Colonial dilemma - Van Vollenhoven and the struggle between adat law and Western law in Indonesia (2007)

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The main feature of the legal system in Indonesia during the colonial era was its dualistic character. This dual legal system had been in existence since the eighteenth century, when the Dutch gained control of the interior of Java. It was solidly anchored in the government regulation (Regeringsreglement) for the Netherlands Indies of 1854. According to article 75 of this 'Indies constitution', jurisdiction, legislation, and legal procedures for Dutchmen and other 'Europeans' (an expression that after 1899 also covered the Japanese) had to be based on regulations and ordinances as much as possible in conformity with the laws and procedures that existed in the Netherlands (the so-called principle of concordance). 'Natives' on the other hand – that is, Indonesians, including the Chinese minority who were especially important in Indonesian business life – were subjected to their own 'religious laws, institutions and customs' – so far as they were 'not in conflict with generally recognized principles of equity and justice' – except where 'natives' or those equated with them had voluntarily accepted European (Dutch) law either generally (which happened only in the case of 'mixed' marriages) or specifically for certain transactions. Furthermore, the colonial administration could declare – and did so many times – the applicability of certain regulations and ordinances to the Indonesian population or part of it (for instance the Chinese minority). Finally, there were two separate court systems, for Europeans and non-Europeans, although in 'native' cases appeals went to the European courts and Dutchmen – either civil servants or professional judges – ordinarily presided over the non-European courts.

At the turn of the twentieth century the dual legal system came under fire. The plural and judicial organization in the Netherlands Indies was seriously challenged by government proposals for a unified legal system. By way of argument for such a reform reference was made to other colonial territories, in particular British India. A fierce discussion about the advantages and disadvantages of the introduction of modern and uniform European law concepts into native societies and of the suppression or conservation of indigenous customary or adat law in Indonesia flared up in the Netherlands and went on for many years. This debate was to dominate any further developments in the Indonesian legal field during the last four decades of colonial rule. Finally, the day was won, perhaps somewhat surprisingly, by the so-called Leiden adat law school, which had its champion and most outstanding representative in Cornelis van Vollenhoven (1874–1933). The debate and its outcome will be discussed in more detail in the following pages.

An architect of adat law

It was the famous Leiden Orientalist Christiaan Snouck Hurgronje (1857–1936) who coined the expression ‘adat law’ and used it for the first time in his book De Atjehers (The Acehnese) published in 1893. To a certain degree this was symptomatic of the slow discovery and appreciation of native customary law in Indonesia. Even the phrase ‘religious laws, institutions and customs’ that had been used in the Government Regulation of 1854 was characteristic of the many misunderstandings to which the notion of indigenous law had given birth, as adat law was erroneously identified with religious – that is, Islamic – law (Van Vollenhoven 1928: 108–9).
The ‘discovery of adat law’ – to quote the title of one of Van Vollenhoven’s almost innumerable publications in this field – did not start before the 1880s. Until the middle of the nineteenth century the Dutch knew next to nothing about the adat law of the Javanese and other Indonesians whom they had been ruling for such a long time. A systematic description and analysis of Indonesian adat law really got underway only after the appointment of Van Vollenhoven to the Leiden chair of adat law of the Netherlands Indies in 1901. This was in more than one sense a freshman’s start, as he was at that moment only twenty-seven years old (Van Ossenbruggen 1976; Sonius 1981).

For more than three decades, until his early death in 1933, the forceful, albeit somewhat unbalanced, personality of Van Vollenhoven was the nucleus of the adat movement in the Netherlands, which also had, as we shall see, certain political connotations. He founded a real ‘school’ of adat law disciples. His students wrote more than twenty doctoral dissertations on this subject. Not a few of them later reached high positions in the colonial bureaucracy since, from 1902 on, Leiden University had the monopoly of the training and education of future Dutch civil servants for the East Indies administration. But Van Vollenhoven himself easily carries off the palm. It was on him and his tireless work that the labour of others, his pupils, admirers, and even his opponents, was centered (Korn 1948; Kollewijn 1948). With his great work Het Adatrecht van Nederlandsch-Indië (Adat Law in the Netherlands Indies) – the first volume (of three) was published in 1918, but the first instalments had already been appearing since 1906 – he set his seal for ever upon the scientific study of this subject. In 1909 he also took the initiative in establishing the Commission for Adat Law (Adatrechtcommissie), of which he was to remain secretary until the end of his life; in setting in motion the publication of the many volumes on adat law published by this body; in founding in 1917 the Adat Law Foundation (Adatrecht-stichting), with its magnificent library still present in Leiden; and finally in being the fountainhead in many other activities in the interest of the study of the customary law of Indonesia. Without any exaggeration, in writing Van Vollenhoven’s obituary, one of his admirers, F.D.E. van Ossenbruggen, could proclaim that he had been the man ‘who elevated adat law to a science’ and who had made the denial of such a science impossible once and for all (Van Ossenbruggen 1976: 59). Dutch legal language adopted the word adatrecht for the first time in 1910; Dutch dictionaries did so in 1914.

A reluctant administration
After 1900, the growing interest in the ‘new science’ of adat law presented a very different picture from the preceding ages of official neglect of indigenous law in Indonesia. With the exception of one or two compilations of old Javanese laws in the eighteenth century, literature and research had been virtually non-existent until 1848. In that year a whole system of new legislation for Europeans was introduced: a civil code; a commercial code; a code of civil procedure (for civil suits against Europeans); a code of criminal procedure; and a new ordinance on the judiciary. A penal code for Europeans followed in 1866. Apart from new rules on native judiciary (combined with the regulation on court organization for Europeans) and only one ordinance on indigenous civil and criminal procedures, the Indonesians were left to themselves and to their own, also unknown, adat law. A rather hasty proposal to apply the European civil code partially to them was rejected by Governor General J.J. Rochussen in 1848 and 1849. He was of the opinion that such a radical measure would play havoc with Javanese society and, for that reason, was ‘hazardous’ and ‘impolitic’ as long as no other social order (for instance, an order based on Christianity instead of Islam) was there to take the place of the original one (Ball 1982: 220–2). He was also afraid of the impact of such a far-reaching proposal on the cultivation system in Java that was pouring huge profits into the Dutch treasury at that time. It was possible, he argued, to base such a system of forced crop
cultivation on native traditions and customs, but impossible to do so on Western judicial concepts.

John Ball in his study on Indonesian legal history concludes from these and other observations that European self-interest and indifference to the indigenous legal order contributed most to the evolution of dualism in the colonial legal system, in particular in a country like Indonesia (Ball 1982: 236). Daniel S. Lev also suggests that colonial law and especially plural law, plurally administered, was intended primarily to make exploitation efficient. Nevertheless even Lev (1985: 57, 60) has to acknowledge that different courts and different laws were only 'equitable'; otherwise people denied their own law might rebel. The Dutch indeed faced an insolvable dilemma. The adoption of Western law for the Indonesians would have meant that Indonesian society was turned upside down. At the very least it was a big leap in the dark, nobody being able to foretell the consequences of the abolition of adat law, as nobody knew anything about it. For this reason – insufficient knowledge of indigenous land rights – in 1866 a majority of the Second Chamber of the Dutch parliament rejected a bill proposed by the Minister for the Colonies, I.D. Fransen van de Putte, to confer the proprietary rights over the cultivated land on the Javanese cultivators, at the same time granting an award of the ownership of the uncultivated land to the government. This rejection led to a temporary schism in the liberal party and the fall of the liberal government.

The Dutch were neither fools nor angels. They were, however, severely handicapped by their lack of knowledge of the indigenous languages, in particular Javanese. How could they have studied adat without sufficient knowledge of native vocabulary and customs? Only in 1842 – almost forty years after the foundation of the East Indian College at Haileybury (in 1806), where the future officials for the British Indian Civil Service were trained – was the instruction and education of young officials for the Dutch East Indian administration begun at the Royal Academy for Engineers in Delft. The Minister for the Colonies, J.C. Baud, who was instrumental in bringing about this decision, thought that it was 'a manifest truth that a subjected people can not, in the long run, be kept in subjection without violence unless the foreign ruler was determined to govern this people with fairness and justice and, above all, in deference to native attitudes, customs and bias' (Historische Nota 1900: 23). To achieve this latter, knowledge of the Javanese language in particular would be a prerequisite; language instruction thus became the core of the education bestowed on the future Dutch East Indian officials, first in Delft and, after the liquidation of the institute in 1900, in Leiden. Baud's well-known penchant for the Javanese language also had other antecedents: as governor general he had once had to decide on the execution of the death sentence on three Javanese who had been accused of robbery and murder. On reading the judicial documents Baud was assailed by the uneasy feeling that the Dutch official who had presided over the native court had, because of his poor command of Javanese, condemned three innocent people. Baud decided to permit them to request a reprieve from the death sentence. Before a decision had been reached on their petition another, similar crime was committed in the same region. The offenders were caught and subsequently confessed to being guilty of the previous robbery as well. These events had not failed to make a deep impression on him (Fasseur 1989b).

After 1850, with their better command of indigenous languages, some Dutch officials – certainly not all of them – became more interested in the customs and attitudes of the people they had to administer. The 'discovery' of adat law had begun in reality. The first scientific works were published by civil servants such as G.A. Wilken (1847–91) on the Central Moluccas, the Minahasa in northern Sulawesi, and Sumatra, and F.A. Liefrinck (1853–1927) on Bali and Lombok. Both were ardent self-taught anthropologists and ethnologists; Wilken ended his short life as a professor of ethnology in Leiden (Van Vollenhoven 1928: 99–106).
Their shrewd observations on native customs and traditions, the rights to the soil, family law, and other topics provided many useful bricks for Van Vollenhoven’s monumental edifice on adat law in Indonesia. The missionaries, too, acquitted themselves well, although they were sometimes more sceptical of all these ‘pagan’ institutions or traditions obscured by ‘the darkness of Islam’. On the other hand, the Dutch lawyers who served in the judicial functions in Indonesia were often less enthusiastic, convinced as they were of the superiority of Western concepts of law to those of ‘primitive’ societies. Their attitude to native law was broadly the same as that of the physician who runs into the tribal health services of the local medicine man (Van Vollenhoven 1928:114). Their judicial training and the terminology they were used to, moulded on Roman and Dutch law, were moreover a serious handicap to a better understanding and appreciation of the specific identity and essence of adat law institutions. In this respect civil servants like Liefrinck and Wilken, not burdened by a judicial education, were often less inclined to torture adat law concepts on the Procrustean bed of Western terminology and definitions.

The rather condescending way in which the Dutch lawyers during the second half of the nineteenth century used to look upon the adat law institutions with which they were confronted had, at least for the time being, more impact on the shaping of government policy in this field than the interest shown in native law by some civil servants who lacked the prestige of the professionals. We should also be aware of the enormous influence of Western ethnocentrism and feelings of superiority in that imperialistic age with regard to – I quote Rudyard Kipling – ‘the lesser breeds without the law’. Questions could arise not only about the intrinsic value of adat law but also about the feasibility of its implementation. First, adat law was by definition unwritten and for that reason difficult to get to know or to understand. According to article 7 of the regulation on court organization and administration of justice of 1848, the judge had in all civil and penal cases against ‘native’ defendants to interrogate their ‘priests’ (sic) and chiefs on the relevant customs and institutions – a time-consuming and usually not very satisfactory procedure. Second, adat law, as even a cursory glance at it could show, was very multiform and regionally diverse. For instance, in his writings, Van Vollenhoven distinguished no fewer than 19 adat law ‘circles’ in the Indonesian area. This marked local and regional differentiation was an evil in the eyes of Dutch lawyers nurtured in the cradle of centralistic Napoleonic law concepts. It also presented a rather mournful spectacle to those who were sympathetically inclined toward native law.

Finally, and here the Dutch looked to the example set by the British in India, time did not seem to be on the side of adat law. Did not progress demand the introduction of a uniform and ‘higher’ law than these native institutions and curious customs which were so badly equipped for the modern epoch? The legal policy of the British government in India in the footsteps of Macaulay – the adoption of a penal code in 1860 and a code of criminal procedure in 1861 which were applicable to all groups of the population, not to mention the more or less simultaneous enactment of a complete code of civil procedure, the Succession Act of 1865 and the law of contracts introduced in 1872 – appeared to be worthy of imitation (Van Vollenhoven 1925: 313; Strachey 1911: 99–118). How these feelings influenced government policy in colonial Indonesia can best be shown by means of the penal law system that was introduced after 1848, pluralistic in name but not in fact.

**Dualistic penal law: unity under a multiform cloak**

Penal law had not been covered by the wave of codification that hit the colony, at least the European segment of it, in 1848. The Netherlands did not then possess a proper national penal code of its own and was still applying the French penal code (Code Pénal) imposed by Napoleon after his short-lived annexation of the country in 1810. After 1848, therefore, the
Dutch had no other choice but to maintain the ‘old Dutch’ and ‘Roman’ penal law that went as far back as 1642. After the largely futile efforts of three drafting committees in both Indonesia and in the Netherlands, a penal code for Europeans in the Netherlands Indies could finally be promulgated in 1866; it took effect on 1 January 1867 (Fasseur 1988). The newly adopted penal code was a faithful copy of the French code that remained valid in the Netherlands until 1886. But what policy should be followed toward the native Indonesian population? Adat penal law was virtually unknown and the cruel and inhuman penalties inflicted by Islamic courts (such as amputation of the hands) had already been abolished at the beginning of the nineteenth century. As a rule Dutch judges applied Dutch penal law concepts in cases which were brought to trial (as they did in civil cases).

The Dutch government therefore decided to frame a penal code for natives and other non-Europeans that in its turn would be a faithful copy of the European one adopted in 1866. Later on a commentator jokingly compared this decision to the course of events in a parsimonious Dutch middleclass household. After many years of loyal service the threadbare coat of the master of the house was not thrown away but cut up into a jacket for the oldest son, subsequently into a cap for the second one and so forth. In 1866, F.F.L.U. Last, member of the Supreme Court in Batavia, was given a commission for the drafting of a native penal code modelled on the European counterpart. Last, however, did not appear to be entirely convinced of the wisdom of his mandate. In a letter to the governor general in 1868 he argued that such ‘a servile imitation’ could be rendered just as well by ‘the humblest of all clerks’, but that the result of such an imitation would be totally unintelligible to even the cleverest native chief. In Last’s opinion, moreover, the French penal code ‘written for a turbulent French nation more than half a century ago’ was completely unsuitable for implementation in the ‘peaceful’ Javanese society. These were interesting, if not very constructive, remarks, which had a predictable effect. A few months after he had lodged his complaints Last was discharged as a government commissioner. His successor was the ambitious director of the new Department of Justice in Batavia, T.H. der Kinderen, who wasted no love whatsoever on adat law. His penal code for natives that came into force in 1873 was an almost perfect copy of the European edition. From that time on adat penal law was a thing of the past, mourned only by a handful of ethnologists. Some of them afterward stated, not very convincingly, that the introduction of Western penal law had stimulated the almost suppressed tradition of headhunting by Dayak tribes in Borneo as, unlike the old adat institutions, the new penal code did not recognize the possibility of a compensation order and so had rekindled the practice of vendetta.

When a really national penal code was introduced in the Netherlands in 1886, history seemed to repeat itself. A new penal code for Europeans in the Netherlands Indies, again a copy of the code then valid in the mother country, was promulgated in 1898 but did not obtain statutory force as the Minister for the Colonies preferred to wait for the framing of its ‘native sister’ before adopting both codes at the same moment. That moment, however, as we shall see, was never to come.

The drive toward unification

The trend toward unification in the field of penal law might be explained with the argument that an efficient enforcement of ‘law and order’ – in any colonial territory always an important asset, and certainly so in the eyes of a small power like the Dutch – required a legislation which was in principle the same for all inhabitants. On the other hand, differentiation could be accepted more easily in private and commercial law, as long as the economic ties between different groups of the population (not only between the tiny Western and the huge non-Western part of it but also between the native populations of different regions) were weak or
even non-existent. Difficulties arose, however, as soon as cases were regularly submitted to the courts in which the litigants belonged to different cultural and ethnic groups with different systems of law. Which law should be applied, and how was the judge to be cognizant with the particular branch of adat law of the parties involved in the conflict that he had to resolve?

These questions became more and more urgent in the 1890s as a result of the improvement of communications in the Indies during the last quarter of the nineteenth century, the increased mobility of the population, and the upsurge of the economy after a long period of depression. The first railways in Java were constructed around 1870, and the first extensive network of shipping routes in the archipelago had been organized by a government-licensed shipping company around 1890. There was another pressing motive for a fundamental reconsideration of the necessity for judicial reforms in the Indies, too. The legal status of the small but fast-growing segment of the indigenous population who had been converted to Christianity was completely unclear. According to the letter of the Government Regulation of 1854 (art. 75), they were subjected to the ‘religious laws, institutions and customs’, marriage law excepted, on the same basis as their Muslim compatriots. But what did this expression mean exactly? Had one to think of Islamic laws or of a sort of Christian substitute, and how could one clarify such a non denominational Christian adat law? Moreover, in the eyes of the missionaries, Indonesian Christians were certainly discriminated against, as they had to perform forced labour on Sundays and Christian holidays, but had to rest on Islamic feasts.

In 1890, the Dutch scholar L.W.C. van den Berg (1845–1927), a former adviser to the Dutch colonial government on Oriental languages and Islamic law, wrote an alarming article in the influential Dutch political monthly De Gids, in which he painted the legal status of the Indonesian Christians in the darkest colours. His conclusion was that the cause of Christianity could not be expected to make much progress in the Indies unless the legal status of its Indonesian converts was greatly improved. ‘As a result of his lack of legal certainty’, Van den Berg wrote, ‘the native Christian is a creature that can hardly take any step on his path of life without stumbling over judicial questions’ (Van den Berg 1890: 97). 6 This harsh sentence could not fail to make a considerable impact on the powerful Christian political parties in the Netherlands. The improvement of the legal status of their Indonesian co-religionists, in order to expedite the spreading of the Gospel, became one of the main issues of their colonial programme in the years that followed. The Liberal Party, entrenched on the government benches until 1901 when a coalition of Protestant and Roman Catholic parties took over, also felt somewhat disturbed. In 1892, a state commission was established for the revision of the colonial legislation in the field of private law, with Van den Berg as its secretary. 7 It drafted an ambitious programme of action for judicial reform that did not, however, prove to be very effective in the years that followed. Legislation, certainly when it is prepared by a commission, is always a long-winded affair!

After 1897, a second line of approach was followed by the liberal Minister for the Colonies, J.Th. Cremer. Van Vollenhoven, then a young official at the Colonial Office, was his private secretary. Probably Van Vollenhoven inspired Cremer’s decision to embark on a new course. This new policy aimed at a codification of local adat law, taking the compilation of adat in the Christian regions of the archipelago (Minahasa and the Moluccas) first. J.H. Carpentier Alting (1864–1929), president of the native court (landraad) in Minahasa, later on a Leiden professor, prepared a compilation in two volumes of certain aspects of adat in that area (including adoption and matrimonial law). 8 But this tree too failed to bear fruit. The original S8 C. Fasseur intention was, of course, to afford more certainty to both the local population and the government officials. In this respect we should be aware of the Dutch judicial axiom,
one of the cornerstones of the Dutch civil code, that custom does not bind (does not give any rights) unless the law refers explicitly to it. Therefore, compared to Anglo-Saxon legal culture, the Dutch legal system allows very little room for any unwritten customary law contribution which does not have a basis in the written law. But the recording of adat threatened to amount to the simultaneous fossilization of native law, as it could then no longer accommodate itself to changing circumstances and local needs. Besides, the work proved to be of gigantic proportions and therefore a time-consuming affair. Not only was a prior local enquiry an absolute condition – even an expert like Alting took almost four years to complete the first chapters of his compilation on the Minahasa – but, as Van Vollenhoven himself rightly guessed, no fewer than 19 or 20 of such local codifications would be needed to chart the complex and highly diverse legal situation in the whole of Indonesia. This vision of a multiplication of overlapping codifications, prepared by an army of eager adat experts, taking half a century or longer, did not appeal much to government officials or to practising lawyers who were looking for an immediate solution to their many questions. The Batavian ‘desk-lords’, as Van Vollenhoven called them, were even less pleased with his ideas when he suggested that each adat codification would be abrogated automatically after ten or fifteen years in order to force the administration continuously to adapt the adat regulations to new developments and changed circumstances in native society (Van Vollenhoven 1905: 38–9).9

After the fall of the liberal government in 1901, however, the judicial policy of the Dutch took a new turn. The Christian Minister for the Colonies, A.W.F. Idenburg, commissioned Van den Berg to prepare a radical modification of the much-discussed article 75 of the government regulation of 1854. This resulted in a bill that was sent to the Dutch parliament in 1904. It was Idenburg’s successor, the liberal D. Fock, who took upon himself the task of defending this proposal in parliament at the end of 1906 (the legislative process in the Netherlands had, and still has, a lamentable reputation for tardiness).

The fact that Fock did not have any objections to endorsing a bill which was originally drafted under the responsibility of his political opponent and predecessor demonstrated that the main political parties in Holland had been able to come to terms with each other in the field of judicial reform in Indonesia. This coalition was indicative of a new era, that of the so-called ethical policy. This policy was aimed at the emancipation or elevation of the indigenous population. Welfare, modernization, and ‘good government’ were its catchwords. But how could these lofty aims be realized under the poor, obscure, and backward adat law system Indonesian society was subjected to? One of the leading liberal politicians of his days, C.Th. van Deventer, the man who had actually inaugurated the ethical policy some years before, Colonial dilemma 59 even saw a direct link between unification of law and common prosperity; the latter was not really possible without the former. Only Western law could ensure judicial certainty for the indigenous people, and industry and commerce would follow in its footsteps and flourish. In his words – and we should not forget that Van Deventer, like Fock, had been a professional advocate in Java for many years – ‘one must recognize that the natural development for Orientals in a colony administered by a Western power is that they, albeit slowly, will have to conform to Western law’. And in quoting Macaulay he assured his fellow members of parliament: ‘Uniformity when you can have it, diversity when you must have it, but in all cases certainty’.10

The comparison with other colonial territories, in particular British India – elaborated upon in the numerous appendices of the explanatory memorandum to the bill – strengthened Van Deventer and like-minded members of parliament in their belief that unification would win the day and that time would soon overtake dualism.
The obvious tenor of the government proposal was to pave the way for a general application of European law in native society. European law – concordant with the laws existing in the Netherlands – would be the rule. Adat law would be the exception, being relevant only if 'the different needs' of the indigenous population made any such deviation necessary. This would mean that adat law would be banished to the outskirts of civilized society; only in certain limited fields – for instance family law and intestate law – might it continue to play an important role, provided that the European law referred expressly to the use of adat law. In this way – and that was of course the great attraction of the government bill for many members of parliament belonging to the Christian parties in the Second Chamber – the problems surrounding the legal system of the Indonesian Christians would have been solved as well.\(^{11}\)

Success seemed to be within reach, but the outcome of the parliamentary debate was, after all, a bitter disappointment to Fock and Van Deventer. The bill was amended by a dissident majority in the Second Chamber and in its final version – promulgated on the last day of 1906 – an unworkable instrument for the government.\(^ {12}\) It was never put into force and was finally replaced by a new regulation in 1919. The failure was the direct result of the one-man crusade waged by Van Vollenhoven against the government proposals. In a very eloquent manner the young Leiden professor had managed to warn parliament against the far-reaching consequences of such a rash decision as the abolition of adat law without any prior enquiry.\(^ {13}\) His admonition that parliament must be wiser than the government had a marked effect. A majority of wavering liberals and Calvinist members of parliament (who were less convinced of the blessings of Western judicial civilization than the former lawyers Fock and Van Deventer) backed an amendment to the bill which turned its main intention upside down. Not adat law but European law would be the exception to the rule. Only when the needs of 60 C. Fasseur native society required it, declared the new article 75, could European law be declared applicable. The burden of proof was thus actually turned 180 degrees. The old axiom that the colonial government should be cautious about interfering with native institutions and customs had carried the day. As one speaker in parliament ironically summarized the debate: the amendment had been a lifeboat for the minister when his ship was sinking, but it had brought him to the wrong shore, that is to say it had brought him back to the same shore of the river which he had wished to cross!\(^ {14}\) And so it was.

**Stalemate**

In the light of hindsight the long discussions on the bill of 1904 were the decisive moment in the drive towards unification of law in Indonesia during the last decades of colonial rule. Not unification as such but legal certainty had been the ultimate goal of the supporters of judicial reforms. If legal diversity had not obstructed this ideal, it might have been acceptable after all. After 1906, the movement for unification gradually lost its momentum and finally petered out. The 'unifiers' were satisfied when a new law, adopted in 1919 and giving article 75 its definite form, declared that private and public law must be regulated by government ordinance, which implied that adat law should be codified.\(^ {15}\) So, as the years passed by, Van Vollenhoven was able to reap the fruits of his campaign against the expansion of Western law in the Archipelago. His students obtained important positions in the colonial administration and his ideas received a more general acceptance as time went by. The only lasting achievement of the unification lobby was the adoption in 1918 of a unified penal code for the Netherlands Indies, in which the separate codes for Europeans and natives were amalgamated.\(^ {16}\) But this was more a question of form than of substance, as both penal codes had been more or less identical already. The penal code of 1918 – almost identical with the Dutch one, with some special provisions for the implementation of punishments meted out to Indonesian offenders – is still valid in present-day Indonesia. But proposals for the introduction of a uniform code
of criminal procedure for all groups of the population – Indonesians, Chinese, and Europeans – broke down in 1919, and such was also the fate of the draft of a unified code of civil law published in 1923. This code, which numbered 2220 articles (!), was safely locked up in a desk after a blistering attack by Van Vollenhoven (1925) on this odious specimen of a 'ready-made judicial product: a unified private law for the Indies'.

European law for everyone would from then on be a thing of the past. And Van Vollenhoven did not miss the opportunity to point out that even in India – for such a long time upheld as a striking example to all 'unifiers' – that is, lawyers, mission friends, and radical liberal politicians – a debate was going on about the advantages of the codification of adat law. He was also very effective in his fight against a government proposal that would, if successful, have compelled the Indonesians to the full acceptance Colonial dilemma 61 of European legal principles with regard to the ownership of land, for the sake of the large-scale agrarian development from which Western enterprises would have profited most. This bill threatened to become a repetition of the history of 1866. In 1919, it inspired Van Vollenhoven to write a bellicose pamphlet, De Indonesiër en Zijn Grond (The Indonesian and His Land) whereafter the bill was withdrawn by the Minister for the Colonies.17

On the other hand, Van Vollenhoven was less successful in the promotion of a real adat alternative that could respond to the needs of modern society. In 1910, he made a courageous attempt to draft A Specimen Code of Indonesian Adat Law (Een Adatwetboekje voor Heel Indië). In only 111 articles a whole set of co-ordinated adat law principles, ready for immediate use by the judge, was presented to the reader. But the booklet proved to be too rudimentary an edifice to give a satisfying answer to the question of how adat law could be made operational in practice. For instance, in the chapter on adat penal law (Van Vollenhoven’s draft covered not only private law but also public law), punishable offences were defined as facts that conflicted with adat law and/or facts that violated the good faith required in society, unless the judge was of the opinion that this behaviour had been ‘justified by the demands of self-interest’! (Van Vollenhoven 1910: 31). Here and elsewhere legal certainty had been entirely lost sight of. This guideline for the judge was in reality the proclamation of his complete freedom to invent the law that, depending on the circumstances, suited people most. Thus it opened the door for judicial arbitrariness. In his later years Van Vollenhoven, though, proved himself to be a fierce opponent of any codification of adat law, for fear that it might stifle a harmonious development of native customs and institutions. At most, all the study of adat law could in his opinion offer the judge was a manual to assist him in making up his mind in any concrete case he might have to deal with.18

Perhaps this inability to present a workable alternative was not so much Van Vollenhoven’s fault as that of adat law itself. Could it really be a useful instrument for responding to the needs of the individual and society in a rapidly changing and modernizing Indonesian world? Van Vollenhoven and his students might have been so busy in pursuing their enquiries and gathering data about adat law – a work that by definition could never be finished – that they never seriously got round to answering this crucial question. It was Professor J. de Louter, one of the few critical voices in the 1920s not silenced by the great master, who formulated the dilemma sharply. Is it enough, he asked, to judge the policy of a colonial government according to the degree to which it respects native institutions and adat law, or should the criterion be that such a government must give the law that best suits the needs of modern society, thus preventing Indonesia from turning into an open-air adat museum? For De Louter himself the answer to this question was not difficult. He considered the judgement of a colonial administration solely by the yard-stick of respect for native customs and adats ‘not only one-sided and unfair but moreover short-sighted and dangerous’ (De Louter 62 C.
Fasseur 1929: 666–7). Although it would be unfair to postulate that Van Vollenhoven had entirely shut his eyes to these dangers, the question may nevertheless be posed as to whether he was entirely aware of the risk that his protectionist policy could deny Indonesia many opportunities for further development.19

An alternative might have been the introduction of an intermediate system of law that tried to combine elements of both Western and adat law in a delicate equilibrium. The concept of such a 'mixed' law for all groups of the population, Europeans and Indonesians alike, had for instance found a stout defender in the prominent Dutch East Indies official I.A. Nederburgh, who also edited a magazine, Wet en Adat (Law and Adat), for some years at the turn of the century.20 But there were severe doubts about the feasibility of this approach, considering the many years it would take to finish the job. And would the outcome not be – to draw a modern parallel – like a Javanese gamelan orchestra conducted by Herbert von Karajan, or, conversely, like the Berliner Philharmoniker conducted by a Javanese dalang, the presenter of the Javanese shadow play (wayang)?

As in other respects – for instance in their attitude towards the Indonesian nationalist movement – the colonial policy of the Dutch in the field of legal and judicial reforms, so hopefully inaugurated at the very outset of the twentieth century, ended in the last decade before the Second World War in a deadlock, in which there was hardly any room for manoeuvre. Although the pride of the Dutch in their achievements in the field of adat law studies might have been justified, seen from a scientific point of view and in an international perspective, here too they were unable to find an adequate solution to the many problems which a rapidly modernizing colonial Indonesia had to face.

Aftermath
What did Indonesians themselves think of the judicial reforms and the adat law policy of the Dutch? As is usual in a colonial situation, their opinion was never asked. Moreover, in the colonial era there were hardly any Indonesian lawyers to give an opinion. Rudimentary legal training for Indonesians was not introduced until 1909. A complete law faculty was opened in Batavia (Jakarta) only in 1924. This faculty would become the cornerstone of the first fully fledged university in Indonesia, founded in 1940 after the German occupation of the Netherlands. One of the most prominent professors in this law faculty was Bernard ter Haar, who taught adat law. This pupil of Van Vollenhoven was also the author of a well-known work on Indonesian customary law, the first full treatise on this subject to be translated into English: Beginselen en Stelsel van het Adatrecht (1939), translated as Adat Law in Indonesia.21 In 1942, on the eve of the Japanese invasion of Indonesia, the colony numbered 194 professional advocates in all, of whom 122 were Dutch, 36 ethnic Chinese and only 36 ethnic Indonesian. Moreover, in 1939 there were around thirty academically trained Colonial dilemma 63 Indonesian judges, all of them, with one exception, sitting in native courts, although Dutch judges were still in the majority in this branch of the judiciary as well (Lev 1985: 60, 68, note 19).

Many of these Indonesian lawyers had received their university training in the Netherlands, in particular at the University of Leiden, for want of an Indonesian academic alternative. The first Indonesian who submitted his doctoral dissertation to Van Vollenhoven was Moestapa in 1913 (on the adat of the Sundanese in West Java). He was followed by seven other fellow countrymen who wrote their theses under the supervision of Van Vollenhoven or his close colleagues. The best-known and most influential of them was Supomo, who became Ter Haar's successor to the chair of adat law at the Jakarta university and the first republican Minister of Justice in independent Indonesia after 1945 (Sonius 1981: XXXIX, LXV, note 23). It
was he who drafted the constitution of the new state. Supomo’s attitude towards adat law was highly ambiguous. Although the writer of two books on adat law before the war and a well-known expert, he turned coat after 1945. And so did the large majority of influential Indonesian lawyers.22

The choice presented to independent Indonesia between the unifying Western legal tradition and adat law has thus been resolved in favour of the former. The European codes on both private and penal law have retained their validity, although their applicability in practice is limited to the rather small upper strata of Indonesian society and economic life that require the intervention of professional judicial institutions. Adat or unwritten law is usually reserved for the lower classes, mainly rural Indonesians, at the village level. Adat judiciary courts, the position of which was strengthened by the Dutch in the last decade of colonial rule, especially in the islands outside Java, were abolished during the war and during the years of revolution that followed. Only Islamic courts survived. In the words of Lev (who is evidently overstating his case): ‘the substantive law of post-1945 Indonesia remained almost exactly the same as it was in 1941’ (Lev 1985: 69).

M.B. Hooker (1975: 283) thinks it ironic that the views of opponents of Van Vollenhoven, who were in his opinion the real colonialists, have come to prevail in modern Indonesia after all. This should come as no surprise to us. In 1928, an influential Indonesian member of the Dutch East Indies Volksraad (People’s Council, a sort of representative assembly, constituted in 1918, with mainly advisory powers) had already observed that ‘the admiration of adat law is to be found more among Europeans than among Indonesians’ (Cassutto 1935: 29, note 29). And Van Vollenhoven himself thought it necessary to warn the Indonesian protagonists of unified law that their aspirations were wrong, as legal differences between Europeans and Indonesians could be justified because of the different conditions prevailing in native society (Cassutto 1935: 29, note 30). This reproach was indicative of the suspicion with which Indonesian intellectuals and nationalists before the war viewed the Leiden adat school. ‘Unification’ was their slogan, not the endless judicial and ethnic fragmentation and differentiation which seemed 64 C. Fasseur to be the inseparable sisters of the protectionist adat law policy (Lev 1973: 4–5). How could a unified and independent country survive without a unified regime of law? How could a ‘primitive’ adat law be a suitable vehicle for modernization? In spite of Van Vollenhoven’s honest intentions, adat and all that he had stood for were seen as an impediment to further development, adat chiefs as tools of the Dutch (which indeed they often were), and adat law as fundamentally a Dutch, not an Indonesian, creation (Lev 1985: 64). This proved to be a bad omen for the position of adat law in postwar independent Indonesia.

Notes

1. I will not try to describe in detail here the very complicated and judicial dualistic situation that existed in the Netherlands Indies during the last century of colonial rule, the period before 1848 having been admirably summarized by John Ball (1982). Such an elaborate survey would burden the general argument of this essay and be a very tedious affair indeed. It may suffice here to mention that useful English-language surveys of this complex matter have been presented by Hooker (1975: 250–300), Lev (1973, 1985) and Sonius (1981).

2. Ball (1982: 224). The Government Regulation of 1854 (art. 109) made a distinction between Europeans and those equated with them (native Christians) on the one hand, and ‘natives’ and those equated with them (Chinese, Arabs, and other ‘Orientals’, until 1899 including Japanese) on the other hand. Each of these categories was subjected to its own system of public (administrative, penal) and private (family, civil, commercial) law. The question of who belonged to the European and who to the
native group was not decided by the law. The criterion was an ethnological one and did not cause many difficulties in practice. Not until 1920 were the inhabitants of the Netherlands Indies given the right to ask for a judicial decision about their classification if they wished so. By a law of 31 December 1906 (but not operative until 1 January 1920) a new legal division was made between: (1) Europeans (including Japanese, Siamese, and other non-European nations with a European system of family law); (2) Natives (Indonesians including Indonesian Christians); and (3) Foreign Orientals (Chinese, Arabs, and other Asiatic nations not covered by (1)). This mainly racial classification, however, was not definitive for the private law that was applied to the different categories and subcategories. Indonesian Christians, for instance, had the same marriage law as the European group; after 1855 the commercial law was the same for Europeans, Chinese, and Arabs.

5. H.H. van Kol in Handelingen van de Tweede Kamer der Staten-Generaal, 10 October 1906: 40. Van Kol referred to the so-called bangun or compensation money for manslaughter in adat penal law.
7. This not very well known state commission (it was not even mentioned by Van Vollenhoven in his work on the discovery of adat law) was established by a royal decree of 30 July 1892 (in Nationaal Archief, The Hague, Archief Kabinet van de Koningin, Portfolio 3117).
8. Fasseur 1989a. Van Vollenhoven’s warm support for Cremer’s approach (he later changed his mind, however) appears from the publications mentioned in note 9.
9. See also Van Vollenhoven’s comments (Verslagen der Algemeene Vergaderingen Indisch Genootschap, 2 December 1905: 19–22) on a lecture by I.A. Nederburgh on the topic ‘Legal Reform in the Netherlands Indies’.
10. C.Th. van Deventer and D. Fock in Handelingen van de Tweede Kamer der Staten-Generaal, 10 October 1906: 35–6 and 11 October 1906: 59–65. Van Deventer, who wrote a famous article (1899) on Holland’s ‘debt of honour’ to Indonesia, was also the author of a long later article on ‘Legal reform in the Indies’ which had Macaulay’s saying as a motto (Van Deventer 1905).
11. This is evident from the lengthy debates in parliament (Handelingen van de Tweede Kamer der Staten-Generaal, 10–16 October 1906: 30–109).
12. De Louter (1907) gives a concise summary of the debate.
13. See the publications by Van Vollenhoven mentioned in note 9.
16. The work on this unified code started in 1911 and was finished in 1915. It was carried out by a subcommittee of the state commission of 1892. The work on the code of criminal procedure came to grief as the Dutch were unwilling to confer equal procedural guarantees upon Indonesians.
17. Other, less controversial legislative measures aimed at fostering greater economic viability also met with a lot of opposition from Van Vollenhoven whenever they took too little account of adat. An example is the 1908 ordinance on credit facilities, which provided for the encumbrance of land in cases of debt, thus avoiding the often onerous consequences of the adat way of handing over land in return for a loan (Sonius 1981: XXXVIII).
18. In 1931, for instance, he was to declare: ‘The problem cannot be solved by codification, or replacement, or unification, or partial retention of adat law, nor by such revision or publication of it as jurisprudents or policy makers see fit to make, but only by the people’s own will to maintain, expand and rejuvenate that law’ (Holleman 1981: 260).
20. See Nederburgh’s 1905 lecture on ‘Rechts herneming in Nederlandsch Indie’ (Verslagen der Algemeene Vergaderingen Indisch Genootschap, 2 December 1905: 1–19); also Sonius 1981: XXXVI–XXXVIII.
21. This was also the first time (1948) that a major work on adat law was made accessible to readers who did not understand Dutch. Ter Haar died during the Second World War. Resink (1974) discusses the role of Ter Haar in the intellectual life of colonial Indonesia and his impact on his Indonesian students (three of them wrote doctoral dissertations on adat law under his supervision).
22. Lev (1985: 69) stresses the point that most Indonesian advocates who practised in both the courts
for Europeans and the native courts were contemptuous of local adat and adat institutions; being nationalists they preferred ‘modern’ legal institutions and procedures even if these were of European origin. A summary of Supomo’s own view on the future of adat law appears in his short biography (1949) of his predecessor Prof. B. ter Haar.

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Bahasa hukum Belanda mengadopsi adatrecht kata untuk pertama kalinya pada tahun 1910; Kamus Belanda melakukannya pada tahun 1914.

How could they have studied adat without sufficient knowledge of native vocabulary and customs?