wherein one particular entity/organisation is related to the other actors in the system in a supervisory capacity, thus it enjoys the position of being the principal in relation to the other actors which remain to be the agents. For instance, organisations such as the World Bank and the IMF are rendered subject to supervision by States and institutions such as the domestic judicial system of these States. Since States are conventionally regarded to be fairly democratic, such a control by States over these organisations, according to the pluralists, makes the model fairly democratic.

Fiscal Accountability:

Yet another model of accountability is by way of fiscal mechanisms. Organisations such as the UN and the World Bank are hugely dependent on government appropriations and funding for undertaking major projects. States making substantial contributions to these organisations are thus effective as accountability holders and can demand reports from these organisations. Further, the possibility of sanctions in the form of cutting back on the funding in case of non-compliance by these organisations makes this as a potentially effective alternate accountability mechanism.

Legal accountability:

Legal accountability mechanisms are operationalised through the means of courts or quasi-judicial arenas. All public officials are expected to adhere to all formal rules and regulations and in case of any abuse of public office, the concerned agent is required to justify his act or else face sanctions which may be enforced through mechanisms of administrative/ criminal legal system. The WTO Dispute Settlement Mechanism, the operations of the Hague Tribunal on the Former Yugoslavia, and the creation of a new International Criminal Court are examples of legal accountability mechanisms cited by the pluralists.

Market accountability:

Market accountability model has been already discussed above. It relies on the functioning of the market mechanisms and the influence of actors such as the investors or customers in the market so as to enforce desirable behaviour by the power wielders like the multinational firms or companies engaging in exploitative practices. For instance, refusal of investors to invest in countries whose policies they dislike or the demand by the investors of a higher rate of return on investment as a response to some abuse of power by the particular country may

serve to be an effective deterrent against such abuse of power. Similarly, the example relating to consumers boycotting products of companies engaging in unethical practices is already given above.

Peer accountability:

Mutual evaluation by the peer organisations can at times act as effective check on the power wielding organisation. As Keohane notes, “Organizations that are poorly rated by their peers are likely to have difficulty in persuading them to cooperate and, therefore, to have trouble achieving their own purposes.”⁴⁷

Public reputational accountability:

Public reputational accountability is implicit in all other models of accountability. Reputation can be seen as a form of “soft power”. It reflects how the particular agent is perceived in the estimation of other actors in the system. Reputation as an accountability mechanism thus works on this principle that actors with a bad reputation are likely to suffer because of the same in their relationships with the other actors in the global realm.

Thus, plural accountability frameworks depart from the vertical accountability mechanisms which are based on direct democratic models of representation that rely on the ‘delegation’ or ‘participation’ principles. However, both these principles rest on the Westphalian assumptions of congruence between a political community and the corresponding power wielder. As is discussed previously, such a state of affairs is difficult to be replicated at the global level. Contrary to the vertical approach, the pluralist approach relinquishes the fascination with the representative, pure democratic forms of accountability and believes in the utility of non-democratic forms of accountability.

To take an example of how the ‘all affected’ and ‘delegation’ principle may not be workable in the changed realities of the world, one may refer to the case of a transnational corporation. Though the transnational corporations are primarily accountable to the shareholders, the ambit of all who are affected by the operation of the corporation, would include not just the shareholders, but also the workers as well as the residents in the area where the factories of the corporation are located. Though in the democratic accountability mechanism, workers and the residents must be the primary accountability holders, it cannot be denied that they may not be the best or the most effective candidates for holding the power wielder to account.

⁴⁷ *Supra* note 28 at 37.

Shareholders and investors with their better bargaining power are in a much better position to hold the transnational corporation to account. This is precisely because of the inequality that persists in the system. Thus, merely incorporating ‘democratic’ principles in the accountability mechanism may yield little benefit if other systemic challenges are not simultaneously dealt with. Recognising this, there are models such as of surrogate accountability that have been proposed as a remedy to the same. The next section discusses the difficulty of inequality of bargaining power between the different actors and the surrogate model in detail.

VI. Combating Inequality in Bargaining power: Surrogate Accountability Mechanism

In the standard model of accountability as discussed above, there are several concerns that mar the efficacy of the model. Scholars like Rubenstein have pointed out issues which arise due to the inability of the accountability holders to exercise their right because of inequality of bargaining power between the power wielders and accountability holders and noted that “...the greater accountability holders’ role in sanctioning the power wielder, the more incentive the power wielder has to persuade accountability holders that she has complied with the relevant standards.” But that is difficult to be achieved in modern global politics. Rubenstein while developing a model of ‘surrogate accountability’ writes: ⁴⁸

Less powerful actors therefore cannot hold more powerful actors accountable, because they cannot sanction more powerful actors. Because inequality appears unlikely to disappear soon, there is a pressing need for “second-best” forms of accountability: forms that are feasible under conditions of inequality, but deliver as many of the benefits of standard accountability as possible.

The inequality between the two sets of actors can be attributed to causes such as holders’ poverty, ill-health, illiteracy, social or political exclusion. Because of these factors, situations emerge wherein the accountability holder is rendered too weak to exercise the right to hold the power wielder accountable in any meaningful way. For instance, a worker facing exploitation in the factory owned by a multinational company, is unable to exercise his right

⁴⁸ *Supra* note 38.

in any real manner since like most workers, he is desperately poor, easily replaceable, and thus would not complain.

The lack of commensurate bargaining power of the accountability holders is further aggravated because of the non-existence of any institutions that could mitigate the effects of impoverishment and systemic oppression of these vulnerable classes. Thus, long term solutions would require a reduction in poverty and strengthening of the position of the accountability holders through systematic and sustained efforts through development of democratic elections, strong and independent institutions of media and judiciary and robust and efficient administrative mechanisms. However, these are long term strategies which are insufficient to meet the immediate short and medium-term goals. Thus, a search for “second-best” forms of accountability is the need of the hour.

How inequality affects the accountability mechanism?

Challenges are associated at all the three levels of the accountability mechanism because of the widespread inequality that exists in the system, i.e., at the level of setting of standards, gathering of information and with enforcing sanctions. Sanctions infact are the weakest link in the whole chain.

Standards set by the accountability holder must be such that they are endorsed by accountability holders and at the same time recognized by the power wielder. Additionally, since the standards are to serve as the yardstick for the evaluation of the actions of the power wielder, they must be specific. Further, they must be such that they are acceptable normatively. It is possible that there are direct negotiations between the two sets of actors at the time of standard setting. For example, there may be a prior negotiation between a trade organization and environmental activist groups as to the use of eco-friendly practices by the trade organisation. For the purpose of effective bargaining at the stage of negotiations for standard setting it is essential that the parties have equal bargaining strength. The wide disparity in the strength of the two actors leads to a problem right at the first stage of accountability mechanism. Even after the standards are set, there may arise difficulties in interpretation of the agreed upon standards and the manner of their application.

Once the standards are identified in a fair enough manner, gathering and interpreting information as to the power wielders' compliance with these standards poses another

challenge. As discussed above, it is the power wielder who is usually in control of this information. In cases where the accountability holders do not have the required ability to enforce sanctions against the power wielder, there remains no incentive with the power wielder to inform the accountability holders with respect to its compliance with standards. Thus, procuring of this information can be a very challenging exercise, and mechanisms for collection and publication of this information need to be devised.

The provision of Universal Periodic Review⁴⁹ which mandates the States to submit an account of all the actions that they have taken to improve the human rights standards in the country and to overcome the challenges to the enjoyment of human rights, can be seen as a mechanism for the dissemination of this information about compliance with standards. More such mechanisms are needed to be put in place.

With respect to sanctions there again exists issues which arise from the glaring inequality between the two sets of actors. In order to ensure compliance to the standards, the power wielder has to be aware in advance of the same and also of the potential for sanction in case of non-compliance with them. For any sanction to be an effective deterrent for the power wielder, it must neither be too mild nor too severe. An extremely mild sanction rather than operating as a potential deterrent, would only be considered by the power wielder as an additional cost for not complying with the standards. On the other hand, too severe a sanction would discourage the power wielder from taking any risks. Thus, it is needed that these inequities in these power relations between these two sets of actors are remedied through some alternate accountability models.

Second Best Accountability Mechanisms: Surrogate Accountability

Models of surrogate accountability act as potential alternatives to the standard models since they display an ability to bridge the wide gaps in bargaining power of the two sets of actors. By the way of surrogate accountability, what one implies is a system wherein instead of the accountability holders holding the power wielders answerable, a third-party steps in to do the same. Thus, it is the third party which sanctions a power wielder on behalf of accountability holders because accountability holders cannot sanction (or play their role in helping to

⁴⁹ The Universal Periodic Review (UPR) as introduced through the General Assembly Resolution 60/251 is a mechanism of the United Nations (UN) Human Rights Council (HRC) for the periodic examination of the performance of all UN Member States with their adherence to the human rights standards.

sanction) the power wielder. Surrogates can in fact substitute for accountability holders at any of the three phases, that is at the time of bargaining for setting standards, or while procuring information or at the last stage while sanctions are to be imposed.

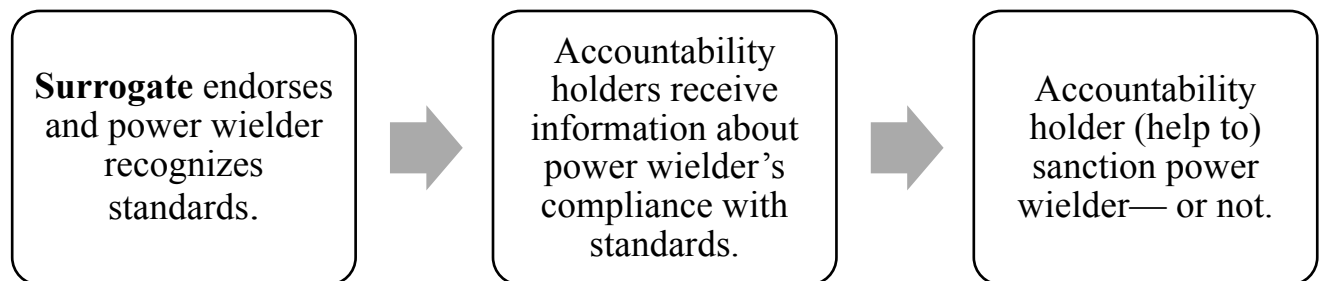


Figure 2. Surrogate Accountability Model (Standards)

Source: Jennifer Rubenstein, "Accountability in an Unequal World", 69 *The Journal of Politics* 616 (2007).

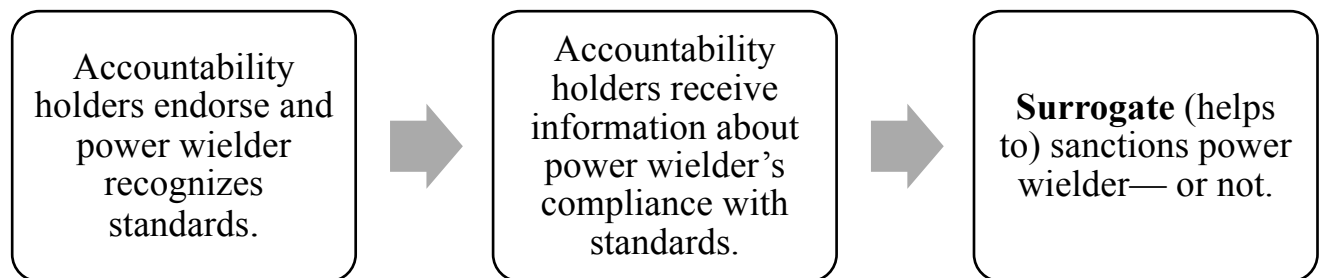


Figure 3. Surrogate Accountability Model (Sanction)

Source: Jennifer Rubenstein, "Accountability in an Unequal World", 69 *The Journal of Politics* 616 (2007).

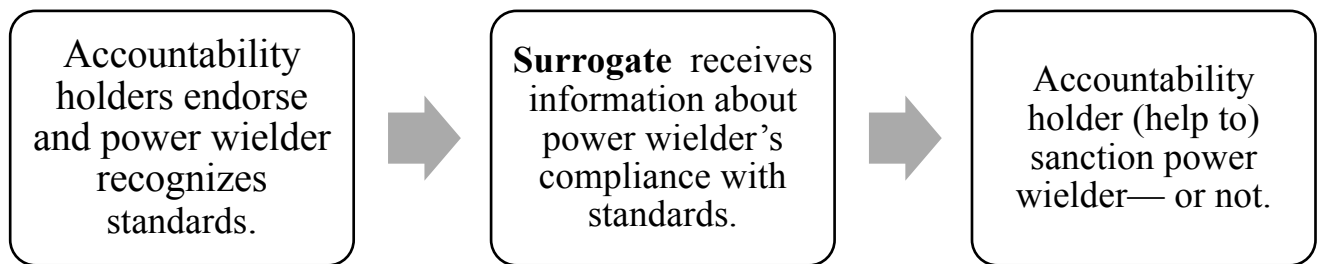


Figure 4. Surrogate Accountability Model (Information)

Source: Jennifer Rubenstein, “Accountability in an Unequal World”, 69 *The Journal of Politics* 616 (2007).

Thus, in a model of surrogate accountability, standards may be set through negotiation between a surrogate and the power wielder, for instance, any NGO can engage with the factory workers to act as a surrogate on their behalf while negotiating with the factory owner and press for more labour right centric contract terms. This becomes crucial since it is essential that the power wielders are held accountable to well thought out standards that are neither too lax nor counterproductive in any sense.

Further surrogates like journalists/ free press can act on the behalf of the accountability holder to bring out information pertaining to the power wielders’ compliance with the standards so that sanctions may be imposed on the basis of this information.

Similarly, surrogates which are more powerful than the actual accountability holders can help in sanctioning the power wielders such as donors cutting back their aid to organisations that engage in corruption and misappropriation of public funds. Rubenstein gives the following examples.⁵⁰

“Example 1: Donors act as surrogates for aid recipients by sanctioning NGOs that fail to meet accepted standards of aid provision, but aid recipients cannot sanction donors.

⁵⁰ *Supra* note 38 at 625.

Example 2: NGOs act as surrogates for Chinese peasants by sanctioning the World Bank for failing to adequately protect or compensate the peasants affected by its projects, but the peasants cannot sanction the NGOs.”

Another example could be the threat of sanctions that may be imposed on the powerful trans-national companies by the investors as could be seen in the Rio Tinto mining case wherein the investors have been demanding action against the company for its alleged role in destruction of the aboriginal caves in Australia and impinging on the rights of indigenous communities.⁵¹

Terry Macdonald and Kate Macdonald while writing about non electoral forms of accountability, have discussed how consumer campaigns were launched in Nicaragua in 1997 against the mighty corporations of the north engaged in the garment industry which had been employing labour exploitative practices over workers in far distant countries of the global south. These anti sweat-shop campaigns worked to gather evidence of the malpractices of the corporations and exposed the conditions of the Nicaraguan factories through screening of the same on the US Hard Copy television programme. This high-profile media expose led to admission of responsibility by several high-ranking corporates such as Nike and Reebok.⁵² This example may be seen as involving both the consumer campaigners as well as the press in the role of surrogates which acted on the behalf of the powerless, exploited workers.

The present-day world is marred by global challenges such as the refugee crisis and the issues of lack of accountability continue to persist in this realm. As reported in the World Refugee Council Discussion Paper No. 1, there is a lack of any formal accountability mechanism in the global refugee regime and the “costs of non-compliance with the norms and principles of the UNHCR’s 1951 Convention Relating to the Status of Refugees are virtually non-existent.”⁵³ The Discussion Paper proposes setting up of a responsibility sharing council/commission (RSC), with an accompanying universal periodic review for refugees

⁵¹ Correspondent, Rio Tinto investors demand action after Aboriginal cave destruction *Financial Times*, June 21, 2020 available at: <https://www.ft.com/content/6db79b46-8e46-4e89-8688-97064effbc61> (last visited on Feb. 20, 2021).; Katherine Anne Trebeck, “Tools for the Disempowered? Indigenous Leverage Over Mining Companies” 42 (4) *Australian Journal of Political Science* 541 (2007).

⁵² Terry Macdonald and Kate Macdonald, “Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry” 17 *European Journal of International Law*, 89 (2006).

⁵³ World Refugee Council Discussion Paper No. 1, Keeping the Promise Three Proposed Accountability Mechanisms for the Global Refugee Regime, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/WRC%20Discussion%20Paper%20no.1_2.pdf (last visited on July. 06, 2021).

which shall require all member states to share their records on responsibility sharing which shall be reviewed every four years. Thus, the same shall be similar to the Human Rights Council (HRC) and like the HRC, the RSC would report to the UNGA. The RSC as proposed shall receive information from the Human Rights Council, UN human rights rapporteurs, the UNHCR and relevant treaty-monitoring bodies. NGOs may further apply for consultative status. The solution as proposed in the Discussion Paper may also be seen as employing a model where a third party is put in the position of the accountability holder. The RSC with its greater ability to gather information through the mechanism of Universal Periodic Review enjoys greater power in the system and is thus capable of acting as a surrogate for the refugees. Further, the role of NGOs as envisaged in the model also display how 'proxy' accountability mechanisms may involve multiple entities acting as surrogates at the three different levels in the accountability mechanism- at the stage of setting standards, at the stage of gathering information about compliance as well as at the stage of enforcing sanctions.

Possible Difficulties

Though the surrogacy model seems like an attractive alternative which provides some solution to the problem of unequal bargaining power between actors, the same is only a 'second-best' kind of a mechanism. Why this is so is because of certain considerations like the inability of the accountability holder to sanction the surrogate in case the surrogates fail to uphold the interests of the accountability holder and act against their interests.

While evaluating the surrogate the major parameter is how well they substitute for the accountability holders. Thus, one needs to evaluate that while setting standards on behalf of accountability holders, have the interests of the accountability holders been kept in mind and have they been similar to the standards which accountability holders would have wanted? In the words of Rubenstein, "How close did the surrogate come to gathering the information that accountability holders would have gathered? How close did it come to sanctioning power wielders as accountability holders would have done?"⁵⁴

Also, one must note that the surrogates do not enjoy any 'delegated' authority to act on the behalf of the actual accountability holders. For instance, in cases of surrogates like NGOs, there is a 'self-asserted' representative status that is invoked by these organisations while proclaiming the rights of the accountability holders. This representation devoid of any actual

⁵⁴ *Supra* note 38 at 627.

delegation and based entirely on self-authorisation, may aggravate the problem of the possibility of discordance between the actual interests of the accountability holder and the interests as represented by the surrogate. In the words of Archibugi⁵⁵

Claims to be representing another actor and to be exercising surrogate accountability are ubiquitous in domestic and international politics, and the need to ascertain which claims are valid and which are not makes the distinction between standard and surrogate accountability difficult to wield for descriptive and explanatory purposes.

It may be desirable as has been argued by some scholars, that these organisations are put to some test of 'recognition' of these self-declared interests and claims at the hands of the original accountability holder and the representation is backed by some form of *ex-post* consent on the behalf of the 'represented' group.⁵⁶

Furthermore, these surrogates may themselves lack internal democratic functioning and may be prone to capture by elitist agendas if the organisation is very far removed from the original accountability holders. In addition to this, "not all social interests are able to organise themselves sufficiently in powerful civil society organisations to be listened to by decision-makers."⁵⁷ Thus, the surrogate model is not devoid of limitations and may not be seen as a panacea.

However, this problem of lack of democratic legitimacy would cease to be a major concern if the self-appointed representation is adequately responsive to and promotes the empowerment of the affected group of the original accountability holders. The credentials of any surrogate will have to be assessed on the basis of its performance as an effective substitute voice of the accountability holder. It has to be earned outside the formal electoral process. In traditional models, the electoral process is seen as the legitimising agent for the relationship between the power wielder (who holds the power since he has been chosen to exercise the same) and the accountability holder (who has chosen the power wielder as the authority exercising control), irrespective of the actual performance of the power wielder. It is expected that the relationship based on a democratic model is by default, to be preferred for attaining the goals

⁵⁵ Mathias Koenig-Archibugi, "Accountability in transnational relations: How distinctive is it?" 33(5) *West European Politics* 1142 (2010).

⁵⁶ Yannis Papadopoulos, "Accountability and Multi-level Governance: More Accountability, Less Democracy?" 33 *West European Politics*, 1037 (2010).

⁵⁷ *Ibid.*

of accountability. On the contrary, for legitimising models like surrogate accountability, the assessment is directly linked to the performance of the surrogate which implies, responsiveness to the interests of the accountability holders and their emancipation over the longer period of time.

Since surrogate accountability model is a pluralist accountability model, where the power to hold the power wielder to account is exercised by a third party, there is an absence of the vertical relationship that exists in the traditional accountability models. The accountability holder is thus neither “the one to whom the power is delegated” nor “the one who is affected by the exercise of the power”. However, the same must not be seen as a factor that nullifies its potential in acting as a tool enhancing the legitimacy of the global governance framework. The surrogate model in order to be effective must function in a manner that *promotes standard accountability*. As mentioned above, employing surrogates can prove to be a good and desirable short-term strategy however, structural inequalities should be removed from the system and surrogates should still try to empower accountability holders and support accountability promoting institutions. The ultimate aim should be to develop a reality wherein there would be no requirement of such surrogates. This is crucial since any model of surrogate accountability can only serve as a second-best alternative as these surrogates are in effect independent actors and without there being any threat of sanction by the actual accountability holders to these actors, the possibility of abuse of the conferred surrogate status also looms large. Thus, these models though attractive, are still normatively inferior to the standard models.

VII. Conclusion

The present paper has highlighted the issue of accountability crisis in the global space in the wake of growing intensification of international law regime. Concerns about how power is used and abused at the global level have increased because of the rise of the post westphalian world with growing interdependence of States, globalization of business, expansion of the scope and authority of multilateral organizations. The accountability discourse has therefore taken centre-stage and the democracy deficit that exists in this arena has led to calls for democratic models of accountability.

There are demands for representative institutions and mechanisms where power holders are accountable to all those who are affected by their decision making. Transposing the representative government model as applicable within the States seems like a far-fetched idea. Thus, to legitimize governance above the level of the nation-state, appropriate mechanisms for accountability have to be devised and requisite institutional apparatus has to be set up. Since even the minimal types of constraints found in domestic governments are absent on the global level, the problem becomes more acute. But calls for a global democratic order fail to take into the analysis the complexities of modern world and the futility of the super ambitious proposal. Thus, there is a need to look beyond 'democracy' centric models of accountability. The idea of alternative models of accountability is based on the realisation that equating democratic representation and accountability is a flawed premise. Thus, pluralists have been focussing on other modes of accountability enforcement such as those of market accountability, peer based or reputational accountability, or supervisory methods.

Further, the huge inequality that persists between the accountability holders and the power wielders make it an imperative that one looks at newer models of accountability such as those of surrogate accountability. Having said that, one needs to proceed with caution and not overlook the difficulties associated with the surrogacy model and the ultimate aim must be to reduce the systemic inequalities that plague the system and create strong institutions which mitigate the vulnerability of the power less accountability holders. A relook at the international law legitimation discourse and an evaluation of the existing accountability mechanisms is thus an inevitable requirement in the present times and innovative solutions like the surrogate accountability are the need of the hour. Attempts to visualise the issue of legitimacy of the existing global governance regime decoupled from the insistence on traditional democratic institutions would need formulation of new theories and models about 'representation', which look beyond the 'participation' and 'delegation' models which have continued to dominate the academic discourse.