

HOUSE-TRAINED

TOWARDS HOUSE-TRAINED

REGULATORS?

Christel Koop and **Martin Lodge** consider the implications of extending parliamentary accountability requirements over independent regulators.



The desire to hold regulatory agencies to account, while insulating them from direct political involvement, is at the heart of regulatory politics. In the last decade or so, the United Kingdom has witnessed remarkable attempts by Parliament and its select committees to assert parliamentary control across different areas of regulation.

First of all, select committees nowadays hold pre-appointment hearings after the selection of candidates for high profile positions such as those of governor of the Bank of England, member of the Monetary Policy Committee, and chair of an independent regulatory agency. Such hearings can lead to testy encounters. For example, in September 2009, then Secretary of State Ed Balls refused to give in to the Education Committee's demand to overturn the decision to appoint Maggie Atkinson as Children's Commissioner for England.

Second, there have been demands for more parliamentary accountability regarding those statutory bodies dealing with professions – an area in which regulators such as the General Medical Council (GMC) scrutinise professionals' fitness to practise. The Privy Council – a formal advisory body in whose policy work only senior ministers participate – needs to consent to rule changes within the scope of the statutory provisions. In 2010, the Privy Council granted the Health Committee the right to hold annual accountability hearings with the GMC and the Nursing and Midwifery Council. This development has led to calls to increase parliamentary involvement in other areas of professional regulation.

Third, the debate about a potential legal backing for a new press regulator has highlighted the trade-offs between the concern to minimise the potential for political interference with the press and the demand to establish structures that would hold the regulator sufficiently accountable for its actions.

These examples highlight the kind of demands for enhanced control by, and accountability to, select committees. They also give insight into the variety of regulators affected. This includes the professional regulators mentioned above, economic and social regulators whose accountability is mainly directed

at their Secretary of State, and those watchdogs which are creatures of Parliament; notably, the National Audit Office and the Parliamentary and Health Service Ombudsman.

The emphasis on the importance of parliamentary accountability and control in the United Kingdom reflects broader international trends towards both specialisation in the legislature and expansion of accountability arrangements. The increase in assertiveness of select committees in keeping the executive on its toes can, thus, be regarded as a natural outcome of two broader trends. Yet, how far can the demand for more parliamentary involvement be taken? And what are the implications for the world of regulation more generally?

Possibilities for extending parliamentary control

To explore potential scenarios for extending parliamentary involvement, it is worth noting what the arrangements for independent regulatory agencies are. Currently, independent regulatory agencies are mainly accountable to, and to some extent controlled by, the respective Secretary of State. For instance, the Secretary of State appoints (and, in particular circumstances, can dismiss) the chairperson, chief executive and other board members of economic regulators such as the Office of Fair Trading (OFT), Ofcom, Ofgem, and the Financial Service Authority. The Secretary of State receives regulators' annual accounts and reports, and regulators are required to provide information upon request.

The economic regulators' formal relationship with the Houses of Parliament is less close, but far from non-existent. The organisations' budget needs parliamentary approval, the chief executive may be invited to appear before the Public Accounts Committee, and the policy, expenditure and administration of the organisations can be examined by the relevant departmental select committee. Furthermore, the Comptroller and Auditor General audits the regulator's accounts and submits the statement to Parliament, and respective Secretaries of State provide Parliament with a copy of those regulators' annual reports under their departmental remit.

Beyond these measures, there are three broad ways in which parliamentary control could conceivably be enhanced. First of all, parliamentary involvement in the regulatory process might be extended without substantially reducing the involvement of the Secretary of State. In terms of accountability, regulators could be required to send their accounts and annual report directly to Parliament. This would imply a change from indirect to direct reporting rather than a change in the amount of information that Parliament receives. Regulators may also be asked to render *ex ante* account to Parliament. They could, for instance, be required to send an annual work programme and an itemised budget to Parliament, either for approval or for information only. Regulators such as the OFT and Ofgem are already required to publish a draft work programme as part of a public consultation procedure. These provisions could be extended to include Parliament. Such provisions are not very common though in parliamentary democracies. While regulatory agencies in many countries are required to send a work programme and itemised budget to the respective minister (often for approval), requirements to submit such documents to parliament are rather exceptional.

Secondly, in a more extensive change, Parliament could also be more involved in senior appointments. The pre-appointment hearings that Select Committees now hold might be transformed into American-style confirmation hearings, with committees having veto power over the proposed appointment. This would have more far-reaching implications for the Secretary of State, whose discretion would be reduced. It would also constitute a relative novelty in parliamentary democracies.

Thirdly, a more radical step would be to make regulators agents of parliament rather than government. Independent regulatory agencies would, as a consequence, look more like organisations such as the National Audit Office and the Parliamentary and Health Service Ombudsman. Senior appointments as well as the budget and the accounts would be determined by Parliament, and account would also primarily be rendered to Parliament. Such a move would make regulators more independent from government, and it

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would make it more difficult for the Secretary of State to give regulators general directions. This scenario may, however, not be very realistic in a parliamentary democracy in which government is held accountable by parliament for the enforcement of regulation.

Implications

Much of the current discussion is about parliamentary control alone, without paying much attention to the wider constitutional implications for the executive, the legislature, and the regulators themselves. Each scenario has distinct implications that require more extensive discussion.

The first and least far-reaching scenario would, unsurprisingly, require only limited procedural change and would maintain the dominant role of the Secretary of State. Select committees would need the competence, the attendance record, and the resources to perform their role in the accountability process in a meaningful way. Regulatory agencies would have to adjust to the increase in accountability demands.

The implications of the other two scenarios are more extensive. The one in which Parliament would have veto powers in the appointment procedure creates two principals: Parliament and the Secretary of State. This may give rise to so-called multiple-principal problems. Regulatory agencies – the agents – may benefit if they are able to play one principal off against the other. However, they may

equally become highly risk-averse and gridlocked as a consequence of the competing demands of the two principals. For the executive, such a setting may be equally problematic, particularly as it can no longer use appointments as a means to ensure that its priorities are reflected. For the legislature, questions arise as to how the Secretary of State can be held to account, and for what issues. The likelihood of co-ordination problems and conflict between the principals may also increase. As a consequence, the traditional non-partisan nature of select committees may come under pressure.

The implications of the third and most far-reaching scenario would be rather different. Turning regulators into creatures of parliament splits regulatory decision-making, for which regulatory agencies are responsible, from the overall responsibility for regulatory policy which is still held by government. Such a split is highly problematic in parliamentary democracies as the executive would retain responsibility for the overall policy domain without being able to hold one of the main actors – the regulator – accountable. Similarly, the legislature would have control over an agency, but would not be able to fully shape the broader policy domain. At the very least, such a scenario would require a fundamentally different system of select committees, one with more resources. The scenario may also imply a breakdown of the non-partisanship convention in select committees as the latter would need to deal with more politicised issues. For regulators, the split would also be

problematic as they may face conflicting demands from the executive – which is still responsible for the broader policy area – and the legislature.

Conclusion

Parliamentary control is essential for the functioning of representative democracy, and the recent developments in the UK give expression to long-standing concerns about appropriate degrees of parliamentary involvement in the control over independent agencies. However, the implications of extending Parliament's grip on regulators deserve more discussion than has been witnessed so far. As shown, the extension of such control in the area of regulation is far from uncontroversial as it raises important constitutional questions that go to the heart of parliamentary democracy. Whatever scenario we move towards, the question of what the implications are for all parts of the chain of delegation and accountability that characterises parliamentary democracies will need to be addressed.



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