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## The Judicial Reform Landscape in Indonesia

### Innovation, Specialisation and the Legacy of Dan S. Lev

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Indonesia's extensive court system delivers justice for the world's third largest democracy of more than 260 million people. The dramatic end of authoritarian rule under Suharto in 1998 ushered in two decades of law reform. Since then, the constitutional and political system has undergone major changes and legal reform. These innovations and reforms have also affected the courts, which have been restructured and imbued with new powers. The judiciary has changed due to constitutional amendments designed to enhance the independence of the courts from the executive and reinforce the concept of the separation of powers in the Constitution (Indrayana 2008; Horowitz 2013; Crouch forthcoming). At the same time, judges have come under renewed scrutiny with the constitutional establishment of the Judicial Commission and the legislative creation of the Corruption Eradication Commission.

Indonesian courts have expanded in expertise, size and geography, with the introduction of a wide range of specialised courts scattered across the islands. The contemporary judicial landscape features at least thirteen different types of courts in Indonesia. This includes the creation of a specialised Constitutional Court, Tax Courts, Human Rights Courts, Fisheries Courts, Anti-corruption Courts and Commercial Courts. These specialised courts often seek to disrupt existing concerns with the general court system, such as by appointing a majority of non-career judges to the bench in an attempt to circumvent the cycles of corruption inherent in the career judiciary. More generally, these new courts allow judges to focus and develop their expertise in a particularly complex and highly specialised area of law. These specialised institutions are also aimed at reducing the time it takes to handle cases and enhance access to justice. This emphasis on judicial reform, new courts and the trend towards judicial specialisation is not unique to Indonesia and can be found across jurisdictions in Asia (Nicholson and Harding 2010). Nevertheless, the

Indonesian case is remarkable in the number and breadth of topics and areas of specialisation.

Despite sweeping changes to the judicial system, there has not yet been a thorough analysis of how and why Indonesia's courts have changed. There has been little consideration of the politics of either court reform or about the changes and continuities in legal culture in Indonesia. This is with the exception of the Constitutional Court, which is the highest profile specialised court and continues to attract significant public attention because of the political ramifications of its decisions (Butt and Lindsey 2012; Butt 2015a; Crouch, Butt and Dixon 2016; Nardi 2018).

The politics of Indonesia's courts were the subject of sustained scholarly analysis by the late Professor Dan S. Lev. His work was grounded in a socio-legal approach to the study of law, legal actors and legal institutions. In this volume, we seek to reinvigorate and affirm the importance of Lev's work on the politics of courts and legal culture for the study of the judiciary in Indonesia. While we acknowledge that many of Lev's findings were specific to the time and era in which he wrote, at the same time, much of his work on courts points to broader patterns and trends in the courts that are still relevant.

In this volume we consider what Lev's ideas about the politics of courts and the legal culture of judicial institutions might tell us about the recent decades of *reformasi* in Indonesia. What is the role of courts in Indonesia? Where do judges fit? What is the symbolic status and authority of legal institutions and the law? To what extent has the function and influence of the courts changed, or remained the same over time? How do judges interact with other legal actors such as prosecutors or independent agencies? What can we learn from the case of Indonesia more broadly about how to study the politics of court reform?

In this chapter, I begin by offering an overview of the courts in Indonesia. The debate over legal culture is one way of considering the politics of court reform. The judicial landscape has changed over the past thirty years through a combination of increased demands for independence, specialisation and professionalism. I briefly summarise the existing socio-legal debate on the concept of legal culture and the discussion over its usefulness. I then consider the work of Dan S. Lev, a political scientist and Indonesianist, and focus specifically on his work on courts. Lev's work broadly promotes the concept of legal culture as one means of understanding the politics of courts. Lev's work, while primarily focused on the colonial era and the immediate decades following independence in 1945, offers one lens and framework through which to rethink how we

study the politics of courts in Indonesia. Lev's work helps us on two levels. The first level of Lev's work is in terms of theory and method. His methodological and theoretical approach to Indonesian law remains critical to the study of the politics of courts. He built theory through practice. His work was deeply empirical. He maintained a particular (and peculiar) geographic commitment to Southeast Asia and to Indonesia, regardless of academic trends. In this way the corpus of his work offers an example of the 'deep research' that he encourages others to undertake. On the second level, Lev's work points us to the uses and misuses of the concept of legal culture for the study of the politics of courts. He exhorts us to interrogate 'grand myths' and in doing so warns us not to use 'culture' as a lazy label or gloss to explain everything. His work demonstrates the utility of legal culture for the purpose of understanding the politics of courts and provides a frame of reference with which to interrogate the role of courts in post-1998 Indonesia. I conclude by reflecting on the common themes of judicial innovation, specialisation and the pervasive issue of corruption that unites the chapters that follow in this volume.

### A Timeline of Courts and Judicial Reform in Indonesia

Dan Lev's work charts the emergence of Indonesia's judicial system from its Dutch colonial roots to its postcolonial manifestations. Today, the Indonesian judicial system bears traces of influence from a wide range of sources both domestic and global, from international human rights norms to local understandings of Islamic law and *adat* (customary) law, as well as the persistence of the Dutch legal legacy. The contemporary Indonesian judicial landscape includes both the general courts and specialised courts, as well as various independent accountability agencies. Taken as a whole, we can discern common patterns and trends across what appear to be vastly distinct judicial institutions.

The core of the judicial system since independence in 1945 has been the Supreme Court at the apex of the general court system (Pompe 2005). Below the Supreme Court is a complex network of lower courts spread across Indonesia's thirty-four provinces, hundreds of cities and regencies and thousands of districts. In the 1990s, two additional specialised courts were added – the Administrative Courts based on a Dutch civil law model, and the formalisation of a nationwide system of Religious (Islamic) Courts (which existed in a different form prior to this). The

creation of the administrative courts in 1986 marks the beginning of a trend to establish specialised courts. Over a period of sixteen years, from 1998 to 2014, the establishment of new courts took place as part of the *reformasi* agenda. As Table 1.1 demonstrates, the *reformasi* agenda began with the creation of the Commercial Courts in the late 1990s and extends to the establishment of the Small Claims Courts and Fisheries Courts.

Judicial reform is seen as a critical part of the wider *reformasi* call, and has been the motivation for major structural reforms to the Constitution. Judicial independence was reinforced and the separation of powers mandated by the Constitution in an explicit effort to reduce executive influence over the courts. In particular, the long-held demands for judicial independence resulted in what are known as the ‘one roof reforms’. In the past, justice was administered under ‘two roofs’, so to speak, the executive as represented by the Ministry of Law and Human Rights, and the Ministry of Religion, and the judiciary as represented by the Supreme Court and Religious Courts. This meant that matters of budget allocation, appointments, discipline and court administration were subject to the influence and interference of the executive. This was one of the main causes of concern and grievance for the advocates of rule of law over the past few decades.

The post-1998 constitutional and legislative reforms changed all this and gave jurisdiction over all matters of court administration and the lower courts to the Supreme Court (including over the Religious Courts). The ‘one roof reform’ promised a culture of judicial independence, judicial control over the budget and court administration, the absence of executive interference, and greater efficiency in the execution of justice. There was an attempt to balance this expansion of judicial power with the creation of the Judicial Commission as an accountability mechanism enshrined in the Constitution but whose mandate is explained further in legislation. Within the Supreme Court, major reforms began in 2001 led by Chief Justice Bagir Manan. The Supreme Court continues its long-term reform agenda under the Supreme Court Blueprint 2010–2035 (Supreme Court 2010).

Common challenges and shared legal culture exist across these different judicial institutions. There are two types of specialised courts in Indonesia in terms of institutional status. One is specialised courts that are a separate and independent entity with its own court buildings and procedures, such as the Constitutional Court, the Administrative Courts

Table 1.1 *Legislative reform for the creation of specialised courts and independent agencies in Indonesia<sup>a</sup>*

1986	Administrative Courts (rev 2004, 2009, 2014)
1989	Religious Courts (rev 2006, 2009)
1993	National Human Rights Commission (rev 1999, 2000, 2008)
1997	Military Courts
1997	Juvenile Courts (rev 2012)
1999	Commercial Courts (amended 2004)
2000	National Ombudsman (rev 2008)
2002/2003	Syariah Courts (Mahkamah Syariah) in Aceh (rev 2006)
2000	Human Rights Courts (ad hoc, inactive since 2005)
2002	Tax Courts <sup>b</sup>
2003	Constitutional Court (rev 2011, 2014)
2005	Judicial Commission (commenced 2005, rev 2009)
2004	Industrial Relations Courts <sup>c</sup>
2004–2010	Anti-corruption Court (Jakarta only)
2009	Provincial Anti-corruption Courts (in all 34 provinces)
2009	Fisheries Courts (commenced 2014)
2010	Central Information Commission
2013	Small Claims Courts (commenced 2014)
2015	General Election Supervisory Body (rev 2017)

<sup>a</sup> This table notes the year the court was first established by legislation, and notes in brackets the year the court commenced where its establishment was delayed, and any revisions to the law and jurisdiction of the court. This table begins in the mid-1980s, although there were some specialised courts during colonial rule and under the New Order.

<sup>b</sup> A Tax Review Tribunal had existed prior to this since 1915: Juwana 2014: 308.

<sup>c</sup> Since the 1960s, the Regional Committee for Labour Dispute Settlement (Panitia Penyelesaian Perselisihan Perburuhan Daerah, known as 'P4D') had existed to resolve labour disputes.

and the Religious Courts. I call these 'independent specialised courts'. They operate relatively autonomously from the general court system, although for many of these courts there is still an avenue of appeal to the Supreme Court, as is the case with the Administrative Courts, Military Courts and Religious Courts.

The second type of courts is specialised courts that exist *within* the scope of another court (usually the district or provincial courts). They may use the same buildings, and are often subject to the same legal

procedure and bench composed of the same judges as the general courts. I call these ‘dependent specialised courts’ in the sense that institutionally they are still reliant on the infrastructure, knowledge and personnel of the general court system. They do not have an independent existence separate from the general court structure, but rather remain dependent on it. These dependent specialised courts include the Industrial Relations Courts, the Juvenile Courts, the Commercial Courts, the Anti-corruption Courts, the Fisheries Courts, the Small Claims Courts, the Human Rights Courts and the Tax Courts. All of these are under the general courts with the exception of the Tax Courts, which is within the Administrative Courts. By thinking of these courts as dependent specialised courts, it puts their function and the scope of their mandate in perspective with the rest of the court system.

Specialised courts share other common characteristics. Most specialised courts are permanent institutions, although some have gradually expanded their location over time. Only one, the Human Rights Courts, may function as both permanent and ad hoc. A permanent human rights court for crimes after 2000 has been established in Makassar, and there are provisions for its establishment in Central Jakarta, Surabaya and Medan. Ad hoc human rights courts can be established for crimes prior to 2000 (see Setiawan, this volume).

Most specialised courts are creatures of legislation and are the legacy of the active role of parliament in justice sector reform. This is with the exception of the Constitutional Court, Administrative Courts, Military Courts and the Religious Courts, which all have constitutional recognition. This means that specialised courts are dependent on the goodwill of the legislature for not only the scope of their jurisdiction but also its very existence as an institution. This is important because, as we will see later, specialised courts are not immune to calls to be abolished, as is the potential fate of the Fisheries Court (see Saptaningrum, this volume).

Many courts do have a long legal history in Indonesia or existed in different forms prior to the creation or nationalisation of the court. This is the case, for example, with the Religious Courts (Lev 1972a; Huis 2015), the Tax Courts which was preceded by a tribunal since 1915, and the Industrial Relations Courts that were preceded by an administrative body since the 1960s. It is important to note that Aceh is exceptional because its special autonomy status permits the establishment of the Syariah Courts (Mahkamah Syari’ah). The jurisdiction of these courts is similar to, but more expansive than, the Religious Courts in other provinces and has been covered extensively elsewhere (see Feener 2014).

Geography and location remains of critical importance in Indonesia. With more than 17,000 islands, 34 provinces, 514 cities or regencies, and thousands of districts, the location of a court matters for access to justice. Some courts are centralised and exist only in the capital city, Jakarta, such as the Constitutional Court and Supreme Court. The general court system exists in every province and district. Specialised courts vary in the scope of their geographic coverage. Some, like the Human Rights Court, are intended to exist only in four set locations, while others, like the Anti-corruption Courts, are now required to exist in every district court across Indonesia. Regionalisation stands out as a trend and an important criterion for access to justice. The lack of local coverage has meant that courts such as the Industrial Relations Courts, which exists only at the provincial level and not at the district or township level, are difficult to access (Tjandra 2016: 207).

It is useful to consider what exactly is 'specialised' about specialised courts in Indonesia. Three aspects stand out: the subject matter or jurisdiction of the court; the judicial selection and composition process, often having a majority of non-career or 'expert' judges on the bench; and the investigation and determination procedure, often differing from the general courts and designed to be more efficient. While many of these specialised courts are the result of legal reform, several years on many of these courts have undergone a second stage of reform, and there remain ongoing calls for future reforms. Often debates go back and forth between those who perceive the primary need to be to improve the implementation of the existing law as opposed to the need to amend the law or introduce new laws to amend the court's jurisdiction or role.

An important reform measure that spans both general and specialised courts is the increase in 'non-career', ad hoc or expert judges.<sup>1</sup> Indonesia is a civil law system, and so judges in the general court system are typically career judges selected through a process of closed recruitment (Pompe 2005).<sup>2</sup> By career judge, I mean someone who is recruited as part of the civil service and works their way up the judicial ranks but stays within the court system throughout their career. While there was a history of occasional external appointments to judicial office (Pompe 2005: 25), this practice diminished under the New Order. In contrast, ad hoc judges are usually not civil servants and may enter the judiciary at different stages of their career, generally serving a short term. The

<sup>1</sup> The terms 'non-career', 'ad hoc' or 'expert' judge are used interchangeably in this book.

<sup>2</sup> See Shapiro (1981: 150) for a general description of judges as career judges.

appointment of non-career judges occurred with the creation of the Administrative Courts, although this recruitment option was later abolished (Bedner 2001). Then in 2000, non-career judges were appointed to the Supreme Court and Bagir Manan became the first non-career judge to hold the office of Chief Justice. Most specialised courts have a majority of non-career judges, though the ratio of non-career to career-judges varies.

There are common issues and shared problems that have arisen in the establishment of specialised courts. Many issues arise from the broader lack of professionalism, incompetence and corruption that have long been identified with the general court system, first by Lev and then by many others since (e.g. Bell 2017). For example, both the Industrial Relations Courts (Tjandra 2016) and the Human Rights Court (Setiawan, this volume) failed to pay their ad hoc judges in the first few months or years of the court's existence. This forced judges to find other sources of income out of necessity. Many of the problems of establishing specialised courts that exist within the general courts in Indonesia centre around the role and position of ad hoc judges. Given that career judges already receive a wage, payment and recognition of their role is often not an issue. A major issue has emerged due to career judges being exempt from taxation, while non-career judges who are not civil servants must pay 15 per cent tax (Tjandra 2016: 217). This is an immediate financial disincentive to take on the role of a non-career judge. Specialised courts are also beset with the issue of needing capable and competent judges to train and develop specialised expertise. The past two decades have seen significant efforts at judicial training and public education campaigns, or 'socialisation' as it is called in Indonesia, of new laws and legal institutions.

The reasons for the establishment of specialised courts vary although common justifications are evident. Often external donors see the creation of a specialised court as a means to create a body of legal precedent and therefore enhance certainty and consistency in decision-making. But legal culture in Indonesia does not place high value on following court decisions, either in law school (where cases are not read) or in legal or judicial practice (Bedner 2013). The desire to circumvent the corruption endemic to the general court system and to career judges in general is often a prominent reason for the creation of specialised courts. A further reason is the recognition of new and emerging areas of law that require high levels of expertise and judges who are not subject to a rotation system, as are career judges of the general courts. Some specialised courts,

such as the Commercial Courts, are the direct result of conditionality loans imposed by external donors such as the IMF (see Reerink et al., this volume), while others such as the Fisheries Courts appear to be more domestically driven initiatives.

The function of all courts in Indonesia, general or specialised, has been affected by the rapid advances in technological innovations. Access to legal information has long been a challenge in Indonesia (Churchill 1992). The Internet has changed how people access information about the courts. All courts in Indonesia have a website, and often a Facebook page, Twitter account and YouTube profile. The Constitutional Court now uploads audio files of all court hearings. Some District Courts have their own profiles on YouTube.<sup>3</sup> The introduction of technology, and new case management and administration procedures has been a core part of the justice sector programmes in Indonesia, undertaken in collaboration with a range of donors, including the Netherlands and Australia in particular (Indrayana 2018). Media coverage of court trials has used these new technologies to enhance their coverage of certain controversial cases (see Tapsell and Dewi, this volume).

There is a system of Military Courts (*Peradilan Militer*) in Indonesia. All members of the armed forces are tried in these courts. However, occasionally, military officers are tried in civilian courts, as has been the case in people smuggling trials (e.g. Crouch and Missbach 2013). There has been significant attention to the withdrawal of the military from an overt political role (Mietzner 2011),<sup>4</sup> but little attention to the Military Courts nor its relationship to the general court system. This remains an area that requires scholarly attention.

This book is focused on courts, but it is important to note the rise of arbitration and the range of non-judicial avenues for dispute resolution from the National Human Rights Commission to the Ombudsman and the Freedom of Information Commission.<sup>5</sup> The main independent accountability institution that is recognised in the Constitution is the Judicial Commission; all other non-judicial dispute resolution mechanisms are subject to the desires of the legislature. There are also new actors

<sup>3</sup> See, for example, Profil Pengadilan Negeri Ungaran Klas 1B: [www.youtube.com/watch?v=NzhaNtsFVOI](http://www.youtube.com/watch?v=NzhaNtsFVOI).

<sup>4</sup> Contrary to this, the military have often been able to ensure for themselves a role in new legislation, such as the role of the military in situations of 'social conflict' according to the Law on Social Conflict: Crouch 2017b.

<sup>5</sup> On these institutions, see Crouch 2007, Crouch 2008, Crouch 2013; Butt 2013; Setiawan 2013; Setiawan 2016.

such as the General Election Supervisory Body (Badan Pengawas Pemilihan Umum, known as 'Bawaslu') established in 2015 as an ad hoc body that can receive certain complaints about the electoral process (often about the General Election Commission itself). The mandate of Bawaslu was expanded in 2017, and there is the possibility that its role as an independent quasi-judicial investigative body may be upgraded to the status of a court. This is to keep up with the demands for accountability and supervision of elections, although it does create multiple layers in terms of who guards the guardians.

### The Study of Courts in Indonesia: The Contribution of Dan S. Lev

Dan S. Lev was a scholar of broad disciplinary orientation, his work engaging with the fields of political science, international relations, Asian studies, legal history, comparative law, legal pluralism and sociology. But above all he was an Indonesianist and unashamedly so (Perry 2006; Pompe 2012). His work was grounded in extended field research and deep in-country knowledge, although he was rarely explicit about this methodology in his writing. This volume is unable to do justice to the full body of Lev's scholarship. Instead, we focus more specifically on his research that relates to the politics of courts in Indonesia. I begin by emphasising the centrality of his *empirical* commitment to his research and the way this method informed his approach to the study of the politics of courts. In many respects, his work fits with the interpretive turn in political science (Yanow and Schwartz-Shea 2006).

#### *Lev's Methodological Approach and Concerns*

Lev was writing in the post-colonial era when Indonesia and many other 'new states' (as he called them) from Asia to Africa were struggling with the task of nation-building. In this light, Lev consistently called for 'problem focused research' (Lev 1972a: 224). He argued for the need for 'deep research' in a similar vein to Geertz's (1971) 'thick description'. Lev had little tolerance for research that took legal text literally or divorced from political context. He criticised the 'vacuity of studies of law in new states that take statutory provisions and legal structures at face value' (Lev 1972a: 1). He saw no use for analysis of legal text if that analysis was void of context. His work encouraged empirical inquiry (Lev 2000d: 11). He modelled this deep research approach in his own work,