Van Vollenhoven Lecture 2008

Traditional law in a globalising world
Myths, stereotypes, and transforming traditions

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Van Vollenhoven Lectures

The Van Vollenhoven Lectures are organized in honour of Cornelis van Vollenhoven, the Leiden law professor who acquired fame between 1901 and 1933 for his elaborate and detailed description and analysis of the traditional law, or *adat* law, of the Netherlands-Indies as well as for his impressive contributions to public international law.
Introduction

Let me start by thanking the organisers of the Van Vollenhoven Lectures for this honourable invitation to give the 2008 Lecture. For us, this is a very special occasion. For in 1974 we were asked to contribute to a series of lectures in honour of Van Vollenhoven, to celebrate his 100th birthday (K. and F. von Benda-Beckmann 1975). This lecture marked our first appearance in the Dutch and Leiden world of adat law and legal anthropology. Now, 34 years later and towards the end of our own active academic careers, it is the 75th anniversary of his death. Today is also a special occasion, because we return not just to Van Vollenhoven, but also to the academic institution in the Netherlands where we first worked after having come from Zurich to Leiden in 1978. Like in 1974, the text of our talk today is a joint venture of the two of us, but this time I shall be the presenter.

When considering how we could best assess the enduring value of this impressive scholar it seemed appropriate to do this in light of current legal and political processes in Indonesia that are captured under the heading “revitalisation of tradition” in law and religion. Many academics and politicians have been struck by the dynamics of these processes set into motion after the fall of the Suharto regime, processes in which religion has obtained new prominence and terms such as adat, adat law, and adat societies have become important categories for claiming greater recognition of adat authority in local government and demanding rights to village commons, ulayat. The issue thus has high political relevance and Indonesia does not stand alone in this. Similar processes have been found in other regions in the world, among others by scholars working at the Van Vollenhoven Institute. In many African states, there is a considerable resurgence of chieftainship and customary law, and in many Latin American states, struggles over the recognition of indigenous peoples’ rights continue. These processes have become of great interest to academics both in social and in legal sciences. They open a wide perspective to a number of fundamental issues to which the anthropology of law has made a contribution.

These developments have also rekindled discussions about the changes and transformations of local ethnic laws that arose in the 1970s under the heading of the creation of customary law. Local rules and procedures were interpreted and transformed through the conceptual language and assumptions of the colonialists’ ethnocentric categories. What was termed and applied as customary law was not a timeless, pre-colonial local law, but often new versions, created by courts or in the interaction between the colonial administration and those local experts whom the administration mainly consulted. To some extent the local rules and institutions were wilfully changed in line with social, economic and political interests. The new political and economic

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1 Hobsbawm and Ranger (1983); Snyder (1981); Chanock (1981, 1985); Roberts (1984); Woodman (1987).
circumstances also changed the ways of operation and significance of the local legal orders in contexts out of the colonial courts.²

Similar points have been raised with respect to the creation of Indonesian forms of social organisation and adat law.³ Many of the recent discussions of the revitalisation of customary law and adat law refer to these earlier discussions, and tend to stress the continuities between the earlier and contemporary creations of adat law. Van Vollenhoven and the Adat Law School occupy a central place in the discussions about the “myth of adat” (Burns 1989). Van Vollenhoven is said to have introduced a sharp distinction between adat and adat law, thus elevating adat into law, a typical legal western category. Thereby, what simply were mostly unwritten and indistinguishable customs was transformed and distorted into a mythical legal universe that did not really exist on the ground. His academic approach and political attitude towards the adat law of Indonesia is said to have been orientalist, anti-development minded, romantic.

These debates also shape the interpretations of current developments that came with reformasi and decentralisation. It is for this reason that a return to the work of Van Vollenhoven is more than a return to a past history long gone by. We suggest that interpretations of continuities and change in the significance of adat law may have been distorted by an inadequate analysis of the past. Today, we want to reassess this critique. We shall first discuss the major points of critique that have been launched at the work of Van Vollenhoven. We argue that while the ‘creation of adat law’ debates have merit, the points are overstated. When assessing the significance of the Adat Law School’s descriptions of adat law in legal politics and administration, the critiques are largely anachronistic and aimed at the wrong enemy. We will substantiate our propositions with a discussion of the history of the ulayat village commons that play such an important role both in the Van Vollenhoven critique as well as in the contemporary revitalisation of adat law and which are vexing politics until the present day. Fully aware of the impossibility to generalise for Indonesia, we focus on the region we know best: West Sumatra, which has always been a central region in any discussion of adat. We end with some considerations about the wider implications beyond the region of this analysis and present a brief outlook on further themes and issues the anthropology of law needs to address.

² It is not always clear to what extent these critiques refer to the fact that mode of operation and substance of local laws had changed due to colonial influence, and the creation of some kind of law that actually did not exist.
Criticism towards Van Vollenhoven

The concept of law: adat and adat law as an invention of the adat law scholars

The proposition that adat law was a Dutch invention was a major critique towards Van Vollenhoven and his followers, most outspokenly argued by Peter Burns,4 of late in a contribution to the very interesting volume “The Revival of Tradition in Indonesian Politics”. The editors Jamie Davidson and David Henley (2007:36) call the concept of adat law “a confusing myth”. The allegation implies two propositions: one is that the term did not relate to what was going on in the life of the Indonesian population. The other raises the question of whether there could be anything in adat at all that could usefully be labelled “law”. Both points are sharpened by the reproach that by speaking of adat law a sharp line was drawn between the legal and the non-legal aspects of adat.

Certainly, the term **adatrecht**, adat law, was a new Dutch concept.5 Van Vollenhoven was well aware of the fact that the term adat was used in many but not all regions of Indonesia to indicate an often undifferentiated whole of morality, customs and legal institutions.6 But within these adats (or equivalent expressions), there were more or less institutionalised sets of rules and procedures for marriage, property and inheritance, political authority and decision making processes; elements with legal quality. He spoke of adat law as the totality of the rules of conduct for natives and foreign orientals that have, on the one hand, sanctions (therefore: law) and, on the other, are not codified (therefore: adat). He consciously used this term in order to emphasise that there was no sharp dividing line between the legal and the other aspects of adat. “The use of the term adat law has an even stronger claim to preference because it serves to weaken the notion that a sharp and rigid line separates legal usages from other popular usage, or adat law from the rest of adat. The borderline is, indeed, so vague that it is difficult, and sometimes impossible, to distinguish one from the other”.7

In talking about rules, institutions and procedures and sanctions as law, Van Vollenhoven thus used a broad analytical concept of law, which is not by definition tied to the state organisation. For authors like Burns, who see as law only rules “consistently enforced by a sovereign state”, adat by definition therefore cannot be law.8 But there is

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5 Snouck Hurgronje was the first to use the term systematically. Snouck Hurgronje (1893:16); van Vollenhoven (1928:23); Sonius (1981:LI).
6 The generic term adat itself was also an invention, as Van Vollenhoven himself has reported. Muntinghe, a former counsellor of Raffles, was the first to use the term systematically (Memorandum of his to the Commissioners-General of the Netherlands-Indies, Batavia, 14/7/1817, cited in Sonius 1981:LI).
7 J.F. Holleman’s translation (1981: 5); Van Vollenhoven (1918: 9). We prefer to speak of law in adat. See F. von Benda-Beckmann (1979). It is difficult to comprehend how Van Vollenhoven’s thinking could be so grossly misrepresented by Burns (2004) alleging that he drew a sharp line between the law in adat and other adat.
8 Burns makes his arguments on the basis of doctrinal British law which, however, is hardly convincing as a basis for a comparative concept of law. Burns has other problems with the term adat law as well. For him the term ‘law’ should be reserved for written law. Rules that are not
nothing mythical about such a conceptualisation. It is simply a broader way of conceptualising law, akin to later social scientific conceptualisations of law that allow for the possibility of legal pluralism, dynamic forms of co-existing legal orders having different legitimations and being based on different organisational structures. It is interesting to note that since the rapid expansion of international and transnational law also many legal scholars, who used to adhere to a narrow, state related concept of law, today no longer have difficulties using a broader concept that includes all kinds of self-regulation, which have not even the remotest relation to sovereignty, the most well known example being the lex mercatoria. Among international lawyers at least the battle seems to be over (see F. and K. von BendaBeckmann 2007b).

A comparative perspective
Van Vollenhoven was first and foremost a scholar interested in a comparative study of the law of the Indies, including the Philippines, peninsular Malay, and Madagascar. He emphasised the importance of understanding the indigenous laws in their own terms and was incessantly struggling against the unwillingness of politicians, lawyers, and writers on adat to understand what they find “on the floor” in terms of the local population itself and who translated and often distorted them by “jamming” them into Dutch legal terminology. This led to unsystematic, muddled, and distorted images, suitable neither for comparative work nor for sound policies. Instead, he argued for a thorough understanding of the conceptual framework of indigenous adat systems. He also emphasised the importance of understanding the relationships, today one would say embeddedness, of adat institutions.

For his endeavour to understand Indonesian adat and the place it had and should have within the Indonesian legal structure, he developed an approach that involved two steps of classification. The first step involved a description at a medium level of abstraction of different local adats that had a high level of communality, for which he created the term adatrechtskring, adat law circle. Today we would say he classified along ethno-linguistic lines. His classifications did allow for local differentiation, but he tried to bring out the common features and internal logic from a great variety of sources, knowing full well that adat was not a rigidly structured, logical and consistent whole. In a second step of classification he tried to find common features throughout the Dutch Indies to develop concepts and a comparative analytical framework that could be used beyond the idiosyncrasies of one particular legal order. For this he coined concepts such as “inlandsch bezitrecht”, “beschikkingsrecht” “inlandsche gemeente” and “rechtsgemeenschappen” in a more substantive sense of having a political

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written in his conceptual framework are mere custom, not law. This is a surprising statement for one who founds his conceptual framework on British law.

9 In the 1970s the issue was taken up by the famous controversy between Gluckman (1969) and Bohannan (1969). While Gluckman made frequent references to British and Roman law, Bohannan insisted that the only way to describe a foreign legal system was by using the vernacular terms. These could be explained in English, but not substituted by English terms.
structure, laying claims to common property and responsibility for damage to outsiders. Using concepts such as beschikkingsrecht, Van Vollenhoven primarily attempted to develop a systematic classification of data by constructing what we could call ideal types in the Weberian sense (see also Lev 1984: 149). He may not have been entirely consistent in this, but we should also realise that he developed his ideas at a time when only scarce and fragmented empirical data was available. And he may have misinterpreted some of that. We know now that there were different degrees of such socio-political rights. Burns and other critics were right in stating that the six criteria with which Van Vollenhoven characterised his ideal type beschikkingsgebied and beschikkingsrecht cannot be found everywhere. But, and that is the important point, the adat rights that Van Vollenhoven wanted to describe and analyse with the concept did exist in many regions of Indonesia, including Minangkabau. They existed quite independently from whatever Van Vollenhoven, Ter Haar and Logemann would write about them in the first three decades of the 20th century.

His approach also entailed a thorough understanding of the processes in which adat law is maintained and reproduced. For him, the “rechtsgemeenschappen”, “jural communities”12, corporate units of an organized indigenous society, were the fundamental places where law was being created. They echo the Verhände of Weber, Ehrlich and Moore’s (1973) semi-autonomous social fields. Unravelling the ways in which law is made, maintained and changed within such jural communities was of primary importance.13 It is here that Van Vollenhoven and F.D. Holleman have perhaps made their most important methodological and theoretical contributions. The insights into preventieve rechtzorg, preventive law care, or gesteunde naleving, supported observance, are brilliant. The insights that law, whether adat law, state law or any other law, is used, maintained, and changed and has different consequences in many different contexts, in village transactions and disputing, processes of preventive law care, in court decision making, in local and national politics and legislation, were quite unique and

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10 Burns (2007: 74) reproached Van Vollenhoven that not all jural communities were territorially organised and laid claims to common land, nor accepted common responsibility for damages to outsiders. This criticism also is not entirely correct. Van Vollenhoven (1928: 37) talks about collective responsibility “where it exists”, acknowledging that it does not exist in every jural community.

11 However, societies with a political structure based on kinship rather than territory may exercise legitimate socio-political control over a certain territory to which various individual and communal rights pertained.


13 This came close to what was to become the common unit of study in all later anthropological monographs based on in-depth but very local studies. This canon of anthropology has only very recently come under attack from those plead for multi-sited research, based on the insight that most people today are not just situated within one local community, but are part of much wider networks. See also F. and K. von Benda-Beckmann (2002).
were only gradually taken up in Anglo-American anthropology of law in the 1970s.\(^\text{14}\) I myself have shown for Minangkabau that the adat law interpreted, often misinterpreted, and applied in state courts often differs substantially from the adat used in village contexts, and that it is the latter that has the most practical relevance for the population. Moreover, whatever is stated to be adat law in courts is often “re-adatized” once the decision leaves the court room, as we have observed both in West Sumatra and on Ambon.\(^\text{15}\) These authors did not see and systematically research the difference between customary or adat law as interpreted and applied in courts and the local law operating in villages, between lawyers’ adat law and people’s adat law, adat juristenrecht and adat volksrecht; ideas which only were picked up much later in Anglophone anthropology in the 1970s (Woodman 1987). Thus, in many respects Van Vollenhoven was a pioneer for the very critique of the transformation of local laws through the ethnocentric and legalistic categories of colonial judges and administrators.

The substantive descriptions of the different adat law circles in retrospect are probably the weakest elements in Van Vollenhoven’s work. For our own research in West Sumatra and on Ambon, these accounts have been the least valuable of all his writings. This is not surprising, given the state of information in the first decade of the 20\(^{th}\) century and the patchwork data he had to work with.

It is also sometimes said that he, and other authors on adat law, wrote about adat law as if it had not been influenced by colonisation and presented it as original, pre-colonial adat, instead of the transformed adat that it was. Looking at the literature on adat law, the monographs and the publications in the Adatrechtsbundels, we find such statements exaggerated. Van Vollenhoven and other writers were well aware of the fact that adat was subject to change and responsive to other law.\(^\text{16}\) On the issue of Islamic law Van Vollenhoven’s work is also rather weak. He was so preoccupied with adat as

\(^{14}\) The discussions about the creation of customary law of the 1970s (Chanock 1985) tended to generalise selectively from a limited set of contexts of the colonial courts and state administration, see. Roberts 1984, F von Benda-Beckmann 1984.


\(^{16}\) Another major reproach is also that he was also orientalist by insisting that the adat categories and thinking was entirely different from and incompatible with European legal thinking (Davidson and Henley 2007: 20). But was he really as orientalist as his critics like to have him? At first sight it seems to be the case. “He who turns from the law of the Netherlands to the law of the Dutch East Indies enters a new world” is the opening sentence of Van Vollenhovens main work Het Adatrecht van Nederlandsch Indië, see J.F. Holleman (1981). And in his publication De Ontdekking van het Adatrecht, the discovery of adat law of 1928 one might find a few places that indeed sound orientalist. Discussing the sources of the second half of the 19\(^{th}\) century, he criticizes the authors for “failing to understand the eastern thinking, classifications and evaluations that must be different from western thinking” (p.96). He talks about “primitive systems of the Gayo tribes and families” (p.127). Like Germanic law, some adat systems are less developed than others. In this respect, he is clearly affected by the evolutionism of the time. However, he is not orientalist in the sense that people are so utterly different that no common understanding is possible, nor does he claim that they are incapable of change and adjustment to the challenges of the modern economy.
folk law that he treated Islamic law largely as a non-native, external legal order. While he did write about pockets of Islamic law in adat law circles, the idea that there might be Islamic folk law did not occur to him.17

Political engagement: The debate about uniform law
The focus on the fluidity of adat is to be understood within the political colonial context in which the adat law scholars worked. Towards the end of the 19th and during the beginning of the 20th century, there raged a debate about the desirability of creating uniform law for the Dutch Indies to replace the co-existence of different laws for various population groups, in order to facilitate economic development. Many recommended the introduction of Dutch law for the whole population. Others wanted to codify adat law to enhance legal certainty and to allow the government to develop this adat law. Van Vollenhoven and Snouck Hurgronje were declared opponents of wholesale codification because it would seriously affect the flexible and dynamic character of adat.18 They were not looking for an uncontaminated adat of the past, nor did they want to maintain it. Such an essentialist notion of adat, as was attributed to them, is a far cry from what Van Vollenhoven and Snouck saw as existing or as desirable. They were interested in the internal logic and dynamics of change within existing adat law, period. In fact it was precisely this essentialist conception of adat of those who wanted to get rid of it that they were fighting against. “The country is too good and promising to be turned into an adat museum” Van Vollenhoven wrote (1919:29). And he was convinced that oriental ideas could be “fertilised with western values” (1933:239). Van Vollenhoven and Snouck predicted that forced codification and subjugation to Dutch law would be counterproductive because it would strengthen conservatism and hamper development. In their eyes, only gradual development from within the communities in which adat law was generated, though not in isolation, could bring about appropriate social and economic progress without seriously damaging the local social order. That part of adat, which can be called law, could not simply be cut out of its larger context without seriously undermining its social foundations. It would strengthen precisely those features of adat which the legislator sought to change. Customary law can very well develop to live up to modern requirements, but this cannot be done by mere imposition of change. And criticising a local population for not being able to live up to the challenges of a modern economy, while at the same time amputating their legal system and denying them access to economic facilities and markets, was misleading.19

17 See Lev 1984: 151 on Van Vollenhoven’s stand-offish attitude towards Islam and his underestimation of the inroads Islamic law had made in local adats. For Islamic law as folk law, see F. and K. von Benda-Beckmann 1993.
18 Van Vollenhoven (1910) did design “a short adat law code for the whole of the Indies” (Een Adatwetboekje voor heel Indië), but this was more a codification of adat principles rather than wholesale codification. See also Davidson and Henley (2007: 21). See also Burns (2004, 2007); Fasseur (2007).
19 To support his argument to developments in English law in the early 18th century to show that it is quite possible to develop a modern legal system by leaving customary law intact (1928:166).
Economic development would be hampered by subjecting the population to corvée labour, systems of forced cultivation, oppressive labour legislation and the large-scale dispossession of their natural resources by the Domain Declarations, not by the fact that adat law is fundamentally differently structured. There are striking parallels with some current accounts of indigenous populations that are barred from commercial exploitation of the natural resources as long as they hold them under indigenous title and for which their indigenous law and not state policies are blamed.

Van Vollenhoven was criticised for opposing the introduction of uniform law and for his insistence on the variety of adat laws, which, according to his opponents, was not even law but only messy and imprecise custom, which would hamper economic development and legal certainty. The fact that he engaged himself for a better understanding of these orders, that he minded the violation of these laws, and that he did not believe that a wholesale introduction of state law would do a better job for economic and political development made him unbearably romantic, paternalistic and anti-development oriented in the eyes of many.\(^\text{20}\) He was denounced as a Jacobite against whom the Netherlands of the shareholders and East Indies pensioners had to be called to arms.\(^\text{21}\) But his critique of the large scale reorganisation of the legal order was less an expression of romanticism, but rather a realistic assessment of the probable consequences of such measures. He clearly saw the dangers, when he criticised the legal reform plans in 1915, even without the hindsight that we have after decades of failed law and development projects aiming at supplanting family and inheritance law or land law in other (post) colonial regions and in Indonesia itself. Many contemporary critics of law and development rhetoric\(^\text{22}\) echo his critique (1933:349[1915]): “There is an impolite Latin proverb saying the world wants to be cheated. That one wants to be cheated by the image of great organisations in my view seems to come from mankind’s yearning for a beautiful panorama of the future. He who paints the largest canvas, he who opens the most wonderful perspective, who closest approaches a radical transformation of the universe, gets the loudest applause. But nobody asks whether there is a road leading to these goals, or whether this road will be passable in the near future”.

The myth of ulayat rights
Let me now turn to a concrete illustration of some of the points made, the history of ulayat, adat rights to the village commons. We shall address four questions: what kinds of rights did local socio-political organisations have? How were these affected by colonial policies? How were they interpreted by colonial lawyers and politicians and by

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\(^{21}\) Colenbrander, as quoted by Panhuys 1975: 3.

\(^{22}\) See e.g. Quarles van Ufford and Roth (2005).
the adat law scholars? And what had these interpretations to do with the actual exercise of rights by state officials, village leaders and villagers?

_Ulayat and the beschikkingsrecht_

In many regions of Indonesia, as e.g. in Minangkabau, village land was mostly under the socio-political control of the village government according to the respective adats.\(^{23}\) The Dutch called this right of socio-political control _beschikkingsrecht_, in English ‘right of disposition’ or ‘right of avail’.\(^{24}\) The Dutch adat law scholars considered the right of avail as an expression of Minangkabau political-economic constitutional theory. In the narrow sense, the _ulayat_ lands were the village commons. It served for collecting forest products, as grazing land and as a reserve for the expansion of agriculture and horticulture. Village land was usually freely accessible to the members of the village. Sometimes a fee of recognition had to be given for extracting village land resources. A cultivator could acquire individual rights on irrigated rice fields or tree gardens. After a few generations this would accrue to the pool of inherited lineage property. The village land could not be alienated. Outsiders were barred from free access, but they could be given temporary access and withdrawal rights. Thus, the right of avail extended in principle over the whole village territory, with the qualification, that it had been weakened with respect to permanently cultivated agricultural land, which had become the inherited property of lineages or self-acquired property through new cultivation, and thus acquired a special legal status.

When Minangkabau was officially incorporated into the Dutch colony in the early 19\(^{th}\) century, the treaties between the Dutch colonial state and Minangkabau representatives stipulated that these rights be recognised and protected. The Dutch, however, quickly broke most of their promises, reorganised the village government, limited the number of lineage heads and introduced a system of forced cultivation of coffee, and put access to markets under debilitating constraints. This was a first major infringement which changed the context under which _ulayat_ rights were exercised. However, the existence of the rights over _ulayat_ as such was not questioned. One year before Van Vollenhoven was born (1874) research on local land rights had been conducted in West Sumatra. Kroesen (1874: 3) concluded: “It may sound strange, yes even unbelievable, yet it became truly very clear from the research conducted that no piece of land could be shown, however far away in the wilderness, on which not one or another _negri_ (village) claimed rights”. And he continued “the uncultivated lands belong to the village and are under the _beschikking_, disposition, of the lineage heads who together represent the village, and people had cultivation rights” (Kroesen 1874: 9).

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\(^{23}\) It could also be distributed among the founding clans of the villages, then administered by, or held under the guardianship of the heads of clans (see also Van Vollenhoven in Holleman 1981, 137; F. von Benda-Beckmann 1979). Burns accuses Van Vollenhoven of claiming that every region of Indonesia had such rights of avail. In fact, Van Vollenhoven (1928:19) reports this for many, not all regions.

\(^{24}\) J.F. Holleman (1981:287, 431). For more detailed discussions, see Van Vollenhoven (1919); Logemann and Ter Haar (1927); F. von Benda-Beckmann (1979); for Ambon, F.D. Holleman (1923).
The Domain Declarations and new interpretations of the rights to ulayat

In the early 1870s the economic policy changed. The system of forced cultivation was abandoned and the colony was opened up for Dutch plantations. This was facilitated by the Domain Declaration legislation. The West Sumatran Declaration of 1874 stipulated that land not held in ownership or under ownership-like rights, the waste lands or woeste gronden, was deemed to be the domain of the state.\(^{25}\) In a gradual process which Van Vollenhoven in 1919 characterised as “a century of injustice” these rights to village land were increasingly and systematically reduced, creating considerable legal uncertainty and much resentment.

The law was justified by a peculiar interpretation of ulayat rights of the colonial administrators, according to which only private rights to land were recognized under the Domain Declarations.\(^{26}\) Neither the beschikkingsrechten of the villages nor the traditional cultivation and gathering rights of villagers on the ulayat conformed to the criteria of private law ownership.\(^{27}\) They were regarded as mere 'interests', subject to the state’s political consideration of the 'common good' – that is capitalist economic development by European companies. Since in the colonial legal logic each piece of land needed to have an owner, it was considered 'inevitable' that the state became the owner of that land (s Jacob 1945). A beschikkingsrecht of villages, if it had existed at all, would have to be seen as a public right of the village government, which would have been absorbed by the new, overriding public rights emanating from the state's sovereignty. Any public right exercised by village governments over village territories could therefore only be derived from and remained subject to the state’s rights.

Van Vollenhoven and his followers argued that such interpretations were based on a fundamental misunderstanding of the nature of the beschikkingsrecht, which had both “public” and “private” characteristics and therefore should fall under the protection clause of the Domain Declarations.\(^{28}\) While not arguing against sovereign rights of the state over these resources as such, the assumption of private law ownership by the state was a "transmutation of an undeniable and unchallenged right of socio-

\(^{25}\) The Domain Declaration was contained in the Agrarian Decree (Agrarisch Besluit) of 1870. The Domain Declaration for Sumatra of 1874 is reprinted in Logemann and Ter Haar (1927, 106).

\(^{26}\) Van Vollenhoven (1919) noted that four different interpretations were held by the colonial administration. He and later Logemann and Ter Haar (1927) were exceedingly critical in their analyses of the changing legal interpretations and administrative practices that gradually systematically reduced whatever rights (members of) the local population held under adat. For the most systematic exposition and justification of the state policies and the claim of private law ownership, see ’s Jacob (1945).

\(^{27}\) As Van Vollenhoven (1919, 72) disapprovingly noted: "The administration only supports those rights that fit well into our categories, the rest are imagined claims or rights which only exist in the imagination of the population."

\(^{28}\) It is difficult to comprehend how Van Vollenhoven could be accused of treating the beschikkingsrecht as private righs, as Burns (2007: 76) does.
political control into an ambiguous and confusing right of ownership”, as Van Vollenhoven argued.  

Legal debates and practice

Legal interpretations, both by colonial lawyers and adat law scholars, are of course a different kettle of fish from actual legal-administrative practice. If we address the question to what extent these controversies affected social life, we must differentiate. The central government did not recognise ulayat rights, and in some parts of the colony this policy was relatively strictly followed and land was given out in erf pacht or other concessions to Dutch companies. But in other regions without large scale plantations, such as West Sumatra, the regional administration largely condoned or even explicitly recognised the continued existence of the village government’s rights over village land, and generally avoided direct interference. Where land or forest areas were given as concessions to outsiders, the agreement of village governments was sought. The Domain Declaration was even called the “secret declaration”, because the regional government for some time did not dare publicise the text or put it into practice for fear of popular uprisings.  

Apart from that, the Domain Declaration was simply unjust and illegitimate in the eyes of many local administrators. Gooszen for instance wrote in 1912 that “without further recognition of any other right the uncultivated land was declared to be state domain. This is illegal (onrecht) because land belonging to no one does not exist there, and in particular not in the Padang Highlands.”

The correct legal interpretation and practice was moreover contested between the central government and the local administration. In 1903-1904, a group of former slaves demanded from the provincial government a piece of ulayat land in their village, on which they had lived and worked since before the abolition of slavery. Opinions about what to do were sharply divided. The Directeur van Justitie in Batavia supported the claim, stating that this ulayat land fell under the 1874 Domain Declaration. Therefore, any rights lineage leaders might hold were subject to the government’s right. The Assistant Resident and the Resident of the Padang Highlands, however, expressed a contrary opinion. They noted that according to adat the land was ulayat under the right of avail of the lineage heads. They noted that the government itself did not fully comply with the rules of the Domain Declaration. For there was a regulation for West Sumatra stating that should a parcel of ulayat land be granted to an outsider, this should only be done after consultation with the population. The grantee should pay an adat fee as a

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29 Van Vollenhoven (1919: 103). Van Vollenhoven, unmasking this transformation of public control into private economic rights, added: Agrarian rent and lease (erfpacht) are private rights in name only. We do not deal here with rent nor lease according to the civil law. They are concessions to land exploitation, or mining concessions (1919: 100). Also the allocation of agrarian ownership to private enterprises is not a transfer of land from owner to owner, but the installation of an owner. It cannot be based on private law (1919: 101).


31 Quoted from Pandecten (I, 1914: 38).
sign of recognition of the lineage leaders’ rights. Administrative officials had even been instructed not to grant a claim if the fee demanded had not been given. On the basis of these latter opinions, the Governor General of the colony rejected the claim.\(^{32}\)

The critique reassessed
What does this historical excursion tell us? First of all, it shows us the anachronistic character of the “right of avail as creation of adat law” discussion. The adat rights over ulayat resources that the adat law scholars summarised as beschikkingsrecht existed on the ground. Until 1874, and partly afterwards, they were widely recognised by the colonial state, thus long before the Adat Law scholars discussed and defended them. Though the rights to village commons were expropriated in different degrees, they continued to inform local legal thinking and practice, albeit often as “violated” rights.

Secondly, the major changes affecting the extent to which the communal rights could be exercised had nothing to do with the work of Van Vollenhoven and the controversies with his colleagues in Utrecht in the 1920s and 30s. They were the result of colonial economic and administrative policies and concrete measures, most of them occurring before the academic discussions. The political engagement of the adat law scholars did not stop the ongoing expropriation. Nevertheless and understandably, the colonial administrators and entrepreneurs saw the adat scholars’ views as a threat to their freedom to develop and exploit the natural and human resources (Burns 2004: 67).

Thirdly, it shows that the colonial administrators, judges and lawyers like Nederburgh, Nolst Trenite and ‘s Jacobs were the ones who most grossly misinterpreted and transformed the character of the Minangkabau adat rights to natural resources in terms of Dutch legal categories; and they did so for political reasons to legitimate the dominant practice of state controlled exploitation of the woeste gronden.

Ulayat under Suharto and Reformasi
Let us now turn to the developments leading up to the revitalisation of adat after the fall of the Suharto regime in 1998. Some could lead to the impression that adat and ulayat rights had lost all influence. The Basic Agrarian Law of 1960 professed to be based upon adat law, but recognised hak ulayat in a rather ambiguous way, subject to the state’s regulatory control and the ‘common interest’. In the new Forest and Mining Laws as well as in the practice of the respective bureaucracies, the state worked on the same legal and political logic as its colonial predecessor. In West Sumatra, the Suharto regime granted an ever rising number of timber, mining and agricultural concessions, leases and ownership titles for commercial companies in disregard of the claims of local populations during the last two decades before the fall of the regime.\(^{33}\) Some expropriations were entirely illegal, many others based on manipulated consent. Adat and ulayat rights might seem to have been dramatically weakened, especially between

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1983 and 1999 during which time the official village organisation based on the neo-traditional Minangkabau village, the nagari, had been replaced with the desa model.

With Reformasi and the ensuing decentralisation policies, the struggle to regain village control over ulayat land has flared up again, especially after the reorganisation of village government which marks the abandonment of the desa structure and a return to a nagari model.\textsuperscript{34} In order to claim back ulayat land, adat law is mobilised against state legislation and bureaucracies by an alliance of village adat leaders and governments, a variety of NGOs, university lecturers and local politicians. This happens in a variety of arenas. Many farmers started to cultivate formerly expropriated ulayat land. Village Adat Councils have begun to negotiate a share of the profits with companies that are exploiting village commons. Cases trying to invalidate earlier state transactions over village land are taken to court. A Provincial Regulation on ulayat land is under discussion since 2000, heavily contested between more radical adat interpretations of rights to ulayat and more state and investor friendly interpretations.

There is, however, a greater continuity than appears at first glance. While the public struggles for ulayat during the repression were on a low level, the Minangkabau population continued to regard the government encroachment on ulayat as an illegal infringement on their adat rights, but did not dare oppose it out of fear of repression. Ulayat and its insufficient recognition in the agrarian and forest legislation remained an issue in provincial and village politics and academic discussions during and beyond the 1960s. They only were less vocal, more repressed, rarely led to open violence, and did not get the media coverage they are getting now. Moreover, ulayat land not directly controlled and exploited by state or private companies was seen as being governed by adat. The claims to ulayat land made today follow a rather classical adat legal model, but one which has been reproduced throughout history. The Minangkabau recourse to adat is less of an invention than a revitalisation and actualisation of these rights. Therefore, one should be careful to observe the continuity in these processes, in which adat legal forms are maintained through time in more or less unchanged manner, but where the possibilities for their strategic use very much depend on the room for manoeuvre of local actors and the strategic potential inherent in adat law concepts such as ulayat.\textsuperscript{35}

These new open claims for ulayat are part of a broader process in which the relationship between adat and state law is renegotiated, especially around the reorganisation of village government. It also changed the political interest in religion, which had been directed mainly at the state and its corrupt administration, but now had to re-establish its position vis-à-vis adat as well. The result is a reconsideration of

\textsuperscript{34} This led to a boost in the adat law, nagari, ulayat rights and adat leadership nexus. See F. and K. von Benda-Beckmann (2006a,b, 2007a; Biezeveld 2007).

\textsuperscript{35} F. von Benda-Beckmann (1992); Li (2007). The conclusion that “any continuity with colonial adatrecht is illusory” is not necessarily warranted. Nor is the reason that makes reference to adat attractive, namely to claim legitimacy for one’s cause entirely new as Li (2007) suggests. Davidson and Henley seem to be somewhat ambiguous here, for they also state that in some areas of social life, and at least in some parts of Indonesia, there is continuity in a straightforward continuity of customary community land rights, as Davidson and Henley admit (2007: 36).
Minangkabau identity and an exclusionary identity politics, though not of the violent kind we have seen elsewhere in Indonesia.  

Conclusions

The claim to village land controlled by the state based on adat law is one of the most visible and politically important aspects in the contemporary revitalisation of adat. In many parts of Indonesia, this is also linked to a revitalisation of religion and religious law. And in most regions, the revitalisation of adat and religion involves more than political, economic and spiritual values, but also feeds into a revitalisation of identity politics (F. and K. von Benda-Beckmann 2006b, 2007a). A wide range of moral values based on adat and religion, modernity and conservatism are revitalised, of which adat law is only one. It has also invigorated identity politics. These are not idiosyncratic Indonesian developments. Similar developments can be observed worldwide. As in Indonesia, ethnic identity is often coupled with customary law claims to land and local government control, and this has been used to justify exclusion and violence. This is especially the case as populations become more intermingled. However, putting all the blame on adat or customary law and discarding this altogether as some have done, would miss an important point. Reference to adat law and ethnic identity may be used in the justification of such politics, but they are rarely their causes, although they have acquired their own momentum. Many of the problems have been a result of government policies, abuse of state power, and of a failing court system. Reference to adat is often a strategy of last resort; the only accepted way of staking out claims that otherwise may be officially legitimate but for many reasons cannot be pursued. Or, the issues are translated into ethnicity or religion. This is especially important where ethnic identity, adat and religion are strongly intertwined.

These processes must therefore be seen in the context of similar developments unfolding on a global scale. In most states belonging to what was called the 3rd and 4th world, local populations or indigenous peoples fight for recognition of their laws, for greater

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36 The research by Davidson, McCarthy, van Klinken, Vel and Bakker on the violent conflicts in Kalimantan, the Moluccas, and other regions show some of the nastier side effects where claims based on adat may have used to exclude parts of the population on ethnic grounds. In Minangkabau, with its relatively ethnically homogeneous population, the identity discussion and the putra daerah politics are rather inward directed. They do not stress ethnic difference but revolve around what it means being Minangkabau. In politics it is mainly an increasing localism within a self-evident Minangkabau dominance.

37 In our research on Ambon, for instance, we have shown how Ambonese adat law, in the hands of the Ambonese, was used as a shield against the government’s legal demands for local political organisation and land law; at the same time it was used to deny the immigrant population, in rural areas mainly Butonese, full political and economic rights. Adat law was used as jurisprudence of insurgency and oppression. Likewise, spontaneous and government organised transmigrants and descendants of slaves in Sumatra often try to shed the patronage of local adat authorities by reference to state law (F. von Benda-Beckmann 1990).

political autonomy based on traditional law and control over their natural resources. In many countries neo-traditional chiefs are gaining influence. There is an increasing use of law to legitimate these claims and translate political and economic conflicts into legal ones. The Comaroffs (2006, forthcoming) have even spoken of a new “fetishisation” of law. In the case of indigenous peoples, the main reference goes to international law, mainly ILO Convention 169. In most African states, customary laws are mobilised. In Indonesian regions such as Minangkabau, Bali, and Maluku such claims are based on adat law. But in some regions with a less developed adat based political organisation and less systematised adat legal order, the new All-Indonesian Alliance of Adat Societies (AMAN) supports such claims by flirting with the status of indigenous peoples as defined by the ILO Convention. The value of adat law and adat rights is also partly strengthened by the work of donor agencies involved in transmitting models of good governance and participation, local communities and their law also have a certain appeal for achieving “development from below”.

These transnational legal influences on adat revitalisation in Indonesia are rather new. But our historical analysis suggests that in most parts of Indonesia the reactivation of adat is not as new as some analysts seem to imply (Bourchier 2007: 113), and it may be more diverse. More generally, the fact that law is mobilised in these struggles probably is also less new than suggested. While the new political freedom, for instance in Indonesia and South Africa, opens up room for the deployment of legal strategies, political and economic conflicts were also largely expressed in legal terms during times of political repression. This was a safer, although not necessarily successful, way of framing claims than in overt political terms (F. von Benda-Beckmann 1989). What is different now that a much wider range of recognised validity of adat law is demanded.

We have seen that any single of these processes should not be treated in isolation. As a more general point, we suggest that it is necessary to look at the full

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40 Note on AMAN, see Li, Acciaioli, Davidson and Henley in Davidson and Henly (2007), Moniaga (2007). AMAN does not play a role in West Sumatra and other Indonesian regions, e.g. Aceh, Maluku, Bali.
41 There is an interesting parallel with current developments that the Comaroffs (2004, forthcoming) have identified for South Africa, and which we are currently experiencing in Indonesia. There, too, as a means to counter the previous underprivileged positions within the state, customary and faith based law is being politicised and pushed upwards to the same rank as state law. This is only one instance of a more general development that is going on world wide. Law talk has become extremely fashionable and social and economic relationships are increasingly cast in legal terms. It is turning out that Habermas has been right more than he ever dreamed of. One of the disturbing effects of this “fetishising of law” as they call it, is that it creates what they call a “poli-cultural” constitutional framework in which ethnicity and religion become new powerful dividing devices. This echoes the earlier legal political devate in the Dutch East Indies. As Burns has said, Nolst Trenité did not so much challenge Van Vollenhovens’s ethnography, but against his “anthropopolitical” thesis, that placed adat law at the same constitutional rank as state law.
spectrum of social and political life and to all relevant arenas instead of singling out one particular new institution. We must see the processes of revitalisation of adat in their dynamic interdependence with, for instance, the “revitalisation of democratic institutions” and the revitalisation of religious law, in a context that is ever more influenced by local and translocal developments. By now, there is a reasonable body of empirical work on adat issues. We suggest that more work is needed on the ways in which religious law affects the social life of ordinary people, but embedded in the wider social and political contexts, and in relation to the other locally available normative orders.42

42 Many have pointed at the negative side of it and there is no doubt that these are often serious. But studies such as those of Bowen for the Gayo Highlands and ours in West Sumatra suggest that there is far more going on as well. The comparative study of Islamic law in state legal systems by Jan Michiel Otto (2006) is an important contribution, for it shows the different ways and extent to which Islamic law is integrated in state legal systems.
References


