THE POLITICS OF COURT REFORM

Indonesia is the world's third largest democracy and its courts are an important part of its democratic system of governance. Since the transition from authoritarian rule in 1998, a range of new specialised courts have been established from the Commercial Courts to the Constitutional Court and the Fisheries Courts. In addition, constitutional and legal changes have affirmed the principle of judicial independence and accountability. The growth of Indonesia's economy means that the courts are facing greater demands to resolve an increasing number of disputes. This volume offers an analysis of the politics of court reform through a review of judicial change and legal culture in Indonesia. A key concern is whether the reforms that have taken place have addressed the issues of the decline in professionalism and increase in corruption. This volume will be a vital resource for scholars of law, political science, law and development, and law and society.

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THE POLITICS OF COURT REFORM

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Edited by

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The District Courts

Sentencing Decisions as Evolving Legal Culture?

DANIEL PASCOE*

'In any country, when the [political] system changes, the decision of the judge also changes'.[1] Does this principle hold true without exception? As part of the present edited collection, aimed at evaluating and extending the work of the late Daniel S. Lev on Indonesian legal culture,[2] in this chapter I aim to determine the extent to which Lev's academic legacy remains relevant in the District Courts of greater Jakarta during Indonesia's 'Reform' (*reformasi*) era from 1998 onwards. In other words, is modern Jakarta's District Court 'culture' recognisable from Lev's early works? The regency or municipality-level District Courts (*Pengadilan Negeri*) try both civil and criminal cases across the Indonesian archipelago,[3] including all private disputes not falling within the jurisdiction of special courts (Juwana 2014: 306).[4] However, this chapter's case study focuses exclusively on sentencing decisions in criminal cases at first instance, which tend to dominate the case dockets of the District Courts (Mahkamah Agung 2018). Criminal punishment, as a subject attracting strong views and even cultural fascination, and unconstrained in Indonesia's predominantly civil law criminal justice system by formal case law precedents or sentencing guidelines (Lindsey & Nicholson 2016: 91; Assegaf 2018b: 1, 15),

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[1] Interview with District Court Judge #2, 17 May 2018.

[2] Particularly the following works: Lev (1962); Lev (1976); Lev (1978); Lev (1999); Lev (2000c); Lev (2000d); Lev (2007c); Lev (2011).

[3] Law 48/2009, art. 25(2); Law 8/2004, art. 4(1); Law 2/1986, art. 50.

[4] With the exception of family law disputes between Muslims, for which there exist religious tribunals (*Peradilan Agama*).

forms an ideal vehicle through which to analyse a jurisdiction's 'internal legal culture', as it manifests here in the attitudes and customs of judges.

Legal culture is a famously nebulous concept (Siems 2014: 119). Previous definitions have focused on the law 'in action', rather than the law 'on the books' (Nelken 2004: 2; Siems 2014: 119), the views and behaviours of the public towards laws and the legal system (as 'external legal culture': Friedman 1975: 193, 223–4; Friedman 2006: 189), and informal dispute-resolution processes and methods of social control (Siems 2014: 120). As noted by Crouch in this volume, Merry's understanding of legal culture as having four dimensions is particularly useful (Merry 2010: 43–4). Within this chapter, I focus on 'legal culture' as 'internal legal culture' – namely, repeated beliefs, practices and behaviours on the part of legal professionals. This definition largely accords with Merry's first conception (Friedman 1975: 194, 223; Merry 2010: 43), and importantly, falls within Lev's own use of the term (Lev 2000d: 162).

The courts, as the precise locus of this research, are the central institutional features of modern legal systems and are therefore prominent repositories of local or national legal culture (Lev 2000d: 161, 184). Judges, as the institutional actors who apply law, give the written law colour and meaning through cultural beliefs and practices. And the more than 350 regency- or municipality-level District Courts in Indonesia feature the largest number of criminal trials at first instance, ranging from traffic violations through to murder cases (Lindsey & Nicholson 2016: 65; Mahkamah Agung 2018). Each panel of judges trying a criminal case in the District Courts normally enjoys a wide discretion to impose the appropriate criminal punishment up to a defined maximum, ranging from non-custodial to custodial penalties, even extending to capital punishment in murder, narcotics and terrorism cases (Lindsey & Nicholson 2016: 95). Although newer legislation beyond the 1918 Criminal Code (*Kitab Undang-Undang Hukum Pidada*) has established mandatory minimum fines and mandatory minimum sentences of imprisonment for particular offences,[5] the judicial imposition of such mandatory penalties has proven patchy (Missbach & Crouch 2013: 13–14), and the differences between minimum and maximum sentences remain wide.[6] Whenever such broad discretion exists within the legal

[5] See, e.g., Law 5/1997 and Law 35/2009 (narcotics); Law 31/1999 (corruption); Government Regulation in Lieu of Law 1/2002 and Law 15/2003 (terrorism) and Law 6/2011 (people smuggling).

[6] Ibid. For example, Law 35/2009, art. 111(1), penalises the possession of Class 1 narcotics with a minimum four year prison sentence and a minimum Rp. 800,000,000 fine, whereas

system, culture through ingrained habits and belief systems typically operates to 'tame' it (Hawkins 1992: 39), just as has occurred in Indonesia's District Courts.

In short, the present chapter has two aims: first, to distil the common beliefs, attitudes and behaviours exhibited by greater Jakarta District Court judges in considering sentences for convicted offenders, and second, to determine whether modern legal culture in the greater Jakarta District Courts, as reflected in sentencing decision-making, accords with Lev's characterisation of Indonesian legal culture in his seminal essay 'Judicial Institutions and Legal Culture' (Lev 2000d), together with his related work on the subject.[7] If not, which factor(s) explain such differences?

In brief, my findings on Lev's continuing influence are mixed: some of Lev's earlier observations mirror the current attitudes and behaviours of greater Jakarta District Court judges in criminal cases, yet other observations are either no longer relevant after *reformasi*, or at the very least, may not be relevant at the District Court level or within greater Jakarta as a geographical region and cultural space.

Measuring Legal Culture over Time

Most existing scholarship on legal culture tends to be comparative in nature (e.g. He 1994; Ferrarese 1997; Miyazawa 1997; Nelken 2004; Kurkchiyan 2012). This is presumably because a nation-state's legal culture can be somewhat difficult to grasp if considered purely in its own context (Friedman 2006: 189). How is it possible to measure the practices, beliefs and behaviours which bring the written law to life without comparing and contrasting with other jurisdictions? How is legal culture to be assessed as either 'normal' or 'exceptional' without international comparison (Nelken 2011: 393–4)?[8] One solution might be to compare legal culture within a vertical plane (i.e. between different courts in the same jurisdiction) (e.g. Crouch, this volume). However, the

the maximum punishment is twelve years plus a Rp. 8,000,000,000 fine. Law 31/1999 punishes individuals who unlawfully enrich themselves with a prison sentence of between four and twenty years (extending to life in the most serious cases), plus a fine of between Rp. 200,000,000 and Rp. 1,000,000,000.

[7] See note 2, above.

[8] Another explanation for the scarcity of longitudinal research on legal culture is that the field is relatively young. Although law has long been associated with societal culture, scholars typically trace the field of legal culture to the late 1960s with Lawrence Friedman himself (Cotterrell 2006: 82; Carrillo 2011: 72).

present case study instead serves to extend academic scholarship on legal culture in a new *longitudinal* direction, by asking whether judicial behaviours, practices and beliefs have changed within the criminal trial courts in Indonesia over time, independently of formal legislative and procedural changes to the Indonesian legal system (Friedman 1975: 234–5).[9] With academic research on legal culture only becoming widespread from the late 1960s onwards,[10] it is a relatively rare privilege to be able to reassess cultural practices in any particular legal system more than fifty years after Lev's pioneering work on the subject.

There are three main reasons to measure changes in Indonesian legal culture over time: first is to gauge the continued theoretical significance of Lev's scholarship for the Indonesian legal system, and for studies on legal culture and legal institutions more generally. Second is to seek more general lessons on the way in which legal culture changes over time. Indonesia offers an ideal opportunity to test the hypothesis that legal culture normally changes incrementally over time (Junquiera 2003: 67; Friedman 2006: 193; Nelken 2014: 270), but can change more rapidly during periods of democratisation, as several Iberian and Latin American examples suggest (e.g. Morn & Toro 1990; Bergoglio 2003; 54–5; Faivovich 2003: 130–1).[11] After all, 2018 marks exactly twenty years since the President Suharto resigned, triggering the *reformasi* era in Indonesian politics. The third, instrumental, reason to mark cultural contrasts is to effect and continue institutional change in a post-authoritarian society such as Indonesia. As Lev (2007c: 250) and Nelken (2014: 262) have both suggested, successful law reform efforts in transitional societies begin with a profound knowledge of local legal culture in a contemporaneous setting, rather than through blindly imposing legal transplants developed in other contexts.

Above, I outlined several disagreements over what is meant by the phrase 'legal culture'. There are also disagreements between legal scholars

[9] Nonetheless, the formal legal changes relevant to sentencing in the District Courts have been significant since Lev first began writing about Indonesian legal culture during the late Sukarno period. There have been several new iterations of the Judicial Power Law passed since then (the most recent of which is Law 48/2009). The law governing the general courts has been reformed three times (by Law 13/1965, Law 2/1986 and Law 8/2004). The current Criminal Procedure Code was passed in 1981 (Law 8/1981), supplanting the previous Dutch code (Herziene Inlandsch (Indonesisch) Reglement 1941). There have also been several new criminal offences created (see note 5, above).

[10] See note 8, above.

[11] Compare Dias' research on legal culture in Portugal after the 'Carnation Revolution' of 1974 (Dias 2016).

on how to *measure* 'internal' legal culture at any one point in time (Nelken 2014: 262; Grodeland & Miller 2015: 17–18). Analysing case judgements systematically is one approach (Friedman 1985: 119), albeit with several drawbacks: to obtain a wide sample, this method is time-intensive; moreover, Jakarta District Court judgements have only been widely available since approximately 2010 and are not yet available in full on the Indonesian Supreme Court's website (Mahkamah Agung 2018). Perhaps most importantly, where written judgements *are* available they do not always convey the beliefs, practices and behaviours of the judges in resolving the case. In other words, court judgements have insufficient *validity* as a measure of legal culture.

Another option would have been to observe court proceedings in detail (see Hurst, this volume) – i.e. legal anthropology/ethnography. The major drawbacks of this approach are, again, the time it takes for the researcher; the difficulty in obtaining a large and representative sample of cases when only one proceeding can be observed at a time; and as with the written judgement-based approach, the lack of access to the judge's private thoughts, and to the negotiations conducted in the private conference between the panel of judges in coming to the decision (*musyawarah*). Almost by definition, 'internal' legal culture includes not only what happens in public view, but also what transpires behind closed doors, and within the judges' own thoughts.

Ultimately, I have chosen to adopt an approach I have applied to previous research on decision-making in the context of commutations and pardons by the executive, including in Indonesia (Pascoe 2014, 2017a, 2019). I conducted semi-structured 'elite' interviews with relevant decision-makers (the judges themselves), and with other observants and participants in the courtroom (defence advocates and legal NGO staff), who provide an important outsider's view of judicial customs and behaviour, to counter judges' potentially selective and self-justifying answers.[12] Together with researchers from Indonesia Jentera Law School, I conducted semi-structured interviews with twelve

[12] Corruption is a good example of an issue that bears upon judicial customs and behaviour, but nonetheless requires outside viewpoints, as judges will not admit to involvement in corrupt practices and will be loath to implicate their colleagues. As Butt (2012: 22) states:

> It is important ... to emphasise that claims about the extent of corruption within [Indonesian] law enforcement agencies are based largely on public perceptions, anecdotal accounts, commonly revealed in the media and *discussions with lawyers and law reform activists*, rather than on firm empirical data [.] [emphasis added]

District Court judges from the greater Jakarta Area over a one-month period in May 2018, together with eight other interviews with legal NGO staff and legal advocates. Semi-structured interviews may possess their own disadvantages as a method of measuring 'internal' legal culture,[13] but for a study of judicial culture in Indonesian courts, they are entirely fit for purpose.

Daniel S. Lev on Culture in the Indonesian Courts

Before he turned away from culture later in his career in favour of 'ideology' (Lev 1992: 1–2; Lev 2005b: 354; Pompe 2012: 201), the foremost Western scholar of the Indonesian legal system during the Sukarno and Suharto administrations (1945–98), the late Daniel S. Lev (1933–2006), described Indonesian 'legal culture' as consisting of several key elements, at least as they relate to the court system and to judicial officers as legal professionals.[14] To reach the following conclusions, Lev's methods included an eclectic mix of historical, legal doctrinal, interview-based and ethnographic approaches. Together, Lev's works provide a multifaceted theory of Indonesian legal culture that the present study seeks to evaluate across a more recent timeframe and a more specific legal context (namely, criminal punishment).

Lev's first set of observations relate to public and judicial attitudes towards the law in Indonesia, invoking both 'internal' and 'external' legal culture (Friedman 1975: 223–4). Here, Lev saw the formal law as a dispute resolution mechanism lessened in importance by 'rules of influence, money, family, social status and military power' (Lev 2000d: 171, 185).[15] Likewise, the role of conciliation and compromise was prominent in resolving legal disputes, both inside and outside the courtroom (Lev 2000d: 179, 186–93). Lev's conception of Indonesian

[13] For example, impressionistic, self-aggrandising, or simplistic accounts by the interviewee; answers being affected by the setting (the interview and the interviewer); incomplete 'corporate answers' designed to protect the reputation of the individual or the institution; and inconsistency between different accounts from the same interviewee or different interviewees (e.g. Nelken 2011: 92; Lilleker 2007: 208; Davies 2001: 75; Pascoe 2017b). Note that, wherever possible, I have attempted to provide at least two independent interview sources to support a proposition, or to verify interview data with written sources, in accordance with standard academic practice (Davies 2001: 78).

[14] Here, I attempt to break Indonesian legal culture into several constituent parts for later explanation, rather than using legal culture as an explanatory variable in itself (see Nelken 1997: 71–2).

[15] See also Butt and Parsons (2014: 58–9).

legal culture as involving frequent informal dispute resolution is an account corroborated by more recent publications (e.g. Naibaho 2011: 91; Komisi Yudisial Republik Indonesia 2017a; Mann 2015). As Nicholson (2009: 273) observes, 'Consensually-based forms of dispute resolution (*musyawarah*) have a strong cultural base and a long history in Indonesia'. Lev himself (2000d: 192) labelled conciliation 'as permanent a characteristic of Indonesian legal culture as one can imagine'.

Furthermore, Lev described within Indonesian judges' (and litigants') thinking a pluralistic tension between the supremacy of Dutch-inherited civil law, Islamic Law precepts and customary (*adat*) law, even if each of these sources of law only informs one or more specific legal fields (Lev 1972a: 63–9; Lev 2000d: 167, 194–5). Lev also described a conflict between judicial views favouring local justice to suit local needs, justice to be imposed in a uniform manner across the Indonesian archipelago,[16] and justice to boost Western (particularly European) views of Indonesia's developing legal system (Lev 1962: 210–13, 218; Lev 2000d: 211). In other words, according to Lev, during the Sukarno and Suharto eras, Indonesian judges were conflicted about their geographical audience and the role that religion and custom should play in dispensing justice.

On the interpersonal relationships and personal politics of judges, at least until Suharto's early rule, Lev described keen political consciousness on the part of certain Indonesian judges (Lev 1962: 205; Lev 1965b: 186–7; Lev 2000d: 180–1). Judges also saw themselves as singular, patrimonial arbiters of disputes, in the Javanese village tradition (Lev 1976: 138, 160, 169; Lev 2000d: 171, 199). Given the authoritarian context under Sukarno's 'Guided Democracy' phase (1957–66) and then Suharto's 'New Order' military regime (1967–98), it is perhaps unsurprising that Lev also perceived a close 'connection between judges and prosecutors to the exclusion of [defence] advocates' in criminal cases (Lev 1999: 183, 186; Lev 2000d: 175, 178; Lev 2011: 204, 303), and noted the implicit and explicit influence of the politics of the day over judicial decision-making (Lev 1962: 223; Lev 2000c: 8–9). In Lev's final work, his posthumously released biography of the prominent Indonesian human rights lawyer Yap Thiam Hien, Lev (2011: 303) wrote:

> Indonesian judges have always considered themselves *pegawai negeri*, civil servants, which implies, formally independent or not, a primary obligation to the state and its leadership. Their identity, institutionally and psychologically, is within the state bureaucracy; this establishes a deep

[16] See also Pompe (2005: 201–203).

divide between judges, as public lawyers, and professional advocates, as private lawyers.

Legal Culture in the District Courts: Views from the Field

Based explicitly on Lev's characterisation of Indonesia's 'internal legal culture' on the part of judges, as described above, the questions I put to available District Court judges from the five Jakarta District Courts (North, South, East, West, Central), as well as from the satellite town Bekasi in West Java province and to selected courtroom observers focused on three broad topics. First was the power relationship in the courtroom between judges, advocates and prosecutors, and in the judges' conference (*musyawarah*) between the judges themselves. Second were the background cultural influences such as religion, ethnic group and political beliefs on decision-making in the sentencing process; and third was the disparity in sentencing ideology and practice between different courts – whether in Jakarta, Java, or in Indonesia as a whole.

The themes that emerged from the twenty interviews conducted are described below, with interviewees' identities and courts served anonymised, in accordance with ethical stipulations.[17] Indeed, the Chief Justice of one District Court observed that no foreign scholar had ever shown any direct empirical interest in the business of the lowest level criminal courts in Jakarta. Surveying recent scholarship, this is not entirely true (e.g. Lindsey & Nicholson 2016; Nicholson 2009).[18] However, it remains the case that most extensive English-language scholarship on Indonesian courts tends to focus on the apex levels of the court system – the Supreme Court and the Constitutional Court (e.g. Hendrianto 2018; Butt 2015; Butt & Lindsey 2012; Stockmann 2007; Pompe 2005).

Power and Decision-Making in Criminal Cases

To reach a verdict in criminal cases, as with the decision on sentencing quantum, the legislative starting point in Indonesia is the 1981 Criminal Procedure Code (*Kitab Undang-Undang Hukum Acara Pidana*).[19]

[17] City University of Hong Kong, Research Committee, Application Number H001634.
[18] See Loebis (1974) and Komisi Yudisial Republik Indonesia (2017b) for similar studies published in Bahasa Indonesian. However, the latter study surveys District Court judges in cities other than Jakarta.
[19] Law 8/1981, art. 182.

Closed-door deliberations (*musyawarah*) between a panel of three (or five) District Court judges determine the verdict and sanction in each case.[20] Within the *musyawarah*, the Chair of the Panel (*Ketua Majelis*) asks questions to each judge from least experienced to most experienced, concluding with him- or herself. Each judge provides his or her decision, along with relevant reasoning. Although the panel should seek to issue a unanimous decision through this process, after reasonable discussions a majority judgement is also possible. Following a guilty verdict, the judicial panel may pass the following sentences, detailed in the Criminal Code (*Kitab Undang-Undang Hukum Pidada*): capital punishment, imprisonment and fines (which are listed as primary penalties); revocation of rights, seizure of property and publicising the court's verdict (which are listed as supplementary penalties).[21] Subject to the maximum sentence prescribed for the offence, imprisonment may be for life, or for a fixed period of between one day and fifteen years, extending up to twenty years if there are significant aggravating circumstances.[22] There is always a written judgement outlining the panel's reasoning (Lindsey & Nicholson 2016: 91), although as noted above, first instance judgements have only recently become available to researchers through the Supreme Court's website.

Importantly, the legislative stipulations on the decision-making process give no indication of the power dynamics among the three (or five) justices, nor do they give any indication as to the relative influence of the prosecutor or the defence advocate on judges' thinking. All that the Criminal Procedure Code provides is that the judges' deliberations must be based upon the prosecutor's indictment and the evidence that has been presented at trial.[23] In theory, all judges have an equal impact on the disposition of the case. Yet, the prevailing legal culture reveals otherwise.

> *It's not like we pressure the youngsters.*
> Interview with District Court Judge (21 May 2018).

> *Experience is an important factor. For the junior judges, the wisdom of the 'Hakim Ketua Majelis' is also significant.*

[20] Five judges are only appointed in important cases, at the discretion of the Chief Justice of each District Court (Interview with District Court Judge, 14 May 2018; Interview with District Court Judge, 21 May 2018). See Law 48/2009, art. 11(1), 14(1).

[21] Criminal Code, art. 10. Imprisonment for one year or less may be suspended with a probation period (art. 14a(1)).

[22] Criminal Code, art. 12(1)–(4).

[23] Law 8/1981, art. 182.

Interview with District Court Judge (23 May 2018), describing the Chair's implicit influence on the panel.

In practice, the Chair of the panel possesses an outsized influence on each case's outcome by initially asking most of the questions to the parties in the courtroom, even if the other judges on the panel later form separate opinions on the verdict.[24] Then, within the *musyawarah* itself, the Chair begins by giving a presentation to the other judges 'about the case, the regulation[s], and about the mitigating and aggravating factors'.[25] Thereafter, as the Chair's questioning proceeds in increasing order of seniority, each judge's opinion is discussed thoroughly by the entire panel, rather than acting as an isolated and independent 'vote' on the outcome.[26] This is particularly so in criminal sentencing, where judges on the panel might reach a consensus position midway between high and low penalties favoured by different judges.[27] On face value, negotiation and compromise are therefore major components of judicial decision-making in the District Courts, albeit conducted in a private rather than a public setting. As Lev identifies in his own work, replacing direct conflict with deliberation by consensus is a key Indonesian cultural tradition with Islamic roots,[28] and is reflected in the version of democracy favoured by *Pancasila* (the Indonesian state ideology).[29] Indeed, when compared with judicial panels in the common law tradition, Indonesian District Court judges, with their preference for consensual, unanimous decision-making behind closed doors, arguably better resemble a jury of laypersons, rather than a bench which frequently splits along ideological or evidential grounds in written decisions.

Nevertheless, although the Criminal Procedure Code procedures are designed to provide a fair opportunity for the two to four less senior judges to present their opinions without the pressure of having to follow

[24] Interview with Defence Advocate #2, 15 May 2018; Interview with Legal NGO Staff, 9 May 2018.

[25] Interview with District Court Judge, 8 May 2018; Interview with District Court Judge, 14 May 2018.

[26] Interview with District Court Judge, 8 May 2018; Interview with Defence Advocate, 3 May 2018.

[27] Interview with District Court Judge, 11 May 2018.

[28] See, e.g., Geertz (1983: 213); Bowen (2003: 89); Tyson (2010: 62).

[29] *Kerakyatan Yang Dipimpin oleh Hikmat Kebijaksanaan, Dalam Permusyawaratan Perwakilan* (democracy, led by the wisdom of *consensual deliberation* among representatives) (Constitution of Indonesia 1945, preamble). See Bourchier (1999: 235–6) for further commentary on 'Pancasila Democracy'.

the Chair's lead,[30] in practice, the more experienced Chair's comments and full opinion often prove influential in procuring a unanimous decision from the panel.[31] The Chair's influence is even more pronounced if the Chair of the adjudicatory panel (*Ketua Majelis*) is also the Chair of the entire District court (*Ketua Pengadilan Negeri*).[32] Two interviewees commented that this phenomenon is a reflection of the importance of seniority in Javanese culture.[33] Here, the lesson is that deference to seniority is not necessarily incompatible with decision-making by consensus, especially if the latter provides the means, and the former is typically the end result.

> *They are responsive to each other. Something like 'you have a space in my heart'.*
>
> Interview with Legal NGO Staff #3 (15 May 2018), mocking District Court judges' amiability towards prosecutors.

As for the role of prosecutors and defence counsel in the courtroom (see also Fachrizal Afandi, this volume), their ultimate influence on judicial decision-making was perceived by several non-judicial interviewees as being minimal, given the heavy judicial intervention through questioning during the trial.[34] To a common law-trained observer of a full bench criminal trial at the Central Jakarta District Court, the judges' total power over proceedings and case disposition was even evident from the layout of the courtroom, with the elevated panel of five judges prominently

[30] Interview with District Court Judge, 14 May 2018; Interview with District Court Judge, 23 May 2018; Interview with District Court Judge, 8 May 2018.

[31] Interview with District Court Judge, 11 May 2018; Interview with District Court Judge, 23 May 2018; Interview with District Court Judge, 21 May 2018; Interview with Defence Advocate, 3 May 2018; Interview with Defence Advocate #2, 15 May 2018. Contrast Interview with District Court Judge #2, 8 May 2018; Interview with District Court Judge, 17 May 2018. See also Komisi Yudisial Republik Indonesia (2017b: 217). Two interviewees stated that differing opinions in the *musyawarah* and ultimately via dissenting judgements were more common in Jakarta, given the more senior status of 'junior' judges, who routinely have more than fifteen years' experience as judges in other parts of Indonesia, usually as Chief Justices of regional District Courts (Interview with District Court Judge, 11 May 2018; Interview with District Court Judge #2, 8 May 2018).

[32] Interview with District Court Judge, 23 May 2018; Interview with District Court Judge, 21 May 2018; Interview with Defence Advocate, 3 May 2018. Contrast Interview with District Court Judge #2, 8 May 2018.

[33] Interview with Defence Advocate, 3 May 2018; Interview with District Court Judge, 21 May 2018. See also Fitzpatrick (2008: 503).

[34] Interview with Defence Advocate, 3 May 2018; Interview with Legal NGO Staff #3, 15 May 2018; Interview with Legal NGO Staff #4, 15 May 2018. See generally Strang (2008: 200).

facing the public gallery, and the teams of advocates and prosecutors facing each other across the room, to create an inverse 'U' shape.[35] In this absolutist model of judicial decision-making, there is very little room for negotiation over the final sentencing outcome with either party in the courtroom, other than through corrupt practices (which I elaborate on below). The judicial panel saves its own internal debate for the *musyawarah*, whereas the litigating parties play a more passive role in adducing and testing evidence,[36] unlike the practice of 'negotiated truth' typical in common law systems of justice (Jorg et al. 1995: 47–8; Vriend 2016: 98).

Still, when interviewees directly compared the influence of prosecutors and defence advocates, almost all respondents who addressed this issue saw prosecutors' bearing on case outcomes as far greater than defence advocates'. Echoing Lev's own position (2011: 303), a common explanation given by non-judicial interviewees was that District Court judges possess a 'natural relationship' with prosecutors as fellow civil servants.[37] A second explanation was that judges wish to avoid prosecutorial appeals and the paperwork that goes with them, if they were to impose a sentence grossly divergent from the prosecutor's demand (*tuntutan Jaksa*).[38] After a case is disposed of, occasionally the written judgement will refer to the defence advocate's submissions, but this is merely to 'pay lip service' to defence arguments.[39] It is more common for written judgements to reflect arguments made by prosecutors in court.[40] In sum, the judges' own considerations are of paramount importance, with the prosecutor's arguments secondary and the defence arguments a distant third.

There are also more explicit institutional links between the judiciary and prosecutors. During the Guided Democracy period, the *Panca Tunggal* institution brought together army commanders, police, prosecutors and

[35] Contrast a 1971 photo of human rights lawyer and associate of Daniel S. Lev, Yap Thiam Hien, who is pictured sitting directly in front of the justices of a *Pengadilan Negeri* in Jakarta (Lev 2011: 280), and Lev's account of the seating arrangements under Sukarno, where the prosecutor was seated *on* the bench next to the judges (Lev 1965b: 182 n27).

[36] Interview with Legal NGO Staff #4, 15 May 2018; Interview with District Court Judge, 20 May 2018; Interview with District Court Judge, 14 May 2018; Interview with District Court Judge, 8 May 2018.

[37] Interview with Legal NGO Staff #2, 11 May 2018; Interview with Legal NGO Staff, 9 May 2018; Interview with Legal NGO Staff #3, 15 May 2018.

[38] Interview with Legal NGO Staff, 9 May 2018; Interview with Legal NGO Staff #5, 16 May 2018; Interview with Legal NGO Staff #6, 21 May 2018.

[39] Interview with Defence Advocate, 3 May 2018; Interview with Legal NGO Staff #2, 11 May 2018.

[40] Interview with Defence Advocate #2, 15 May 2018; Interview with Legal NGO Staff #2, 11 May 2018; Interview with Legal NGO Staff #4, 15 May 2018.

judges to discuss pressing law and order issues (Lev 2011: 205; Liang 1995: 64). In 1984, during the Suharto era, the *Mahkejapol* forum was established for regular cooperation and coordination between the Indonesian Supreme Court, the Attorney General's Office and the police force, regarding the latest political developments and concerns in criminal justice (Mulya Lubis 1993: 117; Brata 2014: 118).[41] A similar forum at the regency level, incorporating District Court Chief Justices, was called *Muspida* from 1986 onwards (Honna 2010: 141 n8). The cooperative relationship between these state agencies and institutions has even continued to the present day, with a similar *Mahkumjakpol* forum created in 2010, now incorporating the Ministry of Law and Human Rights, despite the purported independence of the judicial branch since *reformasi* (Alim 2010; Hukum Online 2012).[42] Although such cooperation typically involves the judicial tiers above the District Courts, over the years these forums have provided an informal setting whereby the judiciary has developed a closer relationship with the executive branch, rather than with the defence bar (Alim 2010; Lev 2011: 205).[43] At worst, the forums have facilitated outright collusion between state officials (Lev 1999: 183; Alim 2010).[44]

Finally, it is impossible to analyse judicial culture in the District Courts without making reference to judicial corruption. In addition to the institutional factors described above, one further explanation for the apparent close connection between judges and prosecutors is to ensure that defendants' main opportunity for a positive result in their cases is to try to bribe either party (Butt 2012: 23). As with the entire criminal justice system in Indonesia (Pompe 2005: 413–14; Lindsey & Santosa 2008: 10; Butt 2012: 1, 22–4), corruption remains endemic at the District Court level as a key influence on sentencing decision-making in cases involving wealthy and powerful defendants (International Federation for Human Rights et al. 2011: 34). Although, as two non-judicial interviewees made clear, there are certainly competent and impartial judges adjudicating on the District Courts,[45] it is telling that Butt (this volume) has labelled pervasive corruption as the most

[41] See also Bourchier (1999: 238) on *Mahkehja*, combining representatives from the Supreme Court, Ministry of Justice and Attorney General's Office.

[42] The Code of Code of Ethics and Code of Conduct for Judges (2006) permits judges to maintain a 'reasonable relationship' with executive and legislative institutions so long as this does not affect current or pending cases before the courts.

[43] See also Interview with Legal NGO Staff, 9 May 2018.

[44] See also Interview with Legal NGO Staff #4, 15 May 2018.

[45] Interview with Legal NGO Staff #2, 11 May 2018; Interview with Legal NGO Staff #4, 15 May 2018. See also Pompe (2005: 414) and Butt (2012: 22–3).

identifiable feature of Indonesian legal culture within the court system. Several non-judicial interviewees blamed judicial corruption in the District Courts on the relatively low salaries of judges,[46] who are still paid modestly as civil servants, despite their purportedly elevated social status (Lev 1978: 65; Bedner 2001: 234). Mirroring Lev's observations during the Suharto era, it remains the case that 'under-the-table money – so common that it is often above the table – has become a standard procedural stratagem, as it were, in both civil and criminal cases' (Lev 1999: 186).

Cultural Influences on Sentencing Practice

On the whole, judicial interviewees were less receptive to questions in this category, possibly because they wished to avoid any perception of bias in favour of defendants of a certain religion, ethnic group, provincial origin, or political ideology. This kind of result is not unique in studies of judicial behaviour (Renteln 1998: 236). In sentencing offenders, most judges interviewed merely affirmed their close reliance on the relevant legislation, and on relevant aggravating and mitigating factors.[47] Nonetheless, judges are human beings, and not judicial robots. Even if they may not be able to recognise it themselves, or may not wish to, background cultural factors undoubtedly influence their decision-making when it comes to the severity of punishment (Freiberg et al. 1996: 237–41).[48] Indeed, one staff member of a legal defence NGO stated that his organisation takes into account particular judges' educational background, religion, previous academic writings and judicial training in developing an advocacy strategy.[49] A minority of judicial (and a majority of non-judicial) interviewees were able to explore the role of culture beyond the archetypal 'corporate' answer – namely, that no cultural factors whatsoever influence criminal verdicts or sentencing.[50] Below, I outline several common responses.

More than one respondent from outside the judiciary mentioned blasphemy cases[51] as a limited example where the *religion* of the judge would

[46] Interview with Defence Advocate, 3 May 2018; Interview with Legal NGO Staff #6, 21 May 2018. See also Butt (2012: 24).
[47] Interview with District Court Judge, 8 May 2018; Interview with District Court Judge, 11 May 2018; Interview with District Court Judge, 14 May 2018; Interview with District Court Judge #2, 8 May 2018.
[48] See also Interview with District Court Judge, 23 May 2018.
[49] Interview with Legal NGO Staff #2, 11 May 2018.
[50] See note 13, above.
[51] Criminal Code, art. 156(a); Presidential Decree No 1/PNPS/1965.

affect sentencing outcomes,[52] despite Indonesia's nominally secular criminal justice system.[53] Two judges also mentioned public drunkenness offences in this context,[54] which, anecdotally, Christian judges tend to treat more leniently, for example, in parts of eastern Indonesia and in North Sumatra province.[55] One interviewee stated that religion had a greater bearing on sentencing deliberations since the fall of Suharto;[56] however, that interviewee may have merely been referring to the dramatic increase in blasphemy cases brought by prosecutors during the *reformasi* era (Crouch 2014).

A second example of religious impact on sentencing decision-making is the perception that Muslim judges were more likely to issue death sentences, and were more ideologically comfortable in doing so than were judges of other faiths.[57] Although this makes theoretical sense given Islamic Law's provision for the death penalty for particular *qisas, tazir* and *hudud* crimes (El-Awa 1982), the general proposition that Muslim judges in Indonesia issue proportionally more death sentences than do judges of other faiths requires more detailed empirical verification. By contrast, in non-capital punishment cases, interviewees did not view Muslim judges as any more punitive than judges of Indonesia's minority faiths.[58] They might even be *less* punitive, due to the prominent role of forgiveness in the Islamic religion.[59] Some judges stated that although they and their colleagues cite verses from the Qur'an, Buddhist canon, or from the Bible in their judgements in criminal cases, the verses are mainly included for illustrative purposes, after the fact, rather than constituting evidence of religion influencing the reasoning process.[60]

> *Nope. I hate politics and politician[s].*
>
> Interview with District Court Judge, 20 May 2018, denying that he ever talks about politics with his colleagues on the bench.

[52] Interview with Defence Advocate, 3 May 2018; Interview with Legal NGO Staff, 9 May 2018; Interview with Legal NGO Staff #6, 21 May 2018.
[53] Excluding Aceh. See Salim (2015: 80–2) and Elmont (2017) on Islamic Law in Aceh.
[54] Criminal Code, art. 492, 536.
[55] Interview with District Court Judge, 8 May 2018; Interview with District Court Judge, 17 May 2018.
[56] Interview with Defence Advocate, 3 May 2018. See also Lindsey and Santosa (2008: 8).
[57] Interview with Defence Advocate, 3 May 2018; Interview with Legal NGO Staff, 9 May 2018. See also Joint Standing Committee on Foreign Affairs, Defence and Trade (2016: 71).
[58] Interview with Defence Advocate, 3 May 2018; Interview with District Court Judge #2, 17 May 2018.
[59] Interview with District Court Judge #2, 17 May 2018. See generally Moucarry (2004).
[60] Interview with District Court Judge, 8 May 2018; Interview with District Court Judge #2, 17 May 2018.

Interviewees, both from inside and outside the judiciary, were also sceptical as to whether judges' personal political opinions affected the sentencing process. One hypothesis holds that the more politically conservative the judge, the heavier the average punishment administered, all else being equal (Clancy et al. 1981: 552). However, judges are not permitted to be members of political parties in Indonesia or to openly declare their support for a political party,[61] and in most cases, do not hold strong political opinions anyway.[62] One exception may be for treason (*makar*)[63] committed by separatists, with more politically conservative judges favouring heavier penalties for what is seen as a serious crime against the state.[64] Blasphemy may be another exception,[65] although there the relevant cultural influence on punishment would be better characterised as religious adherence, as above, rather than political ideology.

However, this is not to say that judges are immune from political developments at the national level, or indeed from public opinion. One judge openly acknowledged taking into account statements by then-President Susilo Bambang Yudhoyono in his decision-making on punishment.[66] Several defence advocates and human rights lawyers accused District Court judges of being directly beholden to popular opinion in passing verdicts and sentences in narcotics and corruption cases – crimes that are heavily politicised in modern Indonesia. Defendants accused of these crimes are arguably 'sentenced in the court of public opinion' before their trials even commence, leaving judges with only one option: conviction, followed by severe punishment.[67] Nevertheless,

[61] Code of Ethics and Code of Conduct for Judges, 2006; Law 48/2009, art. 5(3).

[62] Interview with District Court Judge, 23 May 2018; Interview with District Court judge, 20 May 2018; Interview with Defence Advocate, 3 May 2018.

[63] Criminal Code, art. 104, 106, 107.

[64] Interview with Legal NGO Staff, 9 May 2018.

[65] See notes 51 and 52 and the associated text, above. One judge observed that if the decision has the potential to cause widespread public dissatisfaction, such as with a blasphemy case, then the *Ketua Pengadilan* will provide appropriate guidance to the judicial panel (Interview with District Court Judge, 23 May 2018).

[66] Interview with District Court Judge #2, 17 May 2018.

[67] Interview with Legal NGO Staff #2, 11 May 2018; Interview with Defence Advocate #2, 15 May 2018; Interview with Legal NGO Staff #3, 15 May 2018. Butt (this volume) argues that an informal 'presumption of guilt' for corruption cases applies more so to cases brought in the Special Courts for Corruption Crimes (initially based within the Central Jakarta District Court), rather than for corruption cases brought within the regular District Court process. Statistics support this contention: from its founding in 2004, through to 2009, the Special Court for Corruption crimes in Jakarta maintained a barely believable 100 per cent conviction rate over approximately 250 cases. Regional Anti-Corruption Courts have recently

respondents perceived this form of judicial bias to be greater within the outer island provinces, as opposed to Jakarta.[68]

> *[T]he community is reliant on us, especially the victims . . . We feel the responsibility to keep their trust[.]*
>
> Interview with District Court Judge, 8 May 2018, outlining a heavy judicial responsibility to the community in criminal cases.

> *[Serving as a] judge is a noble job. The judge establishes himself as a public figure not to gain respect but to maintain authority.*
>
> Interview with District Court Judge, 23 May 2018, on judicial motivations.

Are trial judges equivalent to village-level patrimonial leaders of their communities – or, in Bahasa Indonesian, *tokoh-tokoh masyarakat*? Surprisingly, interviewees' reaction to this question was strongly negative.[69] Functionally speaking, *tokoh-tokoh masyarakat* and the District Court judges under study here do share certain similarities. For example, one courtroom observer noted that judges frequently provided moral exhortations to unrepresented defendants, defendants in traffic violation cases and defendants younger than themselves.[70] One judge, although he denied he behaved as a patrimonial community leader as Lev has suggested, nonetheless saw the judiciary's role as one of multifaceted supervision in the community: mediating between aggrieved parties, and bringing police, lawyers and prosecutors together to solve local law enforcement problems.[71] This judge also described how members of the public often approach him out of court to 'ask for a way out of their problem[s]', which involve a mix of legal and non-legal issues.[72] Judges' own perceived prominence in the community even belies their relatively low government salary, compared with the better-remunerated defence advocates.[73]

maintained a conviction rate at 81 per cent (Butt & Schutte 2014: 607, 611). By contrast, around 50 per cent of corruption defendants were acquitted across Indonesia before the Special Courts were established (Dick & Butt 2013: 18).

[68] Interview with Defence Advocate #2, 15 May 2018; Interview with Legal NGO Staff #3, 15 May 2018. See note 82 and the associated text, below.

[69] Interview with District Court Judge, 21 May 2018; Interview with District Court Judge, 11 May 2018; Interview with District Court judge, 20 May 2018; Interview with Legal NGO Staff #3, 15 May 2018; Interview with Legal NGO Staff #6, 21 May 2018.

[70] Interview with Legal NGO Staff #3, 15 May 2018.

[71] See also notes 41–2 and associated text, above.

[72] Interview with District Court judge, 20 May 2018.

[73] Interview with District Court Judge, 23 May 2018; Interview with Defence Advocate, 3 May 2018. However, other interviewees argued that the general public's view of judges at all levels is severely compromised by perceptions of corruption (Interview with Legal NGO Staff, 9 May 2018; Interview with Legal NGO Staff #6, 21 May 2018).

Based on such anecdotal evidence at least, greater Jakarta District Court judges do seem to exert moral authority both within and outside of the courtroom. Even though they may not identify directly with *tokoh-tokoh masyarakat*, in essence, greater Jakarta District Court judges still see themselves as community leaders, although the 'patrimonial' analogy may be taking things too far.

Regional and International Dimensions

> *I think every case has [a] unique pattern and story . . . there will be [a] difference between one case to another case, moreover [differences between] courts.*
> Interview with District Court Judge, 20 May 2018, claiming indifference to sentencing disparity between courts.

> *Wherever a judge goes, he must learn the local customs.*
> Interview with District Court Judge #2, 17 May 2018.

In his own work, Lev did not come to a firm conclusion on judicial attitudes towards disparity of punishment across the Indonesian archipelago. Sentencing disparity between District Courts certainly exists (United Nations Asia and Far East Institute 2002: 14; Ministry of Law and Human Rights, n.d.) and has been recently catalogued in acute detail by the Indonesian Judicial Commission (Komisi Yudisial Republik Indonesia 2014). For some non-judicial interviewees, any sentencing disparity at all reflects poorly on the District Courts' performance.[74]

Most judicial interviewees, on the other hand, did not find disparity in punishment between courts such a major problem. After all, every case is unique, and regional cultural factors tend to influence sentencing.[75] One judge gave the example of the theft of a water buffalo (*kerbau*) in a rural area of South Sulawesi. As a vital and expensive part of villagers' livelihood, the punishment for stealing the animal would be greater in a regional District Court than it would be in a Javanese court.[76] A second judge

[74] Interview with Legal NGO Staff, 9 May 2018; Interview with Legal NGO Staff #3, 15 May 2018; Interview with Legal NGO Staff #4, 15 May 2018. See also *Hukum Online* (2013).

[75] Interview with District Court Judge, 20 May 2018; Interview with District Court Judge, 11 May 2018; Interview with District Court Judge, 14 May 2018; Interview with District Court Judge #2, 17 May 2018.

[76] Interview with District Court Judge, 17 May 2018. A second judge from the same court provided a similar example regarding chickens stolen in Ambon (where meat is rare) compared with the equivalent situation in Jakarta (Interview with District Court Judge #2, 17 May 2018).

observed that in a murder case involving *carok* (a Maduranese fighting tradition exercised for self-esteem and pride), a Maduranese Judge would pass a much lighter sentence than a judge in Jakarta.[77] A third judge gave the example of different regional crime rates justifying sentences of differing severity.[78] Non-judicial interviewees perceived heavier sentences for equivalent drug crimes in Tangerang, where Jakarta's international airport is located;[79] heavier sentences for terrorism in West Jakarta, reportedly home to a network of terror cells; and lighter sentences for white-collar crimes in South Jakarta, due to the pervasive influence of corruption within the local court serving Jakarta's business district.[80]

It is difficult, however, to study sentencing disparity on a truly empirical basis, isolating the trial venue as an independent variable contributing to sentencing outcomes. For example, are proportionally more death sentences passed in the Tangerang District Court because more defendants are arrested for drug trafficking there, and Tangerang drug cases evince numerous aggravating factors (such as recidivism, foreign nationality, or trafficking over international borders), or are the judges serving on the Court simply more punitive? Would the equivalent caseload be treated the same way in the Central Jakarta District Court? Of all the Jakarta courts, the Central Jakarta District Court (which Lev (2011: 372) labelled 'the most important district court of the land') was perceived by non-judicial interviewees to be the most fair and consistent in its rulings for defendants, as a result of greater judicial experience and a higher number of journalists to report on irregularities and corruption scandals.[81] Interviewees also perceived Jakarta District Courts, in general, to issue decisions of greater quality than courts in the outer islands.[82]

As to whether judges saw themselves as serving the local community, the city of Jakarta, the island of Java, or Indonesia more broadly, there

[77] Interview with District Court Judge, 8 May 2018.
[78] Interview with District Court Judge, 11 May 2018.
[79] Interview with Legal NGO Staff, 9 May 2018; Interview with Legal NGO Staff #5, 16 May 2018.
[80] Interview with Legal NGO Staff, 9 May 2018; Interview with Legal NGO Staff #4, 15 May 2018.
[81] Ibid. Contrast Lev's (2011: 373) account of corruption in the Central Jakarta District Court, during the Suharto period.
[82] Interview with Legal NGO Staff #3, 15 May 2018; Interview with District Court Judge, 8 May 2018. See also ASEAN Law Association (2005: 53) and Pompe (2005: 449).

were a mixture of views, as with Lev's earlier characterisation. Here, interviewees' responses often varied based on the type of offence. Narcotics was seen as a national or even an international problem.[83] In sentencing corruption cases, judges were also performing a service to the nation as a whole, rather than their immediate jurisdiction.[84] Terrorism cases also involved both a national and an international dimension.[85] The pattern is clear: with murder the notable exception, the crimes with the heaviest maximum penalties (death or life imprisonment) are typically seen as a national or international problem requiring diligence by local judges on the 'front lines' in Jakarta.[86] Crimes of lesser seriousness, such as theft, are perceived by Jakartan judges as more of a local concern.[87]

Not one respondent believed that his or her judicial influence simply disappeared at the borders of the court's jurisdiction (for example, the municipality of East Jakarta or West Jakarta), given the fluid movement of people and commerce within Indonesia's sprawling capital city of close to 10 million people. Moreover, judges in the Jakarta District Courts tended to have a much broader national outlook, given their typically lengthy work experience in outer island courts earlier in their careers, their eclectic ethnic background, and, of course, their present service within Indonesia's capital city. Nevertheless, other than for exceptional crimes perceived as a national or international problem (as above), the judicial panel's focus was typically on the offender him or herself, when considering punishment in the name of specific deterrence, incapacitation, rehabilitation and retribution.[88]

By contrast, several interviewees viewed judges *outside of* Jakarta as more concerned with their immediate geographical communities in

[83] Interview with District Court Judge, 14 May 2018; Interview with Legal NGO Staff #2, 11 May 2018; Interview with District Court Judge, 21 May 2018; Interview with District Court Judge, 11 May 2018.

[84] Interview with District Court Judge, 8 May 2018; Interview with District Court Judge #2, 21 May 2018.

[85] Interview with Legal NGO Staff #4, 15 May 2018; Topsfield and Rompies (2016).

[86] The judicial interviewees did not discuss the more rarely prosecuted death-eligible offences such as treason, piracy resulting in death, robbery resulting in death, possession and misuse of firearms or explosives, criminal acts aboard aircraft, human rights violations and child rape (Cornell Center on the Death Penalty Worldwide, 2018; *BBC News*, 2016).

[87] Interview with District Court Judge #2, 8 May 2018; Interview with District Court Judge, 21 May 2018.

[88] Interview with District Court Judge, 14 May 2018; Interview with District Court Judge, 8 May 2018; Interview with District Court Judge, 17 May 2018; Interview with District Court Judge #2, 17 May 2018.

sentencing offenders, given Jakarta's status as Indonesia's foremost cultural and ethnic melting pot, compared with other provinces' more homogenous cultures.[89] One interviewee who had served on courts in the outer islands pointed to the Law on Judicial Power,[90] and interpreted the need to apply 'legal values and a sense of justice living in society' as referring to the legal values of his local community, rather than of Indonesian society as a whole.[91]

One area that future research might address, in addition to further empirical study on sentencing disparity in the District Courts across the country, is differing perceptions of the judicial role in criminal cases within Jakarta and Java, as compared with Indonesia's outer island provinces. Certainly, the results of this study suggest an initial hypothesis that serious crimes taking place in Jakarta are seen by Jakarta District Court judges (and perhaps also by the Jakartan public) as a major concern for all of Indonesia. However, the same may not be true in District Courts within Indonesia's outer islands. Aggrandising social and criminal ills on the national stage is a tactic often employed by Indonesian politicians (Aspinall 2016: 78). Might Jakarta District Court judges also have bought into this rhetoric?

Discussion: Vindicating Lev?

Based on the interview data presented above, does Daniel S. Lev's characterisation of Indonesian legal culture during the early Suharto period still hold relevance today, at least when reassessed in relation to criminal cases within the District Courts? Again, there are caveats concerning measurement and sampling to be borne in mind. The interviews conducted as part of this study reveal a series of opinions and practices on the part of District Court judges in greater Jakarta. As described earlier, this is only one possible means of measuring 'internal' legal culture. Moreover, the available sample (twelve different judges plus eight further experts and outside observers) may or may not be representative of all District Court judges in Jakarta and may or may not be representative of all judges in more than 350 District Courts in other parts of Indonesia.

[89] Interview with Legal NGO Staff #4, 15 May 2018; Interview with Legal NGO Staff #3, 15 May 2018; Interview with District Court Judge, 11 May 2018.
[90] Law 48/2009, art. 5(1).
[91] Interview with District Court Judge, 20 May 2018. See Yulianti & Ikhwan (2017) for a paper interpreting this provision of the Law on Judicial Power.

The critique of Lev's work outlined below may therefore derive from a reasonably narrow case study, but it also contributes to the theoretical debate over the legacy of Lev's work for *all* contemporary Indonesian District Courts.

There are six main trends evident from the interviews conducted. First, extra-legal factors are still clearly relevant to judicial decision-making on criminal punishment, as in Lev's conception of Indonesian legal culture. With democratisation in the *reformasi* era, *corruption* may have surpassed nepotism and favouritism to the military as a means of doing judicial business (Butt & Parsons 2014: 58–9), but the deleterious impact on the reputation of the District Courts remains the same. As for Lev's emphasis on conciliation and compromise between opposing parties, this may hold true for civil matters, given compulsory mediation by law,[92] and a continuing preference for settlement outside the courtroom (Juwana 2014: 335–6), but for criminal matters the only compromises evident were those made behind closed doors between judges, during the *musyawarah* session. Whatever influence the parties bear on sentencing outcomes is achieved by presenting their evidence and arguments before the court, rather than through direct negotiation.

If anything, the interview data presented here suggests that Lev's theory of negotiation and consensual deliberation as means of resolving legal disputes ought also to be bolstered by emphasis on the influence of *seniority* in Indonesian, and particularly Javanese, culture (e.g. Uhlenbeck 1978: 333; Fitzpatrick 2008: 503, 509). More generally, the results of this study query whether, in the Indonesian context, preference for consensual deliberation in resolving disputes merely serves to entrench existing power structures (here, the authority of the Chair of the Judicial Panel (*Ketua Majelis*), or the Chair of the Court (*Ketua Pengadilan Negeri*)), rather than helping to create a blank slate upon which less powerful actors can shape decisions.[93]

Second, consistent with Lev's writings, greater Jakarta District Court judges still tend to presumptively side with prosecutors over defence lawyers, whether due to their comity as fellow civil servants, long-established institutional links (such as the *Mahkumjakpol*), a desire to avoid prosecutorial appeals, or indeed as a means of soliciting bribes from defendants seeking a favourable outcome. This calls into question

[92] E.g. Law 48/2009, art. 58, 60; Supreme Court Circular Letter 1/2002.

[93] Several non-Indonesian scholars have previously noted the shortcomings of consensual deliberation as a method of decision-making, observing that it tends to entrench existing power structures. See Knierbein and Hou (2017: 234), Osei-Kufour (2010: 56) and Rigon (2015).

the effectiveness of the separation of the judiciary from the executive branch after 1998 (Assegaf 2007: 12–13; Juwana 2014: 304–5, 319–20). Although higher-level Indonesian courts are increasingly willing to find against the government in civil cases (Butt & Lindsey 2012: 104; Assegaf 2018a), are District Court judges really neutral arbiters within criminal litigation? Alternatively, is the problem of partiality merely limited to 'extraordinary' crimes considered a threat to the entire nation or the dominant religious grouping – currently narcotics, corruption, terrorism and blasphemy? Pursuant to the 'one roof' administrative system established under the Supreme Court in the *reformasi* era (Assegaf 2007: 12–14), members of the political executive no longer instruct judges to pursue particular policy objectives in their decisions.[94] However, in a system that has long espoused the presumption of innocence for defendants,[95] any conscious or unconscious favouritism towards the prosecution side remains a threat to fair and just decision-making in criminal cases.

Third, both the District Court judges and the non-judicial actors interviewed largely rejected politics as an internalised influence on decision-making in criminal cases, and even as a personal interest of judges. This is a notable divergence from Lev's writings centring on the late Sukarno and early Suharto periods, as well as the accompanying literature covering the same period (Pompe 2005: 36, 111, 411; Lindsey & Santosa 2008: 10). Illuminating is the quote from one judge, provided above, who stated bluntly that 'I hate politics and politician[s]'. While other interviewees were not as forthright, the interview responses revealed a distinct political apathy from District Court judges, who instead perceived themselves as civil servants, performing an apolitical job for the benefit of all citizens, and to provide for their own families.

What explains this observed difference from Lev's writings? One possibility might be that, unlike the Guided Democracy and New Order eras, there are now many opportunities for political participation for young professionals in Indonesia, and hence those who voluntarily embark on a judicial career after completing their university education do so with a politically neutral civil service mentality.[96] Similarly, during Guided Democracy and the early New Order, Indonesian judges' political organisation and awareness was a historically contingent effort to

[94] Interview with District Court Judge #2, 17 May 2018; Interview with District Court Judge, 21 May 2018; Interview with Legal NGO Staff, 9 May 2018.

[95] Law 19/1964, art. 4(2); Law 14/1970, art. 6(2); Law 8/1981, elucidation; Law 48/2009, art. 8(1); Code of Ethics and Code of Conduct for Judges, 2006.

[96] See further Lev (1976: 162).

push back against an increasingly authoritarian political establishment (Bedner 2001: 21–2). As Pompe (2005: 411) has observed:

> [T]he political struggle of the judiciary in the 1950s contributed to a growing political awareness within the profession, as the judges changed from a politically atomized group of individuals to one that was much more cohesive. In addition, they moved from political innocence to a kind of maturity marked by broad agreement on the fundamental political goals to be achieved.

Another possibility is that Lev's position on politics implicitly influencing the courts remains vindicated today, albeit that political campaigns against certain crimes *unconsciously* influence judicial decisions on punishment. Nevertheless, the judges themselves do not recognise the implicit influence of national politics on their decision-making. Further empirical scholarship might explore the relationship between the prominence of certain crimes within the Indonesian political agenda and mass media coverage (see Tapsell, this volume), and the punishments accorded to those crimes at the trial level or on appeal.

Fourth, the interview responses on religious consciousness among judges also demonstrate divergence from Lev's writings. On the whole, the interviews suggested that District Court judges felt no need to distance their religious belief from their duties on the secular courts. Several examples were cited. Unlike with political parties, Indonesian judges are entitled to, and do, become members of Islamic non-governmental organisations such as *Muhammadiyah* or *Nahdlatul Ulama*.[97] There were instances of Muslim judges citing passages from the Qur'an or the Sunnah in their own judgements for illustrative purposes, and even an example of a Christian judge doing likewise. Interviewees also observed Muslim judges citing Christian or Buddhist texts to illustrate their reasoning.[98] Furthermore, although judges can only ever be responsive to prosecutorial trends, with the increasing prevalence of death-eligible cases (McRae 2012: 5–6: Pascoe 2019 : 160, 164–166) and blasphemy cases (mostly for blaspheming Islam) (Crouch 2012a, 2014) in post-Suharto Indonesia, District Court judges' religiosity arguably plays a growing role in criminal sentencing, even within Indonesia's secular criminal justice system. Within death penalty cases

[97] Interview with District Court Judge, 14 May 2018; Code of Ethics and Code of Conduct for Judges (2006).

[98] Interview with District Court Judge, 8 May 2018; Interview with District Court Judge #2, 17 May 2018; Interview with Legal NGO Staff #6, 21 May 2018.

and blasphemy cases, judges' overt religiosity might even have overtaken Lev's idea of the patrimonial village leader, to serve as the sentencing judges' foremost source of moral authority in pronouncing punishment. In cases such as these, no longer are District Court judges merely acting as community leaders or as bureaucratic functionaries, but instead they are religious arbiters of morality, thereby revisiting the age-old debate over Islam's potential role within Indonesia's criminal justice system (Hooker 2008: 265; Emont 2017). Indeed, if the proposed unlawful sexual intercourse (*zina*) and premarital cohabitation provisions are passed in the Revised Criminal Code (*Rancangan Kitab Undang-Undang Hukum Pidana* – RKUHP) during the next few years,[99] this trend will accelerate even further.

Fifth and further to the previous point, beyond cases where judges' moral authority to punish derives from religious belief, greater Jakarta District Court judges do appear to hold positions of patrimonial leadership in the communities in which they serve, by virtue of their status as legal arbiters. Judges tend to perceive themselves in this way, although for the public their moral leadership is also tainted by frequent allegations of corruption.[100] It remains a puzzle why judicial interviewees' responses in comparison with village-level *tokoh-tokoh masyarakat* were so negative. There are several plausible explanations. These include the *tokoh masyarakat*'s relatively informal role and separation from state institutions, judges' wider geographical sphere of responsibility beyond the village level, that judicial decision-making is not carried out unaided (as with a *tokoh masyarakat*) but in teams in three or five,[101] or perhaps due to the historically negative connotations of corruption, and political or military partiality associated with patrimonial village leaders (Kammen & Chandra 2010: 85; Antlov 2013: 82; Welker 2014: 78). Nevertheless, as described earlier, on a purely functional level, Lev's original equating of judges with *tokoh-tokoh masyarakat* appears to remain vindicated.

Sixth and finally, as in the Sukarno and early Suharto periods, judges still appear divided over whether their role involves tendering justice for local, provincial, or national needs and audiences. The continuity of this finding may be a result of Indonesia's unique geography, the age-old political debate over centralisation versus autonomy, the ethnic diversity

[99] See Institute for Criminal Justice Reform (2018) and Eddyono (2016).
[100] See note 73, above.
[101] Early in Lev's academic career, District Court trials were usually heard by a single judge only, potentially informing his characterisation of judges as patrimonial figures (Lev 2000d: 172 n20).

of the judges themselves, or their career trajectory, which involves frequent moves between different provinces before arriving at Jakarta's 'Class 1A' courts.[102] Lev also suggested in his work that judges in the Sukarno and early Suharto periods felt pressure to decide cases in a certain manner to please foreign audiences (Lev 1962: 210; Lev 2000d: 211). Indonesia was a far newer and less institutionally confident country back then. I found no evidence of that kind of thinking in the greater Jakarta District Courts today.

Recent innovations, such as the twenty-four-hour news cycle, instant communication across the archipelago and most importantly the rise of populist democratic politics, have elevated particular crimes (namely narcotics, corruption and terrorism) to the status of perceived national emergencies. These offences are now seen to require national coordination by police, prosecutors and the Supreme Court, and consistency of harsh punishment across provincial borders. At first glance, these developments, as reflected in the interview responses from various District Court Judges and observers, appear unique to the *reformasi* era. However, upon closer inspection, they accord closely with Lev's conception of politics affecting the operation of Indonesia's courts during the Sukarno and Suharto eras. In assessing political and judicial attitudes towards serious crimes, Indonesia-watchers will also note the echoes of the 'moral panic' over communist subversion (Wee 2012: 24–6), which was an important self-justifying feature of the Suharto military regime. In this sense, the more things change, the more they stay the same.

Conclusion

'Internal' legal culture, as a set of repeated practices, beliefs and behaviours on the part of legal professionals (Merry 2010: 43), is arguably more important in analysing civil law systems, where case law precedent is not as important in resolving legal disputes in the courts, as compared with common law systems. Legal culture is also important in transitional and developing societies with less of a tradition for formal 'legality' restricting judicial and prosecutorial behaviour in the criminal process. Indonesia falls into both categories, as a society where informal practices appear to govern judicial outcomes as much as the positive law does.

This case study has helped to reaffirm the importance of Daniel S. Lev's seminal work on legal culture in Indonesia, at least as it pertains to the

[102] See note 31, above.

District Courts of greater Jakarta in criminal cases. Only relatively minor updates to Lev's conception of Indonesian legal culture are required in light of contemporary judicial behaviour in the District Courts of greater Jakarta. Overall, this is surprising, given the seismic political and societal changes brought about by *reformasi* after 1998 (Arinanto 2018), and the academic literature that suggests more rapid changes to legal culture during periods of democratisation (Morn & Toro 1990; Bergoglio 2003; 54–5; Faivovich 2003: 130–1). While this may be good news for Lev's academic legacy, it is not so good for Indonesia's criminal justice system as a whole. With significant democratic progress in the twenty years since 1998, that Indonesia's judicial culture as an authoritarian state throughout the Guided Democracy and New Order periods still remains recognisable today is troubling for law reformers. It is an indication that legal culture, much like the broader societal culture on which it often depends (Nelken 1995: 438; Faivovich 2003: 111), changes only very slowly, if at all.

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