THE MYTH OF ADAT

Peter Burns

1 SUMMARY OF THE ARGUMENT

1.1 Preamble: The ideological importance of adat

One major difficulty in the creation of the independent state of Indonesia was the concept of nationhood. Where were the founders of the State to look for the common features which so many writers have held to be the essential ingredients of national identity? There was, it is true, a basis for the development of a common language (Malay) but, in the years when the nationalist movement was yet to gel, that basis was more a promise for the future than an immediate reality. There was the common experience of Dutch rule as alien intrusion. The indigenous people of the Indies could quickly identify the outsiders. They were the European colonial masters: 'they' were different from 'us' (*kami*). That was, however, a negative approach to Indonesian nationhood. It gave no positive answer to the question which naturally arose: who exactly are *kami*, the 'we' as opposed to 'them'?

Enthusiastic Muslims put forward their religion as candidate for the essential unifying ideology which would inspire Indonesia's struggle for national liberation. But Islam was too limited. It had been tried with apparently brilliant success in the second decade of the twentieth century but, by the nineteen-twenties, its energy was dissipated. As an ideology it seemed to be at once too broad and too narrow. As a universal religion, it adresses all mankind and, excepting

only the Followers of the Book[1], it claims the absolute allegiance of every people. So Islam was - and is - supra-national. And, as a particular faith, Islam could make at best a very limited appeal to Native Christians and the Confucian residents of the Netherlands East Indies. Yet members of these groups were to participate in the struggle and eventually to become full citizens of the new nation. Even the vast bulk of the Muslims detected by the colonial census were nominal, rather than devoted, adherents to their faith. Many had allegiances other than the exclusive worship and service of Allah. So Islam did not satisfy the needs of all the nationalists.

There were similar objections to the second option. That was to promote the idea of Java as the cornerstone of Indonesian nationhood. In its favour, Java had a highly developed culture and the longest recorded continuous history of any regional polity in the Archipelago. As an island, Java had served as an administrative centre through three centuries under the Dutch. Nevertheless, despite these advantages, the concept of a Javanese base would not enthuse, and would quite possibly alienate, many of the other subject peoples of the Netherlands East Indies.

What was needed was some other concept which would embrace the entire territory of the Dutch colony in Southeast Asia, marking it off as an entity, distinct from the rest of the world, and yet, at the same time, internally integrated. To a large extent, the ideological gap was filled by the myth of adat. 'Adat' is a word used in Indonesia to refer to indigenous culture, values and traditions. How it became a national myth - 'a whole world picture' (King 1964: 450) - is the subject of this essay.

This is not a history of the use which Indonesian nationalists made of the adat concept. There are two reasons for putting that task to one side. In the first place the role of adat in the battle of ideas was largely passive. As a general notion it would serve to reassure Indonesians-to-be of their common and distinctive cultural inheritance. But it was not used extensively or intensively in political debate against the colonial establishment. If pressed too far, the Indonesian advocate of adat would have ended up defending the details of his own regional usages rather than the enduring unity of national culture. The former was all he knew well. Adat was a useful

1 *Ahl al-Kitab*: an expression designating communities governed by a revealed scripture. The standard examples are the Jews and the Christians.

ideological weapon for nationalists in their struggle for independence. But in the end it was, like Islam and the idea of Java, too limited. That is one reason why this essay is not concerned with the nationalist use of the adat concept. The second and more important reason complements the first.

1.2 The myth-makers and their opponents

Ironically, the task of collecting and sorting out the ethnographic details, of analysis and systematic description, was, in the main, a Dutch enterprise. So the essay, instead of providing an account of nationalist myth-making, will tell how the colonial power itself contributed to the development of the sense of ethnic identity among its subject peoples. It will tell how it became a matter of intellectual and ethical commitment for a group of scholars to observe, record and process data concerning customs and values of legal significance in diverse Indonesian communities. It will tell how, largely under the inspiration of one man, the data were interpreted as peculiar local reflections of an underlying pan-Indonesian pattern. This pattern was conceived in terms of a single metaphysical idea - the idea of balance. Balance was thought to be the key concept in interaction between mankind and the environment. It was held to be the governing idea in relationships among human beings. To illustrate this central idea I shall make particular reference to two areas, land rights and the resolution of social disturbances.

The essay will also tell of the intense opposition which this enterprise generated among other Dutchmen. These men were loth to acknowledge the validity or the autonomy of native legal culture in the Indies. They feared the inferences which might be drawn from its acceptance. The ideological antagonism crystalized in the Netherlands during the nineteen-twenties, in the form of two schools of colonial law, each associated with a particular city and its university.

1.3 Retrospective assessment

In the light of later history, the battle of ideas between the two schools may be reckoned to have ended in a stalemate. The polemics petered out in the last years of the nineteen-thirties, to flare up, shortly, finally, at the immediate end of the war in Europe. Soon another issue - the survival of the Colony itself - took precedence over questions of the proper standing of indigenous legal custom. In the independent Republic of Indonesia, the successor state to the

Netherlands East Indies, adat has generally received the honoured place which its ideological usefulness won for it. But the legal values of adat are of no avail when they are pitted against the interests of the national power-holders.

The final section of the essay offers an explanation for this disjuncture between practice and ideal. Granting that there were established customs of legal significance in rural Indonesia, I suggest that the exaltation of adat grew in part out of the necessities created by administration, and in greater part out of the devotion of Dutch legal scholars. The cause of adat provided a justification for their presence in Indonesia and for their participation in the institutions of colonial government. I do not suggest that this was a conscious motive. It was, rather, part of that general European attitude to Asia and its culture that Edward Said has named (and so inadequately characterized) in his major critical work, *Orientalism* (Said 1978).

Underlying my analysis is an assumption that 'law' is a social phenomenon which can be distinguished from 'custom'. This concept of law is intrinsically linked with the concept of sovereign authority in society, by which I mean the concept of a disinterested third party superior to all contending parties. Diamond (1971) has distinguished 'the rule of law' (in this sense) and has set it in opposition to what he calls 'the order of custom'. Though Diamond's conception of law has been criticized as simplistic and of limited practical significance (Hooker 1978b: 147), I hold that the essential contrast of ideas is valid. I employ it in my analysis: the myth of adat arose from the identification of custom with law.

Having discovered custom, the adat theorists generally thought that that was sufficient: if the custom held significant legal value then the authorities ought to acknowledge it as law. It was the proper role of academic lawyers and enlightened administrators to persuade them. But the enthusiasts for adat were reluctant to go much further. They wanted to preserve the integrity of adat. They feared that it would be distorted by any attempt to incorporate it within the official legal system. This was the problem: as long as adat remained essentially custom, "something other" (Said *id.*: 1), it lacked the force, "the cutting edge" (Diamond *id.*: 47), which marks law as the instrument of a state. The champions of adat gave some thought to this, but too little and too late. In the final years of the Colony, one of them proposed a scheme which would have effected the transformation of adat-as-custom into adat-as-law. It was never adopted as judicial policy.

2 THE SETTING

The beginning of the twentieth century must have seemed like the dawn of a new and promising era for the Netherlands East Indies. A new young queen was on the Dutch throne. After tutelary years in the dying decade of the old century under the regency of her mother, she reigned at last in her own right. In 1898, the year of her accession, an idealistic lawyer, Van Deventer, recently returned from Semarang in Java, had published an essay in *De gids*, the most influential periodical of metropolitan Nederland at that time. The essay, 'A debt of honour', (Colenbrander and Stokvis 1915: 1-47) argued that Nederland had a clear moral and financial obligation in relation to its Asian colony. The essay won much public notice. It is difficult to say how much this may have contributed to subsequent developments but soon a new government, the 'Christian Cabinet' of Abraham Kuyper, was committed to a new ethical direction for the administration of the Indies.[2] In this general aura of optimism and willingly acknowledged colonial responsibility, another idealistic lawyer, Van Vollenhoven, a young man from Dordrecht in Holland, accepted an academic appointment to a chair at Leiden University. In accordance with convention he was free to determine the specific direction of the discipline which he professed. He chose the adat law of the Netherlands East Indies. This was to be his life's work.[3] He was to create for Indonesian adat such a status that eventually no colonial administration and, after independence, no Indonesian Government could afford totally to ignore it.

3 THE BEGINNING: THE THEORY AND THE MAJOR ISSUE

The development was, however, gradual. The first years were devoted to the analysis of the huge collections of unprocessed data available to him at Leiden. From time to time the routine was varied by an occasional publication: a progress report on the synthesis he was building out his findings or an urgent response to plans for an

2 The new 'ethical policy' was announced in the speech from the throne at the installation of Kuyper's Ministry on 17 September 1901. See Raalte (1946: 193f.).

3 This statement should be modified by reference to Van Vollenhoven's interest in international law. He continued to write on problems in that field to the end of his life. See Van Vollenhoven 1934b *passim*.

immediate policy change in the administration of the Indies.[4] In the following sections I discuss three occasional publications. The first (Van Vollenhoven 1934a: 51-56) was delivered as a lecture to the Royal (Dutch) Academy of Sciences. Van Vollenhoven provided an insight into his conception of his task and his working method. The lecture contrasts the classifications used for the comparative study of languages and of legal systems. The second (Van Vollenhoven 1909) was the printed form of four lectures given to the Academy for Administration of the Netherlands East Indies: it detected and corrected common but mistaken beliefs about adat law. The third (Van Vollenhoven 1919) was a polemic written ten years later. It was composed in haste to persuade members of the Netherlands parliament to disallow an amendment to the fundamental agrarian law of the Indies. These documents provide the framework for a more detailed history of ideas and for a discussion of their validity.

3.1 "Language families and law families"[5]

> To speak of the Indonesian language is nonsense,[6] but to speak of Indonesian law makes quite good sense.

This was the fundamental contrast of concepts which Van Vollenhoven (1934a: 52) sought to establish. In elaborating the distinction he said (*id.*: 51f).

> Differences of legal systems go far less deep than linguistic differences, seemingly. If I understand no Hungarian or Chinese, those languages are abracadabra for me; but if I know nothing of Hungarian or Chinese law, I may yet find in those

4 Ball (1985: 36-37, 39-40) summarizes four such major crises-1904-1905, 1914-1917, 1918-1919, 1923-1925.

5 This and all subsequent translations from the Dutch are my own. Van Vollenhoven published an English text (*id.*: 57-62) which differs slightly but not essentially from mine. As I had no access to this publication when the essay was written and presented, I have let my words stand. The main difference lies in the words chosen to establish the contrast: the Persian, 'gurg', and the English, 'wolf', replace the Armenian, 'erku', and the Dutch, 'twee', respectively.

6 He was speaking in 1920, eight years before the delegates at a pan-Indonesian youth conference in Bandung committed themselves to the promotion of a single national language. Sixty years later it is no longer nonsense.

> systems various things which are not completely strange to me.... In the eighteenth century, Europeans in Sumatra could earnestly believe, that the populace of that island "[spoke] languages radically and essentially different," (Marsden 1782: 154) and such opinions can still be discovered today among the uneducated in the Indies. Whereas, the same uneducated people are inclined to opine that the law in that country is as it is in our own.... So therefore the task of Comparative Law is totally different from that of Comparative Linguistics. Both aim to delineate a pattern of historical-geographical development; but in what different ways! Genealogical linguistics searches for agreements; it hunts for possible connections; it burrows down after relationships, searching for the degree and nature of the relationship; and it constructs its family tree of languages from the bottom up. Its battle is with those who are incapable of believing that the Sanskrit, 'cakra', [pronounced chakra] and our 'wheel'[7] or the Armenian, 'erku', and our 'two'[8] correspond with each other, letter for letter. Comparative Law, on the contrary, is on the lookout for possibilities for fencing off; its battle is with those who say that the essentials of the law pretty well everywhere over the Earth are essentially the same and that, for example, Indonesian and Dutch rights on land in essence do not differ....
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> Philology is grateful for a survey ... which shows clearly that more similarity exists than is commonly thought. Few things are so dangerous for Comparative Law as the global survey, which in every place identifies vendetta, inheritance law, marriage regulations and, consequently, lays an undesirable emphasis on such likenesses....
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> Law has still to find its Linnaeus.

Van Vollenhoven regarded his essential task as one of description, fine distinction, and classification. I turn now to one example of the application of his method to the peculiar legal situation in the Netherlands East Indies.

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7 Actually the Dutch, *wiel.*
8 Actually the Dutch, *twee.*

3.2 "Misapprehensions about adat law"

The first of the four lectures was entitled 'Native communities' (Van Vollenhoven 1909: 1-18). Van Vollenhoven argued that the significant indigenous legal groups with which he was concerned (the *rechtsgemeenschappen*) existed at various levels, many of them above the level of, or distinct in kind from, the village and that the colonial government was legally obliged to recognise them. These *rechtsgemeenschappen* were the several autonomous adat communities which in the different regions of the Indies[9] claimed to exercise a *right of allocation* over land. The right of allocation formed the substance of, and provided the title for, his second lecture, 'Beschikkingsrecht over den grond' (*id.*: 19-41). The third (*id.*: 42-66) dealt with the essence and internal organization of adat law and the last (*id.*: 67-90), with Javanese adat. This was a significant topic given the then prevalent belief that Java, being more 'advanced' or 'civilized' than the Outer Possessions (the residue of the N.E.I.)[10] and certainly having experienced centuries of centralized authority, would have no significant place for adat law. This was the assumption that Van Vollenhoven was concerned to contradict. It was the second lecture, however, which had the greatest potential for controversy.

3.2.1 "The right of allocation"

The basis of Van Vollenhoven's approach to adat was twofold. First, he believed that Indonesian customary laws were the expression of a thought-world alien to the mind of Europeans. Yet he held that the gulf might be bridged by a leap of the imagination. By diligent and sympathetic investigation a Westerner might shed his European

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9 Van Vollenhoven had tentatively proposed a division of the territories of the N.E.I. - and some contiguous areas* - into nineteen *rechtskringen* (separate adat law regions). These were largely similar to, but by no means identical with, the major ethnic and linguistic divisions within the N.E.I.

* The large anthologies of adat law data - ten volumes of the *Pandecten van het Adatrecht* (Koninklijk Koloniaal Instituut 1914-1936) and forty-five volumes of the *Adatrechtbundels* (Commissie voor het Adatrecht 1911-1945) - treated material from the Philippines and the Malay Peninsula in addition to that from the N.E.I.

10 *Buitenbezittingen*: The expression was altered to *Buitengewesten* (Outer Territories) in 1921.

presuppositions and gain insight into the world-outlook common to Indonesians. The process is set out in Van Vollenhoven (1919: 7-9). If the insight were sufficiently penetrating, the chaos and contradictions of indigenous practices would be resolved into a comprehensible and coherent system.[11] As a superscription for this lecture, he cited Lohman, speaking in the lower house of the Netherlands' parliament: "Adat law is held in contempt; but this is in great measure because it is very difficult to enter into another person's way of thinking". This shows that someone else had come to a similar point of view.

Van Vollenhoven remarked at the outset on the obscurity and ambiguity attached to the term, *beschikkingsrecht*, as used to denote an aspect of the law of property. It had been used in Indonesia, long before Van Vollenhoven's time, to refer to the set of rights he had in mind. I shall deal with the problem of rendering it in English. The verb, *beschikken*, means 'to dispose' and so the term has been translated as 'right of disposal' (Ter Haar 1948: 81 and *passim*). There are, however, at least two prepositional idioms attached to the verb, 'dispose', viz. 'to dispose of' and 'to dispose over'. It is the second of these, which bears the sense of 'to order' or 'to manage' (matters) that suggests the appropriate translation. J.F. Holleman, focussing on the privileges of the individual member of the autonomous adat community, renders the expression as 'right of avail' (Van Vollenhoven 1981: 43, 278 n.2, *passim*). I prefer 'right of allocation' and shall use it. Neither term is perfect. Neither covers the whole concept. Yet both are better than the first translation. It will emerge below, in the discussion of the features of *beschikkingsrecht*, that theoretically neither the autonomous community, nor any one of its members, could alienate land forever. So 'right of disposal' gives the wrong idea.

Van Vollenhoven presented a sixfold set to characterize the *right of allocation*:

- The autonomous adat community and its members may make free use of virgin land[12] within its area.[13] It may be brought into

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11 Despite his tendency to dissect and to differentiate, and emphasize the variety of local particulars, Van Vollenhoven held that, underlying that variety, there was a single, basic, *Ur-adat* common to all regions of the Indonesian culture area. See, for instance, Van Vollenhoven 1934a: 51.

12 *Woestgebleven* (Van Vollenhoven 1909: 19). Here, this term carries the sense of intact natural land. Elsewhere in the literature, land

cultivation; it may be used to found a village; it may be used for gleaning; etc.

- Others may do the same there only with permission of that community: without it, they commit an offence.

- For such use, outsiders must always pay some charge or give a gratuity in tribute; sometimes members of the community are also obliged make such payments.

- The autonomous adat community retains in greater or smaller measure the right to intervene concerning land already under cultivation within its area.

- The autonomous adat community is accountable for whatever transpires within its area if there is no one else from whom recovery can be made (for example, offences for which the culprit remains unknown).

- The autononomous adat community cannot alienate the right of allocation in perpetuity.

Van Vollenhoven referred in passing to the metaphysical basis of the right of allocation. Major writings by Dutch ethnologists (for instance Liefrinck 1927: 164ff. 316-377[14]; Adriani 1909: 88-91; Van Ossenbruggen 1905: 161-192, 360-390) had stressed the importance which the rural population attached to the set of animist beliefs which bound together the living community, its ancestral founders and the natural environment which sustained the community through time in both its spiritual and material life. This set of beliefs was conceived as a dynamic balance of vulnerable relationships. Although Van Vollenhoven here (1909: 20) barely acknowledged these ideas, he

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which had once been cultivated and which had then reverted to the *woest* condition, as defined by adat, is also held to be land at the disposal of the autonomous community.

13 *Kring* (*id.*). The word can be translated into English as 'circle', 'ring', or 'area'. I have chosen 'compass' as a compromise as, later, it was to become a matter of debate whether the *kring* should be considered as narrow and circular, like a *krans* (wreath).

14 Van Vollenhoven's references are rarely exhaustively detailed. Here he refers to Liefrinck (1890). Investigation reveals, however, that he almost certainly had Liefrinck (1927: 164-176) ~~he had~~ in mind. The other cited reference to Liefrinck is also relevant.

made clear elsewhere the extent to which they contributed to the formulation of the right of allocation concept.

He argued that this principle had not been totally ignored or denied by the government. Rather, he suggested, the performance of successive administrations had been erratic, self-contradictory and characterised by bad faith. The right of allocation was "not dead but sleeping" said Van Vollenhoven, adapting words which his non-immediate predecessor, Wilken, had used in discussing the peculiar land rights problem of Minahasa, an area at the northern tip of the Celebes.[15] As evidence of government confusion, Van Vollenhoven cited the notorious 'secret statute' (Anonymous 1874). This was an administrative decree which had, in despite of the major agrarian legislation of 1870, declared all virgin lands in the directly administered territories of Sumatra to belong to the State as part of its domain. The concept of *staatsdomein* requires some explanation: it will be supplied below. Here it suffices to say that the senior administrators of the Indies planned to implement a peculiar interpretation of the 1870 Act, one so limited that it vitiated the plain meaning of the words Parliament had chosen four years earlier. The 'secret statute' was never publicly proclaimed for fear, wrote Van Vollenhoven (1919: 117), of reaction among the West Sumatran people. So far, this shows duplicitly and deviance on the part of the bureaucrats. However, as Van Vollenhoven (1909: 23ff.) pointed out, even in the wording of the decree (Article 7) there was some official acknowledgement of the right of allocation.

Again in relation to Sumatra, he referred to instances in which land, used by Europeans for military or educational purposes over periods of longer than a hundred years, had reverted to its original status. That is, it had become once more subject to the living right of allocation exercised by the district or the kin-group or the village (*id.*: 23f.).

He referred to the violation of native land rights by the Europeans who had established tobacco plantations in East Sumatra around Deli.

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15 I mention this particular area and its land rights problems because the anomalies in the adat there posed a theoretical difficulty for Van Vollenhoven in his attempt to show that the right of allocation was to be found everywhere in the Netherlands East Indies. I return to this matter later.

This he listed as an instance of "total misapprehension".[16] He cited, as evidence of the outrage done to the native sense of justice, the retaliatory arson and crop-destruction prevalent on the hill slopes behind Deli in the years before 1883. Though at that time the Batak hill people had won some recognition of their rights, for the coastal Malay there was none. So savagely had the right of allocation been repressed that later investigators (Mahadi 1978: 172ff.) were to speak seriously of *hak jaluran* (right of dibbling in land left fallow or land along the margins of the plantations) as the characteristic East Sumatran adat land use (Pelzer 1978: 72f.). In terms of his theory Van Vollenhoven would have had to interpret this as a mere surface form. In consistency he could not have regarded it as other than a distortion of the underlying basic right of allocation.

He accused the Administration of subterfuge or, at the very least, of bad faith with regard to Minahasa. In 1903 it quite clearly conceded that, up to 1877, the native heads of districts there had been competent to allocate virgin lands. Yet, in that earlier year, when the Government had taken over all such land, the justification offered was a reference to the cupidity of local chiefs. They had intended, quite improperly (the official explanation implied), to arrogate the land in the name of their districts. With obvious inconsistency, the same document, the Colonial Report (Anonymous 1903), that had made the honourable admission mentioned at the head of this paragraph went on to suggest that, when the Minahasan gentry attempted to exercise this right, it was an 'abuse' of power.

He next turned his attention to the case of Java. In the east and centre of the island, he found, the right of allocation was still operative, though impaired and disguised. The conventional wisdom, by way of contrast, was that Javanese villagers held rights of common possession. Against this administrative orthodoxy, Van Vollenhoven argued that the phenomenon involved was either a distorted use or a misnomer. The distortion arose from the imposition of an alien plantation economy on an original Javanese base. The term applied in some cases to practices identical with those by which he defined the right of allocation.

For West Java, an ethnically distinct area (the people are Sundanese, not Javan), he conceded that the right of allocation was not in

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16 Some would have used stronger language. The planters had become infamous for their indifference to the sufferings of Indonesian peoples in East Sumatra. See, for instance, Van den Brand 1902.

evidence. Individual possession of fields and alienation to outsiders were accepted and common. But he argued that historically (ca 1861) rules had operated there not unlike the supra-village right of allocation which in 1909 still held good in Aceh (northernmost Sumatra).

In relation to the law of territorial accountability, the obverse side of right of allocation, he clearly distinguished two other practices. This was not, he wrote, an aspect of the adat law of mutual responsibility. That concerned the internal relationships of the community. Nor was it to be confused with the collective responsibility imposed by an external authority, a sultan or a colonial governor. Rather, he said, the principle of accountability was similar to that accorded to the persons and property of diplomats and visitors accepted for residence in, or transit through, the territory of a sovereign state. However, he argued, the idea of an autonomous adat community was not to be confused with that of an independent sovereign state: the right of allocation lay in the sphere of private, not public-constitutional, law.

So frequently in the future were attempts made to resolve the *beschikkingsrecht* controversy by use of such an identification with public-law questions that it is worth noting here how explicit Van Vollenhoven was in his rejection of this possibilty. To give some idea of his outlook and the force with which he argued his case, I reproduce a page from his lecture (*id.*: 27-29):

> Why, when the indigenous *right of allocation* manifests itself in one form or another pretty well all over the Archipelago- why, when even the most stupid of natives can understand it - why do our writers and government find it so obscure and complicated?
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> I believe: through wretched attachment to our European terminology. For what kind of rights does the civil code recognize with respect to land? Uppermost: property, next: civil occupancy, further commercial rights such as tenure under long term leasehold, usufruct and tenancy under rent. So what was the enquiry from the government? And what is it still, from the code-book jurists? They do not recognize any other system than the Justinian and the Dutch-Napoleonic; nor do they want to know about any other such system. They asked: "Who here is the owner of this patch of undeveloped land - 'owner', that is, in just the same sense as A and B are the owners (native occupants) of the paddy fields I see yonder?" The answer was:

> "No-one owns them." The government said: "Then I proclaim myself as owner and this patch as government domain." The response was then: "But, even though no one is the owner, the people *have the say over*[17] that land and there is no acre of land over which they do not have the say, none which they do not regard as theirs." But then the administration countered: "Good, dear friend: what you now mean is what we call public-law authority. Consequently, we recognize the whole area as the territory of your native community. But, just as the province of South Holland or the city of the Hague has no private-law rights on its entire territory, neither have you."
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> And the consequence? That we gave them, in exchange for their many-sided *right of allocation and avail* ... the constitutional authority of a state, the theoretical inaccuracy of which emerges in consideration of the *right of allocation* of a Minahasan family. No one concedes that it has a territory. The practical significance is this: that in place of bread, they have got stones.

Concerning the charges or gratuity in tribute presented by outsiders wishing to use the land, it was altogether mistaken, wrote Van Vollenhoven, to regard these as "compensation on account of loss in the collection of forest products". That was not the issue. However great such compensation might be, the loss that the communities feared was loss of control: they wanted to participate in negotiations for concessions to private enterprises. Basically, they wanted recognition: the adat payment was called (in Dutch) *recognitie*.

Van Vollenhoven (*id.*: 40) regarded the domain theory (the main ideas of which are still to be explained: see below, sections 3.2.2, 3.3.4 and 4.1) as feeble and historically invalid. It was in clear contradiction with Government regulations (*Regeringsreglement*, Article 62: sections 5 and 6; Article 75: section 3). The resolution of the problem was not to be achieved by transferring the right of allocation from the lower level community (were it extended family, clan, village, district, or federation) up to the very highest, the Government, as domain holder. That would be confusing two dissimilar concepts (*id.*: 31).

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17 My emphasis. Cf. my gloss on *beschikken*: 'to have the say over' in the analysis of *beschikkingsrecht* above.

His recommendations were three:

(i) The Government should institute a general investigation. Where the right of allocation still survived, it was to be recognized; where impaired, mended.

(ii) Where expert investigation showed that planning or adjustment was necessary, the Government should commence that task without delay for, he wrote, "None of us regards adat law as a sacred cow" (*id.*: 40).

(iii) In practical administration, the officials should cast off European prejudice; they should try to look at such popular institutions through native eyes. He expressed serious concern that continued contempt for indigenous right could lead to social upheaval, even to full-scale civil war.[18]

3.2.2 Ten year interlude: mustering for ideological battle

The publication of *Misapprehensions* was Van Vollenhoven's first clear open challenge to the conventional view, namely: that the government was supreme master of the lands of the N.E.I. It was a challenge to the comfortable muddle in which the colonial bureaucracy continued to survive, amid vagaries and paradoxes, conflicting laws, a muddle of statutes, ordinances, decrees and regulations.[19]

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18 Ironically, he cited as an example the Minangkabau area of West Sumatra (*id.*: 41). It was there (and in Banten in West Java) less than twenty years later, that the fledgling Communist Party of Indonesia launched its first abortive attempt to seize power. See Schrieke (1966: 83-166) for an analysis of the Minangkabau uprising. Schrieke (*id.*: 110) noted that adat had lost legal force. "[M]any would like nothing better than to see the government decree the inalienability of land by law." The irony is, as Van Vollenhoven and his followers pointed out repeatedly, that parliamentary enactments - effective from 1870 (or even earlier) and superior to any administrative decree - had long since proclaimed the land inalienable.

19 Benda (1966: 589-605) identified the N.E.I., in its final years, as a *Beamtenstaat*, a self-perpetuating administration the only function of which was preservation of the status quo. The ethical idea had lost its impetus. Benda's description certainly agrees with Van Vollenhoven's characterization of the colonial bureaucracy.

The administrative establishment of the Indies was now faced with a major criticism and a need to respond. It required a rationale for official policy.

Meanwhile, in 1914, the Royal Colonial Institute of Amsterdam provided more fuel for argument with the publication of the first volume of its *Pandects of adat law* (Koninklijk Koloniaal Instituut 1914-1936). This was a study devoted to 'Right of allocation over land and water', an anthology drawn from various European accounts of Indonesian practices. By means of editorial comment, generally in the form of footnotes, the compilers endeavoured to reduce the chaos of conflicting terminologies to a uniform set of technical expressions. "The collection and ordering [of the material] was entirely the work of people studying at Leiden," wrote Van Vollenhoven (Koninklijk Koloniaal Instituut 1914: v), "essentially of students qualifying themselves for legal work in the Indies."

The central bureaucracy had been marshalling its polemical resources. G.J. Nolst-Trenité, a senior departmental advisor on agricultural policy, later to become known as Van Vollenhoven's most energetic and persistent opponent, drew up a statement, 'The right of the state to land in the directly-governed outer possessions of the Netherlands East Indies' (Anonymous 1916: 66-105). Prepared in 1912, this text, commonly identified as the *Domeinnota*, was attached as an appendix to the *Agrarian regulation for Sumatra's West Coast* (Anonymous 1916), which appeared four years later. He also wrote a position paper for presentation to a convention of the N.E.I. Association of Jurists (Nolst-Trenité 1917: 193-240). This was an attempt "to cut through the [Gordian] knot" (*id.*: 206)[20] by subordinating all the various and conflicting agrarian rules to one supreme principle: that the State was master of the land. That simple proposition needed some qualification, of course. In addition to certain tracts established as absolute private property some hundreds of years earlier, the geographical realm of the Indies included the territories of the indirectly controlled or 'self-governing' principalities allied by treaty with the Netherlands colonial government. Even in the directly-governed territories, the lands which the Indonesians used for building their homes, for instance, were exempt from the absolutely untrammeled competence of the Government: to use, to neglect, to destroy, to dispose of or over.... Nolst Trenité (*id.*: 232) recognized

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20 Though Nolst-Trenité was here refering to a previous attempt to simplify agrarian laws, the expression is also appropriate to his radical proposal for administrative rationalization.

that. So the theory of domain had to be elaborated: in addition to 'free domain', there was a residue, 'encumbered domain' land. Of its own good will, the sovereign government had so bound itself that the native inhabitants of the Indies were free to exercise certain options. More concerning the conceptions of domain rights will emerge below (3.3.4 and 4.1), in a discussion of Van Vollenhoven's major polemic achievement.

In 1918 the contending parties drew up for conflict. In the course of that year the first part of Van Vollenhoven's magnum opus, *The Adat Law of the Netherlands East Indies* (Van Vollenhoven 1918-1933) appeared in print. It was, however, his opponents' attempt to change the basic agrarian legislation for the N.E.I. which provoked the Leiden professor's most majestic response. Nolst-Trenité had advised the parliamentary draftsman on the wording of a Bill for the Amendment of Article 62. Article 62 was the agrarian section of the organic law (*Regeeringsreglement*) which functioned as a constitution for the colonial state in the Netherlands East Indies. Had this legislation passed both houses of the metropolitan parliament, it would have removed from the law all the protection theoretically provided for adat land rights.

3.3 THE INDONESIAN AND HIS LAND

Van Vollenhoven had been in Washington since late 1918: he was on an official mission, charged with negotiating post-World War I problems[21]. According to Beaufort (1954: 111), he left Washington in May 1919. The effective notice which he received of the presentation of the proposal mentioned above was three weeks.[22] Yet that sufficed

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21 Van Vollenhoven was generally concerned with the interests of neutral nations in the new world order conceived by Woodrow Wilson and the victorious allies (Beaufort 1954: 111ff.). The study of international law was Van Vollenhoven's other major academic commitment. See note 3.

22 Personal communication from J.F. Holleman. The period of three weeks is hard to determine. The bill was presented on 29 May 1918 (Van Vollenhoven 1919: 108). It apparently came before the members in two parliamentary sessions: 1917-1918 and 1918-1919 (*id.*: 1). It would seem that the critical parliamentary session must have taken place in 1919. The account of Jonkers (Commissie voor het Adatrecht 1930: 46) is in no way incompatible with this interpretation. It would be strange, though, if Van Vollenhoven knew nothing of a draft bill,

for him to write, and to have printed and distributed to every member of the Second Chamber the document later published as *The Indonesian and His Land* (Van Vollenhoven 1919).

The book falls into two parts, each consisting of four chapters. The symmetry of the structure emerges clearly from the table of contents which I have arranged below:

motivation
an apology for this criticism
the necessity for this criticism

i	**the farm lands of the Indonesians** a century of injustice	v	**the virgin lands of the Indonesians** a half century of injustice
ii	**practical considerations** with regard to farm lands	vi	**practical considerations** with regard to virgin lands
iii	**agrarian regulations** and the farm lands	vii	**agrarian regulations** and the virgin lands
iv	**the conscience stopper** proclamation of the farm lands as the domain of the state	viii	**the conscience stopper** proclamation of the virgin lands as the domain of the state

ix **the pending legislation**

x **the reconciliation**

The following summary shows the development of the argument of the book, the views opposed by Van Vollenhoven, the enemies he identified, his attitude to the development of adat law, and, I hope, something of the force of his writing.

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concerning such an important matter, which was presented to Parliament six months before he departed from his homeland. Ter Haar (1950b: 90) wrote that the Second Chamber had "responded weakly" in a preliminary report on the draft legislation. That was, presumably, in 1918.

3.3.1 "A century of injustice"

Such a title immediately brings to mind the period of the Cultivation System (*Cultuurstelsel*). This was a nineteenth century extractive enterprise based on plantation agriculture with forced labour and forced deliveries. It included a monopoly for the benefit of the Dutch Trading Company (N.H.M.), instituted by Governor-General Van den Bosch in the years after 1830. Founded five years earlier, with the Dutch King as the first share-holder, the N.H.M. was administered by the government in the Indies for the direct benefit of the Kingdom of the Netherlands. But the "century of injustice" began before the establishment of the Cultivation System. Van Vollenhoven's narrative and analysis also covers the period from ca 1817 to 1830 and even the French and British interregna in the years (1808 to 1816) before the Indies became a Dutch colony.[23]

Right at the outset, however, Van Vollenhoven rehearsed for his readers (a slightly more elaborate version of) the right of allocation doctrine first enunciated in the *Misapprehensions*. He presented the concept as a discovery, as a pattern common to the autonomous communities (*id.*: 8). He stressed the extraordinary agreement of practices in different parts of the Archipelago:

> The adat restrictions must, of course, have been thought out and proclaimed at some stage - perhaps by the villages themselves? - through unwritten regulation? - or by superior authority, perhaps?...[24] Yet it remains rather odd that, in a time void of the means of transport..., without printing presses and newspapers, for the whole of Java (one might say: for the whole of the Indies), those restrictions turned out just as uniform in tenor and content as regulations from military commanders, dispatched from the *one* centre.

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23 'Property' of the Dutch East India Company until the last day of 1799, the Indies fell subject, in the new century, to the liberal-autocratic rule first of the Bonapartist nominee, Daendels, from 1808 to 1811, and, thereafter, for five years, of Raffles, Lieutenant-Governor for the British East India Company. The Indies became a colony of the King of the Netherlands on 19 August 1816.

24 Van Vollenhoven here cites the *Eindresumés*. These three volumes (Bergsma 1876, 1880, 1896) were the reports of a government commission set up in 1867 to investigate native land rights in the N.E.I.

He presented the doctrine as the solution to all the puzzles of land tenure claims and practices among the various native peoples of the Indies.

He listed the faults of the past. Daendels, Governor during the French period, had arbitrarily allocated rice fields for the benefit of native civil servants. These infringements, however gross they were, occurred only in rare cases. But in 1832 the practice was repeated as a form of payment to native soldiers and regents (local administrators of aristocratic native descent). In neither case was any thought wasted on the rights of the commoners (*id.*: 13f):

> To get free land for forced cultivation, the whole set of cultivated fields was flung together in great confusion. The levy banks between the irrigated fields, which also served as boundary markers, were sacrificed to the culture of indigo. In some places inheritance rights were abolished because they were inconvenient. The lands occupied by neighbouring villages were mixed wholesale and so badly was the Administration smitten by this particular bug that it brought these measures into play in villages in no way connected with the Cultivation System.

He concluded his comments with this invitation: "Men stelle zich iets dergelijks voor in Nederland" (Just imagine the same sort of thing in the Netherlands!). By its solemn repetition, this refrain would underline his argument to the elected representatives in the Lower House.

He pointed out the difficulty of trying to administer Java from a central office. During the more liberal administration of Raffles, Lieutenant-Governor during the British occupation, an attempt had been made to levy a land tax in proportion to the size of the individual native land-holding. The rationale for this policy was the promotion of private ownership of land and the accumulation of capital. What in fact happened was that the individual native's registered land-holding increased or decreased with the local chief's assessment of that individual's duty or capacity to pay (*id.*: 12).

Raffles was no hero as far as Van Vollenhoven was concerned. He was, if not the author of, then at the very least a strong propagandist for, the domain doctrine which the Dutch professor held to be a confusing and dangerous fantasy of the colonial bureaucrats. Van den Bosch, the founder of the Plantation System and, as Van Vollenhoven observed, "no adat law fanatic", had condemned as plain

falsehood the decree under which Raffles had likened Java to the "farmyard" of the Government (*id.*: 52).

In several places (*id.*: 23, 29, 85f.) he emphasised the view that the right of allocation was in different stages of development or perhaps attrition. In natural course, it would become a system of individualized negotiable land holdings with scope for large scale concessions to foreign enterprises. This was as it should be, he judged: Van Vollenhoven was in theory no enemy of 'development'. There is a clear statement to this effect at the beginning of the next chapter, "Practical considerations" (*id.*: 29):

> A respect for the rights of the people at the expense of the development and prosperity of the N.E.I. would wreak greatest vengeance on the people themselves. The land is too good and promising for it to be made into a museum of adat.

He referred to the acceleration in the natural process of attrition in the right of allocation which occurred in Java after 1900. His theory could account for it: that of the bureaucrats could not. According to the latter, individual Javanese who withdrew land from their village community acted arbitrarily: their pretence was essentially fraudulent (*id.*: 23). The bureaucrats came to this mistaken conclusion, Van Vollenhoven said, because they began from the familiar mistaken premise, to wit: that, in Java, land was held as the common property of the village. The central administrators purported to be protecting the Javanese peasant from the 'caprice' of his own purposes. Despite his own emphasis on the underlying oneness of adat, Van Vollenhoven here claimed to find an obsessional drive for uniformity among his foes (*id.*: 33, 42). He may have wished to distinguish his unity from their monolithic concept.

Among other gross examples selected to illustrate 'the century of injustice', he mentioned for the first time the case of Kromowidjojo (*Het Indisch Tijdschrift van het Recht* 1916: 207-220), a Javanese peasant who, in full accordance with the local adat, reclaimed a patch of alluvial land created by a sudden change in the course of a river. After he had spent time, effort and the equivalent of 1,000 guilders in developing it as a rice field, it was, by regional administrative fiat, taken from him. Kromowidjojo appealed for justice. In the first instance the controller sentenced him to several days of labour. Then the presiding officer of the *landraad* (district court) announced he had no time to spare. Finally, the Viceroy of the Indies declined to respond to Kromowidjojo's suit. The story has been retold, in part as fiction, in the memoirs of the president of the

district court sitting at Magelang who eventually, on 21 October 1915, gave adat justice to the heirs of Kromowidjojo (Wormser 1946: 27-80). Had precedent had binding force in adat law, Wormser's finding would have established forever the right of avail, at least for the district of Magelang. At any rate, this case became a frequently-cited instance of official insensitivity to indigenous legal values. It was a case, said Van Vollenhoven, that cried to heaven for redress.

Characteristically, he ended his survey with a warning. Some Sundanese had dug a water channel across N.E.I. military pasture land in West Java. They had acted without notice or by-your-leave. This was genuinely arbitrary behaviour, in contrast to the bureaucratic misapprehension mentioned above. Had the Sundanese been learning from their colonial mentors, he asked, and closed the chapter with a warning, the proverb: "Who sows the wind will reap the tempest."

3.3.2 "Practical considerations with regard to farm lands"

Van Vollenhoven recommended nine initiatives. He wanted to see:

- the rapid development of land tenure (or occupancy) into a right of free avail (or usufruct[25]) and a right of allocation or disposal: (He was thinking of individualized land holdings and he saw this development as a spur to the growth of economic consciousness);

- sound guidelines established to regulate the attachment of lands for debt;

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25 The Dutch text is difficult: "Indonesisch grond*bezit* worde zooveel en zoo spoedig mogelijk een recht van vrij *genot*...." According to Le Docte, the word, *bezit*, can be translated as 'possession' (1978: 427): it is not distinguished, there, from 'property'. Elsewhere (*id.*: 180), it is given as 'tenure', 'precarious possession'. *Bezit* is also used in the sense of 'occupancy' (*id.*: 383). Ten Bruggencate (1977: 108) is no more helpful: 'property' is brought into consideration as another candidate translation.

The word, *genot*, by itself, means 'pleasure', 'enjoyment'. Legally considered, it means 'usufruct' (*id.*: 259), a construct for which there is at least one other Dutch term, *vruchtgebruik*. Taken in conjunction with the word, *recht*, *genot* signifies 'right of undisturbed possession' (Le Docte 1978: 196).

- legally valid means of proof established for rights of occupancy and allocation;

- European laws applied to native-held land in the major cities (where adat law was no longer operative);

He opposed and wished to see diminished:

- casual[26] alienation of land to Europeans or foreign Asians;

- dismemberment of land holdings;

- self-help, that is: taking the law into one's own hands;

- rights to intermittent usufruct on established farm lands;

- preferential rights.

In connection with the last point, it is necessary to understand that, under adat law, the peasant who first brought land under cultivation retained certain privileges. Later, when, in accordance with the local adat definitions,[27] the land had reverted to its original condition, he had first option to rework it. Should he not avail himself of the

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26 He did not oppose alienation in principle, but he was absolutely opposed to casual alienation. When it was necessary to cede native lands as private property, this should be done, he said, with the metropolitan government acting as intermediary. The government should first expropriate the land through act of parliament, with adequate compensation debated and determined. Then the government, acting on its own behalf, would negotiate the alienation to the eventual purchaser or grantee (Van Vollenhoven 1919:116).

27 These definitions differ from region to region. See Van Royen (1927: 159-175) for a discussion of the intricacies of preferential rights in one area of the South Sumatran adat law region. For a survey of practices recorded for the nineteen distinct adat law regions, see Koninklijk Koloniaal Instituut (1915: *passim*, especially 99-112). Ter Haar (1939: 57) mentions just one of the various imaginative tests devised to measure survival of preferential right:

> When the signs are no longer visible because the bark of the tree has, or the branches have, grown again, the right of the community is fully restored....

privilege, the land then fell once more under the right of allocation of the community.[28]

Given agreement on the nine policies set out above, how should they be implemented? Not by decree, he said. The history of administration by decree had been a failure (*id.*: 31, also 63). Apart from one or two policies, for instance the ban on the alienation of native lands[29] and the promotion of the right of tillage, government decrees, whether originating in legislation or in consistent case-law,[30] generally misfired or did harm to the legal condition.[31] Rather, he said, let adat law develop along its own lines. It was ridiculous, for instance, to attempt to apply in Lombok rules which had been developed to meet the needs of the Javanese situation (*id.*: 42). Such mixing of different cultures, adat systems and stages of development was counterproductive. He went on to criticize an even more ludicrous mixture: the christening of an Indonesian concept (*inlandsch bezitrecht*: native right of occupancy) with a European name (*oostersch eigendomsrecht*: oriental property rights). The result: a confusing construct of which the Javanese had made no use (*id.*: 34).

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28 Van Vollenhoven (1919: 36) noted that adat might be encouraged to develop some limitation on anti-social reservation of privileges. His cited reference, which leads ultimately to Enthoven (1927: 16f.), shows that superannuation was possible (though the argument seems tenuous). With regard to priority in reclamation, most regions succeeded in keeping land in productive use. Only in a few adat law regions (Menado-Minahasa and among the Dayak of Borneo) (Koninklijk Koloniaal Instituut 1915: 75) did preferential rights create major obstructions for agricultural and economic development.

29 Early in the history of the Dutch in Indonesia, large private estates had been sold or otherwise granted as absolute property to non-natives. This practice stopped, roughly in the period 1830-1854. Thereafter, the Netherlands colonial government spent money, energy and time trying to reacquire these estates.

30 *Door een bestendige jurisprudentie.* This seems an odd concept of government by decree, an extension of its conventional meaning. It should be noted, though, in connection with my later discussion of Van Vollenhoven's attitude to the concept of judge-made law.

31 *Bedierf den rechtstoestand.* It is far from clear what this expression means. I take it that Van Vollenhoven was referring to the subjective sense of justice among the peoples of the various autonomous adat communities and suggesting that the imposition of law from outside, by decree, would alienate the peoples from the law-giving government. This was one of his familiar themes.

(The purpose had been to offer a title which would allow a native landholder to convert his occupancy into a condition of ownership.)

3.3.3 "Agrarian regulations and the farm lands"

In this chapter Van Vollenhoven established a contrast which remained as a recurrent theme through the rest of *The Indonesian and his land.* It was not with the officers in the field, but with the officials in the central administration, the "Lords of the Bureaux," that the fault lay. The regional administrators of the *Binnenlands Bestuur* (Administration of the Interior)[32] were sometimes[33] wiser and more sensitive to Indonesian (legal) values. The bureaucrats were generally arrogant, stupid and vicious (*id.*: 70, 72, 78, 80). It was a basic working premise with them to regard the alien culture of the Indies, not as a system with its own autonomous values, but as a stunted reproduction of European civilization. They could not, for example, conceive of unowned land (*id.*: 58).

3.3.4 "The conscience stopper"

This chapter shows Van Vollenhoven at his polemical best. According to one of the variants of the domain doctrine, the peasants held land

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32 I do not know if, strictly speaking, Van Vollenhoven's "Lords of the Bureaux" would have been classified as members of the *Binnenlands Bestuur* corps. The question has some point: I value and intend to use the analysis suggested to me by Professor B.O'G. Anderson of Cornell University, to wit: the Leiden-Utrecht controversy (a major theme in this essay) was a battle for the hearts and minds of the *Binnenlands Bestuur.* Whatever their proper designation, the "Lords of the Bureaux," the masters of the corridors of power, sat in Batavia and Buitenzorg (Jakarta and Bogor), the cities of government, just as their successors do today.

33 See Van Vollenhoven's praise (*id.*: 95) for the Resident of Jambi and the superscription for Chapter VIII (*id.*: 99) (see section 3.3.8) which he cites for irony from Anonymous (1912: 65). The writer (actually Nolst Trenité) mourns the misdirected sense of justice frequently manifest among the field officers of the *Binnenlands Bestuur.* Contrast Van Vollenhoven's implicit approval of those men with his condemnation of the Resident of Riau (Van Vollenhoven 1919: 74). The catalogue of that man's failings is summarized below (section 3.3.5 b).

only at the pleasure of the government in its function as owner.[34] According to an even more extreme view propounded by a member of parliament, they were "occupants in bad faith", with no rights: they were, in effect, no better than squatters. Another ludicrous outcome of the domain doctrine was the technical invalidation of all Islamic sacred bequests (*wakap*, from the Arabic, *waqf*) (*id.*: 56f.). These were endowments of land allocated, or personally alienated in accordance with adat, for the establishment of mosques, prayer houses or schools. In 1904 a district court in Bandung had held that there could be only one donor for all the *wakap* in the Indies. That was the Government of the N.E.I. Now, realistic Muslims might have assessed the Government as pagan. Others might have given it the benefit of the doubt and treated it as Christian. Either way, however, the Government would have been incompetent in Islamic law to act as donor. So the doctrine was, both theologically and judicially, untenable nonsense.

Van Vollenhoven argued that there was actually no single 'domain doctrine'. Analysis of the various statutes and decrees showed clearly that there were at least four distinguishable meanings for (state) domain. The text of his analysis (*id.* 53f.) is as follows:

> The first and foremost question is whether this right of domain over native farmlands - proclaimed in the face of parliamentary objections and in spite of ministerial undertakings - has actually contributed to order and legal certainty. (Do not set your hopes too high).
>
> The most extensive formulae (for Java, 1870 and for the Outer Possessions, 1875) say that state domain is all land on which no other person can demonstrate right of ownership. Leave aside the question of what 'demonstrate' may mean. These words have given rise - among the bureaucrats - to [at least] four [different] authoritative interpretations:
>
> first: all land for which no other person can demonstrate a European right of ownership (according to the Civil Code);
> second: all land for which neither European nor agrarian ownership (a category created in 1872) can be demonstrated;

34 The formula used was *bezit ter bede*.

> third: all land for which neither European, nor agrarian, nor oriental ownership can be demonstrated (the last category is an unencumbered native right of occupancy);
>
> and, to bring confusion to the full, the Chief Adviser to the Government on Legal Aspects of Agrarian Affairs[35] has defended the proposition that state domain consists of:
>
> [fourth:] all land on which no other person can demonstrate either European, or agrarian, or oriental property rights or even an encumbered native right of occupancy.
>
> And such a formula is said to create order, regularity and legal certainty with regard to the farm lands, being "that on which all else rests".

Yet, this was just the beginning. In another instance, a provision with regard to Minahasa in 1899 had carefully distinguished between coffee plantations established on domain ground and those established on once cultivated land (*id.*: 54). So deserted fields, too, might be exempted from the definition of domain land. And, as evidence of confusion among men of good will, a missionary conference had discussed "the domain lands of the *desa* [Javanese rural community]". (*id.*: 58)

In concluding the first half of his book, Van Vollenhoven considered two reasons often advanced for the domain doctrine. One held that it was essential for voluntary alienation of land to non-natives. Should an Indonesian, in full consciousness of his rights and having a proper power thereto, wish to dispose of his land to a European, or a Chinese, or an Arab, the necessary process was for him first to cede it to the government. The government would then, for whatever consideration it deemed appropriate, grant it as property to the alien.[36] This was nonsense, said Van Vollenhoven; would it not be

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35 This was Nolst Trenité.

36 As one of Van Vollenhoven's students was later to point out (Logemann 1937: 14-41), these legal fictions created a tangled web. How, he asked, could this theory ever justify the Indonesian in receiving any consideration for the alienation of his land? It was not due to him from the government, for according to this theory, the government was entitled to all abandoned lands. It was not due to

more sensible for the Government to establish *by decree* that it was the necessary sole approving authority for such a transaction?

The other cited justification, ownership of treasure trove, could be simplified and rationalized in the same manner. Legislation could establish the proportion of the benefits which should fall to the nation and the proportions for the finder and for other claimants. There was no need for a doctrine of government domain over cultivated lands in the N.E.I.

3.3.5 "Fifty years of injustice"

Van Vollenhoven began the second half of his exposition - the part concerned with virgin lands - by tracing the history of agrarian legislation for the N.E.I. from the time of J.C. Baud, an administrator who became aware of personal rights on lands in Java which he had, all unwitting, allocated as private estate. Later, as Governor-General (1833-36) and still later, as parliamentarian (circa 1850 - a period of major government reform in the Netherlands), he acted as the devoted advocate of recognition for adat land rights. He was instrumental in the passage of the 1854 Act and was influential in moulding the thoughts of the Liberals who, in the years leading up to 1870, were formulating the new agrarian policy for the N.E.I. This was a delicate task. The Liberals sought the end of the Cultivation System and of the royal monopoly. They wanted the land opened up for development by private capital and enterprise. At the same time, Thorbecke, the Liberal leader, worried that in expelling one devil (forced labour on the state plantations) the Netherlands Government was simply leaving room for seven more. He in no way wished to see infringement of native rights.

With the passage of the 1870 Act, however, native rights were supposed to be secure. "Secure?" wrote Van Vollenhoven, "One might have hoped so." The trouble was, he said, that the central bureaucrats were allowed great scope for administrative interpretation. They made full use of it. They found a loophole in the wording of the law. During the debates prior to the passage of the Act, the expressions, *gebruik* (use) and, subsequently, *gedurig gebruik* (lasting use) had been employed to distinguish the area over which, in each locality, the vaguely conceived native community exercised its rights of

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him from the European/Chinese/Arab purchaser, for the purchaser received the land from the government.

allocation (its *beschikkingskring*). This *beschikkingskring* was to be distinguished from the no-man's-land over which the Government might quite properly have the say.[37] In the same context, Thorbecke, trying to define the territory at the disposal of the community, beyond its fields and houses, spoke of a *krans* (literally, a wreath or garland) of land around the village. These expressions were later so interpreted that despite the 1870 Act large tracts of virgin land between established settlements could still[38] be "flogged off" to Europeans or Chinese "for an apple and an egg" with no intervention from the administration (*bestuur*).

The editorial licence of the bureaucrats, reflected in regulations, ordinances, directives and so on, followed lines such as these:

> Article 62 had excluded "lands belonging (to the community) under any other head." This phrase had been interpreted to mean "lands in use": that would really be to say "lands in constant[39] use". Well now, "lasting" or "constant" use must have entailed that the lands belonged to someone. That could only apply to the cultivated fields and house allotments. In effect, the area of allocation was identical with the developed land of the community. (*id.*: 67, 76)

This series of logical slides had made nonsense of the original wording of the Act, to wit: "under any other head". Yet that did not embarass the bureaucrats, wrote Van Vollenhoven: they did not worry about such matters.

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37 Van Vollenhoven conceded that there were such areas in the N.E.I. By 1900, however, they had ceased to exist in Java and West and South Sumatra.

38 This had in fact been going on since 1860, wrote Van Vollenhoven (*id.*: 71).

39 Van Bockel (1921: 449) presented an ingenious analysis of this assumption. He asked: why not sporadic use? His argument might be augmented in the following way. Imagine:

(i) that members of the community must have a particular forest product,
(ii) that they take only a small amount,
(iii) that they do so rarely but regularly.

Surely that would qualify as constant use? If that argument were systematically pursued, the whole case for the interpolation of the word 'constant' would fall apart.

Digression on the extent of the *beschikkingskring*

Nolst Trenité, the protagonist of domain theory, had offered an interpretation (Nolst Trenité 1916: 241) of the official administrative position. For him, Thorbecke's word, *krans*, meant *kom* (basin, declivity). At a later stage, during the debates of the nineteen-twenties, he was to refer to the legally protected land as *beheers-kring*, meaning 'land under the management of the autonomous community' (Nolst Trenité 1926: 639): the term carries the legal connotation, in Dutch, of municipal property (Ten Bruggencate 1977: 76). Elsewhere (*id.*: 622), he wrote of Thorbecke's "*dessamark*". From one point of view, this controversy might be viewed as a semantic dispute. For, on the one hand, Van Vollenhoven and his associates and disciples at Leiden were prepared to concede the existence of residual patches of no-man's-land over which the N.E.I. Government[40] - in default of any superior or countervailing authority- might properly dispose. And, on the other, Nolst Trenité and the lawyers and the academics who eventually came to comprise the School of Utrecht in opposition to that of Leiden, generally (though not always) conceded the *krans*. That is to say, they recognized some land as 'encumbered domain'. Was a *krans* a *kring*? Or a *kom*? What had the legislators intended? The issue is essentially geographical: how far did the protected area extend? I have discovered no maps that show exactly what the nineteenth century parliamentarians had in mind or just how far the contending parties in the twenties thought the *beschikkingskring* should extend or be curtailed. No writer has suggested that such maps exist. But the surviving literature suggests the following: that the Leiden teaching would have treated the allocation area as co-extensive with the territory over which the community was supposed to exercise civil authority (*het politionele gebied*) whereas Nolst Trenité's *kom* would have comprised but a thin margin around the developed village lands.

There is in any case some evidence to support the suspicion that the central bureaucrats would so interpret the meaning and extent of the *beschikkingskring* as to maximize the land available to Europeans and minimize that available to Indonesians. In the nominally self-governing territories of coastal East Sumatra, the tobacco plantations came right up to the sides of the native houses (Pelzer 1978: 70). In the same adat law region, the secret grant of urban land to the Deli Racing Club (Van den Brand, no date, 42-49) showed how much

40 They meant, by that expression, the Dutch Parliament.

respect would be shown for native needs, not to speak of native rights.

One of Van Vollenhoven's associates, in a general criticism of Nolst Trenité's understanding of parliamentary history (Logemann 1927a: 386, n.1), drew attention to the manner in which the tenor of the debate had been distorted in favour of the Utrecht position, the narrower *kom*-interpretation. Baud had said (*id.*: 385f.):

> Should such rights exist - and I can well conceive that they do - and should they be put aside in order to grant an exclusive right to any European entrepreneur to collect the raw materials in question in a certain part (*bepaalde gedeelte*) of those forests, then that would be a great iniquity.

Nolst Trenité had rendered this passage as follows (*ibid.*):

> The thought never occurred ... neither to Baud, nor to anyone else in the House, that the Government might lack the competence to make such grants ... provided only that the people should not be driven ... from certain parts (*bepaalde gedeelten*) of the uncultivated lands.

Logemann believed that his adversary had hereby stood Baud's judgment upside down.

Resumption of the summary of "Fifty years of injustice"

During the past half century, wrote Van Vollenhoven (1919: 72), the colonial bureaucrats had shown just the same sort of scant respect for adat rights to land as Nolst Trenité.

> Let it not be forgotten (so runs the official commentary from the bureaucracy of 1872) that it is impermissible (sic!) to interpret any entitlements of the native people as constituting any sort of sovereign right. The existence of such would be incompatible with the Sovereignty of the Netherlands Government. (They are) private rights arising from reclamation or use.... The rest are "fanciful pretences".

According to the official explanation, to be echoed time after time by the Utrecht partisans, any personal right putatively derived from habitual use existed simply at the pleasure of the Colonial Power.

> And all this [wrote Van Vollenhoven, *ibid.*], in spite of the overwhelming rejection of an identical interpretation, the Keuchinius Proposal, in Parliament in 1867. O, fortunate peoples of the Indies [he added two pages later], to be blessed with such a gracious government.

Van Vollenhoven next turned his scorn on the Resident of Riau (the archipelago to the immediate south of Singapore). In 1863, this official had taken over administrative jurisdiction in the self-governing realm of Siak (East Coast Sumatra). He refused to recognize any of the popular entitlements associated with the right of allocation. He dismissed with umbrage any suggestion that a Resident might lack the competence to grant land rights to aliens by proclamation. Any such suggestion he labelled the work of provocateurs. He also denied any obligation in the grantee to pay *recognitie* to the adat community. And, Van Vollenhoven reported (*id.*: 74f.), there were other Residents in other regions whose attitude was much the same.

He saved his most scathing condemnation, however, for the officials of the central bureaux of the colonial administration. These were the men who, by the "lying policy of 1874" (*id.*: 75) and by the characteristically underhand practice of "editorial improvement", had nullified the unambiguous intention of the Act of 1870. One telling example (*id.*: 80): Upon the discovery of precious minerals within the allocation area of a West Sumatran village, any outsider who wanted to mine it would be obliged to pay *recognitie*. On this matter no government office could feign ignorance. It had, since 1871, been the subject of repeated investigation and the government had confirmed the obligation by supplementary statute in 1879. Furthermore, the Minister for Colonies in 1899, during the passage of the Mining Law, had reassured a member of the Upper House that the interests of the native population had been protected. A new investigation confirmed the obligation once again in 1902. Given all this, how did the colonial bureaucracy react? They held that *recognitie* was "in principle" in conflict with the Mining Law and, in 1905, they rescinded the supplementary statute of 1879. "So safe ..." wrote Van Vollenhoven, "So safe in Indonesia are people's rights on virgin land."

3.3.6 "Practical considerations with regard to virgin lands"

In his second treatment of practical necessities, Van Vollenhoven attempted to demonstrate how reasonable the case was for adat law. He identified five urgent tasks:

- The Administration had to guard against predatory cultivation: each year saw seas of sterile kunai grass covering once fertile hill and jungle slopes.[41] (This was a problem in the Outer Possessions; in Java, there was massive sheet erosion.)

- Inasmuch as the forests of the Indies represented a great economic potential for development, they had to be guarded against casual depredation or wilful destruction. This was particularly so in the case of the teak forests.

- Hence, the Administration was obliged to supervise the reclamation of new land.

- And, again, it was necessary to overcome the inertia factor associated with preferential rights.

- Lastly, it was in the common interest to facilitate the establishment of large scale foreign enterprises on unexploited land.[42]

Adat law, Van Vollenhoven argued, was not in most cases opposed to these ends. Rather, it could work to facilitate them. Persuasion was the necessary factor. It was a fairly simple matter of winning the co-operation of the communities by observing the formal adat ceremonies and paying the *recognitie* in tribute for the use of land. Co-operation was easily obtained.[43] The leaders of the autonomous communities could appreciate the rationale for, say, forest conservation and government goals could be achieved with greater ease by persuasion than by proclamation. But what if the community or the individual Indonesian were to prove obdurate? (This is a fundamental question which every defender of adat land rights could be called upon to answer.) Consider, for instance, the case of a man[44] who, as first to

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41 Geertz (1963: 13-28) has explained how the rain forests created such fertile soil and just how fragile that fertility was, once the land had been cleared.

42 An environmentalist of the nineteen-eighties might, of course, be less confident of the 'general good' of 'development'.

43 Compare the optimism of Van Vollenhoven with the judgement of Boeke (1960: 285-297), to wit: that *perintah halus* ('gentle persuasion' specifically, of the Indonesians by the colonial government) and the Ethical Policy generally had failed. See also Wertheim 1964: 214f.

44 These hypothetical objections are my own: Van Vollenhoven (*id.*: 88) was more concerned with the hypothesis of a recalcitrant

break new ground, had established there his exclusive right both to work and to neglect it. Should such a man be permitted to deny access to that land forever to those who would exploit it for their own, and for their country's[45] benefit? The first point that should be made in defence of adat law is, of course, that preferential rights did not last forever: the right of allocation has more social utility in an overpopulated land than does the right of property. Whether with regard to a farmer and his fields or, as Van Vollenhoven's text (*id.*: 88) has it, the autonomous community and the waste lands at its disposal, recalcitrance was, in the last resort, to be met by expropriation "in proper legal form" (*id.*: 106), "the royal way" (*id.*: 26). Only Parliament could enact a bill of expropriation: he trusted Parliament, the public process and the metropolitan conscience. The cost of such expropriated land, it being unused, should not be high, Van Vollenhoven surmised (*id.*: 97).[46]

In concluding his discussion of 'practical considerations' Van Vollenhoven suggested that the most inefficient policy of all was the self-contradictory, cynical, make-shift expedience of the central colonial administration:

> For one weighty consideration should not be forgotten: one of the very first demands of practice is this, that there should be calm and co-operation among the population. Why, some five and thirty years ago, did the glow from burning granaries linger in the sky above some Batak districts of the [Sumatran] East Coast? Why have the Lampongs, why has Minahasa, experienced a good twenty years of agricultural unrest? How

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community, one which was reluctant to yield or to negotiate rights of avail on waste lands in its territory. The difference does not matter: the answer he proposed would apply in either case.

45 Sic. Such expressions occur: they would not have called forth any comment in the imperial age. Now they seem anomalous and jarring. An Indonesian citizen would react more strongly, I imagine. To overcome the distraction occasioned by inappropriate terminological connotations, I hereafter translate such expressions as 'for the common good' or 'in the interests of the public' or 'for the general well-being'.

46 This assumption seems naive in retrospect. Given the rhetoric of decolonization and the ideology of post-independence nationalism, no person could have qualified as a disinterested arbiter. Any decision or award would reflect either irrational indigenous obstruction or imperialist bias.

did it come about that government control of uncultivated land in Batak Silindung led to a year of agitation and turbulence in 1918? The people, according to a news report, "continue, as they ever did, to regard the land as belonging to the tribes and federations" (read: to the villages and village alliances) "and do not recognise the exclusive right of concession which the government has arrogated to itself." Why did the Governor of Sumatra's East Coast Residency feel it necessary to exclude the Karo country (in the lands of the Batak) from [development by the] European plantations? And then again, why did the Bataks send a delegation to the Governor-General? Religious fanaticism?[47] Casual vandalism? Malice? Surely the bureaucrats could not have the cheek to try to pass that off! (*id.*: 89f.)

3.3.7 "Agrarian regulations and the virgin lands"

He continued in the same vein. The 1918 Menado regulation had dismissed as imaginary a pretended popular right to garner on waste terrain. The basis of the rejection would seem, he wrote, to have been threefold, viz:

- The land is abandoned, absolutely waste. It is therefore impossible that any rights should exist in relation to it.
- In the conventional bureaucratic style, "sufficient space and ample" had been set aside for the population.
- There was no precedent in Java. (*id.*: 93).[48]

(Here is the basic problem in the theory of customary law: how can one establish that, say, garnering has the status of a right rather than that of a mere custom? Is habit self-justifying? I shall return to these questions later in consideration of the criticisms directed at Van Vollenhoven's theories.)

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47 This was the stock explanation for most problems of public order in the N.E.I.

48 The third (freely translated) objection ignores the existence in the Sundanese adat law region (West Java) of *carik rights* (Koninklijk Koloniaal Instituut 1918: 519f.). The reference (Van Vollenhoven 1919: 93 n.4) mistakenly shows the volume number as IV B: it should be IV A.

He continued with his criticism of the colonial administrators. They were content to offer in passing a token gesture to the ideals contained in the fundamental law (Article 62): it would generally suffice to pay lip service, in the preamble of an ordinance, to that "scourged and thorn-crowned" article. For Van Vollenhoven, the rights which that law had recognized deserved a deeper reverence.[49]

3.3.8 A second time: "The conscience stopper"

The superscription for chapter VIII is a quotation from the writings of Nolst Trenité (Anonymous 1916: 65). The writer regrets the

> repeated arguments pro and con from the officers of the administration in the Outer Possessions who, lacking sufficient insight into the actual legal relationships and motivated by a misdirected sense of justice, have time and again felt obliged to come forward in defence of a pretended right of the indigenous people....

But, asked Van Vollenhoven, why should the writer limit his pity and condescension to subordinates? What about the Minister for Colonies himself? Van Vollenhoven was thinking here of Baron van Dedem. In his capacity as Minister in 1894, Van Dedem had written a despatch to the Colony declaring that the domain declaration for West Sumatra was an utterly "unnecessary mystification", "that it abridged the rights of the people" and that the sooner it "altered its shape the better". The despatch had been ignored (*id.*: 91f.).

In summarizing his case, Van Vollenhoven made three proposals (*id.*: 115f.):

- The right of allocation should be officially recognized.
- The Government should act as intermediary in releasing native lands to Europeans or alien Asians.

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49 It may be of interest that the fundamental agrarian law (Anonymous 1960) of the Republic of Indonesia pays initial lip service (Art. 3) to the same adat concept (*beschikkingsrecht*, there referred to as *hak ulayat*). See Harsono (1986: 1ff.). In the details of the law, and in practice, these values count for very little.

- The Government should control Western capital undertakings on plantation lands in the Indies.

His most breathtaking recommendation was, however, the complete removal of the old regime (*id.*: 117).

> Give them ... rank and salary as members of the Council of the Indies [which advised the Governor-General], give them golden umbrellas [the saffron symbol of royalty in Southeast Asia], just so long as there is *another set of men* to replace them when it comes to the determination of agrarian policy (emphasis added).

He acknowledged that that would be in some sense a loss for the country, but, he argued, the rights and interests of forty-seven million Indonesians should have priority. He offered three thoughts on honesty as the best policy (*id.*: 120f.):

- Good faith towards the indigenous population would ultimately be good for private industries (roughly speaking, the colonizers).

- Good faith and integrity would set a model for the self-governing territories. (Lest, if the central government were perceived to be acting as an autocrat, the petty princelings of the Indies should feel justified in following suit. Who could reproach them?)

- In future, it should be the judiciary, rather than the central bureaucracy, which heard appeals in land cases.

In closing, Van Vollenhoven expressed his general confidence in the role of the Netherlands in the Indies. There had been great wrongs in past performance, but many such mistakes had been made in ignorance. If, however, the amendment should be made law, that would be a clear indication of moral defect, of conscious malice.

3.3.9 Van Vollenhoven's achievement

So ended Van Vollenhoven's most strikingly successful adat law argument. It served its purpose. The amendment was withdrawn and on 16 November 1920 the proposed legislation was abandoned. (Jonkers 1930: 46f.)

4 THE RESPONSE

Frustrated in their intention, the supporters of the domain theory turned to the attack. The period of the nineteen-twenties saw scholarly articles, critical notes, notes in reply, marginal comments, journalistic essays and pamphlets from both sides. For, in addition to the publicity he had gained through his two major publications, Van Vollenhoven had already contributed significantly to that replacement of the old regime which he had proclaimed as ethically necessary. A new set of men, graduates trained at Leiden, were becoming more and more influential among the *Binnenlands Bestuur* personnel. Furthermore, the Leiden thesis had begun to generate its own antithesis. In response to altruistic concern with indigenous values, those financial interests which, for practical reasons, supported the domain doctrine as enunciated, interpreted and implemented by the bureaucrats, reacted in what they saw to be the most practical way. They saw the Leiden approach as a threat to their freedom to develop or to exploit the natural and the human resources of the Indies.

I shall, for the sake of brevity,[50] summarize some sample arguments of the twenties, the period leading up to the major triumph of the adat law advocates.

4.1 Nolst Trenité: defender of the domain theory

Nolst Trenité's writings had been ridiculed in *The Indonesian and his land*. This may have goaded him to respond. In any case, he became a prolific publicist for the domain theory. Under pressure of criticism he did yield untenable ground. Logemann, Leiden's leading legal historian, would acknowledge that (1927a: 380f.). Leiden, however, won no substantial ground from its most determined opponent. Writing twenty years later, Nolst Trenité made these seven familiar points:

- 'Domain of' means 'belongs to' (1942: 81).

- In an earlier period (1828), the entire land was conceived as being the domain of the sovereign state and each farmer, as a tenant of the state (*id.*:74).

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50 The list of references which follows this essay gives a very inadequate idea of the wealth of writing generated as a response to the issues so clearly exposed and espoused in *The Indonesian and his land*.

- After 1870 state property was to be identified by this gauge: "all land on which no other party can demonstrate the right of ownership": that meant, of course, that the onus of proof lay with the other party.

- Land which the natives cultivate or use for building is protected. It has the fictional status of 'encumbered domain'. If, say, a government official should attempt to alienate such land, he would be guilty of an offence under the code (*id.*: 78).

- The state might freely act, as an owner might act, with regard to the unencumbered domain (*id.*: 83).

- The principle can be summed up in these words: All land lying within the boundaries of the state which in no sense belongs to any other person (neither as property, nor under an indigenous right of occupancy) is at the disposal of the state.

- The competence of the government, as the agent of the state, seems to involve it in a paradox: on the one hand, the origin of its power lay in a public law concept; on the other, in practice, it exercised its competence as though it were a private law right. This entailed that any proper description of domain law would involve some queer terminology (*id.*: 82).

4.2 Nolst Trenité: the inferiority of Indonesian legal culture

Nolst Trenité did not attack Van Vollenhoven's anthropological research, nor did he argue strongly against the suggested metaphysical base for adat and adat legal values. Rather, his continual attack was directed against the 'anthropolitical' theses: the constitutional position claimed for adat rights and the status claimed for Indonesian culture generally. It was beyond doubt, for Nolst Trenité, that these were inferior. It was not merely that Asian legal values were intrinsically different. (That was, the reader will recall, the starting point for Van Vollenhoven's approach.) No, those values were of necessity subordinate.

On one occasion (Nolst Trenité 1923b), he poured ridicule on a newly-published thesis, *Indonesian Water Rights*, the work of an Indonesian-born scholar studying in Leiden, remarking contemptuously

that it consisted of a mere forty-eight pages.[51] These criticisms, to which Van Vollenhoven replied a month later (1933: 700-703),[52] repay close scrutiny; they serve to introduce Nolst Trenité, the man and his manner of argument.

In connection with the concept of native possessory rights over water, the author of the thesis (whose name[53] both Nolst Trenité and Van Vollenhoven seemed reluctant to mention) had noted that "there [was] no talk of such rights on lakes and rivers." In regard to this, Nolst Trenité commented: "One might say 'Thank heavens' and, again, 'Obviously'" (*id.*: 341). Continuing, he quoted from the thesis:

> But, then, on the other hand, a part thereof can become the subject of native possessory rights as, for instance, a dammed or pallisaded place as a fishing spot.

Nolst Trenité's comment:

> Oh, yes, why not? If the one native goes fishing regularly at a specified place in the river, then, in all probability, his neighbour will respect [this arrangement] and will go and look for his own spot.

There was, he wrote, such an abundance of water in comparison with the relatively sparse population (of the Outer Islands, ca. 1923) that such occasions as taking 'possession' of water would rarely cause problems. Implicit in his criticism were certain core beliefs:

- There was no basic economic problem for the native population. They did not depend, for their survival, on the great bulk of the natural resources, land or water, in their environment.

- Law is determined and rights are discovered in conflict situations.

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51 Academic conventions were different in those years and a thesis of this length was not unusual.

52 Van Vollenhoven maintained: that the topic was valid; that rights to, or over, water were important; that little was known about these; that a nil finding was not invalid as the outcome of an investigation; and that the manner of Nolst Trenité's criticism vindicated him against those who felt he had been unfair in his own attacks on the colonial bureaucracy in 1919.

53 Wibo Gerard Joustra.

- Customary practices are relatively trivial. They lack legal significance. He was, in fact, questioning the concept of customary law or of custom-as-law.

That last point touched a fundamental belief of Van Vollenhoven's. Nolst Trenité thought that the author had been mistaken in his choice of topic: Indigenous water rights did not merit the serious attention of a dissertation. Or, he asked rhetorically, was it the supervisor and intellectual author who was at fault? (*id.*: 340). The Leiden professor was far too enthusiastic about trivial matters (*id.*: 339).

Many of Nolst Trenité's characteristic arguments appear in another, longer article, "Het Indonesisch dorpsgebied" (The Indonesian village territory) (Nolst Trenité 1923c).

4.3 "The Indonesian village territory"[54]

Nolst Trenité selected Minangkabau as the focus of his exposition. (It is an adat law region which, probably because of its striking matrilineal social organization, has been the subject of exhaustive ethnographic investigations.) Within that territory he distinguished three categories of land:

- the *kampong*[55] complex;

- the permanently maintained farm and garden lands including, perhaps, a limited amount of ground used from time to time for various purposes (the village head would have to be notified each year of intention to work this land) and also the proximate regularly exploited woods;

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54 Nolst Trenité was, it seems, not an ultra-conservative for, among the latter, the words, '*Indonesië*', '*Indonesiër*' and '*Indonesisch*' were absolutely taboo. Nolst Trenité distinguished between '*Indonesisch*' and '*Indisch*': the former was ethnologically appropriate in descriptions of the pre-colonial condition; the latter concerned the enhanced civilization of the Netherlands East Indies. (*id.*: 339)

55 It speaks of Nolst Trenité's ignorance of adat, or of his lack of ethnographic rigour, that he should use this word. The Minangkabau have neither villages nor *kampung/kampong*. *Kampueng* is indeed a Minangkabau word: it refers to a genealogical, rather than to a territorial, municipal or residential concept.

- the much more extensive outer area subject only to sporadic (*id.*: 495) use. In these more remote parts the *kampung* dweller held no private right, though he had become accustomed (*id.*: 497)[56] to foraging there under the benign neglect of the superior (ab)-original government and, subsequently, under the benevolent tolerance of the legitimate successor government, the N.E.I. administration. *Ladang* (the swidden fields of nomadic slash-and-burn cultivators) had no status in the law since they were not subject to lasting occupation and/or use.

The first two categories together constituted the land which the basic agrarian legislation of 1854-1870 had been designed to guarantee. With regard to this Nolst Trenité was quite clear. Such land was absolutely protected. But the domain declaration had had two purposes: first, preservation of these native land rights; second, promotion of large scale agriculture. Nolst Trenité stated his equal commitment to the two principles of protection and progress.

The Leiden School[57] and its formidable spokesman had extended the legal safeguards over land so that they covered the third category (*id.*: 504). This was a measure of that romantic attraction to adat which, said Nolst Trenité, had characterized and invalidated much of Van Vollenhoven's propaganda. His writings were brilliant in outward form; weak in substantial argument.[58] Retired *Binnenlands Bestuur*

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56 *Is gewend*. Note that, in the one essay, Nolst Trenité could write of gleaning-and-gathering both as sporadic and as a practice which had become a habit. If these two expressions do not amount to a self-contradiction, then they at least reveal a tension which his argument should have resolved.

57 This casual reference shows that by 1923 the concept of a special Leiden identity in the field of Indonesian studies was already established as commonplace.

58 Consider this, from (by then, Professor) Nolst Trenité (1935: 86):

> It has never cost me the slightest effort to do full justice to the great figure of Van Vollenhoven. But I did indeed see myself obliged, many times, to expose his weak side to the light of day.

and this (*id.*: 79f.):

> Although his intellect from time to time found expression through the pen in utterances such as this; that it "was no-one's purpose to turn the living Indies into a dead adat museum, a collection of folk curiosities," [Van Vollenhoven 1918a: 222], ... his heart and, may I say it, his artistic sensitivity to the primitive indigenous

administrators who had served for several years in the Minangkabau area had often come to the same theoretical conclusions as Van Vollenhoven, but the demands of practice had taught them a different doctrine (*id.*: 502f.).

Neither the Government (and by this he meant the authorities both in the Netherlands and in the Indies) nor the people had contested or even doubted the superior competence of the State in the management of uncultivated lands. The Government was both entitled and obliged to intervene whenever it saw Indonesians seriously abusing the forests and mountain slopes so necessary for the preservation of water (*id.*: 503). Reckless reclamation of land reduced rich woodland resources to acres of arid kunai grass plains.[59] And, finally, unreasonable objections to limited land grants for the benefit of alien agricultural undertakings would frustrate development. It was the Government's job to prevent all this.

Nolst Trenité (*id.*: 506) was not really satisfied by the concession of a 'no-man's-land' on which the Government could decree and do as it wished (Van Vollenhoven 1919: 76). The conventionally established but imprecisely defined boundaries[60] of the putative allocation areas stretched, in Minangkabau, to the mountain peaks. (It was a conventional claim, in exposition of the *beschikkingsrecht* concept, that nowhere, neither in Minangkabau nor in Java, nor elsewhere, was there any "acre of land" which lay outside of the allocation areas of the autonomous adat communities: all land was in principle included; it fell within one set of boundaries, or the other.) If the legislators had accepted this claim (as the Leiden scholars maintained) what could they possibly have had in mind with the provision of the 1870 Act which empowered the colonial government to lease out land in long term concessions? The Leiden construction made no sense, he

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ideas and usages proved, in the main, to be too strong for him.

59 It was common ground, in the nineteen-twenties, that the uncontrolled slash-and-burn *ladang* cultivation would be ultimately disastrous for the Indonesian forest environment. That conventional wisdom has since been questioned. Other analyses of government aversion to uncontrolled agricultural communities have been offered; some are very persuasive. See, for instance, Dove 1985.

60 The idea of "imprecisely defined boundaries" struck Nolst Trenité as self-contradictory. Logically, he was, of course, quite correct. But, if precision is a necessity then customary law is an impossibility. It can only emerge and take shape gradually from a set of fuzzy-edged, inchoate concepts.

argued (Nolst Trenité 1923c: 505).[61] Nor (*id.*: 506) was he appeased by the news that the right of allocation was on the wane (Van Vollenhoven 1919: 93). He was in fact opposed in principle to the concept of co-operation: the premises on which that policy was based were repugnant to him. Think, he asked, which is the more sensible policy? Was the Government to approach the native, offering at once full recognition of his allocation area and telling him, in the next breath, that he must nevertheless patiently endure the initiatives of the Supreme Authority in the allocation and disposal of this land? Or would it be easier to use the simple, but much defamed, declaration of domain?

5 MELEE

5.1 Van Mook

Hubertus Van Mook, later appointed as Lieutenant-General and chief Dutch negotiator during the troublous times of the post-World War 2 Indonesian struggle for independence, wrote a review of the controversy, 'Historical realism,' (Van Mook 1927). Claiming to be an impartial interpreter, Van Mook set out to examine documents and arguments not normally accessible to the lay reader. He took issue with Nolst Trenité's interpretation of the Basic Agrarian Legislation. As shown above, Nolst Trenité had argued that the nineteenth century parliamentarians could not have envisaged the (almost) complete indigenous control of Indonesian lands: they must have had something far more limited in mind. He proclaimed his reading of the legislation as something which spoke for itself. Van Mook showed, however, that matters were not so clear for the parliamentarians who had deliberated on the Bill: neither Baud nor other members of the Lower House. "The Government had doubted with a mighty doubt" (*id.*: 149). The inexperienced reader should be wary, Van Mook suggested, of Nolst Trenité's habit of italicising words from the parliamentary transcripts. It would be easy to make the entirely unjustified inference that *grondbezit* (land possession, circa 1850-1870) was identical with the later concept (1920-1930) of *bezitsrecht*

61 He was to argue this point at greater length, and repeatedly, in other publications. Those recorded in the list of references at the end of this article give some idea of his polemical energy.

(possessory rights).[62] After his examination of the data he presented his conclusion (*id.*: 153), to wit:

> If [Nolst Trenité] says that the right to garner products on free domain ground has never been recognised in statute law, then I fail to see how he can reconcile that with the facts unless he takes [the term] 'free domain' in the strict sense of adat no-man's-land.

5.2 Ter Haar and Logemann

The most searching response to Nolst Trenité came, however, from two professors at the Law School at Batavia. Both were Leiden-trained and both were now working in the colony, preparing legal administrators for service in the government. (Indeed, the third decade of the century saw a shift, a diffusion of locations for the adat law controversy. Leiden had been the centre for twenty years. Now other arenas opened in the Netherlands and in the N.E.I.) The two men, Ter Haar and Logemann, prepared a three-part response to Nolst Trenité. It appeared in the major legal journal of the colony, *Indisch Tijdschrift van het Recht*, in 1927. Logemann's section (1927a: 380-457) has been mentioned in passing above (para. 3.3.5), in connection with the question of the extent of the allocation area, and I have analysed Ter Haar's arguments at some length elsewhere (Burns 1978: 101-103). Here I shall summarise them, before moving on to describe two significant developments of the period. The one took place in the Netherlands and was focussed on Utrecht University; the other, in the *Volksraad* (People's Council), which led to the establishment of a vice-regal agrarian commission of enquiry.

Ter Haar (1950a: 291-328) dealt with the history of right of allocation data from Indonesian communities both before and, especially, after 1919. For that later period a mass of impressive documentation had become available. A third section was devoted to the basic nature of the right of allocation. He discussed the idea that the allocation area was basically the resource for the subsistence of the community but then he rejected it. The ultimate basis of the right of allocation was not economic. He disputed Nolst Trenité's tripartite division of adat community territory. The area of the autonomous adat community was

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62 Compare the wording problem here with what I have written in note 25. Did Van Vollenhoven have the same sense of caution about the use of *grondbezit* as Van Mook here manifests?

integral. He detailed cases of Indonesian responses to Government intervention and showed that it was neither happily accepted nor conceded as a right. He insisted that the right of allocation was, like the autonomous community's area, integral and not, as Nolst Trenité suggested, twofold with private and public law aspects. He repeated this argument in the Conclusion which he and Logemann jointly composed and appended to their individual essays. Here they also contested the argument from succession. But, before summarizing that, I wish to return for a moment to look more closely at the problem of nomenclature.

Nolst Trenité (1926: 609) had argued that the specific terms used in different adat law regions showed that the territory which they controlled was, in each case, something best conceived of as a public law realm. That is to say, there were no limits to the community's authority over virgin land. It exercised sovereign public authority (*overheidsrecht*). He went on to argue that this authority, and the power of alienation inherent in it, had passed over to the superior government of the N.E.I. The three words on which he based his analysis were *ulayat* (from *hak ulayat*, the Malay term which was, in Minangkabau, commonly identified with the right of allocation), *patuanan* (from Ambon, in the Moluccas), and *pertuwanan* (from the Simalungan region of the Batak lands on Sumatra's east coast). Given the basic Malay meaning of *tuan* (lord), the last two terms suggested, to him, the concept of mastery. The Arabic word, *wilaya*, (from which *ulayat* is derived) has even stronger connotations. In that form, it means 'sovereign power', 'sovereignty', 'rule', 'government' (Wehr 1961: 1100).[63] After close analysis of the etymology of these words and comparison with the native terms used in other law regions, Ter Haar (*id.*: 303) convinced himself that Nolst Trenité's inference was wrong in each case. The word, *tuan*, in Ambon, meant 'owner'. F.D. Holleman (1923: 79) had found a faint resemblance in Ambonese adat between the *patuanan* and features of the right of allocation but Ter Haar dismissed the connection as being altogether too tenuous. This is significant. Holleman was associated with Leiden, by training and sympathy. (What he had discovered and written does, in my judgement, count as evidence for Nolst Trenité's interpretation.) Ter Haar found even less significance in the Batak word. It was, he explained, a synonym for *perbapaan*, a word designating, according to Ter Haar's sources and informants, the paramount chief (*id.*: 300). With regard to *hak ulayat*, Ter Haar made these comments (*ibid.*):

63 The plural form, *wilayat*, means 'administrative area', 'province', 'state' (*id.*: 1100).

> The original meaning of a term in a foreign language has less significance than has current usage in the community under investigation.... Contrary to commonly accepted usage, *hak ulayat* should not be translated as *beschikkingsrecht* or *right of allocation*.[64]

In support of his second comment, Ter Haar quoted extensively from a booklet published by a Minangkabau adat dignitary who knew no Dutch. From this, he argued that *ulayat* and *wilayat* referred to powers and rights exercised by the *raja* and the *penghulu* (adat chiefs) or to the objects over which those rights and powers were exercised, in the name of the people. It seems to me that here (*id.*: 301), Ter Haar was disingenuous.

The case seems much sounder to me when (jointly with Logemann (1927b), in their conclusion) he argued against the assumption of supreme powers by succession. Protagonists of the domain theory had held that the N.E.I., as successor state to the various autocracies of the Archipelago - sultanates, kingdoms, 'empires', principalities - could assume the absolute powers to which these polities had once pretended. This theory was faulty in two regards, Ter Haar claimed. It was doubtful whether sovereign powers in Indonesia had ever been absolute with regard to land and, in any case, succession in itself, even through conquest by force of arms, in no way justified abrogation of existing laws and entitlements (*id.*: 325):

> It is a construction long since abandoned, that the establishment of a new authority should wipe out all existing ... public

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64 Some Indonesians did take this point. Soebakti (Ter Haar 1974: 71ff.), in his translation of Ter Haar's *Beginselen en Stelsel van het Adatrecht*, rendered *beschikkingsrecht* as *hak pertuanan*. Such an expression would have been even less useful to Ter Haar in his argument. In modern Indonesian the term means sovereignty, or suggests public law authority, or, with reference to land, ownership (Echols and Shadily 1963: 408). The Leiden School would have been most reluctant to concede any of these interpretations to Nolst Trenité. In general, however, and particularly in the *Penjelasan* (Clarification) of the *Undang-undang Pokok Agraria* (Basic Agrarian Law) of 1960, Indonesians identify the Dutch *beschikkingsrecht* as *hak ulayat*. Ter Haar was trying, not very convincingly, to escape the consequences of a fair argument.

> law rights.... No one has ever claimed it with respect to [the N.E.I.].

They denied the proposition (which they found absurd) that the authority of the autonomous communities had somehow been called back into existence by the Act of 1854. In the view of Ter Haar and Logemann, communal rights had survived colonization, maintaining an autonomous life from the assumption of sovereignty (1816) until formally recognized by the Dutch government. Nolst Trenité would have argued for the contrary view: that, in principle, all power had passed to the King of the Netherlands in 1816.

5.3 The king and the country

This leads back to the earlier question, of the sovereign's ownership of land. It was a vexed and longstanding problem. Raffles's land tax system was based on the assumption of its validity. Van Vollenhoven (1918b) and others (Rouffaer 1918: 305-319; De Roo de la Faille 1919-1921; Schrieke 1919a, 1919b) had written on it without seeming to offer the slightest possibility of resolution. Later, in the early years of national independence, when republican institutions and populist values were much in vogue, a Javan scholar would still assert what he declared to be the definite and long-standing principle of Javanese civilization: that the monarch was master of the soil (Selosoemardjan 1962: 215, n.1). It is worth noting that his critics drew attention to his close relationship with the palace in Jogjakarta. Schrieke (1919b: 1) had no doubt that consciousness of king's right was manifest in the Javanese principalities of his time. The proponents of the royal rights theory could point to deferential formulae which acknowledged princely ownership. The Leiden scholars tended to pass off such assertions as pleasantries, certainly no more than mere convention, the phatic utterances of the Orient.[65] Did the king own the land? Or

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65 To illustrate: they would cite, as parallel, the characteristic behaviour of a native civil servant. His wife having been ill, he would respond to an enquiry concerning her health from a superior: 'Your *slavin* (slave, feminine) is much improved.' Mere ceremonial fiction, the Leiden scholars said. See the argument advanced by the six signatories to "Marginal notes on the Report" (Ter Haar 1950b: 70). A similar argument was presented years later (Korn and Van Dijk 1946: 21), dismissing inconvenient or inexplicable utterances as ritual courtesies. Time has done nothing to improve the plausibility of this approach.

was this the unfounded pretence of ambitious autocrats? Were the observed practices genuinely Javan? To what extent might one "speak of the 'indonesisch' character of the Javanese land laws" (*id.*: 7)? Were they part of the indigenous legal consciousness? Or were they exotic in origin? Here, what purports to be the subject matter of historical study has passed into the realm of inscrutable subjective judgements. The whole matter is lost in sets of claims and counter-claims, of imputed motives and counter-motives. Final assessment was and still is very much a matter of which premises the advocates and the audience accept from the beginning.

5.4 A centre of opposition in the Netherlands

By the mid-twenties the defenders of the domain principle had been active in Holland for some time. Leiden was coming to be regarded as 'soft' on matters of colonial policy. Some of the criticisms offered were far more vicious than that: "the lecturers of ... Leiden ... were [accused of being], consciously or otherwise, traitors to the nation" (De Beaufort 1954: 150). Van Vollenhoven's biographer has recounted how deeply the reflections on his personal integrity disturbed him (*id.*: 155-164). He found it especially wounding to discover that a canard, to the effect that 'Van Vollenhoven can be bought', had gained some currency in the Hague (*id.*: 158). And the work of the Leiden faculty was dismissed as 'insufficient', 'unscientific', 'a-prioristic and anti-historic' (*id.*: 145f.). Leiden felt as if it were under siege. Meanwhile, with somewhat similar apprehensions, the representatives of 'Big Business' (*id.*: 141) and the ultra-imperial loyalists were collecting funds and negotiating for the establishment of an alternative school for the training of officers for the administration of the N.E.I. Finally, against advice from Leiden, protests from Amsterdam, and in the face of strong opposition from its own staff and students, a new institute was established at the University of Utrecht (*id.*: 147; Van Gybland Oosterhoff 1935: 43-50). It was at once characterized as 'the petroleum faculty'. According to Van Niel (1960: 284f.), it was indeed the petroleum industry interests, marshalled by ex-colonial administrator, and Premier-ad-interim-Minister of Colonies Colijn (Van Gybland Oosterhoff 1935: 54), which underwrote the Utrecht School. The staff of the new Utrecht Indonesian Studies Association had no reticence about their promoters or the source of their support. In the memorial publication which eventually marked the first decade of their existence, the members set out their several motives. They gave great praise to Professor Treub (Utrechtse Indologen Vereeniging 1935: 7, 10; Van Gybland Oosterhoff 1935: 41) who had been so active in soliciting support and

funds from industry, and who, while acting as the President of the N.E.I. Council of Entrepreneurs, had written tellingly on the virtues of independent (sic, non-Leiden) tertiary training in Indonesian Studies (Van Gybland Oosterhoff 1935: 53).[66] Lohman, lacking perhaps the historical-realism ascribed to Treub, looked forward to the time when, in contemplation of the Netherlands' achievement in the Indies, people would acclaim it as the work of a Christian nation (Utrechtse Indologen Vereeniging 1935: 69). And Gerretson (1935: 11-24) had seen the integrity of the realm under threat, and suffering from neglect. So did the Indologists of Utrecht justify their institute. The Utrecht faculty certainly made one contribution to academic freedom: the approach offered at that university was in striking contrast to that of Leiden.[67] It also provided academic posts and a platform for Van Vollenhoven's opponents, Professors Nolst Trenité and Nederburgh. They too could now bid, through teaching, to create, or to alter, or to maintain, colonial policies and practices.

5.5 Recognition of the right of allocation?

Meanwhile, in the N.E.I., in the 1927 session of the People's Council (*Volksraad*), the question of adat land rights had won the attention of the nominated and elected representatives of the various Indies peoples. The People's Council did not have the full powers of a parliament. It had been established with an advisory function in 1917. Subsequently there had been much debate about whether this was a move towards eventual autonomy, or a token gesture, or a rash and radical mistake (Dahm 1971: 44-52). Now, a decade later, it had been granted (nominal) "joint legislative functions" (*id.*: 70). The discus-

66 Treub was an outsproken propagandist for the retention of the Penal Sanction. This colonial legislation prescribed severe punishments for indentured labourers who broke their contracts for work on the tobacco plantations of North-East Sumatra. Ever since Van den Brand published his first pamphlets, at the dawning of the 'Ethical Era' in the first years of the century, the Penal Sanction had been attacked by critics of colonial cruelty. It was regarded as the abiding monument of European indifference to Indonesians. Treub's savage opposition to the Leiden School, its outlook and its sympathies, is completely consistent with his other commitments.

67 According to two surviving Leiden-trained former N.E.I. administrative officers (Professor Prins, H.W.J. Sonius, personal communications, 1980), theoretical differences between the schools tended to disappear in field practice.

sions on agrarian policy during the July sittings of the Council are relevant to this history of adat ideas.

On 15 July, Jonkman, a European member, referred to an article in the *Indisch Tijdschrift van het Recht* which purported to show that the Domain Declaration was void of legal force. This was, in fact, the combined argument of Ter Haar (1950a: 291-328) and Logemann (1927a 1927b) discussed above (para. 5.2). The Government response, to the effect that it would be difficult to undertake an immediate revision of a very complicated matter, left Jonkman completely dissatisfied. The time was ripe, he argued; with the help of the two academics concerned a thoroughgoing review could be instituted. The next day, Soekawati,[68] an Indonesian member of the Council, gave a general survey of the Government's attitude. The Government did not deny the existence of the right of allocation. That would be a difficult task, he said, in view of the massive evidence compiled by Van Vollenhoven. The Government said neither one thing nor the other. All it said was that it was a very difficult matter. This was not good enough, said Soekawati. The matter was important: too often had it happened that land had been granted for concessions without compensation and against the will of the community which held the right of allocation. Such action had always been justified by an appeal to the Domain Declaration. So Soekawati made a two-part request:

- that the heads of the regional administration should take the right of allocation into consideration whenever they were negotiating concessions;
- that the Government should commit itself on these questions:
  1. Is the right of allocation protected under Article 51, Section 6?
  2. If not, what is the rationale for the rejection?
  3. If so, is it ready to undertake a revision of the law?

A reply from the Director of the *Binnenlands Bestuur*, given on 22 July, indicated that the Government was still reluctant to become involved. In a remark not directly to the point, the Director agreed with Ratu Langi, a Minahasan, that the Menadonese adat land laws were not in the common interest (these allowed perpetual preferential rights), but that the Government expected that it could transpire, by the death without succession of all the family heirs, that a piece of

68 Soekawali, according to the spelling given at the top of Commissie voor het Adatrecht 1930: 50.

Minahasan land would become deserted, waste (and, presumably, once more subject either to the right of allocation or to the domain principle). On 25 July, Mandagie, another Minahasan, pointed out that, under adat, even that supposition was wrong. No ground in Minahasa was ever abandoned: adat there did not recognize such a condition. He who paid the funeral expenses for the last heir became, automatically, the right-holder.[69] After this digression, Jonkman was heard again. He gave a rebuttal of Nolst Trenité's domain theory. Summing up in reply, Soekawati moved the motion since identified by his name, to wit:

> The People's Council, being of the judgement:
>
> - that there has clearly emerged a compelling necessity, both theoretical and practical, for a major revision of the agrarian legislation or, at least, for a major study of the question: whether Indonesian land rights are properly recognized in the currently valid agrarian legislation;
>
> - that [this necessity] ... has emerged from the research of the last twenty years in the field of Indonesian land rights;
>
> - that the revision or at least the exhaustive study ought to be implemented as quickly as possible;
>
> vigorously urges the Government to establish without delay a commission charged with answering the question - does the agrarian legislation give full recognition to Indonesian land rights? - and [also charged], should this prove necessary, with drafting revised agrarian legislation in such a fashion that it is

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69 I make three observations on this seemingly casual deviation in the course of parliamentary discussion.:

- that not every member was seized, as Jonkman was, by the fundamental legal issue: the validity or otherwise of the Domain Declaration;
- that the peculiar adat land rights of Minahasa created problems for the Government administration, as well as for Van Vollenhoven's theoretical construction (the pan-Indonesian *beschikkingsrecht* principle);
- that the administration almost succeeded in its attempt to direct attention away from the dangerous topic raised by Jonkman: on other occasions, no doubt, it did succeed.

fully reconcilable with Indonesian land rights while at the same time satisfying present day economic demands.

With the dissent of one member (s'Jacob)[70] recorded, the resolution was adopted (Jonkers 1930: 49-51).

On 16 May 1928 the Governor-General appointed an Agrarian Commission to advise:

- if, and if so, why and to what extent, it would be desirable in principle to abandon the domain construct as the basis for agrarian legislation?

- if the finding were in the affirmative, what constructs should form the basis for agrarian legislation?

- in broad outline, what alterations, whether from a legislative point of view or with an eye to practice, would be required by any eventual abandonment or amendment of the domain principle?

To the Commission he appointed:

- as President: the Inspector of Agrarian Affairs and Compulsory Services;[71]

- as members: Ali Moesa, R.M.A.A. Koesoema Oetoyo, P.A. Mandagie and Tjokorde Gde Rake Soekawati (Indonesian delegates to the People's Council); F. Blok (Inspector in the Forestry Service); B.J. Haga (Chief of the *Binnenlands Bestuur* for the Outer Regions); and Logemann and Ter Haar;

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70 No initials appear beside the name in the report (Jonkers 1930: 51). I have been informed, however, that this was E.H. 'sJacob, a scholar who succeeded to the chair of Nolst Trenité at Utrecht in 1946. He published a thesis on the domain principle and adat law ('sJacob 1945).

71 This inspector, G.J. Du Marchie Sarvaas, attended only one session of the Commission. He subsequently became a member of the (Utrecht-oriented) 'study commission' set up by the *Vereeniging 'Indië-Nederland'* ('Indies-Netherlands' Association) (Commissie tot de Bestudeering van het Advies der Agrarische Commissie 1932: 4). It seems that Du Marchie Sarvaas was replaced as president by S. Bastiaans (Anonymous 1930:115).

- as Secretary: A.P.G. Hens (Adjunct Inspector for Agrarian affairs and Compulsory Services) (Anonymous 1930: 122).[72]

It must have seemed to the Leiden scholars as though the battle for recognition of the adat right of allocation was almost won.

6 A FRESH FIELD

I wish to leave this particular history at this point, to turn to another aspect of adat law as formulated by Leiden. This is the topic conventionally known as adat penal law. It might, however, be better represented as the 'adat law of delicts' or 'adat tort law' (Ter Haar 1948: 213, 236).[73] I shall come back to the history of the right of allocation controversy subsequent to 1928 when, in the conclusion to this essay, I canvass the criticisms made of Van Vollenhoven and the Leiden adat law theory, and attempt to assess their validity.

6.1 Adjustment

It was one tenet of the Leiden doctrine that Indonesian adat had a distinctive type of penalty. I have written 'penalty' but the word is unsatisfactory. If I subscribed fully to the theories of the Leiden School, neither that term, nor any of the alternative candidate expressions: 'punishment' or 'compensation' or 'retribution' would suffice. There is no English word that will serve. Leiden orthodoxy[74]

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72 Another Hens, A.M. Hens, served on the Utrecht-oriented 'study commission'.

73 Cf. Sir Henry Maine (Seagle 1937: 286): "The penal law of ancient communities is not the law of *Crimes*, it is the law of *Wrongs*, or to use the English technical word, of *Torts*."

74 Dutch commentators (among them J.F. Holleman) have objected to what they perceive as an anomaly: the coupling the name of Van Vollenhoven, or of his school, with the word, 'orthodox,' or with any of its derivatives. He was, they insist, so radical and innovative in his time that the conservative associations carried by the word orthodoxy seem particularly inappropriate. Accepting their judgement, I should still like to maintain that there was a sense in which Van Vollenhoven's teachings became Leiden doctrine and that, after his death, and in the post-revolutionary exultation of everything

would have had it that there can be no accurate European translation for whatever word Indonesians used when they wanted to talk about the official or sanctioned or right response to disturbance in the social order. The conceptual problem is parallel to that which arises in contemplation of the right of allocation. Nevertheless, Van Vollenhoven coined a rough and ready term for that concept: he had to. And so, for the same reason,[75] the Leiden scholars employed the word '*reactie*', a word obviously cognate with the English word, 'reaction', as a technical term for the concept which they wished to discuss. I shall use *adjustment*, hoping thereby to indicate something more about the concept.

I attempt to establish the concept of *adjustment* by contrasting it with the European idea[76] of punishment. That necessitates a short digression.

6.1.1 The conceptual analysis of punishment

Philosophers have not solved every problem in attempting to explain the institution of punishment. Yet, they have established some areas of tentative consensus. Or, at least, they have conceded that certain arguments are significant, or seem plausible. The following summary sketches those ideas. It does no justice to the finer points of disagreement.

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indigenous in the culture of Indonesia, his conception of adat acquired the status of sacred truth. This essay constitutes, of course, a reaction to the very long shadow that he still casts.

75 Consider the theoretical problem: if a term is ultimately untranslatable, then its designatum is ultimately unknowable. Difficult terms can, in the last resort, be translated, either by ostensive definition or by recourse to set theory. But if, after that, there remains, beyond the resources of our language, an irreducible residue of 'meaning' in a word of another language, then that residue is, by definition, inaccessible. We simply cannot know what speakers of that other language are talking about.

76 Here, for the sake of exposition, I make an assumption, namely: that there is one distinct idea, peculiar to, and characteristic of, Euro-American legal understanding. Later, when I assess the validity of the Leiden position, I shall disown that assumption.

Punishment is carried out by a recognized authority.[77] It is imposed on a guilty party, for an offence. Its social function may be to modify behaviour or to prevent the repetition of offences. It may fulfil either or both of these functions by incapacitation or exclusion or by deterrence or reformation. It may serve to reinforce the values of society, to vindicate the behaviour of the righteous and to justify the expectations of outraged citizens.[78] It may achieve these ends by public denunciation of the offence, as well as by imposition of pains upon, or withdrawal of benefits from, the offender. The severity of the punishment should be governed by the seriousness of the offence. The concept of retribution is needed to answer the question, to whom may punishment be applied. (See Hart 1968: 1-27.). Three ideas emerge from the analysis of retribution: that the action was wrong; that it was known to be wrong; that, despite this, some individual deliberately performed the action. That is to say, personal guilt is the central factor in the concept of retribution.

6.1.2 By way of contrast: the concept of adjustment in the adat world view

In adat, as the Leiden experts conceived and represented it, questions of intention and guilt were never of primary importance. To appreciate the preoccupations of the autonomous indigenous community, they taught, it is necessary to understand the 'adat outlook on the world'. Within that cosmology, phenomena such as adjustment and the right of allocation have their coherent places. Here follows an outline of the Leiden conception of the total world view according to adat.

An Indonesian community constituted a whole. It was not to be regarded as just a collection of individuals. Its internal relationships were organic. Moreover, that sense of organic relationship extended to the environment in and from which the community derived its life.

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77 The authority must be conceived as acting, in a significant degree, as an impersonal instrument of society. Judges, jailers and hangmen have their rights to act explicitly conferred by the supreme expression of civil authority, the State. But teachers and even parents derive their right to act, when they punish, from the tacit approval of society.

78 This last mentioned purpose of punishment comes close to one of the functions of adjustment. In adjustment, however, the outraged feelings of the community may be given full personal expression.

The natural world was peopled with supernatural forces. These were thought of, sometimes as impersonal entities, often as ancestral spirits, but always as having great, though finite, potency. The optimal condition of the community and the individuals who were its members was static, balanced and harmonious. This applied pre-eminently to the emotional life. For transactions in the material world the values of reciprocity, equilibrium and concord were equally important inasmuch as material goods - weapons, cloth, money, for instance - were esteemed as repositories or, at the very least, symbols of supernatural entities. Sudden change, in particular violent disturbance, was to be avoided. For, once the equilibrium was lost, all sorts of dangerous consequences could arise from the uncontrolled play of magical powers.[79] In such a case, the proper task of law was the restoration of social harmony and individual tranquility. The process by which a new state of balance was achieved is that which I have translated as adjustment.

The idea of adjustment was already immanent in the works of various Dutch observers of adat culture whom I mentioned above (para. 3.2.1: Adriani, Van Ossenbruggen and Liefrinck), as well as, especially, in that of G.D. Wilken (1912a, 1912b, 1912c, 1912d)[80] who had inter-

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79 Incest, for instance, was regarded as a violent disturbance. Consider the consequences it entailed:

> The rains will fail, the harvest will fail, volcanic eruptions, natural disasters, drought, plagues, shall fall upon the land, the sun and the moon will be covered, the country will be given into the hands of its enemies, the elite of the governing class will die before they reach maturity. In short, the magical world is out of order (Roest 1941: 26).

80 Wilken was very much Van Vollenhoven's hero. The son of a missionary in the Minahasa-Menado region, Wilken was first a civil servant in the *Binnenlands Bestuur* (1869-1883). He eventually became a Professor of Geography and Anthropology of the N.E.I. He did much descriptive work and was also involved in the development of general anthropological theories of the late nineteenth century. After his death in 1891, the potential for the development of adat law study was arrested. Wilken had recognized the 'unity-in-diversity' of Indonesian adat, wrote Van Vollenhoven (1928: 101), but he had not formulated any theory about adat law regions. It is not hard to conceive that Van Vollenhoven may have seen himself as Wilken's successor, charged with the task of securing the recognition for adat that the pioneer had failed to win. Roest (1941: 52) remarks, however, that Van Vollenhoven regarded Wilken's essay on adat penal

preted adat in terms of the magico-religious system of the autonomous indigenous community. The adjustment concept was made explicit in Van Vollenhoven's major descriptions of adat law and formed the basis of Volume X of the *Pandecten* (Koninklijk Koloniaal Instituut 1936). The fullest expression of the standard Leiden doctrine on adjustment was the thesis published by N.W. Lesquillier (1934) on *The Adat Law of Transgression in the Magical World View*. It offers the best starting place for a closer understanding of adjustment.

6.1.3 Types of disturbance in the adat world

Lesquillier distinguished four main groups of offences in adat law (*id.*: ixff.):

- behaviour which upset the universal harmony;
- disturbance of emotional equanimity;
- transgressions against the authority of custom;
- behaviour resulting in injury or damages.

He subdivided behaviours disruptive of universal harmony (group 1) into section A: inward and section B: public or outward. The chief examples of 1A were incest, miscegenation and bestiality. The consequences of undischarged incest have already been mentioned (see note 79). The basic objection to marriage across caste barriers was the inevitable weakening of spiritual resistance among the eventual offspring. They were vulnerable to infection by malign magical forces. But, in addition, the conjunction of mismatched parties could throw the whole system of magical relationships out of kilter. This is especially the case with unnatural relationships with animals. To avert the release of uncontrollable forces within the environment, the beast, as bearer of this danger, had to be destroyed (*id.*: 46). Even the kissing of a cow's head required this adjustment in Bali.

For section 1B, the listed offences were litigation, divorce, argument and brawling. With regard to litigation, Lesquillier suggested that, contrary to general opinion based on frequent observation, Indonesians did not enjoy the spectacle of public legal process. It was true, he conceded, that they would gather round when some dispute

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law, *Het strafrecht bij de volken van het Maleische ras* (Wilken 1912b: 449-541) as his least satisfying work.

A leading Indonesian anthropologist (Koentjaraningrat 1967: 6f.) has written a survey of Wilken's contribution to Indonesian ethnology.

was underway. The common motive was, however, to help, by means of *rukun*,[81] in the amicable, effective and (above all) rapid, disposal of the affair (*id.*: 50). Litigation was dangerous. In support of this interpretation, he drew attention to the practice of making unsolicited payments to bystanders at the court sessions. These were to protect them from any untoward magical influence let loose in the process of the trial (*id.*: 55).[82] Kits van Heijningen (1916: 77) reported of the Batak that they imposed fines on persons whose appeals had been rejected finally by the higher courts. According to the adat law of the Batak, any party to a dispute was entitled to have the case heard in the superior court. Appeal proceedings, however, entailed extention of the time during which the community was exposed to the spiritual dangers associated with litigation. The Batak reasoned that the unsuccessful appellant could have taken either one of two safer options: he could have accepted the judgment of the lower court or he could have bypassed the lower court entirely. Clearly, an unsuccessful appellant had rejected these options and had chosed the most dangerous path. It was fitting, then (the Batak concluded), that he should provide the material-magic (that is to say: money) to shield court officers, other parties and society at large from any lingering threat. It was good to end cases with despatch. For divorce, the parties might have to make a payment. This payment was neither a penalty nor a fee. It was an adjustment (*id.*: 58f.). Yet, in contrast to this, adat authorities might, in some instances, recommend divorce. When the village chiefs or elders

81 *Rukun* refers to the give-and-take harmony of traditional Indonesian life, an attitude which could be brought to bear in the resolution of social difficulties and conflicts. Lesquillier (*id.*: 184) refers to it as valid for all adat law regions. It has variously been identified by the terms *rukun*, *tolong-menolong*, *gotong-rojong*. Under that last name, this adat value was enshrined as part of the ideal national character by the founding president of the Republic, Sukarno. In its adat law aspect, *rukun* is almost certainly related to the Karo Batak institution, *runggun*, discussed by *inter alia*, Van den Steenhoven 1970 and Slaats and Portier 1981: 189-239.

82 Lesquillier cited Mallinckrodt (1928a: 238) who indicates that the payments were made from the fines collected from the unsuccessful party. Coins were regarded as pieces of magically potent material. This idea, particularly as it applied to payments to judges before the opening of adat court proceedings, is of course open to another, more mercenary, explanation. For argument that the prime motivation was neither cupidity nor the intention to bribe, see Lesquillier (*id.*: 59-61).

became convinced (sometimes by virtue of omens or reports of nightmares) that the potential magical danger arising from marital incompatibility had become too great, they would act to facilitate the separation of spouses. Conjugal union did not constitute a desireable state in itself. Nor was there any intrinsic virtue in dissolving the marriage. The unifying motive in these cases was the desire to avert the unleashing of terrible and unmanageable spiritual forces.

The second group of offences, 'disturbance of emotional equanimity', involved adultery, abduction and (what might be likened to) affronts to public morality (the conventions of decency) or to the individual's *amour-propre*. Lublink-Weddik (1939: 100f.) provided instances of the last two sorts of affronts. Public expression of sexual affection was an offence in adat. Behaviour which might put a spouse out of countenance (i.e. which might make him or her feel *malu*) constituted an adat offence (*id.*: 78). The heightened emotion - whether of shame, anger, lust, excitement or whatever - increased the vulnerability of human beings[83] to malign magical powers. In the adat world view it was best to discharge intense emotions as quickly as possible in order to recover the safety of tranquillity.

Departures from the behaviour prescribed by custom and from traditional roles and responsibilities comprised the third group of transgressions on Lesquillier's list. Such acts were occasions of great peril: they might be regarded as the equivalent of sacrilege. Korn (1933: 131) recorded a contrast which Dutch observers found amazing. In one Balinese village community, a notorious thief was regularly tolerated while a fellow villager, appearing at a ceremony with but one flower too few behind his ear, lost, by that piece of negligence, his right to participate in adat deliberations, and even his membership entitlements in the community. An adat transgression occurred if a young girl married before her elder spinster sister (Lesquillier 1934: 32f., 33 n.1). In Minangkabau, the *penghulu* (adat dignitary) was forbidden to climb in trees, to carry goods on his head or in his hands. He might not act as a merchant (Willinck 1909: 851f.).

The richness of the natural environment meant that, for the Indonesian, the sense of secure possession was less important than,

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83 The principals were vulnerable in the first instance. Through the mechanics of a kind of moral domino theory, however, the whole community was eventually at risk.

say, the enjoyment of good health, wrote Lesquillier.[84] And magic and the spirit world mattered more than material interests. Let me illustrate this by returning for a moment to the right of allocation doctrine. A man might use conventional adat tokens to mark trees to reserve them for his peculiar use. By gradual extension through time, the land around the trees came to be included as part of the personally reserved environment. And even later, as Van Vollenhoven was to suggest, the concept of property may have begun to crystallize within this practice. Yet at first, the tokens[85] were conceived to be simple warning devices. Their function was to advise strangers of dangers which they, the strangers, ran should they improperly attempt to exploit those resources. The idea of exclusive possession was, so the argument ran, a subsequent development (Lesquillier 1934: 96; Holleman 1923: 49f.).

In the Ogan-Ilir district of Palembang the man who found a fishing net did not report it. The penalty imposed (or the adjustment exacted) in this case was administered, according to the analysis of Lublink-Weddik (1939: 152f.), not on acount of material loss involved in the unjustified possession, but because, in itself, the action of concealment constituted an attack on the communal order.

Under the heading of injuries or damages (his fourth group), Lesquillier dealt with four sections in turn. Of these, the most serious was causing detriment to the magical potency of the community. The material interests of the community ranked second. Often a case which would have seemed to involve injury to one person alone required, for its resolution, a general ceremony for the purification of the village, its inhabitants and the land on which it stood (see Lublink-Weddik 1939: passsim). Only then did the interests of the individual come up for consideration. And, again, spiritual well-being was rated more important than the individual's material concerns. Kits van Heijningen (1916: 141f.), for instance, reported of

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84 See, however, Willinck (1909: 855). The Minangkabau did not require adjustment for deceit either in written form or under oath as long as no material advantage came to the would-be deceiver. From this, I infer that, whenever a perjurer did gain wealth or property by deceit, the Minangkabau thought he should be punished (Willinck would have used this word: he was not affiliated with the Leiden School). This would seem to indicate that material considerations did count with the Minangkabau.

85 See the photographs from different adat law regions shown in the plates following Commissie voor het Adatrecht (1923: 446).

the Kai Islands that the death penalty was exacted as adjustment (for the restoration of spiritual balance) after the offence of stepping on the shadow of some person of high degree. Witchcraft and black magic would have belonged to this section. For the final set of offences, Lesquillier listed, as examples, bodily harm, homicide, incendiarism, and theft and robbery.

There is nothing to be gained by following Lesquillier further through his more detailed analysis of each group and section. Instead, my purpose is to present some samples of the argument, in order to illustrate the powers of persuasion with which the Leiden adat scholars strove to establish the West-East contrast between equity and just punishment on the one hand, and the redressing and disinfecting functions of adat law adjustment on the other. I shall attempt to do this by citing some of the brilliant and bizarre examples found in the reports of Dutch observers.

6.2 Adjustment: the irrelevance of guilt

"Within the Western tradition, the theft of a flower is as great a crime as the theft of a jewel." So wrote Van Vollenhoven (1931: 148), trying to establish a background against which he might contrast the basic Indonesian preoccupation, a concern with deed and consequent disorder. Of the many examples cited in Dutch studies, the following concerning the case of two would-be assassins is, perhaps, the most striking. The contrast in approach emerges clearly:

> The members of the [adat] bench discharged a miscreant from all responsibility, after he had shot at someone and had missed. In complete opposition thereto, his co-defendant had been convicted by the self-same judges of the self-same offence, i.e. he had, in like manner, shot at the deceased.... But he had killed him. When the judges had their attention drawn to the peculiarity of their decision, inasmuch as the two defendants had, in accordance with a premeditated plan, shot at the victim, they posed the standard question: 'Suppose two hunters were, in the course of the chase, to shoot at the one bird. Suppose further that one of them were to miss.... To whom would the bird belong?' (De Gelder, 1897: 12).

Western legal culture of course also distinguishes the crime of attempted murder from that of murder. Any such objection, however, entirely misses the point which the Dutch commentator wished to make. The word, 'also' is wrongly used to imply basic similarity. The

adat judges were entirely uninterested in the guilty, but inaccurate, conspirator. Having missed his target, he became completely unimportant to them. He just did not enter into consideration at all, not even for a lesser offence.

6.2.1 Adjustment involving innocent others

A general illustration of the comparative unimportance of personal guilt is the custom, reported from different areas, of seeking redress from third (that is to say, innocent) parties. Kits van Heijningen (1916: 92) knew only one people, the Alfuru of Poso, in which this was the regular form of adjustment. Nevertheless, the practice was widespread, if intermittent. Among the Toraja, a third village might intervene between two warring communities. In such a case, the peace-making village had to carry the costs of settlement. A slave might be handed over to the belligerent villages. To discharge their griefs and pent-up anger, the combatant villagers would, together, hack him to pieces (*id.*: 91). The Dayak, seeking redress, never asked who the culprits were. Instead, they asked where the murder had taken place. And, on the trail, their operative rule for taking satisfaction was 'the first one you come across will suffice' (Roest 1941: 110).[86] The greatest possible shame that an aristocratic family in the Lampongs could experience was to have one of its members murdered by a slave. On occasions such as that, the senior members of the family would retire to some out-of-the-way spot and there, to rid themselves of their emotional distress, they would *mengamuk* (run amuck). The characteristic victims of their fury would be unarmed men, defenceless women and children (*id.*: 110). In Java, the victim of a theft or robbery, upset by the experience, held a *selamatan*[87] for restoration of spiritual well-being. Note that it was the innocent party who organized the adjustment ceremony. The victim paid:

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86 Behind the bizarre seeming disregard for guilt, there was in some cases at least clear evidence of the concept of responsibility. This was explicit in the Timorese practice of calling out, from a safe distance, to the injured third party to tell him from whom, ultimately, he ought to seek redress. See Lesquillier (1934: 107). The existence of such a practice shows that the notion of ultimate responsibility was clearly understood.

87 On *selamatan* generally, see Geertz 1960: 11-85, particularly 11ff. On *selamatan* in relation to adjustment see Commissie voor het Adatrecht 1915: 211-213, and 1941: 474-476.

harmony was more important than justice (Lesquillier 1934: 129, 216f.).

6.2.2 The irrelevance of intention and complicity

In theory, there could be no adat crime of attempted murder, attempted theft, or attempted anything (Kits van Heijningen 1916: 129). The offence of being an accessory before or after the act was likewise impossible. Either every party involved was obliged to compensate fully or, as in the case of the Balinese assassins, one alone was selected to bear the full burden of the penalty. Given the first rule, it could have turned out quite profitable, ultimately, to be the victim of a robbery. Among the Palu Toraja of the Celebes, the penalty for theft was double compensation from each person involved. Say that four men had stolen a buffalo. On discovery of their responsibility, the owner could expect to receive eight buffalo by way of adjustment (Commissie voor het Adatrecht 1911: 137).

6.3 Adjustment: the relevance of status

Other cases serve to show that adat penal law respected persons. Among the Gayo, a rich thief might have to repay three times the value of stolen property (Snouck Hurgronje 1908: 110). And a man of standing might claim in adjustment the life of the thief who had taken his things. Thus both rank of victim and rank of culprit might determine the amount involved in fines for adjustment. The *bangun* and the *pampas*[88] paid for women were generally lower than the sums required for men. Slaves required even less. Generally, the higher the status, the better for the person concerned, either as victim seeking compensation or as perpetrator facing up to such demands. Among the Batak, however, it seems to have worked the reverse way: "the greater the prestige of the culprit, the more severe his punishment" (Roest 1941: 16; see also Willer 1846: 203-213; Graafland 1893: 21f.). And, for offences in Lesquillier's section IV-A, that is to say: acts which would diminish the metaphysical potency of the autonomous

88 The *bangun* involved transfer of money to a family or lineage or kin-group which had been diminished by the death of one of its members. The *pampas* functioned in a similar way in cases of wounding or other bodily harm. Below, I present the Leiden interpretation which accommodates these seemingly mercenary arrangements within the general theory of adjustment.

adat community, Lesquillier (1934: 119) reported that, in Bali, those who were esteemed most potent had greater penalties to bear.

6.4 Corporal and capital adjustment

Many reports from European observers mention physical violence, even death, as reactions of the adat community towards transgressors or those involved in disturbing states of affairs. It is interesting to see how these practices were accommodated within the Leiden doctrine of adjustment. One type of case reported from many law regions concerned the action of a betrayed husband. In the heat of discovery, he might properly kill his wife's seducer. The justifying motive was not, as a westerner might have expected, the notion of proper vengeance. Rather, the Leiden theory argued, it amounted to the discharge of a potentially dangerous accumulation of emotion or spiritual excitement. Harmony would be restored by the rapid dissipation of the disturbing psychic energy. The defenders of this interpretation could point to the limitations placed upon the practice. For the Minangkabau (Koninklijk Koloniaal Instituut 1936: 513f.), the fugitive philanderer would be safe on reaching the sanctuary of the forest edge. Again, it was required that the husband should have witnessed the event. Given that condition, his swift violence would be allowed to pass as an appropriate response. For the Acehnese, delayed adjustment was recognized, provided the aggrieved man had a *tanda*, some visible proof, say, a piece of clothing, which showed clearly who had injured the honour of his house (*id.*: 181). The fact that in many regions, for many communities,[89] it was mandatory for the guilty wife to share her lover's fate, can be taken as evidence for the interpretation which sees adjustment as serving to 'disinfect'.[90] In a case from Timor, the husband had severely wounded the other man. The latter's family came, not to complain about the injury, but to demand that, at the very least, the wife should be injured in like measure (Commissie voor het Adatrecht 1926: 239). On some occasions, the necessary killing was carried out silently by a member of the wife's own kin-group.

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89 See the cited references (Koninklijk Koloniaal Instituut 1936: 181, 513f.). See also *id.* at 515 for Mentawai, where the guilty wife was banished to an uninhabited island.

90 It might also be used to argue that Indonesians understood the idea of equity quite well.

Mutilation was justified by reference to the disinfection principle rather than by the need to inflict pain or to take reprisal. The essential act was the removal of the eye, ear, or other organ which, by its exposure to forbidden stimuli, might eventually bring further and greater trouble to the community (Van Ossenbruggen 1916: 118-119; Lesquillier 1934: 85; Roest 1941: 75, 230f.). Many reports of the death penalty were qualified in such ways that they were susceptible to interpretation as adjustment rather than as capital punishment. The Gayo drowned thieves, but only when they were judged to be "stubborn recidivists, beyond reformation, having committed major theft with aggravation" (Roest 1941: 211). This was, surely, the ultimate disinfection, the ultimate isolation of a society which had no effective prison system. The Batak killed lunatics, but only as a safety measure (Roest 1941: 172; Willer, 1846: 204).

In the Barbar archipelago, the populace might club to death both a wizard and the full-grown members of his family. Such an act would have followed the discovery through sorcery, that the wizard had brought about the sickness (and presumably the death?) of some other person. The wizard's children "were given into the hands of the victim's family, to deal with as they wished". Though potentially dangerous, being genealogically infected, they were usually sold to foreigners, "since a wizard, [once] transported across the sea to other islands, would lose his supernatural qualities" (Roest 1941: 75; see also Riedel, 1886: 346). Among the Galela and Tobelorese, the sea served a cleansing function. Sorcerers were killed and their bodies were cast into the ocean (Roest 1941: 75; Steinmetz 1892: 330).

Among various adjustments reported as a reaction to incest (Kits van Heijningen 1916: 65; Commissie voor het Adatrecht 1933: 355), water seems frequently to have been used. The partners might have been floated away on a raft (downstream or out to sea), or drowned (with weights), or left caged in a wicker basket on the beach. It seems to have been a clear principle that blood should not be spilled upon the earth. The blood of the incestuous pair would have brought all the disasters mentioned above (see note 79). But in other cases the violence might be avoided. Marsden (1811: 261f.) mentioned a fine, and then added that, as an alternative, a ceremony would suffice. After this, apparently, a marriage might be confirmed![91] A rationale

91 Marsden 1784: 221 should be compared, however, with Marsden 1784: 194: "If relations within the prohibited degrees intermarry, they incur a fine of twice fifty dollars and two buffalos, and the marriage is not valid." The dispensation (1784: 221) did not apply to contracts

for this seeming variety of reactions may be derived from the following account of adjustments after incest. In this form the pair were bound together, back to back, and placed in a deep pit. They were buried alive but each was equipped with a bamboo tube leading up and out to the air. After a certain period, according to Lesquillier seven days, the grave was reopened. Either or both, having survived the ordeal, would be set at liberty. The case was closed, the danger passed (Lesquillier 1934: 38f.).[92] Think here, not of punishment, but, rather, of the successful outcome of a dangerous medical operation.[93] A similar interpretation seems plausible for yet another South Sumatran adjustment after incest. Tied to each other, in a sort of wicker-work basket, the pair were thrown into the sea. If, by the aid of a lead knife, they could free themselves and reach the surface, they were, in effect, acquitted (Commissie voor het Adatrecht 1935: 284). Kits van Heijningen (1916: 69) told of a case in Borneo which seems susceptible to the same sort of analysis. The affected pair, in this instance, were both single but were the cause, because of their unpermitted sexual intimacy, of spiritual ill-being in the community. After some ceremony, they were set adrift on a raft together with a pig. The raft sank; the two people swam to the bank. They returned, presumably rehabilitated within the community. What happened to the scape-pig remains a mystery.

These cases contrast with the instances of adjustment after incest in which there was not the slightest possibility of survival. But,

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between parties related in the first degree. A more detailed description of similar proceedings *adat memecah priuk* or *perkawinan pecah suku* was given in Hazairin (1936: 78ff.). The family connection was formally, ritually, broken and the impediments to marriage ceased to exist.

92 Lublink-Weddik (1939: 86) was given a first-person account. In Palembang, before the coming of the Dutch changed the whole nature of the adjustment, moving feathers at the top of the tube(s) showed whether the subjects were still breathing. The feathers usually stopped moving after the second day. Hoven (1927: 47) said that the authorities opened the grave "to satisfy themselves that divine judgement had been consummated." Mallinckrodt (1928a: 405), writing of Borneo, took the provision of air conduits as an aggravation of the sufferings of the buried partners. The origin of Lesquillier's report is article 25, section iii of a South Sumatran code compiled by Gersen (1873: 117).

93 Lesquillier (1934: 39, n.3) mentions, for comparison, the burial of a lunatic by the *lurah* (head) of his community, *to cure him.*

Lesquillier would have argued, the prime motivation was always to remove, or dissipate, potential danger from the community. Lesquillier (1934: 251) went so far as to say that, notwithstanding the more terrible cases cited, the characteristic mode of adjustment was amicable settlement. There is much evidence to support that view.

6.5 Amicable settlement

> [A]ll punishments [are], by the laws of the country, commutable for fines (Marsden 1784: 174).
>
> Corporal punishment of any kind, is rare (*id.*: 208).
>
> Capital punishments are ... almost totally out of use among them ...(*id.*: 207).
>
> It was the regular practice for the avenger never to demand the full amount of the fine which the positive penal law laid down....(Willinck 1909: 281).
>
> It was not uncommon for a payment in propitiation to be accepted as redemption from [the consequences of] a blood feud ([that is] composition). It was the exception with homicide, [but] the rule, with wounding (Kreemer 1923: 284).
>
> For murder on the public way the punishment is death and, if it has been accompanied by robbery, the head is stuck up on a pole for three days. The judge can, however, order him to return the goods and to pay a fine of 150 guilders and the ransom, whatever it may be in that *nagari* (Van Eerde 1896-1898: 219; see also Koninklijk Koloniaal Instituut 1936: 240).
>
> They must marry if they can. If this is impossible, they ought really to be strangled, in accordance with the adat. More often than not, however, they get off with a payment in propitiation (Kits van Heijningen 1916: 138).

Kits van Heijningen had been discussing adjustment after the seduction of a maiden (cf. also his comments 1916: 39). Lublink-Weddik (1939: *passim*) describes the general tendency of findings in the courts of the Palembang *marga* communities (Palembang is a section of the adat law region of South Sumatra). At the time when he wrote major criminal cases no longer came before the *marga* courts. So, effectively, these proceedings concerned torts, trespasses

and minor transgressions. Nevertheless, the overall trend in the cases he analysed was the imposition of adjustments which peacefully repaired disturbed situations.

The adat law of the Bugis seems in many cases to have favoured violent adjustment and capital penalties but, on at least one occasion, actual practice was far more gracious than the formal requirements:

> A Buginese, suspecting another of having stolen his spear, stabbed him with his kris and, in the process, struck a woman in the back. This should actually have been a capital crime, inasmuch as it was committed right in front of the house of the princess. Consequently, the mother set out at once for the royal dwelling, taking an empty *lojang* (crock) and a young slave girl as ransom for her son's life. The matter was taken very seriously. The verdict ran:
>
> > The lojang and the slave girl were accepted.
> >
> > The kris of the transgressor, estimated to be worth about 20 Dutch guilders, should fall, for the one half, to the benefit of the wounded man, and for the other half, to the benefit of the woman.
> >
> > The transgressor was obliged to bear the costs of medical treatment and care for the injured parties until they had both recovered.
>
> That evening, however, the slave girl and the *lojang*, likewise the kris, had been given back so that the only obligation of the transgressor was to attend to the costs of medical treatment and nursing. Such an act of grace is in no sense a rarity. (Commissie voor het Adatrecht 1929: 106)

6.6 The judgement of God or trial by ordeal

One common method of coping with vexed or insoluble cases was to resort to trial by ordeal or divine judgement. This removed the necessity for any direct imposition of pains or violence. The following descriptions came from the adat law region of Nias:

> Those accused sit in the ring into the middle of which is thrown a chicken which has just had its carotid artery cut:

> the one at whom the still-struggling chicken points with its foot as it dies is the guilty party....
>
> This must take place under water.... [A] stick has been firmly stuck into the bed of the river. The one involved goes under and grabs the stick tightly from below so that he will not surface too soon. The *selawe* now scoops the water with his hand and throws it in the direction of the [stick], three times, but with intervals between, so that, in all, a time of half to three-quarters of a minute elapses. If the accused surfaces before the time is up, then he is guilty. If he does not emerge ... then he is innocent.
>
> A *tahil* weight has been hidden in a wooden trough in which equal amounts of ash and water have been mixed. The accused has to hunt for the weight with his mouth. Should he discover it, his innocence is clearly demonstrated (Schröder 1917: 364; see also Koninklijk Koloniaal Instituut 1936: 575).

Similar practices were reported from most adat regions of Indonesia. Among the Dayak, there were "many professional divers ... willing (for a trifling sum) to undergo the painful contest" (Commissie voor het Adatrecht 1917: 96). And the same people had the test of the lighted tapers. The defendant held one, the plaintiff, another: they were of equal length. The first taper to go out identified its holder as the party with whom fault lay ... or, better (in accordance with the Leiden view), the one from whom initiative in adjustment could properly be expected (*id.*: 134).

In another, more clearly religious variant, an accused party might be required to confirm his protestations of innocence by taking a holy oath. The social effectiveness of an oath of self-exculpation, administered, say, on the Qur'an, would seem, on the first analysis, to depend on the degree of sincere religious belief in the community. If such an oath is to function as a deterrent, the accused should be a convinced Muslim. And if the plaintiff and the witnessing community are to accept it as a satisfactory resolution of the problem, it would surely be necessary for them to believe in the inevitability and (preferably) the immediacy of divine retribution for perjurers. Roest (1941: 303-308) pointed out, however, that such an analysis is both too limited and too broad. In terms of the magical-metaphysical world view, the members of the community need not expect God to act; they need not share the defendant's faith: they need to believe only that perjurers draw harm upon themselves. The oath need not function to determine the truth; nor need it serve in any other way

as a means: on the contrary, it is the end, the adjustment in itself. In one way or another, it restores metaphysical equilibrium (*id.*: 304). According to this interpretation, the oath-taker draws upon himself the dangers threatening the country and the community. If he is innocent, he need not worry: his oath serves as an antiseptic. And, if he has falsely sworn, he will have reduced or exhausted his personal spiritual resources. He has rendered himself vulnerable to all sorts of harm. If the perjurer is prepared to take that risk, that is his worry.[94]

6.7 Asylum

The institution of asylum provided another alternative to violent adjustments. Kits van Heijningen distinguished the protection afforded by personal presence from the concept of sanctuary. In the former, the king, say, by his mere physical presence, provided a shield of magical potency which covered all fugitives in his retinue. So far as he was aware (Kits van Heijningen 1916: 134), Indonesian adat law knew only this form of asylum. However, among the short set of extracts quoted in the *Pandecten* (Koninklijk Koloniaal Instituut 1936: 743-748) are two which refer to temples or to places which pursuers might violate only at the cost of most terrible pains (Koninklijk Koloniaal Instituut 1936: 747; Kleiweg de Zwaan 1930: 39; see also Lesquillier 1934: 73). Again, *handam*, the custom in the old Minangkabau realm of Pagarruyung of seeking refuge in the royal court, seems to have been an instance of place-centred protection (Willinck 1909: 811, 831, 848). The meaning of '*handam*' - buried alive in the great house - indicated that it was not the royal presence but the royal residence which guaranteed the safety. Indeed Lesquillier (*ibid.*) argued this point quite clearly. Fugitives who stepped outside the bounds of the sanctuary were no longer under protection. In most cases, there was no release. A woman pregnant outside of marriage might eventually leave (Willinck 1909: 837, 888f.)[95] and a debtor for a fine might eventually have it paid off (Roest 1941: 68; Grijzen 1908: 119). But, for the majority, the servitude, as well as the protection, was for life.

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94 The practice has survived in independent Indonesia. See *Tempo* (1976: 12).

95 And leave her child behind?

6.8 Adjustment by means of money

The most common alternatives to violence were the previously mentioned transactions known in Malay as *bangun* and *pampas*. These involved the exchange of money consequent upon acts of homicide and grievous bodily harm, respectively. European commentators generally tended to equate these two practices with old Germanic institutions such as *weregeld* or *smartgeld*. They held that *bangun* and *pampas* tended to undermine respect for human life and human suffering, respectively.[96] Hence, they argued, it was - or ought to have been - a principle of colonial administrative policy to oppose these adat institutions. However, within the scheme presented by the Leiden adat scholars, the exchange of cash was not mercenary in nature. The exchange, ideally, represented a transfer of spiritual capital between distinct components of a total[97] society. The transfer functioned to restore[98] the disturbed system of balance between the

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96 See, for example, Marsden (1784: 206-212), particularly the account of the feud (1784: 210f.). With a system such as this, the risk of vendetta is always latent and should be borne in mind when considering striking examples of composition and reconciliation such as those printed in Commissie voor het Adatrecht 1915: 211-213 and 1941: 474-476. Marsden (1784: 187f.) cited the *bangun* and *pampas* (*pampay*) rates current among the Rejang at about the turn of the eighteenth century (see also *id.*: 195). He ascribed to avarice the customary preference of the victim's family for selling a murderer into slavery rather than having him put to death. This option would only arise when he, or his family, proved unable (or unwilling?) to pay the *bangun*. Nevertheless, in his discussion of the origin and the meaning of the term, *bangun*, Marsden showed that he was aware that the institution signified more than mere desire for material gain.

97 That is to say, *total* in the world-view of the autonomous Indonesian community. Its components (lineages or territorial sub-groupings) were, ideally, to be regarded as organs within the one body. The atrophy or demise of one would not benefit, but would endanger, the other components. Excessive profit of a particular party would, likewise, have been disastrous - cancerous.

98 See the discussion of the etymology of the word, *bangun*, in Willinck (1909: 830). The equivalent term among the Dayak is *beli*. Lesquillier (1934: 106) suggested two possible origins: *beli* (Malay: buy) and *balik* (Malay: back). They provide occasion for dispute among anthropologists. *Balik*, with its suggestion of a return (to a former condition), stands for the ideal interpretation. It approximates the usual explanation given for *bangun* (Malay: wake/rise): the

component groups and to re-establish harmony in the physical and the material worlds.[99] The non-mercenary value of money transferred in adat ceremonies was a standard teaching of the Leiden School (Hazairin 1936: 49ff., passim). It was cogently argued in the discussion (Lesquillier 1934: 51f.) of payments to judges in the adat court sessions (*rapat*). It was possible, of course, for adat judges and officials to abuse their office. It was also possible that they were tempted to take more than their allocated share[100] of fines for their own use. (This would have been an offence in adat.) But the money given to an officiating judge at the commencement of a court sitting did not function, could not have functioned, as a consideration in hope of a favourable verdict. Lesquillier advanced this argument with great assurance. He pointed out that, in terms of real purchasing power, the ritual money was valueless. In Bali, for instance, the coin given for the protection of a presiding magistrate was a *kepeng* - at that time worth about one-fifth of a Dutch cent (*id.*: 19).[101] The coin was a repository of spiritual capital: it was not a mere token but a source of magical energy. This interpretation received further support from the custom of returning the 'protection money' after the satisfactory conclusion of court proceedings (Mallinckrodt 1928:

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resurrection of the spiritual power cast down in the death (of a member of the genealogical group). The Acehnese word is *bela* (Commissie voor het Adatrecht 1913: 31). No *bela* might be claimed for the life of a thief killed in flight with his loot. Instead, his family had to be content with the stolen goods. That was their right. They (the goods) were the going value of the thief's life: he might be presumed to have made such an estimate before he acted. As for his pursuers, they had already achieved their adjustment.

99 Willinck (1909: 831) distinguished *bangun* from *dendang*, a Minangkabau word apparently cognate with the Malay, *denda* (fine). On this basis, Roest (1941: 62) was prepared to argue that the *bangun* was not particularly concerned with the culprit, and that it was in no sense a ransom price to save his life. (Compare, however, *id.*: 107.)

100 Roest (1941: 55-59) surveys the proportions to which various participating or involved Indonesian officials were entitled. The practices differed from adat law region to adat law region.

101 Elsewhere, Spanish piastres or Portuguese reals were used. This suggests that the significance of money, in adat law rituals, might be traced back to times when the autonomous indigenous communities had no clear understanding of the economic function of money.

205ff., cited by Lesquiller 1934: 52).[102] It had served its purpose; the danger to the officiating heads was past.

6.9 Adjustment through commensality

The communal meal (*selamatan*)[103] mentioned above (para. 6.2.1) served a variety of adat purposes. One of its main functions was adjustment. It was the ritual used for reconciliation of estranged groups within the community, or between the living community and the unseen world of natural forces or ancestral spirits, or for the purification of a polluted environment. Wherever murder, bodily wounding, robbery or sexual assault had taken place, the ground was held to be unclean. Various ceremonies might be held to redeem the land from its defiled condition.[104] Defilement could affect more abstract entities, too. The title of a Minangkabau *penghulu* (head of lineage) could be misused, or fall into disrepute. So feasts might be held for the purification, or restoration, of the good name of the kin group (Koninklijk Koloniaal Instituut 1936: 250).

6.10 The responsibilty of the group

The last feature of adjustment that I wish to discuss is the phenomenon of group responsibility. Some adat theoreticians, notably Van Vollenhoven (1909: 37-40), distinguished discrete principles under this heading: mutual responsibility as a relationship among members of a group (usually a kin-group), corporate group solidarity in the face of claims or threats from outside, and a freely acknowledged accountability for unresolved losses or damages suffered by visitors on the territory of the autonomous adat community. (This last was, of course, one of the characterising features of the right of allocation.)

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102 The compelling evidence is the habit of leaving the 'protection money' with the judges whenever the litigants remained unsatisfied with the verdict. Compare Perelaer 1914: 45, who reported the secret return of the 'bride price' money after the marriage ritual had been completed.

103 It is also known in different regions as *kenduri, bimbang, kejai, sedekah, panula, ngabuan.*

104 *Tepung bumi* or *pembasuh dusun* in the first five cases discussed by Lublink-Weddik (1939: 13f., 20f.). Koninklijk Koloniaal Instituut (1936: 246ff.) cites instance after instance of the ritual feast of reconciliation from Minangkabau sources. See also Roest 1941: 223.

Most cases in which the group, as opposed to the single person, became involved in the adjustment concerned situations which might otherwise have been occasions for violence.[105] They facilitated the process of adjustment in the wake of social disturbance.

Collective responsibility was reported by an English observer of the Rejang people in the late eighteenth century (Marsden 1784: 207, 212; 1975: 247, 252). Among the Batak, the family and the community were held accountable and liable to fines for damage caused by lunatics (Roest 1941:79). Roest found several instances of group responsibility in reports from the Javanese principalities. If, in the realm of Mangkunegara, an unmarried woman were to fall pregnant, her seducer was, naturally,[106] required to marry her. Should he have vanished from the face of the earth, then the village chief was obliged to marry her. The marriage might last at his pleasure or discretion; its purpose was, seemingly, to circumvent the dangers associated with illegitimate birth. If, on the other hand, the identity of the father remained unknown and no one would assume the responsibility, then it fell to all the men who drew water from the same well as did the girl, to pay such a fine[107] to the village head as was necessary to cover the costs of her marriage (Commissie voor het Adatrecht 1926: 83). According to one old Javanese law code, *Surya Alam*, the father of a juvenile thief might be fined. So, too, the neighbours on the right side and the left would have to pay, as a caution, so that neither of them should turn into thieves (*id.*: 79). An unsolved murder in the region of Jogja or Solo entailed, after forty days, the imposition on the community[108] of the *diat*,[109] a fine of

105 Occasionally, violence spread wider because of the idea of collective responsibility or, perhaps (in line with the standard Leiden teaching), collective contamination:

> Not only descendants but ascendants and wives, often even the slaves and all possessions of the [offender] were done away with (Roest 1941: 71).

106 'Naturally', ... because he was a responsible party in awakening the dread forces? Or was he, maybe, held to be the most effective antidote to these dangers? It is clear from the description of such adjustments, that agency was not the critical consideration. Someone had to marry the wretched girl, not for her sake, nor for that of the unborn infant, but for the protection of the whole community.

107 Dutch: *boete*. Why a 'fine'? In another light, it might be viewed as a subscription - a shower party?

108 That is, everyone living within an area of 140 *cengkal* measured crosswise. A *cengkal* is about four metres.

500 real for a Dutchman, 250 for a Chinaman, 125 for a Javanese. That the locals were innocent was an irrelevance (*id.*: 78).[110] In South Celebes, a similar event required somewhat similar adjustment. There, if the murderer remained undiscovered, each household in the village nearest the place of the offence was required to pay four guilders. After an interval, the fine was levied again. This continued until, eventually, the criminal was identified (Commissie voor het Adatrecht 1929: 281). In Bone (another part of the South Celebes adat region), a theft from persons of consequence (the prince or his minister) brought the group principle into action. The thief and the members of his household would become the agents of adjustment (Commissie voor het Adatrecht 1916: 233).[111]

6.10.1 Territorial responsibility

Some of the last examples given above link the responsibility of the group to a particular locality. I want to examine this connection more closely, particularly because it constitutes one of Van Vollenhoven's six defining features in of the right of allocation.

It was reported from the Celebes that the member of the village community who entertained overnight a person subsequently suspected of theft was held accountable for whatever was stolen. The bulk of the evidence, however, comes from Sumatra (Roest 1941: 84; Kooreman 1883: 646). This is the concern for visitors which emerged from the data collected by Dutch officials from the autonomous adat communities. Commissie voor het Adatrecht (1913: 385ff.) contains the most detailed data about local variations in the obligations recognized and accepted by the indigenous communitites with regard to travellers and visitors on their territories (areas of allocation). These consist of the responses to a round-robin interrogatory issued by the Dutch Resident in Jambi in 1911. Officers stationed in various parts of the

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109 From the Arabic: *diya*, blood money. The differential rates seem reminiscent of *bangun*. They indicate some influence, perhaps, of the colonial value system. They certainly do not arise from any Islamic understanding.

110 The *diat* was paid to the civil authorities. One of the sources cited by Roest, another old Javanese code called the *Angger Agung* (Supreme Laws), stipulated that one third part should go to the victim's heirs.

111 From the same reference source: "If a thief hides in a village, then all the villagers are punished."

Residency wrote formal replies. The data showed that commitment to protect and indemnify differed from district to district; they also showed clearly that the principle of territorial responsibility was established custom in that part of South Sumatra. In other parts, too, it was effective. Consider the following extracts from a government report of 1872. With regard to Palembang, the reporters (Koninklijk Koloniaal Instituut 1913: 545) wrote:

> The age-old and still-honoured local native custom, that each marga is answerable for the misdeeds committed on its territory ... is the reason that every marga possesses its well-known boundaries. Consequently, you will discover that any kind of land - developed or undeveloped - will belong in one way or another to a *marga*.[112]

And with regard to Bengkulu, on the west side of South Sumatra, the *Adviseur* (official consultant in the regional administration) wrote (Commissie voor het Adatrecht 1912: 125, n. 2):

> I learnt myself how deep this adat rule is in the popular [consciousness] when, staying in a balai [public hall] in Bengkulu, I lost one of my shoes overnight - probably the cats had dragged it away. Next morning the Chief, having been informed of what had happened, asked me straight away how much the shoe had cost, since, so he said, the kampong was responsible to me, as an outsider, for any loss I might suffer there.

Notice that the Chief's concern was not with questions of theft, of guilt or discovery. It was a matter of making good.

A final citation from a report from Java links the right of allocation and adjustment, thus illustrating the Leiden doctrine that all fields of adat law were but aspects of the whole, the characteristically Indonesian vision of life and the Universe. The topic under discussion was the fixing of boundaries between communities, and the reporters (Bergsma and others 1896: 134) described the following incident:[113]

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112 This concerned a report on the principles of territorial responsibility implicit in a 1907 verdict. A government guest-house had (been) burnt down. The community at Laïs had been held accountable.

113 The report also mentioned two other cases, a theft in the Surabaya district and a corpse discovered near Madiun, which led to

> When a corpse was discovered in the forest near the desa, the chiefs of all the desas in the neighourhood of ours[114] declared that they made no claim to that land. On the other hand, the chief of [our] desa did. So the task of investigating the case was handed over to him. Ever since then that land has been regarded as belonging to the desa.

Such a balance of rights and responsibilities was, in Van Vollenhoven's view (1909: 39f.), a fair and sensible arrangement.

7 ASSESSMENT

The thesis of this essay is that the concept of adat law elaborated by Van Vollenhoven and his associates,[115] was ultimately invalid and unviable. The Leiden doctrine[116] was a reflection of the Founder's mind, of his great learning and of his misconception of scientific endeavour, of his generous liberal conscience and of his romantic Orientalism. Its failure, in the sense that I shall judge it, is a reflection of the unspoken but inescapable contradictions of law in a colonial state. Having come near to an ideological victory by 1930, the Leiden champions of adat did not know how to consummate it. Their hands were tied by their own theory. At the conclusion of this essay I shall deal with one option, one theoretical initiative which might have broken new ground: it was proposed, but never systematically attempted. I shall also, before that, have to devote some words to explaining the technical meaning, in the history of ideas, which has since become associated with the word, *Orientalism*: that, I shall suggest, is an essential idea for understanding the frame of reference in which Van Vollenhoven's thought was cast.

7.1 On the meaning of 'myth'

There was, of course, an empirical base for the Leiden doctrine. The title of this essay, 'The Myth of Adat', is in no sense meant to deny that. The customary legal behaviour of Indonesians was not imagined:

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the determination of community boundaries.

114 Presumably, the desa where the reporters were staying.

115 Conventionally known as the *Leidse School* (Leiden school).

116 *Leidseleer*.

it was observed and reported. The particular myth with which I am concerned is what Van Vollenhoven and his disciples made of this material.

Following Davies (1976: 16), I use the word, 'myth', to refer to an accepted belief. It may concern the past, for instance, or it may concern nature, law, duty or beauty. Whether the belief be false or true is strictly speaking irrelevant. Myths function to order the thoughts and lives of human beings. Effective myths are so familiar that they may escape notice. They are ascribed the status of axioms or common sense beliefs. To illustrate, I might, for example, remark that the institution of the sovereign state is one of the most persuasive (and, therefore, most powerful) myths of the twentieth century. It is the vocation of scholars to examine myths, to renovate them or to reject them: sometimes they must create them.

To demonstrate the excesses and the weaknesses of the particular myth made by the Leiden scholars, I return first to the right of allocation controversy. Thereafter, I present a more sober interpretation of penalty in adat law.

7.2 The *REPORT OF THE AGRARIAN COMMISSION* and the aftermath

In due course, the Agrarian Commission (see para. 5.5) presented its findings (Anonymous 1930). Given its history and the composition of the Commission, the advice on the status of the right of allocation was a little less emphatic than might have been expected. The Commission did ask that the right should be formally recognised in statute law, but it also found it "unnecessary ... and undesirable to spell out in detail the nature and the scope thereof" (*id.*: 10). This is perhaps less surprising when it is remembered that, for one of the legal experts on the Commission, the opposition: domain principle v. right of allocation, was a false theoretical dichotomy (Ter Haar 1950b: 91f.). And, since the Commission had been asked to comment on the former, it was to that theory that they addressed their criticism. The domain declaration was superfluous. All the good that it might achieve could be achieved in other ways; all the evil, avoided (Anonymous 1930: 81). It was "an interesting piece of legal history", no more, for, the Commission argued, it was not necessary to be an owner in order to enjoy most of the rights and powers of an owner (*id.*: 87). Thus, the fiction of domain could be bypassed. If such an option were not available, they argued, the State would be involved in a hopeless paradox. For, should it ever be deemed

desirable or necessary to do so, it would nevertheless prove impossible for a Western legal system, equipped most relevantly with the right of property, to create peculiarly Indonesian rights in land (*id.*: 66).

The domain doctrine led straight into a theoretical impasse. It was unacceptable for the State to claim to have ownership by right of conquest: such a derivation was repugnant.[117] Nor could such property rights be instituted by legislation. The metropolitan parliament could not bring into being rights of property over land in the Indies and transfer these to, say, the King of the Netherlands. In support of this, the Commission cited the legal maxim: no one can convey to a second party a right which he does not himself possess (*id.*: 67). There was no escape from this paradox, only an infinite regress. The argument of the Utrecht School was naive. They had insisted that the State must necessarily be, or must be made to be, owner of the land so that it could legitimately grant concessions and other rights. Yet, said the Commission, suppose, for the sake of argument, that the Legislature did have the competence to make itself owner. That would show the pointlessness of the exercise. For, if the Legislature could make itself owner, then it was also competent to grant those lesser rights. So, clearly, the domain theory was not essential.[118]

The Commission differed from the Master[119] in the methods advocated in reaction to native recalcitrance. According to Van

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117 See para. 5.2 of this essay. For some Indonesian communities, the idea of a right of conquest was simply inapplicable. See Waworuntu (1920: 16f.) for an indignant rejection of the idea that the Minahasans had ever been subject to any alien sovereign.

118 These strike me as valid criticisms. If, however, the same rigorous analysis is applied to the positive suggestions advanced by the Commission, then they, too, lose some force. Consider, for instance, the proposition mentioned above, viz.: that one does not need to be an owner in order to exercise the functions of an owner. What is the meaningful distinction between two persons, A and B, the first of whom is the owner of property x, while the second in every way exercises the functions of owner with regard to property y? If the members of society accept the pretensions of B, then he is, at least as far as they are concerned, just as much the owner of y as A is of x.

119 This was a standard form of address applied to Van Vollenhoven by his students (professor J.F. Holleman, private communication).

Vollenhoven, a government act of expropriation was the only fit way of taking over land for development. The Agrarian Commission, however, advocated a new approach: the obligation of forbearance (*duldplicht*). This was derived from precedents in the legislation (Anonymous 1930: 15-17). In extraordinary circumstances, whenever a superior government authority decided that 'the common need' was of greater significance than customary rights, the indigenous community would have to endure the loss of usufruct and access to land.

The Report referred to the problem of definition - a difficulty which Van Bockel (1921: 449) had raised in the argument nine years before. The Commissioners pointed out (Anonymous 1930: 98) the extreme vagueness of the concept of 'waste' or 'virgin' lands. So, when they came to sum up their findings - in the form of a proposal for legislation (*id.*: 95) - they avoided such expressions. They suggested amendment of Article 51 of the colonial constitution. One of the suggested innovations would have empowered the government to grant limited parcels of urban land as property. Another offered protection for traditional agrarian practices - the bulk of the adat land rights for which the Leiden School had contended. A third set a maximum period of seventy years for a long-term leasehold: it imposed the duty of forebearance for the common good.

These proposals motivated the minority report submitted by one of the Indonesian members of the Agrarian Commission, Koesoema Oetoyo (a delegate from the People's Council). In the main, he wrote, he agreed with his fellow commissioners. He had reservations, however, about some of their initiatives. He referred to the change of wording which would exempt *permanent* farmlands from the competence of the government. Previously, he wrote, the government was obliged only to ask: Is this land under (any sort of) cultivation? If the answer was in the affirmative, then that was the end of the matter: the land could in no manner be made available for alien use. Under the proposed innovation, a positive response to the simple question would trigger a second inquiry: Are these *established* farmlands? He feared that the qualification, 'permanent' or 'established', would constitute the chink into which the thin edge of interpretation would be wedged: eventually rural indigenous development of Java would be stunted (Oetoyo 1930: 116f.). As a Javan, he could not speak with authority about the effect which the proposed 75 year maximum term would have in the Outer Territories. He feared, though, that under the influence of international finance, 'proposed maximum' would turn into 'effective minimum' (*id.*: 118). He cited (*id.*: 117) the practice in the tobacco cultivation lands around Deli and Siak:

> This [the political power of large-scale capital] is to be seen ... on the East Coast of Sumatra where, so I hear, the plantation lands fit so closely together that there is no place between them that holds any significance for native agriculture.

Under the proposed amendment, land not clearly in 'permanent' use might be granted under a 75-year lease. It was conceivable that, within a much shorter period, the situation might change significantly. The land could be needed by the local Indonesian community for permanent use. Such a need might arise from, say, the natural growth of the population. His most important reservation, however, was in the matter of forestry.

7.2.1 Conservation of the forests

Oetoyo saw a significant issue in the conflict between the age-old Javanese practices of foraging, gleaning and grazing livestock in the jungle and the State's commitment to the preservation of virgin forests (a source of teak and other timbers). How many Javanese, he asked rhetorically, had wound up in jail simply by exercising their traditional gleaning or pasture rights? (Anonymous 1930: 119). The solution, Oetoyo judged, lay not in the then current practice by which the Government, claiming the great forests as its own domain, allowed such traditional popular rights as its forestry officials should permit. They were, of course, devoted to the protection of the forests. It was in accordance with their vocation that they should in all ways, and on every occasion, try to prevent the people from the exercise of any right which might damage the trees they nurtured. Far better, he wrote, to have a fully recognized right of allocation subjected to the obligation to forbear necessary to prevent harm to the public interest. He concluded his submission with these words (*id.*: 121):

> My argument is not so much against proclamation of the teak forests as state property; it is more against the denial of all right of allocation thereon.

It is worth noting the exact distinctions he made, for Leiden's enemies seized on the fact of his dissent and the subject of forests as an objection to the right of allocation. They were not always accurate in reporting the nature of his objections.

The major occasion for the forestry debate was the 1932 Congress of the Association of Senior Officials of the N.E.I. Forestry Service. Logemann, appearing at the conference in his own capacity,[120] presented his response (Logemann 1932a: 85-107) to the position paper J.W. Gonggrijp (J.W. Gonggrijp 1932: 38-46) had distributed before the meeting, and to the points raised by Gonggrijp and others in the first session. Logemann was, of course, an expert academic lawyer arguing with laymen. But that counted for nothing: the foresters, conforming to Koesomo Oetoyo's expectation, would have nothing to do with the policy recommended by the Agrarian Commission (Anonymous 1930: 112-115). The foresters did not, could not, would not, trust the native communities. At the end of the Congress, the delegates/members adopted by acclamation a motion rejecting the suggestion made in the report. Against such attitudes the Leiden idealists made little progress during the thirties.

7.3 Hardening of the arteries

The Leiden School had, by the end of the third decade, won some recognition for adat. Adat had, by now, become a recognized, significant aspect of Indonesian culture. Every conscientious administrator in the N.E.I. had to take cognizance of its existence. Most took pride in the diligence with which Dutch scholarship had sought it out and organized it into coherent formulae. For many, it was becoming a new orthodoxy to which lip service was due, even though its political implications[121] were taboo.

Even among the members of the Utrecht School, there was an appreciation of the scholastic achievement. Neither Louter (1929: 655ff.) nor Cassutto (1935) showed that contempt for adat legal culture which was scarcely hidden in the writings of Nolst Trenité. Cassutto did indeed mention a critical jest from an older generation,[122] only to dissociate himself from it. Those times were past. He agreed (*id.*: 9) with the Leiden opposition to legal unification ('one law for all who live in the Indies'). It was, he said, an impossibility for the peoples of the nineteen mutually distinguished adat law regions.

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120 That is, he made clear, he had no competence to speak for, or on behalf of, the Agrarian Commission. That had now disbanded.
121 See para. 8.2.1. below.
122 If you want to know what adat is, "take a concept or a major principle of Dutch law, and inscribe in it the word, 'not'" (1935: 6).

Another aspect of the 'hardening arteries' was an abatement of the first flush of energy and excitement with which research and advocacy had been imbued in the early 'ethical' years of the century. Van Vollenhoven himself was to die in 1933, and the discipline of adat law needed a more sober and rigorous approach.

7.4 Problems and paradoxes

7.4.1 Buying what you cannot have; selling what you do not own

The implicit criticism in that last remark can be made substantial by describing some of the theoretical difficulties which arose from the Leiden theory. In the first case, Cassutto claimed that he had found a contradiction. The Leiden scholars held it to be a distinctive feature of interpersonal relationships under adat generally that every transaction required the transfer of some material consideration. Word of mouth or gentlemen's agreement would not suffice to seal a contract. In Javanese adat, Van Vollenhoven had taught, the *panjer* is necessary to bind the parties. He explained (1918: 637) that the *panjer* was not to be considered as an advance payment: it did not in the slightest way reduce the purchase price. Van Vollenhoven had presented this as an essential element in Javanese adat. Yet, wrote Cassutto (1935: 14), seven pages later Van Vollenhoven (1918: 643) had written that in dealings "with one's fellow villagers, everything is arranged on the basis of mutual understanding and good faith". The contradiction is not absolute: the explanation given (*id.*) makes it clear that it was in dealings with outsiders that the Javanese had recourse to the *panjer*. So Cassutto's criticism may be met. Yet it will serve to draw attention to a Leiden tendency - the tendency to generalize and to make the data fit the formulae.

The second example exposes the folly of one of Van Vollenhoven's idealist constructions. He had, unwisely, extended the distinction between European property rights and indigenous possessory rights from real property (land) to movable personal property. He wanted to distinguish European ownership from native possession. His critic, a professor of adat law at Utrecht University, deftly showed the practical irrelevance of such distinctions (Nederburgh 1933:101). Cassutto (1936: 251, n. 1) commented:

> It creates all sorts of purely theoretical difficulties. Nederburgh has provided an amusing example. He puts before us the adat

> law question: what is the legal position if a European housewife buys a chicken from a native? According to Van Vollenhoven's theory, the native cannot transfer any property right, because he has no such right.... The housewife, however, gets even less from the chicken dealer in the way of native possession, since she cannot acquire this right - it being, for her group, non-existent. Nederburgh, jesting, added that this jurisprudential adat law claim on the chicken - apparently left hanging in the air - will not make it one whit the less tasty.

Van Vollenhoven (1931: 663f.) had remarked that it was fortunate that this theoretical difficulty rarely gave rise to practical problems (contrary to the impression which Cassutto creates in the passage cited above, it was Van Vollenhoven who first mentioned the problem of the hypothetical chicken). He did not live to respond to Nederburgh's aside. The Utrecht professor's remark does make one point, however, and Van Vollenhoven's comment indicates a lacuna in the Leiden theory. If a theoretical legal distinction makes no difference in practice, a critic might well wonder about the purpose of the theory. In many cases, Leiden theories did function in defence of vital practical interests among the native peoples in the N.E.I. But, often, it seems, Van Vollenhoven and his school spun webs of fine distinction which, while creating lengths of theoretical impasse, served no direct useful purpose.[123] Nederburgh had identified one such case. Consider: if the adat law system contained such a coherent and peculiar set of rights as Van Vollenhoven had proclaimed for it, then the subjects of that system (native communities and the individual members thereof) could hardly interact with the subjects of any other discrete, self-sufficient legal system. Indeed, Dutch-Indies lawyers did develop a theory of relations within and between the various adat law regions especially to cope with this problem.[124] The need would not, however, have been so great had the Leiden scholars not been so assiduous in searching out the exotic, the singular features, which, in defence of the integrity of adat, they emphasized. Cassutto (1935: 15) commented that "Van Vollenhoven saw adat law

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123 In Leiden, in 1980, I asked one academic lawyer with expertise in the field of adat law to explain the practical differences between regarding land as property under private law and regarding it as domain under public law (*staatseigendom*). He said that, for practical purposes, there were no differences.

124 See, among other works, the writings of R.D. Kollewijn on this matter.

as something separate, something of an utterly peculiar nature, at variance with Western law".[125]

7.4.2 The guilty go free?

Lesquillier was the most systematic exponent of the Leiden theory of adjustment in adat law. He came quickly to the conclusion (Lesquillier 1934: 20):

> that the world-view of the Indonesian was entirely different from that of the Westerner. One could not simply put it down to a difference in degree.... It was a world-view anchored for the most part in the emotional consciousness, whereas the Western world-view was based on cerebration. Yet one could not think that a gulf existed between the two ways of thinking. They merged into each other and in many cases came to the self-same conclusions.

The obvious reaction to such a position is that Lesquillier was trying to eat his cake and keep it too. In fairness, then, it should be registered that he did go on to illustrate his point. He referred to a common practice. In both Europe and the N.E.I., court rules called for prior separation of contending parties (in, say, suits for damages or divorce). Yet, Lesquillier claimed, the similarities of practice are based on different explanatory myths. The Western motivation for separation is to avoid "argument and irregularities". The Indonesian motivation is to avoid "disharmony in the magical force of the communities which will manifest itself in the form of irregularities". Are these different motives? And, even if I or the reader were to accept the distinction which Lesquillier wanted to make, other questions would arise: Why focus on the differences? Why regard them as basic? Could it not, perhaps, turn out that it is the similarity which is essential? Later adat law studies tended to show much more of the common ground shared by punishments and 'reactions'.

Roest, very late in the life of the colony, devoted his thesis (1941) to an investigation of the guilt factor in adat penal law. His analysis

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125 Cassutto was the subject of a devastating, but certainly justified, attack by Ter Haar (1950b: 418-452) in a review of Cassutto 1936. The fault, plagiarism, of which Cassutto stood convicted, does not diminish whatever salience his observations may have had.

of the literature - the same reports and commentaries which earlier writers had used - enabled him to detect elements of Western (universal?) notions which should be taken into consideration in criminal jurisprudence, namely: complicity, aiding and abetting (*id.*: 142), malice aforethought (*id.*: 166), manifest intention (*id.*: 117, 166),[126] aggravation of an offence, mitigation, exculpation and non-accountability (*id.*: 172ff.), the legitimate use of force (necessity) (*id.*: 197f.), recidivism (*id.*: 207ff.), and attempted crime (*id.*: 129). His third chapter considerably modified the occidental-oriental dichotomy - punishment as opposed to adjustment - which had been standard Leiden doctrine. He concluded that intent was a significant factor in the adat law of offences. Indeed Lesquillier (1934: 92) had conceded as much: though it never came first, it was always present.

A little earlier, Lublink-Weddik (1939: 55, 60) had found that he could dispense with the extreme distinctions of the West-East contrast. He had found that the concepts of mitigation and aggravation were known and employed in the *rapat* courts in South Sunmatra (*id.*: 178f.). Among the numerous offences that he listed was "concealing oneself beneath somebody else's house at night-time for no clear purpose" (*id.*: 153). Here, obviously, the intention of the offender had to be taken into consideration. Was this the result of a changing native consciousness? Or had these elements of similarity always been there?

There is older evidence that the concept of guilt was known. From the *Latowa* (Niemann 1929: 234) an important source of ancient Buginese tradition, Roest (1941: 151) cited a convention under which a royal death necessitated the death of the palace servant. The rationale of adjustment is inapplicable here. It was not avoidance of infection, nor even balance. The text is explicit. The prince having been poisoned, the butler was reckoned as an accessory "inasmuch as he had been negligent". There is, of course, hiatus between the ideas of culpable neglect and of full complicity. Nevertheless, the important point to register is that the justification for the butler's execution was given in terms related to the concepts of will and responsibility.

In another case (Commissie voor het Adatrecht 1933: 355), the adjustment for incest was applied, but with a difference. The father

126 Roest (*id.*: 156) argues that, in Bengkulu, the death penalty required positive proof of intention to kill: lacking that, the decision was adjustment through payment of the *bangun* (100 real). Cf. the decision in Riau (*id.*: 169).

had violated a child. The guilty party was taken out in a boat and, with stones bound to his feet, was flung into the sea. 'The guilty party' ... that must have been the father. One may speculate that the innocent, but sullied, daughter(?) was purified in an adat ceremony of adjustment. But whatever the fate of the child, the report is clear that guilt was, for the father, the fatal distinguishing consideration.

Some European legal theorists - notably among them, Barbara Wootton - have proposed analyses of penalty which would function in much the same sort of utilitarian way as adjustment was held to function. Her rhetorical question: Is the magistrate trying to punish the wicked, or to prevent the occurrence of wicked acts? (Wootton 1963: 45) indicated that her view was more forward-looking than retrospective. Sentences, she held, should be focussed more on the reformation of the culprit than on any other consideration. Such a system of sentencing could be made to work for the benefit of all parties. It would be therapeutic, and, incidentally, restorative and ameliorative. The only contrast with adat 'penal' law is that the latter is immediately concerned with the injured society, or party, rather than with the culprit as an object worthy of attention or treatment in her- or himself.

It is appropriate here to cite the view of a contemporary Indonesian scholar concerning the Leiden theory and its effect on legal development. Bushar Muhammad argued that academic interest in the idea of pristine adat had slowed down both the rationalization of law and the growth of nationalism. The Leiden legal scholars:

> felt concern based on 'love' for the native peoples whose society they wished to 'protect' from the disintegration which would surely follow if adat were to experience a too hasty modernization (forced acculturation). Let adat law be stored, for the time being, in a glass case with a golden lid! Adat law as an object of scientific interest and devotion must be kept in precisely that condition. For should the original condition cease to exist or be less than perfect, then the representations of adat law obtainable would be obscure, and that would be a matter for regret. In that way, the attitude 'science for the sake of science' becomes ironically, a barrier against the beneficial use of the fruits of scientific research, both for national progress and for the development of adat law itself. The desire to preserve adat law is clearly displayed by, among others, Lesquillier in his dissertation. (Muhammad 1961: 196, 1976: 208)

Bushar Muhammad detected an attitude for which the standard term in English has become *Orientalism*. It is an idea to which I must soon turn in my attempt to 'place' Van Vollenhoven's thought. First, however, I shall complete this second survey of adjustment, by re-examination of the form which links adat penal laws to adat land laws. It will involve consideration of another problem raised by Bushar Muhammad, the concept of the 'genuine' adat.

7.4.3 Collective responsibility

I wish to scrutinize the adat law phenomena of group responsibiity, particularly that manifestation (territorial accountability) which Van Vollenhoven identified as a characteristic expression of the right of allocation. The scrutiny will not take long. It will be sufficient, though, to cast doubt on these three main propositions:

- that, in contrast to a European concern with individual culpability and accountability, Indonesian adat law was focussed on the collective;
- that collective liability was a marked feature of adat law;
- that the principle of territorial responsibility is genuine adat.

In her analysis of collective responsibility among African peoples, Moore (1978: 122ff.) distinguished two aspects of group responsibility. In the first - that is, the outward - aspect the group is united. The members maintain solidarity in the face of external hostility incurred by behaviour of an individual belonging to the group. The second aspect concerns the group in its internal relationships and focusses on the individual whose initiative has resulted in the debt which the collective has to pay. Internally, that individual is liable to be sanctioned. The ultimate penalty is, of course, expulsion from the group. I have discovered very little in the pre-war Leiden adat law research writings which touched on the topics of guilt, intention and accountability *within* the autonomous adat law community.[127] The adat law researchers did not discover these phenomena inside the

127 Cf. Van Royen (1927: 158):

> Where the boundaries of the *dusun* were known, the *dusun* paid half the *bangun* for murders committed on its territory: the rest of the *marga* paid the other half.

In the light of Moore's analysis, this internal discrimination of liabilities falls into place.

group, for the simple reason, I suggest, that they did not look for them.

The doubt expressed in that last comment is justified by the thin coverage which collective responsibility received even in Van Vollenhoven's major work. In Volume I of *The Adat Law of Indonesia* (Van Vollenhoven 1918a), he reported for:

- Aceh — no mention of collective responsibility (*id.*: 217);
- the Bataks — collective responsibility of the villages or village alliances (*id.*: 243);
- Minangkabau — collective responsibility only at the level of the allocation area (the only other form is that of individual responsibility) (*id.*: 269);
- South Sumatra — collective responsibility (*id.*: 286);
- the Malays — no explicit reference, "so its existence is uncertain" (*id.*: 307);
- Bangka and Billiton — no mention (*id.*: 309f.);
- Borneo — no more than collective responsibility for the safety of travellers in the district: they are handed over from the care of one tribe to another at the territorial boundaries (*id.*: 324);
- Minahasa — no mention (*id.*: 350);
- Gorontalo — no mention (*id.*: 353);
- the Toraja — collective responsibility limited to debts and fines incurred by fellow villagers (*id.*: 369);
- South Celebes — no data (*id.*: 382);
- Ternate — uncertain data (*id.*: 392);
- Ambon — members of one village accepted responsibility for fines incurred by their fellows in another village (but there was no indication of any accountability of the community which held allocation rights for unresolved crimes committed within the area) (*id.*: 421);
- New Guinea — no data (*id.*: 429);
- Timor — no mention of accountability for unresolved crimes within the allocation area: in Central Timor, there were other forms of collective responsibility for homicide or theft (*id.*: 453);
- Bali & Lombok — collective reponsibility, but not in the paddy fields and only for strangers (*id.*: 502);
- Java & Madura — collective responsibility: the evidence of responsibility for crimes committed by unknown persons could be deduced from border disputes and,

more importantly, from occasional concessions of parcels of land on the discovery of a corpse in, say, the village forest (*id.*: 651);

- Sunda — no mention after an apparently isolated case at Cirebon in 1868 (*id.*: 753).

This is at best patchy support for a phenomenon which Van Vollenhoven had presented as one of six characteristics of a putatively pan-Indonesian right of allocation. It is not good enough.

The Leiden theory becomes even less secure upon close examination of the history of one of the regions where the data was supposed positively to support it. The evidence presented above (para. 6.10.1) shows that the principle of territorial responsibility was fully operative in South Sumatra. However, the close examination and analysis of adat land law in Palembang conducted by Van Royen provided good evidence for the argument that territorial responsibility was not a principle of indigenous adat (Van Royen 1927: 159). Van Royen took the separate ethnic groups in the Palembang sub-region[128] and examined them, one by one, for traces in their history and their practices of a territorial concept of group responsibility. Of the Kubu, he reported that these nomadic people claimed a certain territory but acepted no responsibility for what happened therein. The Pasemah people knew no fixed boundaries and the Ranau settlements (*dusun*) were engaged in civil conflict when the first Dutch observers came to their district. Mutual responsibility did exist, among communities of the other groups. The basis thereof was genealogical, however. Earlier reports had indeed spoken of collective responsibility among members of the *dusun*. This word is conventionally translated as 'village' but, Van Royen pointed out, the *dusun* consisted of a single lineage and the responsibility towards outsiders, such as it was, was limited to happenings within the pallisaded settlement (*id.*: 149, 150).

By comparison of the various editions of *Undang-undang* - the Van Bossche compilation of 1854 (edited and translated by Van den Berg (1894: 11-117)[129]), Gersen (1873) and Anonymous (1876) - he showed that various *aturan* (regulations) had, at various stages, been inserted among these putatively authentic collections of indigenous laws. Article 47 of Chapter 5 in the Van Bossche collection (Van den Berg,

128 There were five: the Kubu, the Anak Laitan, the Rejangers, the people of the Pasemah plateau and the Ranau.
129 See Perelaer 1914: 455.

1894: 110) referred to murder or robbery "on the public roads". This is anomalous, wrote Van Royen: there were no public roads in the Palembang hinterland in the eighteen-fifties. Article 23 of the 1873 collection (Gersen 1873: 124) was another anomaly. In the clauses prior to that one, the *dusun* was specified first as the responsible collective. Only when it failed to meet a claim could the creditor approach the *marga*. In Article 23, however, only the *marga* is mentioned. Up to that time, an oath of self-exculpation was sought only from those members of the *dusun* community who were under strong suspicion of involvement in an unsolved crime. Suddenly, in this edition, the oath is mechanically applied to all members of a *marga* in whose forests a murder has been discovered. Van Royen (1927: 154f.) thought that these stipulations were not genuine adat. They were, rather, administrative expedients designed to secure order in localities beyond the policing capacity of the central legal authorities. He traced the changes in local regulations, showing how they could be viewed as a series of government responses as the introduction of new transport technology altered horizons for the Palembanger communities (*id.*: 155-158). He concluded (*id.*: 159) that:

> there can be no talk of a connection between the *right of allocation* and responsibility for the territory. As it manifests itself in Palembang, the *right of allocation* does not derive from a single archetypal law; it is more a complex of discretely developed or imported laws.

Van Royen's interpretation raises the problem of the quest for the 'aboriginal' adat. With it arises another, related question: What is the significance or, perhaps more accurately, the lack of significance of central royal authority as a source of law in Indonesia?

7.4.4 Genuine adat

If what Van Royen wrote was true: that the right of allocation is not autochthonous but a stitched together bundle of expedients and imports, that may suggest that the investigator has to probe even deeper, or to search elsewhere, for 'genuine' adat. If he should think that he has found it, how can he be sure? What guarantee can there be that whatever he comes up with will prove immune to the kind of analysis deployed by Van Royen. This is, I suggest, a spurious problem, generated by loose terminology and illegitimate reification. Consider the first fault: variety in the use of the term, 'adat'. Imagine that, after several decades in South Sumatra, the displaced Malays have become accustomed to the practice of *jaluran* (dibbling)

along the margins of the tobacco plantations. Imagine that they have surrounded this new practice with a number of conventions and that most members of the community conform to these. Do these conventions comprise a part of genuine adat law? The answer depends on the way the term is understood. In the middle of the nineteenth century and earlier it was misunderstood as those "legal rules which form part of a complex with [popular] religions and customs" (Muhammad 1961: 12). For some, adat law meant any Indonesian law not derived from Dutch or Islamic sources. Others would have disqualified Hindu sources, too. For some,[130] it meant the unwritten law of Indonesia. For others, adat law signified folk law, as opposed to the laws of sultans and *sunans*.[131] For Snouck Hurgronje, who is credited with the first use of the expression, *'adatrecht'*, it was that part of adat which has legal consequences. Van Vollenhoven eventually came to discard Snouck's distinction (De Josselin de Jong 1948: 5): he regarded every aspect of adat as having indigenous legal significance. Adat was for him, a peculiar and pan-Indonesian cultural value system.[132] I shall suggest, below, that this idea came from Van Vollenhoven's own world view and that he projected it onto the subjects in his field of study. I do not contend that he was wrong. Such a contention would require an alternative hypothesis which evidence might confound. The difficulty I have with the myth of an inchoate *volksgeist* or national ethos is that once it is offered as an explanatory device, it is not susceptible to empirical correction. It may be satisfying for a time. It may later come to seem implausible and be abandoned. But no demonstration of its falsity is possible. I find the approach adopted by Roest and van Royen more profitable in the long run.

The fault, if fault it were, was widespread: Van Vollenhoven was not alone. The people of Minangkabau, for instance, aware of social change, of the challenge it posed to established procedures and of

130 Supomo, for instance, held that adat was unwritten, non-statutory law (Muhammad 1961: 21).
131 This seems to have been Van Vollenhoven's position as it emerges from his criticism of Raffles (Van Vollenhoven 1928: 28).
132 See para. 3.1 and 3.2.1 above for examples of his conceptualiztion.

the ease with which innovation becomes accepted practice, distinguished four grades of adat, namely:

- *adaik nan sabana adaik*: aboriginal custom;
- *adaik nan taadaik*: that which in the course of time has become custom;
- *adaik istiadaik*: ceremonial custom;[133]
- *adaik nan diadaikkan*: that which has, by conscious and deliberate will, been made into custom (Abdullah 1966: 10; cf. Von Benda-Beckmann 1979: 115f.).

Yet, despite clear conceptualization of 'genuine' Minangkabau adat (*adaik nan sabana adaik*), there is no evidence that this was ever observed in practice as the set of social relationships functioning among the Minangkabau peoples. Every report that I have read concerning the (then) current adat presented it either as breaking down or undergoing transition. One can legitimately wonder whether this supposedly pristine adat ever existed outside the minds of informants and/or the reports of observers. This need not denigrate the concept: it would function as a critical constant, a gauge against which inconsistent or incongruous behaviour might be measured. A myth may be useful even if it is not really descriptive of social life (Koentjaraningrat 1975: 174ff.).

7.5.2 The gap at the centre: the sovereign is vague

By the time Dutch administrators and scholars were involved in the substance of indigenous legal norms and practices in the N.E.I., many of the traditional centres of power - the courts of kings and sultans, the palaces of port-city princes - had ceased to function as seats of government and rule-enforcement. This power vacuum in the autochthonous social structure, in large measure a result of European penetration and occupation of the Archipelago, let the rights and obligations mutually recognized among the rural peasantry and the jungle tribes assume an importance much greater than they might have enjoyed had Indonesia never been subjected to colonial domination. Had the nominal authorities of native society exercised actual sovereign power, there might have been no argument about popular rights on land. The N.E.I. was, however, a colony, and the

133 Von Benda-Beckmann (1979: 116, 405, n.5) indicates that this category comprises the set of rules that conflict with Islam.

customs analysed by Wilken and by Van Vollenhoven and his followers were, unavoidably, a reflection of that specific political situation.[134]

This framework makes sense of Van Royen's analysis. He held that the various phenomena associated with the right of allocation could well be understood as a manifestation of a particular developmental stage in the economic history of an indigenous community. At that stage its outlook on its own growth, its dependence on the resources of its natural environment and the needs and interests of alien human beings would find expression in a set of laws roughly conforming to Van Vollenhoven's principles. At earlier or later stages, however, neither the community nor its members would require that particular form of legal-economic protection. They would express their needs and interests in other terms.

7.5 The great gaps in the theory

There was yet another weakness in Van Vollenhoven's all-encompassing construction, the archipelago-wide right of allocation. Ter Haar was apparently unaware of the difficulties created by anomalies in such a general theory. In his major review of adat law (Ter Haar 1948: 82), he wrote, concerning the right of allocation:

> in Minahasa, the title to a piece of land cleared by individual effort exists in principle in perpetuity. As a result, there is no power of recapture in the community's right of allocation.

Yet, just above that in the same text, he had presented the interplay of individual and community rights as the "first feature" in the basic formulation of fundamental Indonesian communal rights of allocation. Surely, if an area such as Minahasa were to be excepted or could be included only by the fiction that the time limit has been extended to infinity[135] then, as a general principle proposed for the whole N.E.I.,

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134 I am indebted to B. O'G. Anderson for this observation. It implies the speculative hypothesis that customary law in Japan must never have had the importance it assumed in colonial Indonesia. Japan, even in the period of the post-Kamakura civil wars, never suffered such absence of power at the centre as the various societies of the Indies experienced in the years of European imperialism.

135 Ter Haar (1948: 82) wrote that "[t]he community right of [allocation] is never static. It grows and shrinks...." In Minahasa, though, the observer would have to wait till doomsday to witness this

the right of allocation was highly questionable. Ter Haar did not let the anomalous practice of the Minahasans count as evidence against the general rule, the right of allocation applicable to all the territories and communities in all the law regions of the Archipelago.

There were other counter-indications available to Ter Haar: Van Vollenhoven (1918) had provided indifferent evidence for the fifth principle (territorial responsibility); Van Royen had indicated a major weakness in one of the supposedly strong regions; the Banggai Islanders and the Ngada of Flores were excepted (Ter Haar 1948: 82). What was left of Van Vollenhoven's grand principle? The right of allocation had been elevated, among the Leiden scholars, from the level of empirical observation to the status of axiom or, as I have chosen to call it in this essay, myth. It had been placed beyond all possibility of falsification.

7.6 Science?

That criticism leads naturally to the consideration of the method which Van Vollenhoven adopted for his chosen study. The title of his inaugural lecture (Van Vollenhoven 1934a: 3-21), ***Exacte rechtswetenschap***, can be rendered in translation as 'Exact Legal Science'. And indeed, Van Vollenhoven did mean 'science' (*id.*: 3, 15). It is clear that his initial commitment was to a rigorous discipline.

If the reader will recall the essay, "Language families and law families" (*id.*: 52-56/57-62) (see para. 3.1), Van Vollenhoven's conception of science becomes clearer. That lecture made explicit the theoretical framework within which he conceived and carried out his research. The method he used was based on the highest common factor of some spectacular intellectual achievements in modern European learning. He clearly admired the achievements of the comparative philologists. He spoke of Linnaeus. He saw himself and his students as working on a similar endeavour. These men may strike one as being first and foremost collectors and collaters. Each was concerned with the universe of his chosen field-of-discourse. The common working method was broad survey followed by classification and sub-clasification based on the nicest discrimination of details, the search for sub-surface relationships and, finally, the formulation of plausible explanations for hitherto mystifying variation in phenomena or behaviour. The theories of a Darwin could be built on the data

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process.

organized by Linnaeus and Mendel. Van Vollenhoven saw a similar evolutionary understanding as an outcome of Comparative Law studies (*id.*: 13). He spoke, with caution, of the converging lines of different legal systems and of the ideal of a universal law.

In practice, it seems, he worked like this: He first read and digested the reports, all the material he could acquire. From these he distilled and hypostatized an ideal archetypal pan-Indonesian law. This archetype then became the standard from which the multiform irregular reality of the various adat law regions were regarded as having deviated or declined. Van Vollenhoven delighted in the detail and the contradictions of the deviant forms in much the same way as a philologist, a lover of Classical Latin, might contemplate its 'fascinating corruption' in Spanish, French, Portugese, Italian and Rumanian. Anomalies and seeming contradictions were explained away as having arisen either from misapprehension[136] or from alien acculturation.[137] Often, it seems, the theory shaped the 'data'; to the extent that that did happen, such 'data' offered no sound support for the theory.

8 THE DEEP STRUCTURE OF THE LEIDEN IDEOLOGY

In this section I propose an intellectual framework for understanding the thought of Van Vollenhoven and his followers, both the creative achievement and the limitations mentioned above. The framework consists, for a large part, of conjecture. So, it is vulnerable to the refutations which may at any time emerge from further studies.[138] The framework consists of two parts: the common silent assumptions underlying most (if not all) Euro-American interpretations of the East, and the hidden agenda of colonial administration in the N.E.I. The latter is a particular manifestation of the former.

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136 Hence, the editorial interpretations appended as footnotes (in the work of his followers) in Volume I of the *Pandecten* (on the right of allocation) (Koninklijk Koloniaal Instituut 1914: passim).

137 Hence the interpretation of 'true' punishment in Aceh as due to Islamic influence (the prerogative of the Sultan). See Roest 1941: 230, 232; Koninklijk Koloniaal Instituut 1936: 767.

138 Someone may expose the sub-surface motivations of my criticism, too.

8.1 *ORIENTALISM*

The publication of the work which bears this title (Said 1978) gave the term, *Orientalism*, a meaning at once new, technical and pejorative. Said, as a Lebanese personally concerned with 'Western'[139] perceptions of Islam and the Arabs, launched an attack on traditional misapprehensions among scholars concerned with Asia.

The point which should at once be noted in this regard is that generation after generation of writers and scholars in the academies of Euro-America have dedicated themselves to the task of pointing out, to generation after generation of readers and students, the common misconceptions about 'the Orient'. They have insisted that Europeans or Americans who approach Asia for the first time must, for the sake of understanding, disabuse themselves of all the cultural prejudice they would naturally bring to the target civilization. Only when the novice has abandoned old axioms can he gain access to the mysteries of that Other World, the antithesis of Euro-America, the inscrutable East. Only then will the convert get the key.

If this has been the standard practice for decades - for centuries, some might claim (Said 1978: 49ff.) - what then, the reader may ask, was the target of Said's atack? The answer is paradoxically simple: to the extent that Said's wrath is coherent, it falls precisely on that practice. For what those devoted and superficially well-meaning *orientalists* have made of Asia is far worse, wrote Said, than say[140] the naive reports of Australian surfers newly returned from Bali Beach. The scholars have reïfied *the Orient*: they have turned Asia into an idol and worshipped it. The Orient is conceived and presented as mysterious - the Other (*id.*: 1) - as the eternally unchanged. Hence, it is sterile (*id.*: 208). Yet it is also seen as sensuous, the realm of forbidden fantasies (*id.*: 162, 180, 188-190). It is perceived, on the one hand, as an object fit for pity. Yet, despite the contradiction,[141] the Orient remains an object of enduring fascination for Western observers. Conforming to the behaviour of converts, the scholars have gone out into the highways and byways, enthusiastically seeking to spread the faith.

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139 Since Said suffers from a vice which, following his own suggestion (*id.*: 50), I christen *Occidentalism*, the quotation-marks around 'Western' seem appropriate.

140 My comparison.

141 Said's text is rich in unresolved contradictions. In most places, though, it is possible to establish the general thrust of his arguments.

In reaction to all this Said argued that Asia is neither one nor immutable. There is, I think he would say,[142] no such thing as Asia.[143] There are only people who differ in personal practices: these differences may arise, for each person, from faith, or culture, or language, or the means of production. The besetting sin of the *orientalist* is the tendency to patronize such people and, for the sake of plausible generalization, to divest them of their personalities. The *orientalist* treats Asians as study objects. The mute motive in Asian Studies, however, is control: control of communities, commodities and commerce.

Many of the claims in *Orientalism* are intrinsically invulnerable to disproof; many of the interpretations are far-fetched; many of the charges, childish (e.g. *id.*: 313-315). Yet, if the flamboyant embellishments are stripped away, the residue of Said's *Orientalism* provides a template against which the Leiden approach to adat and law might be tested for its fit. Consider once again, if you will, the elements of the myth: adat is held to be one, distinctively Eastern, mysterious to unsophisticated Westerners, ultimately accessible only to those equipped with the key of understanding. The suggestion that the myth of adat is a species of *orientalism* is plausible, perhaps: the reader must judge. This is not a question for which compelling argument can be mustered. Let me add more in a similar vein, a detail from the Van Vollenhoven's life.

The biography (De Beaufort 1954: 15-18) reports a great intellectual influence during Van Vollenhoven's formative years. This was the thought of the French writer, Ernest Renan. From him, the Dutch professor might have acquired the concept of philology as a study of essential national, or - even - racial, characteristics. From him, Van Vollenhoven might have learned to think of an essentialist contrast of The East with The West and of this contrast as an object proper for scientific study. Through him, the older influence of Hegel's philosophy, the concept of self-expressing national spirit, could have been transmitted to Van Vollenhoven. Consider the following passage (*id.*: 16f.):

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142 On this point, Said is inconsistent. This is his clearest statement: "It is not [the] thesis to suggest that there is such a thing as a real or true Orient...." (*id.*: 322).

143 A former colleague, an Indonesian, once remarked that the idea of Indo-centric history (as opposed to Euro-centric methodology) was purely and simply a European notion (Abé Kelabora, private communication).

> He trusted Renan, because the writer showed that he possessed scientific precision and that he strove to be brutally honest.... If he s[aw] folk constituting themselves as a group and accepting responsibility in the context of the group, he [would] ask, time and again, what constitutes a nation? Common descent? No. Common language? Not even that. Racial unity? Far off. National identity must rather be sought in a common civilization, born out of, and reinforced by, sacrifice and struggle. For then, surely, it is born of the spirit, then it is, in pith and essence, a holy image, a religious idea. The strongest ideas, the most vital, surge up from the depths of a nation. But where, among those religious ideas, is the ultimate to be discovered? And what lies beneath and beyond that very last idea? Here Renan [would] explain no more, for he held that the ultimate and the absolute were unknowable and inexpressible in words. And so, for Renan, the word, 'secret', ha[d] a wide-ranging significance.

This is the stuff of myth.[144] For Edward Said (1978: passim),[145] Renan epitomized the vices of the *orientalist*.

My suggestion is that the ideas of European essentialists and romantic nationalist writers, mediated through the teachings of the Leiden school, have influenced the conception of adat and Indonesian

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144 The supposition of influence, however, finds no explicit support in Van Vollenhoven's writings. Renan apparently left little impression on Van Vollenhoven's conscious mind: his name does not appear in either the index of *The Adat Law of Netherlands India* (1933) nor in that of the *Verspreide Geschriften* (1935). And even if influenced by Renan, the young Dutch scholar was also quite definitely the beneficiary of an older and more generous tradition which ran back from the time of Thorbecke, through Hugo de Groot (Grotius) to Erasmus. De Groot, for instance, remained an ideal for Van Vollenhoven throughout his life (De Beaufort 1954: 37, 38, 60, 93-95, 168, 178 194-203, 210). The idealism of Grotius may well have contributed to the liberal values, the commitment to rational, dispassionate discourse, the concern for international law and the (supra-national) respect for rights which were characteristic of the Leiden professor.

145 Said's index (*id.*: 365) shows that Renan was mentioned in passing on thirty-seven occasions and that twenty pages of sustained analysis were devoted to his thought. Said regarded Renan as racist, male chauvinist, essentialist and, as a philologist, incoherent.

nationhood. I found another spoor on the trail in Bushar Muhammad's exposition of adat (Muhammad 1961: 39-41). In support of his contention, that "Indonesia's national personality differs from that of other societies, [that] it has its own way of thought, its own design and character", Bushar cited the teachings of the German *Historische Rechtsschule* and the concept of *Volksgeist* (national *élan*) which it had elaborated (*id.*: 41):

> It is not open for us to take a view of Indonesian adat law divorced from what Von Savigny called *Volksgeist*, the 'spiritual structure', the 'underpinning' of Indonesian society.

The references to Von Savigny in Van Vollenhoven (1933, 1935) are few and cursory. There is evidence, however, of the mediating role of Dutch legal teachers in the references cited by Bushar (1961: 39-41).[146]

8.2 Embryonic sovereignty in Indonesian communities

Van Vollenhoven's two doctrines - the right of allocation and adjustment - represented phenomena not specific to Indonesia (compare Cassutto 1935: 21). Both, however, carried implications which would have proved, if fully analysed, to be incompatible with the position of the colonial state.

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146 Another formative influence on Van Vollenhoven was Wilken (Van Vollenhoven 1928: 99-104). At the conclusion of his essay on "Eastern and Western legal concepts," Wilken wrote (1912b: 131) that he "had shown with an example that a remarkable agreement exists between them." The essay showed no sign of *orientalist* opposition. Though Wilken's enthusiasm for adat was well-known, he emphasized the administrators' task of bringing Indies natives to an appreciation of, and to reconciliation with, the legal values and institutions of the (colonial) Europeans. Knowledge of adat he saw as a necessary prerequisite to effective performance of this task (Wilken 1885, cited by Nolst Trenité 1939: 365). In short, Wilken was unlike Van Vollenhoven. He was no subtle *orientalist*. He was a straightforward believer in the civilizing mission of the colonial administration. His conception of the land rights of the autonomous adat communities (1893: 433ff.) was far more limited than Van Vollenhoven's theory of the right of allocation.

8.2.1 The autonomous community and its land

The first doctrine involved an inchoate claim to govern. It was an embryonic principle of territorial sovereignty. In the absence of effective monarchical authority and the institutional apparatus of the modern state, the autonomous adat communities were conceived as acting, within their limitations, as proto-nations. If their pretensions were to be allowed to develop without check, they would eventually find expression in a proclamation of territorial independence. That was what was entailed in according legal status to the rights which Indonesians claimed to their land. Few Dutchmen of that time, though, could envisage that that was the inevitable end of the process. Even fewer would dare to put the vision into words.

Van Vollenhoven (1919: 96f.) wrestled with the conceptual problem: the lands over which the community exercised the right of allocation (conceived as a private right) turned out, in most cases, to be identical with the territory which they were expected to supervise that is, the territory over which they had derived, either through uncontested custom or by delegation from superior powers, a kind of public law authority. That congruence allowed the colonial bureaucrats the opportunity to argue that the N.E.I., as the successor state in the Indies, had succeeded to the public law right to dispose over land previously held by indigenous rulers. Though such an approach did not leave much scope for protection of Indonesian land rights, it was a perfectly rational and coherent argument. Against this Van Vollenhoven argued that the right of allocation was a private property interest protected by Dutch law and beyond the scope of bureaucratic allocation. "It is not easy to comprehend the concept of land that is almost completely privately owned but which is not available for commercial transactions (*extra commercium*)," wrote the Director of Justice in 1877 (Van Vollenhoven 1925: 96 n.2). Nevertheless, the Leiden scholars had to abide by the private law myth: to have conceded the rationale of the other interpretation would have been to give the game - and the land - away.

I have found but one writer,[147] among the many who supported or

147 Louter (1929: 667f.) had written of "a colonial power ... making itself superfluous ... soon to vanish from the scene, not having fulfilled her mission, but because she had forfeited her right...." Clearly, he understood the implications. Equally clearly, he felt that the alternative policy (recognition of adat rights) did not warrant serious contemplation. The tone of his argument contrasts sharply

attacked the report of the Agrarian Commission, who could comprehend and analyse the full significance of recognizing a paramount native right over land in the N.E.I. This was A.C. Deelman, an officer of the colonial administration who tended to side with the Utrecht side in the controversy. He was clear-sighted and had the intellectual courage to make explicit the alternatives available in the N.E.I.[148] He offered his own judgement, that adat was being given an importance greater than it deserved. But, he conceded, there was no way to demonstrate this:

> It ... is a question of sensitivity ... essentially a political question most closely bound up with the view ... concerning the justice of our being and remaining in the Indies (Deelman 1930: 65).

The question was, he suggested: Had the Dutch served out their time and usefulness in Indonesia? This was an awkward topic in 1930.[149] Van Vollenhoven's reply (1933: 809-811) showed no awareness of the pertinance of Deelman's questions.[150]

I suggest that the land rights question was embarrassing for both sides, Leiden and Utrecht.[151] If the Deelman analysis were pressed to

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with Deelman's analysis.

148 A note at the end of his article indicates that Deelman had written it in 1929, in anticipation of the publication of the Report.

149 The Government had crushed a Communist rebellion three years earlier. Now it was busy watching the activities of the leaders (Sukarno among others) of the newly formed nationalist movement.

150 Deelman had boasted of the competence in adat affairs among his, the older generation of officers. From his own detailed knowledge concerning the history of administrative training, Van Vollenhoven was able thoroughly to destroy Deelman's claims. Deelman had also challenged Van Vollenhoven's criticism of the bureaucratic department heads. They were civil servants, he argued: they did what they were told. It was improper to blame them. In terms of the theory of ministerial responsibility, he was correct. But Van Vollenhoven's representation must have been a better approximation to the facts. (Cf. Benda 1966: 589-605.)

151 Despite the rancour and malice of the adat land rights controversy, both parties seemed reluctant to put on paper the worst of the motives which they no doubt ascribed to one another in private. A certain reticence, a certain dignity, lay over much of the formal dispute. It was only in 1930, with the publication of *The Report of*

its conclusion, the Leiden idealists might have found themselves confronted with the awkward question: By what right did they administer anything at all in Indonesia? And, if the Utrecht policy were carried out completely, foreign concession interests would ride roughshod over the right of allocation: the pretence of justice would have been abandoned. The Leiden-Utrecht controversy threatened continually to expose the contradictions at the heart of colonialism. In the light of that analysis, I am not surprised that the right of allocation remained an insoluble but inescapable problem in the theory of Dutch imperial government.

8.2.2 Who has the authority to punish?

The concept of adjustment posed a parallel, if less urgent,[152] problem of principle. The features of adjustment were in many ways similar to customs recorded in, or reported of, other non-Indonesian societies. Some of these concerned ancient European peoples. So there is nothing exclusively oriental about these practices. One salient common feature of these societies was the lack of an efficient, regulated system of detention. Michel Foucault (1977) argued that the institution of imprisonment, with accessible jails and warders to watch convicts, marked a change in the history of punishment. He argued further that this reflected a marked change in the power relationships within society. He contrasted the new monotonous deprivation of liberty with previous practice, the spectacular imposition of pain (cf. Mabbott 1969: 117). The new is susceptible to

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the Agrarian Commission that adat law supporters provided a simple answer to a simple question. Money. "All said and done, the domain declaration has been used as a sufficient reason for brushing aside all claims for compensation" (Anonymous 1930: 83). Even that is not absolutely brutal. By comparison with much of what was written, Deelman showed refreshing candour.

152 In 1918, all Indonesians ('natives') came under the criminal code which operated for Europeans and Alien Asiatics. Only summary offences such as form the substance of the analysis in Lublink-Weddik (1939) came under the jurisdiction of the adat courts. On the other hand, Van Vollenhoven had won a victory in principle when the repugnancy clause (Article 75 of the 1854 Constitution) was omitted from the revised version, the *Staatsinrichting* of 1925. This then opened the possibility for the application of adat law even when it was "in conflict with generally recognized principles of equity and justice". This would only apply in civil cases. See Hooker 1975: 189f.

measurement (in lengths of time); the old was governed by the ruler's caprice. The innovation mirrored changes in the mode of production (the emergence of a new industrial system) and in the value system of society (the dominance of bourgeois interests).[153]

A similar analysis might see the phenomenon of adjustment - the emphasis on the collective interest, on amelioration rather than vindication, on reciprocal balance and compensation - as the legal correlate of non-acquisitive rural economies in which the major function of social life is the preservation of the group. If this sort of analysis is applicable to many societies, in various continents, at various times, why did the Leiden School expound the doctrine of adjustment as a peculiar feature of indigenous Indonesian penal law?

To the extent that any such society might formulate a concept of its autonomy, that formulation would include an account of its competence to react, as appropriate, to perceived threats to its survival. And, to the extent that the reaction might be invested with formality, the idea of state authority - the apparatus of impersonal administration, of impartial magistracy - would lie latent in the formula. Far better, for colonial theory, far more reassuring, that the pretensions of the autonomous adat communities, their initiatives in imposing sanctions, should be rationalized in terms of a pan-Indonesian mystical view of the universe.[154]

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153 B.O'G. Anderson drew my attention to the relevance of Foucault's writings.

154 Nolst Trenité sensed that there was some implicit challenge to Dutch authority in the idea of according legitimacy to the indigenous process of adjustment. In an article on adat penal law (Nolst Trenité 1939: 360-366), long after Van Vollenhoven was dead, he maintained his standard criticisms. He appealed to his readers without apology (*id.*: 362): surely a legal system which took no cognizance of persons was intrinsically superior to one which measured penalty in accordance with rank or social status? Surely the specification of evil intention as an indispensible pre-requisite for punishment was preferable to the Indonesian act-focussed indifference to personal culpability. The alternatives he posed were simplistic. He was reacting, however instinctively, to the challenge implicit in the recognition of adjustment.

9 INVOLUTION

I have suggested (in section 7.3) that adat law scholarship had reached a kind of impasse in the nineteen-thirties. In this section I shall explore that idea further to indicate both the factors which were binding its development into a proliferation of ever more detailed observation of behaviour and the one proposal for practical innovation which might have broken the vicious circle.

Geertz (1963) uses the term, *involution*, to refer to an arrested development. This does not mean an arrested *state*. It refers to a condition under which the previous pattern of development continues. The chrysalis spins ever more intricate cocoons, but never emerges as a butterfly. I suggest that, by about the mid-thirties at least, the Leiden adat law enterprise was locked into a similar circle of ultimately sterile self-replication. The diligence and the passion of a hundred Dutch scholars is useful for those with a taste for ancient anthropology: as law, it counts nowadays for next to nothing.

More relevant than my retrospective judgement is an on-the-spot commentary from an opponent at Utrecht. How did Nolst Trenité assess the new orthodoxy? He maintained that, though to all appearances indigenous legal values and expectations had received recognition in official documents, these were so hedged with provisoes and restrictions that they functioned effectively as instruments imposing European-type law (Nolst Trenité 1939: 364). Very little scope for the free play of adat principles was left. He cited the Report of the Agrarian Commission as one notable instance in which the appearance of respect for adat was thoroughly confused with the implementation of provisions which were basically European in character. He especially had in mind the concept of *duldplicht*.

It had been a continuing theme of the Leiden lobby in both legislative arenas - the Peoples' Council and the Dutch Parliament - that adat should be allowed to develop autonomously. But what did the Leiden scholars mean by autonomous development? The suggestion that the Leiden approach led to the involution, rather than the development, of adat implies that there was a central fault with the Leiden scholars' assumptions about normal legal development. Could adat cope, as law, with transactions in the field of international trade? That was the sort of question the theorists from Utrecht

might pose. In response, a defender of the Leiden orthodoxy could say, quite truly, that Van Vollenhoven's teaching left room for economic development and it looked for the eventual transition of adat laws into forms far more suitable for multinational transactions in an industrialized world-order. Foreign capital was of course interested in gaining access to the raw commodities of the N.E.I. and Van Vollenhoven and the other Leiden scholars had allowed for such contacts and contracts. Yet, it could be properly urged against them by the adherents of Utrecht that the presentation of adat as derived from an aboriginal pan-Indonesian archetype had fixed it in practice as a static absolute. Almost every proposal for its adaptation to the dominant laws of the N.E.I. was rejected by the Leiden purists as unacceptable, as European violation of the autonomous legal culture of the natives.[155]

9.1 Custom distinguished from law

One of the key methodological questions for the right of allocation disputes ran rather like this: How can one establish that garnering is a right rather than a custom? Or, divorced from the particular practice: is habit self-justifying? Very simply, the Utrecht theorists would have been inclined to say: No, not without validating legislation.

Against this, the Leiden theorists would have tended to say that valid law lies in the consciousness of the community. They would have tended to say that the legislature had a duty to confirm the jural expectations of the people. For them custom had legal status. The most explicit exposition of this doctrine that I have discovered is the inaugural address of a practising lawyer (André de la Porte 1918) who, retiring to the Netherlands from the N.E.I., unexpectedly found himself appointed to the University. For André de la Porte there was no doubt: law was a reflection of the popular values; the proper task of the law-maker was to match the just demands of the people with the maximum of accuracy and the minimum of delay; and the judges should be free to take up any slack in the meantime. Judges should regard legal codes as no more than guidelines: the exact letter of the statutes ought not command the obedience of the judiciary (*id.*: 25). Cassutto (1935: 18) drew attention to other writers who found that this an extraordinary proposal: it allowed more licence than was

155 Such, for example, was the reception of the proposals made by Nederburgh (1933), a serious adat study from the Utrecht side.

proper for any elite. Cassutto also characterized Van Vollenhoven's standard reaction to any draft enactment of law for the Indonesian community in these terms: 'Whether it be intended or not, codification drifts in the direction of unified law.' Against this, wrote Cassutto, "The only way to maximize the retention of adat law is to have it confirmed by statute." Years later, the anthropologist, J.P.B. de Josselin de Jong (1948), referred to customary law as "a confusing fiction". Custom is not law, he said. There is even confirmation for this analysis in the early writing of Van Vollenhoven himself (1934a: 5): "Where there is no authority ready and able to enforce obedience to the rules, there is no law." In later years, however, he and his companions were committed to resisting every step that would allow adat to undergo the painful transmutation into formal law. Hence, the involution.

The following, a simple characterization of the basic opposition, will help clarify the discussion of the penultimate section of this essay. Imagine, if you will, a community which formally separates the office of judge from that of law-maker and, again, both of these from the offices of administrator and law-enforcer. Imagine that this community makes explicit matters of procedure and substance in court sittings; imagine that it minimizes differences between persons and that it works continually towards predictability in the decisions of its magistrates. Contrast that community with another, which lacks courts, codes, precedents, procedures, police sanctions and any detectable sovereign. The proposition I would put is that the phenomenon of law is much more clearly manifest in the first community than the second. This is not necessarily to say anything about the desirability of the one community or the other: nor whether justice is necessarily present to a greater degree in either. It is simply a clear case of Diamond's distinction (Diamond 1971: 47), between the "order of custom" and the "rule of law". Citizens in the first case may, or may not, be able to give a coherent account of the locus of sovereignty within their community: they may or may not know how to define their state. For an appreciation of the law, that does not matter. As long as they know that each court (should) function independently of personal considerations, with an authority superior within its compass to all parties that may appear before it, to deliver regular decisions, they know clearly where and how the law is to be found.

Late in the life of the colony, an adat law professor (Ter Haar 1937) commended an approach on similar lines in a commemorative address at the Batavia Law School (see also Ter Haar 1948: 228-233). Had it

been adopted it might have served to allow the delivery of adat as law.

9.2 Custom transformed into law: Ter Haar's decision doctrine

Ter Haar thought that adat might gradually acquire the force of law through the reinforcement of successive similar decisions. Under the influence of 'legal realist' arguments he proposed that like cases, within the one jurisdiction, should receive like judgements. The substance of the initial judgements would be a matter of careful observation and enquiry among members of the autonomous indigenous communities - exactly the style of research in which Leiden graduates were skilled. A wise government, colonial or independent,[156] could have built on this basis to establish, through case records, a body of precedent-determined law derived from adat. Subject always to legislative oversight and amendment, it would have made excellent sense in the process of nation-building.

Ter Haar came to this view late seemingly too late in his, and the colony's, life. His address drew a response (Holleman 1938) in defence of the status quo. Holleman, like Ter Haar a former student of Van Vollenhoven, saw the innovation as another instance of that *juristenrecht* (lawyers' law) which the Master had condemned in 1905 (Van Vollenhoven 1933: 22-59). Van Vollenhoven had been concerned, on that occasion, to defeat the planned codification of private law for all Indonesians. It seems doubtful that Ter Haar's proposed innovation fell under the same condemnation: in any case, Ter Haar (1948: 231) thought that it did not. It is a measure of the strength of the myth of adat that the discussion should have been cast in terms of this question: Would the deceased former teacher have approved? Surely the debaters would have done better to ask: Which approach is more likely to realize justice for Indonesians?[157]

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156 Von Benda-Beckmann (1979: 117, 118) reported a vague influence of Ter Haar's decision doctrine in the state courts of Minangkabau.

157 That would have been an appropriate question, then, for men thinking in the framework of the colonial order. Now, of course, many people would find it inappropriate that non-Indonesians might presume to decide such matters. Even to formulate the question in this way might be thought to betray an Orientalist presumption.

Ter Haar's suggestion has not been adopted. The *adatrecht* research of the Leiden School remains today a mass of rapidly dating data. Meanwhile, the rural masses of Indonesia enjoy no greater certainty of either law or rights than did their ancestors in the years when Van Vollenhoven was first moved to defend their interests. Now, as then, a central government is concerned to encourage foreign capital to develop the natural resources of the land, but adat law no longer functions as a weapon which might be employed to resist over-exploitation.

10 CONCLUDING REMARK: PERSONAL EVALUATION

Having brought in a verdict against the teachings of Van Vollenhoven and the Leiden School orthodoxy, I strongly wish to add these remarks in extenuation.

I have not found it easy to resist the charm of both the man and his writing. I have tried, in the course of this essay, to convey something of the latter to the reader. Of his personality something survives which students may still, perhaps, appreciate indirectly. Of the man himself, his admirers spoke in superlatives only. De Beaufort's (1954) biography might be more accurately described as hagiography. Indeed she reports the opinion of a visiting French scholar, a guest for some days in the Leiden professor's home, to the effect that his host was "a sage, and almost a saint". Certainly, Van Vollenhoven had the commitment and the discipline, the sensitivity to human suffering, the concern, the courage and the patience under calumny generally ascribed to saints. Certainly, he inspired enmity in the proportions by means of which, I understand, the Church of Rome generally identifies candidates for retrospective beatification. And, certainly, his followers regarded him as a sage.[158] Such reverence might, as Nolst Trenité quite rightly suggested,[159] have impaired their critical faculties and diminished the objectivity with which they should have heard his arguments. But, as his old opponent conceded in the same text, it was difficult to deny the power of his exposition. It may be easier, perhaps, fifty years after his death, to make an

158 See n. 119.

159 "The *autos epha* of the disciples of Pythagoras - the Master has said so - has become a watchword in Leiden." (Nolst Trenité 1935: 80)

objective assessment of his work. And so I have tried, and have delivered my judgement.

I found him to have been too far under the influence of Romantic and *orientalist* conceptions of the world, and far less scientific than he first aspired to be. Yet, in spite of all that, the overriding, surviving impression he left was of a man who cared deeply for human rights. More important for him than all his learning was the plight of Indonesian peasants, the victims of administrative insensitivity and of exploitation of their environmental wealth under the justifying cloak of 'the common good' or 'the general interest'. And now, half a hundred years after his death, a bureaucratic government, sitting in present-day Buitenzorg and Batavia, solicits foreign interest and investment for the exploitation of the natural resources of the Archipelago. Peasants still lack secure tenure of their acres. Independent Indonesia needs its own Van Vollenhoven to protest against injustice.

REFERENCES AND READINGS

ABDULLAH, Taufik
1966 'Adat and Islam: an examination of conflict in Minangkabau.' *Indonesia* 2: 1-24.

ADAM, L.
1924 *De autonomie van het Indonesisch dorp.* Amersfoort: Melchior.
1932 'Grootlandbezit in de inlandsche maatschappij.' *De stuw* 3: 51-53.

ADRIANI, N.
1909 'De landbouw in het heidendom der Indonesische volken.' *Mededeelingen van het Nederlandsche Zendeling-Genootschap* LIII: 82-92.

ADRIANI, N. and A.C KRUYT
1912 *De Baree-sprekende Toradja's van Midden Celebes* I:182. Cited, p.746 in Koninklijk Koloniaal Instituut 1936.

ALBERTS, A.A.
1973 *De eilanden.* Knipperberg: Utrecht.

ANDRE DE LA PORTE, G.
1918 *Over codificatie van materieel privaatrecht in het bizonder van Ned.-Indisch adatrecht: rede uitgesproken bij de aanvaarding van het hoogleraarsambt aan de Rijks-Universiteit te Leiden, op den 16en October 1918.* Leiden: S.C. van Doesburgh.

ANONYMOUS,
1874 *Woeste gronden. Sumatra. Regeling der wijze van uitgifte van onbebouwde gronden in de gouvernementslanden van Sumatra.* Staatsblad van Nederlandsch-Indie No. 94f. Buitenzorg: De Algemeene Sekretaris.

ANONYMOUS
1876 'Oendang-Oendang Simboer Tjaija, verzameling van adats uit de Residentie Palembang.' *Tijdschrift voor Nederlandsch-Indië* 5: 13-32, 122-141.

ANONYMOUS,
1903 *Koloniaal verslag.* Cited, p.26 in Van Vollenhoven 1909.

ANONYMOUS (G.J. Nolst Trenité)
1912 'Nota gedagteekend Weltevreden 29 Maart 1912 over "Het recht van den staat op den grond in de rechtstreeks bestuurde buitenbezittingen van Nederlandsch-Indie".' Pp. 65-106 in Anonymous 1916.

ANONYMOUS
1916 *Agrarisch reglement voor de Residentie Sumatra's Westkust (vastgesteld bij de ordonnantie van 15 januari 1915) met toelichting.* Batavia: Lands-drukkerij.

ANONYMOUS
1930 *Advies van de agrarische commissie ingesteld bij gouvernements besluit van 16 Mei 1928 No.17.* Weltevreden: Landsdrukkerij.

ANONYMOUS
1960 *Undang-undang Pokok Agraria.* Jakarta: Sekretariat Negara Republik Indonesia.

BALL, John
1985 *Indonesian Law - Commentary and Teaching Materials* Sydney: Law Faculty, University of Sydney.

BEAUFORT, Henriëtte L.T. de
1954 *Cornelis Van Vollenhoven.* Haarlem: H.D. Tjeenk Willink & Zoon.

BENDA, Harry J.
1966 'The pattern of administrative reforms in the closing years of the Dutch rule in Indonesia.' *Journal of Asian Studies* 25: 589-605.

BENDA-BECKMANN, Franz von
1979 *Property in Social Continuity: Continuity and Change in the maintenance of Property Relationships through Time in Minangkabau, West Sumatra.* The Hague: Martinus Nijhoff.

BERG, L.W.C. van
1894 'Rechtsbronnen van Zuid-Sumatra.' *Bijdragen tot de taal-, land- en volkenkunde van Nederlandsch-Indië* 43: 1-350, 1-61.

BERGSMA, W.B. and others
1876 *Eindresumé van het bij gouvernements besluit dd. 10 Juli 1867 No. 2 bevolen onderzoek naar de rechten van den inlander op den grond.* Batavia: Ernst & Co., Landsdrukkerij.
1880 *Eindresumé van het bij gouvernements besluit dd. 10 Juli 1867 No. 2 bevolen onderzoek naar de rechten van den inlander op den grond.* Batavia: Ernst & Co., Landsdrukkerij.
1896 *Eindresumé van het bij gouvernements besluit dd. 10 Juli 1867 No. 2 bevolen onderzoek naar de rechten van den inlander op den grond.* Batavia: Ernst & Co., Landsdrukkerij.

BOCKEL, O. van
1921 'Uit den strijd van den Indonesiër om zijn grond.' *Koloniaal tijdschrift* 10: 419-461.
BOEKE, J.H.
1960 *Indonesian Economics: The Concept of Dualism in Theory and in Practice.* The Hague: W. van Hoeve.
BOER, D.W.N. de
1932 'Het recht op de grond in Atjeh. *Koloniaal tijdschrift* 21: 51-80.
BRAND, J. van den
1902 *De millioenen uit Deli.* Amsterdam: Pretoria.
1903 *Nog eens: De millioenen uit Deli.* Amsterdam: Hövecker & Wormser.
BROWN, James Cook
1960 'Loglan.' *Scientific American* June: 53.
BRUGGENCATE, K. ten
1972 *Engels woordenboek* II. Groningen: Wolters-Noordhoff.
CASSUTTO, K.A.
1935 *Het adatrecht van Nederlandsch-Indië, zijn waarde voor het heden en voor de toekomst: rede gehouden ter aanvaarding van het ambt van bijzonder hoogleraar in het adatrecht van Nederlandsch-Indië aan de de Rijksuniversitet te Utrecht op 4 Februari 1935.* Groningen, Batavia: J.B. Wolters.
1936 *Handleiding tot de studie van het adatrecht.* Haarlem: de Erven F. Bohn.
COLENBRANDER, H.T. and J.E. STOKVIS
1915 *Leven en arbeid van mr. C.Th. van Deventer: II Van Deventer's voornaamste artikelen.* Amsterdam: van Kamp & Zoon.
COMMISSIE VOOR HET ADATRECHT
1911-1945 *Adatrechtbundels.* 's-Gravenhage: Martinus Nijhoff.
1911 'Regeeringsrapport over de afdeeling Paloe (1910).' *Adatrechtbundel* 1: 131-144.
1912 'H. Jambi.' *Adatrechtbundel* 5: 150-305.
1913 'Aansprakelijkheid van rechtsgemeenschappen in Djambi.' *Adatrechtbundel* 6: 385-409.
1915 'Verzoening na moord in Benkoelen (1914).' *Adatrechtbundel* 10: 211-213.
1916 'Bonesch wetboek (ouderdom onbekend).' *Adatrechtbundel* 12: 231-248.
1917 'Gegevens over volksordening (staatsinstellingen) bij de Dajaks (1706-1915).' *Adatrechtbundel* 13: 61-158.
1923 'Verwijzing enz.' *Adatrechtbundel* 22: 447ff. (unnumbered plates).

1926 'Gegevens betreffende bestuur en rechtspraak in het prinsdom Mangkoenegaran (1867-1913).' *Adatrechtbundel* 25: 70-104.
1929 'Oude gegevens.' *Adatrechtbundel* 31: 105-108.
1930 *Adatrechtbundel* 33. 's-Gravenhage: Martinus Nijhoff.
1933 *Adatrechtbundel* 36. 's-Gravenhage: Martinus Nijhoff.
1941 'Perdamaian in de Lampoengs na moord of doodslag (1933-1934).' *Adatrechtbundel* 41: 474-476.

COMMISSIE TOT DE BESTUDERING VAN HET ADVIES DER AGRARISCHE COMMISSIE
1932 *Verslag*. 's-Gravenhage: Martinus Nijhoff.

COSTER, Ch.
1932 'Debat prae-advies Gonggrijp.' In J.W. Gonggrijp and others, *De dienstuitoefening van het bosch-wezen en de strijd om de domeinverklaring*. Buitenzorg: Archipel.

DAHM, Bernhard
1971 *History of Indonesia in the Twentieth Century*. London: Pall Mall.

DEELMAN, A.G.
1930a 'Over de afschaffing van de domeinverklaring.' *Koloniaal tijdschrift* 19: 61-74.
1930b 'Nogmaals over de afschaffing van de domein- verklaring.' *Koloniaal tijdschrift* 19: 437-440.

DIAMOND, S.
1971 'The rule of law versus the order of custom.' *Social Research* 38: 42-72.

DOCTE, Edgard le
1978 *Legal Dictionary in Four Languages*. Bruxelles: Oyez; Paris: Van der Oyez.

DOVE, Michael R.
1985 'The agroecological mythology of the Javanese and the political economy of Indonesia.' *Indonesia* 39: 1-36.

E.
1931 'Advies van de agrarische commissie ingesteld bij G.B. 16 Mei 1928 nr 17.' *Indisch tijdschrift van het recht* 134: 88-90.

ECHOLS, J. and Hassan SHADILY
1961 *An Indonesian-English Dictionary*. Ithaca: Cornell University Press; Jakarta: Gramedia. (revised 1963)

EERDE, J.C. van
1898 'De adat volgens Menangkabausche bronnen.' Pp. 209-220 in *Wet en adat* vol. 3. Cited, p. 240 in Koninklijk Koloniaal Instituut 1936.

ENTHOVEN, K.L.J.
1927 *Het adatrecht der inlanders in de jurisprudentie.* Leiden: E.J. Brill.

FEUILLETAU DE BRUYN, W.L.H.
1932 'Debat prae-advies Gonggrijp.' Pp. 108-120 in J.W. Gonggrijp and others, *De Dienstuitoefening van het boschwezen en de strijd om de Domeinverklaring.* Buitenzorg: Archipel.

FOUCAULT, Michel
1977 *Discipline and Punish* (translated by Alan Sheridan). London: Allen Lane.

FRIEDERICY, H.J.
1929 'De Gowa-federatie (1928).' Pp. 364-427 in *Adatrecht-bundel* 31.

GEERTZ, Clifford
1960 *The Religion of Java.* New York: Glencoe Free Press.
1963 *Agricultural Involution.* Berkeley: University of California Press.

GELDER, W. de
1897 *Het strafrecht in Nederlandsch Indië.* Batavia: Kolff.

GERRETSON, F.C.
1935 'De rijkseenheid bedreigd ... en verzuimd.' Pp. 11-24 in Utrechtse Indologen Vereeniging, *Gedenkboek uitgegeven ter gelegenheid van het tweede lustrum.* Utrecht.

GERSEN, G.J.
1873 'Oendang-oendang of verzameling van voorschriften in de Lematang-Oeloe en Ilir en de Pasemah-landen van oudsher gevolgd en door langdurig gebruik hadat of wet geworden.' *Tijdschrift voor Indische taal-, land- en volkenkunde* 20: 108-150.

GONGGRIJP, G.
1920 'Van Vollenhoven over de voorgenomen wijziging van artikel 62 Regeringsreglement.' *Koloniaal tijdschrift* 9: 1-12.

GONGGRIJP, J.W. and others
1932 *De dienstuitoefening van het boschwezen en de strijd om de domeinverklaring.* Buitenzorg: Archipel.

GONGGRIJP, L.
1932 'Eenige opmerkingen naar aanleiding van het prae-advies Gonggrijp "De dienstuitoefening van het boschwezen en de strijd om domeinverklaring.' Pp. 131-143 in J.W. Gonggrijp and others, *De dienstuitoefening van het boschwezen en de strijd om de Domeinverklaring.* Buitenzorg: Archipel.

GOULD, J. and William L. KOLB
1964 *Dictionary of the Social Sciences.* London: Tavistock.
GRAAFLAND, A.C.H.
1893 *Iets over strafwetgeving en strafrechterlijke begrippen in de Nederlandsch-Indischen Archipel.* Cited, p.408 in Roest 1941.
GRIFFITHS, John
1986 'Recent anthropology of law in the Netherlands and its historical background.' Pp. 11-66 in K. von Benda-Beckmann and F. Strijbosch (eds.), *Anthropology of Law in the Netherlands.* Dordrecht: Foris Publications.
GRIJZEN, H.S.
1908 'Nota omtrent de IX Kota en Pandang Tarap (Midden-Sumatra).' *Tijdschrift van het Bataviaasch Genootschap.* 50: 62-120.
GYBLAND OOSTERHOFF, H.H.A.
1935 'Uit de geschiedenis van de oprichting van de Indologen faculteit te Utrecht.' Pp. 34-56 in Utrechtse Indologen Vereeniging, *Gedenkboek uitgegeven ter gelegenheid van het tweede lustrum.* Utrecht.
HAAR, B. ter
1939 *Beginselen en stelsel van het adatrecht.* Groningen, Batavia: J.B. Wolters.
1948 *Adat Law in Indonesia* (translated by George C.O. Haas and Margaret Hordyk, edited with an introduction by E. Adamsom Hoebel and A. Arthur Schiller). New York: International Secretariat, Institute of Pacific Relations.
1950a *Verzamelde geschriften* I. Djakarta: Noordhoff-Kolff.
1950b *Verzamelde geschriften* II. Djakarta: Noordhoff-Kolff.
1974 *Asas-asas dan Susunan Hukum Adat* (translated by K. Ng. Soebakti Poesponoto). Jakarta: Pradnya Paramita.
HARSONO, Boedi
1986 *Hukum Agraria Indonesia: Himpunan Peraturan-peraturan Hukum Tanah.* Jakarta: Jambatan.
HART, H.L.A.
1968 *Punishment and Responsibility: Essays in the Philosophy of Law.* London: Oxford University Press (second impression 1970).
HASSELMAN, C.J.
1920 'Indonesische grondrechten en Nederlandsche juristen.' *De gids* 3: 1-19 (reprint page numbers).
HAZAIRIN
1936 *De Redjang.* Bandoeng: A.C. Nix.

HEIJTING, H,G.
1931a 'Het landsdomeinbeginsel in Nederlandsch-Indië.' *De Indische gids* February: 97-113.
1931b 'Advies van de agrarische commissie ingesteld bij het gouvernementsbesluit van 16 mei 1928 no.17.' *Indische gids* 53: 239-245.

HESLINGA, J.H.
1928 *De rechten op grond en water op Java en Madoera verklaard.* Weltevreden: Visser.

HOLLEMAN, F.D.
1923 *Het adatgrondenrecht van Ambon en de Oeliasers.* Delft: W.D. Meinema.
1930 'De gouvernementsrechtspraak en de verwarring in het inlands grondbezit in de Minahasa.' *Koloniale studiën* 14: 435-474.
1938 'Het adatprivaatrecht van Nederlandsch-Indië in wetenschap, praktijk en onderwijs. (Bespreking der rede door mr. B. Ter Haar Bzn. uitgesproken op den dertienden herdenkingsdag van de stichting der Rechtshoogeschool te Batavia, op 28 October 1937).' *Indisch tijdschrift van het recht* 147: 428-440.

HOOKER, M.B.
1975 *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws.* Oxford: Clarendon.
1978a *A Concise Legal History of South-East Asia.* Oxford: Clarendon.
1978b *Adat Law in Modern Indonesia.* Kuala Lumpur: Oxford University Press.

HOVEN, W.
1927 *De Pasemah en haar verwantschaps-, huwelijks-, en erfrecht.* Wageningen: Veenman.

JACOB, Eduard Herman 's
1945 *Landsdomein en adatrecht.* Utrecht: Kemink & Zoon.

JAPING, C.H.
1932 'Eenige opmerkingen naar aanleiding van het prae-advies Gonggrijp "Boschwezen en Domeinverklaring".' Pp. 121-130 in J.W. Gonggrijp and others, *De dienstuit-oefening van het boschwezen en de strijd om de domeinverklaring.* Buitenzorg: Archipel.

JONKERS, A.
1930 'Het adatgrondenrecht in openbare beraadslagingen (1870-1928).' *Adatrechtbundel* 33: 31-51.

JOSSELIN DE JONG, J.P.B. de
1948 *Customary Law (A Confusing Fiction).* Amsterdam: Het Indisch Instituut.

JUDA, J.H.
1915 'Sedekah boemi.'-'Njiangi gawe.' Pp. 211-213 in *Adatrechtbundel* 10.
KAT ANGELINO, A.D.A. de
1930 *Staatkundige beleid en bezorg in Nederlandsch Indië.* 's-Gravenhage: Martinus Nijhoff.
KEMP, P.H. van der
1920 'Van Vollenhoven over de voorgenomen wijziging van art. 62 regeeringsreglement.' *Koloniaal tijdschrift* 9: 1-19.
KIELSTRA, J.C.
1932 'Het advies van de agrarische commissie.' *Koloniaal tijdschrift* 21: 225-263.
KING, A.R.
1964 "Myth". P. 450 in Julius Gould and William L. Kolb (eds.), *A Dictionary of the Social Sciences.* London: Tavistock.
KITS VAN HEIJNINGEN, H.M.
1916 *Het straf- en wraakrecht in den Indischen archipel.* Leiden: Batteljee & Terpstra.
KLEIWEG DE ZWAAN, J.P.
1931 'Het asylrecht bij overspel in den indischen archipel.' *Tijdschrift van het aardrijkskundig genootschap* 48: 36-47. Cited p.747 in Koninklijk Koloniaal Instituut 1936.
KOENTJARANINGRAT (ed.)
1967 *Villages in Indonesia.* Ithaca: Cornell University Press.
1975 *Anthropology in Indonesia.* The Hague: Martinus Nijhoff.
KONINKLIJK KOLONIAAL INSTITUUT
1914-1936 *Pandecten van het adatrecht.* Amsterdam: Koninklijk Koloniaal Instituut.
1914 *Pandecten van het adatrecht I: Het beschikkingsrecht op grond en water.* Amsterdam, J.H. de Bussy.
1915 *Pandecten van het adatrecht II: Het voorkeurrecht op grond en het genotrecht van grond.* Amsterdam, J.H. de Bussy.
1918 *Pandecten van het adatrecht IVA: De overige rechten op grond en water.* Amsterdam, J.H. Bussy.
1936 *Pandecten van het adatrecht X: Adatstrafrecht.* Bandoeng: A.C. Nix & Co.
KOOREMAN, P.J.
1883 'De feitelijke toestand in het gouvernementsgebied van Celebes en onderhorigheden.' *De gids* I: 171-204, 358-384, 482-489, II: 135-169.

KORN, V.E.
1933 *De dorpsrepubliek Tnganan Pagringsingan.* Singaradja: Kitija-Liefrinck van der Tuuk; Santpoort: C.A. Mees.
KORN, V.E. and R. van DIJK
1946 *Adatgrondenrecht en domeinfictie.* Gorinchem: J. Noorduijn.
KREEMER, J.J.
1923 *Atjeh* II. Leiden: E.J. Brill.
LACUELLE, F.A.E.
1916 'De zoogenoemde communalen bouwvelden in Midden Java.' *Koloniaal tijdschrift* 5: 273-290.
LESQUILLIER, N.W.
1934 *Het adatdelictenrecht in de magische wereld beschouwing.* Leiden: Eduard Ijdo.
LIEFRINCK, F.A.
1927 *Bali en Lombok.* Amsterdam: J.H. de Bussy.
LOGEMANN, J.H.A.
1927a 'Mr. Nolst Trenité's parliamentaire geschiedschrijving.' *Indisch tijdschrift van het recht* 125: 380-457.
1930a 'Aanteekeningen over onteigening.' *Indisch tijdschrift van het recht* 140: 439-442.
1932a 'Debat nopens prae-advies Gonggrijp.' Pp. 85-107 in J.W. Gonggrijp and others, *De dienstuitoefening van het boschwezen en de strijd om de domein- verklaring.* Buitenzorg: Archipel.
1932b 'Kronkels (en vervolg).' *De stuw* 3, 13 (1 July): 151-154; 14 (16 July): 165-169. Reprinted Batavia Centrum: Albrecht.
1932c 'Na het congres van de VHABINOI.' *De stuw* 3, 9: 102-105.
1937 'Aantekeningen Spit kommissie.' *Koloniale studiën* 21: 14-41.
LOGEMANN, J.H.A. and B. Ter HAAR
1927b 'Slotwoord.' *Indisch tijdschrift van het recht* 125: 458-464.
LOGEMANN, J.H.A. and G.J. NOLST TRENITé
1930b 'Domeinbeginsel en erfpachtscontracten.' Pp. 83-119 in *Indisch genootschap jaarvergadering van 1930.* 's-Gravenhage: Martinus Nijhoff.
LOUTER, J. de
1929 'De ontdekking van het adatrecht.' *De Indische gids* May: 655-668.
LUBLINK-WEDDIK, W.F.
1939 *Adatdelictenrecht in de rapat-marga-rechtspraak van Palembang.* Bandoeng: A.C. Nix.

MAHADI
1978 *Sedikit "Sejarah Perkembangan Hak-hak Suku Melayu atas Tanah di Sumatera Timur" (Tahun 1800-1975).* Jakarta: Badan Pembinaan Hukum Nasional, Bandung: Alumni.

MALLINCKRODT, J.
1928a *Het adatrecht van Borneo* I. Leiden: M.Dubbeldeman.
1928b *Het adatrecht van Borneo* II. Leiden: M. Dubbeldeman.
1933a 'Beschikkingsrecht bij Bantai-vorming onder de doesoen Dajaks van Boentoek (1925).' *Adatrechtbundel* 36: 74-77.
1933b 'Grensregeling van beschikkingskringen bij de Boekit Dajak (1875).' *Adatrechtbundel* 36: 86-89.
1933c 'Gegevens over Mandar en andere landschappen van Zuid-Selebes, verzameld door dr. J. Mallinckrodt (1928-1929).' *Adatrechtbundel* 36: 303-429.

MARGONO
1930 'Het agrarisch probleem.' *De stuw* 1, 14:1-6.

MARSDEN, William
1782 *Archeologia* VI. Cited in Van Vollenhoven 1934: 57.
1784 *The History of Sumatra.* London.
1811 *The History of Sumatra.* Kuala Lumpur: Oxford University Press (reprint 1975).

MATTHES, B.F.
1929 'Matthes over de adat van Zuid-Selebes (1885).' *Adatrechtbundel* 31: 246-283.

MONOARGA, R.
1937 'Zoogenaamde verjaring van grondbezitsrechten gebaseerd op de Gorontalosche adat (1932).' *Adatrechtbundel* 39: 365-367.

MOOK, H.J. van
1927 'Historisch realisme.' *Koloniaal tijdschrift* 16: 146-158.

MOORE, Sally Falk
1978 *Law as Process.* London, Henley and Boston: Routledge & Kegan Paul.

MUHAMMAD, Bushar
1961 *Pengantar Hukum Adat.* Jakarta: Ichtiar.
1976 *Asas-asas Hukum Adat.* Jakarta: Pradnya Paramita.

NEDERBURGH, I.A.
1933 *Hoofdstukken over adatrecht* I. 's-Gravenhage: Belinfante.
1934 'Adat tegen westersch recht?' *Indisch tijdschrift van het recht* 139:477-493.

NIEL, Robert van
1960 *The Emergence of the Modern Indonesian Elite.* The Hague: W. van Hoeve.

NIEMANN
1929 'Niemann over de Latowa.' *Adatrechtbundel* 31: 220-245.
NOLST TRENITé, G.J.
1916 'Een bedenkelijk landraad vonnis.' *Indisch tijdschrift van het recht.* 107:229-247
1917 'Praeadvies.' Pp. 193-240 in *Handelingen der Nederlandsch-Indische Juristen-Vereeniging.* Batavia: De Verwachting.
1920a 'Van Vollenhoven's jongste agrarisch geschrift.' *Koloniale studiën* 4: 54-87.
1920b *Inleiding tot de agrarische wetgeving van het rechtstreeks bestuurd gebied van Nederlandsch-Indië.* Weltevreden: Landsdrukkerij.
1923a 'Uit Indië terug.' *Vragen des tijds* I: 143-160.
1923b 'Indisch waterrecht.' *Vragen des tijds* February: 338-351
1923c 'Het Indonesisch dorpsgebied.' *Koloniaal tijdschrift* 12: 494-507.
1925a 'Een Leidsche dissertatie.' *Koloniaal tijdschrift* 14: 150-159.
1925b 'Een agrarisch curiosum.' *Koloniaal tijdschrift* 14: 540-546.
1926 'De bevolkings-rubbercultuuren de agrarische wetgeving in Nederlandsch-Indië.' *Koloniaal tijdschrift* 15: 604-644.
1927a 'Een kort wederwoord.' *Koloniaal tijdschrift* 16: 280-284.
1927b 'Het goed recht der domeinverklaring.' *Berichten en mededeelingen*: Vereeniging van de Ambtenaren bij het Binnenlands Bestuur.
1928 'De grondslag der Indische agrarische wetgeving.' *Economisch-statistische berichten* 25 Juli: 637-640.
1929 'Ned.-Indisch of indonesisch agrarisch recht?' *Indisch tijdschrift van het recht* 128: 107-116.
1931 *Advies van de Indische domeincommissie ingesteld bij G.B. van 16 Mei 1928, No.17.* 's-Gravenhage: D.A. Daamen.
1933 'Een kort wederwoord op de "Kantteekeningen op het verslag der (agrarische) studiecommissie Indië-Nederland".' *Koloniaal tijdschrift* 22: 27-38.
1935 'De Utrechtse faculteit en het Nederlandsch-Indisch agrarisch recht.' Pp. 77-86 in Utrechtse Indologen Vereeniging, *Gedenkboek uitgegeven ter gelegenheid van het tweede lustrum.* Utrecht.
1937 'De misstap van de Commissie-Spit.' *Koloniaal tijdschrift* 26: 389-395.

1939 'Het Indische strafrecht, wet en adat.' *Koloniaal tijdschrift*. 28: 360-366.

1942 *Inleiding tot de agrarische wetgeving van het rechtstreeks bestuurd gebied van Nederlandsch Indië* (completely revised second imprint). Utrecht: Kemink & Zoon.

OETOYO, Koesoemo

1930 "Minderheidsnota". Pp. 116-121 in Anonymous, *Advies van de agrarische commissie ingesteld bij het gouvernements besluit 16 mei 1928 no. 17*. Weltevreden: Landsdrukkerij.

OSSENBRUGGEN, F.D.E. van

1905 'Over het primitief begrip van grondeigendom, getoetst aan de hieromtrent heerschende begrippen bij de Chineezen, Inlanders en eenige andere volken en volksstammen.' *De Indische gids* I: 161-192, 360-392.

1916 'Het primitieve denken zooals dit zich uit voornamelijk in pokkengebruiken op Java en elders; bijdrage tot de prae-animistische theorie.' *Bijdragen tot de taal-, land- en volkenkunde van Nederlandsch-Indië* 71: 1-370.

1945 'Prof. Mr B. Ter Haar Bzn., met portret.' *Adatrechtbundel* 41: viii-xv.

PELZER, Karl

1978 *Planter and Peasant: Colonial Policy and the Agrarian Struggle in East Sumatra*. The Hague: Martinus Nijhoff.

PERELAER, E.

1914 'De adatrechtspraak in de residentie Palembang.' *Koloniaal tijdschrift* 3: 451-471.

RAALTE, E. van

1964 *Troonredes, openingsredes, inhuldigingsredes 1814-1963*. Den Haag: Staatsuitgeverij.

RIEDEL, J.G.F.

1864 'Het landschap Bolaang Mongodouw.' *Tijdschrift van het Bataviaasch Genootschap* 13. Cited, p.75 by Roest 1941.

1886 *De sluik- en kroesharige rassen tusschen Celebes en Papoea*. 's-Gravenhage: Martinus Nijhoff.

ROEST, Jacob

1941 *Het schuldvraagstuk in het adatstrafrecht van den Indischen archipel*. Leiden: Dubbeldeman.

ROO DE LA FAILLE, P. de

1919-1921 'Over het grondenrecht onder Javaansch vorstenbestuur.' *Tijdschrift voor Indische taal-, land- en volkenkunde* 59: 22-121.

1925 'Javaansch grondenrecht in het licht van Lomboksche toestanden.' *Bijdragen tot de taal-, land- en volkenkunde van Nederlandsch-Indië* 81: 552-672.

ROUFFAER, G.P.
1918 'De agrarische rechtstoestand der inlandsche bevolking op Java en Madoera: rapport uitgebracht aan mr. C.Th. van Deventer op 16 april 1904.' *Bijdragen tot de taal-, land- en volkenkunde van Nederlandsch-Indië* 74: 305-397.

ROYEN, Joseph Wilhelmus van
1927 *De Palembangsche marga en haar grond- en waterrechten.* Leiden: C.L. van den Berg.

SAID, Edward
1978 *Orientalism.* London: Routledge & Kegan Paul.

SCHRIEKE, B
1919a 'Uit de geschiedenis van het adatgrondenrecht.' *Tijdschrift voor Indische taal-, land- en volkenkunde* 59: 122-190.
1919b *Over vorstelijk eigendomsrecht.* Weltevreden: Seen.
1966 *Indonesian Sociological Studies* I. The Hague: van Hoeve.

SCHRODER, E.E.W.G.
1917 *Nias* I,II. Leiden. Cited p. 575 in Koninklijk Koloniaal Instituut 1936.

SEAGLE, W.
1937 'Primitive law and Professor Malinowski.' *American Anthropologist* 39: 286. Cited p.41 in Roest 1941.

SELOSOEMARDJAN
1962 *Social Change in Jogjakarta.* Ithaca: Cornell University Press.

SINAR HARAPAN
1980 'Tanah-tanah di desa dimiliki orang-orang kota' P.5 in *Sinar Harapan* 4 January.

SLAATS, H.M.C. and M.K. PORTIER
1981 *Grondenrecht en zijn verwerkelijking in de Karo Batakse dorpssamenleving: een beschrijvende studie.* Nijmegen: Instituut voor Volksrecht, Faculteit der Rechtsgeleerdheid, Katholieke Universiteit.

SNOUCK HURGRONJE, Christiaan
1903 *Het Gajoland en zijne bewoners.* Batavia: Landsdrukkerij.

SNYDER, Francis G.
1981 'Colonialism and legal form: the creation of "customary law" in Senegal.' *Journal of Legal Pluralism* 19: 49-90.

SOEPOMO
1936 *Het vervreemdingsverbod van inlandsche gronden.* Praeadvies, Vierde Juristen Congres. Printed as an appendix in *Indisch tijdschrift van het recht.*

SPOOR, A.S.L.
1933 'Grondenrecht en inheemsche rechtsgemeenschappen in de onderafdeeling Maros (1926).' *Adatrechtbundel* 36: 201-221.

STEENHOVEN, G. van den
1970 *The Land of Karenda. Background, procedure and settlement of case 43/s/1969 in the State Court at Kabandjahe (Karoland, North Sumatra).* Nijmegen: Instituut voor Volksrecht, Faculteit der Rechtsgeleerdheid, Katholieke Universiteit.

STEINMETZ, S.R.
1892 *Ethnologische Studien zur Ersten Entwicklung der Strafe.* II: 330. Cited p.75 in Roest 1941.

STOPPELAAR, J.W de
1929 'Beperking van vervreemding van inheemse grondrechten door inlanders aan niet inlanders.' *Koloniaal tijdschrift* 18: 162-167.
1931 'Boekbespreking: het advies van de agrarische commissie.' *Koloniale studiën* 15: 148-161.

STRATEN, L.B. van
1935 'Utrecht en adatrecht.' *Koloniaal tijdschrift* 24: 210-214.

TEMPO
1976 'Sumpah pocong.' *Tempo* 11 December: 12.

UTRECHTSE INDOLOGEN VEREENIGING
1935 *Gedenkboek uitgegeven ter gelegenheid van het tweede lustrum.* Utrecht.

VOLLENHOVEN, Cornelis van
1909 *Miskenningen van het adatrecht: vier voordrachten aan de Nederlandsch-Indische bestuursacademie.* Leiden: E.J. Brill.
1918-1933 *Het adatrecht van Nederlandsch-Indie.* Leiden: E.J. Brill.
1918a *Het adatrecht van Nederlandsch-Indië* I. Leiden: E.J. Brill.
1918b 'Antirouffaer. Naschrift op het rapport ... van 16 april 1904 over den agrarische rechtstoestand der inlandsche bevolking op Java en Madoera.' *Bijdragen tot de taal-, land- en volkenkunde van Nederlandsch-Indië* 74: 399-406.
1925 *De Indonesiër en zijn grond.* Leiden: E.J. Brill.

1928 *De ontdekking van het adatrecht.* Leiden: E.J. Brill.
1931 *Het adatrecht van Nederlandsch-Indië* II. Leiden: E.J. Brill.
1933 *Het adatrecht van Nederlandsch-Indië* III. Leiden: E.J. Brill.
1934a *Verspreide geschriften* I. Haarlem: H.D. Tjeenk Willink & Zoon; 's-Gravenhage: Martinus Nijhoff.
1934b *Verspreide geschriften* II. Haarlem: H.D. Tjeenk Willink & Zoon; 's-Gravenhage: Martinus Nijhoff.
1935 *Verspreide geschriften* III. Haarlem: H.D. Tjeenk Willink & Zoon; 's-Gravenhage: Martinus Nijhoff.
1981 *Van Vollenhoven on Indonesian Adat Law* (edited and translated by J.F. Holleman and others). The Hague: Martinus Nijhoff.

WAWO-RUNTU, A.L.
1920 *De agrarische quaestie in de Minahasa.* Semarang.

WEHR, Hans
1961 *A Dictionary of Modern Written Arabic* (translated, edited by I. Milton Cowen). Ithaca: Cornell University Press.

WERKUM, A.D. van
1931 'Sociaalmaatschappelijkevraagstukken "Domeinbeginsel en erfpacht".' *De banier* 1 January.

WERTHEIM, W.F.
1964 *East-West Parallels.* The Hague: W. van Hoeve.

WILKEN, G.A.
1893 *Handleiding voor de vergelijkende volkenkunde van Nederlandsch-Indië.* Leiden: E.J. Brill.
1912a *De verspreide geschriften* I (edited by F.D.E. van Ossenbruggen). Semarang, Soerabaja, 's-Gravenhage: Van Dorp.
1912b *De verspreide geschriften* II (edited by F.D.E. van Ossenbruggen). Semarang, Soerabaja, 's-Gravenhage: Van Dorp.
1912c *De verspreide geschriften* III (edited by F.D.E. van Ossenbruggen). Semarang, Soerabaja, 's-Gravenhage: Van Dorp.
1912d *De verspreide geschriften* IV (edited by F.D.E. van Ossenbruggen). Semarang, Soerabaja, 's-Gravenhage: Van Dorp.

WILLER, T.J.
1846 'Verzameling der Battaksche wetten en instellingen in Mandailing en Pertibie.' *Tijdschrift van Nederlandsch-Indië.* Cited p.414 in Roest 1941.

WILLINCK, G.D.
1909 *Het rechtsleven bij de Minangkabausche Maleiers.* Leiden: E.J. Brill.

WINK, P.
1926 'Rechten op grond en water in Bengkoeloe.' *Adatrechtbundel* 32: 47-50.

WOOTTON, Barbara
1963 *Crime and the Criminal Law.* London, Steven & Sons

WORMSER, C.W.
1946 *Adat of recht.* Leiden: Burgersdijk & Niermans.

YPES, W.K.H.
1920 'Bestuur grondenrecht en jachtrecht in Siambaton Toeka Dolok en Toeka Holboeng.' *Adatrechtbundel* 27: 214-220.

ZWART, W.
1932 'Debat prae-advies Gonggrijp.' In J.W. Gonggrijp and others, *De dienstuitoefening van het bosch-wezen en de strijd om de domeinverklaring.* Buitenzorg: Archipel.