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When Do Chinese National Ministries Make Law?

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Abstract: This paper documents some basic empirical facts about the issuance of formal regulations (FRs) and informal policy directives (IPDs) by China's national ministries and agencies from 2000 to 2014. Prior scholarship (e.g. Cui 2011, Howson 2012) depicts specific instances of Chinese national agencies announcing substantive new policies (many *ultra vires* by statutory standards) through IPDs. I use FR and IPD quantities as measures of the agencies' propensity to resort to legal as opposed to non-legal, merely bureaucratic mechanisms for announcing policy. I find significant variations across agencies in the quantities of FRs issued, both in absolute terms and relative to the quantities of IPDs. The variations often contradict conventional perceptions about different agencies' political orientations. Budget fluctuations do not predict FR or IPD issuance, nor do the minister's tenure in office. Overall, formal rulemaking has been on the decline in China, accentuating the importance of the question: Why do Chinese bureaucrats bother with rulemaking at all? I suggest a preliminary set of considerations relevant to answering this question. The study sheds new light on the different approaches taken by actors in the Chinese government to establishing basic "rule by law".

Keywords: Chinese law, rule by law, rule of law, rulemaking, informal policy documents, national ministries.

Introduction

Perhaps the most ubiquitous distinction in recent scholarship on Chinese law is drawn between "rule by law" and the "rule of law". While individual usages differ, "rule by law" typically denotes an approach to governance that uses instruments and mechanisms that can be described as constituting a "legal system", but which can essentially be tailored to the preferences of autocrats and used in state oppression, with disregard for citizens' rights. Many refer to the same concept also by the term "thin" rule of law. Both terms are contrasted with the concept of "rule of law", which reflects a deeper respect for due process and individual rights, and possibly additional norms associated with Western democratic institutions. Increasingly, scholars have come to assume that the Chinese government has embraced "rule by law" (in the mode of, say, Singapore), and focus their attention on the contrast between such a mode of "authoritarian legality" and the rule of law as traditionally understood in the West.

I believe this widespread assumption is mistaken. "Rule by law" may be what the Chinese Communist Party (CCP) claims to want to implement, but does not accurately characterize many fundamental aspects of the Chinese state's operation. The reach of legal institutions and processes in China—i.e. the presence of rule by law or "thin" rule of law—has been substantially overestimated in recent scholarship. Arguably, in taking the existence of basic legal ordering in China for granted,

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scholars—even those who believe themselves to be highly critical of the Chinese government—have uncritically accepted much CCP discourse. This creates an intellectual conundrum; it does not seem conceptually possible to have the (thick) “rule of law” without the “thin” rule of law or rule by law. The focus on the distinction between the two seems unjustified when both are absent from Chinese governance.

Among the relatively few scholars who have commented on the fragility of even the “thin” rule of law in China is Professor Nico Howson. In his 2012 article “Enforcement without Foundation”,¹ Professor Howson identifies a 2007 China Securities Regulatory Commission (CSRC) internal policy document on insider trading that is *ultra vires* relative to statutory provisions, patently invalid by Chinese administrative law standards, but that was nonetheless routinely enforced by CSRC and widely tolerated by affected investors in China’s capital markets. Professor Howson marvels at how “China’s most ‘modern’, politically independent and technically competent regulator” could decide to impose such an egregiously defective rule, all with remarkably little resistance, “upon relatively sophisticated, well-educated, largely urban, property rights-wielding investors.” This seems especially surprising when “the regulated transactions are economic and financial, not political or oppositional in nature.” Such phenomena, he argues, “provide important insights regarding China’s efforts to establish even thin ‘rule of law’ after more than three decades,” because they are emblematic of “a much larger dysfunction that exists in many other areas of the People’s Republic of China (PRC)’s applied legal and administrative law system.”²

Professor Howson conjectures that “the problem [that] appears under the administration of the CSRC...exist[s] even more in the approaches taken by older-line agencies and departments.” In this chapter, I test Professor Howson’s conjecture through a simple empirical exercise: I examine the promulgation of formal regulations (FRs) and publication of informal policy directives (IPDs) by all of China’s national ministries and agencies during the 2000-2013 period. Using the quantities of FRs and IPDs as a measure of agencies’ propensity to utilize legal as opposed to non-legal, merely bureaucratic policy instruments, I highlight some surprising patterns in the different approaches taken by a large range of actors in China’s central government to establishing basic “rule by law”.

I find very significant variations in the quantities of formal regulations (which are genuine legal instruments) issued by different agencies, both in absolute number and relative to the quantities of IPDs published by the same agencies. These variations often contradict conventional perceptions about the political orientation of different agencies. For example, the Ministry of Public Security, an integral part of China’s machinery for state oppression that perhaps few would assume pursues the legitimacy of law, adopts formal regulations with greater relative frequency than most other ministries. Other patterns that emerge from the empirical analysis similarly lack ready explanations that can be drawn from the existing literature. I offer some preliminary hypotheses about how the patterns I identify may be explained. But the more general point is that the Chinese political class may have very limited incentives

¹ Nico Howson, “Enforcement without Foundation?—Insider Trading and China’s Administrative Law Crisis,” *American Journal of Comparative Law* 60(4) (2012): 955.

² Professor Howson persuasively argues that the illegality of the CSRC’s actions had little to do with what other commentators alleged to be China’s “turn against law” in recent years. The CSRC policy guidance was non-ideological and had “everything to do with how an expert agency actually applies the law and delegated power in a technically complex area way below the radar of public perception or macro-level political-legal discourse.” It was also “firmly rooted in long-held...and continuing understandings about the power and discretion afforded administrative actors in China, and the relationship of those institutions to law and legal institutions.” *Id.* at 994-5.

to pursue even “rule by law”, and that instead of taking the growth of legal ordering for granted, it is more appropriate to ask the question: Why do Chinese politicians bother with law at all?

The chapter proceeds as follows. Section 1 provides basic background on China’s national level agencies and the distinction between formal regulations and informal policy directives. In particular, I draw a sharper distinction between what is law and what is not law in the Chinese system than Professor Howson does, and elaborate on why doing so is justified. Section 2 sets out certain basic patterns in agency rulemaking. Section 3 discusses potential explanations of the patterns identified in Section 2, and presents further related empirical analyses. Section 4 sets out a preliminary framework for understanding Chinese politicians’ incentives for lawmaking and discusses some implications of the chapter’s empirical findings.

1. Can Ministries Make Law other than Regulations?

I propose to assess Chinese national government agencies’ propensity to establish “rule by law” by measuring their frequency of issuing formal regulations (*bumen guizhang*) relative to their issuance of informal policy directives. Since the enactment of the Law on Legislation (LL) in 2000, clear procedures have generally governed the adoption and publication of ministry/agency regulations. A ministry regulation is always issued as a decree (*ling*) in the name of the minister, and is published with consecutive numbering. Consistent with the principle that law must be published to take effect, it is rare for a ministry regulation associated with a known decree number to not be locatable. By contrast, Chinese executive branch agencies issue a wide variety of bureaucratic documents, and there is no uniform format for those documents intended to have policy significance, and no guarantee that those documents with policy significance would be publicly available.

Take the CSRC for example. The 2007 insider trading guidance that Professor Howson criticizes has the document numbering “*zhengjian jicha zi* (2007) No. 1”. In the same year, the CSRC issued 13 regulations by itself (CSRC Decrees no. 40 to 52) and 4 joint regulations with other ministries. As of July 2019, Chinalawinfo also lists 62 CSRC ministry policy documents (*bumen guifanxing wenjian*) from 2007, along with 626 CSRC “ministry work documents” (*bumen gongzuo wenjian*) and 1,042 CSRC decisions made with respect to individual persons from the same year. While the insider trading guidance is classified by Chinalawinfo as a policy document, no other document in the *jicha zi* series is available for 2007. This could be either because there was no further document in the series,³ or because further documents in the series were not released to the public. Moreover, given that the *jicha zi* series concerns audits, one might have expected documents in the series to relate to the enforcement of already-announced policies, instead of announcing policies for the first time. In other words, Chinalawinfo’s classification of the guidance as a CSRC policy document did not have any particular legal basis; it seems that the guidance could easily have been treated as a “work document” (a category of Chinalawinfo’s own creation).⁴

The difficulty of identifying bureaucratic documents that are not formal regulations *and* are intended to be generally complied with is much more pervasive than the single example of the insider trading guidance might suggest. For instance, in 2007 the CSRC appears to have issued at least 144

³ This seems somewhat unlikely, given that the *jichazi* series is presumably tied to the Audit Bureau and possibly even the Audit Taskforce (*jicha zongdui*) of the CSRC.

⁴ Professor Howson argued against viewing the insider trading guidance as *guifanxing wenjian*. Howson, *supra* note 1, at 979-80.

circulars (*zhengjianfa*) in its own name. As of 2019, only ten of these are available as policy documents on Chinalawinfo; seven others are available as work documents (and none as individual decisions), leaving most documents in the *zhengjianfa* series unaccounted for. The CSRC also issues other documents on behalf of its various divisions, e.g. the *jigouzi* series for the Institutional Division, the *faxingzi* series for the Listing Division, and so on. Plenty of documents in each of the multiple series remain unpublished. The published documents in each series are used variously for announcing policies, organizing bureaucratic matters within the agency, or rendering individual decisions. There is generally neither a legal nor institutional basis for knowing which documents are intended to promulgate policy.⁵

Finally, it should be noted that in the last decade, the CSRC appears to increasingly issue policy documents in the consecutively-numbered bulletin (*gonggao*) format. This practice bears some similarity to the practices of a few other national agencies (e.g. the State Administration of Taxation or SAT⁶) that aim to improve the procedure for agency policy adoption outside formal rulemaking, and to make it easier for the public to follow policy announcements. However, it remains unclear whether the CSRC currently issues major policy announcements only through bulletins, and if not, what other methods exist to identify such announcements.

In summary, if we stipulate that *guifanxing wenjian*—which I translate in the remainder of this chapter as “informal policy directives” (IPDs)—refer to government documents that are not formal regulations but that nonetheless announce policies intended to be generally followed by the public, then what is an IPD at the CSRC remains unclear to this day. To our knowledge, this ambiguity applies to virtually all Chinese executive branch entities, at national and subnational levels. Indeed, few agencies have adopted the CSRC and SAT practices of identifying IPDs through a specific document format (e.g. a consecutively-numbered bulletin).

I believe that these observations imply, at a basic conceptual level, that IPDs issued by Chinese government agencies should not be viewed as generating *legal norms*. Stated in legal theoretical terms, legal norms come into being only when there are accepted “rules of recognition”—used by either government officials, or the public to whom legal norms apply, or both—to identify which rules are legally valid.⁷ Legal norms must display certain “attributes of legality,” so that it is possible for it to become common knowledge in the relevant community which norms embody the demands of law.⁸ The example of the CSRC shows that when one puts ministry regulations (and higher norms such as national statutes) aside, Chinese national agencies have not offered alternative mechanisms for identifying sources of norms that civil servants and citizens must comply with and enforce. Therefore, in a non-legalistic sense that should be recognizable in diverse legal systems, Chinese ministry IPDs do not constitute “law”.⁹

⁵ For example, Chinalawinfo classifies a no-action letter issued to Dongfang Electric (*zhengjian gongsizi* [2007]191) as a *guifanxing wenjian*, while other similar no-action letters are treated as either work documents or individual decisions.

⁶ The SAT began the practice of announcing policy through bulletins in 2010. See Wei Cui, “What Is the “Law” in Chinese Tax Administration?” *Asia Pacific Law Review* 19(1) (2011): 75.

⁷ See H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2012); Scott J. Shapiro, *Legality* (Cambridge, MA: Belknap Press, 2013).

⁸ See Gillian K. Hadfield, and Barry R. Weingast, “Microfoundations of the Rule of Law,” *Annual Review of Political Science* 17 (2014): 21.

⁹ Professor Howson refrains from drawing this conclusion (Howson, *supra* note 1, at 987-8), but I believe the argument in the text compels it.

This conclusion is—or at least would have been until recently—even more straightforward when analyzed in Chinese legal terms. The Law on Legislation (LL) prescribes clear norms and procedures for enacting law (including executive branch regulations) and does not contemplate any source of generally applicable norms in the Chinese legal system aside from those stated in its scope. The LL arguably offers the most salient set of “rules of recognition” within the Chinese legal system, which rules command wide compliance among government officials.¹⁰ There is no comparable set of alternative rules of recognition anywhere else in the Chinese legal system. This set of rules of recognition was also until recently clearly upheld by the judicial system. Under the Administrative Litigation Law (ALL), Chinese judges must refer to (*canzhao*) ministry regulations as sources of law and must apply them if they are not in conflict with higher legal norms. On the other hand, at least prior to 2018, Chinese judges could choose to apply or disregard IPDs at their discretion.¹¹

The recent change to the “rules of recognition” in the Chinese legal system just alluded to does not affect Professor Howson’s 2007 CSRC example nor the empirical analysis below; it is a change that is still unknown to much of the world. Since 2015, when the ALL was amended, plaintiffs suing government agencies in China have been entitled to request courts to pass judgements on the legal validity of any IPDs that defendant agencies purport to be the basis of their actions. I have argued elsewhere that this measure for judicial review of IPDs, which would ostensibly empower plaintiffs, is not only largely unnecessary but also will likely prove counterproductive. This is because of the glaring ambiguity as to how much China’s civil law judiciary can compel agencies in the executive branch to explicitly revise or withdraw their IPDs. Moreover, in 2018, the Supreme People’s Court (SPC) issued an interpretation of the amended ALL, which instructed judges to give IPDs legal effect whenever they are determined to not contravene higher legal norms. In other words, whereas the previous standard of judicial review of IPDs is that IPDs *may* be given effect if judges deem them to be reasonable and not *ultra vires* (or otherwise invalid), the new standard is that IPDs *must* be given legal effect if they are not invalid (even if unreasonable).

This seems to amount to a requirement of *greater* judicial deference to the executive than under the previous status quo. It further implies that IPDs may be regarded as a source of legal norms, as long as they are not patently illegal. This is because executive branch agencies can now argue that, in the absence of patent illegality, their IPDs *would* always be given effect by courts per the SPC’s instruction. It remains to be seen how the SPC’s new ALL interpretation will be followed. It does not resolve the question of how to identify IPDs generally, since the vast majority of IPDs will not be litigated. However, it does threaten to introduce a new path to “legality” for IPDs completely alien to the Law on Legislation.

In any case, I study the practices of national ministries in adopting formal regulations and issuing IPDs in an earlier period, during which FRs, based on the foregoing arguments, were the only forms of law promulgated by ministries.¹² The issuance of FRs and IPDs by national ministries put an important

¹⁰ That is, few Chinese government officials, and least of all government lawyers and judges, would fail to distinguish between regulations and IPDs, even though many laypersons and legal scholars do.

¹¹ Cui, *supra* note 6; Wei Cui, Jie Cheng and Dominika Weisner, “Judicial Review of Government Actions,” *China Perspectives* 1 (2019): 29.

¹² I do not analyze the State Council’s promulgation of formal regulations and IPDs, since the unique status of the State Council makes it hard to compare with other executive branch entities.

bound on the overall supply of rules and policies in China. Although provincial and sub-provincial governments also issue FRs and IPDs,¹³ they face numerous constraints in and disincentives for doing so (particularly the veto or disapproval of higher-level policymakers). National-level rulemaking, by contrast, faces the lowest risk of interference by other principals, while also benefitting the most from economies of scale. Therefore, for any regulatory issue for which a nationally consistent set of rules is feasible, the adoption of such rules by the national government is the most desirable.¹⁴

During the period I study, Chinese national ministries were officially divided into six types:¹⁵

- (A) 25 cabinet ministries;
- (B) 16 agencies directly affiliated with the State Council, 9 of which are full ministry-level agencies;¹⁶
- (C) 13 “non-administrative” agencies directly affiliated with the State Council, three of which—agencies regulating banking, insurance, and securities—perform functions important to the administrative state (notwithstanding their classification);¹⁷
- (D) 16 national bureaus reporting to other national agencies, all of which are ranked one tier lower than agencies in categories (A) to (C), though some of them also play important regulatory functions;
- (E) 4 clerical offices of the State Council; and
- (F) 30 temporary inter-agency coordination offices.

In 2015 and 2016, I gathered FR and IPD data for most agencies within groups (A) to (D) except for the non-regulatory agencies in category (C).¹⁸ I have ignored agencies in groups (E) to (F). A table of ministries/agencies, as well as information regarding data on additional ministry-level variables used in the analyses below, are given in Table A.1 in the (online) Appendix.

2. Overview of Ministry Regulations and IPD Issuance, 2000-2014

Figure 1 depicts the overall trends in ministry regulation-making and IPD release. The dramatic rise in the volume of publicly available IPDs is not surprising; open government information initiatives individually pursued by various ministries prior to 2008, and made mandatory by the State Council in 2008, are likely responsible for the increases of IPDs in the public domain. Perhaps more remarkable is the decline in formal rulemaking since the mid-2000s; collectively, Chinese national agencies in recent years make only about half of the number of regulations that they did in 2004. The ‘per ministry’ mean of FR issuance is 65 over the fifteen-year period and the median is 54, both converting to around four

¹³ For a systematic study, see Wei Cui and Jiang Wan, “When Do Chinese Subnational Governments Make Law?” <https://ssrn.com/abstract=3467703>.

¹⁴ In terms of data, national ministries also enjoy economies of scale in publicizing the rules they adopt, and therefore any rule that is meant to be published and to be of common knowledge is also most likely to be published.

¹⁵ See http://www.gov.cn/gjig/2005-08/01/content_18608.htm.

¹⁶ These tend to be agencies that began as minor agencies but evolved and acquired important status—the General Administration of Customs, the State Administration of Taxation, and the State Administration for Industry and Commerce are examples.

¹⁷ Others in this group are quite different in character, and include, for example, Xinhua News Agency and the Academy of Science. I exclude these non-regulatory agencies from the scope of the study.

¹⁸ The timing of the data gathering matters for IPDs, as more IPDs are released and included in databases over time. It does not matter for FRs, since information on FRs is identifiable and invariant from the time of their issuance.

regulations per ministry per year. For IPD, the mean and median per year per ministry are 183 and 66, respectively.

Table 1 ranks ministries by FR adoption during this period and provides the corresponding mean annual IPD frequency for each ministry.¹⁹ Consider first the end of the spectrum characterized by infrequent regulation making. The ministries of National Defense and of State Security issued not a single FR over the 15-year period, and the Ministry of Foreign Affairs issued only one. Notably, Defense also released to the public only two IPDs during the entire period and State Security released 12, while MFA released on average only seven IPDs per year. One explanation of these striking numbers for these three large, cabinet-level ministries might be their lack of transparency.²⁰ Supporting this interpretation is the observation that, while the National Oceans Administration and the (former) National Administration of Survey and Geography also adopted very few regulations (one and three for the whole period, respectively), they are more forthcoming in releasing IPDs (averaging respectively 29 and 68 per year). Specialized jurisdictional scope and smaller regulated populations, rather than secretiveness, seem the more plausible explanation of the low frequency of rulemaking in these latter ministries.

At the other end of spectrum, characterized by (relatively) high frequencies of regulation making, the Ministry of Commerce (MOFCOM) leads with an average of sixteen regulations a year. It might be suggested that MOFCOM's status as the agency most closely associated with China's accession

¹⁹ Omitted for reasons of space are numerous category D agencies that displayed zero FR adoption but either sizeable or at least not extremely low IPD issuance (total IPD issuance in parentheses): State Post Bureau (153), National Energy Administration (289), Tobacco Monopoly Administration (346), State Administration of Coal Mine Safety (721), State Administration of Grain (796), State Administration of Traditional Chinese Medicine (994), and State Administration of Cultural Heritage (6,293).

²⁰ Several category D agencies also showed extremely low IPD counts: the State Administration of Science, Technology and Industry for National Defense, State Bureau of Civil Servants, and State Bureau for Letters and Calls (each released fewer than two IPDs on average per year). It is reasonable to regard these agencies as nontransparent as well. They are omitted from Table 1 because of zero FR adoption.

to the WTO makes it most sensitive to the WTO's government transparency requirements. For those tempted by this explanation of MOFCOM's frequent formal rulemaking,²¹ it will be disappointing that it would not work for the other agencies at the top of the chart (the Ministry of Transport, General Administration of Quality Supervision, Ministry of Agriculture, General Administration of Customs, and so on). Furthermore, for anyone inclined to explain the CSRC's relative high rank by the modern outlook of its staff, the even higher rank of the National Development and Reform Commission should give pause.

Another way to assess the propensity for formal rulemaking is to look at the frequency of regulation making relative to IPD issuance. The idea is that if the volume of IPDs is a function of an agency's scope of regulatory responsibility, then the FR to IPD ratio would render ministries' observed dispositions towards "rule by law" more comparable. This idea is partially validated empirically. Through single-factor ANOVA analysis I determined that there is no significant difference among agency categories (A) to (D) in respect of mean annual FRs, nor with respect to the FR to IPD ratio (calculated on a 14-year aggregate basis). However, with respect to mean number of IPDs issued, category (A) agencies generated more IPDs than category (B) agencies, which in turn generated more than category (D) agencies.²² It seems plausible to attribute these differences to the average political status of agencies among the three groups. The FR to IPD ratio would render the agencies in the different groups more comparable.

It must be acknowledged, however, that the available data on IPDs is quite noisy for two basic reasons. First, the volume of IPDs clearly depends on the transparency of the agency; an agency that lacks transparency will have lower IPD counts than an agency of the same size or importance that is more transparent. Second, as discussed in Section 1, what constitutes an IPD is unclear, and one must rely on the judgements of Chinalawinfo's classifiers (which may change over time) for measuring IPD quantity. In further analysis discussed in Section 3, budget and staff information are used as alternative measures of agency size/importance. In the absence of more accurate measures of agency regulatory responsibility, one can do no more than to exclude some outliers that appear to suffer the above problems most severely. Specifically, in the ranking below I exclude State Security, Defense, Supervision, Foreign Affairs, the Bureau of Statistics, the Audit Bureau, and the National Civil Aviation Administration based on their low IPD counts, and the China Insurance Regulatory Commission because of its extremely high IPD count (probably due to Chinalawinfo's classification).²³

Figure 2 displays the resulting ranking. I emphasize that the aim of the ranking is to highlight certain patterns of potential interest: for the reasons given above, the ranking cannot be taken as definitive. The first thing to note is the significant variation across agencies (which is also observed in terms of the absolute quantities of FRs). Among cabinet ministries, the Ministry of Transport has an FR to IPD ratio ten times as high as the Ministry of Education and the Ministry of Finance. Among ministry-level bureaus, Industry and Commerce has an FR to IPD ratio six times higher than the State Administration of Taxation. Second, even after omitting many zero or near zero FR adopters, the median FR to IPD ratio (instantiated by the NDRC) is relatively low, with 40 IPDs for each FR. Third, the ranking is, I would suggest, not easy to rationalize based on conventional wisdom. For instance, the Chinese police

²¹ Anecdotes also suggest that MOFCOM has the largest legal department among all national-level agencies.

²² I leave out category (C) agencies in the ANOVA analysis because the only agencies in this group I examine are the three financial regulators, and the CIRC is a clear outlier in IPD output.

²³ Further, all category D agencies with zero FR adoption are also omitted.

(Public Security) seems far more likely to pursue rulemaking than the People's Bank of China. It is a pattern, like the ranking in Table 1, that begs an explanation.

3. Potential Explanations of the Diverse Approaches to Rule by Law

a. Policy Topic and Institutions of Enforcement

A clue to an explanation for (at least some of) the patterns in Figure 2 (and Table 1) is furnished by a study of subnational lawmaking I carried out with a co-author.²⁴ In that study, we gathered comprehensive information for the period of 2000 to 2014 regarding the local statutes (LSs) enacted by China's 31 provinces and 49 of its cities that had lawmaking power before 2015, as well as the FRs and IPDs issued by the People's Governments in the same jurisdictions. We further classified all LSs, FRs, and IPDs into 39 policy subjects. These subjects do not perfectly correspond to the assortment of line agencies at the subnational levels,²⁵ but there is a reasonable amount of overlap. After applying this classification to over 184,000 policy instruments (!), we computed, for each governmental unit, policy subject and type of policy instrument (LS, FR, or IPD), the proportion of that type of instrument devoted to the subject. For each subject, we then computed (i) the excess of the proportion of LSs devoted to it over the proportion of IPDs devoted to it in a given jurisdiction, and (ii) a similar excess of FRs over IPDs. When both (i) and (ii) are positive for a subject, we take this as an indication that for the jurisdiction in question, there is a preference (relative to other policy topics) to announce policy on the subject through lawmaking. Conversely, when both (i) and (ii) are negative for a given subject, we take this as indication of a relative preference for informal policy announcement.

²⁴ Cui and Wan, *supra* note 13.

²⁵ This was partly because at the subnational level, only the chief executive office (i.e. governors or mayors) can enact FRs, while line agencies did not have their own power to make law, unlike national agencies. Thus we needed to come up with our own classification.

Certain consistent biases towards formal lawmaking or informal policy announcements in most provinces *and* cities emerge from this analysis. Among the subjects for which informality seems to dominate are (i) tax and public finance, and (ii) education. These correspond to three of the lowest-ranked ministries in Figure 2. Other subjects for which informality seems to dominate are economic development, medical and healthcare, social security, and food and drugs regulation. By contrast, in numerous policy areas, including transportation and public safety, a relative preference for lawmaking is found in most provinces and cities. Other similar areas are regulation of markets, environmental regulation, population and marriage, and construction and real estate. Figure 3 illustrates the patterns for some of these subjects.

We proposed to explain these biases towards formality or informality in the following way. For some subjects, there may be a strong need for the relevant policies to become public and common knowledge. For instance, enforcement by government agents alone may not suffice for rules on public safety, transportation, environmental protection, construction and real estate, or regulation of markets generally. Parties outside of the government are crucial to monitoring compliance, but they must know what the rules are to perform such monitoring. Arguably, therefore, these policy areas are inherently “public facing”. The promulgation of policies in these spheres through formal procedures has the unique ability to provide the publicity that the rules are likely to require, while IPDs, though much less costly to promulgate, would not allow for similar benefits.

In contrast, in policy topics dominated by informality, we observe either of two institutional arrangements. One is the presence of public ownership, as reflected in education and healthcare (and therefore also drugs). The other is the involvement of bureaucratic internal coordination; policies to promote economic development are a key example. Tax, public finance, and social security in China are policy areas that combine features of both arrangements. In both settings, policies matter more to bureaucrats and public employees than to the wide public; therefore broad social compliance is less of an issue. Therefore, regardless of who adopts these rules—provinces or cities—informal implementation carries no disadvantage.

The validity of these explanations, in my view, gains support from the ministerial patterns in Table 1 and Figure 2. Surely it is striking that the subjects of tax, public finance, and education lend themselves strongly to informal policy announcement consistently at the national, provincial, and city levels, while lawmakers at all three levels show a relative preference for formality on the subjects of transportation and public safety. It is worth noting that this explanation implies that whether the use of law is necessary (or dispensable) depends on prior institutional choices. For instance, tax policy can be public facing, if we assume that tax collection relies on taxpayers to learn what the law is and declare their tax liabilities accordingly (subject to the threat of audits and penalties). That, precisely, is how we tend to think about tax administration in many developed countries (tax compliance is rule-following *par excellence*). In China, however, tax collection very much relies on the effort of frontline tax collectors to coerce and cajole taxpayers, with the result that taxpayer knowledge of tax law is far less important.²⁶ Conversely, one can imagine that if the transportation sector in China were (counterfactually) largely state-owned, as schools and hospitals are, the need for lawmaking in promulgating transportation policy would decrease substantially.

²⁶ See Wei Cui, “Administrative Decentralization and Tax Compliance: A Transactional Cost Perspective,” *University of Toronto Law Journal* 65(3) (2015): 186.

b. Ministerial characteristics

Are there other ministerial characteristics, aside from policy area, that might explain the quantities of FRs (and IPDs) they generate?²⁷ The only independent variables I am able to gather data for at the ministry level are the staff size, budgets (both proposed and actual), and the identities of ministry or agency chiefs (for all years) for some ministries.²⁸ Figure 4 visualizes the correlations of numbers of FRs and of IPDs to the budget variables. The size of the ministry budget has no impact on FR output, and once agency and year fixed effects are controlled for, similarly has no impact on the quantity of IPDs.²⁹ Figure 5 shows that there is a raw positive correlation between staff size and both FR and IPD output, and that this correlation remains even after controlling for average budget. It is quite likely, however, for some other ministry characteristic to jointly explain staff size and the volumes of FRs and IPDs produced, reducing the plausibility of any causal relationship.³⁰

These results are not altogether surprising. Much Chinese government staffing is concentrated at sub-provincial levels, and ministerial staff size often fails to reflect the jurisdictional scope of a national agency.³¹ The nature of ministerial budgets is also not well understood. Both might be noisy measures of agencies' regulatory responsibility.

c. Politician Incentives

In both China and the U.S.,³² often the most well-known and closely observed aspect of government agencies besides their policy announcements is their political leaders. In recent years, political scientists studying China have offered a variety of evidence showing that China's subnational politicians are strongly motivated by certain implicit performance metrics and political career incentives. None of the studies, however, examines ministerial-level political leaders. It is, of course, a good question how the performance of ministry chiefs in China can be evaluated—virtually none of the targets set for subnational politicians (e.g. GDP growth, social stability, birth control, etc.) is applicable to national ministries. There are at least two possible answers. One is that ministers are evaluated on the implementation of policies that hold priority for more senior politicians; these may be reflected in ministerial policy announcements. The other is that policy implementation mostly occurs at the subnational level and thus requires much coordination from subnational actors, such that it is difficult to specify a ministerial-level outcome that would be appropriate for evaluation.

²⁷ Analysis not shown here confirms that once agency and year fixed effects are controlled for, there is no significant correlation between FRs and IPDs.

²⁸ Data on staff size tends to be available only for one year per ministry, thus form only a cross section (with 39 observations). However, staffing level tended also to experience little change at the national ministries in the period we cover. The budget data formed a panel with a maximum of 113 ministry-years. See Appendix Table A.1 for data availability by ministry.

²⁹ Figure 4 uses data on proposed budgets. The results from closing budgets are similar.

³⁰ Because we only have cross sectional data on staff size, we cannot control for year fixed effects.

³¹ The SAT, for example, has a staff of fewer than 800 but nominally supervises close to 800,000 tax administrators across China, which represents more than 10% of the civil service. The Ministry of Environmental Protection similarly hosts only 0.7% of the total staff employed by environmental protection agencies in China.

³² For a recent empirical study of U.S. federal government rulemaking, see Rachel Potter and Charles Shipan, "Agency rulemaking in a separation of powers system," *Journal of Public Policy* 39(1) (2019): 89.

Figure 6 displays regressions where the dependent variable is the FR (or IPD) count of a ministry in a given year, and the independent variable is the year-in-office of the minister, along with agency and year fixed effects. Two different specifications (Poisson and negative binomial, both used to deal with the low-count nature of the FR variable) are used. What we see is clearly a null result: except for a slight loss in productivity for ministers occupying their offices for eight years or more, career progress has no observed impact on FR or IPD production. This is consistent with the fact that (to my knowledge) making regulations per se is not one of the performance metrics applied to political leaders in the executive branch, and issuing IPDs is sufficiently low-cost to most bureaucrats that it could not possibly be used as a performance metric.

4. The Calculus of Lawmaking

Studying patterns in and explanations for agency rulemaking behavior is challenging in any context,³³ but I believe it is crucially important in the Chinese setting, for the following reason. Chinese government agencies do make law, but as Professor Howson’s CSRC example and so many other similar examples demonstrate, they could just as easily—or, indeed, much more easily—not make law. Commands directed at bureaucratic subordinates, including in the form of IPDs, prevail. Much recent scholarship on Chinese law has endeavored to argue that authoritarianism may be consistent with “rule by law”, even if it is in conflict with a stronger notion of “rule of law”.³⁴ But the very infrequency with which Chinese bureaucratic leaders resort to law shows that even if “rule by law” is *consistent* with authoritarianism, it is far from the preferred approach to governance. To understand Chinese governance today and in the foreseeable future, one must understand the autocrats’ alternatives to law—alternatives that have not only survived 40 years of economic reform but have likely grown with the economy.³⁵

We can frame the issue in the following way. A minister of a national agency can choose among several different paths for implementing new policies. He can propose to the Prime Minister that the latter enact either statutes (through the National People’s Congress), administrative statutes (*xingzheng fagui*), or some State Council informal directive. Or he can promulgate a formal regulation (if not preempted by higher law), which also possesses formal legal effect and is binding on courts, without elevating the issue politically. Alternatively, he can eschew formalities altogether, and implement policy through issuing IPDs. It would seem which path he pursues should depend on their relative benefits and costs. In particular, putting aside the options related to the State Council (outside the scope of this study), what relative benefits and costs do FRs possess when compared with IPDs?

The attractions of IPDs seem overwhelming. Informal directives are much less costly to produce in terms of both time and political resources, making them the perfect instruments for achieving short-term policy objectives. They are also flexible, and can be easily revised to incorporate new information and to correct mistakes in past policies. Moreover, they can be used to express the wills and preferences of a few political actors without garnering the consensus of a broad array of stakeholders. Finally, although IPDs may not command consensus among political actors, they are generally backed by the

³³ For reviews of the (mixed) results in empirical analyses of federal rulemaking in the U.S., see Potter and Shipan, *supra* note 32; John de Figueiredo, J. M., and E. Stiglitz, “Democratic Rulemaking,” in *Oxford Handbook of Law and Economics: Volume 3: Public Law and Legal Institutions*, ed. Francesco Parisi (Oxford: Oxford University Press, 2017), chapter 3.

³⁴ To some, this may seem like a platitude; to others, “rule by law” and “rule of law” are not so easily distinguished.

³⁵ See the declining trend in rulemaking in Figure 1.

coercive power of the state and few private actors will succeed in contesting them merely because they lack formal legal effect. Even if IPDs cannot bind courts, this fact in itself is unlikely to undermine a policy's implementability in China.

In what circumstances, then, might a minister view a formal regulation as a superior path of for the pursuit of policy? I propose four such reasons.

First, because of the existence of procedural rules, the adoption of a formal statute or regulation is more time-consuming—and, by the same token, so is its repeal. That is, formal legal rules are generally more permanent, whereas IPDs are easily reversed. The adoption of formal legal rules can thus insulate policies from changes in political coalitions or configurations in special interest groups.

Second, the procedures for adopting formal legal rules also imply that there is a process for achieving policy consensus and political coordination within the ministry. For example, if a single ministry division is capable of implementing a policy without opposition from other division, it may be sufficient for the division to sponsor its own IPDs. However, if coordination among multiple divisions is necessary or desired, making formal legal rules is one important way of achieving such coordination. Indeed, the relative permanence of formal legal rules ensures that such coordination can be relied on and does not easily unravel.

Third, the higher legal status of formal legal rules may lead to greater compliance by government actors (e.g. different government offices). This is the case not because of enforceability by courts, but by virtue of bureaucratic and Party disciplinary rules. That is, formal legal norms can be used by the superior or more powerful members of the political hierarchy to discipline subordinate or less powerful members. The vulnerability of those who take actions in breach of the law comes not from the threat of judicial repudiation and any consequent undermining of the implementation of the policies, but from political rivals who may highlight such a breach in political contests.

Fourth and finally, whereas the large quantities of informal agency announcements and their most frequent use in managing mundane government activities ensure that any given IPD is likely to remain obscure to the public, formality provides the rules with prominence, legitimacy, and authority. It is possible that ministerial political leaders have personal preferences for these “attributes of legality”, but it is more likely that the functional role of these attributes in securing compliance exerts a steady, even if not inexorable, pull on bureaucratic choices. This logic may be what is at play in the consistent biases towards formality in certain policy areas discussed in Section 3.1.

It is surely an empirical challenge to find ways to ascertain the presence of any of these four circumstances. My own intuition is that reasons two and three have infrequent application in the ministry context. Different divisions within a ministry do not represent factions with firmly demarcated turfs in the same way that different ministries or line agencies do, so the cost of ongoing inter-division coordination is unlikely to justify investing in rulemaking. Moreover, if we think that the important political rivalries occur across ministries instead of within, the formal regulation of one ministry is unlikely to intimidate rivals in a different ministry. This leaves reasons one and four as the main incentives for and benefits of ministry regulation-making.

These preliminary conjectures deserve further investigation, by both legal scholars and political scientists. I close this chapter with a comment on one strand of recent political science scholarship on China's bureaucracy. There appears to be substantial interest in studying open policy consultations

hosted by the executive branch entities. It is as though scholars are eager to extend their studies of public deliberation in the parliamentary branch of government in China to the executive branch. I have argued elsewhere against the fixation on parliamentary deliberation; in a parliamentary system firmly controlled by one party, one would simply not expect much parliamentary deliberation even in a democracy.³⁶ Here, I would strongly caution against fixation on deliberation in the executive branch as well. Public consultations are generally *required* for the making of ministry regulations,³⁷ and as far as I can tell, the public consultation processes pursued by national ministries and studied by scholars predominantly involve regulation-making. That is, engagement in public consultation is entirely a parasitic *epiphenomenon* of the decision to engage in formal rulemaking. Thus, any study purporting to address the question of when (and which) Chinese ministries pursue public consultations must necessarily yield to the study of the more fundamental question posed in this chapter: When do Chinese national ministries make law?

³⁶ Wei Cui and Jiang Wan, “Decentralizing Legislation in China’s Law on Legislation Amendment,” *Hong Kong Law Journal* 49(2) (2019).

³⁷ Regulations on Procedures for the Formulation of Rules (规章制定程序条例) (Promulgated by the State Council on November 16, 2001; revised on December 22, 2017), Article 15.

Table 1: National Ministries' Formal Regulations and Released IPDs (2000-2014)

Ministry	FR annual mean	IPD annual mean	Ministry	FR annual mean	IPD annual mean
Ministry of Commerce	15	417	Human Resources and Social Security	3	189
Ministry of Transport	13	181	People's Bank of China	3	224
General Administration of Quality Supervision, Inspection and Quarantine	12	408	Ministry of Culture	2	320
Ministry of Agriculture	10	452	State Taxation Administration	2	347
General Administration of Customs	9	155	State Food and Drug Administration	2	190
Civil Aviation Administration of China	9	16	State Forestry Administration	2	69
National Development and Reform Commission	9	317	Ministry of Water Resources	2	76
China Securities Regulatory Commission	8	259	Ministry of Civil Affairs	2	117
Ministry of Housing and Urban-Rural Development	7	455	National Railway Administration	2	64
State Administration of Work Safety	6	146	State-owned Assets Supervision and Administration Commission	2	59
Ministry of Industry and Information Technology	6	217	National Tourism Bureau	2	40
Ministry of Public Security	6	82	Ministry of Education	2	474
China Insurance Regulatory Commission	5	791	Ministry of Supervision	2	11
National Health Commission	5	236	General Administration of Sport	1	78
State Administration for Industry and Commerce	5	116	Ministry of Science and Technology	1	91
Ministry of Justice	5	62	National Bureau of Statistics	1	17
Ministry of Environmental Protection	5	256	National Audit Office	1	24
China Banking Regulatory Commission	5	428	State Administration of Foreign Exchange	1	67
State Administration of Radio, Film and Television	4	52	National Administration of Surveying, Mapping and Geoinformation	0	68
Ministry of Finance	4	617	Ministry of Foreign Affairs	0	7
State Intellectual Property Office	4	35	State Oceanic Administration	0	29
General Administration of Press and Publication	4	57	Ministry of National Defense	0	0
Ministry of Land and Resources	4	105	Ministry of State Security	0	1
			Average across ministries	4	183

Data source: Chinalawinfo, IPD information gathered in December 2015.

Figure 3: Province and city (ordered by formality dominance at the province level)

Figure 4: Correlation between Agency Budget and FR and IPD output

(a) Projected budget without FEs

(b) Projected budget with FEs (year and ministry)

Figure 5: Correlation between Agency Staff Size and FR and IPD output

(a) Correlation between Staff size and instruments

(b) Correlation between Staff size and instruments, controlling for projected budget

Figure 6: Minister career analysis

(a) Negative Binomial

(b) Poisson regression

Dots indicate the predicted number of events for each year of tenure, while the range plot with the capped spikes shows the corresponding 95 CI. If the year of tenure is higher than 8, it is recoded to 8. Regressions include Ministry and year fixed effects. Standard errors are clustered at the Ministry level. When working with FR, ministries that report a total of 3 or less instruments during the whole period of analysis are excluded.

Table A.1 List of National Ministries and Agencies and Independent Variable Coverage

中央部委名称	Name of National Ministry or Agency	Category_abb	Career	Staffing	Closing Budget
农业部	Ministry of Agriculture	A	2000-2013	2008	2007-2013
民政部	Ministry of Civil Affairs	A	2000-2013	2008	2011-2013
商务部	Ministry of Commerce	A	2000-2013	2003	2010-2013
文化部	Ministry of Culture	A	2000-2013	2008	2007-2013
教育部	Ministry of Education	A	2000-2013	2008	2007-2013
环境保护部	Ministry of Environmental Protection	A	NA	2008	2007-2013
财政部	Ministry of Finance	A	2000-2013	2008	2010-2013
外交部	Ministry of Foreign Affairs	A	2000-2013	NA	2011-2012
住房和城乡建设部	Ministry of Housing and Urban-Rural Development	A	2000-2013	2008	2010-2012
人力资源和社会保障部	Ministry of Human Resources and Social Security	A	2000-2013	2008	2008-2009
工业和信息化部	Ministry of Industry and Information Technology	A	2000-2013	2008	2010-2013
司法部	Ministry of Justice	A	2000-2013	2008	2010-2013
国土资源部	Ministry of Land and Resources	A	2000-2013	2008	2010-2013
公安部	Ministry of Public Security	A	2000-2013	NA	2013
科学技术部	Ministry of Science and Technology	A	2000-2013	2008	2007-2013
监察部	Ministry of Supervision	A	2000-2013	NA	2013
交通运输部	Ministry of Transport	A	2000-2013	2009	2011
水利部	Ministry of Water Resources	A	2000-2013	2008	2010-2013
审计署	National Audit Office	A	2000-2013	2008	2007-2013
国家发展和改革委员会	National Development and Reform Commission	A	2000-2013	2008	2011-2013
国家卫生和计划生育委员会	National Health and Family Planning Commission	A	NA	2013	2011-2013
中国人民银行	People's Bank of China	A	2000-2013	2008	2013
国家民族事务委员会	State Ethnic Affairs Commission	A	NA	NA	2010-2013
国务院办公厅	General Office of the State Council	A	NA	2008	NA
国防部	Ministry of National Defense	A	2000-2013	NA	NA
国家安全部	Ministry of State Security	A	2000-2013	NA	NA
国家食品药品监督管理总局	China Food and Drug Administration	B	2000-2013	2003, 2008, 2013	NA
海关总署	General Administration of Customs	B	2000-2013	2008	NA
国家质量监督检验检疫总局	General Administration of Quality Supervision, Inspection and Quarantine	B	2001-2013	2008	2010-2013

国家体育总局	General Administration of Sport	B	2000-2013	2009	NA
国家统计局	National Bureau of Statistics	B	2000-2013	2008	NA
国家旅游局	National Tourism Administration	B	2000-2013	2008	NA
国家工商行政管理总局	State Administration for Industry and Commerce	B	2000-2013	2008	2010-2013
国家新闻出版广电总局	State Administration of Press, Publication, Radio, Film and Television	B	NA	2013	NA
国家税务总局	State Taxation Administration	B	2000-2013	2008	2010-2013
国家安全生产监督管理总局	State Administration of Work Safety	B	2000-2013	2005, 2008	NA
国家林业局	State Forestry Administration	B	2000-2013	2008	NA
国家知识产权局	State Intellectual Property Office	B	2000-2013	2008	NA
国务院国有资产监督管理委员会	State-owned Assets Supervision and Administration Commission	B	2000-2013	2003	NA
中国银行业监督管理委员会	China Banking Regulatory Commission	C	2003-2013	2003	NA
中国保险监督管理委员会	China Insurance Regulatory Commission	C	2000-2013	2003	NA
中国证券监督管理委员会	China Securities Regulatory Commission	C	2000-2013	NA	NA
中国民用航空局	Civil Aviation Administration of China	D	2000-2013	2009	NA
国家测绘局	National Administration of Surveying, Mapping and Geoinformation	D	2000-2013	2009	NA
铁道部（国家铁路局）	National Railway Administration	D	2000-2013	2009, 2013	NA
国家外汇管理局	State Administration of Foreign Exchange	D	NA	2009	NA
国家海洋局	State Oceanic Administration	D	2000-2013	2008, 2013	NA
国家能源局	National Energy Administration	D	NA	2013	NA
国家文物局	State Administration of Cultural Heritage	D	NA	NA	NA
国家煤矿安全监察局	State Administration of Coal Mine Safety	D	NA	2005, 2008	NA
国家外国专家局	State Administration of Foreign Experts Affairs	D	NA	2008	NA
国家粮食局	State Administration of Grain	D	NA	2009	NA
国家国防科技工业局	State Administration of Science, Technology and Industry for National Defense	D	NA	NA	NA
国家中医药管理局	State Administration of Traditional Chinese Medicine	D	NA	2009	NA
国家公务员局	State Bureau of Civil Servants	D	NA	2008	NA
国家信访局	State Bureau for Letters and Calls	D	NA	2009	NA
国家邮政局	State Post Bureau	D	NA	2006, 2009	NA
国家烟草专卖局	State Tobacco Monopoly Administration	D	NA	2008	NA