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**Lev on the Links between Legal Evolution, Political Change and  
Activism**

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## Lev on the Links between Legal Evolution, Political Change and Activism

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Daniel Lev's legacy of scholarship remains the starting point for the best writing about Indonesia's courts. Lev is the starting point only in part because he was one of the first Western scholars to study Indonesia's modern legal system. More importantly, Lev is revered because his approach set future research on a productive path that avoided all too frequent snares including mistaken assumptions about legal development and reliance on theory developed to explain law in the European tradition. This collection of contemporary studies of Indonesia's courts amply demonstrates that Lev continues to enrich decisions about what to study, where to look and how to go about learning from fieldwork.

Among other lessons, Lev's studies of courts showed that multiple points of entry may be required to understand their functions and dependence on political authority. Thus, Lev's deep understanding of the courts and law combined knowledge gained from the perspectives of judges, legal advocates (of many descriptions), litigants, journalists and the media, politicians, activists and others, as well as familiarity with the society in which his informants lived and intimate knowledge of local history. This book is a continuation of that labor, Lev's avocation, pursuing penetrating description and illuminating detail about particular courts and related organizations in a complex system. The authors' own methods of research follow Lev's advice, incorporating the perspectives of actors within and outside the courts who constitute the court system but are simultaneously integrated within multiple social relationships and Indonesia's hierarchies of power and authority. Lev led the way to a vibrant, productive and coherent, if complex, field of research that continues to examine the contemporary courts and their political context.

When Lev began his work, political science and sociolegal studies of courts in developing countries typically focused on the fate of familiar-seeming legal institutions under unfamiliar conditions. Lev perceived

clearly, and well ahead of many of his contemporaries, the precise ways in which the rule of law, the foundation for courts, had emerged in European political history, following a path of political conflict, compromise and contingent achievement that bore little relationship to later theorizing about the universal qualities of rule of law or the functions of courts. As Melissa Crouch tells us in her introduction, Lev was skeptical of theories of legal development, which he characterized as a source of “grand myths” – generalizations that obscure critical details, details that distinguish one court from another and comprise what is often referred to as “culture.” Lev’s prescription: examine the foundations of Indonesian legal experience through “deep research.” Lev’s research, in contrast to studies by Western scholars who sometimes failed to put aside assumptions about the functions or form of legal institutions and often eschewed field work, involved close observation of the motivations, work routines, decision making and interconnections among the actors who shaped the courts’ structure, character and importance. Among the important perspectives he studied, he included those of actors who sought change or subverted it. As Crouch notes, to some degree Lev anticipated the “cultural turn” in sociolegal studies that marked rediscovery of the agency of individuals and groups in constructing the society in which they live. His research gave concrete meaning to the courts and legal development from the perspectives of those whose actions construct them.

Indonesia may have been the perfect case study for such a grounded approach. Indonesia is a supremely complex society, as different from Europe and North America as could be imagined – in its geography, religious diversity and ethnic hierarchy, and it was influenced by many globalizations before Europeans appeared on the scene, mostly notably from China, India and cultures migrating from neighboring countries in Southeast Asia. Indonesia’s fractured political structure and multi-layered courts present every challenge imaginable and few familiar reference points for a scholar trained in Western political or sociological theory attempting to understand legal development.

Lev was well aware that Western legal ideals and institutions could have strong appeal in Indonesia and elsewhere. Law was employed by the powerful to legitimate their power, control subordinates and regulate globalizing markets, while limiting its influence beyond these functions. Law appealed to those who lacked power and sought accountability from those who had it and wider opportunities for themselves. The point was, Lev emphasized, that “foreign ideas, in Asia as in Europe or anywhere

else, take hold only when they make sense domestically and are adapted to domestic purposes” (Lev 2000d: 6).

Chapters in this collection represent the full range of Lev’s own diverse interests and approaches to studying courts, but they share a common theme – and explicit focus on Lev’s concept of legal culture, exploiting the complexity of Lev’s conceptualization and the relationship of culture to specific contexts. Lev initially defined the term broadly, following Lawrence Friedman’s study of generational shifts in values and resulting shifts in litigation and legal remedies. Lev came to use the term in a different way in his own research, at times rejecting use of the term (in its broadest, societal values, sense). Rather, Lev used the term culture to refer to the orientation (not unlike Bourdieu’s 1977 term *habitus*) of situated actors who both instantiate and create the character of institutions. Motivations, perceptions and possibilities for action are linked to a role in the system that defines and shapes the functions of courts – a judge, a litigant, a legal advocate, a journalist or an influential political figure – and, in turn, are derived from experience in that role but also from broader social environments organized by religion, politics, social class or social movements. The authors of the chapters in this volume capture this complexity in revealing ways showing us how Indonesia’s legal system matches its fragmented politics. Over more than half a century, Indonesia’s rulers and legislatures have established courts at different times that have become embedded in the complex political and social environments. For example, Rifqi Assegaf’s chapter on the Indonesian Supreme Court describes the embedding of the Court in existing modes of legal thought and politics in ways that pushed its judges toward accepting a limited mission, that of dispute resolution, while avoiding the more risky mission of policymaking. Assegaf’s description of the culture of the Supreme Court may be contrasted with Theunis Roux’s examination of the Constitutional Court, a court that initially assumed a bold policymaking role reflecting institutional independence and a very different judicial culture. At the same time, the authors’ descriptions of cultural variation share a theme found in Lev’s understanding of Indonesian judicial culture, corruption, having roots in Indonesia’s continuing political realities that are structured by oligarchy and military power. Lev’s concept of culture, like that of the New Institutionalists’, assumes that both institutions and their social and political environments are responsible for “creating the lenses through which actors view the world and the very categories of structure, action and thought” (Powell and DiMaggio 1991: 12–13). Indonesia’s political institutions continue to undermine the independence and power of its courts, allowing a more self-serving, entrepreneurial judicial culture to survive.

Unlike the new institutionalists, Lev had a keen interest in actual politics and political change. I want to underscore two points that should not be lost in the richness of this volume or its wealth of detail about Indonesia's contemporary court system. First, like the authors, Lev sought to understand legal development by studying the micropolitics of courts and related sites of legal action in a context of ongoing political change. The studies in this volume examine the results of attempts to reform the courts following the democratic opening in the 1990s. Mechanisms of political and legal change form an important element of the background and motivation for the research. But Lev himself had more to say about conditions under which political change occurs and when it could succeed that are worth remembering because they may provide a fruitful additional perspective on these chapters. The second theme of Lev's work and life I want to underscore is their relationship to activism. Lev's interests were never far from the possibilities for political change and his admiration for advocates for a more just distribution of power, constitutionalism and an impartial rule of law.

### Lev as Comparativist: Class Structure and Political Change

Knowledge of the unique circumstances of European legal development made Lev a cautious comparativist. Nevertheless, the social and political conflict that drove legal development in Europe not only reinforced his interest in political change but also offered a template for understanding the influence of class and the distribution of power on the courts and rule of law evolving under very different conditions. In an essay addressing the comparative study of constitutionalism (1993), Lev underscored the importance of constitutionalism, that is, establishing written or unwritten limits on rulers, as a basis for a rule of law. Legal rules must count over and above decisions made by religious orders or customary rulers or military commanders. Lev asserts that rules of this type begin to count as a result of political demand. In turn, Lev viewed that demand as arising from "fundamental changes . . . in class structure," more specifically formation of a middle class.<sup>1</sup> Here and elsewhere in his writings, Lev observes that pressure for rule of law by an emerging middle class has become a global pattern. By implication, the struggles of an emerging middle class to establish a government that respects rules lies at the core

<sup>1</sup> Pressure for change has been "the peculiar ideological haven of the middle class that could not claim an inherently legitimate right to govern but were dissatisfied with their lack of regular access to and influence over those who did govern" (1993: 141).

of legal development. Conversely, enduring power structures that resist such a change through force or by establishing rules that serve the powerful alone explains its failures. In the transition to postcolonial status, conditions have seldom favored democracy movements which have given way in most cases to the enduring power of traditional elites, oligarchs or the military – groups that are often allied or overlapping. Rule of law may be established but not rule of law that limits the power of rulers.

In this essay, written two decades into his career, Lev describes not only the historical grounding for his interest in political change but also his research methods. Political contentions over the status of law, he says,

are local matters, fed by local issues, interests, values and historical circumstance, the outcomes [of which] . . . are comprehensible essential only in local terms. [P]olitical compromises worked out historically, the tacit social and economic agreement made along the way, the play of local habit and values and cultural assumptions, the ways in which change proceeds, are all taken for granted at home but are unfathomable away. Without an understanding of the conflicts that go on in state and society, and between the two, of the ways in which power is generated and authority actually exercised, of the values and ideologies that inform political structure and behavior, we cannot comprehend constitutionalist (or any other) movements as they have evolved. (Lev 1993: 141)

Motivation for Lev's continuing interest in the role of lawyers defending the rule of law is found in the further observation that pressure for development of a rule of law is typically aligned with social movements that attempt to broaden and generalize the appeal of such protections.<sup>2</sup>

Like Lev, the authors in this collection engage political change and possibilities for further change in important ways, but examination of the history of political change, its key players and possibilities for changing the course of legal development in the future remain unfinished work. In some chapters, Indonesia's political past and present is essential background (for example, Pascoe's excellent discussion of district courts or Bedner and Wiratraman's updated examination of the administrative courts), while other chapters address the means and outcome of reform efforts directly (for example, illuminating chapters on the Anti-corruption Courts, Human Rights Courts and Constitutional Courts,

<sup>2</sup> He also notes the important connection between such movements and the concept of human rights. Lacking an indigenous ideology similar to European law's grounding in natural rights, human rights, and the conditions under which they become meaningful, serve a similar purpose.

each of which has experienced the penetration of politics into promising beginnings and attempts to encourage actors with a new orientation toward the function of law and the courts). These chapters invite more direct examination, in the spirit of Lev's own work, of the possibilities for further change and where pressure for change would have to be directed. Characteristically, Lev would also encourage special attention to the question: Who is likely to take up the struggle and the conditions under which the outcome might be different?

### Lev and Legal Activists

My admiration for Daniel Lev's work as scholar grew from my first encounter with him while I was serving as General Editor of the *Law & Society Review* in 1993, overseeing publication of a symposium (organized by David Engel, Jane Collier and Barabara Yngvesson) titled *Law and Society in Southeast Asia* – one of the first collections of sociological scholarship on Southeast Asia to appear anywhere. Dan Lev (1994) wrote the Foreword. Dan drew attention not only to Southeast Asia's diversity and promise for comparative study but to the role of law in its politics. The subject matter is, he said, "a moving object" and the "uses of law . . . for getting anything done legitimately in Southeast Asian states are all contested and undergoing change . . . [set off by] economic transformations, social upheaval, ideological battles over the very shape of the state and its relationship to society" (at 414). Soon after, I had the opportunity to spend extended periods of time with members of a network of human rights lawyers and activists in Thailand, and I was quickly hooked, in much the same way Lev must have been drawn to study the roles of lawyers and courts in political change in Indonesia. During my first years of fieldwork in this new environment, I encountered Lev's influence in an entirely different way through a chance meeting with one of his former graduate students turned grassroots activist, a career transition mentored by Lev and likely inspired by the political spark that contributed to Lev's own interest in political transitions, his romance with fieldwork and his friendships with activists in Indonesia.

I have described Lev's essay on the roots of constitutionalism in Europe, in which he observed that establishing rule-based limits on the powerful has been associated with social movements and, therefore, with activism directed against autocratic regimes. The conditions under which pressure for political inclusion and governmental restraint succeeded in European countries were complex but provided support for Lev's class

and social movement-based theory of legal evolution (for a similar argument, see Tilly 1990; for additional complexity, see Vu 2010). Lev's interest in advocates for rule of law in Indonesia is likely to have had still deeper roots and greater importance than can be explained by his knowledge of Western history alone. Lev studied the careers of lawyers who resisted Soekarno's efforts to undermine the rule of law in a pathbreaking working paper on legal aid in Indonesia, written in 1987 (Lev 1987). An early working paper described the founding of the Legal Services Institute (LBH) by outspoken lawyer Adnan Buyung Nasution with the support of PERADIN, the first association of Indonesian lawyers. Together, LBH and PERADIN became a bulwark of rule of law advocacy, promoting litigation challenging Indonesia's autocratic rulers and training generations of rule of law advocates notwithstanding the considerable risk of reprisal by powerful rulers. Nasution, lawyers who followed him, and the support provided by LBH and PERADIN played a part in the parallel history of Indonesian courts through the work of legal advocates who brought cases to the courts. Many were also outspoken public advocates for court reform. Lev's later writing on "cause lawyers" included comparison of lawyer-activists among Indonesian and Malaysian lawyers who, in spite of quite different constitutional systems and political conditions, have played functionally similar roles in creating and defending a "law-state" (Lev 1998). Lev's analysis of cause lawyers has continuing relevance. It would be valuable to understand, for example, the nature and source of the commitment to the rule of law among the relatively independent investigators and prosecutors working for the Indonesian Anti-corruption Commission [KPK], described by Simon Butt in his chapter on the Anti-corruption Courts. Further research might reveal whether their successful prosecutions and resilience in the face of political resistance results from self-selection among recruits or principles of bureaucratic independence (or both), findings that could guide future reforms.

Lev's last work, published posthumously, is a biography of Yap Thiam Hien, a Peranakan (Indonesian Chinese) lawyer of great courage and principle, and a personal friend whom Lev greatly admired (2010). Benedict Anderson, in his introduction to the biography, speculates about the sources of Lev's attraction to activism. Lev's career as a scholar began in the 1950s during a period of global reordering and hope for liberal change. His graduate school mentor was himself a passionate sympathizer with the Indonesian nationalist cause and friend of its leaders, adding to the romance of fieldwork there and the

excitement of Indonesia's revolutionary uprising and democratic opening in 1955. For Lev, Anderson writes, law was not a matter of statutes and decisions but became "a social, economic and political institution" (Anderson 2011:6). Indonesia's revolution in the 1950s was followed, of course, by Soekarno's rise and abrogation of a liberal constitution, the starting point, perhaps, of Lev's career-long interest in the efforts to restore a meaningful rule of law. Nasution's outspoken defense of the rule of law and Yap's outrage at abuses by the government were likely to have been part of what drew Lev's attention and mirrored his own reasons for his deep lifelong interest in the progress of legal development in Indonesia. Not coincidentally, many of the authors contributing to this volume have been activists in their own right, and thus are likely to have found in Lev a true mentor – a kindred spirit as well as a deeply informed scholar – for research about the evolution, functions and possible futures of Indonesia's court system.