

The Rise of the British Regulatory State: A Legislative Text Perspective

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Abstract

This paper explores the rise of the regulatory state from a legislative language perspective. It focused on delegation - the transfer of regulatory powers from the legislative to the executive branch – and focuses on how the language shapes and design the discretion to make regulation. While regulation scholars have mostly focused on delegation to regulatory agencies, little is known about the development, structure, and content of delegation of regulatory authorities to make secondary legislation. This paper fills this knowledge gap, focusing on two dimensions of discretion: the distinction between mandatory and optional language, and between obliging, permissive, and prohibiting provisions. Using syntactic parsing and Natural Language Processing (NLP) techniques, this paper identifies and characterize delegation sentences and provisions made between 1900 and 2020 in the United Kingdom. The findings show an increase in the number of delegations, especially from the post-war period. The increase in delegations, and especially in optional delegations, shows a tendency to grant discretion to make regulations rather than command rulemaking. However, the findings also show an increase in the number of prohibiting delegation provisions, that seek to reduce discretion. Taken together, these two conflicting trends depicts the rise of the British regulatory state from a legislative text perspective.

1. Introduction

The expansion of regulation is one of the most striking features of democratic countries (Levi-Faur, 2011). The number of regulations in democratic countries is on the rise despite the voices for deregulation and state retreat in the neoliberal era (Adam et al., 2019; Kosti et al., 2019; Vogel, 2018). In the United Kingdom (UK), for example, the annual number of regulations has substantially grown over the last century, from less than 1,000 regulations per year in the late 1890s to above 3,000 regulations in the 2000s (Loft, 2019; Page, 2001). However, research on

the development and evolution of the regulatory state has been, so far, limited due to the challenges of measuring and counting regulation (Al-Ubaydli & McLaughlin, 2017). This research seeks to fill this gap by investigating the changes in legislation and legislative language in the UK.

What, then, an analysis of parliament's language can add to what we already know about the regulatory state? The expansion of regulation reflects the widespread of formal and informal bureaucratic rulemaking, rule-monitoring and rule-enforcement (Levi-Faur, 2011). The formal rulemaking powers to make regulations, however, are not 'inherent' in most countries (Page, 2016; Yackee and Yackee 2016). Legislatures rather delegate regulatory authority to the executive branch. The rise of the regulatory state, in this sense, is the surge of the powers delegated to make regulation (Baldwin, 1995). However, the regulatory governance literature has observed delegation, so far, from regulatory agencies perspective, mainly in the form of agency design, (Coen & Thatcher, 2008; Gilardi, 2008; Jordana et al., 2011, 2018; Thatcher, 2002), while there has little discussion about how laws delegate regulatory authority to make regulations.

The delegation literature, in contrast, has paid much attention to the understanding of how politicians design laws to control the bureaucracy (Epstein & O'Halloran, 1999; Huber & Shipan, 2002; McCubbins et al., 1987; Moe, 1987), often in the context of the US. Even recent literature on delegation is mainly focused on the US (Vakilifathi, 2019; Vannoni et al., 2020; Yackee & Yackee, 2016) or the EU (Anastasopoulos & Bertelli, 2020; Citi & Jensen, 2021). Rare attention has been paid, so far, in this regard, to parliamentary countries (but see Williams, 2018). Additionally, this paper goes beyond the common distinction between mandatory and optional delegations in the literature. These two approaches for rulemaking are always demonstrated as conflictual, but in reality, however, sections conferring powers to make regulations use both optional and mandatory language. A more useful approach, developed in this paper, following Vannoni et al. (2020), is to distinguish between mandatory and optional delegation sentences, such as "the minister shall make regulations" and "the minister may by regulations", and mandatory, optional, and prohibition delegation provisions, that provide additional details about the scope of delegated powers. The literature, so far, has overlooked this nuance, which are vital to the understanding of the nature of delegation and discretion.

To address the gaps above, this paper examines the extent, and how, British laws have delegated authority to make regulations between 1900 and 2020. In doing this work, this paper

provides, for the first time, an overview of the rise of the regulatory state from a legislative language perspective. It shows that the rise of the regulatory state has an echoing impact on how laws are written, and how powers are increasingly transferred from the parliament to the British executive branch during the twentieth and twentieth-one centuries.

These issues are not just an academic matter. Recently, the house of lords claimed that “there has been a tendency for bills to be introduced with broad or vaguely worded delegated powers that leave considerable discretion to ministers” (Select Committee on the Constitution, House of Lords, 2016, p. 15). And indeed, in a series of recent groundbreaking studies on UK legislation, Matthew Williams illustrated how the parliament’s language has become considerably indeterminate over the years (Williams, 2016, 2017, 2018). Following these studies, this study focused not on the full texts of British legislation, but specifically on those excerpts that delegate regulatory powers.

The findings show a dramatic increase in the number of delegations throughout the twentieth century. While the paper does not match these delegations to the actual number of regulations, it does echo the increase in regulation over the last few decades, showing that the language of laws has equipped the bureaucracy with extensive powers to make regulations. Additionally, the findings present a greater tendency to use optional delegation sentences, accompanied by optional delegation provisions, that identifies areas where the bureaucracy may make regulations, and set the boundaries may be made by such regulations. At the same time, the findings show decrease in mandatory optional that obliges regulation-making. While these measures indicate an increase in regulatory discretion, an analysis of parts of speech associated with determinacy point to more determinate language in delegations in the two recent decades.

The remainder of this paper is structured as follows. Section 2 provides an overview to the scholarship on the rise of the regulatory state, and specifically discussed the role of command-and-control regulation in the regulatory state. Section 3 develops a theoretical framework for the study of bureaucratic discretion, distinguishing between two dimensions of discretion. Section 4 presents the research design of the paper, specifying the process the data collection, delegation extraction, and measurements. Section 5 presents empirical findings, showing delegation and discretion evolved over the years. Section 6 concludes.

2. The Regulatory State: Still a Command-and-Control Regime?

The term "regulatory state" emerged in the US in the early 1960s (Levi-Faur, 2013). Back then, it was used as a label for the Federal Government's decentralized and regulation-oriented administrative model of governance. Originally opaque and under-conceptualized, the term was largely confined to the discourse of American politics. Since the mid-1990s, the term has been developed in line with the trend of privatization, liberalization and EU governance (Caporaso, 1996; Lodge, 2002; Loughlin & Scott, 1997; Moran, 2000, 2003). The regulatory state was portrayed as the opposite of the positive interventionist state, which its primary function is to correct market failures through "rule-bound and legalistic" policy style (Majone, 1994, 1997).

However, the literature's understanding of the regulatory state as rule-making state was soon challenged. Braithwaite's (2000) 'new regulatory state', and the literature that follows, sees the regulatory state not as a rule-making state but as state that uses non-hierarchical mechanisms, such as self-regulatory, enforced self-regulation, compliance systems, codes of practice and other responsive techniques that substitute for direct command and control. The new regulatory state therefore revolves about the decentering of the state, 'rule at a distance', ranking, shaming and other forms of soft-regulation (Braithwaite, 2000, pp. 224–225). In a similar manner, Moran (2000, p. 6) argued that the focus on the concept of the "regulatory state" is indeed a product of the rise of the "governance school", that "intended to announce a move away from the old command modes of hierarchical, classic bureaucracy to a world of negotiation within, and between, self-steering networks. In these accounts the regulatory state is more or less openly identified as the successor to, and the antithesis of, command".

While command and control regimes did not disappear, the regulatory governance literature focuses mainly on "decentred understanding of regulation" (Black, 2001). Scott (2004), for example, uses the term "post-regulatory state" to depict a state of mind, where sovereign states are not the main or sole forces of control over social and economic life, which is diffused through society. His focus on the rise of Governance is also reflected by Lobel (2004) who describes this new shift with eight clusters of approaches. Summarizing these ideas, in the introduction to their handbook on regulation, Baldwin et al. (2010, p. 5) claim:

"The very concept of regulation has evolved so that study in this area is no longer confined to the examination of dedicated 'command' regimes that are designed to offer continuing and direct control over an area of economic life. The 'regulator' on the book cover represents this kind of traditional vision (and, arguably, continuing rhetorical attraction) of regulation as a 'red light' concept, an idea that through the rule of law a system could 'maintain its designated characteristics'... In contrast to this 'fixed' view,

the practice and study of regulation has increasingly moved towards more flexible understandings. This includes, for example, the indirect regulatory effects of control systems that are set up with aims other than regulation (e.g. taxation mechanisms). Similarly, it has become widely accepted that regulation can be carried out by numerous mechanisms other than those commonly typified as ‘command and control’.

While the literature has moved to the study of various forms of regulation, command and hierarchical forms of regulation are still dominant today, even more than two or three decades ago. The growth of rules has been on the rise across western democracies (Adam et al., 2017, 2019; Kosti et al., 2019). This requires more attention to the sources and origins of regulation in the form of command and control regulation.

3. Delegation and Discretion in Regulation

From a command and control regulation perspective, regulation is a delegated action, which in most countries requires explicit authorization for its execution (Page, 2016; Pünder, 2009). Every such delegation entails also a degree of discretion. In fact, delegation and discretion are intertwined concepts in the study of legislative systems (Vannoni et al., 2020). They denote the transfer of authority from elected representative organs, such as legislatures, to unelected non-majoritarian institutions, including public and private organizations, and the scope the latter may have to implement the authority in varied and different contexts (Galligan, 1986; Thatcher & Sweet, 2002; Williams, 2018). Scholar of regulation, however, often study delegation from the perspective of independent regulatory agencies (Ennsner-Jedenastik, 2016; Gilardi, 2008; Maggetti, 2012). The extensive literature on delegation, as mostly developed by political scientists in the context of the US, however, understands delegation as a transfer of rulemaking authority from the legislature to the executive (Epstein & O’Halloran, 1999; Huber & Shipan, 2002; McCubbins et al., 1987; Moe, 1987; Vakilifathi, 2019; Vannoni et al., 2020; Yackee & Yackee, 2016). While the two literatures do not speak to one another, following the delegation literature may have an added value to provide a better understanding on the origins of the regulatory state as a command-and-control regime.

In pursuit of this goal, the point of departure of this research is the understanding that in European countries, the executive delegate to itself. In other, the legislature delegates regulatory authority to a variety of executive bodies. This point is critical and central to the understanding of the development of the regulatory state, on the one hand, and to the existing knowledge gaps in the regulatory governance literature. While the literature has focused mainly

on the evolution and diffusion of independent regulatory agencies, in parliamentary regimes, the powers to make regulations, at least in the form of delegated legislation, is vested in ministerial departments. For example, in the UK, ministers who head ministerial departments are those who sign regulations in the form of statutory instruments (Page, 2001). This is justified on the basis that “it is ministers who receive a mandate from the electorate and remain accountable to parliament” (Gains, 2003). Such understanding can assume, that in parliamentary countries, especially those with one-party-dominant and two-party systems, delegation of powers shall provide high levels of discretion.

Discretion, according to Galligan (1986), can be defined as “power delegated with a system of authority to an official, or set of officials, where they have some significant scope for settling the reasons and standards according to which that power is to be exercised” (Galligan, 1986). Accordingly, in this research, I pay attention to two dimensions of discretion: the type of delegation (mandatory versus optional), and the type of provisions accompanied these delegations (mandatory versus optional). While the former determines whether the bureaucracy can decide to use power given in delegation, the latter reflects what delegated powers *shall* or *may* include.

3.1 Mandatory and Optional Delegation Sentences

One essential dimension of discretion the distinction between mandatory and optional delegations (Rodrigues, 2017; Vaklifathi, 2019; Yackee & Yackee, 2016). Following informal interviews with consultants, legislative staff, and legislative attorneys, Vaklifathi (2019: 985) assert that, “the distinction between optional and mandatory clauses is[as] the main determinant of discretion when interpreting statutes”. Mandatory and optional delegations are distinguished by the level of discretion they grant the bureaucracy to make regulations. While mandatory delegation obliges the bureaucracy to handle some regulatory matters, optional delegation permits the bureaucracy to take such actions on its own will. Mandatory and optional delegations can be distinguished by the auxiliary verb used.

Mandatory delegation often includes auxiliary verbs, such as “shall”, “will”, and “must”, before verbs, while optional delegations usually use the auxiliary verb “may”. The following delegation from section 34(1) of the Children and Social Work Act 2017 exemplifies a use of a mandatory language:

“The Secretary of State must by regulations make provision requiring—

- (a) relationships education to be provided to pupils of compulsory school age receiving primary education at schools in England;
- (b) relationships and sex education to be provided (instead of sex education) to pupils receiving secondary education at schools in England”.

As shown in the subsection above, the authority to make regulations is mandatory, as illustrated by the inclusions of the modal auxiliary verb “must”, that obliges the Secretary of State to make regulations on relationships and sex education. In contrast, an example of optional delegation can be found in section 43(3) of the same act, authorizing the Secretary of State to make regulations regarding education and training of social workers:

“The Secretary of State may by regulations make provision for the regulator to operate a scheme for the approval of—

- (a) courses of education or training for people who are or who wish to become social workers in England; (b) qualifications for people who are or who wish to become social workers in England”

As illustrated, the authorization does not command the Secretary of State to exercise his regulatory powers. Rather, such optional language equips the Secretary of State with the discretion to decide whether, if at all, and when to make regulations on these matters.

3.2 Optional and Mandatory Delegation Provisions

Distinguishing between mandatory and optional delegation is just one dimension of delegation. It provides an understanding of whether the legislature obliges or permit the bureaucracy to make certain actions. While this distinction is important, it does not provide a full picture of how the boundaries of such delegated authority. In fact, written laws usually provides additional provisions that determines regulatory actions under a delegation. Delegations, in this regard, are often accompanied by more specific provisions, stating the scope of the delegated powers. This means that we need to be more careful not only to the distinction between mandatory and optional delegation, but also to the distinction between mandatory and optional delegation provisions. Optional delegation provisions include additional details about what delegated power *may* include, or in other words, what issues *may* be covered by future regulations. See, for example, section 13(1-2) of the Public Health (Control of Disease) Act 1984:

(1) Subject to the provisions of this section, the Secretary of State may, as respects the whole or any part of England and Wales, including coastal waters, make regulations—

- (a) with a view to the treatment of persons affected with any epidemic, endemic or infectious disease and for preventing the spread of such diseases,
- (b) for preventing danger to public health from vessels or aircraft arriving at any place, and

- (c) for preventing the spread of infection by means of any vessel or aircraft leaving any place, so far as may be necessary or expedient for the purpose of carrying out any treaty, convention, arrangement or engagement with any other country.
- (2) Without prejudice to the generality of subsection (1) above, the Secretary of State may by any such regulations apply, with or without modifications, to any disease to which the regulations relate any enactment (including any enactment in this Act) relating to the notification of disease or to notifiable diseases.

As shown, the excerpt presents the first two subsections of the section. The first subsection grants the Secretary of State the power to make regulations on three issues related to the treatment and prevention of infectious diseases. The second subsection, however, provides additional provisions about how the Secretary of State may implement this delegation. I term such provisions as optional delegation provisions, since they describe what regulations *may* do, rather than what they *ought* to do. The third subsection of section 13 of the Public Health (Control of Disease) Act 1984 adds more details about the scope of future regulation, using again optional languages:

- (3) Regulations made under this section may provide for—
 - (a) the signals to be displayed by vessels or aircraft having on board any case of epidemic, endemic or infectious disease,
 - (b) the questions to be answered by masters, pilots and other persons on board any vessel or aircraft as to cases of such disease on board during the voyage or on arrival,
 - (c) requiring persons alighting from aircraft to answer questions pertaining to their state of health or their contact with infection,
 - (d) the detention of vessels or aircraft and of persons on board them,
 - (e) the duties to be performed in cases of such diseases by masters, pilots and other persons on board vessels or aircraft,and may authorise the making of charges and provide for the recovery of such charges and of any expenses incurred in disinfection.

As written, the Secretary of State *may* use the power to make regulations in four additional areas, related to the prevention of epidemics coming by aircraft. While this choice of language provides, so far, permissive provisions about the scope of such delegated powers, subsection 4 of the section provides another, different provision, about what future regulations must do:

- (4) Subject to section 14 below, regulations made under this section—
 - (a) shall specify the authorities, whether county councils, local authorities, port health authorities, Regional Health Authorities, Area Health Authorities, District Health Authorities or special health authorities, by whom they are to be enforced and executed, and

As shown in this example, unlike optional delegation provision, such provisions confers what regulations must do. Regulations, according to this subsection, shall specify which authorities shall enforce the regulations. I term such instance as mandatory delegation provision, as such provisions mandates the bureaucracy to carry out actions.

3.3 Prohibiting Delegation Provisions

While regulations can be accompanied by optional and mandatory delegation provisions, prohibiting provisions can determine that some actions are now allowed (Vannoni et al. 2020). For example, section 262(1) of the Town and Country Planning (Scotland) Act 1997 includes an optional delegation sentence to modify regulations regarding the development winning and working of minerals and depositing of mineral waste:

- (1) In relation to development consisting of the winning and working of minerals or involving the depositing of mineral waste, the provisions specified in Part I of Schedule 18 shall have effect subject to such adaptations and modifications as may be prescribed by regulations.

However, subsection 3 of section 262 states that:

- (2) Any such regulations shall not apply—
 - (a) to the winning and working, on land held or occupied with land used for the purposes of agriculture, of any minerals reasonably required for the purposes of that use, including the fertilisation of the land so used and the maintenance, improvement or alteration of buildings or works on it which are occupied or used for those purposes, or
 - (b) to the winning and working of peat by any person for the domestic requirements of that person.

As shown, the provisions make it clear that the regulations can not be made in some areas and some issues. Rather than including what regulations *may* or *ought* to do, as in the case of mandatory and optional delegation provisions, in this instance, the provision includes what the delegated powers must not do. I term this provision a prohibiting delegation provision.

4. Data, Text Extraction, and Measures

4.1 Data

The data used for this research covered the full texts of legislation made between 1900 and 2020. Texts of legislation were derived from two sources. For 1900-2015, I used Matthew Williams' dataset of British legislation. The dataset consists of the plain text of each law legislated in the UK between 1990 and 2015, its preamble, and title. For 2016-2020, I web scraped all legislations appeared in legislation.gov.uk, the British official website of legislation. The website, managed by The National Archives on behalf of HM Government, includes all texts of legislation and was easily downloaded using Beautiful Soup Library on python (Richardson, 2019). Merging the two datasets, the aggregated legislation dataset included 6,752 laws. After collecting the data, I used a series of regular expressions to divide

each law into sections, allowing further analysis of each section according to dimensions of delegation and discretion.

4.2 NLP Techniques

In recent years, studies on delegation and discretion have built on machine learning techniques and other computational text analysis tools, such as NLP, to identify and measure delegation and discretion in the context of the EU (Anastasopoulos & Bertelli, 2020; Citi & Jensen, 2021), the US (Vannoni et al., 2020), and the UK (Williams, 2018). These studies have used NLP techniques for two main reasons. first, it is used as an information extraction tool to detect delegation in legislative texts, either by supervised machine learning techniques (Anastasopoulos & Bertelli, 2020) or by syntactic parsing (Vannoni et al., 2020). Overall, the use of NLP can help deciding whether a specific token (i.e., a word) is, for instance, a verb or adjective. For example, it can decide whether the word “order” indicates an action of giving an authoritative direction or an authoritative command.

4.2.1 Extraction Rules

In this study, I follow the method developed by Vannoni et al. (2020) to identify delegation and discretion. However, my focus is on delegation and discretion to make regulation, rather than on general bureaucratic powers. Therefore, I created different extraction rules, designated to extract delegation and discretion of rulemaking, which specifically designed to capture delegation and discretion in the British context. To start with the extraction rules, I dismantled each section into subsections using the sentence tokenizer of spaCy. The next step was to analyze these sentences and distinguish between sentences that include delegation and sentences that do not include delegations.

British delegation takes often two patterns. Starting with the first one, the standard UK formulation for delegation is the use of “by regulations”, “by rules”, or “by orders” (Page, 2016), as can be shown in the following example from section 11(2) of the British Education Act 2011:

“The Secretary of State may by order make changes in consequence of sections 7 to 10 to any provision of subordinate legislation made before the date on which this Act is passed”.

As can be seen, the sentence introduces an actor who is authorized to make regulation (the Secretary of State), the object of making regulation (make changes...), and how the action shall be taken (by order).

The second way to identify delegations in UK legislation is when a type of regulation is placed as an object of the sentence. This often comes with a combination a verb. Take, for example, section 6(1) of the Mineral Workings (Offshore Installations) Act 1971:

“The Secretary of State may make regulations for the safety, health and welfare of persons on Offshore installations in waters to which this Act applies, and generally, and whether or not by way of supplementing the preceding sections of this Act, for the safety of such installations and the prevention of accidents on or near them.”

Again, such sentences can come in different configurations. For example, two actors sometimes are authorized to make regulations together (as in “...the Minister and the Scottish Board of Health may jointly make an order under this section...”).

To extract sentences including one of these two patterns, I used the rule-based matcher of the Python package spaCy (Choi et al., 2015).¹ spaCy’s rule-based matcher engines and components allow access to the tokens within texts and their relationships. Similar to regular expression, the matcher iterates over tokens (i.e. words) and allows to refer to token annotations. This rule-based matcher's strength is that it allows researchers to focus not only on specific keywords but on their linguistic features. The matchers created were based mainly on the token’s part of speech tag and some specific words.

Table 1 demonstrates the extraction rules of the five elements studied in this research. As shown, mandatory delegations often come with two patterns: (1) a nonnegated strict modal (“may”, “shall”, or “will”) followed by delegation verb (for the full list of verbs, see table 1), and regulation term (‘order’, ‘Order in Council’, ‘regulation’, ‘bylaw’, ‘rule’), such as “the Secretary of State must make regulations”; (2) a nonnegated strict modal (“may”, “shall”, or “will”) followed by an adposition (i.e. “by”), regulation term (‘order’, ‘Order in Council’, ‘regulation’, ‘bylaw’, ‘rule’), and delegation verb (for the full list of verbs, see table 1), such as “the Secretary of State must by regulations establish”.

¹ <https://spacy.io/usage/rule-based-matching>

Optional delegation sentences may appear in one of five patterns: non-negated permissive modal (i.e. ‘may’) followed by (1) delegation verb and regulation term, such as “the Secretary of State may make regulations”; (2) adposition, regulation term, and delegation verb, such as “the Secretary of State may by regulations make”; (3) adposition, regulation term, and delegation verb, such as “the Secretary of State may by regulations make” (4) delegation verb, provision term (i.e. “provision”), adposition and regulation term, such as “the Secretary of State may by provisions by regulations”; (5) the auxiliary verb “be”, delegation verb in its past tense, adposition, and regulation term, such as “as may be prescribed by regulations made by the Secretary of State”.

After detecting mandatory and optional delegations, I moved to extract the three types of provisions accompanied these delegations.

Mandatory delegation sentences can take three forms: regulation term followed by (1) non-negated strict modal and delegation verb, such as “regulations shall require”; (2) adposition, determinator (optional), section term, adposition (optional), and non-negated strict modal, such as “regulations under subsection 2 shall require”; and (3) delegation verb (in past tense), adposition, determinator (optional), section term, adposition (optional), and non-negated strict modal, such as “regulations made under this section shall”.

Prohibiting delegation provisions can take five forms: (a) regulation term followed by (1) adposition, determinator (optional), section term, adposition (optional), and non-negated strict modal, such as “regulation under subsection (3) must not”; non-negated strict modal and delegation verb, such as “regulations shall not make”; (b) non-negated strict modal followed by (3) delegation verb, negation, and regulation term, such as “the secretary of State must not make regulations”; (4) adposition, regulation term, and delegation verbs, such as “the Secretary of State must not by regulations increase”; (c) negation, adjective, regulation term, strict modal, and delegation verb, such as “no such order shall”.

Optional delegation provisions may include regulation term, followed by: (1) non-negated permissive modal and delegation verb, such as “regulations may specify”; (2) adposition, determinator (optional), section term, adposition (optional), and non-negated permissive modal, such as “regulations under subsection 2 may specify”; (3) delegation verb in past tense, adposition, determinator (optional), section term, adposition(optional), and non-negated permissive verb, such as “regulations prescribed by section (2) above may”; (4) non-

negated permissive modal, delegation verb, adjective and provision term, such as “regulations may make such provision”. The fifth pattern of permissive delegation provisions starts with permissive modal, followed by the auxiliary verb “be”, delegation verb in past tense, determinator, and regulation term, such as “as may be prescribed in regulations made by the Secretary of State”.

Table 1: Lexical Units and Extraction Rules

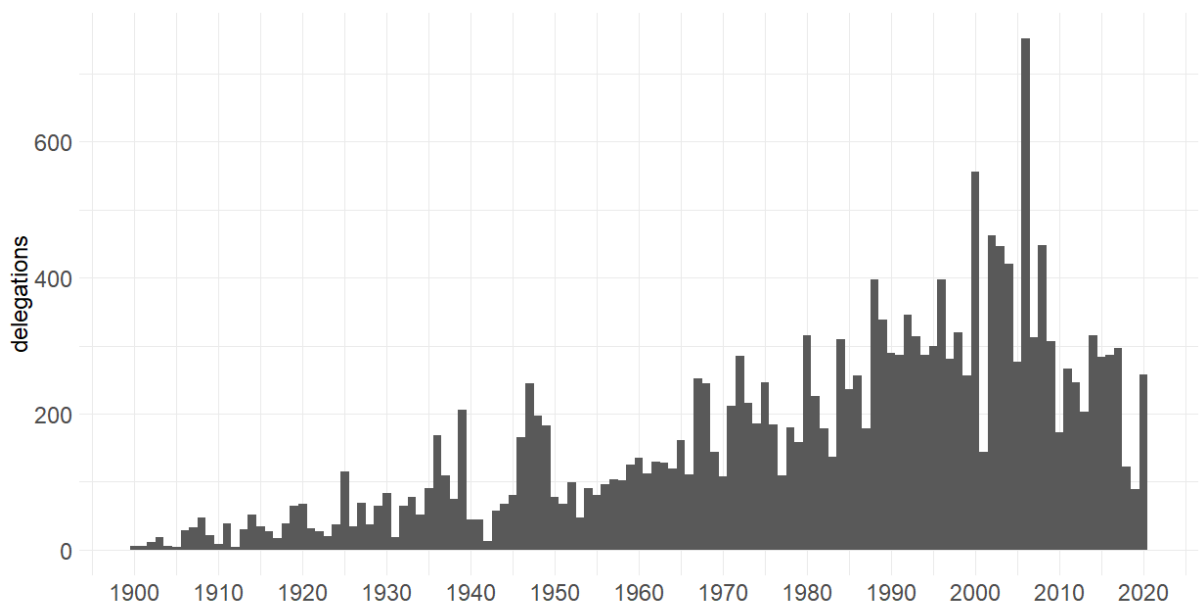
Lexical Units		
Strict modals	'shall', 'must', 'will'	
Permissive modals	'may'	
Delegation verbs	'impose', 'establish', 'merge', 'establish', 'modify', 'alter', 'grant', 'include', 'appoint', 'vest', 'notice', 'abolish', 'require', 'make', 'suspend', 'issue', 'give', 'extend', 'determine', 'constitute', 'transfer', 'extinguish', 'increase', 'vary', 'confer', 'revoke', 'nominate', 'replace', 'amend', 'prescribe', 'delegate', 'prohibit', 'apply', 'repeal', 'do', 'need', 'fix', 'declare', 'designate', 'specify', 'substitute', 'empower', 'provide', 'exempt', 'frame', 'direct', 'increase', 'remove', 'approve', 'operate', 'contain', 'provide', 'authorize', 'revoke'	
Regulation terms	'order', 'Order in Council', 'regulation', 'bylaw', 'rule'	
Section terms	'section', 'subsection'	
Provision terms	'provision'	
Adposition	'under', 'above', 'by', 'in'	
Adverbs	'also'	
determiner	'the', 'a', 'an'	
Extraction Rules		Example
Mandatory Delegation	1. strict modal + not negation + delegation verb + regulation term	“The Secretary of State must make regulations”
	2. strict modal + not negation + adposition + regulation term + delegation verb	“The Secretary of State must by regulations increase”
Optional Delegation	1. permissive modal + not negation + delegation verb + regulation term	“The Secretary of State may make regulations”
	2. permissive modal + not negation + adposition + regulation term + delegation verb	“The Secretary of State may by regulations make”
	3. permissive modal + not negation + delegation verb + provision term + adposition + regulation term	“The Secretary of State may by provisions by regulations”

	4. permissive modal + not negation + adposition + regulation term + delegation verb (past tense) + adposition	“The Secretary of State regulations made under this part”
	5. permissive modal + auxiliary verb+ delegation verb (past tense) + adposition + regulation term	“As may be prescribed by regulations made by the Secretary of State”
Mandatory delegation Provision	1. regulation term + strict modal + not negation + delegation verb	“Regulations shall require”
	2. regulation term + adposition + (optional: determinator) + section term + (optional: adposition) + strict modal + not negation	“Regulations under subsection 2 shall require”
	3. regulation term + delegation verb (past tense) + adposition + (optional: determinator) + section term + (optional: adposition) + strict modal + not negation	“Regulations made under this section shall”
Optional delegation Provision	1. regulation term + permissive modal + not negation + delegation verb	“Regulations may specify”
	2. regulation term + adposition + (optional: determinator) + section term + (optional: adposition) + permissive verb + not negation	“Regulations under subsection 2 may specify”
	3. regulation term + delegation verb (past tense) + adposition + (optional: determinator) + section term + (optional: adposition) + modal verb + not negation	“Regulations prescribed by section (2) above may”
	4. regulation term + permissive modal + not negation + delegation verb + adjective + provision term	“Regulations may make such provision”
	5. permissive modal + modal verb + delegation verb (past tense) + determinator + regulation term	“As may be prescribed in regulations made by the Secretary of State”
Prohibitive delegation provision	1. regulation term + adposition + (optional: determinator) + section term + (optional: adposition) + modal verb + negation	“Regulations under subsection (3) must not”
	2. regulation term + strict modal + negation + delegation verb	“Regulations shall not make”
	3. strict modal + delegation verb + negation + regulation term	“The Secretary of State must not make regulations”
	4. strict modal + negation + adposition + regulation term + delegation verb	“The Secretary of State must not by regulations increase”
	5. negation + adjective + regulation term + strict modal + delegation verb	“no such order shall”

5. Findings

Laws in the UK usually conceived as “skeleton legislation”, where the Westminster Parliament can shift ‘significant’ decisions in the regulatory field to secondary legislation and in some cases even allow to use them to amend laws through Henry VIII clauses (Pünder, 2009). The number of UK laws has decreased in recent decades, but they became much longer and detailed. For example, the number of words in legislation made between 2011 and 2015 was above 6 percent higher than the number of words in legislation made between 1901 and 1995 (Williams, 2018). But laws not only became longer over the years, but perhaps also changed their function. As illustrated in figure 2, while there are periods of growth and decline, the overall trend, at least until the beginning of the 2000s was a trend of growth. In the beginning of the twentieth century, the number of delegation sentences with delegations was very minimal with few dozens delegations per year, but over the years it grew and reached few hundreds sections in some years. This trend points to a shift in governance – from governance based on legislation, and perhaps also on informal arrangements (Moran, 2003) – to a more legalistic approach that is visible on the books of law,

Figure 1: Number of Delegations, 1900-2020



The increase in delegations also reflects a greater tendency to include optional delegations. Such types of delegations provide more discretion to make regulation, as optional delegations allows the bureaucracy to decide whether to make regulation at their own will. The difference between mandatory and optional language demonstrates two different approaches

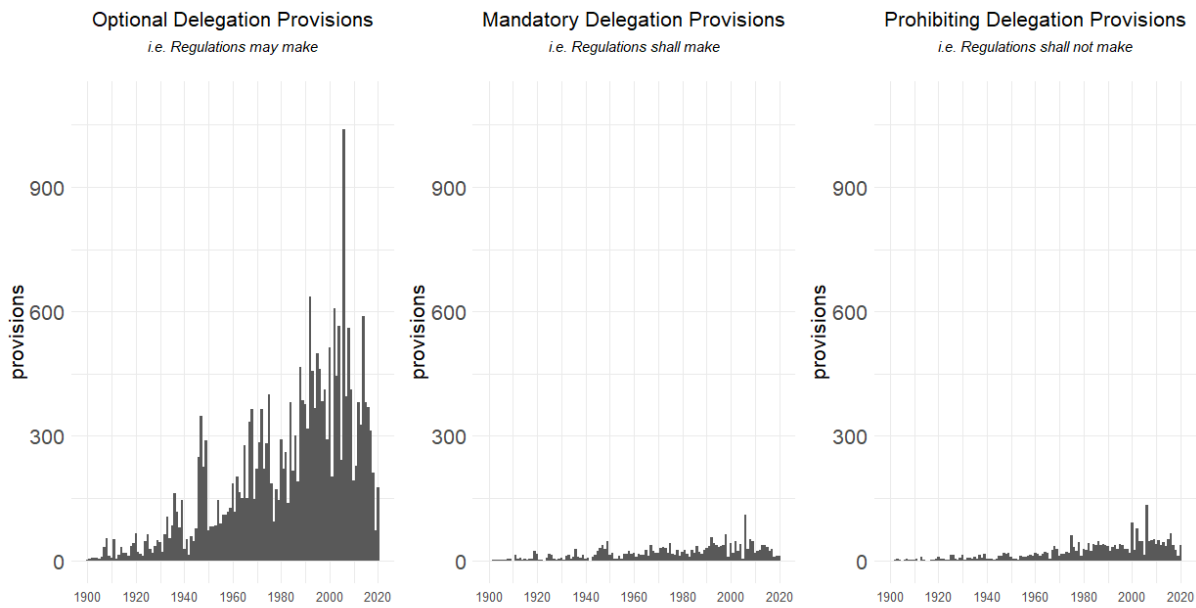
to rulemaking. They reflect different relationships between principals and agents, namely between the legislative and executive branches. Accordingly, Yackee and Yackee (2016) argues that mandatory language provides agencies “with a clearer sense of what Congress “want them agency to do” (p. 411). As figure 2 shows, the increase in delegations shown in figure 1 came mostly in optional form. This means that instead of ordering the bureaucracy what to do, British governments preferred to use more permissive language that enables discretion. As illustrated, number of mandatory delegation sentences was relatively minimal over the years. However, it still grew to some extent over the years, although not significantly, compared to optional delegations.

Figure 2: Optional and Mandatory Delegation Sentences, 1900-2020



The increase in optional delegation sentences is a striking evidence for granting more discretionary powers to make regulations in the UK. Similarly, a closer on the provisions accompanied such delegation sentences shows similar tendency (figure 4). As demonstrated, optional delegation provisions are the most common provisions accompanied delegation sentences. Put differently, delegations not only permit the bureaucracy to decide whether to make those regulations, but also, how and to what extent, they *may* exercise these powers. Mandatory and prohibiting delegation provisions, however, that denote what regulation *must* or *must not* was much less common, although it increased in recent decades.

Figure 4: Three Types of Delegation Provisions: Optional, Mandatory, and Prohibiting



6. Conclusions

The expansion in regulation is still ongoing process in light of neoliberalism and the ‘retreat of the state’ debates (Adam et al., 2017, 2019; Kosti & Levi-Faur, 2019). Even narrow definition of regulation, as adopted in this paper, shows an extensive increase in the bureaucratic powers to make regulations. This paper illustrates, for the first time, the rise of the regulatory state from a legislative language perspective. It highlights a relatively unexplored side of the regulatory state, that is, the growth in delegation of regulatory authorities. Rather than looking on how laws delegate powers to regulatory agencies, the study provides an innovative perspective on how the parliament’s language changed to establish the rise of the regulatory state.

By examining the delegation of regulatory authorities in the UK’s laws between 1900 and 2020, the findings show an increase in the delegation of regulatory authorities, as well as in the functions law fulfil. From 1900, the number of delegations has increased. The findings also reveal an increased use of permissive language that enables larger discretion to decide whether, and when, to use regulations. At the same time, there a small increase in mandatory delegation provisions that oblige the government to make regulations. Similarly, the number of prohibiting delegation provisions revealed a tendency to use also more restrictive approach to rulemaking. In recent years, however, there is a moderate trend of all sorts of delegations.

The findings provide a strong reminder to the parliaments' roles in the regulatory state. The expansion in regulation could not have happened without the transfer of broad powers to make regulations. Despite the growing reliance of governments on regulation, we know little about the growth in production of regulations, and particularly, about the relationship between law and regulation (but see Kosti et al., 2019; Kosti & Levi-Faur, 2019; Yackee & Yackee, 2016). While the findings are in line with Majone's characterization of the regulatory state as a rule-making state, whose policy style is "rule-bound and legalistic" (Majone, 1997), they show that this policy style stems from a massive change in the language of legislation.

The study makes noteworthy contribution to the regulatory governance literature and the delegation literature. While literature has mostly focused on the study of delegation of regulatory functions to independent regulatory agencies (Coen & Thatcher, 2008; Gilardi, 2008; Jordana et al., 2011, 2018; Thatcher, 2002), it paid too little attention to the delegation of regulatory powers to make regulations. The study also points how focusing on legislative language can provide important insights into the regulatory governance scholarship. In particular, it shined a new light on how the regulatory state was evolved using a unique approach of textual analysis.

This study also showed that a more nuanced observation about the language of legislation is helpful to the understanding of discretion. Delegation and discretion are intertwined concepts in the study of legislative systems (Vannoni et al., 2020). Discretion denotes how authority can vary and be applied in different contexts. In this study, I conceptualized two dimensions of discretion: the first was the distinction between mandatory and optional delegation sentences, and the second was the distinction between mandatory, optional, and prohibiting delegation provisions. The distinction between these two dimensions clarifies that it is more useful to identify levels of discretion rather than using a simplistic binary definition. The way in which laws are written requires a more complex observation about how laws delegate powers, and to what extent, and how, these powers may be exercised.

These findings open a discussion about how legislative bodies largely grant more and more powers, and perhaps more discretion, to executive bodies. As the British journalist Jane Fae puts it:

"On present trends, the next parliament will pass 4,000 or more statutory instruments a year. They will, in aggregate, have a significant effect on how we conduct our daily lives. Some of this legislation will be debated. Much of it will not. The elephant in the room is the fact that this shift towards statutory instruments will itself take place without any debate. Slowly, surely, the very essence of our

parliamentary democracy is draining away from primary legislation, where it receives full and frank scrutiny, towards secondary legislation, where it does not...”²

As this quote observed, the over-reliance on regulations challenges democratic values and raises a democratic deficit. While this study found striking evidence for the increasingly transfer of regulatory powers from the legislative to the executive branch, it also found a tendency to use more mandatory delegation sentences, mandatory delegation provisions and prohibiting delegation provisions. Such use of these elements means that regulations, to some extent, and at least on paper, are more accountable than they used to be.

However, more research on this topic needs to be undertaken. In future studies, there is abundant room to investigate the how delegations drive regulatory production (Yackee & Yackee, 2016). Legislatures often authorize bureaucrats to make actions, but whether bureaucrats use their delegated powers is still an open question, especially from a comparative perspective. Additionally, future investigations need to take more seriously the actors are granted legislative and rulemaking powers (Epstein & O’Halloran, 1999; Vannoni et al., 2019). Third, future research shall take a more comparative perspective. Comparative studies on delegation are indeed rare, partially due to the differences in law traditions and conceptualization across nations (Page, 2016; Pünder, 2009).

² Fae, J. (14/1/2015). “A War on Democracy: How Statutory Instruments Replaced Acts of Parliament”. Retrieved <http://www.politics.co.uk/comment-analysis/2015/01/14/a-war-on-democracy-how-statutory-instruments-replaced-acts-o>

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