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Luis Aguiar Santos

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Instituto Superior de Economia e Gestão
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Luís Aguiar Santos

(GHES/CSG/ISEG - Lisbon School of Economics and Management/ULisboa)

luisaguiarsantos@phd.iseg.ulisboa.pt

Abstract:

Regulation, considered in the context of economic phenomena, has been treated by economists and jurists in a chronological context that, at best, recedes into the early twentieth century. This short time span of the study of regulation is due, on the one hand, to the fact that it is understood by many as a historically recent phenomenon and, on the other, to the difficulty that a clear, operational concept of regulation has been used. The starting point of this paper is that the focus on formal and state-sanctioned normativity is fundamental to empirically clarify the scope of the study of the regulation of economic activities over historical time, since institutions (including economic ones) have indisputably also a normative nature. This problem is introduced here with a case study which purports to have more general relevance. This paper is based on a comprehensive and exhaustive empirical research of all the formal economic norms published by the Portuguese state between 1790 and 1919. The purpose is twofold: to present a first normative mapping of this national regulatory system and to demonstrate the relevance of state-issued formal norms as primary sources for the study of economic regulation from a historical perspective.

Keywords: State; Private enterprise; Norms; Regulation; Portugal.

JEL codes: K20; K40; K41; L51; N43

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1. A norm-centered approach to the history of regulation

Douglass C. North characterized institutions as 'the humanly devised constraints that structure political, economic and social interaction', consisting of 'informal constraints' (sanctions, taboos, customs, traditions and codes of conduct), and formal rules (constitutions, laws, property rights).[1] Although North does not elaborate on this point[2], we must assume that whenever there is a rule or norm, there is also a constraint – and these two facets to normativity (norm and constraint) apply to both the formal and informal dimensions. Hence, any norm seeks to regulate human behavior and actions through establishing that which is lawful and that which is unlawful.

Thus, we may assume formal norms to be mainly written norms (that is, requiring writing down as a means of fixation and publicity), and sanctions, taboos, customs, traditions and codes of conduct to be (generally unwritten) informal norms. We may further deduce that both coexist in the same society and may be overlapping or complementary -- in a kind of division of normative work. This normative plurality stems from the fact that both the state and social groups create normativity. However, in any society in which the state claims a monopoly on formal normativity and declares its sovereignty over any other form of normativity that may subsist or arise, formal norms become confused with state sanctioned rules -- as the informal then gets confused with that not sanctioned but not necessarily banned or subject to punishment. At this point, Santi Romano's legal definition of social groups (as creators of normativity) is clarifying by dividing them into lawful (when sanctioned and regulated by the state), illicit (when they are not, and for all intents and purposes become competitors of the state) and unregulated (when they are in limbo with the state displaying indifference or ignorance).[3] On accepting this typification, formal normativity would also cover whatever, while originating in groups outside of the state and its legislative activity, falls within the scope of the lawfulness defined and sanctioned by the state. This would include, for example, the statutes of certain groups (companies, associations, etc.) or property registries and contracts

[1] Douglass C. North, "Institutions", *Journal of Economic Perspectives*, 5:1 (1991), 97-112.
[2] See Geoffrey M. Hodgson, "What Are Institutions?", *Journal of Economic Issues*, 40:1 (2006), 1-25.
[3] See Santi Romano, *The Legal Order* [1.st Italian ed. 1917] (Abingdon and New York: Routledge, 2017), §§25-48, especially §31. Romano's "illicit" category implies North's assumption that the state is constrained by the opportunity cost of its constituents to resort to potential rivals providing the same services. See Douglass C. North, *Structure and Change in Economic History* (New York and London: W. W. Norton & Company, 1981), 20-32.

concluded under the auspices of state legality. We would importantly note that, according to this normative framework, judicial decisions also form part of formal normativity.

Assuming the framework for normativity defined above, this article's thesis maintains that formal norms and rules, as well as the process of their generation, deserves a greater weighting in the study of economic institutions from an historical perspective. From North onwards, we have been working with a broad and theoretically seductive notion of the institution and its norms as ranging from the written constitution to the informal codes of conduct of everyday life and correspondingly relativizing the importance of the formal legal system.[4] This positioning was, in practice, in parallel to those inspired by twentieth-century legal institutionalism and realism, which legitimized the notion of the "indeterminacy" of formal norms as opposed to the relevance of the "real" beliefs and behaviors of agents.[5] This "realist" tendency in institutionalism has resulted in implications for the current definitions of regulation as it is clear in such formulations that "regulation is about bureaucratic and administrative rule making and not about legislative or judicial rule making".[6]

This kind of conception of the institutional environment of social and economic relations conditions historical research. Thus, many historians find themselves pursuing the path of the Holy Grail of historical realism, seeking to capture "true" social (and economic) relations without the alleged formalist fiction of law. The problem, for economic history, is that it is not possible to treat the institutional aspect properly without a systematic knowledge of formal normativity. First, a practical matter. The formal rules, written and guaranteed by magistrates, are the most comprehensive, complete and most available primary source of normativity. And, agreeing with North, writing records both the laws decreed by the ruler and contracts between private agents – both important to study social (and economic) relations. But what makes the former more important to the historian is a matter of normative hierarchy and the fact that they explain more social

[4] Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge, UK, and New York: Cambridge University Press, 1990), 46-47.

[5] See Brian Leiter, "American Legal Realism", Public Law and Legal Theory Research Paper n.r 042, The University of Texas School of Law (2002), and Martin Loughlin, "Santi Romano and the institutional theory of law", in *The Legal Order* [1.st Italian ed. 1917] (Abingdon and New York: Routledge, 2017), xi-xxix.

[6] David Levi-Faur, "Regulation and regulatory governance", in *Handbook on the Politics of Regulation* (1.ª ed. 2013), ed. David Levi-Faur (Cheltenham, UK, and Northampton, Mass.: Edward Elgar, 2016), 3-21. However, for other regulatory scholars, it seems clear that "legislative or judicial rule-making" is an integral part of the regulatory system. See Margit Cohn, "Law and regulation: the role, form and choice of legal rules", in *Handbook on the Politics of Regulation* (1.st ed. 2013), ed. David Levi-Faur (Cheltenham, UK, and Northampton, Mass., Edward Elgar, 2016), 185-200; Anthony I. Ogus, *Regulation: Legal Form and Economic Theory* [1.st ed. 1994] (Oxford and Portland, Oregon: Hart Publishing, 2004); or even Stephen Breyer, *Regulation and Its Reform* (Cambridge, Mass., and London: Harvard University Press, 1982).

(and economic) relations than the latter. All traders were subject to what was legislated on trade (and eventually published in printed text) at a given time; but not all were obliged to comply with the clauses of handwritten contracts between two or more private merchants.

Now a conceptual question. The indetermination of the formal norm (or formalized in writing), if taken seriously, knows no scale. If it relativizes the adherence of the known norm to the "reality" one seeks to grasp, then a handwritten contract between private individuals, manipulated as a relic by the cultivator of microhistory or private history, has as many problems as the five books of the Ordinations of the Kingdom of Portugal ordered to be printed by King Philip II (III of Spain). Not even the informal constraints in a Tupi tribe – which an anthropologist could register in his fieldwork – would be sheltered from the problem of indeterminacy. In principle and on any scale, you can always object with the possibility of diversion and the problem of the free rider. The advantage of written law, for those who are accustomed to reading and interpreting it, is that, as a historical source, it often refers to the types of behavior it intends to correct or align with what it declares to be lawful, allowing one to infer what would continue to be their own probable limitations. The legislator also often has the praiseworthy habit of justifying what led him to legislate – which opens the possibility for us to reach the historical context of the norm – or to refer to previous related norms – which promises the viability of our preference for diachronic understanding.

No one here claims that other sources cannot compete in enriching what the written norms, as primary sources, tell us about the constraints in effect or the institutional environment. What I do however argue is that the devaluation of formal rules and laws is difficult to sustain. In addition, another question relates to the empirical support that our case study intends to deploy. It is a fact that the density of formal normativity is much greater than that assumed in general commentary. Even North mentions, under the "political norms" that define the hierarchical structure of society, "economic norms" as those defining property rights (how to use them, whether to extract income or dispose of it) and below which only contracts between individuals and judicial decisions seem to exist.[7] It turns out that systematic study of all the formal norms affecting the economic activities of private capital in Portugal in the period between 1790 and 1919, leads us to a rather different image. "Economic norms" extend much further than the property rights definition -- or the modalities of its application. Under the formal norms falling within

[7] North, *Structure*, 187-198, and *Institutions*, 46ff.

North's definition, there is, as we shall see, a hegemonic set of others in which it is impossible to apply David Levi-Faur's distinction between "bureaucratic and administrative rule making" and "legislative or judicial rule making". Instead, and under more general laws, there is a tangle of published, state-sanctioned norms that tend to regulate, with increasing detail, different sectors of activity, leaving no discernible space for any autonomous regulatory agency in the face of such formal normativity.

According to the normative framework defined above, there are also difficulties in understanding, on a purely conceptual basis, the autonomy of 'bureaucratic and administrative rule making' in relation to 'legislative or judicial rule making'. This arises from how the former is hierarchically subject to the latter. Any regulatory agency, to a greater or lesser extent within the state apparatus, to a greater or lesser extent independent of the state, works within the prevailing framework of the formal normativity in effect. As Levi-Faur rightly points out, what characterizes the 'regulatory state' is not the monopoly of violence but the claim to a monopoly of deployment and distribution of power through the creation, monitoring, and enforcement of rules, a process susceptible to delegation or sharing but nevertheless belonging by right to the state.[8] This claim implies that this monopoly may neither be real nor effective, both in the present and in the past -- but remains a presupposition that shapes the presence of the state as a creator of constraints both for its own actions and for those of others.

One last clarification. The proposal made here to study the formal regulation of economic activities from a historical perspective subscribes to the validity of Giandomenico Majone's understanding that history presents us with a succession of regulatory models[9] -- and, therefore, the concept of regulation must be temporally comprehensive. Such a temporal scope enables the deployment of the regulation concept for studying the normative and institutional evolution over historical time and not only applied to studying the current or recent institutional universe of economic activities as is generally the case.[10] The study of regulation from a historical perspective also extends the analytical

[8] David Levi-Faur, "The Odissey of the Regulatory State. Episode One: The Rescue of the Welfare State", Jerusalem Papers in Regulation & Governance, Working Paper n.r 39 (2011), 14.

[9] Giandomenico Majone, "Regulation and its modes", in *Regulating Europe*, ed. Giandomenico Majone et al. (London: Routledge, 1996), 10-27.

[10] For the use of the concept of regulation among economists, see Johan den Hertog, "Review of Economic Theories of Regulation", Discussion Paper Series n.r 10-18, Tjalling C. Koopmans Research Institute, Utrecht School of Economics (2010). Historical considerations generally retreat towards the end of the 19th century, but they focus mainly on the New Deal era. Regulatory scholars with a more legal focus are capable of a much more pronounced chronological retreat (see Ogus, 6ff), but always brief and unsystematic. In the context of economic history, the (old) disregard for the concept of regulation as a problem, or even a theme, is still evident in Larry Neal and Jeffrey G. Williamson, eds., *The Cambridge History of Capitalism* [1.st ed.

field of economic history, generally more focused on the performance of economies based on macroeconomic indicators, on taxation, business history and, in some cases, on reasonably complete and integrated sector studies.[11] In relation to other historical studies also focused on regulation in Portugal, I intend to reach beyond the relatively restricted chronological scope or sectorial incidence as this does not allow for drafting or designing a general mapping of regulatory norms and practices for a longer period of time.[12]

2. The "long Portuguese 19th century": presenting the case study

The goal of the empirical research that underpins the construction of the present case study involves mapping the formal norms that regulated the private economic activities ongoing in Portugal. In its current state, this research has already led to the collection of data on a period ranging from 1790 to 1919.[13] This chronological period thus covers the entire process of establishing, consolidating and maturing the Portuguese "liberal state" through to the beginning of the first post-war period (1919), including, at the outset, some chronological retrospective coverage (back until 1790) to contextualize the structural changes that took place in the 1830s. This is a "long 19th century," ranging from the immediate post-French Revolution period to the year of the Peace of Versailles.

The mapping of the formal norms regulating economic activities requires the identification of all the legal documents relevant to this topic. This took place through an exhaustive reading of the official compilations of legislation that the Portuguese state began publishing in the early eighteenth century. It should be noted that Portuguese law underwent its first codification in 1446, which compiled the norms relating to public, civil, criminal, administrative and ecclesiastical issues into five books that became the main source of law for the length and breadth of the kingdom. This code (Ordenações, literally

2014], 2 vols. (Cambridge, UK: Cambridge University Press, 2015); but also in Pedro Lains and Álvaro Ferreira da Silva, org., *História Económica de Portugal, 1700-2000*, 3 vols. (Lisbon: Instituto de Ciências Sociais, 2005 and 2012).

[11] A good example of this last case in Portuguese historiography is Nuno Valério, coord., *História do Sistema Bancário Português*, 2 vols. (Lisbon: Banco de Portugal, 2006 and 2010).

[12] Almost unique examples are partial studies on industrial conditioning in the Estado Novo (1933-1974): José Maria Brandão de Brito, *Industrialização Portuguesa no Pós-Guerra (1948-1965): O Condicionamento Industrial* (Lisbon: Publicações Dom Quixote, 1989); João Confraria, *Condicionamento Industrial: Uma Análise Económica* (Lisbon: Direção-Geral da Indústria, 1992). Alfredo Marques, *Política Económica e Desenvolvimento em Portugal (1926-1959): As Duas Estratégias do Estado Novo no Período de Isolamento Nacional* (Lisbon: Livros Horizonte, 1988), presents an interpretative exercise for a longer period (1926-1959) within the theoretical framework of the so-called "French School of Regulation".

[13] Period from January 1, 1790 to December 31, 1919, thus totaling 130 full calendar years.

Ordinations) went through two subsequent editions, with updates and incorporations, in 1521 and 1603. The final version remained in effect until the beginning of the codification process in the liberal era of the 19th century. Many other laws were published after 1603 which were never to be incorporated into the Ordinations but nevertheless completed this legal framework (referred to as "extravagant laws"). These however were collated in the official legislation compilations (relating to one or more calendar years) and regulated alongside the Ordinations. The liberal constitutions of the 19th century -- which reorganized public law -- revoked many of the 1603 Ordination provisions and, throughout the 19th century, modern codes advanced by replacing their earlier codified norms. What we need to retain here is the perspective that the Portuguese legal system stemmed from a very longstanding formalization and codification dating back to the fifteenth century. It was this set of formal norms that constituted the universe of my empirical investigation for the 1790 to 1919 period.[14]

This case study applies a quantitative approach to the collected data while also proposing its classification through analysing temporal distribution by areas of economic activity (or business sectors). In order to quantify and process the data, there was the need to refine the criterion for the inclusion of the different Portuguese state regulatory documents. Thus, I correspondingly included:

a) All the legal documents that, in whatever the way, impacted on the economic activities of private capital. The documents regulating the state's own bodies -- for example, regulations for ministries or state agencies -- were only subject to inclusion when containing provisions regarding the relations of these organisms with the economic activities of private capital (that is, whenever these norms invested regulatory powers in them).

b) All the licensing of the economic activity of firms, companies, etc., of private capital, carried out by legal acts.[15] This includes both the licensing of the firm itself and the

[14] These collections were consulted in the library of the Faculty of Law of the University of Lisbon. For the Ordinations of 1603, I consulted the five volume edition of Cândido Mendes de Almeida, *Codigo Philippino ou Ordenações e Leis do Reino de Portugal…* (Rio de Janeiro: Typography of Instituto Philomathico, 1870).
[15] I consider only legal documents compiled in the official collections of legislation (which, in the liberal era, are also published in *Diário do Governo*, the official gazette), almost always issued by the central state, although some documents issued by the municipality and district of Lisbon also appear at times. The latter were included whenever considered relevant (but in small numbers). The licensing of firms (and associations) was, in some cases, granted by “civil governments”, eg the delegation of central government in each of the country’s 22 districts. In the case of Coimbra, see Ludovina Cartaxo Capelo, *Catálogo dos Alvarás e Diplomas do Governo Civil de Coimbra, 1835 a 1949* (Coimbra: Arquivo da Universidade de Coimbra, s.d.). But in this research (in its current state) district databases are not included.

subsequent licensing of its specific activities, changes in statutes, authorizations to issue bonds, etcetera. Incidentally, the distinction between licensing and regulation proves difficult -- even should we wish to consider the former as a preliminary stage of the latter. What is noticeable in the information collected is that regulation represents a process that deploys different kinds of licensing at different stages -- thus, licensing becomes part of or an instrument of regulation, such as inspection.

c) The concession of title deeds or exploration rights to already founded firms or companies as well as the approval of mining plans or the exploration of water sources. I selected this facet in order to avoid the likely distortion resulting from the inclusion of the many individual entitlements that never evolved into real holdings – as some legislation on the validity of mining rights suggests (for example, a decree dated 7 September, 1857). The same principle was followed with the legal documents attributing plots of land under the different legal regimes for forest – generally enacted by means of decrees. Furthermore, the legal documents characterizing and transforming these forest regimes are also included as are all concrete cases that directly and explicitly affect firms or private capital (for example, Decree No. 2162 of December 30, 1915 involving a company). A similar criterion served for the regulation of wastelands, hunting and fishing grounds.

d) Tax and customs legislation only became eligible for inclusion when directly and explicitly related to the licensing and regulation of private businesses. Taxation systems generate a series of constraints on the economic activities of private capital -- in a way that is not always easy to disentangle from the regulatory logic. In fact, licensing generally remains associated with the payment of fees and charges, which constitute one aspect of the taxation system. However, taxation remains an autonomous issue in relation to the issue of regulation.

e) The granting of industrial patents was included in its entirety because they account for a legally sanctioned constraint on the market even though this incurs the risk of considering non-implemented manufacturing processes.

f) Cases of private interests litigating against the state (with the final decisions also published as a legal document) but only where the legal parties are firms, companies, businesses, etcetera. As we see below in a more structured fashion, litigation provides an important aspect of the analysis proposed here.

This criterion led to the selection of 6075 legal documents for the civil years from 1790 to 1919. Their analysis revealed that each had different incidence rates on economic activities and that this diversity also interlinks with the corpus containing documents of different legal natures. We therefore had to first classify this set of legal documents as detailed in Table 1, which introduces the organization proposed by this interpretation. The legal documents are therefore distributed by the six business sectors under regulation (A to F), plus a transversal area (explained below). This distribution overlaps with the other, made up of three categories of regulatory norms (1 to 3). Hence, there are 21 types of documents by normative category and each with an area of incidence (from A1 to F3, plus three transversal).

Table 1 Legal documents of economic regulation, 1790-1919 (absolute values)

Normative categories Regulated business areas	1. Legal regime (ownership, nature of the firm, lawful actions)	2. Legal and administrative constraints	3. Judicial, administrative and tax litigation (private interests *vs.* the state)	TOTAL
TRANSVERSAL	52	691	105	848
A. Agriculture and natural resources	[A1] 17	[A2] 871	[A3] 51	939
B. Trade (wholesale and retail) and services	[B1] 19	[B2] 1092	[B3] 112	1223
C. Manufacturing, energy and related industries	[C1] 3	[C2] 1017	[C3] 127	1147
D. Capital market and insurance	[D1] 11	[D2] 646	[D3] 28	685
E. Transport and communications	[E1] 20	[E2] 1016	[E3] 38	1074
F. Regulated professions	[F1] 9	[F2] 142	[F3] 8	159
TOTAL	131 (2.16%)	5475 (90.12%)	469 (7.72%)	6075 (100%)

Source: Official collections of legislation (1790-1919). **Note:** A-area: agriculture, livestock, fisheries, hunting, forestry, mining; management of wastelands, springs and other aquifer resources; use or distribution of water (especially channeled). B-area: commercial activities of wholesalers traditionally related to import-export, retailers (shop-keepers and hawkers, also pharmacies, etc.); "liberal" exercise of medicine, law or teaching (individual or firm); any "service" not explicitly included in another area. C-area: industry, civil construction, works and repairs, fuel manufacturing, power generation and distribution, public lighting; rules on industrial

property patents. D-area: banking sector and other interest or lending loans businesses; foreign exchange; insurance sector. E-area: maritime and land transport (including railways); use and exploitation of roads (including tolls); emigration services; sanitary regulation at borders and ports, etc.; telephones and wireless telegraphy. F-area: as described in the text.

The six areas of economic activity identified with the letters A to F in Table 1 partially recognizes Colin Clark's classical classification for economic activities even while subject to substantial adaptation with criteria both for affinity (by type of resource used and / or of output) and for the functionality of reading the data set.[16] This latter criterion implies that the defined areas display sufficient elasticity to adapt to technology-induced changes in economic activities and their varying relevance over long time periods.

The F-area (regulated professions) takes on a *sui generis* character. In fact, this incorporates a transversal nature, including professions clearly linked to some of the A to E areas: for example, stockbrokers (D-area), doctors, apothecaries / pharmacists, lawyers and solicitors (B-area), registered fishermen and seamen (A-area) or coachmen (E-area). However, its autonomization is justified by its relationship with a clearly oriented type of regulation, not targeting economic activities per se (products, services, labor or sales processes or the nature of firms) but rather individuals in terms of capacity prerequisites or other particular conditions for their licit entry into a given activity.[17] Intending to empower this area made it difficult, in some cases, to classify the respective legal documents. The criterion followed involved determining the predominant content of the document (whether the economic activity in itself or the exercise of a profession by individuals).[18]

The seventh area defined, that for the legal documents transversal to several of the A to F areas, did not seek to group documents whose classification or inclusion in one of the previous areas was difficult or doubtful. Instead, the purpose of this cross-cutting area

[16] In the classification of the legislation, other necessary care was taken to identify the regulated activity. For example, the concession for the operation of a sea port falls into E-area, but the contract for the construction or re-qualification of a similar port is in C-area since it is here that the activities related to works and constructions were included.

[17] See, for example, the case of the classification of the British Nation Privilege given in 1791: the members of that group are traders but could not be placed in B-area because they were not engaged in the general trade regime, but rather within a special regime (of access conditioned to nationality), forming, for all purposes, a professional body endowed with particular rules and restricted access, which led to include it in the group of occurrences that here I classified in F-area (regulated professions).

[18] This criterion was also followed in cases of legal documents with provisions relating to different areas of activity (generally two, in some cases three). A paradigmatic case is a large part of the legislation on imported wheat (which affects both the B-area importing trade and the C-area milling industry) or the export of wine (which affects both production in A-area and trade in B-area); in the first case, the documents were generally classified in C-area and, in the second case, in B-area.

involved grouping those documents which, by their very nature, apply general provisions to the whole economy and across every area of activity. For example, the following are included in this cross-sectional area (only normative category 1 cases, representing 0.86% of occurrences): the laws of July 13, 1863 and June 22, 1867 on stock companies; the law of July 1, 1867, approving the Civil Code; the law of July 2, 1867, on cooperative societies; the decree of November 15, 1888 on commercial registration; the law of March 29, 1890, which established a commercial court in each district; the decree of January 24, 1895, approving the Commercial Process Code. These documents apply to most, when not all, of the A to F areas as they define general legal regimes that are not specific to any area of activity.

Data quantification and treatment revealed these seven areas were well represented according to the empirical basis under construction (see Table 1). Except for the regulated professions, all the other areas range in representation varying from between 11.27% and 20.13%, reflecting a fairly even distribution of the occurrences. As for the normative categories (which intersect with the business areas), three emerged from the period under analysis:

(1) "Supra-regulation" (legal regime), which groups the general norms to establish the legal framework for the performance of private capital economic activities;

(2) "Infra-regulation" (constraints), the most conjunctural and / or sectorial normativity sanctioned by the state, theoretically submitted to the norms of the previous category;

(3) “Litigation”, thus, legal documents ultimately resolving conflicts between the regulator(s) and regulated, applying the rules of the two previous categories.

As it turns out, these three normative categories reveal quite contrasting dimensions – quantitatively, from the outset. Category 2 (constraints) takes on an overwhelming weighting which, as we shall see, is in itself revealing of the "regulatory culture" conditioning and shaping private economic activities in Portugal in the period under analysis.[19] Let us now examine each of these three normative categories in detail.

[19] By "regulatory culture" I mean an institutional environment that creates strong incentives for certain choices on the part of the agents involved. This "culture" is therefore not a cause (more or less nebulous), but an effect, of relations that a robust theory must be ready to explain. It is also in this sense that the path dependence factor discussed by North must be understood. See North, *Institutions*, 92ff.

3. How regulatory norms distribute: “supra-regulation” and “infra-regulation”

The documents included in category 1 (legal regime) are both transversal (examples already presented above) and relate to only one of the A to F areas as set out in Table 1. What unites them is their establishing of a framework or legal regime designed, in principle, to endure and to frame the finer and more direct regulation of conjunctures and sectors. For these reasons, this is what I refer to as "supra-regulation".

Oriented towards each of the A to F area, category 1 contains, for example: the alvará (license) of January 30, 1802 with rules for the mines of the kingdom, law No. 677 of April 13, 1917 on mine exploitation (A-area); the charter of September 20, 1811 abolishing the prohibition on free trade with Brazil, or the decree of January 16, 1837 regulating the operation of the Stock Exchange (B-area); law 678 of April 14, 1917 regulating steel industry operational concessions and seeking to adapt to a new branch of manufacturing (C-area); the decree of August 17, 1836 for the regulation of savings and loans banks and the law of June 22, 1867 regulating the organization of agricultural and industrial credit banks (D-area); the law of June 25, 1864, which granted government regulation of the railways, telegraphs, roads, rivers, canals, ditches and sea ports, the decree of May 27, 1911 regulating automobile traffic (E-area); and the decree of January 16, 1837 for the regulation of the brokers corporation (F-area).

Although for whatever reason some of these legal documents might be subject to repeal in the short term, they were all nevertheless meant to last – that is, not to solve any short-term questions or apply or adapt the norms already in force for these areas but rather to define a new regulatory framework, which in turn could be articulated with the more detailed norms of "infra-regulation".

Category 2 gathers those legal documents which, while not containing provisions that contribute to defining what I described above as the "legal framework", above all establish the broad level of "infra-regulation", hence, the field par excellence of legal constraints that affect economic activities. These constraints have often been created as exceptions to that defined in the Category 1 standards, whether invoking urgencies and emergencies or the simple need to relax general rules unfriendly to the conveniences of the state or organized interests. Without necessarily being a matter of urgency, many of these rules also trace their origins to Public Administration opinions about problems with

the enforcement of previous rules, the "gaps" identified in regulation, complaints over the terms or lobbying by organized interests. On other occasions, this simply embodies the old Portuguese practice of the "regulamentação" (literally, regulation) of general rules (category 1) which, in order to be applied, and as already foreseen by the legislator, have to be complemented by supposedly more detailed instructions.[20]

Given the range of occurrences in Category 2, the examples end up being somewhat random but nevertheless demonstrative of the characteristics I have just identified. The chronological publication sequence of these norms, in the short term, holds importance to understanding the underlying logic. Thus, in Table 2, with a merely illustrative purpose, I detail all the occurrences from the year of 1851 and may correspondingly note that all incidences belong to category 2. Qualitatively, this is a typical year, even if, quantitatively, it reflects the lowest number of occurrences in that decade (which in other years fluctuates between 30 in 1858 and 56 in 1859).

Table 2 Occurrences of legal documents of economic regulation (1851)

[1]	m.o.	January, 13 Regulating how midwives are enabled [Min. Kingdom, unpublished in D.G.]	F2
[2]	notice	January, 18 Obtaining any misperceptions or exorbitance of prices in the sale of medicines by Apothecaries [Public Health Council, D.G. No 18]	F2
[3]	circular	January, 20 Providing that in fishing boats there are no bigger crews than there should be [Min. Reino, D.G. No 58]	A2
[4]	m. o.	January, 24 The authorities must comply with the Min. Kingdom circular on fishing vessel crews [Min. Marinha, D.G. 58]	A2
[5]	ann.	January, 25 Noting that the privilege to manufacture metal-cleaning bricks has ended [Min. Reino, D.G. No 23]	C2
[6]	decree	January, 30 Approving the new Bylaws of Companhia União Comercial, including C.ª de Seguros Bonança and dissident partners [Min. Reino, D.G. No 46]	D2
[7]	decree	February, 4 Approving the table of the substances and medicines that the Apothecaries can sell without prescription [Min. Reino, D.G. No 45]	F2
[8]	m. o.	February, 14 Establishing measures for the maintenance of the quiet and police of the Theaters during the shows and general rehearsals [Min. Kingdom, unpublished]	B2
[9]	ann.	February, 19 Noting that the privilege of manufacturing gloves by machine ended [Min. Reino, D.G. No 43]	C2
[10]	m. o.	March, 8 Providing on the omission of some Apothecaries in the annual information about their practitioners [Min. Reino, D.G. No 63]	F2
[11]	notice	June, 21 Raising the ban on selling foreign lottery tickets and obliging buyers of nationals who subdivide tickets into safeguards to secure themselves and sellers to be licensed by the Civil Government [Civil Government of Lisbon, D.G. No 146]	B2

[20] These constraints may also have cross-cutting characteristics (see, in Table 1, that there are 691 legal documents in this situation, which represent 11.37% of total occurrences).

[12]	decree	July, 14 Organizing a commission to propose ways to improve the fortunes of seafarers and others interested in the salt trade of Setúbal [Min. Fazenda, D.G. No 171]	A2
[13]	decree	July, 18 In charge of a committee to submit an opinion on a proposal for the construction of a railroad from Lisbon to the border [Min. Reino, D.G. 169]	E2
[14]	ann.	July, 21 Publication of the conditions for the product of the coal mines of Buarcos and São Pedro da Cova for 20 years [Min. Fazenda, D.G. No 175]	A2
[15]	ann.	August, 4 Publishing the conditions with which the Government grants 15 year exclusivity of navigation of the Tagus by steamboats [Min. Reino, D.G. No 182] + notice of conditions [Min. Reino, D.G. No 44 of 1852]	E2
[16]	notice	August, 6 Prohibiting prostitutes from residing on the Barroca Stairs of Lisbon [Civil Government of Lisbon, D.G. 186]	F2
[17]	decree	August, 11 Confirming the Bylaws of the Commercial Company of Goa [Min. Marinha, unpublished]	B2
[18]	decree	August, 12 Approving the Regulation presented by the Commercial Company of Goa for loans on pledges [Min. Marinha, unpublished]	D2
[19]	m. o.	October, 16 Ordering to proceed against those who grow rice without the competent license [Min. Reino, unpublished]	A2
[20]	decree	October, 22 Dividing the coast of the kingdom into departments and maritime districts and having a general registration of seafarers [Min. Reino, D.G. No 280]	F2
[21]	notice	November, 10 Providing against the frauds of the sellers of coal in the capital [Lisbon city council, D.G. No 268]	B2
[22]	decree	November, 20 Establishing the rules for the service of the Sado River Salt Wheel [Min. Fazenda, D.G. No 278]	A2
[23]	decree	November, 20 Consigning the rules for the administration and supervision of ballasts in the port of the town of Setúbal [Min. Fazenda, D.G. No 278]	E2
[24]	m. o.	December, 9 Establishing regular direct communication with West African possessions by steamboats [Min. Marinha, D.G. No 291]	E2
[25]	m. o.	December, 24 Securing the stamp of approval letters from dentists, bleeders and other minor health officers [Min. Reino, unpublished]	F2

Source: Official collection of legislation (1851). **Key:** M.o. = Ministerial order. Ann. = Announcement. D.G. = *Diário do Governo* (official gazette). Min. Kingdom = Home Office. Min. Marinha = Navy and Overseas Ministry. Min. Fazenda = Finance Ministry.

First of all, these are 25 occurrences that account for only a small proportion (5,3%) of everything legislated for in 1851. This year does effectively represent the field of constraints that complement the legal regimes protecting any one of the A to F areas of activity. This conveys a field with both a normative and also a formal texture (which is not, therefore, exclusive to category 1). It is the dense field of sectorially and / or conjuncturally legislated norms, which follow each other in close succession over the short term, on a continuum of alterations and "corrections" of previous (often immediately previous) norms, and, in the justification issued by the legislator, reacting either to complaints of affected interests or to difficulties over implementation, etcetera. However, they are also legal documents that derive from the licensing activities and the appropriate

regulatory and / or administrative activities of the state as provided for in the norms establishing the "legal regime" of economic activities (category 1).

In Table 2, at least occurrences 2, 3, 8, 10, 11, 16, 19 and 21 certainly derived from inputs received by the legislator, whether originating in complaints from the public (as explicitly stated in the text of 2) or in communications from public inspectors or agents (explicit in 3). Occurrence 4 comes in sequence of 3, which it reinforces. Occurrence 7 is a clarification and addition to the Rules for Delegates of the Physicist of the Kingdom of January 22, 1810 (classified in category 1). Occurrence 12 arises from a petition to the government by several property-owners from the city of Setúbal. At least occurrences 13 and 15 will then directly trigger other legislative acts in the near future. Occurrences 6, 17 and 18 are purely about licensing. All 25 documents, if enforced, would have consequences for the different private activities they are directed at or which they command agents of the state to act in. Nevertheless, we clearly face here a set of norms that saw the light of day because there were stimuli, inputs, requests for response, whether either from individuals or from the state agents themselves, that triggered decision-making in the form of legislative acts. We are thus indeed distant from the type of document that defines a generic "legal regime".

This set of regulatory rules from 1851 also makes it clear how the regulator retained the ability to intervene in the market in order to change the relative position of the different economic agents, granting temporary monopolies (occurrences 5, 9 and 15), determining market prices (2), creating specific rules for exercising certain professions (1, 4, 7, 10, 11, 16, 20, 21 and 25), interfering with certain activities in the name of public safety or health (7, 8 and 19), taking measures to assist private interests (12) and taking initiatives designed to change or improve public services (13 and 24). The occurrences of this year also confirm a facet also evident throughout the chronological period considered: that the prior licensing of firms and economic activities by the state is the rule for entering or remaining in the market (1, 6, 11, 17, 18, 19, 20 and 25).

For the historian, this substrate of sectorial and / or conjunctural norms of category 2 often brings clarifications about the regulated reality, as if in "ricochet" -- and also enables us to better understand the modus faciendi of the regulator(s). This is, to a large extent, regulation in action -- not necessarily (and entirely) as planned or conceived in the legal regimes of category 1, but as actually applied and received. Here, we may clearly detect

the 'bureaucratic and administrative rule making'.[21] This production of norms may even originate from "technical" and/ or advisory state agencies or councils, which functioned under one of the government ministries, but were always published as legislative acts in the form of a legal document (usually ministerial orders or government decrees). What is relevant, as stated above, is that this "bureaucratic and administrative rule making" represents one dimension of the state's standard activity of increasing and / or updating the body of formal rules in force. In legal form and status, they are no different to any other that we might consider such as Levi-Faur's "legislative or judicial rule making." At least in the Portuguese case, and because the executive branch has to sanction all "bureaucratic" or "administrative" measures, "bureaucratic and administrative rule making" is part of "legislative rule making". There is no formal distinction in legal terms between one and the other. And, in the traditional typology of legislative acts, laws, decrees and ministerial orders serve, without distinction, as "legislative" and "bureaucratic and administrative" documents.

Moreover, the information in Table 2 reveals one cause of the overwhelming predominance of category 2 in the normative regulation of economic activities: that of recourse by regulated agents to the executive power for the resolution of pending cases, through the shortcut of "administrative decision" – instead of, as we might theoretically expect, the option for judicial litigation. Occurrences 2, 3, 8, 16 and 21 appear to fit into situations that might have been resolved by the enforcement of pre-existing standards by the regular courts. High opportunity costs in the recourse to justice may explain the choice by individuals (with litigation ongoing among themselves) to resort to executive power. On the other hand, the predisposition of governments to act through normative regulation and densification might also have stimulated the option by private interests for the "administrative decision" shortcut, downgrading the judicial power left only in charge of cases of clearly diminished opportunity costs to those concerned (in keeping with the amount of capital and / or risk involved). This is a preference expressed in the context of private disputes as conflicts between private interests and the state took on a different legal framework (see below).

There is still what we might term the "multiplier" of normative density. Embarrassment is often associated with prohibition, the imposition of a non-action. However, what predominates in category 2 is not the "constraint-prohibition" but rather the "constraint-barrier", which implies the lifting of the same by the authority invested with the regulatory

[21] Levi-Faur, "Regulation and regulatory governance".

capacity. In general, both embarrassment and the withdrawal of embarrassment take place through means of a legal document. Removal of embarrassment includes licensing -- whether to start or to continue the activity, or to carry out the acts necessary to changing the activity (for example, changes in company statutes or, in the insurance sector, changes in policies already exploited or the introduction of new ones). This "barrier-constraint" therefore generates the need for the necessary authorizations for the lawfulness of either beginning or continuing some activity as well as any such alteration. This reflects, for example, in corporate bond issues: there is a constraint through the need for government authorization to carry them out; but the lifting of this constraint generates then many new rules (the authorizations) that fall within the scope of category 2.

The legislation consulted also reveals a parallel spring, which cannot be analysed in depth here but which holds relevance to knowledge about the mechanisms driving the creation of regulation: very clearly from the 1860s onwards, a network emerged within the government of advisory style "technical" bodies that co-opted representatives of the regulated sectors with the task of keeping up with certain economic activities and informing the executive power of any arising needs, in particular regulatory.[22] That is to say, in the participatory logic of the "liberal state", and in the presence of legally defined and recognized private players, the sovereign regulator created mechanisms capable of generating demand for regulatory standards and assisting in delivering those under conditions that probably lowered their information and enforcement costs.

In fact, the number of regulated agents with the capacity to resort to the "administrative decision" shortcut presumably grew throughout the 19th century. At the origin of this phenomenon was the empowerment of the regulated through the liberal era commercial law and civil law, which gave firms a more solid legal status and enabled to act as entities well defined before the law and more easily recognized as players by the state. From the very outset of the liberal era, this process of empowerment was complemented by the role of business associations (of merchants, industrialists and farmers) undertaking collective actions in order to resort to the "administrative decision" shortcut.[23] The

[22] Without any attempt to be exhaustive: the advisory board of public works and mines (1868); higher council of commerce and industry (1887); boards of agricultural improvements (1888); higher council of agriculture (1890); permanent grain commission (1892); central fisheries commission (1895); central sanitary improvements commission (1899). These are bodies whose institutionalization represents a point of arrival for their communication circuits and not a point of departure.

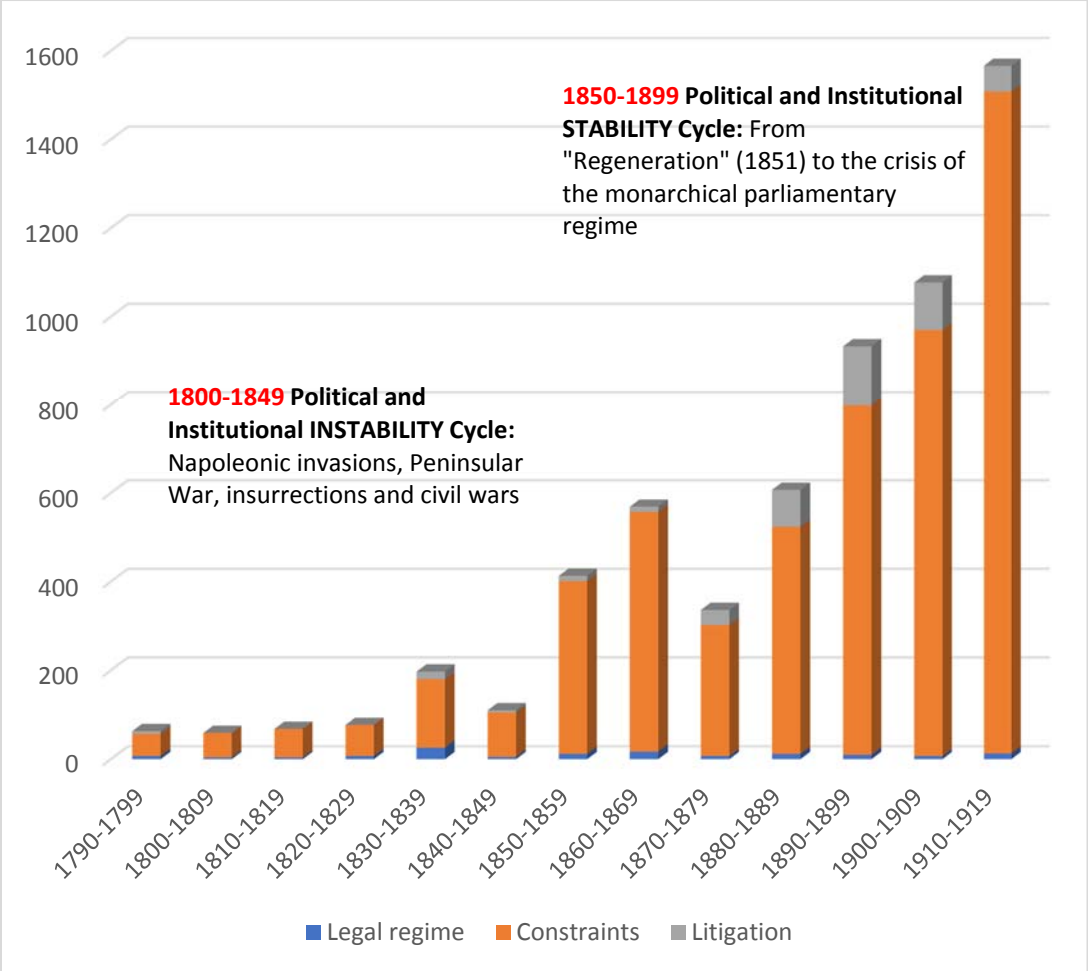
[23] Luís Aguiar Santos, *Comércio e Política na Crise do Liberalismo: A Associação Comercial de Lisboa e o Reajustamento do Regime Protecionista Português, 1885-1894* (Lisbon: Colibri, 2004).

demand for regulatory rules generated by all these factors would explain the overwhelming weight of category 2 (constraints), which spans every defined area of activity across the entire extent of the time period considered. We must now ascertain whether this general pattern was maintained throughout the 1790-1919 chronological period.

4. The temporal evolution of normative regulation

The thirteen decade breakdown of the 6,075 legal documents collected ensures we are able to perceive the intensification of the drafting and implementing of regulatory norms, with category 2 continuously predominating throughout the 19th century. See Figure 1.

Figure 1 Number of regulatory documents per decade and normative category (1790-1919)



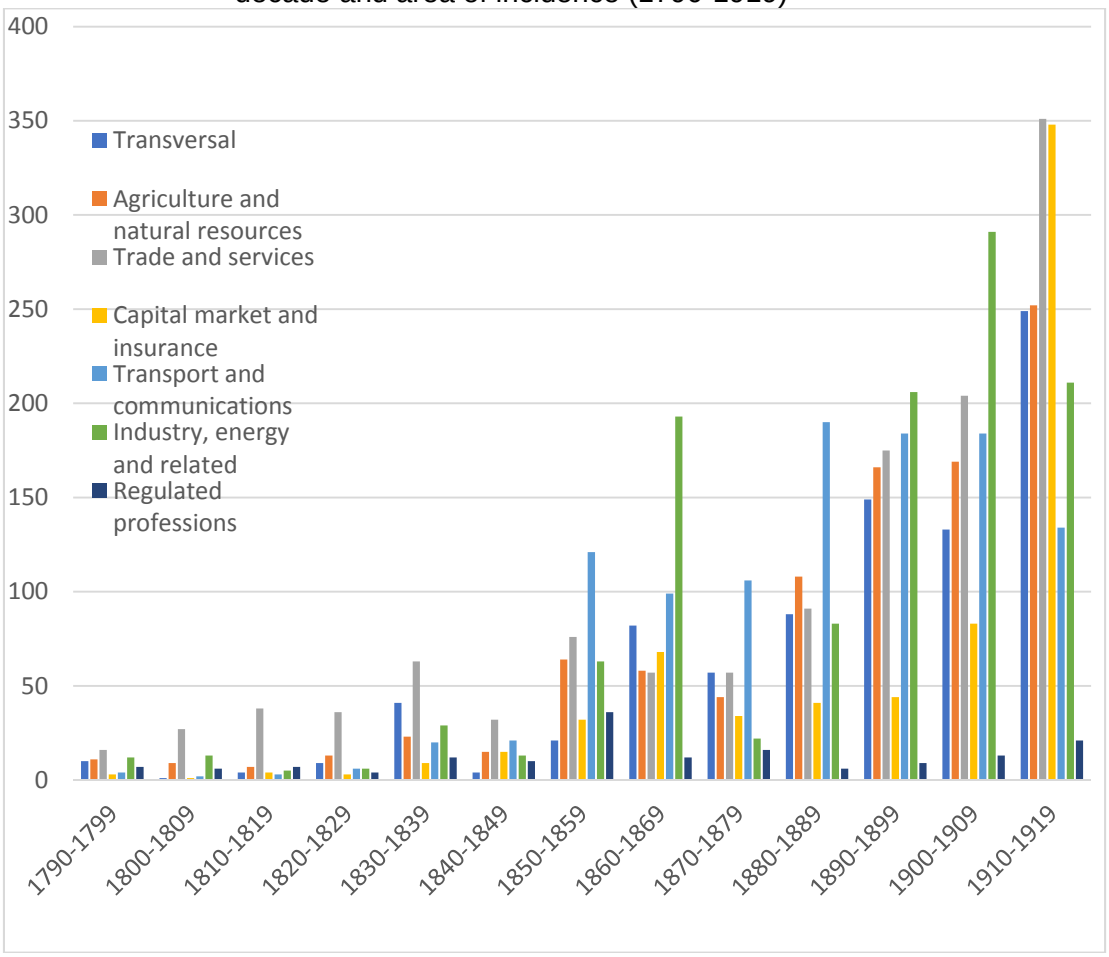
Source: Official collections of legislation (1790-1919) and Table 1.

In the early decades of the 19th century, the level of regulatory standard production did not substantially exceed the final decade of the eighteenth century. The period of invasions and civil wars to which this corresponds certainly explains this. Subsequently, there then came a period with a timid tendency towards growth, extending over the following two decades (1830-1849), still characterised by chronic instability. The "leap" in the 1830s came about due to the reformist and legal reconstruction state effort in the wake of the 1832-34 civil war (as demonstrated in Figure 1 above and Figure 2 bellow, the 1830s, in absolute terms, contain the largest category 1 input and the highest percentage of transversal standards, that is, a relative overproduction of framework rules). A second and more consistent jump arrives after 1850 and clearly characterized by the overwhelming preponderance of category 2 documents. However, the quantitative retraction of normative production in the 1870s requires more complex explanation. Even it certainly related to the effects of the crisis of 1873 that extended into the following years (nationally expressed in the 1876 financial crisis)[24], this may serve to reinforce the hypothesis that the regulatory activity, through legislative production, is umbilically linked to demand for the production of standards and / or dispute resolution on behalf of both private individuals and the state agents themselves – and which may, in certain cases, be proportional to the dynamism of activities and to economic growth (see Figure 2 below). I say “in certain cases" because the rulemaking "leap" of the 1910-1919 decade already incorporates the effects of a war economy (within the First World War context) and presumably other stimuli of demand for and supply of regulation (discussed further below). However, the suggested relationship does seem to bear some resemblance to the patterns of the 1850s, 1860s, 1880s, 1890s, and, to a degree, the 1900s. To better understand this, we should duly take the incidence of regulation into consideration.

Figure 2 now distributes the occurrences of each decade by areas of economic activity and the incidence of regulation (A to F and transversal).

[24] This hypothesis, however, the annual price and GDP indexes do not confirm. See, in particular, Nuno Valério, “Algumas questões sobre o crescimento económico português nos séculos XIX e XX”, *Estudos de Economia*, 13:4 (1993), 411-427.

Figure 2 Number of regulatory documents per decade and area of incidence (1790-1919)



Source: Official collections of legislation (1790-1919) and Table 1.

Up until the mid-19th century, trade and services (B-area) remains the area with the greatest regulatory impact. However, this is not the area that accounts for largest active population or the greatest share of production as quantified by economists. However, this does constitute the state's largest source of tax revenue, which would perhaps inevitably predispose it to greater regulation. This is an area in regulation intensified from the mid-19th century onwards but in keeping with similar movements in other areas and losing its relative weighting. Regarding the A-area (agriculture and natural resources), we should recall how this includes the mining and fishing sectors, which are very frequent targets of legislation and licensing, thus emphasizing the weak weighting of normative regulation on the agricultural sector. The latter, incidentally, and unlike the mining sector, was less organized in both business and concentration, which may interrelate with a

lower capacity to stimulate or generate demand for regulation. Nevertheless, there are also obvious exceptions, which are duly noted in the legislation, such as the Alto Douro (related to port production) and the Lezírias companies (farming extensive lands on the Tagus flood plain) and the wine sector of Madeira. The progressive transformation of this picture reflects in the way this A-area keeps pace with the growth in regulation of other areas in later decades (not to mention the constant presence of the mining and fishing sectors, which were also under development).

The evolution of E-area (transport and communications) regulation appears to trace the cycle of construction and expansion in the rail network throughout the second half of the 19th century -- but not only that: road, port and telegraph networks (and telephones from the 1880s) also generate an increase in regulation in this area. As regards the C-area (industry, energy and related), its evolution would also seem to accompany the gradual and relatively slow growth in factory industrialization. We should bear in mind that this area also includes the construction sector (with a relevant amount of regulation), energy and fuels and public gas and (from the 1890s) electric lighting, which becomes the target for many licensing acts. The rise of this C-area in the 1860s stems from a factor that had first begun to emerge in the previous decade: an avalanche of industrial patent registrations, which declined sharply from the following decade onwards. In the decade of 1900-1909, the C-area peak seems to correspond to the effective consolidation of national factory industrialization as accounted for by historiography.

From that already stated above, through to 1909 (and with the exception of the 1870s deviation), there seems to be some correspondence between the dynamism of each area of activity and the production of normative regulation. In the 1910-1919 decade, there was a general "jump" in the number of regulatory documents produced which nevertheless arises from another cause. While the revolutionary political change of 1910 stimulated some initial legislative production, it was the effect of the First World War that, from 1914, generated a major increase in normative production. All areas were affected but the rise in trade and services (B-area) legislation was particularly notable because of price controls and limitations imposed on the sale and distribution of basic needs that required constant legislative interventions and led to successive attempts at institutional arrangements for coordination and oversight. Foreign trade was also deeply affected, being subject to very frequent measures and closely directed at specific products and foodstuffs (which also partially explains the addition of A-area regulation). The similar increase in the capital and insurance market (D-area) mainly derived from the dynamism

of insurers interlinked with public demand in a perceived high-risk environment (which actually began before the war with the violent worker strikes of 1912).

5. Litigation between regulator and regulated

Normative category 3 (litigation) still remains for our analysis. This comprises of a set of legal documents relating to disputes between private interests and the state, which did not go through the ordinary courts or at least did not follow the same procedural steps of litigation as, in these cases, the final decisions required validation by the executive.[25] Its relative weighting in the set of regulatory documents for the period under study stands out in Figure 1 above.

In the 1790s, one-tenth of the legal documents concerned litigation of this kind. This ranks slightly higher than the average of 7.7% for the whole period 1790-1919 (see Table 1 above). Not all documents are the final decisions on disputes between the state and private interests. Even in the last decade of the eighteenth century some of these documents represent laws that define, structure or reform the very process of litigation or are of relevance to this. The same happens in the reformist decade of 1830-1839, with the effect of the legislative activities that began in 1832 while the liberal government was still in exile on the island of Terceira -- with most documents from this decade constituting rules defining procedures and competences for this type of litigation. This thus explains the shrinkage effect in the immediately following decades.

The 1870 to 1899 period appears as the "thirty glorious" years of litigation, with a clear majority of litigation cases among the legal documents studied. This "explosion" probably relates to the relative legal and institutional stability and the confidence this created for individuals to litigate against the public authorities. By contrast, in the thirty years between 1800 and 1829, there is a "blackout" on this kind of litigation that must interrelate with the instability then experienced and which was apparently not conducive to any significant private litigious activities against the regulator -- or the latter's interest in

[25] Prior to the definitive establishment of the "liberal state", the litigation involving the state (*contencioso*) belonged to the higher courts (such as Desembargo do Paço) but their opinions then had to be confirmed by the sovereign; see Manuel Borges Carneiro, *Direito Civil de Portugal* [1826], Tome 1 (Lisbon: Tip. de Maria da Madre de Deus, 1858), 7-21. In the liberal era, *contencioso* left the judicial sphere and was transferred to a section of the Council of State, which was an advisory body to the executive branch, which maintained the practice of confirming opinions. Following the establishment of the Supreme Administrative Court – and administrative justice – in 1870, the principle of confirmation of decisions (with approval or rejection) by the government remained a *de jure* and *de facto* procedure.

legislation about litigation. The pronounced shrinkage that occurs in the 1910-1919 decade (with an average of less than 4%) may derive from similar causes, due to the internal instability and the First World War (note that in the previous decade, 1900-1909, litigation still remains above average).

Most of the litigation processes found in the empirical research concern tax matters (in general, industrial contributions). It was only natural that the litigation procedure should be adopted by those regulated mainly in terms of dealing with the state over complaints about the liable taxable amounts as there simply was no other institutionalized mechanism to appeal to that effect. In other areas (e.g. licensing or regulatory enforcement by state agents), the executive's intervening power in decisions would provide a strong cause of increasing the opportunity cost of litigation and greatly reducing expectations of the deferment of complaints. Even so, there were also cases of non-tax litigation appeals, which demonstrates how this effect was not absolute and, as seen, could change conjuncturally according to greater or lesser political and institutional stability.

6. The normative dynamics of the Portuguese regulatory system

The material we have examined here helps in understanding the quantitative hegemony of "infra-regulation" in the Portuguese regulatory system. This hegemony, expressed quantitatively in the weighting of normative category 2 (constraints), had already taken shape prior to the definitive establishment of the "liberal state" in the 1830s. From the outset, this hegemony, verified from the 1790s onwards (Figure 1), probably originated in the dominant role of executive power as a regulator and in the incentives this created among those regulated and their preference for defending their interests through the use of the "administrative decision" shortcut. To this was added the "multiplier" factor of the "constraint-barrier" that characterized the constitutive norms of "infra-regulation" (as mentioned above) and later joined by the incentives provided by the "liberal state" for the participation of the regulated interests themselves in the regulatory system from the mid-19th century onwards.

It thus became possible for a "regulatory culture", based on the intervening and “concerting” role of the sovereign -- first, the king, and then the government in the king’s (or the people’s) name and under parliamentary supervision -- to survive (and, in fact, to be enhanced) throughout the juridical and institutional innovations of the "liberal state".

In contrast, and as an autonomous power, the judiciary was basically understood as the venue for conflict resolution between private parties and not between them and the state; a "structural encirclement" was thus added to the regulatory intervention of the judiciary and this situation only reinforced the idea of a regulatory system dominated by executive decisions issued in the form of legal documents. The central role of the executive involved frequent decision-making on short-term and sectorial issues that formed the broad scope of bureaucratic and administrative-type norms of "infra-regulation". Furthermore, this expanded whether during the period of political and institutional stability (beginning in 1851) or in the decade shaped by the war economy (1910-1919). From the 1850s to the 1900s, the monthly average of new regulatory documents more than doubled -- from an average of 3.44 per month to 8.86.

The normative densification is greater than these figures suggest as several norms issued in previous decades remain in force and generating a cumulative effect statistically imperceptible here. This effect however certain makes the normative web not only denser across each moment of the period under analysis and with highly significant lines of continuity extending through time to create a complex system of interrelated formal rules. This interconnection is especially evident in the constant references, in newly published legal documents, to previous documents and the very common phenomenon of revoking only certain provisions in prior legislation and leaving the remaining in force. This density of formal normativity does not nullify but does reduce the space for the informal constraints that allegedly mediate between formal norms and historical-economic agents -- also reducing their relevance in the study of regulation and the institutional environment in which this operates.[26]

This tremendous formal normative web also constitutes a complex and vast primary source from which the study of the regulation of economic activities can neither be dispensed with nor understated, proposing to the economic historian the challenge of having to study both its purport and its multiple interconnections over time.

[26] This observation does not invalidate the relevance of studying the enforcement of regulatory norms by agents of the state in keeping with North's theoretical question on the difference between the utility function of the sovereign (in its objectives) and that of its agents (in their conduct). See North, *Structure*, 25.