

RULING BEFORE THE LAW

How do legal systems actually operate outside of Western European or North American liberal democracies? To understand law and legal institutions globally we must go beyond asking if countries comply with idealized, yet under-theorized, rule of law principles to determine how they work in practice. Examining legal regimes across different areas of criminal and civil law in both urban and rural China and Indonesia during distinct periods from 1949 to the present, William Hurst offers a new way of understanding how cases are adjudicated (and with what implications) across authoritarian, developing, postcolonial, and newly democratizing settings. This is the first systematic comparative study of the world's largest Communist and majority-Muslim nations and the most comprehensive scholarly work in many years on the micro-level workings of either the Chinese or Indonesian legal system at the grass-roots, based on a decade of research and extensive fieldwork in multiple Indonesian and Chinese provinces.

WILLIAM HURST is Associate Professor of Political Science at Northwestern University, Illinois. For this book, he completed more than two years of field research across rural and urban settings of multiple provinces in both Indonesia and China. His first book, *The Chinese Worker after Socialism* (Cambridge, 2009), explored the economic, social, and political causes and ramifications of more than 35 million job losses in China's state-owned enterprises, and was based on two years of fieldwork and over 350 interviews in nine Chinese cities.

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RULING BEFORE THE LAW
The Politics of Legal Regimes
in China and Indonesia

William Hurst

Northwestern University, Illinois



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PREFACE

On the frieze of the portico above the main entrance to Harvard Law School's Langdell Hall is an imposing inscription: "Non sub Homine, Sed sub Deo et Lege." Such lofty rhetoric embodies a classic ideal of the Rule of Law (though some might prefer to leave God out of it). But what about when this is not the ideal (or only faint lip-service is paid to it) – as in illiberal, revolutionary, democratizing, or most post-colonial contexts, or indeed even at many times and in many places among the long-established avowedly liberal democracies where a rule of law is most frequently and stridently trumpeted? Should we classify all possible deviations from the imagined inerrant archetype simply as "non-rule of law"? Or are they in some way lesser, partial, or diminished subtypes of the rule of law? How many such subtypes are valid, and which ones are closer to or further from the rule of law? What are the political, economic, and social stakes and risks of being in one subtype or another? And how might a country "progress" or "evolve" into a "better" one?

Such debates and intellectual machinations become moot if we examine legal, political, and social realities from a less rigidly teleological and normative perspective. Indeed, the diversity of legal regimes this book explores in Indonesia and China over the past seventy years tells us much more about law and politics, both in those countries and in general, than would trying to fit their complex realities into the Procrustean bed of a standard rule of law template. Both countries absolutely have had functioning law and legal systems, even at the height of what might appear to be periods of lawless social upheaval, hopeless corruption, or ruthless authoritarianism – which a rule of law framework would occlude rather than illuminate. Legal regimes – defined by how open or contested the polity is, as well as by how much empowered actors from outside the formal legal system intervene in the adjudication of specific cases – let us parse the contours of law and politics in a wide variety of contexts and offer to shed additional light

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back onto legal systems previously classified as one or another rule of law subtype. The empirical research presented in the following chapters also aspires to be among the most comprehensive to date on the ground-level functioning of Chinese and Indonesian legal institutions, especially (though not exclusively) courts of the first instance and their work in both criminal law and civil dispute resolution, from roughly 1949 to the present.

I began to work on this project almost as soon as I started to wrap up revisions to my previous book, when I was a newly appointed postdoctoral fellow at Oxford in fall 2005. As I was employed in the Institute for Chinese Studies, I started with the China portion of the research, supported by a grant from the British Academy and Economic and Social Research Council to spend part of spring 2006 based at the Sichuan Academy of Social Sciences in Chengdu. I followed this with research based in Beijing in summer and early fall 2006, and then another round of research in Jiangxi, Guangdong, and Shandong in spring 2007, supported with funding attached to my position from the Higher Education Funding Council for England (HEFCE). Colleagues at Beijing University, the Jiangxi Province Academy of Social Sciences, Shandong University, and Qinghua University facilitated my research during those trips, and also in subsequent rounds of fieldwork I undertook in 2008, 2009, and 2011.

After I relocated to the University of Texas at Austin, I began the Indonesia research with greater focus, beginning with library work in Singapore (based at the Institute for Southeast Asian Studies, ISEAS, at the National University of Singapore) and preliminary research in Jakarta and Yogyakarta in summer 2008, supported by a Summer Research Assignment grant from the UT-Austin College of Liberal Arts. I followed this with the China research in 2008, 2009, and 2011 mentioned earlier, which was supported by internal grants from UT-Austin's Program in British Studies and Center for East Asian Studies, as well as its Department of Government. In Austin, colleagues were very helpful with advice and suggestions, including Catherine Boone, Daniel Brinks, Clement Henry, Gary Jacobsohn, David Leal, Roger Louis, Tse-min Lin, Patricia MacLachlan, H.W. Perry, Bartholomew Sparrow, and Peter Trubowitz.

The largest body of Indonesia research was completed during the 2009–10 academic year, when I was a Fulbright researcher and visiting lecturer in the faculties of social and political sciences and law

at Airlangga University in Surabaya. UT-Austin's College of Liberal Arts also generously supplemented my Fulbright (CIES) grant for that year with a College Research Fellowship. Besides Surabaya and other parts of East Java, I also returned to Manado, where I had been an Indonesian language student at the 2004 Consortium for the Teaching of Indonesian and Malay (COTIM) program (then hosted by Sam Ratulangi University), to conduct research in North Sulawesi.

In 2011 and 2012, I was fortunate to be based at the University of Toronto, where I was able to do a great deal of secondary source and document-based research in the excellent collections of Robarts Library. I also benefited a great deal from the advice of many colleagues there, including Joshua Barker, Jacques Bertrand, Alana Boland, Ran Hirschl, Tania Li, Lucan Way, and Joseph Wong.

Soon after I moved to Northwestern, I completed critical final rounds of research in fall 2013 and fall 2014 that were made possible by a grant from Northwestern's Equality, Development, and Globalization Studies (EDGS) program, funded by the Rajawali Foundation in Indonesia. In September and October 2013, the History Department of Shanghai Jiaotong University gave me access to invaluable archival materials colleagues there had collected. From September through November 2014, I returned to both East Java and North Sulawesi to complete important follow-up rounds of research with assistance from colleagues at both Airlangga and Sam Ratulangi Universities.

I then benefitted greatly from a book workshop, also funded by EDGS and held at Northwestern in May 2015, attended by Karen Alter, Jordan Gans-Morse, Tom Ginsburg, Alan Lepp, Andrew Mertha, Ethan Michelson, and Jeffrey Winters. Yuchen Liu, at the time a first-year Northwestern political science graduate student, assisted with taking notes on the day's discussion, in addition to participating. I learned more than I could have hoped from my colleagues, who gave selflessly of their time and energy to engage carefully with my work. But I unfortunately can only be confident that I have failed to make full use of their myriad excellent and incisive suggestions and advice; and I thus remain fully responsible for the shortcomings remaining in the book.

The manuscript was completed and revisions started while I was appointed as a fellow of Harvard University's Radcliffe Institute for Advanced Study during the 2015–16 academic year. Radcliffe really is the paradise it is acclaimed to be. Judy Vischniac, director of the fellowship program, played an especially important role in making

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my time there as wonderful as it was, as did Radcliffe Dean Lizabeth Cohen, Sharon Bromberg-Lim, all of Radcliffe's other administrative and coordinating staff, and most of all my fellow fellows, who are too numerous to be thanked by name here but collectively were the most exceptional group of warm, kind, friendly, and brilliant people I have ever encountered anywhere.

Though it did not directly reproduce material from the book, some broad arguments and general points discussed in the following chapters were previewed in my article, "Chinese Law and Governance: Moving beyond Responsive Authoritarianism and the Rule of Law," published in the *Journal of Chinese Governance*, Volume 1, Issue 3 (Hurst 2016); available online at www.tandfonline.com/doi/full/10.1080/23812346.2016.1212549.

At Cambridge, I began working with Lucy Rhymer on this project some time ago and she has remained both exceedingly patient and extremely helpful at every turn throughout the process. When it was determined that my work was suitable for inclusion in the Law and Society series, Finola O'Sullivan assumed primary responsibility for the project and has guided it through the final stages both expertly and generously. I am grateful to both editors, and to the series editors (especially Sally Engle Merry), for looking favorably upon my work and for helping me improve and refine it.

Beyond these formal channels, others also played important roles in helping me think about the research, structure the book, and revise the text. Thomas Bernstein, Sida Liu, Adnan Naseemullah, Dorothy Solinger, and Christian Sorace all read and commented on critical parts of the manuscript at critical points. Michael Buehler, Rachel Stern, and Benjamin van Rooij also offered important critiques and suggestions on the manuscript as a whole, and more pointedly on specific parts of it. Donald Clarke offered extensive comments and advice on a draft of the full manuscript. Finally, I received timely, incisive, and much appreciated suggestions from the participants in the American Bar Foundation's Chicago Area Legal History Workshop, where I presented part of the book in November 2016. The help of all these friends and colleagues, along with the sage guidance of two anonymous reviewers, helped take the book from rough draft to its present form. As with the book workshop participants, I must apologize and take responsibility for not meeting all of their hopes or expectations.

Research cannot proceed in the absence of libraries. Specifically, I could not have completed this project without a great deal of help

and support from librarians at the University of Oxford, the University of Texas at Austin, the National University of Singapore (including at ISEAS), Airlangga University, the University of Toronto, Harvard University, and Northwestern University. Besides these, I also must thank Gao Qi and all of the librarians and staff of the Universities Service Centre (USC) at the Chinese University of Hong Kong, many of whom have been working there since the first time I visited as a graduate student eighteen years ago. That the USC remains the gold standard in the world for research libraries focused on contemporary China is testament to their tireless efforts and admirable dedication.

Beyond those already mentioned, friends, colleagues, and mentors in China and Indonesia, too numerous for me to name all of them here, helped me in a wide variety of ways in the field. Indeed, without their assistance and counsel, I would never have been able to make much headway at all. In China, I must especially thank Cao Shuji, Chen Qi, Gao Ping, Guan Kai, Shen Ling, Shi Zhiqin, Wang Jianmin, Xu Xianglin, Yan Qing, Yuan Yuhong, and Zhang Xiangrong. In Indonesia, I am especially grateful to Nurul Bazirah, Vinsensio Dugis, Eman, Iqbal Felisiano, Frans Limahelu, Maradona, Andree Maramis, Ronny Maramis, Peter Mahmud Marzuki, Irjuniawan Radjamin, Lieke Radjamin, Dwi Rahayu Kristianti, Emma Senewe, Joko Susanto, Sartika Soesilowati, Bambang Suheryadi, Basis Susilo, and Muchammad Zaidun. In addition, I am forever grateful to all those who selflessly agreed to be interviewed or granted me access to courtroom proceedings or case records in both countries, and who unfortunately must remain anonymous here.

I must also gratefully acknowledge my very deep debts to Ninik Lunde, who has expertly trained generations of far better students than me in Indonesian language at the University of California–Berkeley for twenty-five years, as well as to all of the teachers and staff of COTIM 2004 at Sam Ratulangi University’s Unit Pelaksana Teknis (UPT) Bahasa, without whom I could never have learned Indonesian sufficiently to undertake this research. More recently, I also had the serendipitous opportunity to learn Dutch (at least sufficiently to access some important written sources for this project), taught to a small group of us at Northwestern University by Alexandra van Oeteren in 2016–17. Language teaching and learning are too often undervalued, but without words we are all doomed to wander the world in silent ignorance.

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Finally, much has changed in the intervening twelve years since I began this research. For instance, China replaced Hu Jintao with Xi Jinping in 2012 and convened the much-ballyhooed “Fourth Plenum on the Rule of Law” in October 2014. Indonesia also experienced a leadership transition (from Susilo Bambang Yudhoyono’s administration to that of Joko Widodo in 2014) and has seen the great intensification of ethnic and religious intolerance, manifested in a degradation of rule by law in parts of its the legal system – as on display, for example, in the political prosecution of Jakarta Governor Basuki “Ahok” Tjahaja Purnama in 2016–17. Though such events have not reshaped either country’s legal regimes fundamentally, they can prevent parts of my work from being up-to-the-minute and I must accept blame for anything that might be out of date by the time it is published. As with physics, the speed at which history moves is dependent upon one’s perspective. In this spirit, I dedicate this book to Charlotte, who, for the first time in her life, can now finally know me no longer to be working on it.