Custom, that is before all law (2007)

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In this chapter I am concerned with key issues in the history of adatrecht. The adatrecht idea was developed in the first half of the twentieth century by the Leiden School. This School was never tightly defined. Centred on the University of Leiden, it consisted mainly of Indologists (scholars interested in what was then the Netherlands Indies), academics (mainly legal academics and practising colonial lawyers) and administrators on furlough. Its members tended to identify custom (adat) with law (recht). I argue that this was a mistake in method which led ultimately to administrative sterility. In reality, the two concepts must be distinguished. Custom, nevertheless, is certainly relevant to law and can influence the development of law. I show this by reference to one of the traditional patterns of marriage which European colonials discovered in Sumatra. I provide a brief summary of the history of the adatrecht idea, indicating the victories that it achieved in the 1920s and the limitations of the idea which started to emerge in the following decade. These limitations were intrinsic to the idea as originally formulated by Cornelis van Vollenhoven, the founding figure of the Leiden School. Van Vollenhoven conceived of adat and adatrecht as manifestations of a peculiarly Indonesian world view which was essentially alien to European – particularly Dutch – thought. Although he took great interest in the differences found among the various legal communities of Indonesia (of which he distinguished nineteen major groups), he also held that there were essential common elements which united them and at the same time set them apart from European legal institutions.

To illustrate the limited utility of this East–West dichotomy, I concentrate on one important point in the doctrine of the Leiden School with respect to land rights: the principle of beschikkingsrecht or ‘right of allocation’. For years this was a central matter of dispute among Dutch colonial administrators and legislators, with Van Vollenhoven and the Leiden School arguing for the integrity and validity of the beschikkingsrecht principle. In what follows I show that one aspect of their argument, its emphasis on the holistic quality of beschikkingsrecht, does not bear close analysis. In addition, I discuss some aspects of the Leiden theory of customary criminal law which reflect similar and equally misleading forms of essentialism and Orientalism. Finally, I suggest that the ineffectuality of the Leiden approach might have been avoided had the judiciary followed the suggestion of another Dutch legal scholar, Barend ter Haar, by adopting a principle of precedent (on the pattern of the Common Law) as a means by which courts could transform custom into law. At a time when adat has again come under consideration as a basis for local rights and obligations, Ter Haar’s proposal may still have relevance today.

Law, custom, and the state
Cornelis van Vollenhoven (1874–1933), the founder of the Leiden School and of the discipline of adatrecht studies at Leiden University, unequivocally identified adat, the conventions of Indonesian community life, with recht, a word conventionally translated into English as ‘law’. I offer an antithetical interpretation, that adatrecht was a Dutch invention. And I distinguish custom from law. I maintain that communities can function without the institution of law: to speak or write of ‘informal law’ in such communities is simply to contradict oneself. In stateless societies, custom functions to organize and to moderate social behaviour. Custom can have legal significance: it may contain the material that is made into law. But law itself, I maintain, is essentially explicit: it depends on the existence, within the society, of some third party – superior and disinterested – who or which functions to resolve conflicts in that society and, acting in that role, to make plain, to its members, the obligations to be observed, and the
opportunities to be enjoyed.

Although adatrecht as such was a Dutch construction, many authentic customs did acquire legal significance under Dutch rule. An example is the Sumatran institution of jujur marriage. Jujur, bride-giving marriage, was widespread in Sumatra, mirroring the parallel institution of semendo or groom-giving marriage. The paramount consideration of custom in the districts which practised one or both of these arrangements was the location of the continuing family. To preserve the family line in its district, spouses of the one gender or of the other had to be brought – or bought – in to take up domicile with the enduring family and maintain the gender balance among its members. In exchange the recipient family would pay the donor family a bride price (jujur) or (under semendo) a groom price, the amount of which was negotiated between the two families.

Some colonial observers, both English and Dutch, disapproved of jujur marriage. Wink (1926: 30) opposed it because high bride prices made for late marriage, and so allegedly inhibited the growth of the population. Perelaer (1914: 456) claimed that in the Lampung region bride prices, which were paid to the bride's father, had been set so high that there were 'many unmarried girls of twenty or thirty – yes, even forty – years old'. Marsden (1975: 273) suggested that jujur increased the incidence of polygamy. Another eighteenth-century observer complained that jujur gave rise to endless litigation (Marsden 1975: 225). Later critics noted that jujur marriage allowed the bride no freedom of choice, and often led to unhappiness and suicide (Wink 1926: 36). Jujur marriage, then, was a highly problematic institution in Dutch eyes. Should the colonial government attempt to abolish it, or recognize it in law and attempt to reform it? Or should the Dutch refrain from interfering in what was obviously a time-honoured popular institution?

Jujur is an example of a genuine custom which under stateless conditions served many of the same ends that law serves in state societies and which, with the arrival of a colonial state, automatically acquired legal implications. Nevertheless, the differences between custom and law do not end with the issue of state enforcement. Another difference is that law is formal. It tends towards the explicit – either in its detailed formulation of code and statute or in the minute distinctions it draws between cases in search of precedent. Custom, by contrast, may be observed by the members of a community without being made explicit. It would be a mistake, according to my analysis, to assert that custom becomes law by a process so gradual that the change is imperceptible. The change is quite discrete and, like mutation in the theory of evolution, it is always in principle detectable.

Some customs may be too weak, in their original context, to acquire legal significance under state conditions. Stateless communities, however traditional, are seldom without any plurality of opinion or scope for innovation. Early in his career Van Vollenhoven distinguished between adatrecht and adat in general (Josselin de Jong 1948: 5) but in his later and better known work, as already noted, the two concepts became interchangeable. The idea that custom is itself a form of law, and that it is in folkways that the essence of law is most clearly manifest, has remained influential in more recent times, particularly in the Netherlands (Griffiths 1986; Remie and Strijbosch 1981). Historically this idea was associated with the theory of the ‘organic state’, as propounded in the second half of the nineteenth century by many European intellectuals – among them the legal scholar Jacques Oppenheim, Van Vollenhoven’s mentor through his undergraduate years (see Bourchier, Chapter 5, in this volume).

In a society where law operates, the role of the judge is formally separated from the roles played by the legislator, by the administrator and by the enforcer. Court sittings are governed
by formal rules of procedure. The courts characteristically work to minimize differences in status between persons and to achieve predictability in their decisions (on this see Hart 1961: 27–8, 134–5). A community governed by custom, by contrast, lacks codes, courts, and records of cases. It has neither police sanctions nor any identifiable sovereign institution or person. It has no formal rules of procedure. Instead, conflicts and problems are seemingly settled by informal convention or consensus.

Law, as I understand it, is an indispensable ingredient of the state: the concept of a territorial polity having sovereign jurisdiction within its boundaries is necessarily married to an apparatus of courts which publish putatively predictable decisions. If the state is the sovereign, then law is the sovereign’s consort. The problem of adat (or, in other emergent postcolonial polities, of custom) becomes significant only in the process of state formation. As I have argued elsewhere (Burns 2004: 249–51), the adat(recht) ideology was certainly significant in the process of state formation: it offered a sacred myth of national identity to Indonesians in their struggle for independence. But adatrecht, of itself, was impotent; it could not mutate spontaneously into material for the practical administration of a national state.

After this analytical excursion, let us return to the problems created by the institution of jujur. How much of the convention known as jujur was to be regarded as law? How much should the colonial state interfere? To what extent would justice be infringed if this longestablished institution were to be terminated? Did not the Sumatran peoples concerned – the Rejang, the inhabitants of Lampung, and others – have some sort of right to practise jujur? On questions such as these Van Vollenhoven and his followers opted either for non-interference or for gradual facilitation of change. Above all, they opposed the forcible replacement of indigenous institutions by alien (Dutch) institutions. In their view, law – recht – was something like a plant. Even when cultivated, it could best be allowed to develop along its own natural bent. A major consideration here was that a practice such as jujur could not be viewed in isolation. Adat, in the understanding of the Leiden School, formed a seamless web, an integrated whole. Changing one part of it would have inevitable and perhaps disastrous consequences for the whole. How, for instance, would the institution of semendo respond to the abolition of jujur? Would it survive? And what would be the flow-on consequences for the conventions of inheritance? For family property? In view of uncertainties like these, it was argued, colonial administrators were best advised to show respect for adat and adatrecht as a whole.

Underlying the orthodox Leiden doctrine was a concept of law (recht) as a given people’s version of justice: something to be discerned, through diligent study, in the assumptions and the practices of that people. Against this I would offer an antithetical understanding of law – and of the state – which derives, albeit at some remove, from the social contract theory set out by the seventeenth-century English political philosopher Thomas Hobbes. Hobbes’s theory establishes a rational basis for state authority – and for the obedience of the subject or citizen to that authority – starting from the material human situation, without reference to supernatural forces or metaphysical entities (Hobbes 1996). ‘Rights’ are treated not as pre-existing entitlements which the legislature or courts should recognize but as discretionary privileges awarded – or revoked, or withheld – by the sovereign state. Without a sovereign, in this view, all talk of rights is meaningless.

At a later stage in the history of social contract theories, in 1690, another English political philosopher, John Locke, made an attempt to reserve some particular rights as ‘inalienable’ after all: that is, to place them beyond the scope of any agreement which human beings might negotiate for the sake of benefits (mutual protection or security of agreements, for example) offered by the state. Among these inalienable rights was the right to property. Under the
teaching of Locke, no sovereign holds absolute power and no state can take away the subject-citizen’s property without his approval. This concept of limitation was similar to an old one which had survived the intellectual turmoil of the European Renaissance and Reformation. During Christendom’s early encounters with the non-European world, the Iberian jurist Francisco de Vitoria and the Dutch jurist Hugo de Groot (Grotius) were already concerned about, and committed to, the rights of pagans (whether Incas or Javanese) vis-à-vis European colonizers (see Hooker and Villiers 1988: 28–30).

The relevance of this history for our purposes becomes clear when we consider the following statement of legal principle by the twentieth-century Dutch jurist Ter Haar (1951: 325):

*It is a construction long since abandoned, that the establishment of a new authority should wipe out all existing law [recht] . . . No one has ever claimed that the Indonesian communities [gemeenten] were extinguished upon the establishment of Dutch authority and . . . not restored until 1854.)*

In the 1990s the Australian High Court brought down judgements (Mabo, Wik) which meant that Australian Aboriginal people could exercise legal rights – native title – over certain lands. There are two ways of looking at these judgements. The first view would interpret the judgements of the court as recognition of real, but neglected or forgotten, rights which had been established long before the beginning of colonial government. The second view is more complicated: that the findings of the court established effective law prospectively, but that this required retrospective validation in the form of a myth of legal continuity. For most practical legal purposes, it is a matter of indifference which of the two views is adopted. But in the context of the present discussion a key question is whether rights, or the law, should be taken as given, or whether human beings should seek consensus – general agreement – as a pathway to legal order. Does a piece of land, for instance, belong exclusively and perpetually to members of a particular family? And, if that family ceases to exist inasmuch as all its members are dead, is it impossible now that the land in question should belong to anyone? Or can society now take it over and allocate new rights to it on a consensual basis?

The analysis devised by Hobbes was meant to establish, and then to satisfy, the paramount need of the people of any polity to feel confident about the law. Citizens need to know whom they must obey, and to what rules or conventions they should conform, in order to lead satisfactory lives. The long history of elaborations of the social contract idea, of which Locke’s was the first, shows that the quest for legal certainty is eternally frustrated because, as formulations of legal matters become easier to understand, they also become simplistic. That is to say, they leave less room for the complications of the hard cases. Simple formulae often fail to satisfy the public’s sense of justice.

The public sense of justice is the basis of the very different concept of law associated with the German Romantics’ Legal-Historical School (Rechtsgeschichteschule), and in particular with Karl Von Savigny. Von Savigny (1814) taught that each system of law (Recht) was specific to a given people (Volk, nation). A good part of the teachings of the Rechtsgeschichteschule reflected the judgement that it was naive and counter-productive to search the statutes of the sovereign state hoping to find the law. The followers of this school abandoned codification – the instrument of the state – as a dead letter, and instead sought the law (Recht) in the practices of the people (Volk) identified by that law. This teaching influenced Van Vollenhoven in his career-long dedication to the study of custom and legal values among the peoples of the Indies.
Beschikkingsrecht: custom or construct?
In line with the approach of the Rechtsgeschichteschule, Van Vollenhoven searched the copious data compiled by conscientious colonial officials, government commissions, scholars and missionaries, looking for distinctively national – that is to say, Indonesian – features. In adat, he believed that he had found them. At the core of his teaching, and his public polemics, lay the doctrine of beschikkingsrecht or ‘right of allocation’. This, he claimed, was a distinctive set of indigenous rights over land, an amalgam characterized by six features which, he claimed, emerged from the disinterested investigation of authentic, autonomous communities within the Indonesian legal-cultural area. It was detectable in (at the very least, the history of) almost all of the 19 customary law areas (adatrechtskringen) into which he had divided that legal-cultural area. The 19 areas were roughly in accord with the major linguistic and ethnic divisions of Indonesia. ‘Almost nowhere’ in Indonesia, according to Ter Haar (1939: 55), were communities to be found which manifested no evidence of the right of allocation: ‘perhaps on the Banggai Islands, perhaps among the Ngada of Flores’. Having registered these acknowledged exceptions, the reader can now consider the claim that otherwise, beschikkingsrecht ‘manifests itself in one form or another pretty well all over the Archipelago’ (Van Vollenhoven 1909: 27).

[These] adat restrictions must, of course, have been thought out and proclaimed at some stage, … perhaps by the villagers themselves? – [or] through unwritten regulation? – [or] by superior authority? … Yet it remains rather odd that in an era devoid of [modern] means of transport … , printing presses or newspapers, throughout the whole of Java (it might be said: the whole of the Indies), those restrictions were apparently as uniform in tenor and content as military regulations dispatched from a single command centre.
Van Vollenhoven (1919: 8)

In order to understand beschikkingsrecht, it is first necessary to understand another concept: rechtsgemeenschap, rendered in English by Holleman (1981: 43), whose usage I shall follow here, as ‘jural community’. The jural community was either a kin group, a territorial group, or a mixture of both. Each adat law area (adatrechtskring) comprised many jural communities, all conforming more or less to its basic conventions. The members of a jural community followed those conventions as a distinctive lifestyle, and as a system fulfilling most of the functions which in other types of community would have been performed by the law.

The six characteristic features of beschikkingsrecht as defined by Van Vollenhoven were first specified in his 1909 booklet Miskenneningen van het Adatrecht, or ‘Misevaluations of adat law’ (Van Vollenhoven 1909: 19–20). They can be summarized as follows.

1. **Community competence with respect to undeveloped land.** The jural community and its members may make free use of virgin land within its territory. Such land may be brought under cultivation, or it may be used to establish a village, or it may become common land for gleaning or for other purposes.
2. **Use of community land by outsiders.** Other parties may make similar use of the land, provided always that they have received the permission of the jural community: unpermitted use constitutes a trespass.
3. **Payment for use of community land.** Members of the jural community may – but outsiders will – be required to pay some charge or to give some gratuity as an acknowledgement for such use.
4. **Community competence with respect to land under cultivation (reserved power).** The jural community retains in greater or lesser degree a residual right to intervene in the disposal of lands which have already been brought into use.
5. **Collective (territorial) responsibility with respect to outsiders.** In the absence of any other party that might be held accountable, the jural community makes good any loss or damage or harm suffered by outsiders on its territory.

6. **Perpetuity of community rights.** The jural community is not competent to surrender these rights absolutely.

Beschikkingsrecht became the central issue of debate through the two decades which followed the publication of Miskennen van het Adatrecht. A senior departmental adviser on agricultural policy, G.J. Nolst Trenité, led the counterattack launched against Van Vollenhoven’s ideas by members of the Dutch government and the colonial bureaucracy. The document commonly known as the Domeinnota (Nolst Trenité 1916) asserted the superior right of the Dutch colonial administration to administer and allot the lands of Indonesia for development by outsiders. Traditional indigenous claims and conventions, in the view of Nolst Trenité and his numerous supporters, were a minor consideration. This debate eventually polarized around schools of thought based in two Dutch universities: Leiden, where Van Vollenhoven worked and his views prevailed, and Utrecht, where they were opposed (Burns 2004: 15–41, 67–89).

In 1918 Van Vollenhoven, by extraordinary industry and a magnificent display of cogent academic argument, was instrumental in frustrating a government plan for a parliamentary act to remove from rural Indonesian communities such protection as previous metropolitan laws had, at least in principle, offered them in matters of land use (Burns 2004: 22–41; Jonkers 1930: 46–7). The ensuing debates raged through the 1920s in academic journals, and even in the national press. The conflict was at times bitter and personal (Burns 2004: 77–89). Nevertheless, Van Vollenhoven and his disciples (the Leiden School) had established their discourse. This was evident in two developments during that decade which can be regarded as recognitions of, or even victories for, the adatrecht ideas. In 1925, firstly, the advocates of adatrecht managed to secure the revocation, in new constitutional provisions, of the ‘repugnancy principle’. This meant that in contrast to the previously existing situation, adatrecht might apply even where it seemed to be in conflict with a generally recognized principle of equity and justice: that is, judges in the relevant courts were no longer bound to make their decisions by reference to the norms of the Netherlands (Burns 2004: 95). In 1927, secondly, European and Indonesian members of the Volksraad (People’s Council), stimulated by the arguments of two ‘Leideners’ resident in Indonesia (Logemann 1927; Ter Haar 1951), raised the issue of the beschikkingsrecht and moved for a government enquiry. In 1928 an Agrarian Commission was accordingly formed and charged with the task of deciding whether it would be desirable in principle to abandon the established ‘domain principle’, whereby uncultivated or undeveloped land automatically belonged to the state rather than to indigenous communities. The composition of the commission was favourable to the Leiden School (Burns 2004: 103–4), and as expected its findings were adverse to the domain principle and positive with regard to beschikkingsrecht. With this second victory, by 1930 the supporters of beschikkingsrecht felt they had achieved a paradigm shift in the discourse concerning law for the Indonesian peoples. There was a greater chance now that the courts of the Netherlands East Indies would recognize indigenous rights in their decisions.

Despite this achievement, adatrecht in the last decade of Dutch rule in Indonesia lapsed into comparative ineffectuality. That the adatrecht project ran into a kind of dead end had to do with the methods and doctrine of law which Van Vollenhoven had espoused and expounded to his followers. Before expanding on this, I want first to examine closely one particular feature of the beschikkingsrecht to show that, despite all the defences offered for the general principle in the colonial debates, it was not reliable. I shall then also allude to another major
Leiden theory, that of adatstrafrecht or ‘adat penal law’, which under close testing likewise proves to be less solid than its Leiden exponents liked to claim.

Van Vollenhoven had insisted that the amalgam of principles which constituted the right of allocation was a private law matter. Against Van Vollenhoven, I would contend that the informing components of beschikkingsrecht, to the extent that they had the character of law, were public rather than private in nature. I suggest that the various jural communities – be they kin groups, descent groups, or territorial settlers’ associations – were, in their several autonomies, nascent village democracies or republics. Van Vollenhoven, for several reasons, could not concede this. To start with he was, as Daniel Lev (1984: 153) has observed, antipathetic to the idea of the contractual sovereign state. For him, the nation was constituted of the people, by the people. The institutions of the state (its civil service, its executive and its legislature) were, all of them, unavoidably artificial. For him a nation was, by definition, ‘natural’, innate – a collectivity to which people belonged by right of birth. In any case, Van Vollenhoven accepted the Dutch overseas empire as a fait accompli and found it disloyal to the realm to endorse national independence as the goal of the colonized peoples. Temperamentally unsuited to the role of revolutionary, throughout his life he remained an ardent Dutch patriot – notwithstanding the accusations of his opponents at Utrecht University and in the imperial establishment.9

Nevertheless, the various forms of competence which he attributed to jural communities resemble those powers which might be manifest in emerging polities – communities evolving towards sovereign statehood. The dominant say over matters of land rests with the community; the community can assign land and it can interfere in the use made of that land. And it can revoke any previous allocation, whenever neglect or misuse of land might prompt such an initiative. The community also accepts responsibility for the security of outsiders present on its territory. If this last element were recast in the discourse of the fully developed sovereign territorial state, it would be expressed in terms of diplomatic conventions of respect and protection for foreign citizens under international law.

It is important here to appreciate that the Leiden School doctrine distinguished two types of corporate responsibility (Roest 1941: 82). The obligation to outsiders was based, according to the right of allocation doctrine, on considerations of territory. It was not to be confused with the adat tanggung-menanggung, which referred to the sharing of responsibility, within the family or kin group or community, for debts owed by any of its members. Nor was territorial accountability on a community basis to be confused with any kind of collective responsibility imposed by an external authority, such as a sultan or a colonial governor.

**Van Royen’s challenge**

An important empirically based challenge to the idea of a pan-Indonesian beschikkingsrecht as defined by Van Vollenhoven was provided in 1927 by J.W. van Royen, a colonial administrative officer on furlough, in his Leiden dissertation (1927). This was a study of the land and water rights of the margas (here a community unit defined in purely territorial terms) in Palembang, one of the four sub-divisions of the adatrechtskring of South Sumatra.10 Although Van Royen identified himself with the Leiden School in opposition to that of Utrecht, his thesis contained a challenge to the right of allocation concept as Van Vollenhoven had spelled it out. I believe that Van Royen saw his work as an enriching addendum, presenting details from one particular locality to enhance the tapestry of academic knowledge. Nevertheless his approach differed significantly from that of Van Vollenhoven, who had presented the beschikkingsrecht as a unitary concept, a constituent of an archipelagic, Indonesian identity. Van Royen, by contrast, argued in his thesis that the pattern of uses with
regard to land ought properly to be considered as incidental and developmental, rather than as vestigial or imperfect conformations to an original or underlying pattern.

The features which Van Vollenhoven had identified as defining beschikkingsrecht were not found everywhere even within the South Sumatran adatrecht area. The Kubu people, for instance, were not peasants but hunters and gatherers, and in their case the right of allocation concept had no applicability. A related group, the Anak Laitan, had shifted to sedentary farming only in the nineteenth century, and here too it was not reasonable to talk of the discovery of an age-old beschikkingsrecht (Burns 1978: 120–1). Van Royen next turned to the Rejang. This was a people with a more established farming economy, yet no record of a Rejang right of allocation could be found in Van Royen’s primary historical source, the 1811 edition of Marsden’s meticulous History of Sumatra (1975). Among other groups, however, Van Royen did concede the existence of customs approximating to the right of allocation formula. This was the case, for instance, in the Kepungutan lands near the port city of Palembang (Burns 1978: 127).

Overall, Van Royen believed that the phenomena understood by Van Vollenhoven as components of beschikkingsrecht were not reflections of an ethnic Weltanschauung but consequences of demographic and economic changes – population growth or immigration, and increasing commercial demand for agricultural products – which had the effect of raising the value and scarcity of land. Summarizing his findings, Van Royen concluded:

- that the beschikkingsrecht ‘bundle’ had neither always nor everywhere existed in a single form;
- that beschikkingsrecht had developed in response to economic circumstances; and that beschikkingsrecht had never been sovereign law, and was better characterized as civil law.

In the last part of his analysis, Van Royen turned to the fifth component of the right of allocation bundle, corporate (territorial) responsibility. This principle offers the temptation to analysis in terms of public law or sovereignty. Van Royen found that the Kubu admitted no claims concerning anything which happened on their lands, and the Anak Laitan accepted no liability for damages or claims for compensation for offences committed by unknown persons within their districts (Van Royen 1927: 148). The corporate responsibility which Van Royen discovered among the Rejangers, from his reading of Marsden, was genealogical rather than territorial. That is to say, when an infringement of the adat occurred, the question of who should make good was not: ‘On whose land did the offence occur?’, but rather, ‘To whom is the offender related?’ In Pasemah, likewise, a system of mutual responsibility, tanggung-menanggung, did operate for the resolution of conflict, but again more on a genealogical than on a geographical basis (Van Royen 1927: 150–1). Reijnst (1838) had attested to five of the six beschikkingsrecht principles in the Kepungutan lowlands, but not that of territorial responsibility. Inasmuch as he regarded Reijnst as a reliable reporter, Van Royen found this a significant omission.

By a comparative study of putatively authentic collections of indigenous South Sumatran statutes as compiled by Van den Berg (1894), Van Royen showed that various government interpolations had been inserted among the aturan (regulations) at various stages. One law dating from 1854, for instance, referred to the offences of robbery and murder ‘on the public highway’ (Van den Berg 1894: 161). But in the hinterland of Palembang in the 1850s, there was not yet anything which could properly be designated as a ‘public highway’. Clearly, Van Royen argued, a creative administrator had been at work here; this law had not emerged from popular tradition and was not genuine adat according to the Leiden understanding.
Van Royen discovered another anomaly in a different early collection (Gersen 1873: 124). Preceding clauses had specified the dusun as the collectivity from which compensation or redress should in the first instance be sought. Only after it became clear that the dusun would not, or could not, provide a satisfactory resolution of a problem case might creditors or claimants have recourse to the marga, the wider community. Article 23 in this collection, however, specified the marga as the forum of both first and final instance. In the past, Van Royen wrote, the practice had been to call on the prime suspects to affirm their innocence under oath. In the 1873 edition, however, the arrangement was significantly and suddenly altered. Now, if the corpse of the victim of a murder was discovered in the marga forest, every member of the marga was required to take the oath. Van Royen (1927: 154–5) judged that these stipulations were not genuine adat but administrative expedients designed to secure order in places beyond the policing competence of the central governing authority.

Having traced such changes in local regulations and determined that they reflected a series of government responses to improvements in transportation and the consequent extension of horizons for the communities concerned, Van Royen concluded that:

there can be no question of a connection between the right of allocation and the principle of territorial responsibility. As it manifest[ed] itself in Palembang, the right of allocation did not originate from a single archetypal law. Rather, it was ... a complex of discretely developed or imported measures.
Van Royen (1927: 159)

Van Royen’s study of South Sumatra, then, already seems to punch a significant hole in Van Vollenhoven’s idea of beschikkingsrecht as an integral and pan-Indonesian legal phenomenon. But what about the other eighteen adatrechtskringen? The most appropriate place to begin looking for an answer is surely the relevant volume of Van Vollenhoven’s own magnum opus, Het Adatrecht van Nederlandsch-Indië (1918).

**Collective responsibility: Van Vollenhoven against himself**

What follows is a summary, by adatrechtskring, of references in Het Adatrecht van Nederlandsch-Indië to the principle of collective responsibility, the fifth component of beschikkingsrecht. In Kring (Area) II, the Batak Lands (the hinterland of North Sumatra), the village or village alliance accepted collective responsibility (Van Vollenhoven 1918: 243). For Kring III, Minangkabau (West Sumatra), collective responsibility operated ‘only at the level of the allocation area’ (Van Vollenhoven 1918: 269–70). Although tanggung-menanggung (mutual responsibility) was often mentioned, there had been no systematic investigation of this convention. South Sumatra (Jambi, Palembang, Bengkulu, Lampung) made up Kring IV. Van Vollenhoven (1918: 286) claimed that collective responsibility existed here but Van Royen, as we have seen, called its territorial basis into serious question as far as a large part of this adat area was concerned. For Kring VII, Borneo, there was collective responsibility for the safety, but not the property, of travellers in the district. At the boundaries, this responsibility was transferred from one tribe to the next (Van Vollenhoven 1918: 324). For the tenth kring, the Toraja lands in upland South Sulawesi, collective responsibility was limited to debts and fines incurred by fellow villagers. There was no question of making good losses suffered by outsiders on village territory. In Ambon (Kring XIII) the situation was apparently similar (Van Vollenhoven 1918: 369, 421).

Timor, in the southeast, was Kring XV. Here there was no mention of accountability for unresolved crimes within the allocation area, although in Central Timor there were other
forms of collective responsibility for homicide or theft (Van Vollenhoven 1918: 453). In the sixteenth kring, comprising Bali and Lombok, the jural communities accepted the principle of collective responsibility for whatever might happen to outsiders in the forest, the undeveloped parts of its territory. No responsibility was recognized for the unlucky foreigner who might have met with misadventure in the irrigated rice fields (Van Vollenhoven 1918: 502). The seventeenth kring was the Javanese language area, and here collective responsibility was accepted. Sometimes the status of marginal land would become a matter of dispute between, or among, different jural communities. It was evident from the case reports that on occasions one or another of the communities would readily accept responsibility for a crime committed by an unknown person. It was all a matter of where the crime had taken place. If it had happened on the land under dispute, then the unhesitating assumption of accountability by one community would establish clearly that that tract fell within that community’s right of allocation. On other occasions, a community would forfeit a parcel of land after the discovery of a corpse in, for instance, the forest (Van Vollenhoven 1918: 651). Instead of accepting liability, the jural community would withdraw its claim to the disputed forest territory.

The last kring was Sunda (West Java). Apart from a single case at Cirebon (where the Sundanese and Javanese areas meet), here there was no mention of collective responsibility (Van Vollenhoven 1918: 753). For the remaining adatrecht areas – numbers one (Aceh), five (Malay – eastern Sumatra and the Malay peninsula), six (Bangka and Belitung), eight (Minahasa), nine (Gorontalo), eleven (South Sulawesi), twelve (Ternate), fourteen (New Guinea) and eighteen (the Central Javanese principalities) – the evidence was even less substantial: in the relevant sources there was ‘no talk’, ‘no report’, ‘no mention’, ‘nothing’, ‘no data’, or ‘the data were uncertain’ (Van Vollenhoven 1918: 217, 307, 309–10, 350, 353, 382, 392, 429, 690–1).

In his formulation of the doctrine, Van Vollenhoven had suggested that the telltale principles of beschikkingsrecht were manifest just about all over the Indies. Yet, when he came to close examination of one of them, the evidence was, to say the least, patchy. Even as an argument by induction, involving the accumulation and persuasive presentation of positive evidence, the case for an Indonesia-wide principle of collective territorial responsibility is unconvincing. Yet I would apply a sterner test by asking whether it is possible to conceive of empirical data which would count as evidence that the theory is unreliable.11 And if so, are such data indeed available? Subjected to this criterion, Van Vollenhoven’s theory does not fare well. At least one of the phenomena identified by Van Vollenhoven as elements of a pan-Indonesian beschikkingsrecht does not seem to have been universally manifest across the archipelago.

**Reasonable doubt**

Another teaching of the Leiden School concerned the contrast between European criminal law and adatstrafrecht, or Indonesian customary penal law. The central concern of the Dutch criminal code is mens rea, guilty intent, and the function of the law is to provide appropriate punishment (Burns 2004: 111–14). In the case of Indonesian adat, according to the Leiden teaching, punishment is not a leading principle. Instead, the adat world view takes primary cognizance of the fact that something wrong had happened and that there is a need to put it right, to redress a disturbance in the balance of the metaphysical world order. In order to understand the dynamics of adatstrafrecht, Leidenars such as Lesquiller (1934) argued, it was necessary to discard the concept of punishment and to replace this with the idea of reactie, which I have rendered in English as ‘adjustment’ (Burns 2004: 111).

In the last years of uncontested Dutch rule in Indonesia, however, Jacob Roest devoted a
doctoral thesis to the question of guilt in Indonesian adatstrafrecht and concluded that the idea of rightful punishment for wrongful behaviour was not after all alien to adat law. Although elements of ‘adjustment’ were certainly involved in many adat verdicts, guilt, and sometimes intention, were also taken into account (Roest 1941: 166). The standard Leiden doctrine insisted that Eastern and Western mentalities were fundamentally different, and that adat penal law could be understood only in the light of this difference. Yet ultimately, the Leidenaars’ legal Orientalism was as insecurely founded as their insistence on the all-Indonesia character of beschikkingsrecht.

To show that Van Vollenhoven made mistakes, some will object, is to judge him by the wrong gauge: his real achievements were to bring about a ‘paradigm shift’ (Kuhn 1962) in the study of law in Indonesia, and to stand up for some of the basic rights of Indonesia’s indigenous peoples. That his emphasis on the value and specificity of autochthonous Indonesian legal institutions was inspired by the German Rechtsgeschichteschule does not necessarily detract from either achievement. But be that as it may be, it is reasonable to say that, since Van Vollenhoven’s paradigm shift, the Leiden adatrecht doctrine has been challenged by another discourse. This is not its old rival, the domain doctrine associated with Utrecht University. It is rather the retrospective consensus of more recent scholars, both Indonesian and foreign. I cite a selection of their most salient comments:

In the broadest sense, though van Vollenhoven was extremely well versed in the European legal-historical school, he found in Indonesia only what he, as a European reacting against the individualism and formalism of European law – especially its Romanized civil law – was looking for. He was essentially searching for certain primordial elements in ancient European customary law, such as had existed among the Germanic tribes before they were conquered by the Romans. In this light one can see that the exaggerations in his analysis and picture of Indonesian customary law were the results of his own personal ideals and sentiments; and that these ideals and sentiments were in their turn simply the manifestations of certain currents within one legal school flourishing in Europe at that time. But one can say that in Indonesia this was the beginning of a sort of romanticism of customary law. It was adulated for its wholeness and its subtle refinement in satisfying the community’s sense of justice and feeling of mutual responsibility.
Alisjahbana (1966: 71 – 2)

The concept of hukum adat was almost certainly a Dutch creation. Before van Vollenhoven and his school began codifying what to Western jurists appeared to be the juridical aspects of native custom, adat law was not a separate and independent entity but was in most cases intertwined with the history, mythology and institutional charters . . . of each ethnic or cultural unit.
Jaspan (1965: 252)

Of course adat was not discovered but invented . . .
Maier (1993: 64)

Finally, I would like to refer extensively to the account of adatrecht offered by J.C. Heesterman (1986). The history of ideas which Heesterman presents is, I concede, in large part an interpretation. It is, however, the most plausible that I have discovered. He suggests that almost all of those engaged in the study of Indonesian adat land rights started out from an assumption that any issue would in practice come down to an opposition: one legal person against another. That made the problem manageable, it seemed: one party right, the other wrong. But it was also an assumption which, as often as not, made the analysis simplistic and
the solution unsatisfactory. In Java, for instance, a single parcel of land could be subject to multiple rights exercised by a whole series of people: monarch, apanageholder, farmer, tiller, mortgagee, builders of irrigation works, participants in the harvest (Heesterman 1986: 191–3). Yet for members of the colonial bureaucracy, whose primary task was to collect taxes and balance the books, it seemed sensible to simplify.

When, in the course of colonial history, some Dutch missionaries, scholars, and idealists began to look seriously at indigenous practices, and to listen to indigenous grievances, they understood that simplification offered no solution. This insight was a stimulus which led eventually to the development of adatrecht studies. The trouble was, according to Heesterman, that the specialists of the Leiden School ‘could not do much more than replace the faulty analysis with another concept of their own’ in the form of the community beschikkingsrecht, a ‘rather vague’ idea the thrust of which was ‘to emphasize the dominance of the community over the individual’ (Heesterman 1986: 192). Moreover for Heesterman, the village community itself – in many regions the putative rechtsgemeenschap, the competent legal person – was not an indigenous institution, but one brought into existence to meet the needs of government: ‘the desa [village], as a territorially bounded and closed corporate body, is a colonial creation’ (Heesterman 1986: 199). And if the indigenous bearer of the right of allocation turns out to have been created (for better or for worse) by the colonial government, how authentic can the right itself be?

Anyone who reads Van Vollenhoven in the hope of discovering an exact programme for legal development, or an inventory of what the master favoured or advocated in policy terms, will be disappointed. Van Vollenhoven believed that, if left to itself, native Indonesian law would find answers to the problems which it faced. It is easier to determine what he opposed than to specify the precise processes and institutions that he favoured. For the point is that there was no point. Van Vollenhoven favoured neither process nor institution. For him law itself was something live and ‘organic’, and as such could not be pinned down in terms of concepts such as sovereign law-givers, social contracts, nation-states, constitutions, separation of powers, codes, or due process. Rather, the law of a people was to be apprehended through learning – more accurately, through sympathetic assimilation of the legal values manifest in the social behaviour of the people in question. Wise and learned judges would be so in tune with the folk that they would deliver verdicts which the folk – all the interested parties – would acknowledge as appropriate. Would the convict, or the unsuccessful litigant, or the otherwise disadvantaged party, participate in this otherwise universal acclaim? In Van Vollenhoven’s Utopian world order, the answer would be: ‘Yes, perhaps.’ While it cannot be shown conclusively that there never has been a working case of such a system, this does not strike me as a realistic proposition.

A more practical vision of how to implement adat law was developed after Van Vollenhoven’s death by one of his disciples, Barend ter Haar. Referred to as the beslissingenleer or ‘decision doctrine’, this involved accepting as legal precedent the verdicts brought in for similar cases already decided within the same jurisdiction (presumably meaning, in the first instance, the same adatrechtskring). If such a system had been accepted and implemented gradually, an increasingly refined set of case law data could have served to achieve the transmutation of adat-as-custom into adat-as- law. Ter Haar’s advocacy of the decision doctrine fell, for the most part, on stony ground. The orthodox champions of adatrecht chose to abide by the stark message of Van Vollenhoven’s (1933) warning essay, ‘No jurists’ law for the native’. That was a pity. Ter Haar’s programme would have given to adatrecht the rigour required for the integration of the conventions of custom into the legal system of a state (either colonial or independent). The decision doctrine offered a method for achieving the transformation of
popular convention and custom into law. It may yet work for the Republic of Indonesia in the twenty-first century.

Notes

1. The title is a quotation from ‘A Defence of Rhyme’ by Samuel Daniel (1562–1619). I found it apt partly because of the ambiguity of the word ‘before’, which can mean either ‘antecedent to’ or ‘superior to’. The original verse by Daniel continues: ‘Nature, that is above all art’.
2. I use the word in the sense given to it by Edward Said (1978).
4. Defenders of the institutions of jujur and semendo would have objected to the terms ‘bride price’ and ‘groom price’ as implying too purely commercial a type of transaction, but I use them here for the sake of simplicity.
5. Under this doctrine it may well be convenient or prudent for a sovereign, when alternative policies seem likely to invoke riot or rebellion, to allow or recognize popular claims to ‘rights’. The origin of such rights nevertheless lies in the will of the sovereign.
6. The first formal constitution for the Netherlands East Indies was created in 1854.
7. Translating the term beschikkingsrecht is a contentious business. As an English translation Holleman (1981: 43) used ‘right of avail’, but I prefer ‘right of allocation’. Ter Haar (1951: 301) had serious doubts even about the term which is most often used to render beschikkingsrecht in Indonesian, hak ulayat.
8. There was also a third victory of sorts, which I discuss elsewhere (Burns 2004: 100–1), in the failure for practical reasons of certain initiatives by F.J.H. Cowan, Director of Justice in Batavia, to bring about limited legal unification with respect to co-operative societies, employment regulations, and (in connection with the prevention of child marriages) the age of consent.
9. Ironically given that his ideas had an important influence on Indonesian nationalism, Van Vollenhoven was careful to withdraw from association with explicit proponents of Indonesian independence.
10. The other three were Jambi, Bengkulu, and the Lampung districts.
11. This approach is based on Karl Popper's falsifiability principle (see, in particular, Popper 1961: 130–47).
12. Some judges did attempt, in the late 1930s, to apply the decision doctrine in individual cases. For the system to work, however, it must be adopted wholesale and engage the complete judiciary.

References


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