

CHAPTER ONE

UNDERSTANDING LEGAL REGIMES

The law may . . . be seen simply in terms of its own logic, rules and procedures – that is, simply as law. And it is not possible to conceive of any complex society without law . . . there is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath this law. But . . . the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems . . . an unqualified human good. To deny or belittle this . . . is to throw away a whole inheritance of struggle about law, and within the forms of law . . . law has not only been imposed upon men from above: it has also been a medium within which other social conflicts have been fought out.

(Thompson 1975: 260, 266–7)

I have had many times the initial apprehension of the objective coverage of a case by a rule. . . [But] . . . From the inside, what happens to my initial experience of the rule as objective is radically contingent. . . Rule application is something that does happen, but it is never something that has to happen . . . If you tell me that law is rules, or that there is always a right answer to a legal problem, I will answer with these cases in which my experience was that law was indeterminate, or that I gave it its determinate shape as a matter of my free ethical and political choice . . . The rule may at any given moment appear objective, but at the next moment it may appear manipulable. It is not as I apprehend it from within the practice of legal argument, essentially one thing or the other.

(Kennedy 1987: 157, 165–6)

INTRODUCTION

How do we assess the dynamics of relations between law, politics, and society? What attributes lead states to structure legal systems in particular ways? Under what types of conditions do courts and legal institutions adjudicate either the exercise of legitimate state coercion through criminal prosecution or the resolution of disputes between individuals

or organizations through civil litigation in particular ways? To look at these issues in China or Indonesia we need a general conceptual and theoretical map for thinking about how societies and states shape legal institutions' behavior and how that behavior affects relations between citizens and the law and between legal institutions and other parts of the state. Previous research on comparative law and society has made great strides, but does not yet offer a ready template to help guide my research.

Most early scholarship on law and politics was grounded in the study of Anglo-American Common Law systems. There have been several divergent clusters of research on law outside this traditional core since the mid-twentieth century. At first, scholars began investigating European Civil Law systems in the earliest ventures into comparative analysis. Gradually, some began to build upon this to develop a large and vibrant literature on comparative "legal traditions," including Civil, Socialist, and Islamic, alongside Common Law. Later, interest developed in specific areas of law and politics in nondemocracies, postcolonial nations, new and emerging democracies, and weak or failed states. Among the strongest work in this last tradition are studies of comparative constitutionalism and judicial review, as well as analyses of "rule by law" and research on what can be characterized broadly as "transitional justice." None of these traditions, however, provides a comprehensive framework that allows us to analyze key aspects of law and politics in China or Indonesia.

Legal regimes are created by societies and states depending on how easy or difficult it is for social groups or individual or organized interests to gain political influence or power and how readily and in what manner nonjudicial state institutions or empowered actors intervene in legal institutions' handling of specific cases. We can use the framework of legal regimes to map out types of law–state–society relations that can then guide research into the political and social dynamics of both criminal and civil adjudication in urban and rural areas of China and Indonesia over time. After assessing the contours of previous scholarship, this chapter lays out the legal regimes framework and explains how it guides the empirical analysis to follow, as well as its potential utility for research further afield.

GENERAL CONTOURS OF PRIOR SCHOLARSHIP

Relevant prior scholarship on comparative law and politics can be divided into several strands. First, general comparative analysis of legal families or traditions has contributed much to our understanding of

how specific institutions – like courts – function within each and how the relations between legal institutions and other parts of political systems and societies can vary across them. Studies of institutions and politics within specific legal traditions, and especially within the Civil Law tradition, are extremely useful for setting the present study in its proper general context. Many scholars have also examined law and politics with an aim of explaining aspects of economic development, political authoritarianism, democratization, or other types of institutional frameworks or change. Such scholarship informs any project seeking to compare legal systems and their relation to political or social orders. After examining each of these strands, we can identify remaining lacunae in the literature more clearly.

Research on Comparative Legal Traditions

Students of comparative law and politics distinguish between a variety of legal traditions or families, within which national-level systems clearly have more in common than they do with systems in other families. Most agree that there are at least four main families: Civil Law, Common Law, Socialist Law, and Religious Law (David & Brierley 1985). Civil Law refers to those systems in some sense founded upon the law of the Roman Empire (especially as codified in the *Corpus Juris Civilis*, published by the Emperor Justinian in 533 CE, or which later imported core elements of the French *Code Napoléon* or German law codes, especially as established in the late nineteenth century *Bürgerliches Gesetzbuch*, which itself was largely derived from the Napoleonic Code). Common Law encompasses all those systems tracing their origins to English Law as established on the basis of custom and common practice during the reign of King William I, after his conquest in 1066, even as multiple other systems of law (Canon, Norman, Roman, etc.) continued to hold sway over elements of British criminal investigation and civil dispute resolution throughout much of the Middle Ages (Strayer 1986: 423–4). Socialist Law refers to those systems implemented in countries that experienced socialist revolutions during the twentieth century and is often seen to take the law of the Soviet Union as its main basis. Finally, Religious Law is something of a catchall category, including all systems based explicitly on religious texts (e.g. Islamic *Shari'a* Law) as well as others more loosely based on customary ethical or philosophical principles (e.g. traditional legal orders in tribal societies, or what is discussed in Chapter 2 as *adat* in Indonesia).

Moving beyond such general characterizations, scholars probed the internal workings of systems within specific families, as well as across

them. Martin Shapiro's seminal analysis of courts across what he called the Civil, Common, Chinese, and Islamic traditions (Shapiro 1981) sets the standard for how to examine courts in different political, social, and historical contexts. A number of other scholars also developed typologies to categorize different aspects of legal systems, mainly to contrast Common and Civil Law (e.g. Damaska 1991). Within the Civil Law tradition, John Merryman and others have probed the distinctions between Roman, Canon, and Commercial law and explained how these earlier codes and frameworks formed the foundation of the fuller development of modern legal systems in Europe as they were later influenced by the French Revolution and the development of "legal science" (Merryman & Perez-Perdomo 2007). As we shall see in Chapter 2, the common contours of the Civil Law tradition inform many aspects of both the Chinese and the Indonesian legal systems. Scholarship on the Socialist legal tradition is also important, however.

Students of Socialist Law emphasize that it is generally similar to the Civil Law tradition, but with the important addition of class struggle and revolution as organizing supreme principles, to the service of which all other rules and structures must conform. In practice, most analysis of Socialist Law has focused on legal development and politics in the Soviet Union (USSR). John Hazard set the tone early on, focusing on the early days of the USSR and the manner in which divergent strands of thinking had influenced the building of legal systems beyond the USSR, including in China (Hazard 1960, 1965). Later analyses continued to look at this early period (Burbank 1995), but also focused in on developments during the Stalin era (Solomon 1996), as well as the Khrushchev years and beyond (Berman 1963; Barry, Ginsburgs & Maggs 1979; Solomon 1997), before the field began to shift away from emphasis on a Socialist legal tradition and toward a tighter focus on Russian law and politics, extending into the post-Soviet era (Hendley 1996, 1997, 2017; Gans-Morse 2017). One may also question the degree to which anything like a coherent Socialist Law tradition ever existed, as well as whether it has continued to influence legal institutions or practice in China since the 1980s.

Research on Law, Development, Authoritarianism, and Democratization

A great deal of research has focused on questions of law and economic development. At root, these studies ask what legal protections or

provisions are necessary to facilitate certain types of economic development (Ginsburg 2000), with most following Hayek (1944, 1982) and generally agreeing on the need for an efficient and predictable legal system to reduce arbitrary state intervention, uncertainty, and transaction costs (Posner 1981, 2014). As championed by scholars in the New Institutional movement in economics and law, this perspective stresses that strong legal rules and consistent predictable enforcement are necessary for the development of efficient markets and higher growth (e.g. North 1961, 1990; Williamson 1985). Some others suggest, to the contrary, that there is little need for a well-functioning formal legal system to support economic growth (e.g. Kang 2002), sometimes seeking to underscore a noneconomic – perhaps moralist or Kantian – theoretical basis for the development of private law (e.g. Weinrib 2012a, 2012b), sometimes citing the case of China as counterexample to earlier claims without necessarily challenging their philosophical underpinnings (e.g. Clarke 2003; Allen, Qian, & Qian 2005).

In a related strain (e.g. Olson 1993), studies of law and democratization, as well as transitional justice (e.g. Teitel 2000), have sought to explain how reforms to legal systems can help support the liberalization of political institutions or processes, alongside the protection or extension of political rights. Tom Ginsburg's 2003 study of judicial review in new democracies offered a framework for understanding how countries seeking to become democratic after long periods of authoritarianism could use powerful constitutional courts to check unbridled government authority (Ginsburg 2003). Much of his later work has also centered on explaining the role of constitutions and constitutional courts in promoting durable democratic change (e.g. Ginsburg, Elkins, & Melton 2009; Ginsburg 2010). Some others have looked to broader trends of the judicialization of politics (Stone Sweet 1999, 2000; Shapiro & Stone Sweet 2002; Hirschl 2004) as possible forces for democracy promotion (e.g. Dressel 2015). Still others, like Meierhenrich (2008) and Massoud (2013), have emphasized the legacies of authoritarian or inchoate legal systems when analyzing domestic and international efforts to promote new, more stable and democratic, institutions. Indeed, a whole industry has sprung up around the analysis of efforts to promote "rule of law" around the world or to promote democratization through legal reform in particular countries, especially in the wake of calamitous or genocidal civil strife or conflict (e.g. de Greiff & Duthie 2009; Hayner 2010; Olsen, Payne, & Reiter 2010; Hinton 2011).

The past couple of decades have also witnessed an explosion of research on law and authoritarianism. Some have looked at authoritarian states' use of law as an instrument of government action (Tamanaha 2004: 91–3) – one that can legitimate and regularize, as well as constrain, that action. Some of these theories posit a “rule by law” (Ginsburg & Moustafa 2008), under which authoritarian governments' actions are made more predictable and legitimate, transaction costs and uncertainty are reduced, and conflict is brought under state-centered and state-dominated frameworks, even if rulers are not always subjected to the law's full control. Others have gone further, suggesting that authoritarian governments can willingly and consciously constrain their own behavior through a “partial rule of law” in order to facilitate easier governance or more efficient economic growth (Wang 2015). Still others have analyzed the ways in which authoritarian states have deployed a superficially liberal discourse of law to give political cover to actions of illiberal authoritarianism (Rajah 2012). Thus, adherence to formal rules, rigorous separation of powers and at least nominal judicial independence can, somewhat counterintuitively, help bolster state attempts to restrict freedom of speech and of the press, contain protests and demonstrations, severely punish vandals and other petty criminals, and generally strike fear into a populace under a very high degree of surveillance and social control in a place like Singapore. Rule of law, or a retreat to legal formalism, in other words, can be used to enshrine and perpetuate political and economic power relations that are fundamentally inequitable (Neumann 1942, 1986: 6, chapter 16; Mattei & Nader 2008; Meierhenrich 2008). Finally, a few scholars even go so far as to suggest that creeping ideas and practices of “liberal legality” can emerge even under harshly authoritarian political systems like Egypt's or Kuwait's, given the right mix of institutional arrangements and political incentives (Brown 1997).

Persistent Gaps and Remaining Lacunae

Though scholarship has blossomed in the general field of law and politics, many significant gaps remain. For example, though much empirical work has been done on courts and legal institutions in other contexts (e.g. Shapiro 1981; Jacob et al. 1996; Epp 1998; etc.) – generally outside the Civil or Socialist legal traditions – less work has focused on China, Indonesia, or developing countries in general. That which

has, has mostly centered on the analysis of supreme courts or judicial behavior (e.g. Helmke 2004; Pompe 2005; Hilbink 2007), with some more recent attention to corruption and the rule of law and to issues of law and economic development (e.g. Kang 2002; Moustafa 2007; Wang 2015). Generally missing from these analyses, however, is an historically informed focus on basic-level institutions and adjudication.

Importantly, most previous studies have tended to view legal systems as independent, rather than dependent, variables – as causal factors helping to lead to economic or political outcomes, rather than as outcomes to be explained in their own right. Thus, we often pay a great deal of attention to whether or how law facilitates or hinders economic development, protects or undermines individual liberties, promotes democratization, or preserves authoritarianism. But we have paid much less, and overall far too little, attention to how law or legal institutions are shaped by politics – and less still to the dynamic and iterative relationships between politics, law, and society across time.

This book sets out to fill some of these gaps. Specifically, by looking at legal regimes as products of political and social arrangements, I hope to add to our understanding of how politics can shape law. By examining the “second-order” causal influence of legal regimes on state–society relations and conflict resolution among citizens, I will improve our grasp of how legal orders, once established, structure other important political and social processes. By looking beyond supreme or high courts and focusing on local-level basic courts, I will increase our knowledge of how justice actually operates on the ground in previously underresearched contexts. By comparing across time and between both urban and rural areas, I will contextualize previously uncritical generalizations about courts or legal systems in China, Indonesia, and beyond.

LEGAL REGIMES

Differentiating Legal Regimes from Rule of Law

Conceptions of the rule of law have garnered much attention and debate for a very long time, even well before Berman or Merryman offered the definitions I quoted earlier. Reacting against Plato’s illiberal ideal of the “philosopher king” (Plato 1991), Aristotle (1984)

argued that laws must reign supreme over any human ruler. Cicero advanced a similar position to bolster the institutions of the Roman Republic (Cicero 1928). Locke (1690) and Montesquieu (1778) also saw legal rules and institutions as key to promoting good governance and preventing abject tyranny. Yet, it was not until Allen “A. V.” Dicey, an Oxford historian and legal scholar, wrote about it in the context of British constitutional debates in the nineteenth century (Dicey 1889) that rule of law came to concern the core of English language scholarship on law and politics.¹ Shortly thereafter, Max Weber and Émile Durkheim emphasized formal legal rationality (though of a sort not necessarily compatible with Dicey’s conception, rooted as it was firmly in the Common Law tradition) as an essential attribute of any modern state or political system (Durkheim 1978; Weber 1978, 1995: 338–43).

Since the early twentieth century, two basic streams of thought have emerged: a substantive perspective that sees rule of law as rooted in particular social or political arrangements (e.g. Weinrib 1987, 2012a), versus a formalist view that sees specific legal rules as the foundation of the rule of law (Tamanaha 2004: 91–2). Each camp can be further subdivided into “thicker” and “thinner” variants, with the thin formalists arguing that a rule of law is achieved so long as governments act through some sort of formalized legal rules and thick substantivists maintaining that only with full democracy and social and economic equality can we even begin to contemplate a rule of law (Tamanaha 2004: 91). These sorts of debates sometimes take on an unfortunate normative character, with reprobative brickbats hurled at opponents by members of all camps.

Indeed, to borrow a phrase, the operationalization of rule of law has remained rather “dicey” (Rajah 2012: 37–9), as normative arguments have been put forward while specific metrics remain opaque, sometimes leaving scholars to lament that we are reduced either to an empty formalism or a facile assumption that all adjudication is hopelessly politicized and merely a product of broader power relationships (Weinrib 1987: 61, 65–7). In practice, we are often left with an adaptation of US Supreme Court Justice Potter Stewart’s formulation (in a ruling on hardcore pornography): “we can’t really define rule of law,

¹ For more on the history of scholarship and debates on the rule of law, see Tamanaha (2004).

but we know when we do or do not see it in operation in Country X.” (Stewart 1964).

Besides the moral hazard of slipping into normative name-calling, efforts to measure the rule of law (e.g. Ginsburg 2011) have sometimes been prone to succumb to what could be termed an endogeneity trap. To assert, for example, that the presence of certain legal rules implies a rule of law, and then also that the lack of a rule of law implies the absence of those same rules, and finally that a failure to adopt those rules will necessarily prevent the development of a rule of law, is tautological reasoning. Alleged causes of an outcome are measured by looking at aspects of the outcome itself. Without recognizing this sort of problem, too many scholars, governments, and international institutions define benchmarks uncritically and then assess countries in relation to imagined “objective” rule of law standards (Serban 2015: 204–5).

To steer clear of both the Scylla of fuzzy normativity and the Charybdis of tautological measurement, we must set aside the loaded concept of rule of law for purposes of dispassionate and systematic analysis. Rather than trying to rank legal systems by how “good” or “bad” they are – or by how closely they align with an explicit or implicit Anglo-American ideal type – we ought to group legal systems into categories defined by aspects of politics and the relationships of political institutions and actors to the work of the legal system, rather than by substantive or formal dimensions of law itself. The concept of legal regimes accomplishes this task and allows for a better characterization and categorization of legal orders and systems.

Legal Regimes: Outline of a Concept

The most basic definition of a legal regime is a system or framework of rules governing some physical territory or discrete realm of action that is at least in principle rooted in some sort of law. Often the concept has been applied to specific areas of law, relating to American labor relations (e.g. Estlund 2002) or environmental protection of the Polar Regions (e.g. Joyner 1999), for example. Much of this work, in turn, ties closely into political science scholarship in international relations, especially that which emerged in the 1980s under the banner of “regime theory” (e.g. Krasner 1983), emphasizing the development of shared rules, norms, and conventional practices that help shape actors’ expectations and behavior across national jurisdictions or between states in the international arena.

Lauren Benton, over a decade ago, offered the clearest recent application of the concept to the study of law and politics, focusing on “patterns of structuring multiple legal authorities” (Benton 2002: 3). Tellingly, her main point is also to assess the interplay of legal systems, philosophies, and authorities in a specific kind of international context – legal pluralism in the age of imperialism and colonization. Benton’s core questions revolve around how European powers negotiated specific kinds of indigenous law or systems of norms at different world historical times and against the backdrop of different legal and political orders in the metropole. In a different vein, John Cioffi used the basic idea of legal regimes to critique previous scholarship on corporate governance and the assessment of the rule of law outside advanced industrial economies (Cioffi 2009).

While these are consequential points on important topics, the concept as deployed so far is of limited utility for my purposes here. I am less interested, for example, in understanding how the Dutch came to prioritize certain aspects of European or *adat* law or why the Chinese Communist Party made specific choices about which portions of the Republican Code to expunge or leave on the books than I am in getting to the bottom of the ways in which aspects of Chinese or Indonesian politics shape a general legal order, the functioning of which, in turn, has implications for broader dimensions of state–society relations and political change. Unpacking the concepts of legal regimes and sovereignty from a slightly different angle brings this into sharper relief.

Indeed, if we view legal regimes through a more clearly non-Weberian, lens, we can see the horizontal dimension of the typology presented in Figure I.1 as whether or not a given state has a coherent sovereign, and the vertical dimension as the degree to which any sovereign (or would-be sovereign) moves to declare exceptions in the realm of legal adjudication. Thus, when a coherent unitary sovereign is present, and that sovereign allows the legal order to operate more on the basis of norms and rules than decisions and exceptions, we see a rule by law. When such a sovereign exerts the force of exceptional decision with some regularity, neotraditionalism is present. When no sovereign is present and the legal order operates by norm rather than decision, we see formally rational pluralism (an unsurprisingly rare outcome). And finally, when no sovereign is present, but one or more would-be sovereigns move to assert their positions through appeals to charismatic or revolutionary authority

and to claim the right of exceptional decision, mobilizational legal regimes can be observed.

Building on the work of Rousseau, Hobbes, and others, Carl Schmitt famously argued that, “sovereign is he who decides on the exception” (Schmitt 2005: 5). Citing the work of Jean Bodin (a sixteenth-century law professor at the University of Toulouse), he further maintained that the sovereign must be unitary, able to act to suspend laws or political commitments without any checks or accountability to other actors or processes. If this unity could not be guaranteed, “sovereignty would thus become a play between two parties: Sometimes the prince and sometimes the people would rule, and that would be contrary to all reason and law” (Schmitt 2005: 9). This view of sovereignty as indivisible also can be traced back to *The Social Contract* and *Leviathan*, since, “Sovereignty is indivisible for the same reason that it is inalienable. For the will either is or is not general; it is the will either of the whole body of the people, or of a part only” (Rousseau 1986: 26), and, “For what is it to divide the Power of a Common-wealth, but to Dissolve it; for Powers divided mutually destroy each other” (Hobbes 1985: 368).

It is possible that a state lacking a sovereign may also lack any legal order at all. This would be a true case of the *bellum omnium contra omnes* that theorists like Hobbes and Schmitt feared so gravely. More likely, we might find an order in which a constitutionally limited or otherwise silent sovereign, one which Schmitt might deride as a state seeking to reduce politics to a “monstrous” debating club (Schmitt 2005: 25–6, 63, 2007: 28), gives way as much as possible to the operation of a formally rational legal system, operating on the basis of norms and steady rules rather than exceptional decisions. Such rational pluralism is also very close to the ideal seen by many rule of law theorists, but it is not present in the cases I have studied and is likely much rarer across the world than many would like to believe or hope.

In a state where one or more would-be sovereigns seek to establish themselves, but none has yet prevailed, we can observe mobilizational legal regimes, in which one or more actors seek actively to impose sovereignty through exceptional declarations and decisions, to assert an unlimited authority, to call a legal order into being by producing and guaranteeing a situation in its entirety, and to lay claim to a “monopoly to decide” (Schmitt 2005: 12–13). The successful imposition of such charismatic authority restores an equilibrium of normality in which mobilizational legal regimes can no longer function. Unsuccessful

attempts allow continuing contestation and the further deployment of mobilizational regimes.

Legal regimes in states with Schmittian or Hobbesian sovereigns are easier to categorize. The sovereign either allows the legal order to operate without recourse to exceptional decisions or it does not. Where it allows legal institutions to operate normally, we see a rule by law regime. Where the sovereign feels obliged frequently to decide to suspend normal legal processes or protections, to exert nonlegal power over law, it does so in order to clarify and maintain a consistent friend–enemy distinction, and thus to preserve vital elements of political order (Schmitt 2007: 26). Specifically, according to Schmitt, all states must decide upon public enemies, *hostes not inimici*, who are to be excluded from the polity, confronted, and if need be destroyed, in order to constitute and preserve the political order and the very integrity of the state (Schmitt 2007: 28–30). This means that there will be some individuals or groups to whom the law specifically does not apply, who are rendered as some form of *homo sacer* – made to stand outside all law, secular and religious, human, and divine, such that their lives are not valued either as potential murder victims or as valid sacrifices (Agamben 1998: 73–4). When the sovereign frequently acts to draw such distinctions, almost always in the interests of preserving established hierarchies and power relationships, we can see neotraditional legal regimes in action.

Examining the typology of legal regimes from these different perspectives serves several purposes. It helps broaden the theoretical and analytical foundations upon which my main arguments rest. It addresses critiques of the entire rule of law project and literature – which I have already criticized for its close adherence to conservative and Common Law principles – that have come from many quarters (including some fundamentally illiberal ones). And, finally, it affords us a more complete and coherent platform from which to consider the conceptualization of various legal regimes and to categorize those on which I was able to collect data in China and Indonesia.

In the end, legal regimes are frameworks of relationships between institutions and actors that structure the politics of the application of legal rules and the social effects of that application. Legal regimes are defined by two key dimensions of politics, rather than by any provisions of formal or substantive law. As suggested earlier, and building on Damaska's two-by-two framework (Damaska 1991), legal regimes take shape along two dimensions: how open or changeable the polity is and the degree and manner of intervention by nonlegal state institutions or

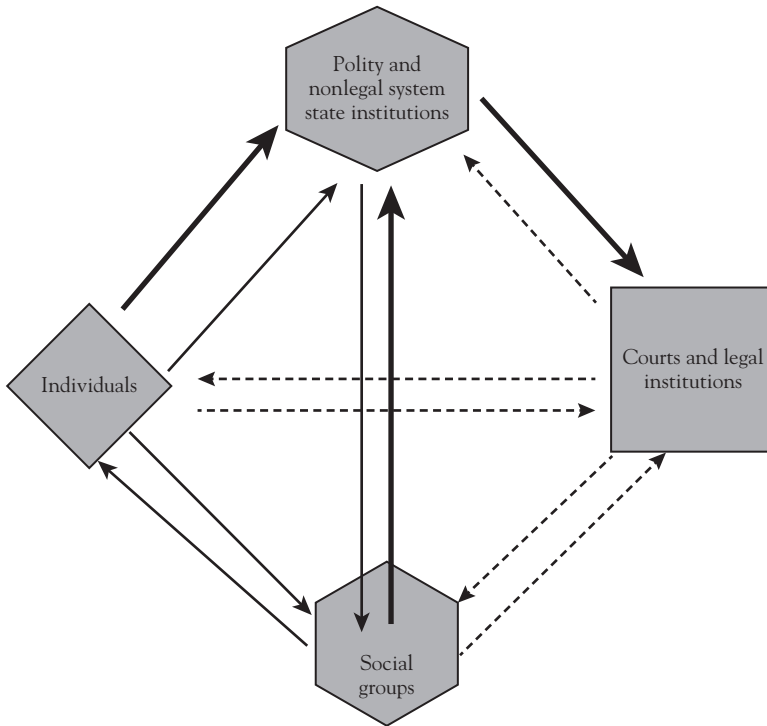


Figure 1.1 Causal dynamics of legal regimes

political actors into the legal system's adjudication or handling of specific cases. Political variables exert causal influence over legal regime outcomes. But legal regimes, in turn, exert causal influence over important dynamics of state–society and intrastate relations.

Specifically, individuals and social groups exert influence over the constitution of the polity and nonlegal system state institutions. These institutions then exert influence over the manner in which courts and legal institutions are constituted and engage in adjudication. The structure and functioning of courts and legal institutions, in turn, exert influence over the polity and nonlegal system state institutions and also interact in important ways with social groups and individuals, helping shape other aspects of politics as well as important dynamics of state–society relations. In Figure 1.1, the thick solid lines thus represent primary causal influence. The dotted lines show what sorts of causal relationships come into play once the primary influences have essentially done their work. Finally, the thin solid lines show

causal influences and relationships that I will not attempt to analyze or explain, but that are important nevertheless.

Having defined legal regimes as at least in large part products of political arrangements, it is seductive to conclude that law and adjudication are merely epiphenomenal, or at least in a subordinate position – in other words that rules and processes matter little in the face of political power or social change. Such a position, while clear and consistent, is also too facile. E. P. Thompson, in the final chapter of *Whigs and Hunters* – his book about an eighteenth-century crackdown on deer poaching in Southern England – struggles with the role of law vis-à-vis economic and political power relations. What he ends up saying, after much perambulation around the topic, is that the relations of production help produce legal rules and forms that reflect material class hierarchies and power politics; but, once established, these legal rules and forms, rather than being mere superstructure, play important roles in structuring ongoing class conflict and social relations. My position on the somewhat reflexive causal role of legal regimes is similar, though less faithfully Marxian. Politics shape legal regimes, but once in place legal regimes structure political and social relationships and contestation.

This causal two-step, building on Thompson and placing law at an intermediate stage of the chain rather than at the end or the beginning, is an essential innovation over most previous perspectives and allows us to grapple with more complex arguments and empirical reality with greater agility. It also allows me to take into account the fundamental insight of many scholars of what we might term critical legal studies (e.g. Kennedy 1987): that not only the content of rules, but also the manner in which they are applied to specific cases, is largely a function of political preferences, choices, and constraints faced by judges.

Rulemaking and the structuring of the judiciary are outcomes of fundamentally political processes and conditions (the structure of the polity, or whether or not there is a coherent unitary sovereign). Once we understand this, we can then examine rule application and adjudication not to assess whether or not it is objective by any universal standard (as it is highly unlikely ever to be in any country or system), but rather merely to gauge the manner and degree of direct intervention into the process by actors outside the formal legal system; that is, to what degree and in what manner can we regard the adjudication process as formally rational on its own terms (or to what degree the legal order operates according to norms rather than decisions).

In this blending of a social science perspective on “law in action” with more traditional approaches to the study of law and politics and a sustained attention to the insights of more critical perspectives, my approach aims to occupy the terrain staked out recently by the so-called New Legal Realism, especially in its “big” or “broad tent” formulations (McCann 2016: xviii; Mertz 2016: 6–8). Specifically, I aim to take power as a central concept, focus on the recursive relationship between law and society, examine how legal systems and structures interact with social and political hierarchies, and integrate the perspectives and experiences of individuals and institutions near the bottom of the hierarchy in ways that inform theory, blending more traditional top-down ideas with a more bottom-up empirical focus and perspective (Klug & Merry 2016: 1–4; Mertz 2016: 6–7). Such an approach seeks to follow the example set by Nick Cheesman’s pathbreaking study of law and politics in Myanmar (Cheesman 2015), in which he manages to relate broad conceptual debates about the nature of law, society, and the state with astute observations about law and politics over 200 years in Myanmar and careful analysis of numerous, mostly previously unavailable or unexamined, individual criminal cases.

Utility of Legal Regimes for Understanding Complex Realities

Legal regimes can be used to characterize a broader set of complex realities than many otherwise useful and popular concepts. Rule of law and rule by law, for example, are both more limited. Without adding clumsy and cumbersome adjectives or qualifiers – epicycles and exceptions worthy of a Ptolemaic astronomer – we can only use them to describe or analyze a narrow band of the range of possible legal orders. Everything else is necessarily beyond the conceptual pale. Similarly, classifying legal systems according to legal traditions provides scant help for those seeking to compare within or between them. Pioneering work like that of Shapiro or Merryman may have hinted at how to compare across traditions, but for these authors most variation seemed always a product of differences between the traditions of interest (almost always Common versus Civil Law), even while most other authors restricted their analyses to a single tradition. Scholars of legal pluralism, federalism, and other special arrangements have perhaps made more substantial gains, but their studies are too often restricted to the examination of formal legal rules rather than legal structures or institutions in action.

Legal regimes let us compare both within and between legal traditions. They also facilitate comparisons at the subnational level – allowing

us, for example, to comprehend the legal order in the American South by accounting for that region's much less open polity and the stronger tendency of nonlegal institutions to intervene in the adjudication of specific cases there (Gibson 2013). They also let us explore how a particular kind of political or social organization or arrangement – oligarchy, for instance (Winters 2011) – can exert important influence across a wide range of legal traditions and state structures to bring much greater uniformity to their legal orders than might otherwise be expected. Finally, legal regimes also offer us a way to get beyond broad national-level phenomena and relatively blunt, if weighty, conceptual tools like judicial review (e.g. Ginsburg 2003) or secularism and constitutional design (e.g. Jacobsohn 2003) to examine the way law actually works at the grassroots; but then also to aggregate back up again in a way that facilitates comparison at the national level or beyond. This is because each category of legal regimes follows a broadly consistent set of political, institutional, and social causal phases and relationships.

In legal regimes in which the polity's composition is open, unsettled, or contested, law will usually be accessible to a broader segment of the population. Where contestation is the order of the day, political contests will play out in legal arenas, especially when nonlegal actors intervene deeply or frequently into the adjudication of cases. In legal regimes where the polity's composition is settled and fixed, law is likely far less accessible to the general citizenry and much more likely at least to appear apolitical. This is true even when political actors intervene frequently and substantially in adjudication.

Formally Rational Pluralistic Regimes

Though this is an empty set for the countries and time periods I am looking at, it is important to outline what this sort of legal regime looks like. In rational pluralist regimes, the legal system can be mobilized by previously disenfranchised or abused social groups in support of their newfound power within the polity (McCann 1994). In short, law supports polyarchy (Dahl 1972) and pluralism. Conversely, it is not susceptible to being hijacked by entrenched interests to repress aspirant members of the polity because nonjudicial actors do not intervene in specific cases (they are either incapable of doing so, prohibited from doing so, or simply refrain from doing so). So long as the polity is both relatively free of high-stakes conflict and open to new entrants, legal institutions remain competent and willing to adjudicate cases consistently and without interference, and no sufficiently powerful social

group successfully upsets the applecart, such an order can be a happy equilibrium indeed. Democracy, pluralism, equality, access to justice, legal rationality, and judicial consistency – all are maintained in mutually reinforcing harmony. Yet such legal regimes are as rare as they are seductive, products of very specific moments in history and political arrangements. Less happy regimes – prone to conflict and instability – are far more common, even when polities are open and accessible.

Mobilizational Legal Regimes

In a mobilizational legal regime, like Maoist China or Indonesia during Guided Democracy and the early years of New Order, contenders to political power make use of the law as much as possible, intervening in specific cases whenever they can to gain any advantage available. When the polity is open, yet politics stay calm and genteel, relaxed pluralism prevails and all interest groups have equal access to the law as a tool for achieving equality and efficacy. But, when open or contested politics become a fight to the death, or even when the stakes are raised such that losers cannot be assured a peaceful retreat from power, all-out struggle, rather than compromise, becomes the order of the day (Tsou 1976). Incentives to intervene in the process of adjudication far outweigh any desire to maintain judicial independence, formal rationality, or institutional legitimacy – “intrigue always unites the crimes of her perfidious treachery” (Robespierre 1794: 20). Equality and justice become less important than domination and survival – that is, one must dominate or risk one’s very survival – during periods of revolutionary upheaval or systemic instability. Such periods can go on for quite some time – indeed, such arrangements are often more long-lived than the kinds of political conditions that facilitate rational pluralism – but they are by definition unsettled as well as unsettling, always shifting and in conflict, never staid and constant.

Under such political conditions, law is not merely a tool of politics, but becomes a vehicle and arena of social upheaval and political reordering – as Neumann says of the legal system of the Third Reich, “law is nothing but an *arcanum dominationis*” (Neumann 1986: 298). Unlike in any other arrangement – in which law is almost always conservative (Garlan 1941: 3) – the law becomes both a venue for transformative upheaval and an often brutal revolutionary force in itself. Such conditions are inherently unstable and fluid and the one force that can reliably bring order – rather than state collapse – is charismatic authority (Weber 1978: 241–5; Andreas 2007). Yet, the assertion of this authority

is neither assured nor, in the short-term, stabilizing – as Neumann also reminds us, “the whole machinery of the law stands exclusively at the service of the Leader [Hitler], in order to transform, as rapidly as possible, his will into legal forms. We cannot, therefore, ascribe to the National Socialist State the basic principles of a *Rechtstaat*” (Neumann 1986: 296).

Would-be charismatic leaders also fail much of the time, and when they do they can sow even greater upheaval in their wake (Weber 1978: 1114–5). When they succeed, their transformative influence (Jowitt 1987) brings *increased* politicization of law and adjudication, at least in the short run, as they remake society in the image of the polity they have reconstituted – “genuine charismatic justice does not refer to rules” (Weber 1978: 1115). Only after a time, as charismatic authority begins to become routinized and institutionalized (Weber 1978: 246–51, 1121–3), do successful charismatic interventions into the legal system begin to promote more regularized adjudication, as they transition through phases Ken Jowitt has termed “consolidation” and especially “inclusion” (Jowitt 1974, 1975).

Nonlegal actors still intervene, to be sure, but their intervention becomes more predictable. Eventually, the polity either returns to a struggle reminiscent of a Hobbesian state of nature or begins to solidify into a stable set of hierarchical power relations, for, “it is the fate of charisma ... to recede with the development of permanent institutional structures” (Weber 1978: 1133). The routinization of charisma in legal regimes, therefore, either fails or ushers in a new regime, one that is almost always either neotraditional or rule by law (or, in some cases as discussed below, a hybrid of the two). Unstable conflictual polities, punctuated by revolutionary charismatic interventions that eventually degenerate back into less ideological conflict or give way to more stable, fixed, and closed polities and more institutionalized legal orders are thus the main narrative of mobilizational legal regimes.

Rule by Law Regimes

Rule by law regimes, such as those we see in Indonesian criminal law since *Reformasi* or Chinese civil law in the Reform era, exist in states with fixed and closed – often authoritarian – polities where nonlegal institutions and actors refrain from excessive intervention into the adjudication of specific cases. There are two main advantages to such regimes. First, they offer the “calculable adjudication and administration” (Weber 1995: 277) that many scholars have identified as

necessary for the development of efficient or rational markets. By creating predictability and at least perceived impartiality, or at a minimum dependable and consistent partiality, in at least some parts of the legal system, they allow economic actors to forge contractual relationships with relative confidence and reduce uncertainty and transaction costs for those seeking to engage in any type of meaningful exchange. But the second advantage is perhaps even greater: they offer a degree of routinization, regularization, and transparency that can help prevent splits from reemerging within the polity while also providing at least a potentially high degree of popular legitimacy. These advantages come at a price, however: the autocrat (or oligarchic ruling elite) must tie its hands (Wang 2015) and refrain from excessive intervention into the adjudication of specific cases.

Sometimes this price proves too high to pay. Some rulers fear legal challengers too much to permit even the remote possibility of any emerging. Where rulers are insufficiently secure in their position to refrain from intervention or legal institutions are too weak to function reliably (or at all) without the intervention of nonlegal political actors into the adjudication of specific cases, neotraditional legal regimes will prevail. One can find the two regimes in hybrid combinations, however – with, for example, a neotraditional regime in place for criminal law and a rule by law regime maintained for commercial law – that allow elites to maximize advantages of rule by law regimes in some areas while maintaining the power-preserving aspects of neotraditionalism in others.

Neotraditional Legal Regimes

Neotraditional legal regimes – as we see in Indonesia under Liberal Democracy and New Order (as well as in criminal law since *Reformasi*) and in Chinese criminal law in the Reform era – maintain established hierarchies by allowing nonlegal actors, drawn from a closed and fixed polity, to intervene heavily into the adjudication of individual cases. Those with power wield it through the law, intervening in individual cases when necessary, explicitly to keep others from attaining power or even slightly more equal status. Unlike rule by law regimes, neotraditional legal regimes tend to proliferate when stable elites have reason to believe they may be under threat. For when longstanding elites believe themselves secure in their position, they have incentives to embrace the predictability and legitimacy offered by a rule by law regime.

Neotraditional legal regimes are often a key feature of colonial administrations, as some astute officials of such systems have observed,

though their existence and importance can sometimes be masked by the presence of features of a rule by law or even rational pluralism in certain segments of the legal system (governing the economic transactions of the colonizer, for example). Indeed, J. S. Furnivall (a famous British colonial officer in Burma), in his comparative study of the British administration of Burma and the Dutch administration of what became Indonesia (Furnivall 1956), argues that Dutch legal pluralism and a combination of “direct rule on western lines” with indirect rule “through native chieftans” (Furnivall 1956: 279), allowed for a system in which social order could be maintained, produce and labor could be cheaply extracted, and the property rights of the colonizer and “comprador elites” (Evans 1979) could be protected.

Anticipating other important arguments in social science (Polanyi 1957; Huntington 1968), Furnivall maintained that a crucial factor behind Dutch success was the use of law and legal pluralism to constrain the political participation of Indonesians or their entry into the polity, limiting both political instability and the social dislocation caused by the imposition of what he saw as a market-facilitating rule of law (which was really closer to a rule by law regime) in places like Burma, such that: “Two basic principles of British colonial policy are the rule of law and economic freedom, whereas Dutch colonial policy has aimed at imposing restraints on economic forces by strengthening personal authority and by conserving the influence of custom . . . Dutch rule has, in great measure been successful in softening the impact of the modern west on native social life” (Furnivall 1956: Preface, 263). Other than colonial regimes, neotraditional regimes are most common in authoritarian states that have long-established political systems and relatively secure and stable elites – though not quite so stable and secure as to countenance a rule by law order.

Neotraditional regimes can be blended with rule by law regimes in different geographic regions or across different areas of the law. For example, in states where certain territories or regions are deemed at risk of insurrection (but, crucially, are not yet in full rebellion or otherwise in any situation such that the constitution of the polity is actually contested), neotraditional regimes might prevail in those territories, even though a rule by law dominates elsewhere. The same dualism could be applied to different segments of a population – as, for example, the Dutch sought to do in the East Indies – with rule by law available to colonists, commercial elites, or favored ethnic groups, and a neotraditional regime for everyone else. Likewise, there are situations in which

a state may seek the legal certainty and stable property rights offered by a rule by law regime in civil (especially commercial) law, while simultaneously maintaining a neotraditional regime in criminal or family law to ensure tighter social control. Such hybrid arrangements can help maintain traditional clientalism, while simultaneously facilitating the entry of essential parts of developing or peripheral economies into international markets, staving off the upheaval that has often accompanied such integration (Scott 1976).

USING LEGAL REGIMES TO GUIDE EMPIRICAL ANALYSIS

I use legal regimes to guide my empirical analysis of complex local and subnational realities, across time and between China and Indonesia. Specifically, criminal (public) and civil (private) law in both countries can be grouped into mobilizational, neotraditional, and rule by law regimes in different periods since 1949. In some cases, there are hybrids, with neotraditional regimes in the criminal law arena and rule by law regimes governing commercial or civil law, or vice versa. The precise character of each regime is expressed somewhat differently, moreover, in rural versus urban settings. Finally, I exclude family and administrative law from my analysis. I do this first because these realms of law are extremely specialized and subject to particular research restrictions. Family law stands out as the most morally and normatively loaded area of law and serves a special function of social control, despite being nominally a subset of private law in most contexts. In China, family law case records and proceedings are sealed to protect the litigants' privacy and reporting in secondary and scholarly sources is scant (though some have focused on this area recently and it is clear that family disputes are the most common of civil suits – see Diamant 2001; Michelson 2007a). Most Chinese political actors and theorists of civil law also consider family law distinct, in large part because the associations between parties are neither voluntary nor equal (Chen 1995: 51). Family law, likewise, is influenced strongly in the Indonesian case by religious norms and very often adjudicated (for Muslims, in any case) by stand-alone religious courts, especially after 1970. The purpose of administrative law is also special – to rein in unruly agents by allowing citizens to alert distant principals to their bad behavior. There are exceedingly few administrative cases filed in either China or Indonesia. Administrative litigation has also only been possible in China since

the early 1990s, while in Indonesia administrative suits are handled through special purpose-designed courts. For these reasons, I confine my analysis to criminal law and nonfamily civil law.

Distinguishing between Public and Private (or Criminal and Civil) Law

Many authors have noted in multiple contexts that law governing relationships between citizens and the state (especially criminal and administrative law), often called public law, is fundamentally different in its aims and organizing principles from law which governs relationships between individuals or non-state organizations (for example, tort law, contract law, and family law), often called private law. Public law is concerned most essentially with regulating the state's application of violent or coercive power – what could be termed its “legitimate domination” – to individuals or private entities (Neumann 1986: 20). Indeed, even in the realm of US criminal adjudication (often presumed by many to encapsulate the sedate and norm-based operation of the rule of law), Robert Cover astutely observed that, “The judges deal pain and death” (Cover 1986: 1609), since, “Legal interpretation is (1) a practical activity, (2) designed to generate credible threats and actual deeds of violence, (3) in an effective way” (Cover 1986: 1610). Private law is fundamentally concerned with facilitating certain kinds of social relationships (stable and honest business partnerships, transparent transactional contracts, monogamous families, etc.) and discouraging others (e.g. making contractual promises one cannot keep, negligence regarding consumer safety, bigamy, or libel) (Neumann 1986: 21). Within private law, family law is in many ways a special case. It governs the definition, structure, maintenance, and dissolution of the most basic social units – families – and thus functions more in the manner of public law than does, say, commercial or tort law.

The basic political logic and social implications are thus different for public and private law. It is through public law that states and polities fend off challenges and maintain order (Pound 1942), but through private law that they foster the development of markets or other economic arrangements they see as preferable or efficient (Hart 1994: 40). Failure to distinguish between these two areas of law can obfuscate one's view of the legal regime in play, especially in many cases of what I have called “hybrid” regimes. In such cases, we may see a very clear neotraditional regime in private law and what looks like a rule by law regime in public law, or vice versa. In fact, such hybrids may be more

common than “pure” examples of either type. Acknowledging the different political roots and social implications of each type of law allows us to observe such regimes more clearly and to categorize them more accurately.

It is very rare that we might find hybrids of rule by law and mobilizational regimes. Indeed, mobilizational regimes are more prone to ignore one or the other type of law almost completely. When charismatic authority is successfully asserted and states have sufficiently functional institutions, public law may be used to enforce reigns of terror upon perceived enemies or challengers. But when states are weak or sufficiently powerful leaders absent, feuding factions within the polity may be apt to fight out their battles in the arena of private law – or to attempt to reshape portions of private law to suit their agendas, while public law’s coercive apparatus may become enfeebled or even lie moribund in the absence of coherent direction from above.

Finally, the history of particular countries can sometimes show a long-term bias for public or private law. As I discuss in Chapter 2, this is true to some degree for both China (which has often favored public law) and Indonesia (which has placed more stress on private law). Thus, when examining the legal regime or regimes present in any given state, we must look separately at both public and private law systems and institutions, before we can assess them together, because of the fundamentally different political dynamics that underpin each and the divergent types of social effects each can produce, as well as idiosyncratic features of specific country contexts. Failure to disaggregate in this way can lead to misperception and inaccurate categorization.

Distinguishing between Urban and Rural Justice Systems

In both China and Indonesia, and likely across many developing countries, the principal divide is between urban and rural areas. This is true for many areas of social, economic, and political life, as well as for the structure and functioning of legal institutions. These institutional differences are key to understanding why legal regimes play out differently, at least in terms of some of their effects, in urban versus rural settings. Urban courts and legal institutions are likely to have vastly more economic resources at their disposal, to be more secure in their political position, to be staffed by judges and other officials of higher status and holding more prestigious qualifications, and to be much more visible to elites and other observers, both within and beyond a country’s borders. Rural courts and institutions tend to be short-staffed, to be

administered by less qualified – or even completely unqualified – judges and officials, to be chronically underfunded and short of resources, to suffer from a lack of status and clout, and to be overlooked by both domestic and international elites and observers.

But what does that matter? Such differences should not change the underlying elements of the legal regime. We cannot observe, for example, a neotraditional regime throughout the cities and a mobilizational one in the countryside. While they do not affect the core attributes of a national-level legal regime, urban–rural divides can and often *do* exert tremendous influence over the specific ways in which legal regimes manifest themselves on the ground and the social and political effects they have in the broader society.

For example, interventions by nonlegal actors into the adjudication of specific cases (whether in a neotraditional or mobilization regime) are much more likely to be coordinated and consistent in urban areas, but less efficacious and subject to being hijacked by the idiosyncratic interests of local strongmen in rural hinterlands (Migdal 1988). Also, perhaps perversely or counterintuitively, the social and political stakes in play are often *higher* in rural settings than in urban ones. Because relatively little social conflict or repression reaches the formal institutions or courts in the countryside, that which does is frequently only observable in a subset of the most intense, meaningful, or politically charged cases. Finally, actions of national-level states to reform or change the legal system can have profoundly different effects on the ground in urban versus rural contexts. One vivid example of this can be seen in how mass campaigns in China during the 1950s upended an urban justice system left more or less intact after 1949, but breathed new life and clout into many rural courts that were just being constituted in many parts of the country (Hurst 2011). It is thus vitally important, when assessing national-level legal regimes, to examine both urban and rural areas with some sensitivity to these important differences of economic, social, and political background and effects.

THE LOGIC OF COMPARISON AND RESEARCH APPROACH

The Indonesian and Chinese legal systems differ in many important ways. But they are ultimately two individuals of the same species – or at least two species of the same genus. The structure of institutions and the basic rules that govern them provides a foundation for the

activities of a variety of players and a baseline setting that can be challenged through reforms or other changes. Over time, China has tended to build new rules and systems more or less from a clean slate, following episodes of political or social change. Indonesia has traditionally layered new features and functions on top of the accumulated basis of existing laws and institutions. Legal system development can also follow a more punctuated or fluid, revolutionary or evolutionary, dynamic – and both countries show examples of each type during different phases of their histories.

Both Indonesia and China have experienced wrenching political change and regular upheavals across their legal systems since the early twentieth century. Both have also evolved along a path that could be characterized as broadly within a “civil law tradition.” Yet, in many ways their histories are rather divergent – not simply because of the two countries’ different geographies or the different political ideologies of their leaders or political orders. The *basic approach* to reform or remaking of legal institutions over a century or more of upheaval is as distinct in each country as are the earlier roots of its legal apparatus. Their current forms are also, of course, rather distinct.

Indeed, Indonesia and China represent perhaps the outer limits of comparability between countries, even as their common features allow for side-by-side comparison of components of their legal systems within each country. Comparing different parts of the legal order within each country allows us to understand how legal regimes actually operate, while comparing across these particular two countries opens a window into the generalizability and necessary antecedent conditions for the development of particular legal orders *precisely because of the extreme differences between them*. Comparing either China or Indonesia with other countries, such as Russia, India, Vietnam, South Africa, Brazil, or Nigeria, for example, would likely not yield similarly fruitful results. Indeed, most other potential comparator cases share certain key attributes with only one of my cases (e.g. a socialist legal tradition or an experience of being colonized), but many also differ in critical respects from both of them (e.g. having a common law system or being a federal state), making the sort of analysis I am about to outline much less feasible.

Internationalizing Subnational Comparison

Chinese Politics has remained remarkably isolated from the rest of comparative politics, while scholarship on Indonesia, and Southeast

Asia more generally, has been much more successful at speaking to broader audiences. Yet, even the most celebrated works from the field's heyday (roughly 1965–85), as well as more recent hits (e.g. Slater 2010; Vu 2010) can be criticized for perhaps moving too quickly up the ladder of generality and sometimes glossing over important subnational variation (for a recent exception, see Buehler 2016). The critical task looking ahead is to scale up insights from careful subnational work (like that which has characterized the best of the China field) so that they can help advance broader claims and debates, as the best work from the Southeast Asian literature has done.

Some of the most methodologically attuned China specialists have advanced a case for not subjecting China to cross-national comparison. Allen Carlson, Mary Gallagher, and Melanie Manion have argued that China does not bear many similarities to other socialist countries and cannot, therefore, be compared easily against this group. Second, citing my work and that of others, they note that significant subnational variation requires nuanced and careful analysis before cross-national comparative studies could do justice to the complexities of China's political reality. Finally, they maintain that persistent problems of data quality and availability restrict researchers in any attempt to gather cross-nationally comparable data (Carlson, Gallagher, & Manion 2010: 4–7). All of these are valid points if we presume that comparisons of China with other countries will be in the form of whole-to-whole examinations of national-level cases.

Indeed, this penchant to eschew cross-national comparative analysis of China apparently stems from the fact that most in the China field and beyond have assumed that small-*n* cross-national comparisons tend to (or ought to) involve the paired or structured comparisons of states at the national level. Even in prominent recent work that professes to celebrate subnational comparative analysis, Dan Slater and Daniel Ziblatt confine their most important theoretical and methodological discussions to extolling the advantages of controlled comparisons of states at the national level (Slater & Ziblatt 2013). Large-*n* cross-national analyses, comparing scores of countries in a dataset using quantitative techniques, hold even less appeal for those who care deeply about the accuracy and internal validity of arguments about specific national cases.

Colleagues working on other parts of the world have sought in recent years to compare subnational units across states (e.g. Gibson 2013; Sinha 2015). While most of this work has centered on subnational

political units – largely in federal systems – some of the best recent research has started to look beyond such neat divisions, for example at subnational political economic regions across states (e.g. Boone 2014) or at specific portions of the political or economic order across states (e.g. Naseemullah 2017). It is this kind of comparison of political economic regions, subnational social or ethnic groups, or of specific portions of the political apparatus or economy that is potentially most fruitful for those looking to compare across large nonfederal states, especially in the developing world. Doing this requires two choices, however: first between inductive and deductive comparison *within* each country and then between several possible strategies for comparing *across* countries.

Inductive analysis entails selecting several subnational cases pretty much at random, or based upon where the researcher can best secure access, and then, after compiling extensive data on each case, suggesting types or categories based upon observed variation between the cases. Little need to be established or assumed about the representativeness or external validity of the case study findings. While hypotheses about larger classes or groups of cases can be generated, they cannot be tested or evaluated. This method also cannot suggest what may lie beyond the range of observed variation and categories. Inductive analysis may thus not be the optimal choice.

In deductive subnational analysis, the researcher must select cases to be representative of some larger set according to some framework theorized *a priori*. Once cases are selected and analyzed, the researcher can advance claims about the classes or subsets of cases they represent. Perhaps more importantly, this method is especially useful for suggesting hypotheses about the limits of generalizability of any claims made – that is, about the antecedent conditions or background variables required for them to operate. It is these meta-hypotheses, as much as the subnational causal claims, which can be usefully tested by engaging in similar or analogous subnational analysis in another national context (Hurst 2009). The difficulty lies in the necessary first step of selecting representative cases – which is not feasible in all research contexts.

After deciding between deductive and inductive analysis, a choice must also be made between “general insight” comparison and at least two possible two-step comparative strategies. General insight comparison involves the derivation of general hypotheses from the subnational analysis of cases within one country. This has always been the most common strategy for moving beyond the borders of a single state in

subnational analysis (Slater & Ziblatt 2013: 10–11). Once some argument about subnational variation or causal patterns is established for Country A, it can be phrased in general terms, “replacing proper names with variables” (Przeworski & Teune 1970), and transported to other national contexts for evaluation.

A “traditional” two-step comparison involves subnational comparison first, followed by national-level comparison of the country studied to some other country or set of countries. Essentially, this strategy amounts to using subnational comparison to derive general claims about one country as a whole – analyzing several parts to map the contours of that whole – and then comparing the whole against that of some other country or set of countries. The disadvantage of this strategy is that it assumes that a valid part-to-whole mapping is possible (Snyder 2001). If we cannot know anything meaningful about China *qua* China, then we cannot compare China as a coherent unit with some other country also taken as a coherent unit. The baseline problem of overgeneralization about each country case is not resolved and the advantages of subnational analysis are eroded.

“Millian” two-step comparison first uses Mill’s method of difference (Mill 1843: 455–60) to control x-variation and engage in side-by-side subnational comparisons of outcomes and processes separately within one country *and* within another country, running what amounts to two most-similar systems designs (Przeworski & Teune 1970) in parallel. Then, subnational cases or processes that appear analogous are matched across national contexts and Mill’s method of agreement (Mill 1843: 454–5) is applied to evaluate whether similar causal logics hold across different country cases – essentially a type of most-different systems design (Przeworski & Teune 1970) in the second step. This method has the very significant advantage of first controlling x-variation to discern patterns and to formulate hypotheses about the antecedent conditions required for these to operate, and then controlling y-variation to test the necessity of these hypothesized antecedent conditions.

Comparing subnational phenomena across cases has become a popular strategy among China researchers (e.g. Solinger 2009; Read 2012; Repnikova 2014). I suggested some years ago the utility of comparing regions (Hurst 2009: 143), though this has not yet been taken up widely. Comparing institutions may actually be more practical than comparing regions and more useful than comparing phenomena.

For example, looking at subnational branches or other microlevel arms of the state, such as local courts or police, should make it clearer which dimensions of x-variation can be held constant and which cannot. By restricting one's focus to subnational institutions, the researcher can have a clearer sense *a priori* of his or her cases across a broad range of potential independent variables, and spell out much more accurately and cleanly on which causal dimensions they vary and which factors can indeed be held constant.

The Method Applied

To study legal regimes in China and Indonesia, I use a combination Millian two-step and traditional two-step comparative method. Selecting urban and rural areas to give as broad a cross-section of contexts within each country as possible (while holding national-level variables constant), I look over time at how courts and legal institutions functioned, regarding both public and private law, in each place. Aggregating up to the national level, I am then able to outline the legal regimes in play in each country during specific time periods. In this basic form, my method resembles the traditional two-step. Still, the fact that legal regimes are disaggregated to public and private law and into different time periods in each country helps me use more of a Millian two-step, in that neither China nor Indonesia is given a single fixed score for "legal regime type." Comparing legal regimes operating in either public or private law at specific moments in time thus amounts to a comparison of subnational elements of politics rather than overarching national types.

Data and Empirical Approach in Light of Prior Research

No research begins *tabula rasa*. There are rich traditions of scholarship that have accumulated on law and politics in both Indonesia and China, though these have not addressed all of the concerns that inform my study. This book aims to offer a more comprehensive and macro-oriented perspective than most prior empirical research, while at the same time offering much richer close-to-the-ground data and micro-analysis than most prior theoretical work, bringing the two strands together and making contributions to both. This book's principal theoretical contributions have already been discussed, but its new empirical offerings should become clearer after a brief review of prior work on Indonesian and Chinese law and politics.

Prior Research on China

The seminal work on Chinese courts was Jerome Cohen's study of the criminal process (Cohen 1968). Others followed this up with updated and increasingly comprehensive studies of the Chinese legal system as a whole (Lubman 1999; Potter 1999, 2001; Peerenboom 2002; Zou 2006; Liebman 2007; Li 2014; Blasek 2015). Many of these works took sides in a macro debate about China's relative progress (or lack thereof) toward some form of "rule of law," and whether or not such progress should be measured against an implied American ideal type. Thankfully, this debate has quieted down as scholars have observed Donald Clarke's advice (Clarke 1998–1999) and moved beyond relatively empty conceptual arguments.

Susan Trevaskes has recently offered a more focused analysis of mass campaigns and the criminal process, mainly in the Baotou Intermediate Court, in Inner Mongolia, during the 1980s (Trevaskes 2007). Woo and Wang (2005) presented a similar study of civil adjudication in three intermediate courts (one in each of three Southern Chinese provinces). A few recent books have set out to trace the contours of criminal (e.g. McConville et al. 2011; He 2014) or civil (e.g. Woo & Gallagher 2011) adjudication in China. Finally, there has been some significant scholarship on very specific issues such as the enforcement of civil judgments (Clarke 1996a; Peerenboom 2001; He 2009) or informal aspects of the penal system (Seymour & Anderson 1999; Biddulph 2007; Sapio 2010). What has been missing so far is sufficient systematic political analysis of just how courts function as institutions and how this affects Chinese politics as a whole.

Bin Liang's book (Liang 2008) uses case observations, interviews, and statistics to analyze Chinese legal reforms since the 1990s. His study suffers from some shortcomings, however, including his looking only at urban courts in two quite atypical cities (Beijing and Chengdu), and that his analysis does not advance any larger theoretical agenda. So far, there have also only been a few attempts at analyzing the politics inside Chinese courts (e.g. Liu 2006a; He 2011, 2012). While a good starting point, this work is still far from comprehensive and would benefit greatly from analysis across Chinese regions and up and down levels of the judicial hierarchy.

Since the early 2000s, a debate has emerged over whether judicial independence (or lack thereof) and the use of mediation and other alternative dispute-resolution mechanisms in Chinese courts affect the integrity of the legal system or trajectory of legal development.

Some, like Carl Minzner, have argued that efforts to prioritize mediation (especially since 2009), while enhancing political top-down monitoring and possibly control of judges, have amounted to a “turn against law” and serious retrograde motion in terms of China’s progress toward any form of rule of law (Minzner 2011). Others, like Randall Peerenboom, have countered that mediation and judicial supervision, while they do impede any ideal of judicial independence, actually help improve the functioning of the Chinese legal system and make courts more reliable and less corrupt (Peerenboom 2006, 2010). Other, more recent, examinations of judicial behavior have been more equivocal in terms of grand conclusions, while often emphasizing the demoralizing aspects of judges’ work (Stern 2010; Kinkel & Hurst 2015) – though a few analyses have examined links between judges’ professionalization and the market for legal services in large cities (Kinkel 2015). All told, the question of just how courts function has not been settled in any authoritative way by scholarship on judges and their professional incentives and constraints.

Analyses of the legal profession have attacked this question from a more oblique angle, examining the role of lawyers, law firms, and legal aid groups in bringing change through litigation and other social and political activities (Alford 1995; Gallagher 2006; Liu 2006b; Michelson 2006; Alford 2007; Stern 2011; Givens 2013; Liu & Halliday 2016). Few scholars, however, have looked directly at the work of lawyers in the courtroom or their impact on judicial decision-making. Some others in the same broad tradition have studied the professionalization of judges, while others have examined the impact of activities within the legal system on the perceptions or attitudes of those outside it (Diamant, Lubman, & O’Brien 2005; Gallagher 2006, 2017; Landry 2008). But, despite the richness of these literatures, they have limited relevance to the issues I seek to address.

Two important new books have also been published on the politics of the Chinese legal system. Rachel Stern’s study of environmental litigation (Stern 2013) and Yuhua Wang’s analysis of China’s construction of a partial rule of law (Wang 2015) share several essential attributes. Stern argues that, in a context of political ambivalence, lawyers – as newly private actors since 2000 – have strategically and skillfully pressed the boundaries of legal reform by helping ordinary citizens sue polluting private and state-owned firms. Wang argues more expansively that local courts make progress toward predictable and noncorrupt behavior when large concentrations of foreign firms (as politically

unconnected actors possessing vast sums of mobile capital) press for a level playing field in the economic arena (for a somewhat similar argument about firms of different ownership promoting divergent paths of institutional development, see Fuller 2010). Stern's analysis is qualitative and revolves around a decidedly political set of relationships and considerations, whereas Wang's is mainly quantitative and hinges on an economic logic. Both books, however, are decidedly ahistorical (beginning from the mid-1990s or early 2000s without much attention to anything prior). Both focus exclusively on areas of private law and civil litigation. And both treat the functioning of legal institutions as an outcome to be explained rather than an explanatory variable.

Prior Research on Indonesia

The scholarly literature on Indonesian legal politics and institutions is less developed than that on their Chinese counterparts. Daniel Lev remains the seminal author in this still nascent field. His work provides an exceptionally vivid and incisive description of the transitions from Dutch colonial rule to Liberal Democracy and from Liberal to Guided Democracy (Lev 2000a, 2000b).² Of particular use for my purposes is his analysis of how general patterns of state–society relations are expressed in citizens' specific encounters with legal institutions (Lev 1972). Adriaan Bedner more recently added an impressive discussion of the evolution of Indonesian legal institutions up until the end of the New Order period (Bedner 2001). Since 1998, several Indonesian scholars (including the former Chief Justice of the Constitutional Court) have also produced substantial works on the relationship of law and politics across key periods of their country's history (Mahfud MD 1998; Saragih 2006), though these have tended to focus more on legislation and the politics of rulemaking than on the functioning of legal institutions like courts.

Many studies specifically of courts have clustered around the Supreme Court (Pompe 2005), Islamic religious courts (Lev 1973b; Bowen 2003; O'Shaughnessy 2009 – the last notable for her extensive use of individual case records from several courts in Yogyakarta), religious politics as played out in court cases (Crouch 2013), and the

² *Legal Evolution and Political Authority in Indonesia* (Lev 2000) is a volume comprised of eight articles and book chapters, originally published between 1962 and 1998, that collectively comprise the core of Daniel Lev's seminal contribution to the study of law and politics in Indonesia.

implementation of local traditional customary law known as *adat* (Li 2001; Davidson & Henley 2007). A smaller number of studies have explicitly examined the interrelationships between state and customary law, including the manner in which *adat* can sometimes be used in state courts and the possibility of forum shopping between state and *adat* venues (von Benda-Beckmann 1984). Few have paid sufficient attention to the legal profession or the politics of judges. Though some have examined the use of courts for larger social purposes (e.g. Susanti 2008), analysis of the role of basic level courts throughout the provinces in the context of Indonesia's rapid democratization has with few exceptions (e.g. von Benda-Beckmann & von Benda-Beckmann 2013) been almost completely absent.

With relatively few exceptions (e.g. Bertrand 1995; Buehler & Tan 2007; Buehler 2008), most political scientists have remained focused on national or provincial levels of elite political debate and contestation. Refocusing research on a lower level of analysis will promote greater understanding of the micro-foundations of Indonesian politics within and beyond the legal system. In fact, much can be learned from the rapidly expanding literature on local governance and autonomy in post-Suharto Indonesia (Kingsbury & Aveling 2003; Schulte Nordholt & van Klinken 2007; Erb, Faucher, & Sulistianto 2009), though these studies have too often disaggregated down only to the provincial level and have rarely focused on judicial institutions (for an exception, see Feener 2013).

My Empirical Approach

Between 2006 and 2014, I completed field research in twenty-two urban and rural localities: Chengdu, Deyang, Luzhou, Meishan, Nanchang, Jiujiang, Jingdezhen, Shangrao, Guangzhou, Dongguan, Shenzhen, Ji'nan, Liaocheng, Surabaya, Kediri, Lamongan, Tuban, Pamekasan, Sidoarjo, Manado, Minahasa Utara (Air Madidi), and Minahasa (Tondano) – as well as more limited work (mostly library research plus a few interviews) in Beijing, Shanghai, Jakarta, Hong Kong, and Singapore. Primary field work involved collecting case files and court documents (both current and historical), observing trials and proceedings, and interviewing judges, lawyers, prosecutors/procurators, parties to cases, and other relevant officials or actors (e.g. secretaries of Communist Party political and legal affairs committees). This overall breadth and depth of field research across multiple provinces in both countries is likely the most comprehensive to date.

There are issues of uneven data quality and availability, however. In general, much more data of much higher quality are available in China than in Indonesia. Of course, the relative utility of archival versus observational data collection also varied across the two countries. China utilizes a version of what might be called a “day-in-court” procedural system, in which trials take place mostly in short single sessions and archives of case files are mostly closed. Indonesia follows an extreme version of what could be called a “piecemeal trial” system, in which trials play out over numerous hearings separated by months or years, but archives and case files are more open (on the contrasting systems, see Damaska 1991: 51–3, 62). Observational data were thus more valuable and easier to collect in China, while certain kinds of archival data (such as case files) were easier to obtain and relatively more revealing in Indonesia.

In selecting the field sites and collecting data in specific courts or on specific cases and issues, I was guided by two general principles. First, I sought to gather data on as wide an array of cases, in as many different settings, and across as many time periods as possible in both China and Indonesia. Second, I aimed to select cases and sites that were at least broadly representative of the times and places from which they were drawn (to the degree that I could assess their representativeness from available secondary sources or general information). Within these two broad guidelines, however, I was forced – like all others who do intensive field research – to follow my contacts and resources to some degree, pursuing an *ad hoc* inductive approach to the agglomeration of data gathered in places where I was able to go and from sources I was able to access.

CONCLUSION

To sum up, previous scholarship on law and politics has too often been fixated on an ideal type of rule of law. This has sometimes caused it to be inflected with a normative teleology. Other scholarship that emphasizes rule by law, transitional justice, law and economics, law and democratization, or other perspectives, has tended to offer conceptual toolkits that are too narrow for my purposes here. Using a new conceptual lens offered by legal regimes allows us to understand the politics of legal institutions in authoritarian and developing country contexts more fully and accurately.

Legal regimes are structured by politics along two dimensions: the degree to which the polity is open/in flux or closed/stable and the degree to which nonlegal institutional actors intervene in the adjudication of specific cases. Conceiving of them in this way allows us to measure and categorize legal regimes without resorting to use of judicial outcomes as a metric. It also lets us see more clearly exactly how political arrangements affect the functioning of courts and legal institutions in different settings.

Distinguishing between public law (mainly criminal) and private law (civil, commercial, etc.) helps us understand the specific dynamics of legal regimes in each area of law as well as the different ways in which certain types of legal regimes can be mixed in specific settings – e.g. neotraditional regimes at work in the criminal arena alongside rule by law regimes in the civil sphere. Furthermore, distinguishing between urban and rural settings helps us see how the specific on-the-ground dynamics of a legal regime operate and also to assess the exact social, economic, and political effects of particular patterns of court or legal institutional functioning more precisely.

In this book, I am looking at legal regimes in China and Indonesia since 1949, across both criminal and civil (nonfamily) law. Based on extensive field research in both urban and rural areas of several provinces in each country, I draw on a comprehensive new set of data, including firsthand observations and interviews, case files and court documents, other archival sources, and secondary sources, to engage in what I would term a hybrid traditional–Millian two-step comparison. That is, I first hold national-level variation constant, to engage in comparative analysis of local courts in specific regions of each country. I then aim, however, simultaneously to aggregate up to broader national-level patterns and to compare specific components of the legal system at particular moments in time across countries. Such an approach is difficult and has rarely been attempted, but it promises many advantages for both the present study and future research.

Before discussing the details of how each legal regime has operated in Indonesian or Chinese local courts, we need a broad historical understanding of the evolution of each country's legal regimes. Chapter 2 summarizes the histories of legal development in China and Indonesia and explains how different legal regimes took root at different times and in different areas of law in each country.