INTRODUCTION

I. *A jurist at the turn of the tide of Dutch colonial policy*

When Cornelis van Vollenhoven, newly appointed as Professor of Constitutional and Administrative Law of the Dutch Overseas Territories and of the Adat Law of the Dutch East Indies, gave his inaugural lecture on 2 October 1901, his proposed 'exact jurisprudence' had yet to meet the crucial test of the legal problems created by a changing colonial policy. Rule by a mercantile company, the United East Indies Company, had been followed by metropolitan rule by the Dutch government, the main objective of which was to exploit the East Indies through agrarian production for the European market (coffee, tea, indigo, rubber and so on) and development of mineral resources (chiefly tin), an exploitation which was successively carried out through state enterprises, compulsory cultivation by Indonesians, and large private plantations. Now, after long and heated debate both in and outside the Dutch parliament, a fresh principle of administrative policy was proclaimed: that of moral responsibility.

In September 1901, Abraham Kuyper's newly-formed confessional Ministry made the following pledge:

> 'As a Christian State, Holland is obliged to suffuse its entire policy with a conviction of moral responsibility to the peoples of these territories, and in particular to improve the legal position of native Christians and to give more tangible support to the Christian Missions.'

Formulated as a Christian obligation this course of action would later be broadened as part of the 'ethical policy'. It resulted in emancipatory measures, decentralization and incipient democratization of colonial government, though not without engendering opposition from within and without the political arena, and always in the face of a rapidly growing nationalist movement.

In the complex 'Indonesian' society of that time, with eastern and western peoples coexisting but sharply divided by differences in civic

status, there were many economic and cultural conflicts which raised specific problems about the law applicable to each group. Van Vollenhoven did not take refuge from this maelstrom in an ivory tower of scholarship, but threw his personal life and scientific work unreservedly into furthering what he saw as a prerequisite of justice: a respect for and the recognition and where possible the promotion of the indigenous law of the Indonesians, their adat law.

Moreover, on many occasions, he persuasively pleaded in international circles for respect for the law of the peoples of the colonial territories — India, the East Indies, Indo-China, the Philippines and Madagascar. An example was his address to the *Institut Colonial International* in Paris in 1921 on 'La Politique Coloniale par rapport aux us et coutumes indigènes', which ended with these words:

> "Si, dans le sens de ces conclusions, le devoir m'incombait d'indiquer la direction du droit futur de l'Empire de l'Inde, des Indes néerlandaises, de l'Indo-Chine française, des Philippines ou de Madagascar, l'étude de la coutume m'ayant appris à connaître sa valeur et à l'aimer, la tâche serait lourde, mais attrayante et sublime. Quand je connaîtrais tous les codes du monde, quand j'aurais toute sorte de science juridique, — si je n'ai pas ce respect et cet amour de la coutume orientale, je ne suis rien" (I Corinthiens, XIII, 2).[1]

Van Vollenhoven's dedication to Indonesian adat law — which he saw as a 'law clan' (1920) [2] extending beyond the law of the Indonesians of the Dutch East Indies to that of the Malayo-Polynesian peoples of Formosa, the Philippines, Malacca, Indo-China and Madagascar — was no accident, as the following quotation from the Encyclopaedia of the Dutch East Indies shows (VII (1935):1389-90):

'His work for the Indies was not the unintended consequence of a chance inclination; it was inseparable from his philosophy of life and sustained religious faith. His premise was the *societas humana* of Grotius, the unity of the human species ... as proclaimed in the New Testament ..., with every people having its own value and significance, and every human gift and talent the right to develop its own variety. He never tired of preaching that the oriental colonial peoples ... were entitled to our cordial support in their search for self-expression; that westerners had an ethical mission to fulfil, a moral responsibility ..., and had no right to impose their own laws, institutions and ideas. On the contrary, (they) should seek to know and understand the living genius of oriental peoples, and develop it in co-operation with

them, so that they would become aware of it and responsible for it. Grotius' ideal of the unity of nations in a world protected by law was adopted by Van Vollenhoven in his student days, and he never relinquished it.'

Thus when the Minister for the Colonies introduced a bill in the Dutch parliament in 1904 which aimed at unifying the law for *all* inhabitants of Indonesia (Indonesians, Europeans and 'foreign orientals') on the basis of the codified law of Holland, Van Vollenhoven began the battle for the proper recognition of adat law, wich he was to wage until his death in 1933.

Van Vollenhoven was born the youngest of four children on 8 May 1874 in Dordrecht, a town famous for the first meeting of the States-General in Holland in 1572. His father was president of the local District Court. His mother died before he was four, and he lost his taciturn father seven years later. The housekeeper tried to provide motherly care as best she could, and in his high school principal, S. J. Warren, he found a revered mentor.[3]

Perhaps the illustrious history of Dordrecht, for centuries the foremost Dutch town, first inspired in the young Van Vollenhoven his patriotism and interest in questions of right and might, and later stimulated him to think about the colonial and international role of the Netherlands.

In 1891 he began his studies at Leiden in law and oriental languages. It was a period of intense revival of Dutch literature. Inspired by English, French and Greek romantic poetry the so-called *Tachtigers*[4] made beauty the focus of art and life. Van Vollenhoven came under their influence: the melancholy poetess Hélène Swarth, the word-artist Lodewijk van Deyssel, the grand-seigneurial novelist Louis Couperus and the social pioneer Henriette van der Schalk. These literary influences must have contributed to the clear and pure language of his works, and to their characteristically literary form, which sometimes strikes us as stately or old-fashioned.

Among the many people who greatly influenced Van Vollenhoven's thinking, the three who, according to his biographer Henriette de Beaufort, were the most important were the orientalist Ernest Renan (1832-1892), with his studies on early Christianity and his arguments about a future in which religion must give way to science; the philosopher J. P. N. Land (1834-1897), who opened his eyes to the unity in the diversity of sciences and, in particular, in juridical thinking;[5] and

Christiaan Snouck Hurgronje (1857-1936), the expert on Islam and Aceh, and sometime government Adviser on Islamic affairs, who had much contact with Van Vollenhoven and influenced him especially on the subject of colonial policy.

On 13 May 1898 Van Vollenhoven obtained two doctorates: at 3 p.m. in political science; at 4 p.m. in jurisprudence.

After leaving the university, Van Vollenhoven first became private secretary to J. Th. Cremer, the former tobacco planter turned politician, and then a civil servant in the legal division of the Colonial Office. At the age of twenty-seven, (already deeply impressed by the article 'Een Eereschuld', by C. Th. van Deventer, in the influential *De Gids* (1899) on the subject of Holland's 'debt of honour' to the Indies) he was called to his chair at Leiden. His inaugural lecture (1901) on 'Exact Jurisprudence' [6] urged the need for a unified knowledge of positive law and the will gradually to achieve a synthesis ultimately leading to a world community.

Van Vollenhoven's academic career might be divided into two periods according to the work he pursued.[7]

During the first period, from 1901 tot 1918, he completed the first part of his great treatise on Indonesian adat law, *Het Adatrecht van Nederlandsch-Indië,* a vast effort which went hand in hand with his political struggle for the recognition of this law, which he presented as a well-ordered, coherent and self-generating whole.

The second period, from 1918 until his untimely death in 1933, saw his political success, and a deepening and widening of the study of adat law the results of which were set out in the second part of his *Adatrecht* (1931) and covered the adat law of 'foreign orientals' (Chinese, Arabs, Indians) in Indonesia, the religious elements of adat law, its maintenance, and its place in the legal system of the Dutch East Indies, past and present.

In 1933, on the initiative of some of his former students, a collection of his many papers on adat law and allied subjects was published as the complementary third volume of his *Adatrecht.* This volume excluded, however, the four longer studies: *Miskenningen van het Adatrecht* (Misconceptions of Adat Law) (1909), *Een Adatwetboekje voor heel Indië* (A Specimen Code of Indonesian Adat Law) (1910), *De Indonesiër en zijn Grond* (The Indonesian and his Land) (1919), and *De Ontdekking van het Adatrecht* (The Discovery of Adat Law) (1928).

He visited Indonesia only twice: in 1907, when he became convinced of the importance of the indigenous system of justice for the preservation and growth of adat law; and in 1932, shortly before his death.

The impression which Van Deventer made on Van Vollenhoven has already been mentioned. Born in Dordrecht, like Van Vollenhoven, Van Deventer obtained his Leiden doctorate with a thesis on the constitutional status of the Dutch colonies. Then he went to the East Indies, where he entered the government judicial service before setting up practice as a barrister at Semarang. He returned to Holland in 1897, where his *De Gids* article of 1899 made him a public figure.

His Indonesian evidence enabled him to expose more clearly than ever before — in opposition to unduly favourable reports on the colony — how morally indefensible the policy of the so-called *batige saldi* (net profits) really was. Although confirming what others had already said, Van Deventer's words struck home, because of his careful calculation that Holland had unjustly extracted a profit of 187 million guilders (excluding interest) from the Indies between 1867 and 1877. He cogently argued that restitution in social welfare had to be made if the Indies were to be saved from economic and social disaster.

He was the co-author of an equally revealing study on the economic situation of the people in Java and Madura, commissioned by the Minister for the Colonies and published in 1904. He became a Member of the Dutch Parliament, serving first in the Lower and then in the Upper Chamber. He revisited Indonesia, writing several more articles stressing the need for a policy in which not material gain but the welfare of the people should be paramount. Thus he initiated what became known as the 'ethical policy'. He died in 1915.

In a tribute written in 1926,[8] Van Vollenhoven admired Van Deventer's 'honest, warm and courageous search for beauty, his love of action and, much more important, his love of people and faith in mankind'. But this did not prevent him disagreeing with what Van Deventer 'advocated or initiated as the most enlightened form of statesmanship' in the field of adat law policy: that it should be largely unified and westernized.

The East Indies Company had left the autochthonous law of the Indonesians largely untouched, but by the end of the 19th century the idea was coming to the fore that Dutch civilizing influence must lead to westernization of the law. In 1904, Idenburg, the Minister for the

Colonies, introduced a bill which would make it possible to codify the substantive private law for *all* population groups in Indonesia on the basis of the Dutch Civil Code, though allowing for exceptions such as family and inheritance law for Moslems and some aspects of agrarian law.

Van Deventer supported this bill in his *De Gids* article of 1905 [9] on 'Law reform in the Indies', in which he quoted Macaulay: 'Uniformity when you can have it; diversity when you must have it, but in all cases certainty'. Although the 'intrinsic nature of things' might necessitate legal diversity, such diversity was in his opinion not desirable.

In the same year Van Vollenhoven published in *De XXste Eeuw* a sharp criticism of the bill, under the title 'No Lawyers' Law for the Indonesian'.[10] He characterized the goverment's aim — 'a general law for all'; a 'standard law, as far as possible in accord with the existing laws of Holland' — as 'lawyers' law', as Roman Law had been in relation to early Dutch law; a dominating European law under which all that was still indigenous law or a separate law of foreign orientals would be submerged. In a detailed argument he showed that the 'kaleidoscopic' Indonesian legal situation did not lend itself to such objectives. The Idenburg bill, considerably modified in favour of indigenous law through an amendment by Van Idsinga, was gazetted in 1906 but never put into operation. The struggle for adat law continued.

In 1909 Van Vollenhoven published his 'Misconceptions of Adat Law'. Under the biblical text, 'But mine own vineyard have I not kept',* he discussed the 'indigenous municipalities', their rights over virgin and cultivated land, the nature and systems of adat law, and the disputed adat law of Java. The essence of these misconceptions was that the courts assumed the non-existence of adat law where it did in fact exist, and used distinctions from western (Roman) law which were absent from adat law.

Again in 1919 he reacted sharply with 'The Indonesian and his land' to Pleyte's bill which aimed at introducing a western-style ownership to Indonesian land holdings. This fierce little publication contained a penetrating analysis of traditional land rights the nature of which had been the subject of considerable controversy. The heart of this controversy was whether, and how far, the village right of avail **

* Cf. Song of Solomon 1:6 (King James Version).

** For 'right of avail', see p. 278, Chapter IV, note 2.

extended to virgin land, a crucial issue in view of the possible granting of long-term leases for European plantations.

Pleyte's bill was withdrawn, but in 1919 a new amendment of section 75 of the Indies Constitution of 1854 came into force. It provided that western law would apply to Europeans; that parts of western law might be applied to Indonesians who otherwise, however, would remain subject to adat law 'insofar as it is not in conflict with generally recognized principles of fairness and justice'; and that individual Indonesians could submit voluntarily to the law for Europeans.

But the idea of unification was not abandoned. In 1923, Cowan's draft bill for a unified civil code for the Dutch East Indies was published in Batavia. Van Vollenhoven reacted with a polemical article on 'Ready-made Law' (1925).[11] His scathing attack on the ludicrously complicated form of the bill ended with the peroration:

> 'The plan has no connexion with any tried and tested system of government in the Indies; it fits into no acceptable or accepted framework. It derives from that barren age of dogmatic juristic intellectualism, when the only known dogmatic system was the Byzantine-Napoleonic, when rules had to be formulated for every contingency, and when it was seriously believed that a couple of gentlemen — one in Batavia and one in The Hague — could fabricate a living law merely by publishing something in the Government Gazette and telling the courts to apply it.'

In this connexion it will be useful to refer briefly to three other works by Van Vollenhoven. In 1922, together with some colleagues, he put forward a 'Specimen Constitution for the Dutch East Indies'. This had been commissioned by the government, but it was put aside by De Graaff, who had become Minister for the Colonies, because it went too far in granting colonial autonomy, and in aiming at the least possible government interference with adat law.

A posthumous volume on colonial constitutional law, *Staatsrecht Overzee* (1934), makes evident how aware Van Vollenhoven — who mainly worked from a study in Leiden — was of the intricacies and difficulties resulting from the confrontation of western and eastern legal conceptions of government, law and order, and justice.

In 1910, his specimen 'Adat Law Code' summarized in about a hundred articles the main rules and methods of adat law as it then operated. It did not pretend to formulate a synthesis of the great variety of adat law in the archipelago; it merely attempted to provide a useful basis for further study, especially for European-trained lawyers

who had to deal with adat law. Too little use has been made of it.

The little book on the 'Discovery of Adat Law' (1928) is a masterly historical essay on the growing knowledge of adat law and the principal workers in this field — except his own person.

On the last page of his 'Misconceptions' (1909) we find Van Vollenhoven's credo: 'Our objective is not to know adat law for the sake of juridical science, still less to impede Indonesia's development by fondly preserving adat-curiosa; our aim is to create, not on paper but in reality, good government and a good administration of justice, both of which are unthinkable without a thorough knowledge of indigenous law and indigenous conceptions.'

What influence did this eminent scholar and those inspired by him exert on Indonesian legal development in the last forty years of Dutch rule? The question has a bearing on Indonesia's policy as an independent state.

Van Vollenhoven himself saw the usefulness of piecemeal legislation concerning Indonesian private law,[12] and perhaps even — as appears from his specimen 'Adat Law Code' — of a very general codification. Yet the incorporation of adat law as an essential element in the wider and more complex legal order of an Indonesian constitution ran aground in the controversy over whether it should be assimilated to the western legal framework or be differentiated according to ethnic group. Only casual attention was given to a realistic appraisal of a possible synthesis of the two.

In the final pages of his *Adatrecht* (vol. II:878ff.) Van Vollenhoven argued that in the last resort neither Ministries and Departments in Holland and Indonesia, nor legal practitioners and scholars, but the Indonesian people in the villages held the fate of adat law in their hands. For some, this formulation begs the question. If the outside world impinges on village life — and this process was already well under way even in Van Vollenhoven's time — traditional adat law gives the people insufficient protection against exploitation. Indeed, as Van Vollenhoven said, the future of adat law depended upon its utilitarian value, its capacity for development and the resistance it could offer. So the question becomes: useful for what, development towards what, resistance to what?

It is a pity that I. A. Nederburgh's study, 'Chapters on Adat Law' (1933),[13] was published after Van Vollenhoven's death, for this was the first dispassionate discussion of the important question of whether

the course of development in the Indies did not impose a duty to refrain from artificially protecting Indonesian adat law. Nederburgh said (p. 126) with justification that the era of closed communities leading their own lives was almost everywhere a thing of the past, and that, though it was good to appreciate adat law, a balance needed to be struck.

Nederburgh had expressed the same idea much earlier in an article (1905) on an optional national law for Indonesia, an 'intermediate law' applicable to particular population groups (e.g., the Indonesian Christians and the Chinese) and in inter-cultural situations, a law to which others could voluntarily submit. Van Vollenhoven's response [14] was unenthusiastic: the plan offered no solution for the great majority of Indonesians, and it would first require thorough research into the existing adat law.

In the later study, however, Nederburgh started from the premise that western law was of a higher scientific and practical value than adat law (p. 88), and that in the nature of things adat law was bound gradually to be replaced largely by western regulations. He pointed out that Van Vollenhoven (*Adatrecht* I:39) had originally said the same thing, but that the 'highly esteemed author', by his love of adat law, often lost sight of his own pronouncements and took the real or imagined disparagement of adat law far too seriously (p. 89).

Van Vollenhoven's influential pupil Ter Haar replied (1933) to Nederburgh, completely rejecting his arguments: the book made a useful contribution neither to the literature of adat law nor to that of constitutional law; the interpretation of statute law was destructive and confusing; and the basic premises of the argument had not been clearly expounded.

Yet Nederburgh was pointing to developments which have become realities today.

This was a dialogue between people who are no longer alive. Their polemics seem now to have been too strongly governed by an exaggerated sense of opposition between two views: one that western law was 'higher' than adat law; the other blindly defending adat law. Surely this tended to obscure the real problem of the development of law. Without its social context, law would be a meaningless fabric of rules and commands. Its *value* can only be tested by relating it directly to the needs of a *particular* society, that is in relation to all factors which determine the choice of priorities in it.

Adat law was probably of the highest value for the small closed

Indonesian communities which still existed in Van Vollenhoven's time, but it became less appropriate as the structure of these communities was undermined by new developments which destroyed their economic self-sufficiency. With the change of priorities a new order was needed.

Legislative measures aimed at fostering a stronger organization or greater economic viability met with much opposition from Van Vollenhoven's side whenever they took too little account of adat.

Thus the Native Municipalities Ordinance for Java and Madura 1906, which aimed at clearly delineating internal government and the control of village finances, was regarded by Van Vollenhoven as too little based on the original *désa* institutions.[15] Reclamation ordinances aimed at preventing a deforestation dangerous to agriculture he considered to be insufficiently consonant with the community right of avail.[16] Finally the 1908 Ordinance on credit facilities, which provided for the encumbrance of land in cases of debt, thus avoiding the often onerous consequences of the adat way of handing over land in return for a loan, Van Vollenhoven thought to be a negation of everything adat law stood for (*Adatrecht* I:634). Nevertheless these and other measures, however poorly thought out and imperfect from an adat law point of view, did have many favourable effects. The mortgage credit facilities of the General Agrarian Bank, for example, saved many people from hopeless indebtedness.

Practice, moreover, teaches that there may be a fairly quick absorption of and readjustment to new law at the lower levels, and often a remarkable synthesis between old and new.

The reproaches against Nederburgh's prejudice in favour of western law were probably not unfounded. But his early proposal for the creation of an intermediate 'Indonesian national law' did not warrant Van Vollenhoven's initial dismissal of it as a mere 'embellishment' of the Government Gazette. Indeed, he was later (*Adatrecht* II:860) to call the proposals 'fresh and sound'.

No one knowing Van Vollenhoven's work would say that he had no understanding of the development that adat law would have to go through to contribute adequately to the Indonesian legal order, or that he had no appreciation of the fact that the closed society of small tribal villages or of diminutive self-governing states was vulnerable to relentless commercial influences from without. Yet it seems likely that he underestimated their rapid progress and overrated the powers of resistance of adat law.

Today, Indonesia is not only open to all sorts of outside powers and

influences, but it is struggling with the problem of resisting and controlling foreign exploitation of its primary resources. Adat law has no institutions which could enable it to operate effectively outside the sphere of the local communities, or to prevent the abuse of foreign concessions.

Might not a less dogmatic adherence to adat law and legal pluralism and the timely creation of some transitional law by the colonial authorities have been of greater service to the country and its people?

After Indonesia's independence, Soepomo, Ter Haar's close associate and his successor to the chair of adat law at Jakarta University, stressed the necessity for a new approach to adat law (Soepomo, 1947).

Indonesian legal scholars are now for instance bent over the task of producing a new law of contract to meet the needs of those who no longer operate on the village level. It will be influenced by principles of the former statute law for Europeans, but equally so by postulates borrowed from adat law. Act. No. 1 of 1974 establishes new marriage provisions, which seem to involve a considerable emancipation of women, in conformity with the ideas of a new era. Similarly it was only after Indonesia became independent that attention was paid to the creation of a modern labour law.

On the other hand, as far as land was concerned, it was undoubtedly wise of the Dutch legislature to preserve adat law in 1870, and to make explicit the inviolability of land belonging to the villages.[17] Although the right of avail of the village over the uncultivated land within its jurisdiction — a right which is in principle inalienable — was not always fully respected with long-term leases or concessions for European plantations, this does not diminish the fact that this colonial legislation spared Indonesians the disastrous dispossession experienced by small farmers in Burma as the results of their indebtedness to Indians and Chinese (Furnivall, 1948:91ff., 224ff.).

Political controversy

Though Van Vollenhoven was regarded as a protagonist of the 'ethical policy' of colonial reform, it is difficult to determine where he stood in relation to the already powerful Indonesian nationalist movement. He did not contribute to the moderately progressive journal *De Stuw,* started by H. J. van Mook in 1930. His biographer quotes the following passages from a private letter, written in 1922: 'I have thought deeply about the dilemma. I remain of the opinion that we shall never achieve a good policy in Indonesia if we do not make this natural nationalistic

feeling of the Indonesians the centre of our attention. As I see it, the Philippines and British India teach the same lesson. Whether this will result in "independence" with strong cultural bonds between Indonesia and Holland, or in a self-governing dominion, is to my mind an irrelevant question, for by the time we have come that far the world and the League of Nations will be very different from what they are now' (De Beaufort, 1954:143).

That Van Vollenhoven envisaged a great degree of self-government and autonomy for Indonesia is evident from his biography and from his constitutional studies (1934), but it seems most unlikely that he ever visualized an Indonesia totally separate from the Netherlands.

One writer called the 'ethically minded' tragic because of their isolation. An equal tragedy is that they never succeeded in translating their main political aim, the emancipation of Indonesians, into terms with which the nationalist movement could identify itself. Wertheim (1964:213-224) and others has ascribed this to the mild paternalism which fostered the inertia of the masses, and to the absence of a fundamental reform of village structure and native land use (that is, contrary to Van Vollenhoven's policy) in order to absorb the increasing population. They believed this resulted in a lack of momentum, in a stagnant situation of 'shared poverty'.

It is a moot point whether more concrete results would have provided stronger arguments with which to defend the ethical policy and would have spared Van Vollenhoven the conservative attacks which were mounted against him and his University in the so-called Leiden-Utrecht controversy of the years 1924-32.

In 1925, as the results of contributions from business interests, politicians and intellectuals, a second Indological faculty was established at Utrecht University for the training of prospective colonial civil servants. According to its sponsors the Utrecht faculty was needed because of the 'inadequacy' of the Leiden training. In the words of Professor De Louter, the Leiden ideas about colonial affairs were out of step with the realities of the situation, the views of the government and the interests of the State. Leiden was accused of a priori and anti-historical methods, of overrating the value of adat and adat law, of wanting to reduce Dutch colonial authority, of opposing government measures, and so on; in short, of being against the existing legal order and the manner in which the Dutch authorities were carrying out their task.[18] Van Vollenhoven's anonymous editorials in the influential newspaper *De Nieuwe Rotterdamsche Courant* on autonomy for the

Indies, in which he likened the Indonesian desire for freedom to that of the Dutch people in 1572, only increased the opposition.

M. W. F. Treub, a politician and later chairman of the Industrial Council for the Dutch East Indies, became the most outspoken opponent of the Leiden teaching with the publication of a number of highly critical articles. The reply from Leiden, drafted by Van Vollenhoven and signed by seven professors, appeared in *De Gids* in 1925. Entitled 'The Attack on Leiden', it bore the motto: 'Thou shalt not bear false witness against thy neighbour'. From this began a fierce pen battle, which lasted for years, but Van Vollenhoven's biographer doubts whether the 'bellicose' tone of his replies persuaded any of the opposition (De Beaufort, 1954:154). He became dispirited by the attacks, which he interpreted as questioning the patriotic spirit of his University and his own integrity. As a conscientious thinker and academic he welcomed a spirited scholarly debate; but he was no political fire-eater, and the fierce controversy between sister universities took toll of his health and spirits.

II. *Views on Law and Methodology*

Van Vollenhoven's inaugural lecture inclines one to believe that his views on law were based on 19th century legal positivism, modified first by a belief that the content of law was determined partly by ethical and political postulates, and secondly by the conviction that the logical and systematic formulation of norms should be supplemented by inquiry into social facts to discover rules of law.

Van Vollenhoven's approach to the study of adat law has been defined as follows: 'At first his scientific interest in this material was of an ethnographic nature; the "Ethnologische Jurisprudenz", too, was ethnologically and historically rather than juridically oriented. From the vast jumble of social phenomena, Van Vollenhoven abstracted the legal institutions without violating their ethnological context. He discovered the principal features of a common Indonesian "law region" [p. 41, below], the enduring framework of legal rules and institutions in all their diversity according to time and place.' [19]

But Van Vollenhoven's views do not appear to have remained unchanged, and we should trace their development during his career.

In his inaugural lecture (1901), holding the view that jurisprudence is an exact, empirical science, and accepting the diversity of human

law, he defines what he understands by law. 'We speak of law only when a rule of conduct is sustained not merely by consideration of advantage or disadvantage, praise or blame, but by coercion as a guide to precept and prohibition. Hence, in the absence of an authority willing and able to enforce rules of conduct, law is absent; if authority sleeps, law lies idle; rules of conduct not yet, or no longer, stamped as law by authority have meaning only as future or past law. The diversity in human law can be ascribed first to the diversity of these countless communities which, because they are based on law (—), should be called jural communities; secondly, to the rich variety of their legal products; and finally, to the greater or lesser strength with which these jural communities succeeded in sustaining the constituent parts of the law they have created.'

The concept of jural communities continues to dominate his methodology. Carefully characterized in the first volume of his *Adatrecht* (Chapter IV, below), it refers mainly to the small autonomous communities of all kinds — kinship or territorially based communities, voluntary associations for various purposes — but also to smaller or larger principalities.

Coercion and the authority of jural communities are thus the pillars on which the order of law, including adat law, depends.

Later in his inaugural lecture he remarked (p. 27) that the function of legal science ends with systematic, historical and comparative inquiry into the constitutions, practice and regularities of the law. In his a-philosophical view, courts and legislatures were expected to make the idea of law a reality and to satisfy a sense of justice, but *jurisprudence* should be concerned only with law as it operated 'at ground level' (pp. 29-30).

But five years later, when the first instalment of his *Adatrecht* appeared (p. 1ff., below), he seems to have modified his earlier opinion that coercion and authority are the pillars of law. He points to the profound difference between the law of Holland and Indonesian adat law: the one a 'fairly comprehensive and coherent whole' formulated in codified laws and regulations, outwardly sharply 'distinct from rules of morality, conduct and aesthetics'; the other 'different', with written law for only a minority of legal situations and relationships, and the greater part an uncodified mass, in which broad guidelines are certainly discernable, but different according to population group, and with legal changes more often brought about by free and unconscious growth than by deliberate decision.

'Viewed through the eyes of a codist the legal inventory of the Indies presents a jumble, an incomplete, inadequate and untidy whole; but when explored by one whose desire for knowledge and explanation of the living law on earth is inspired by the very diversity of its past and present manifestations, this same inventory becomes an inexhaustible source of instruction' (pp. 1-2, below).

This law of Malayo-Polynesian origin has been exposed to a succession of foreign influences: Hindu, Islamic, Chinese, European (Portuguese, English, Dutch); yet autochthonous institutions have remained the most important part of the legal composite. Accordingly, 'the oriental legal institutions have to be considered in a common frame together with the western law. On the other hand, it is obviously impossible to divorce these legal institutions from the non-legal elements of popular customs and beliefs' (p. 3, below).

There being no general Indonesian term for this oriental legal system, Van Vollenhoven gave careful thought to the most suitable term. Arguing against the adoption of 'customary law' and other definitions he finally decided on a compound based on *adat,* the widely known Arabic word for 'custom'. Hence, for '*adat* with legal consequences', *adat law* would be appropriate, as the term did not imply a rigid division between matters of law and other *adat.*

What did Van Vollenhoven understand by *legal consequences*? He observes that it is often doubtful whether we are dealing with 'legal' or with other usages, for instance, as regards reciprocal contributions to wedding feasts or the ritual evasion of marriage prohibitions. But even though some rules would not be regarded as 'law' by western opinion, 'if they carry an enforceable sanction, how could this name be denied to them?' (p. 6, below).

As we read it, enforceable sanction here means human punishment, or the human power to make something *pantang,* forbidden. Yet he recognizes that difficulty and confusion arise when certain conduct is prohibited as likely to provoke the wrath of the gods or spirits (*pantang, rebu, pemali*), but its violation is punished by humans as well.

Twenty years later, when writing on the 'Maintenance of Adat Law' (Chapter VIII, below), Van Vollenhoven's understanding had deepened, not least by the flood of fresh materials from workers in the field. His concept of adat law is now placed on a much broader basis. His earlier distinction between adat and adat law, that is the use of human coercive sanctions, is less important. In general, he argues, people comply

with adat law not because of the threat of judicial force, but because compliance has become a habit, because they fear their ancestors, because violation would not serve their interests, and finally because of the force of oral tradition (below, pp. 215 ff.).

Moreover, there is the Indonesian 'practice of headmen and others of giving guidance in the observance of the adat, of taking it under their care and supervision, without there being any question as yet of the resolution of disputes or of action to enforce the law'. In his 'attested law observance' (pp. 222 ff., below), instead of the sanction of force, there is peaceful consultation and patient mediation, in which religion, myth and tradition all play an important part.

Also the action of Indonesian adat-judges, when they do adjudicate in dispute, is characterized by attempted mediation, accommodation and reconciliation of conflicting individual and communal interests.

Attested observance of the law by headmen and other socially prominent figures, and the accommodating character of indigenous justice — 'a hundred times more effective than adjudication by the commanding voice of authority' — are natural because these notables are seen as part of the cosmic order of society. They act and speak as those whose duty it is to 'see that the wishes of the ancestors are observed and to act as their earthly representatives' (p. 227, below). Accordingly the adat judges are neither bound to accept as true that which is not in dispute, nor to accept as law what the litigants assert to be such. They have an independent contribution to make in finding the facts and law of the case (below, pp. 253-4).

When the vast majority of a country's inhabitants has for centuries adhered to one or other of the great religions, elements derived from these will be adopted into the indigenous legal system. But Van Vollenhoven showed convincingly that, so far as religious influences were concerned, it was the belief in watchful ancestral spirits, and other so-called pagan features of Malayo-Polynesian origin, that still predominated in most of Indonesian adat law and indigenous judicial practice. In Chapter II below, some of his most spirited pages are devoted to refuting the premise that 'law follows religion, that the pagan Indonesian therefore has pagan law, the Hindu Hindu law, the Moslem Moslem law, the Christian Christian law — a supposition which . . . is emphatically contradicted by the facts' (below, p. 8). Nevertheless, he found this aspect important enough to return to some twenty years later, when in the second volume of his *Adatrecht* he devoted a hundred pages or so (not reproduced in the present edition)

to a meticulous examination of pagan, Hindu, Moslem and Christian features in adat law.

By 1918 Van Vollenhoven had completed a systematic description of Indonesian adat law in nineteen 'law areas' (*rechtskringen*). Some of these he distinguished as self-evident, but others more hesitantly. In distinguishing law areas (Chapter IV, below) he relied less on the differences between 'specific legal rules', than on 'the different structures of jural communities'.

Indeed, Van Vollenhoven's work is marked from the outset by the conviction that law can only be known through examination of the jural communities in which it applies. Hence he objected strongly to restricting or restructuring the indigenous jural communities.

The critical significance of the internal configuration of these communities for the nature and 'cut' of adat law can be gauged from his descriptions of the law areas, for the systematic description of which he worked out a standard model comprising these rubrics:

1. *Jural communities* (socio-political organization).
2. *Individuals* (personal status, rights and duties).
3. *Government, justice, legislation* (constitutional law).
4. *Inter-local law* (the law between villages).[20]
5. *The law of kinship.*
6. *Marriage law.*
7. *The law of inheritance.*
8. *Land law.*
9. *Law of chattels* (obligations, rights to movables).
10. *The law of wrongs* (without division between civil and criminal wrongs).
11. *Legal remedies* (procedures, sanctions).

It can be seen from this that Van Vollenhoven largely departed from the usual methodology of continental European law. He believed that the use of Roman law constructs could only lead to a misunderstanding of differently conceptualized legal categories. Not only did he succeed as nobody before him in sympathetically understanding the concepts and properties of Indonesian law, but he often sharply attacked the common misconceptions of it. In the words of Van Ossenbruggen:

> 'Van Vollenhoven immediately saw that the way in which orientals draw distinctions and classify is vastly different from that of occidentals. The oriental ... makes sensory perception the basis of his legal categories and distinctions ...; abstract juridical contructions are foreign to him. For example, our distinction

> between rights *in personam* and rights *in rem* is incomprehensible to him, whereas to divide legal transactions in land and water from those in all other goods seems natural' (1933:XII).

In Van Vollenhoven's methodology the clarification of Indonesian legal conceptions had to serve the ends of justice in colonial judicial practice. In the very different Indonesian conceptual world, government courts — especially in the earlier days — often failed to give judgments comprehensible and acceptable to the people. An important part of Van Vollenhoven's work therefore consisted of exposing fallacious or erroneous premises used by government courts — especially the *landraad* courts — which dispensed justice 'in the King's name'. A few examples may suffice.

Land could not be 'pledged', because in terms of section 1150 of the Indies Civil Code this was possible only in respect of movables. Yet a common transaction in adat law involves the redeemable transfer (*jual gadai)* of a person's land in return for a loan of money. (For the terminological problem, see footnote p. 102, below.)

The courts regularly employed the distinction between *jura in rem* and *jura in personam,* which has no equivalent in adat law.

Totally foreign to Indonesian conceptions of justice was the 'dismissal' of actions on account of a litigant's lack of capacity, a court's lack of jurisdiction, or the failure to start proceedings within a prescribed time.

A misconception which particularly attracted Van Vollenhoven's attention concerned the highly sensitive area of indigenous land rights, the 'highest' of which he called *beschikkingsrecht* ('right of avail' — see p. 278, Chapter IV, note 2). Being indissolubly bound up with the key-concept of 'jural community', he gave it priority in his description of each law area. He understood this right to be religiously rooted and to reflect the fundamental connexion of a human group to the deities and spirits of the land it inhabits. The earliest (and fullest) summary of the nature and content of the right appears not in his *Adatrecht,* but in one of his lectures on 'Misconceptions of Adat Law' (1909) given at the Academy of Netherlands-Indies Civil Officers. It is worth reproducing here, for it is of value even today when third-world governments face problems of agrarian reform.

> 'The right of avail . . . applies when an indigenous jural community, whether territorial (native municipality, self-governing chiefdom) or genealogical (family, lineage, clan), claims to have within a certain area the exclusive *right* to avail itself of the

> land. In general, the manifestations of this right are six: first, the community and its members may freely exploit any virgin land within this area (e.g. clearing it for agriculture, founding a village, gathering forest produce); secondly, outsiders may do these things only with the community's permission, and commit an offence (*maling utan*) without this; thirdly, outsiders, and sometimes even members, must pay some compensation (*séwa bumi,* etc.) or tribute (*ulu taon*) for such exploitation; fourthly, the community retains to a greater or lesser extent some control over cultivated lands within this area; fifthly, it is held liable for unaccountable delicts within the area (e.g. when the perpetrators remain undetected); sixthly — and this is not the least remarkable feature of the right of avail — it cannot be permanently alienated' (Van Vollenhoven, 1909:19-20).[21]

Van Vollenhoven reproached the colonial government for being 'uncertain', 'inconsistent', and 'unjust' in its attitude towards this right, which was sometimes fully respected, sometimes partially recognized, and sometimes totally ignored (e.g. with the granting of long-term leases or concessions to European agrarian enterprises). The issue was (and is) juridically difficult and politically delicate.

The agrarian law of 1870 guaranteed full protection of the rights of the indigenous people to all land 'cleared by them for their own use or as common pasture, or for any other reason', but the crucial question was whether this covered the so-called 'virgin lands', which were not in regular use but from which the villagers derived occasional benefit.

The prevailing opinion in government circles was that a community's right of avail to virgin land was no more than a rather loose claim, perhaps involving some form of administrative control, and that the land belonged to the 'free domain of the State', which accordingly could be leased to European enterprises for agrarian or other profitable purposes. Van Vollenhoven rejected this interpretation as the view of 'statute book lawyers ignorant of and unwilling to know any system other than Justinian's and the Napoleonic-Dutch'.

The issue stirred public opinion for many years, but by the first quarter of the 20th century the granting of leases had been drastically curtailed.

More recently, however, the Indonesian government, in the basic Agrarian Law 1960 (*section* 3), adopted the principle that the adat communities' right of avail, so far as it still existed, might only be

exercised in ways compatible with the national interest and with enacted laws and regulations.

Though the struggle for adat law was largely successful, in that its existence could no longer be denied and the courts gave it serious attention, yet the dividing line between adat as custom and adat *law* continued to pose a problem. On what grounds could one determine its binding character? How could innovations in adat law qualify as *customary* law if the Roman criterion of *inveterata consuetudo* were to be applied? How could one ascribe to adat law a body of objective and pre-existing rules if the conciliatory nature of adat justice made it constantly necessary for adat judges to 'find' or 'create' the law applicable in individual cases? Since only a very small and unknown minority of adat disputes were settled in a court of law, how often, and when, could one be certain of dealing with judicially sanctioned rules?

In his chapter on the maintenance of adat law (VIII, below) Van Vollenhoven addressed himself to these questions.

> 'The people of the village who voluntarily observe the ancestral adat law, the adat heads who attest its observance, and the courts which dispense justice in the spirit of adat law, they all see ... how adat law grows under their own hands' (below, p. 256).

And he remonstrated:

> 'If a rule is so deeply ingrained that nobody would dream of breaking it, with the result that nobody remembers it to have been judicially affirmed, would it therefore not be adat law? If [some] rules ... are so well protected by the authoritative guidance of headmen and elders — much more important here than adjudication in the narrow sense — that no judicial action to obtain their observance can be remembered, would they therefore fail to qualify as adat law? Whenever a true adat judge has before him a case, and nobody remembers a like case to have been decided, is he to turn the petitioner away on the pretext that, though a custom may have been violated, there has been no breach of law? — as though every question of law did not have to be raised for a first time!' (below, p. 257).

He then reformulated his approach. Adat law was to be found by 'careful enquiry into how, in a given area, matters of consequence for the legal order are usually done or tolerated as being normal ..., and how, in cases of deviation, fellow villagers or adat heads, or occasionally the courts, react ... Even approbation and disapproba-

tion, if inextricably associated with precept and prohibition in popular thinking and conduct, are law and not mere morality ... In cases of dispute adat judges had to determine the difference between normal peaceful usage ... and disruptive deviance which they could not possibly ignore' (p. 258, below).

After Van Vollenhoven's death, Ter Haar (1937) formulated a more formally juristic view. Speaking at the 13th anniversary of the Batavia Law School he stressed that the science of adat private law, like any other positive jurisprudence, was a science of contemporary positive law, and not to be classified under legal ethnology, sociology, or historical or comparative jurisprudence. Not being a written law 'except for the insignificant part of it which is contained in written village regulations and princely edicts, ... valid adat law is therefore to be learned only from the decisions made by the authoritative functionaries of the group ..., whether or not in situations of conflict, with due regard to the coherence and interaction of the *structural ties* and *values* of the community' (1937:4; original italics).

This drew a spirited reply from F. D. Holleman (then holding the chair of Adat Law at Leiden). Why, he asked, this artificial restriction of the field of study and of the criterion of adat law? Hitherto it had been accepted by students of adat law, including Van Vollenhoven, that law comprised all legal norms which a scientifically and juridically reliable enquiry could abstract from the *reality of legal commerce in society*. What was this reality? Everyday life with its social intercourse in every field, in which legal norms were not as a rule separated from social norms but a particular species of them, recognizable by those who observed their operation from a juridical point of view. Authoritative decisions, however important they undoubtedly were, should not be overrated. Adat justice on the whole dealt with concrete interests, and its decisions were nearly always expressed in terms of concrete issues and not of legal rules — though trained lawyers could formulate them in legal terms (Holleman, 1938:430ff.).

The opposing views in this debate seemed to be motivated, on one side, by a desire for the sake of legal certainty to provide adat law with a formal criterion (the judicial decision, jurisdiction), and, on the other, by a fear that such a criterion would unduly restrict the meaning of operative adat law, the essential criterion of which lay in the interaction generally between habitual social practice and impermissible deviance from it (as Van Vollenhoven had indicated).

In a short article on 'The Judge's Task' (1938), Logemann attempted

to reconcile these views. He believed Holleman's opposition to Ter Haar to be engendered by fear of the dominating role of government judges, who would be inclined to dismiss the conciliatory decisions of indigenous tribunals as of little value for ascertaining operative adat law. He suggested that, 'If judgments were presented and taken note of in full, instead of merely as the (concluding dictum) of a detailed account, the so-called conciliatory adat judgment would be as valuable a guide to subsequent jurisdiction as any other judgment' (1938:36).

The history of judicial practice teaches that there was some justification for Holleman's fear, but Logemann did not answer the principal question. The crucial point is that 'law' is something other than 'fact', that 'ought' (*sollen*) is something other than 'is' (*sein*), but that none-theless the two are closely connected. Van Vollenhoven glimpsed the question early in his *Adatrecht* (vol. I:71-75) when dealing extensively with the connexions and the differences between ethnological data and law, unfortunately without arriving at a clear conclusion.

Because of the dualism of Dutch codified law and indigenous folk law in the Indies, adat law often threatened to become relegated to the field of morality or custom. The situation did not change immediately with independence for Indonesia, but the constitutional basis for the formal division between the two systems has now been removed and Indonesia is on the way to a single system of national law, a development which faces it with the difficult task of how to accommodate the traditional law of the people in the new system. Hence a fundamental study, in the light of present-day circumstances and in a broad context, of the problems revealed by Van Vollenhoven's scientific approach to adat law as positive law, would be of great value.

III. *The Discovery of Adat Law*

Van Vollenhoven has been called the 'discoverer of adat law'. According to Van Ossenbruggen (1933:I), 'The most important fact is expressed in one all-embracing word: Van Vollenhoven elevated adat law to a *science*. Though much that preceded his work was of value — I need but mention Snouck Hurgronje, Wilken and Liefrinck — a science of adat law did not exist before Van Vollenhoven and without him would probably not yet have been created.'

In his brilliant little study on 'The Discovery of Adat Law' (1928), Van Vollenhoven himself regarded Wilken (1847-1891) as the man through whose work 'adat law for the first time achieved an indepen-

dent place in the wide range of ethnographic data. Admittedly, with Marsden, Raffles and Crawfurd it was presented under the rubric of 'law' or 'government', but in the way in which games, food habits or modes of dress also appeared under separate headings. Marsden's last chapter on adat law runs over into native pastimes. With Wilken, however, adat law is a subject in its own right, though he rightly leaves its connexion with folk custom and folk religion intact' (1928:101-2).

Muntinghe (1773-1827), was the first to speak consistently about *adat*. One passage of a Memorandum of his to the Commissioners-General [22] of the Netherlands Indies (Batavia, 14/7/1817) reads: 'The institutions and customs of the people have remained veiled under the general term adat'. It was Snouck Hurgronje who later (1893:16) introduced the term adat law.

Naturally the question arises of what is meant by 'discovery'. For Van Vollenhoven (1928:1-2), it meant:

> '[A]lthough Indonesian adat law itself had its beginnings in the mists of time, an awareness of its existence and of its value only recently dawned upon us westerners. Strange as it may sound, this adat law indeed had to be discovered, and its discovery has cost time and effort. At first sight this seems to be a paradox. Surely we do not 'discover' the vernacular of the land which we visit. We either do or do not research the language, do or do not know it; but in any event we hear with our own ears that some people speak in words and idioms which we do not understand. Moreover, as soon as we come into regular contact with the people of a tropical country — with its government, system of taxation, land tenure, kinship system, inheritance and justice — we must surely now and again allow ourselves to be informed by the people themselves how these things are arranged and what peculiarities they have.'

[Nonetheless, adat law had to be 'discovered'],

> 'for virtually all peoples, western or eastern, have been late and slow in acquiring knowledge of their dialects, of their literature and even of their history; [and although] already during our Middle Ages the Indies, in Java at least, had its jurisprudents (Wilken, 1926:438), apparently they were practitioners only, not people who could enlighten a stranger about adat law' (1928:3).

Here Van Vollenhoven put his finger on a fact which has indelibly influenced the fate of adat law, namely that over a period of approximately three centuries until the 1920s the recording, the analysis, the

systematization of adat law and partly also its place in a constitutional context, has been the work of western research and scholarship. Jaspan (1965:252-3) has appropriately described the situation:

> 'The concept of *adat* law is rather broad since the term *adat* has several connotations including custom, usage, rule, proper behaviour and propriety. The concept of *hukum adat* was almost certainly a Dutch creation. Before Van Vollenhoven and his school began codifying what to Western jurists appeared to be the juridical aspects of native custom, adat law was not a separate and independent entity but was in most cases intertwined with the history, mythology and institutional charters ... of each ethnic or cultural unit ... In traditional Indonesian societies, both centralised and stateless, there were no professional jurists and no separate judiciaries. In the centralised states the sultans or other rulers, in the non-centralised societies the village headmen and elders, were both the repositories and the arbiters of what we may now, for convenience, call adat law. Outside Java — with the exception of the Yogyakarta and Surakarta principalities — much of the traditional adat law was carried over by the Dutch and made an integral part of the system of government by indirect rule.'

Van Vollenhoven's *Discovery* names about 450 people who over three centuries contributed in some way to the knowledge of this folk law, but Indonesian names are scarcely to be found. It was only after 1918, when he had completed his description of indigenous adat law (*Adatrecht,* vol. I), and written the most important of his polemical articles defending that law in the arena of colonial politics, and when he had already been lecturing for many years at Leiden, that a number of Indonesians,[23] chiefly through his personal influence, began to follow up his pioneer work.

As against them, four or five times their number of Dutch scholars published works on adat law in Van Vollenhoven's time.[24] This tardy interest in adat law on the part of Indonesian scholars was partly influenced by the fact that the Batavia Law School devoted (as the Jakarta Law Faculty still does) by far the greater part of its curriculum tot 'European' law. Add to this that some of the professional judges who administered adat law were less than well versed in it, and we may have a reason why, in present-day Indonesia, such great difficulties are engendered by the problem of shaping a national law and of finding a place in it for adat law.

The problem of discovering and accommodating adat law is part of a checkered colonial history of which a few facets and names should be mentioned.

The period of Company rule (1602-1790), though offering the best opportunity for finding genuine folk law, was used scarcely if at all for this purpose. The Company's legal system was aimed mainly at the coastal towns and suburbs under its direct control and rarely reached the rural hinterland. Initially, its law for orientals falling under its jurisdiction was the revised law of the Dutch Republic, occasionally modified for non-Christians and Chinese. Typical for this system was that Indonesians could voluntarily subject themselves to indigenous law, and it was not until 1824 that a Dutch statute decreed that those resident in the towns of Batavia, Semarang and Surabaya fell under government native justice and hence under rural adat law. Virtually the only time the Company became acquainted with indigenous law was when it intervened in princely justice in feudal territories, where a capable Company servant like Gobius at Cirebon learned to distinguish 'original Javanese law ... of before Mohamedan times from the law of the evil Moslem clergy' (*Adatrecht* II:342).

Through her formal neutrality the Company therefore left the indigenous administration of justice largely intact (Carpentier Alting, 1926:222f.). Nevertheless, its armed presence, its demands for agrarian produce, and the sale (from 1705) of tracts of land to private European enterprise, must have affected adat land law, though it is not possible to form a clear picture of this (see Furnival, 1944:41, 46f.; Gonggrijp, 1928:28-77).

However little attention the East Indies Company paid to adat law, it did produce some chroniclers of Indonesian life in the 17th and early 18th century, including Rijckloff van Goens (Java), Speelman (the Mataramese principalities), Padt-brugge (Minahasa), Gobius (Cirebon) and Valentijn (Ambon).

But it was the Irishman William Marsden in whom Van Vollenhoven recognized 'the pioneer' of adat law studies (1928:14ff.). Written even before the final demise of the Company, his *History of Sumatra* (1783) deals mainly with the Rejang of Benkulu. The British interregnum also brought Crawfurd with his (still important) *History of the Indian Archipelago* (1820) and other works based on nine years of service and enquiry in various parts of the Indies; and Raffles, Lieutenant-General of Java from 1811 to 1816. For materials on Javanese adat law Raffles' *History of Java* (1817) relies too much on texts

from the central Javanese principalities, but his *Substance of a Minute on ... internal management and the establishment of a land rental for Java* (1814) contains much valuable first-hand information collected by a team of able assistants from all over Java (Van Vollenhoven, 1928:27ff.). Yet the latter volume contains an annex — his Minute of 14/6/1813 — in which he states that the ownership of land was invariably regarded as exclusively vested in the sovereign or state — an opinion which started the protracted 'domain' controversy.

After the British there followed a thirty-year period of uncertainty, during which the new Kingdom of the Netherlands made efforts to replace the regime of the run-down and heavily indebted Company by a proper colonial government. Wholly in the spirit of the times, a policy was pursued which would give the motherland the greatest possible material gain, but yet would respect the rights of the indigenous people. It was a controversial question whether this was best achieved by state exploitation or private enterprise, but since both involved agrarian production for the world market the main interest in customary law concerned the nature of indigenous land rights (Boeke, 1918: 22). In a Memorandum (14/7/1817) to the transitional government ('Commission-General'), Muntinghe, one of Raffles' former counsellors, listed the conditions under which concessions to European agrarian enterprise might be made. The first to be included were:

— 'that no lands should be granted for this purpose other than those not cultivated, inhabited, or possessed by the Javanese people;
— that, consequently, this should exclude not only all peri-urban and rural villages, but also all lands known by the village authorities to lie within the village boundaries, or to be used as pasture for livestock.'

(Van Vollenhoven saw the latter condition as recognition of the Javanese village municipality and of its right not only over cultivated but also over waste land in its domain.)

Others, too, had displayed more liberal views. Dirk van Hogendorp, administrator (1794-98) in East Java and a convinced opponent of the Company regime, pleaded that the Javanese should not have to be — as Raffles had wanted — a kind of leaseholder of his land, but the 'owner' of it — not in the old Dutch common law meaning, but so that he could say: 'This land is mine' (Van Vollenhoven, 1928:37). While Dirk van Hogendorp started from an existing leasehold system which he wanted to change, his brother Gijsbert Karel, a leading politician in

Holland, considered that according to Dutch positive law the Javanese was already owner of the land.

In the Commission-General charged with taking over from the British there was no agreement on agrarian policy. Though both Elout and Van der Capellen considered it 'a matter of course that the Javanese small-farmer (*tani*) had to be guided', Elout thought in terms of private European estates such as the Company had fostered in West Java, while Van der Capellen believed that Java's agrarian economy should be exclusively the concern of the government (Boeke, 1918: 52-4). It was Elout's opinion that all of the Indies was 'the property of the sovereign' and hence 'every farmer a small tenant of the state' (Van Vollenhoven, 1928:41) — a view shared by Du Bus, the King's Commissioner in the Indies in 1825-30. By that time, with Holland's own economy in dire straits, the colony was a heavy financial burden.

Then Van den Bosch, as Commissioner-General (1830-32) invested with special powers, introduced the so-called *Cultuurstelsel* (Culture System) in Java. Unlike Raffles, whose ideas were biased by his knowledge of the principalities, Van den Bosch based his own doubtful conceptions largely on what he believed to be the situation in West Java. He rightly accepted that the Javanese village constitution comprised 'heirs, descendants of the first occupiers of the land', called *sinkap,* who were responsible for the whole land rent burden, in contrast to non-heirs. But he believed inheritance to be regulated by Moslem law; hence he saw land law as a mixture of Brahman and Moslem institutions, with adat as pliable as wax (ibid:43).

Under the new system the villages would contractually undertake to make one-fifth of their cultivated land available for the production (supervised by European officials) of crops for the European market (mainly sugar and coffee), but receive a proportionate reduction in land rent; the 'net profits' would go to the government.

In the decades that followed, the scheme proved a great success financially, but it played havoc with village institutions and land rights.

Van den Bosch was succeeded by Baud, a conscientious and clear-headed administrator. Though he extended his predecessor's policy he was not blind to its hardships, which he tried to mitigate. Sensitive to the autonomy of the Javanese village and its right of avail over uncultivated land within its domain, he would later help to safeguard these rights in section 62 of the 1854 Constitution of the Indies — a provision which gave rise to great controversy over the territorial scope of the right of avail. In 1842 he founded the first School for Colonial

Civil Officers in Delft, and in 1851, though no scholar himself, he helped to create what is now the Royal Institute of Linguistics and Anthropology at Leiden.

The growing resistance to the abuses of the Culture System stimulated the study of Javanese land rights. Governor-General Duymaer van Twist (1851-56), for instance, ordered inquiries in Cirebon and Banyumas, and appointed a Commission to report on contracts between government and sugar producers in Java. The Commission's report, published in 1862 well after his retirement, 'put Cabinet and Parliament in a position to know at least something about Javanese land rights' (Van Vollenhoven, 1928:78). But the 'favourable turn of the tide' as far as the interest in adat law was concerned came about in 1865, when 'Parliament was forced to take note of agrarian problems and adat land law; the Indies administration of indigenous social organization and the constitution of adat communities; the Missions of adat family law and inheritance; and lawyers of transactions in land as well as in movables, and of problems of criminal law' (ibid:82).

In the period 1865-1870 Parliament dealt, among other things, with two bills, the 'Cultures Bill' of Fransen van de Putte (1865) and the 'Agrarian Bill' of De Waal (1869). The former, which aimed at reinforcing Javanese land rights while enabling Europeans to found estates on *virgin l*and, foundered on Thorbecke's opposition to the proposed recognition of a Javanese individual right of *ownership,* which he feared would adversely affect adat land law (see Idema, 1925: Ch. I). De Waal's Agrarian Bill, which became law in 1870, added supplementary paragraphs to the agrarian section 62 of the 1854 Constitution. Thus leases of land were not to exceed 75 years; no alienation was to interfere with indigenous rights; land cleared by natives for their own use, or belonging to a village for common pasture or other purpose, might be interfered with only 'in the public interest'; land occupied by natives in hereditary individual use might be granted in ownership to them at their request (subject to some limitations, e.g. as regards sale to non-natives), etc.

The fierce debates, particularly on Van de Putte's bill, led to a proclamation of Governor-General Sloet van de Beele, which assured 'the people of Java' that their individual and communal land rights would be recognized and protected, and that the nature of these rights would be thoroughly studied. These investigations resulted in a number of reports which proved to be among the richest contributions ever made to our knowledge of adat law: the *Résumé* on Bantam (1871); three

volumes of *Eindresumé* for Java and Madura (1876, 1880 and 1896); and eight *Résumés* for the Territories outside Java (1872-77).

At the same time that the agrarian question was providing politicians with some notion of adat law, colonial civil servants were becoming aware of it in new training courses at Leiden, Batavia and Delft. This improved the situation, 'although the name of the course, "Religious laws, indigenous institutions and customs", again had the result that what was taught was Islam and ethnology, but not adat law' (Van Vollenhoven, 1928:93-4).

Many civil servants and missionaries published on adat law, but trained lawyers contributed only at a later stage. There was a small handful of truly scholarly figures who preceded Van Vollenhoven or who were his older contemporaries: Wilken (1847-91), an administrator turned comparative ethnologist with special interests in adat law, who later became a professor at Leiden; Liefrinck (1853-1927), an administrator and specialist on Bali and Balinese Lombok; Snouck Hurgronje (1857-1936), an Arabist famed for his sojourn in Jeddah and Mecca disguised as a 'Moslem student of divinity', and an influential political adviser to the Indies government before becoming a professor at Leiden; Van Ossenbruggen, a legal scholar and teacher at schools for colonial administrators, later a high-court justice, with particular interest in Indonesian conceptualizations of adat institutions.

The first volume of Van Vollenhoven's *Adatrecht* (1918) reflects his indebtedness to their work, and in his *Discovery* (1928:99-110, 127-8) he singles them out for generous praise and a succinct analysis of their significance.

In 1909, at Van Vollenhoven's instigation, the Royal Institute of Linguistics and Anthropology (then at The Hague) established a 'Commission for Adat Law', which, supported by a sister institution in Batavia, set out to publish systematic collections of widely dispersed adat law data. Most of these were published in the *Adatrechtbundels* (45 volumes since 1910) which contain pieces of varying length, largely classified by the 'law areas' he distinguished. Partly concurrent with these ran the *Pandecten* (10 volumes between 1914 and 1936), consisting of brief quotations from writings on *adatrecht* systematically organized. There were collections of adat case law (1912, 1916, 1924, 1935), extensive bibliographies (1927, 1937) and a *Dictionnaire de termes de droit coutumier indonésien* (Van Hinloopen Labberton, 1934).

While the older material was being sorted out and systematically

published, new field research — mostly part-time by administrative and judicial functionaries — proliferated in topical studies, and many major monographs appeared, notably those of Mallinckrodt (Borneo), Korn (Bali), Soepomo (West Java), Vergouwen (Toba-Batak), Djojodigoeno and Tirtawinata (Central Java). In a mere thirty years, adat law scholarship yielded a vast literature,[25] virtually all of it cast into the mould which Van Vollenhoven had presented early in his *Adatrecht*.

IV. *The Place of Adat Law in the Indonesian Legal System*

The Dutch legislature was for a long period in a permanent state of conflict over whether the East Indies should have a single or a plural system of law.

As far back as 1747 the Company had made some provision for the administration of indigenous law for its subjects in the interior of Java. The system was later reformed by Daendels and Raffles and in 1824 it was introduced in the big towns. After 1838, however, when the codification of law was completed in Holland, many asked whether the Dutch legal doctrine, that custom gives rise to law only so far as referred to by the written law, should not also apply to Indonesian adat law. But the question was not affirmatively answered, and the 'General Provisions' of 1847 maintained the principle that, for reasons of fairness and good government, the (non-Christian) natives of the archipelago would as a rule be permitted to live according to their own laws and traditional institutions.

In 1854, section 75 of the new Constitution (*Regeringsreglement*) of the Indies laid it down that, except for European statutes declared applicable to Indonesians or to which Indonesians had voluntarily submitted themselves, native courts would apply the 'religious laws, institutions and customs of the natives, insofar as they are not in conflict with generally recognized principles of fairness and justice'. This section also subjected Europeans in civil, commercial and criminal matters to general decrees which were to conform as far as possible to Dutch statute law, and thus established the legal system of the East Indies on as basis of differential group law: a legal pluralism of regionally differing adat law for natives and 'foreign orientals' equated with them, and a Dutch statute law for Europeans.

The position has remained essentially the same in the subsequent Constitution (*Indische Staatsregeling*) of 1925.

In Volume II (1931) of his monumental *Adatrecht* Van Vollenhoven

devotes some 350 pages to an exhaustive analysis of 'The constitutional position of adat law in the legal system of the Netherlands East Indies'. One might lay aside those chapters with the thought: that is the past, it is no longer topical. Yet this is not so. Very many lacunae, misconceptions, objections and complicated technical problems which arose then continue to appear in independent Indonesia.

The essence of the problem of the constitutional 'accommodation' of adat law was seen by Van Vollenhoven in these terms: 'Even if the adat law of the Indies had been explored in all its recesses, and even if its maintenance were to conceal no secrets from us, it would still present us with a major problem unknown to western society. For in the total legal system of the Indies, adat law and western law lie side by side: seldom tidily organized and neatly fitted together, but mostly in some uneasiness, and occasionally in direct conflict. Does one of the two — this is the question — provide the dominant framework into which the other has to be fitted as a subordinate part, or are they co-ordinated within a common Indonesian frame? And if so, how is the one related to the other, and what is the structure that frames them both?' (*Adatrecht* II:405).

This problem has not been solved by Indonesian independence. Writing in the mid-1960s, Lev found that Indonesia 'wants to create a legal system which on the one hand is undeniably Indonesian, but on the other is modern and internationally acceptable. The legal profession is divided between those who lean towards an ideological approach, the *hukum revolusi,* and those who try to maintain the older symbols of their vocation. But both groups remain partially immersed in the world of colonial law in which they were brought up and in which, to some extent, law students continue to be trained' (1965: 305-6).

Though the division of citizens into juridical groups and the corresponding differences in legal status have disappeared, the 'European' private law of the colonial legal codes has remained operative. It continues to apply to those Indonesian nationals to whom it was declared applicable in the past, or who voluntarily submitted themselves (and their descendants) to it in whole or in part. The formulation of a uniform private law, and the place or influence of adat law, are largely unresolved problems. The same is true of criminal law, which is still governed by the Criminal Code of 1915.

What is incontestable, however, is that since 1900, through the ever increasing amount of material provided by field research and by

inquiry into the essentially 'oriental' values of Indonesian legal life, but above all through the creation of an appropriate *system,* that is by Van Vollenhoven's methodical classification of the materials of adat law, its exploration in depth has been made possible.

Administrative and Judicial Aspects

It should be emphasized that, even at the end of the colonial era, much of Indonesia was not directly ruled but consisted of some 275 smaller and larger 'self-governing territories' in which, with some limitations laid down in treaties, the powers of government were left to the autochthonous authorities. Even in Java, one of the oldest and most 'directly' ruled possessions, there were four recognized principalities under indirect rule.

This duality in the system of government had its origins far back in colonial history. The East India Company initially only established a few fortified coastal settlements in the archipelago. Gradually, however, mostly because of troubles in the interior which interfered with commerce, it had to extend its influence. But even after the Napoleonic Wars and the British interim government (1811-1816), when the Indies had been incorporated into the Kingdom of the Netherlands, Dutch governmental power was by no means established everywhere. During the protracted process of establishing its authority (Aceh was not subdued until 1904) it was often considered wise not to introduce direct government, but to be satisfied with treaties with Indonesian princes and peoples, in terms of section 44(1) of the 1854 Constitution.

As a result there was dualism not only in the kind of government — direct and indirect — but also in the administration of justice: justice in the King's name, alongside indigenous justice.

Moreover, even in the directly administered territories outside Java and Madura, partly for reasons of personnel, the indigenous system of justice was often maintained. In fact, in the 'Outer Provinces', that is, outside Java and Madura, more than half the area consisted of self-governing regions, ruled by indigenous princes or headmen and, usually, according to indigenous institutions. In these territories adat law could be practised without restriction, except that 'religious laws, institutions and customs' were not to conflict with 'generally recognized principles of fairness and justice'. Laws made by the central government, for example the 1915 Criminal Code, were in force in such territories only if declared applicable.

The government of independent Indonesia is trying to abolish this dualism, and the system of local government for which it has legislated is quite different from the colonial system of delegated and largely decentralized government. The extent to which the new system leaves room for an adat law guided and enforced by 'elders' and 'headmen', rooted in and legitimated by adat and adat law, is difficult to judge.

The colonial administration also recognized, throughout Indonesia, a large variety of so-called 'native municipalities', which were authorized to regulate and administer their internal affairs. In these municipalities, adat and adat law used to be observed and respected under the paternalistic guidance of Indonesian and European administrators, but this category of mainly traditional jural community, too, has been reshaped by post-colonial legislation, and so the question again arises of the continuation of adat institutions (Logemann, 1947:118-20).

Before the second World War, the East Indies system was often considered an example of good colonial government. It was well suited to the practical limitations of the colonial situation, and although Van Vollenhoven's posthumous publication on Constitutional Law (1934) criticizes the excessive interference by government administrative officers, it can still be said that the system generally gave great scope for the natural development of Indonesian institutions, especially in the last decades of the colonial era, when 'emancipation' of indigenous officials and decentralization of government had become fundamental policies (see De Kat Angelino II, 1931:365-82).

After the war, respect for this aspect of Dutch policy waned sharply. It was, and is still, argued by some that the deliberate protectionist policy had denied Indonesia many opportunities for development.[26] The protection of adat law was blamed for the backwardness of political, legal and economic structures.

There is no reason to suppose that the growth and reform of law in Indonesia could or should be different from anywhere else: on the one hand, the refinement of its own system; on the other, the reception of useful legal institutions from outside. Van Vollenhoven has sometimes been misunderstood in this respect. In 1919, for instance, he wrote: 'The country is too good and promising to be turned into an adat museum' (1919:29). And in his last essay: 'There is no need whatever to barricade access to western values — on the contrary, they may have to be imported to fertilize oriental ideas. But forced

westernization to suit our convenience can only bring disorder in an oriental society, and frustration to ourselves' (1933:239).

Administration of Justice

The administration of justice in the colony likewise had a basic dualism, with a distinction between:

a) *landsrechtspraak* or government justice 'in the King's name';
b) *inheemse rechtspraak* or indigenous administration of justice.

However, the two do not coincide with the administrative division between directly administered and self-governing territories.

Because in Van Vollenhoven's text below there are frequent references to different kinds of court dealing with adat law it is necessary to give a brief outline of this rather complex system.[27]

a) The *government* administration of justice was itself dualistic, in that there were different courts, depending on whether the defendant in a civil case or accused in a criminal case was European or not.

As regards Europeans it suffices to state that Dutch-derived statute law was applied by six regional courts (*raden van justitie*) as courts of first instance, and by a High Court as court of appeal.

For Indonesians, the colonial Constitution prescribed that, 'where the native people are not left in the enjoyment of their own administration of justice, justice shall be done in the King's name'. Local (*landraad*) courts — in some places called *rapat* — were the ordinary civil and criminal courts of first instance. Always in Java and Madura, and elsewhere as often as practicable, the presiding judge was juridically qualified. He was assisted by two indigenous court members besides a Moslem adviser and a *griffier* to record the process (often a young prospective judge); and in criminal cases by an indigenous prosecutor (*jaksa*) as well. In civil cases these courts mainly applied adat law — or what the Constitution referred to as 'religious laws, institutions and customs' — in a simplified western procedure; in criminal cases the Criminal Code of 1915 was applicable.

Appeals could be made to the regional courts (in 1938 the Batavia *raad van justitie* had a special bench for adat appeal cases attached to it).

The government system further included a variety of lesser tribunals for special purposes, such as regency and district courts for minor criminal matters, and so-called 'priestly' courts (a misnomer) in which

the head of a mosque (*penghulu*) dealt with matters of Moslem law affecting marriage, family property and inheritance.

b) About the *indigenous* system of justice it is important to know, first, that it operated not only in self-governing territories, but frequently also in directly administered areas in the Outer Provinces (i.e. outside Java and Madura). Second, in directly administered areas these indigenous tribunals operated under the supervision of the local administrator (i.e. the Resident Commissioner, with powers to issue judicial regulations, and to confirm, revise or quash judgments), and its sessions were usually chaired by a civil officer in a non-judicial advisory capacity; but even in self-governing regions the indigenous system was not free from the government's scrutiny. (In the Javanese principalities much of the indigenous system was even replaced by government courts 'at the request of the princely authorities' — Holleman, 1940:386).

In short, the term 'indigenous' (*inheemse*) justice means little more than that traditional judicial authorities (headmen, chiefs, princes, etc.) administered adat law, and were permitted to do so more or less in the manner of their forefathers. In self-governing territories the competence of these courts was limited to the 'subjects of these states', and a number of specified civil and criminal cases were withdrawn from their jurisdiction. But all civil claims involving land, houses or crops owned under adat law fell under their jurisdiction regardless of the identity of the parties.

The resolution of legal disputes at grass-roots level is commonly referred to as 'village justice' in adat law literature, but the term embraces the smaller jural adat communities generally. In traditional judicial systems and in everyday rural life these tribunals played (and often still play) a much more important role than justice at higher levels, for the vast majority of legal disputes were satisfactorily resolved here without having to be taken higher up. Working with little formality, and having no real powers to enforce judgments, these tribunals relied on a spirit of give and take, on mediation and conciliation, rather than on judicial incisiveness. This may be a reason why village justice was officially known as 'amicable settlement' or 'arbitration', but not 'jurisdiction' (*rechtspraak*), and hence not recognized as part of the indigenous administration of justice until the mid-1930s, long after Van Vollenhoven and other adat law scholars had testified to its

importance and popularity. The 1935 Ordinance on Village Justice (*dorpsrechtspraak*) not only formally legalized the judicial function of these village tribunals, but made it possible for a *landraad* court to refer a dispute to the village authorities for their decision before dealing itself with the matter. Thus government judges were provided both with a useful window on the mainstream of adat legal commerce from which they could only benefit, and a means of checking possible abuses of power (Ter Haar, 1939*a*).

Like most other ex-colonial states, Indonesia soon abolished the dualism of the colonial judicial system, the emergency legislation of 1951 being confirmed by the Judiciary Act 1970. By laying down that 'all administration of justice in the Republic shall be done by the State', section 3(1) of the Act formally abolished the former 'indigenous' administration of justice (the administrative duality and self-governing territories having been abolished in 1948 — Van den Steenhoven, 1974:256, note 7). The new judicial hierarchy has three tiers: local courts (*pengadilan negeri*), regional high-courts also acting as appeal courts (*pengadilan tinggi*), and the Supreme Court (*Mahkamah Agung*).

The local courts are a continuation (with revised competence) of the former *landraad* courts. They have jurisdiction in all civil and criminal matters not expressly reserved for the other courts, and are courts of first instance for all persons.

In addition, religious courts (*pengadilan agama*) have been retained, and there must be one for each local court.

In the Judiciary Act itself there is no mention of justice at the village level, which seems a step backwards from the 1935 Ordinance to those who believe it is essential for judges to keep in touch with the living law (Holleman & Sugijono, 1971). But the Explanatory Memorandum to the Act states that 'dispute resolution based on amicable settlement or arbitration outside court remains permissible' (Van den Steenhoven, 1974:256, note 1). So it is left to the discretion of government judges whether or not to be advised by village authorities on the antecedents of cases coming before them (for some heartening examples, see Van den Steenhoven, 1970 and 1974).

Finally, Indonesia has established a uniform judicial system as one of the means of promoting greater unity in the substantive private law. In this respect the problems are formidable, and often besides adat law the old colonial statute law is applied, though it is interpreted

more and more differently as time goes on. There is still a long way to go to a unified national private law.

H. W. J. Sonius

NOTES

1 Reproduced in his *Adatrecht* III:658.
2 In the original Dutch version (1920), reprinted in his *Adatrecht* III:569ff., he used *rechtsstam;* the English translation (*Illinois Law Review* XV(7), 1921) as 'law tribe' seems less appropriate.
3 There is a good biography by Henriette L. T. de Beaufort, *Cornelis van Vollenhoven,* Haarlem, 1954.
4 Protagonists of a renewal of the literary arts in the 1880s.
5 Van Vollenhoven commemorated him in the students' journal *Minerva* (6 May 1897); reprinted in his *VG* III:667ff.
6 *Exacte Rechtswetenschap,* Brill, Leiden, 1901; repr. in his *VG* I:3ff.
7 This excludes his efforts and publications in other fields of legal scholarship in which he excelled.
8 Reprinted in his *VG* III:686-7.
9 *De Gids,* (69), 1905:307ff.
10 Reprinted in *Adatrecht* III:22ff.
11 'Juridisch confectiewerk', reprinted in *Adatrecht* III:719ff.
12 *Adatrecht* II:13ff.
13 *Hoofdstukken over Adatrecht,* The Hague, 1933.
14 Reprinted in *Adatrecht* III:65ff.
15 *Adatrecht* I:517 *et passim.*
16 Ibid, 625f.; 1919:24 *et passim.*
17 Section 51 of the 1925 N.I. Constitution.
18 De Beaufort, 1954:153ff.; *VG* I:174ff.
19 *Enc. N.I.* (suppl. 1935:1381).
20 Van Vollenhoven used the term *adat-volkenrecht* (adat 'Law of Nations').
21 This summary can also be found in his *De Indonesiër en zijn Grond,* 1919:9-10.
22 Three *Kommissarissen-Generaal* formed the transitional government of the Dutch East Indies after the British interregnum. They were later replaced by a Governor-General.
23 They include: Moestapa (1913); Sanggoenodirajo (1924); Enda Boemi (1925); Soebroto (1925); Soepomo (1927; 1933); Soeripto (1929); Soekanto (1933); Hazairin (1936).
24 For adat law bibliographies, see 'The Ethnography of Law: a Bibliographical Survey' (ed. L. Nader, K. F. Koch, B. Cox), *Current Anthropology,* June, 1966.
25 See note 24.
26 See e.g. Soepomo (1947), Pye (1960), Wertheim (1964), Tas (1973:81-102).
27 For a more detailed and well documented survey (including most useful distribution tables) of the colonial judicial system, see the Introduction by Hoebel and Schiller to Ter Haar's *Adat Law in Indonesia* (1948:14-31).

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