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Il pluralismo giuridico: paradigmi ed esperienze

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LEGAL PLURALISM IN PURSUIT OF SOCIAL JUSTICE: CORNELIS VAN VOLLENHOVEN AND THE CONTINUED RELEVANCE OF HIS LEGACY IN CONTEMPORARY INDONESIA

1. *Introduction.*

In a recent newspaper article professor Maria Soemardjono criticised a new government regulation on collective rights of ownership to land (1). Such collective rights have a long pedigree in Indonesia and they have been central to the land tenure of communities throughout the archipelago. The most important collective right is the right to avail (*hak ulayat*), which under Indonesian state law can only be held by a 'customary law community' (*masyarakat hukum adat*). The new government regulation (18/2021) tries to 'modernise' this right to avail, by turning it into a management right (*hak pengelolaan*).

According to professor Soemardjono this is a bad idea. The new regulation makes the right to avail dependent on the state and thus turns it into a right provided on state land instead of an original right. In this manner it changes the nature of ownership. The consequence is that if a community holding the management right provides a concession to a company, for instance for a plantation, once the conces-

(1) Maria SOEMARDJONO, *Tata Kelola Pertanahan Pasca-UUCK [Managing Land Post-the Work Creation Law]*, in « Kompas », 16-3-2021.

sion expires the land will go to the state and not be returned to the community. This clearly is a matter of great importance to the community and has been the subject of debate since colonial times.

Despite the distance in time, this newspaper article — its topic, its argument and its style — relate directly to the work of Cornelis van Vollenhoven. Van Vollenhoven was professor of Constitutional and Administrative Law of the Dutch Overseas Territories and of the Adat Law of the Dutch East Indies from 1901 until his early death in 1933. During his lifetime Indonesia was ruled by a Dutch government that showed no inclination to release its profitable colony in the foreseeable future. But even though Indonesia did become independent and has changed tremendously since, Van Vollenhoven's scholarly legacy has continued to influence Indonesian law and legal thinking until the present. There is no Indonesian jurist who does not know his name. Some still revere him as one of the few colonial figures who promoted justice for Indonesians and opposed colonial exploitation. Others have accused him of paving the way for 'integralism' — Indonesia's brand of fascism — or of having been a mere anti-Muslim colonialist.

This article will try to shed some light on Van Vollenhoven's ideas and his legacy. It will show how debates about land law and legal pluralism in present-day Indonesia have been shaped by Van Vollenhoven's scholarship and his influence on colonial legal policies. Evidence of their relevance is that 75 years of promoting legal unification have not removed legal pluralism. The main reason is that the conflicts caused by colonialism have never been resolved: the rise of capitalism and its demand for secure property rights has continued to undermine the land tenure and livelihoods of 'small people'; and the rise of a modern state that wants to unify the nation but still faces a population with conflicting ideas about what is proper or desirable.

The present article will also discuss how Van Vollenhoven came to be one of the founders of the study of legal pluralism — the idea that several legal systems operate within a single space — comparing his views and method with two of his contemporaries: Eugen Ehrlich and Bronislaw Malinowski. I will argue that the approaches of these three scholars were more closely related than commonly acknowledged. In the case of Van Vollenhoven and

Ehrlich the similarities rely on their comparable positions within the legal scholarly field and the common heritage they built upon, while Malinowski found himself as an ethnographer in a society which much resembled the societies Van Vollenhoven looked at in the Netherlands Indies.

The final sections of the article will address the significance of Van Vollenhoven's work in present-day Indonesia. In the conclusion I will argue that the drive to acknowledge legal pluralism should not merely be understood as an analytical scholarly approach, but that it is always part of a quest for justice and respect for others. Van Vollenhoven, Ehrlich and Malinowski were all three concerned with ways to accommodate the tensions between modernisation and justice and therefore their ideas are still relevant.

2. *Van Vollenhoven as a defender of legal pluralism.*

When Van Vollenhoven became professor in Leiden in 1901, the population in the Netherlands Indies was officially divided into two groups: the native population and the Europeans (2). To these groups different laws applied: religious law, institutions and custom to the first, and adapted versions of the Dutch legal codes to the latter (Art. 75 jo. 109 *Regerings Reglement*). For criminal matters natives were tried in separate courts, to which they could also bring their civil disputes. Procedural codes were different as well, with the rules of criminal procedure for the native population containing far fewer guarantees to a fair trial. Appeals from the native court system went up to the court of first instance for Europeans. Those not belonging to one of these two groups, mainly Chinese, Arabs and Indians, fell under the laws for the native population (Art. 109 *Regerings Reglement*), but for civil and commercial law the Chinese were subject to the laws valid for Europeans (3). Finally, the native

(2) I use the term native population to remain close to the original text in Dutch, which speaks of *inheemse bevolking*. Later during the colonial period this term was increasingly replaced by « Indonesians ». I will follow the terms used during the period I am addressing.

(3) Cees FASSEUR, *Colonial Dilemma: Van Vollenhoven and the Struggle between Adat Law and Western Law in Indonesia*, in *European Expansion and Law: The*

population were subject to their own 'heads', who were incorporated into the Netherlands-Indian administrative service.

While this may create the impression of a strict divide, in practice the situation was not so clear-cut. During the 19th century the number of laws that applied to the entire population continued to grow. In the field of criminal law custom only held a subsidiary position to the criminal code for the native population — which was almost a copy of the one applying to Europeans. Similarly, many administrative regulations were of general application, while the validity of religious law and custom was subject to a repugnancy clause. Finally, Indonesians could request to be brought under European laws, a possibility that was increasingly made use of as time progressed (4). In short, the plural system was not set in stone and constituted a complex legal edifice. The question begs itself why the Dutch colonial state supported such legal complexity and why it did not simply impose Dutch laws on the entire population (5).

The original reason was expediency. The dual system of law was closely connected with the indirect rule the Dutch practiced from the days the United East Indian Company (V.O.C.) started to govern parts of the Indonesian archipelago. It was much easier to leave the local law in place than to subject the entire population to Dutch legal codes which in no way resembled the rules applied by this local population in their daily lives. The Dutch relied on violence and coercion whenever they needed to, but preferred native government and local legal structures whenever possible (6).

However, during the 19th century mere self-interest gradually

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Encounter of European and Indigenous Law in 19th- and 20th-Century Africa and Asia, Wolfgang Mommsen and Jaap de Moor eds., Oxford/New York, Berg, 1992, pp. 237-238.

(4) Bart Luttikhuis, *Beyond race: constructions of 'Europeanness' in late-colonial legal practice in the Dutch East Indies*, in « European Review of History — Revue européenne d'histoire », 20 (2013), 4, pp. 539-558.

(5) Fasseur, *Colonial Dilemma*, cit., pp. 237-238; Michael Barry Hooker, *Legal pluralism: An introduction to colonial and neo-colonial laws*, Oxford University Press, 1975, pp. 251-257.

(6) A good example of such reticence was the government's refusal to interfere on behalf of Dutch sugar planters on Java, who requested legislative measures to simplify and regularise the land leases they had obtained from the Javanese aristocracy (C.C.H.

gave way to the idea that the Dutch presence in the colony ought to be justified in another manner and that the government should be concerned less with profit and more with the welfare of its Indonesian subjects. This did not mean that the colonial project turned into a benign venture; as until at least 1914 the Dutch were engaged in a war in Aceh which resulted in an estimated 50, 000 to 60, 000 Acehnese killed (7) and they fought another bloody war at the time in Bali. Nonetheless, the official narrative of colonial rule changed. At the turn of the century, when Van Vollenhoven was appointed at Leiden University, the Dutch government announced a new, 'ethical' policy: the Netherlands should develop its colony by promoting the moral and material welfare of its population (8).

The new policy carried implications for the legal system. Most 'ethical' liberals at the time were convinced that development required unification of laws and institutions in all fields of law. This applied in particular to private and commercial law, which should provide the legal certainty considered necessary for enabling Indonesians to take part in the modern economy. Former lawyer in the Netherlands-Indies and now MP Van Deventer, whose article 'A Debt of Honour' of 1899 had been the turning point leading to the ethical policy, listed the main arguments in another article with the title *Rechtshervorming in Indië* (Legal Reform in India). He wrote in support of the government proposal submitted to Parliament in 1904 to change the *Regerings Reglement* and thus pave the way for legal unification. His central point is captured in the following quote:

> From the aforegoing it will have become clear that Netherlands India provides a map not only of peoples, but also of societal institutions. It goes without saying that what is essential in these institutions should be respected. But it is equally clear that the interest of the entire community is served by simplification, by a gradual removal of the boundaries existing between the groups of inhabitants of a single country; by pursuing a solution, where

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VAN HASPEL, *Overwicht in overleg: Hervormingen van justitie, grondgebruik en bestuur in de Vorstenlanden op Java 1880-1930*, Leiden, KITLV, 1985, p. 21).

(7) Adrian VICKERS, *A History of Modern Indonesia*, New York, Cambridge University Press, 2005, pp. 10-13.

(8) John Sydenham FURNIVALL, *Netherlands India: A Study of Plural Economy*, Cambridge University Press, 1944, p. 232.

> possible, of the diversity in a higher unity and, in any case, by removing anything that can cause doubt, that can cause uncertainty (9).

The author continued to indicate that the present system *was* uncertain, both in its content, its boundaries and its divisions. The key concern, according to Van Deventer, was the content of the unwritten law of the native part of the population. Finding customary law was an 'exceedingly difficult job' for judges, but its codification would lead to petrifying the differences (10). For these reasons the author applauded the solution proposed by the government. The new draft Article 75 took as its point of departure regulations that were universally applicable to the entire population. It left open the possibility to regulate particular topics in different ways for different groups, but reduced religious law, institutions and custom in civil law matters to a residual role. This new arrangement, Van Deventer thought, would lead to « an increase in prosperity, an acceleration in the intellectual development process, in a single word, to Progress » (11).

However, not all of those supporting the ethical policy were of the same opinion. Only a few years before, in 1901, the previous Minister of Colonies Cremer had ordered in-depth research into religious law and custom so as to prepare for codification (12). Cremer no longer held office, but his former private secretary and now professor Van Vollenhoven, took up the cause of his former employer to resist the unification.

Van Vollenhoven presented his argument in an article called « No jurist's law for the native » (13). He started by conceding that law in the Netherlands Indies was extremely diverse indeed and hard to handle for those charged with the administration of justice.

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(9) Conrad Theodor VAN DEVENTER, *Rechtshervorming in Indië*, in « De Gids », 69 (1905), p. 314.

(10) *Ibid*., pp. 323, 326-327.

(11) *Ibid*., p. 346.

(12) *Ibid*., pp. 325-326.

(13) He had already published another newspaper article expressing his dissent with the amendments, but not as fundamental as this one (see Cornelis VAN VOLLENHOVEN, *Inlandsch recht en inlandsche christenen* (1904), in ID., *Het adatrecht van Nederlandsch-Indië*, deel III, Leiden, Brill, 1933, pp. 14-21).

Nonetheless, unification was a bad idea, simply because a diverse society needs a diverse legal system. In his own words:

> The obstacle against this, which lies in the multi-coloured (*kakelbont*) character of the population itself, this obstacle does not let itself be pushed aside, and therefore neither can it be predicted *what* unity of law the developmental lines of the existing pluriformity in the long, long run will converge on (14).

This quote indicates that Van Vollenhoven did not oppose legal development *per se*, but rather that he resisted imposition of a law which would not correspond to local needs and ideas of justice. He continued with an argument that is fundamental to his defence of legal pluralism:

> in the eye of the government European jurists' law is apparently the only that deserves the name 'law'. The adat law of the population may be usable for the good-natured, 'patriarchal' administration of justice by a government official, it is absolutely insufficient for the administration of justice 'founded on juridical principles' of the 'judge educated in the European school' (15).

According to Van Vollenhoven, the arguments the government listed against the inferiority of adat law lacked any evidence. To these principled points he added a thorough analysis of the legal complications and anomalies the amendments would cause, demonstrating juridical brilliance and rhetorical skill. He also effectively used his knowledge of adat law to denounce the absurdity of applying a unified European law-based code, asking what this would mean for the « preferential right to buy adjoining fields », the « native conception of houses as movable goods », the « absence of adverse possession », etc (16). These and many other examples, which he seemed to produce just off the bat, added much to the persuasive force of his argument. It was clear that this was someone who knew what he was talking about.

Van Vollenhoven concluded by promoting the approach taken by former Minister Cremer: conduct thorough research into adat

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(14) Cornelis VAN VOLLENHOVEN, *Geen juristenrecht voor den inlander* (1905), in *Het adatrecht van Nederlandsch-Indië*, cit., p. 24.

(15) *Ibid*., p. 26.

(16) *Ibid*., p. 38.

law before starting to compile codifications for the approximately 20 legal circles (*rechtskringen*) (17). Although he failed to convince the incumbent Minister of Colonies, Parliament proved susceptive to his plea and amended the proposal. In the end the law was gazetted but it was never put into operation (18).

This was neither the first nor the last time Van Vollenhoven would be out on the barricades to fight legislative attempts at legal unification, but he did more than that. As from 1901 onwards he started collecting, documenting and analysing materials on adat law which he received from colleagues and officials in the colonial service, most of whom were educated at Leiden. He thus put into practice what he had argued the Dutch colonial government ought to do. This led to the publication in 1918 of *Het Adatrecht van Nederlands-Indië*, in the words of Sonius « a vast effort which went hand in hand with his political struggle for the recognition of this law » (19).

The highlight of this struggle was the resistance Van Vollenhoven mounted in the spring of 1919 against an amendment to another provision of the *Regerings Reglement*, Article 62. This time it did not concern application of European law to Indonesians, but the ownership of land. Indirectly, Van Vollenhoven's action concerned the livelihoods of tens of thousands of Indonesian peasants, and the debate is still relevant in Indonesia today.

What was the issue about? In 1870 the Dutch Parliament had adopted the so-called Agrarian Law, which opened up Indonesia to European capital by enabling the colonial state to provide long leases for plantations, mines, and other economic activities. Part of the legal reform was the so-called Domain Declaration which accompanied the new law and held that all land in the Netherlands-Indies « on which no one could prove right of ownership » was state domain and could in principle be leased. The question was of course what 'right of ownership' meant and how much domain the state

(17) *Ibid.*, p. 55.

(18) H.W.J. SONIUS, *Introduction*, in J.F. HOLLEMAN, *Van Vollenhoven on Indonesian Adat Law*, The Hague, Martinus Nijhoff, 1981, p. XXXIV.

(19) *Ibid.*, p. XXXII.

could dispose of. This remained subject to debate until the end of colonial rule.

The proposed amendment to Article 62 would include the Domain Declaration into the *Regerings Reglement* and it would remove much of the protection of land held by Indonesians under communal rights. In particular, it suggested to get rid of the provision in particle (6) that

> The Governor-General will not avail over land brought into culture by the native population, or as communal pasture or on any other basis belonging to the villages, other than for the public interest [...] and for the benefit of agricultures introduced by high authority (*op hoog gezag ingevoerde kultures*), according to the applicable regulations, against a proper compensation.

While Van Vollenhoven held that this provision still offered too much leeway for the government in appropriating land, its abolition would mean unfettered power of the government to provide land to capitalist entrepreneurs. He laid out his objections to the amendment in a 120-page long book he managed to write, print and distribute to all MPs within a time span of three weeks (20). The book carried the title *De Indonesiër en zijn grond* (The Indonesian and his land) and probably still is his best-know work. Its main argument was simple: the proposed changes would lead to widespread dispossession of land and spelled disaster for the Indonesian population. Hence, they should be rejected. The author did not accuse the government of having bad intentions; these he argued were « selfless » and could « see the light of day ». However, they were based on « delusionary-knowing » (« waanweten ») and bad faith on the part of the officials in the Netherlands Indies who would be in charge of their implementation (21).

This reference to 'delusionary-knowing' was key to Van Vollenhoven's argument. While the book provided dozens of examples of injustices committed against the Indonesian population, it derived its argumentative power from the author's profound knowledge regarding the content of their land rights. This he combined with com-

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(20) Peter Burns, *The Leiden Legacy: Concepts of Law in Indonesia*, Leiden, KITLV Press, 2004, p. 22.

(21) Cornelis van Vollenhoven, *De Indonesiër en zijn grond*, 1919, p. 2.

plete mastery of the Dutch legislation concerning their recognition, including its history. Such knowledge, combined with a brilliant polemic style, made Van Vollenhoven's plea hard to resist. And indeed, in the end the government decided to withdraw its proposal (22).

From these episodes we can infer two major reasons for Van Vollenhoven's relentless struggle against legal unification. First, such unification was unfair and disrespectful — this reason was most visible in the 1905 debate about introducing a unified civil code. Indonesians had a different species of law, but their law was no less worthy of respect than the law codes in the Netherlands (of which Van Vollenhoven wrote in a rather dismissive way). Importantly, adat law was closely connected to common people's daily lives and it was responsive to social change. It corresponded to local ideas of justice in a way that an abstract and alien code could never achieve. The majority of this law did not change by « deliberate decisions », but through « spontaneous and unconscious transformation ». It was an uncodified law, which could be documented by ethnologists, but for the time being should remain uncodified (23).

Secondly, Van Vollenhoven understood that recognition of adat law was central to protecting Indonesians against dispossession — this is most evident in the debate about the Domain Declaration. The only way to save Indonesians from losing their land was to gain recognition for their own forms of tenure. Key was the right to avail, which through the provision mentioned above limited the power of the Governor-General to provide leases. The right to avail was of both a public and private law nature, an insight he supported by extensive empirical evidence. He also demonstrated how Dutch legislation and its interpretation by the Netherlands Indies authorities had led to widespread legal uncertainty — disproving the claim that European law would make land tenure more secure.

How successful was Van Vollenhoven? We have seen that at the level of legislative policy he wielded much influence: Dutch colonial legal policy would no doubt have looked different had he not been around. Legal pluralism remained the basis of the substantive civil law and of the administration of justice, even as unification

(22) BURNS, *The Leiden Legacy*, cit., p. 41.
(23) VAN VOLLENHOVEN, *De Indonesiër*, cit., pp. 3-4.

of courts proceeded and transactions in the modern economy involving Indonesians increased in number and became subject to European codes. However, with the expansion of this modern, capitalist economy the pressure on Indonesian land increased as well and the arbitrary dispossession of land continued despite legislative success, due to the « bad faith » interpretations of the colonial government. Nonetheless, it is likely that the protection championed by Van Vollenhoven contributed to preventing dispossession — how much is hard to tell (24). The fact that colonial capitalists fought against such provisions until the end of the colony bears testimony to their importance. These entrepreneurs even established a competing faculty to educate colonial officials who were more sympathetic to the interests of Dutch corporations than the colonial officials educated in Leiden (25).

3. *Legal pluralism in Van Vollenhoven's time: Ehrlich.*

To what extent was Van Vollenhoven's argument in favour of legal pluralism unique in his days? In order to answer this question I will now look at the intellectual tradition Van Vollenhoven built on and compare him with two contemporaries who are generally considered as founders of legal sociology and legal anthropology respectively: Eugen Ehrlich and Bronislaw Malinowski. They both developed theories of non-state law and legal pluralism during the lifetime of Van Vollenhoven. This comparison will show that Van Vollenhoven's ideas about law and how to conduct research on law were very similar to the ones promoted by these two scholars, and that Van Vollenhoven was part of an intellectual movement not limited to the colonial world. Moreover, as the comparison with Ehrlich will show, Van Vollenhoven should be considered as responding to the *Historische Schule* of Von Savigny and Puchta instead of representing it (26).

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(24) Sonius, *Introduction*, cit., p. XXXIX.

(25) Burns, *The Leiden Legacy*, cit., pp. 77-90.

(26) This argument has been made by many scholars, in its most elaborate version by Peter Burns (*ibid*., pp. 227-237). See also David Bourchier, *Illiberal democracy in Indonesia: The ideology of the family state*, Routledge, 2014, pp. 11-36.

Of these two contemporaries Eugen Ehrlich resembles Van Vollenhoven the most. Just as Van Vollenhoven he had a background in law. Trained at the University of Vienna and a citizen from the Austrian-Hungarian Empire, Ehrlich stood in the German-oriented legal tradition of the *Historische Schule* which was also influential in the Netherlands (27). Van Vollenhoven seldom mentioned the *Historische Schule*, but at one of the first pages of *Het adatrecht van Nederlandsch-Indië* he refers to one of its major critics — Georg Beseler — and the distinction Beseler made between *Volksrecht* and *Juristenrecht* (28). Ehrlich's seminal work *Grundlegung zur Soziologie des Rechts* is for a major part constructed as a critique on the *Historische Schule*.

Ehrlich also referred to Beseler, as the single legal scholar in Germany in the 19th century who had attempted to « breathe life » into the *Historische Schule* by promoting the study of *ausserstaatliches Recht* in practice (29). Beseler reproached Von Savigny and Puchta and their followers that they only studied texts about non-state law; where instead one should study such law in action. Unfortunately, according to Ehrlich, Beseler had « seen much right, but thought little through to the end » and therefore failed to change the tide (30). In *Grundlegung* Ehrlich set out to further develop Beseler's ideas and to create a methodology for studying what he called *lebendes Recht.* The central object of his studies was the *geordnete Gemeinschaft* (ordered community): studying this ordered community, according to Ehrlich, « we will also perceive the law everywhere, as the organiser and carrier of any human association » (31). In Ehrlich's view this was exactly what scholarly study of law should be concerned with: studying society and the role of law

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(27) See for instance J.F.S. SCHOORDIJK, *De privaatrechtelijke rechtscultuur van de twintigste eeuw in context*, Mededelingen van de Afdeling Letterkunde, Nieuwe Reeks, 66, 2, Amsterdam, KNAW, 2003, pp. 1-14.

(28) VAN VOLLENHOVEN, *De Indonesiër*, cit., p. 4.

(29) Bernd-Rüdiger KERN, *Georg Beseler — Leben und Werk*, Schriften zur Rechtsgeschichte, Heft 26, Berlin, Duncker und Humblot, 1982, p. 381.

(30) Eugen EHRLICH, *Grundlegung der Soziologie des Rechts* (1913), Berlin, Duncker und Humblot, 1967, pp. 12-13.

(31) *Ibid.*, p. 18.

therein, instead of looking at the formal, written legal rules (*Rechtssätze)* as incorporated in codes and judgments.

Ehrlich did not write much about colonies and colonial law, but here and there he makes a remark on non-Western societies:

> In backward (*zurückgebliebenen*) areas, in the Orient, partly also in the East and South of Europe, each traveller from the West will remark the general 'disorder' (*Unordnung*); this disorder consists therein, that formal legal rules (*Rechtssätze*), even when they are present, will not be followed. To this disorder in general life stands in peculiar contrast the strictness with which the traditional order in small associations, in the house, the family or the clan is observed ([32]).

It was this « traditional » order Van Vollenhoven wanted to get recognition for, instead of enacting alien legal rules that would not be followed.

There are strong similarities between Ehrlich and Van Vollenhoven. In the first place, both emphasised the scholarly nature of their approach to studying law. Ehrlich held that

> the actual legal science is a part of the theoretical social science, the sociology. The sociology of the law is the scientific theory (*Lehre*) of law ([33]).

Van Vollenhoven first outlined his views on the study of law in his inaugural lecture, where he argued that it should be conducted in a similar way as the study of languages and that the task of jurists was to devise a taxonomy of law. This should be done through « investigating the state, trajectory, and regularity of law ». Indeed, this is how he ordered and analysed the materials he obtained about adat law, leading to results that were very similar to what Ehrlich intended the sociology of law to produce.

A second similarity is the distinction both scholars made between state and non-state law. Van Vollenhoven used the term adat law (*adatrecht*) for this purpose, a concept he adopted from the Islam-scholar Snouck Hurgronje, and which encompassed more than customary law. Adat resembles custom, but can also be referred to more broadly as 'the way in which one ought to do things'. As adat alone is too broad, Snouck Hurgronje coined the term

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([32]) *Ibid*., p. 29.
([33]) *Ibid*., p. 19.

adatrecht. It refers to those rules governing society which have a legal consequence. The distinction is not a sharp one, but it is sufficiently determined to be of use in scholarly study (34). Ehrlich introduced the famous term « living law » (*das lebende Recht*), « the law not laid down in formal legal rules, but which nonetheless governs life » (35). Just as Van Vollenhoven he emphasised that this was not customary law (*Gewohnheitsrecht*), which in the traditional German jurisprudence had a far more limited meaning.

We should note a difference as well, for Ehrlich seemed mostly interested in studying 'modern' legal phenomena: « More important for the jurist than such dying remains are the viable shoots of new law ». This sentence follows a description of legal forms and practices found in various parts of the Austrian-Hungarian empire, such as the family-community called *Sadruga* (common all over the Balkan), a special trading community of the Bojken (East-Galicia) and the farmers' communities of the Ruthenians (East-Galicia and Bukovina) (36). Such local traditional legal phenomena in the Netherlands-Indies were precisely what Van Vollenhoven was interested in. However, unlike the aforementioned legal forms in Ehrlich's Austria-Hungary such 'traditional' phenomena were at that time dominant in most of Indonesian society, and Van Vollenhoven moreover did not limit himself to describing them:

> Our goal in this is not the adat scholarship in itself, even less to impede Indonesia's development for the benefit of pampered adat curiosities; our higher goal is the creation of good administration of justice and good government for our natives, the two of which cannot be achieved without solid knowledge of indigenous law and indigenous conceptions (37).

This takes us to the third point of similarity, which was practical orientation. Van Vollenhoven's concern with the practical application of his knowledge is evident from the quote above and the previous discussion. Ehrlich is less explicit than Van Vollenhoven. When he discusses the research into the living law, he seems

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(34) VAN VOLLENHOVEN, *De Indonesiër*, cit., pp. 8-9.

(35) EHRLICH, *Grundlegung*, cit., p. 399.

(36) *Ibid.*, pp. 403-404.

(37) Cornelis VAN VOLLENHOVEN, *Miskenningen van het Adatrecht*, Leiden, Brill, 1909, p. 90.

mainly concerned with understanding, less so with practical application (38). However, if we consider the argument he develops throughout *Grundlegung der Soziologie des Rechts* it is evident that he wishes this knowledge to be relevant to legislators and judges. His trenchant critique of many formal legal rules reminds of Van Vollenhoven's criticism of the Dutch legislator (39). This is also why he pays so much attention to the distinction between 'norms of decision' (*Entscheidungsnormen*) and the living law, and why he argues that the judge must orient himself on the latter when determining the former.

The final point of similarity I want to note is method. Both Ehrlich and Van Vollenhoven promoted field-research, next to the study of written sources. Ehrlich is less detailed than Van Vollenhoven in how exactly to conduct such research, referring to geography and to the importance of studying the concrete in the form of legal practices in trade, family life, etc (40). Van Vollenhoven in 1910 developed a so-called 'Adat Guide' for field-work, which contained practical guidelines that will look quite familiar to legal anthropologists today, for instance the first one:

> The best way to find an adat rule is not to ask people about the rule itself, but to observe how they handle certain cases in actual practice. Therefore, only ask information on facts and solutions, and above all, do not ask about this or that system.

In summary, their work is different in size, scope and orientation, but the object, the theoretical premises, the objective, and the methodology of Van Vollenhoven and Ehrlich's scholarly approaches are quite similar. The most important difference seems to result from the fact that Van Vollenhoven developed his work and ideas in a colonial context, whereas Ehrlich set out to develop a sociology of 'modern' law. This impacted on the forms of legal pluralism they promoted. In the Netherlands-Indies legal pluralism was part of the state system and Van Vollenhoven's objective was to preserve it. Ehrlich lived in a state which had introduced its major

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(38) See in particular EHRLICH, *Grundlegung*, cit., p. 408.
(39) See for instance *ibid*., p. 396.
(40) *Ibid*., pp. 405-409.

codifications in the early 19th century. His concern was to make sure that jurists remained aware of the existence of law outside the state, which they should take into account when interpreting the formal law. In that sense — and as we will see in the final sections of this article — Ehrlich is in some respects more relevant to the development of Indonesian law today than Van Vollenhoven.

4. *Van Vollenhoven and Malinowski.*

The next contemporary of Van Vollenhoven and another founder of legal pluralism whose approach I will briefly address is Bronislaw Malinowski. Malinowski was not a law professor but an anthropologist and he did not write for jurists but for social scientists. In his classic monograph *Crime and Custom in Savage Society* he refers to the German group of jurists related to the *Zeitschrift für vergleichende Rechtswissenschaft* as a rare example of scholars interested in « savage justice », but he adds that their work was « heavily handicapped » because « [t]he writers had to rely upon the data of the early amateur ethnographers » and « in an abstract and complex subject such as primitive law, amateur observations are on the whole useless » (41).

Malinowski is generally considered as one of the founders of modern anthropology. His fame relies in large part upon his contributions based on in-depth and long term fieldwork among the Trobrianders in Melanesia between 1914 and 1918. Much anthropology at that time was still of the armchair-type and academically the discipline was not taken very seriously. In Malinowski's own words, in the introduction to *Crime and Custom in Savage Society*:

> Anthropology is still to most laymen and to many specialists mainly an object of antiquarian interest. Savagery is still synonymous with absurd, cruel, and eccentric customs, with quaint superstitions and revolting practices. Sexual license, infanticide, head-hunting, couvade, cannibalism and what not, have

(41) Bronislaw MALINOWSKI, *Crime and Custom in Savage Society* (1926), London, Routledge & Kegan Paul, 1951, p. 3. Some of the scholars mentioned by Malinowski were associated with Eugen Ehrlich in the *Freirechtsschule*, notably Joseph Kohler. See Albert S. FOULKES, *On the German Free Law School (Freirechtsschule)*, in « ARSP: Archiv für Rechts- und Sozialphilosophie/Archives for Philosophy of Law and Social Philosophy », 55 (1969), 3, pp. 367-417.

> made anthropology attractive reading to many, a subject of curiosity rather than of serious scholarship to others (42).

In *Crime and Custom* Malinowski set out to change this view, by demonstrating the falseness of conceptions about « primitive societies » as lawless. He demonstrated that in 'primitive' or 'savage' society individuals were not completely dominated by the community or mechanically obeying its commands, but that complex mechanisms were involved in maintaining social order and coherence. These mechanisms operated in the absence of specialised institutions to settle disputes or enforce rules, just like Ehrlich's living law. As Malinowski notes:

> The fact is that no society can work in an efficient manner unless laws are obeyed 'willingly' and 'spontaneously'. The threat of coercion and the fear of punishment do not touch the average man, whether 'savage' or 'civilized', while, on the other hand, they are indispensable with regard to certain turbulent or criminal elements in either society (43).

Malinowski demonstrated that all societies have legal ideals and rules, but in practice these ideals are frequently forsaken and rules are bent or evaded. Trespassers expose themselves to sanctions, but they often get away with their violations.

A major contribution of *Crime and Custom* was that it showed how the Trobrianders were not only governed by criminal law, but also by civil law. Hitherto, most scholars had assumed that if « primitive societies » knew a form of law it was criminal law only (44). Malinowski demonstrated that by contrast an intricate complex of rules governed transactions and institutions as village, clan, and marriage, quite similar to the « civil law » of modern societies. These societies were nothing like « communist tribes », but had their own rules concerning property and contract. The latter were based on reciprocity, economic obligation, public enactment and systematic incidence of obligation. Such rules were binding and could not be broke without consequence.

Just as between Ehrlich and Van Vollenhoven, strong similari-

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(42) MALINOWSKI, *Crime and Custom*, cit., p. 1.
(43) *Ibid*., p. 13.
(44) *Ibid*., p. 63.

ties exist between Malinowski and Van Vollenhoven. However, they are different ones, mainly connected to the nature of the non-Western societies they studied and the colonial context in which their work was located.

The first similarity is the wish of both scholars to reinforce respect for and an understanding of « the other ». Both argued that the local systems of social relations were *law* and not mere custom and for this reason these systems deserved respect. However, there was also a difference. Malinowski mainly drew attention to the similarities between « savage » and « civilised » human beings, often with a touch of irony. So he finds that « [w]henever the native can evade his obligations without the loss of prestige, or without the prospective loss of gain, he does so, exactly as the civilized business man would do » (45), or « [t]he savage is neither an extreme 'collectivist' nor an intransigent 'individualist' — he is, like man in general, a mixture of both » (46). The best example is in a footnote, where Malinowski explains how difficult Melanesians find it to hear the preaching by « civilized » white people of Christianity, « brotherly love » and a taboo on warfare and killing, and reconcile this with the stories they heard about the Great War going on in Europe:

> They forcibly concluded that the White Man was a tremendous liar, but they were not certain at which end the lie lay — whether in the moral pretence or in his bragging about war achievements (47).

Van Vollenhoven had made it a major part of his task to expose similar hypocrisy — in particular on the part of the colonial bureaucracy — even if his indignation usually precluded irony. But a more important difference is that he was facing the difficult task of reconciling the equality between Indonesians and Europeans as human beings, while at the same time promoting Indonesian legal systems as something so alien to Western thought that the imposition of Western law could only lead to great injustices. On top of that, most adat law in the Netherlands Indies was far removed from what one could possibly label « primitive law », often concerning

(45) *Ibid.*, p. 30.
(46) *Ibid.*, p. 56.
(47) *Ibid.*, p. 83, fn. 1.

highly complex systems of legal rules governing equally complex social organisations.

Malinowski was in the relatively comfortable position that his work had no immediate practical relevance. His objective was not to obtain legal recognition of local normative systems. However, by calling these systems *law* he elevated them to a higher level, beyond European arrogance vis-à-vis these « savages ». And he certainly was aware of the problems faced by local populations confronted with the modern world. Sometimes he comes very close to Van Vollenhoven in his normative evaluation:

> The study of the rapidly vanishing savage races is one of those duties of civilization — now actively engaged in the destruction of primitive life — which so far has been lamentably neglected. The task is not only of high scientific and cultural importance, but also not devoid of considerable practical value, in that it can help the white man to govern, exploit, and 'improve' the native with less pernicious results to the latter (48).

Or in the following quote, where the second sentence could have been written by Van Vollenhoven:

> there is the subject of primitive law, the study of various forces which make for order, uniformity and cohesion in a savage tribe. The knowledge of these forces should have formed he foundation of anthropological theories of primitive organisation and should have yielded the guiding principles of Colonial legislation and administration (49).

In short, both were fighting Western arrogance and concerned with the fate of the colonised.

The other main similarity between Van Vollenhoven and Malinowski is the importance they attach to doing fieldwork and to do this properly. The long-term participant-observation promoted and practiced by Malinowski was out of reach for most of the pupils and colleagues of Van Vollenhoven, who most often were conducting their research while being employed in the colonial civil service or judiciary. Nonetheless, the ideal was the same: « the study by direct observation of the rules of custom as they function in actual life » (50). They were

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(48) *Ibid*., p. xi.
(49) *Ibid*., p. 2.
(50) *Ibid*., p. 125.

also aware of the problems involved in examining a normative field as law and the danger of receiving answers indicating desirable instead of actual behaviour (51). It is unsurprising that the descriptions of cases in *Crime and Custom* are quite similar to the ones encountered in the studies produced by the adat law scholars.

As a summary conclusion to this section and the previous one: Van Vollenhoven's work on adat law was located at the crossroads of several scholarly traditions — colonial law, the emerging sociology of law within the continental European legal tradition, and the emerging anthropology of law in 'primitive society'. As a result Van Vollenhoven's scholarship is representative of an eclecticism still found in much law and society research today. What made him unique and what made his work so sensitive — and to some critics controversial — is the colonial context in which he operated.

We can also see that there were differences between the legal pluralisms of Van Vollenhoven, Ehrlich and Malinowski. For Van Vollenhoven and Malinowski legal pluralism was not only an intellectually honest way of labelling the different forms of law they perceived, but also a way to command respect for communities other than the Western, so-called civilised ones. Choosing one's concepts has political consequences. According to Sonius, Van Vollenhoven also pleaded internationally to respect the law of the peoples under colonial rule (52). Ehrlich's legal pluralism seems to be of a somewhat different nature. Although he called attention to the law of different ethnic communities in the Austrian-Hungarian empire his main interest were modern law and modern communities. This does not mean, however, that Ehrlich was not concerned with justice. His efforts to promote sociology of law were intimately intertwined with his resistance against the extreme legal formalism prevalent in Germany and his involvement in the *Freirechtsschule.* Ehrlich saw knowledge of living law as a key to a just interpretation of formal law, where the 'norms of decision' should be influenced by legal practices and their connected ideas on justice. Much of the

(51) *Ibid*., p. 120, Commission for Adat Law, *Adat Guide*, 1910, in HOLLEMAN, *Van Vollenhoven on Indonesian Adat Law*, cit., p. 264, rule 23.

(52) SONIUS, *Introduction*, cit., p. XXX. It is relevant to note that Van Vollenhoven was also a renowned scholar of international law.

difference in the scholarship of Van Vollenhoven, Ehrlich and Malinowski seems to stem from the variable degree of interconnectedness of the living law and the formal legal system within the social fields they studied. But this difference also resulted from the social fields they themselves were part of.

5. *Legal pluralism in independent Indonesia.*

Several scholars have pointed out the irony in history: while Van Vollenhoven was sympathetic of Indonesian autonomy and supported Indonesians to study at Leiden and enter the Netherlands-Indian judiciary, it were his colonialist opponents' ideas on legal unification which would become leading in independent Indonesia (53). Yet, unsurprisingly, and as Van Vollenhoven would have predicted, unification of law in such a plural country has not been easy to achieve. More than 75 years after Indonesia became independent legal pluralism is still widespread. However, most of it looks more like the 'living law' legal pluralism of Ehrlich than the state-recognised legal pluralism of Van Vollenhoven.

But before addressing the present let us first take a look at the situation immediately after independence. Like virtually all newly independent states Indonesia from the start became involved in two overarching projects: nation-building and promoting development (54). For both purposes legal unification was an attractive policy option. A clear sign that Indonesia was heading in this direction can be found in the 1945 Constitution stipulation that Indonesia is a unitary state. After the Revolution — the four-year war of decolonisation against the Dutch — this Constitution was replaced and Indonesia became a Federal state, to return in less than a year to the unitary structure (55).

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(53) E.g. *ibid*., pp. XL-XLI.

(54) Ferrell HEADY, *Public Administration: A Comparative Perspective*, New York, Marcel Dekker, 1979, pp. 244-245.

(55) Adriaan BEDNER, *The Need for Realism: Ideals and Practice in Indonesia's Constitutional History*, in *Constitutionalism and the Rule of Law: Bridging Ideals and Reality*, Maurice Adam, Anne Meuwisse and Ernst Hirsch Ballin eds., Cambridge University Press, 2018, pp. 167-168.

An indication of a different nature was the speech given on occasion of the anniversary of Universitas Indonesia by Professor Soepomo, in 1947. Soepomo was a former pupil of Van Vollenhoven and Indonesia's most prominent adat law scholar. Under the Japanese he had held an influential policy position and he was one of the key actors in drafting the Constitution. Later he served as the first Minister of Justice of the Republic of Indonesia. If anyone among the nationalists might have been sympathetic to adat law at the time it would have been Soepomo. However, in his lecture he made clear that Indonesia's legal future was not one of adat law. Soepomo dismissed the colonial aspects of Western law, but unification along the lines of such modern law would be the way forward (56).

Less known, but more nuanced and insightful on the issue of legal unification is a chapter Soepomo contributed to a volume commemorating the 25th anniversary of the *Rechtshogeschool*, which by then had become the Law Faculty of *Universitas Indonesia.* It was published in 1949, shortly before the Dutch finally conceded defeat in the struggle to keep their colony. In a discussion of the work of Ter Haar — Van Vollenhoven's most influential pupil — Soepomo held that « [t]hose studying or applying adat law in these times should be mainly educated in sociology to understand the new social reality and the new forms of adat recht it has created » (57). Sociology should form an important part of the education of lawyers.

Soepomo agreed with Ter Haar that the key in proper administration of justice was a thorough sociological knowledge of the population's sense of law (*rechtsbesef*) combined with the judge's own sense of law. To acquire such knowledge the judge could use the adat law text-books, the descriptions of adat law in different regions in Indonesia, and the compilations of precedents (*jurisprudentie*). Finally, the judge should keep in close contact with the « legal environment » in which he or she was administering justice.

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(56) SOEPOMO, *Kedudukan Adat Di Kemudian Hari*, Djakarta, Pustaka Rakyat, 1947.

(57) SOEPOMO, Prof. Mr. B. ter Haar Bzn. (9 February 1892 — 20 April 1941), *Heroriëntatie op het gebied van adatrechtpolitiek*, in F. VAN ASBECK, *Gedenkboek Rechtswetenschappelijk Hoger Onderwijs in Indonesië 1924-1949*, Groningen/Djakarta, Wolters, 1949, p. 39.

While according to Soepomo much of adat law was still relevant, one should also acknowledge that the general environment had changed. Large parts of the Indonesian population were modernising rapidly, becoming more individualised and businesslike; a « social revolution » had taken place and increased social tensions required a more active role of the government. The major change obviously was that this government would soon be one of Indonesians over Indonesians. Required was « the adjustment of Indonesia to the demands of the modern world, and specifically as regards the administration of justice, a system of law and administration of justice, which is equivalent to that of modern countries ». Soepomo agreed with Van Vollenhoven that in the long run a codification answering the legal needs of Indonesians was the most preferable way to accomplish this, but he acknowledged that it would be extremely difficult to do this properly given the diversity of the population. Most difficult, according to Soepomo, would be to unify family law. However, commercial and labour law as part of modern legal relations were amenable to unification. And land law should certainly be unified as well and if necessary the new land law should change the old adat rights. But in all of this, he warned, a key point made by Van Vollenhoven remained central: making new laws is easy, but getting them accepted by the population is another matter (58).

The form and substance legal unification should take was not entirely clear. Ideas about unification were shared by a broad political spectrum, from communists to Islamists. They agreed that Indonesia needed to be centralised and unified, but they disagreed profoundly on the content of the new law. Islamist wanted Islamic law, nationalists wanted modern law, many communists wanted as little law as possible. In any case, few — if any — preferred legal pluralism.

Nonetheless, the fate of adat law as a special form of living law deserving of state recognition was sealed. In the years to come the formal recognition of adat law was slowly but steadily undermined. Some scholars and politicians looked for ways to maintain the

(58) *Ibid.*, pp. 47-50.

symbolic value of adat law as something genuinely Indonesian to support the national state. This gave rise to the idea of a 'national adat', a core of principles shared across the nation which should find its expression in the unified legal system (59). Nonetheless, as we will see, Indonesia's future legal reality stayed closer to Van Vollenhoven's pluralist law than most would have predicted.

6. *Land law.*

One of the key areas of legal unification concerned land law. Land was considered indispensable for development purposes such as rural restructuring and industrial and urban expansion. This led the government to enact the Basic Agrarian Law (BAL) in 1960. The BAL replaced the Dutch plural system of land law with a unified system of rights, allegedly based on the national adat. It also replaced the domain principle with an even further-reaching claim to ownership of land by the state.

If one looks closely at this idea of national adat underlying the Basic Agrarian Law (BAL) and the actual content of the law, it reminds of Savigny and Puchta's pretence that « the law originates with the people », but that what « the people » actually do is of no importance (60). While the BAL stipulated that it was based on adat law, it limited the validity of the living adat wherever it could and elevated the state's ownership of land to a new level. Henceforth the right to avail was only valid to the extent that adat communities had not developed over time into more modern communities, and — in any case — their rights could always be overridden by the state for reasons of public interest. The general recipe of the BAL is that land rights should be individualised and registered — exactly the kind of system that Van Vollenhoven feared would marginalise small peasants (61).

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(59) Muhammad KOESNOE, *Hukum Adat sebagai suatu model hukum*, Bandung, Mondar Maju, 1992.

(60) See also FOULKES, *On the German Free Law School*, cit., p. 369.

(61) On the BAL see for instance Daniel FITZPATRICK, *Disputes and pluralism in modern Indonesian land law*, in « Yale Journal of International Law », 22 (1997), pp. 171-212; Adriaan BEDNER, *Indonesian land law: Integration at last? And for whom?*, in

Even if registration of land has proven difficult and very slow (62), this is more or less what has happened. Many communal lands have been enclosed by the state, in particular under the Soeharto regime which was in place from 1966 until 1998, but the process of dispossession has continued, and of course it has not remained limited to adat communities (63). What is striking, however, is the lack of respect the Soeharto regime had for adat communities in particular. Labelled « isolated tribes » (*suku terasing* or *masyarakat adat terpencil*) they were subjected to all kinds of development programmes most of which led to loss of land, livelihood and social coherence (64).

The difference with colonial times was of course that it were no longer foreigners but Indonesians governing, developing and exploiting other Indonesians. Yet, the justification for the dispossession of land had not much changed: the 'will to improve', under the New Order coined as 'pembangunan', or national development, was not unlike the ethical policy of the Dutch; a genuine belief and effort for some policy makers, a cynical sham for others. Most likely it was both at the same time. But the official narrative in any case was that the ones who lost their land were supposed to pay the price for the progress of the nation and that they should not complain.

During the early years after 1998, when Soeharto was deposed and Indonesia transitioned to a democratic political system, many communities saw opportunities to reoccupy the land taken from them. Sometimes they were successful, sometimes they were not. As time passed and the rebellious atmosphere dissipated new forms of action to regain land became necessary. And remarkably, the domi-

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Land and development in Indonesia: Searching for the people's sovereignty, John F. McCarthy and Kathy Robinson eds., Singapore, ISEAS, 2016, pp. 63-88.

(62) Pierre VAN DER ENG, *After 200 years, why is Indonesia's cadastral system still incomplete?*, in *Land and development in Indonesia: Searching for the people's sovereignty*, John F. McCarthy and Kathy Robinson eds., Singapore, ISEAS, 2016, pp. 227-244.

(63) BEDNER, *Indonesian land law*, cit.; Adriaan BEDNER, Yance ARIZONA, *Adat in Indonesian Land Law: A Promise for the Future or a Dead End?*, in « The Asia Pacific Journal of Anthropology », 20 (2019), pp. 420-421.

(64) See for instance Gerard PERSOON, *Isolated Islanders or Indigenous People: The Political Discourse and its Effects on Siberut (Mentawai Archipelago, West-Sumatra)*, in « Antropologi Indonesia », 68 (2002), p. 30.

nant mode of action in retrieving lost land — at least in rural areas — harks back to Van Vollenhoven. At present, the key form of resistance against land dispossession is once again the appeal to the right to avail (65).

This return to Van Vollenhoven's line of defence has been stimulated by the rise to prominence of the *Aliansi Masyarakat Adat Nusantara* (Association of Adat Communities of the Archipelago), or AMAN. They provide nationwide support to communities to retrieve or protect their land by referring to their status as adat communities. This process has been going on for twenty years now and its end seems not in sight.

Unfortunately, there are two problems with this approach. The first one is that Indonesia's national laws have changed and that they are far less conducive to recognition of the right to avail than the colonial laws. Given the limitations imposed by the BAL and the Forestry Law, proving the right to avail is exceedingly difficult. Until recently there was not even an implementing framework for such recognition, and the one that has been created since erects several hurdles which are for most communities impossible to overcome.

The second problem is that Indonesia has changed. Even in Van Vollenhoven's days migration and changing living conditions were leading already to loss of cohesion of adat law and its institutions. As a result, the defence based on adat law as first defined by Van Vollenhoven and his contemporaries rarely works. This could be different if the definition of an adat community would change. The idea of adat law should be broadened to living law, in line with the ideas of Van Vollenhoven, Ehrlich and Malinowski. However, given that adat is treated as a fossil from the past by adat scholars in Indonesia's law faculties, and given the conservatism of most of government officials involved it is difficult to imagine such a development.

This does not mean that legal pluralism has disappeared in land matters. As long as land remains unregistered and/or contested people will occupy, live on and try to legalise the land they hold. For this purpose they often use systems of tenure they have created

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(65) The next few paragraphs are based on BEDNER, ARIZONA, *Adat in Indonesian Land Law*, cit.

themselves (66). This happens both in rural and in urban areas and on many occasions the state accommodates this living law, or is forced to. In his recent *Nine Tenths of the Law* Christian Lund writes about legal pluralism in land tenure under the new, complex conditions as follows:

> Statutory law is present, propped up by the redoubtable powers of enforcement of the state, but claims, rules, and forms of access that can be made to appear legal may possibly enjoy the same status and enforcement. These efforts to legalize are fueled by popular imaginations of the law and the desire that a claim should be seen as legal rather than be dismissed by the strictures of professional legal dogma (67).

This is far removed from the adat communities whose systems of land holding and way of life Van Vollenhoven sought to protect. Yet, the contestation is similar and the importance of getting recognition has remained. The main difference is that the colonial formal substantive law offered arguably more room for recognition of the land rights of communities than Indonesia's current formal substantive law — even if it is true that many in the colonial bureaucracy subverted this law in favour of foreign capitalists.

7. *Family law.*

In another field of social life in Indonesia legal pluralism has continued to receive more recognition by the state than in land matters. Family law, as already mentioned by Soepomo above, is generally recognised as probably the most difficult field to achieve legal unity, due to the diversity of local value systems, the close connection with religion and the emotional values involved. Despite continuous efforts at unification plurality has remained, and here we

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(66) See for instance Gustaaf Reerink, Jean-Louis van Gelder, *Land titling, perceived tenure security, and housing consolidation in the kampongs of Bandung, Indonesia*, in « Habitat International », 34 (2010), 1, pp. 78-85 and Rikardo Simarmata, *Legal complexity in natural resource management in the frontier Mahakam Delta of East Kalimantan, Indonesia*, in « The Journal of Legal Pluralism and Unofficial Law », 42 (2010), 62, pp. 115-146.

(67) Christian Lund, *Nine-Tenths of the Law: Enduring Dispossession in Indonesia*, New Haven, Yale University Press, 2020, p. 178.

see that the state has been able to strike a better balance between its drive for unification and the living law.

While so far I have discussed legal unification mainly as an elite government project, it has been driven by various interest groups. In the case of family law the one which invested most in unification was the women's movement. Women activists wished to get rid of the patriarchal system of Islamic law which has dominated family law of most Indonesians. However, over time it became clear that the Islamic establishment would never accept a fully secular system, and that most Indonesians support this point of view. The outcome of the struggle has been a system where the state is in charge of registering marriages, but where the validity of a marriage is not formally dependent upon registration. To be recognised by the state a religious marriage must be registered and to be registered it needs to conform to the limitations imposed by state law. Such limitations concern issues as polygamy, repudiation and other discriminatory practices. Another important requirement is that a divorce must take place before a state court, the Islamic court (68).

The actors who make this system work are the local bureaucracy and the judges charged with its implementation. The local bureaucracy here involves an array of officials, some of whom are paid by the state (such as the head of the registration office) and some of whom are not. The latter are those involved in concluding the religious marriage, who act simultaneously as intermediaries between the local population and the registration office. The present mechanism does not answer the requirements of a streamlined modern legal system, but it has the ability to deal with the legally plural nature of local society and hence can resolve problems of pregnant girls who are too young to get married, problems of women who want to get a divorce while their husbands do not, and of children who need a birth certificate carrying the names of both

(68) See for instance Mark CAMMACK, Adriaan BEDNER, Stijn VAN HUIS, *Democracy, human rights, and Islamic family law in post-Soeharto Indonesia*, in « New Middle Eastern Studies », 2015, <http://www.brismes.ac.uk/nmes/archives/1413>.

their parents — even if these parents were not officially married at the time of birth (69).

Whereas in land matters the bureaucracy and judges have failed to reconcile the modern legal system with living law, in the field of family law they have been quite successful. In this manner they have achieved what Van Vollenhoven — and Ter Haar even more — saw as the way in which adat law and modernisation could be reconciled. The main reason is that the stakes in family law are different from those in land law: in the former it is an orderly civil registry versus the indifference of a population who do not need the state for organising their family lives, whereas in the latter it is the interest of large capital versus the livelihood of small peasants. The relatively autonomous nature of communal family life also allows people to withdraw with relative ease from the purview of the state — something they cannot do in situations where a company arrives to take away their land, backed up by the power of law, bureaucracy and courts.

8. *Aceh.*

Before coming to a conclusion I need to briefly mention the unique situation regarding legal pluralism in Aceh, the single province which has managed to gain a high degree of formal autonomy from the unitary state. After a long civil war and a devastating tsunami that killed an estimated 167, 000 people the Indonesian central government and the Free Aceh Movement concluded a peace treaty. Under the autonomy Aceh thus gained, it introduced its own brand of Islamic law and its own system of Islamic courts. The latter's powers do not only include family law, as in the other parts of Indonesia, but also certain crimes — such as gambling,

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(69) See for instance Stijn VAN HUIS, *Islamic courts and women's divorce rights in Indonesia: The cases of Cianjur and Bulukumba*, Leiden, EM Meijers Research Institute and Graduate School of Leiden University, 2015; Mies GRIJNS, Hoko HORII, *Child marriage in a village in West Java (Indonesia): Compromises between legal obligations and religious concerns*, in « Asian Journal of Law and Society », 5 (2018), pp. 453-466; Muhammad Latif FAUZI, *Aligning Religious Law and State Law: Street-level bureaucrats and Muslim marriage practices in Pasuruan, East Java,* PhD-thesis, Leiden University, 2021.

drinking alcohol and being involved in illicit sexual relations (70). Less known is that adat law has become officially applicable as well, in large part to the same offences as covered by the Aceh state Islamic law. While officially these systems are separate, in practice it appears that police and other local government actors skilfully use the plural system to resolve local problems in the way they see most fit. In practice this is usually the way that is locally considered the most appropriate, for instance by applying adat law in cases of those endogamous marriages which are considered unacceptable, while in cases involving lesser violations police, prosecutors and local government apply Acehnese state Islamic law. Criminal suits in more severe cases are brought under Acehnese state Islamic law or even under national criminal law instead of adat law, because the punishments these systems apply provide more protection for the victim. A good example are cases concerning sexual abuse of children, where national law can serve to remove the perpetrator from the local society.

The case of Aceh is complex and the effects still need to be fully understood. What it does show is that by reintroducing adat law local power-constellations have been redefined and checks and balances seem to have increased. Moreover, it indicates that the recognition of legal pluralism can serve to better adapt the responses of the legal system to local ideas of justice (71).

9. *Conclusion.*

The final sections of this article have provided a mere glimpse of legal pluralism in Indonesia today. They deal with complex phenomena that can be considered from multiple perspectives and deserve a more elaborate treatment. Nonetheless, they do show that in present-day Indonesia legal pluralism lives on, even in those fields of law where the government has tried hardest to achieve unifica-

(70) Arskal SALIM, *Dynamic legal pluralism in Indonesia: Contested legal orders in contemporary Aceh*, in « The Journal of Legal Pluralism and Unofficial Law », 42 (2010), 61, pp. 1-29.

(71) I have derived the information about Aceh from the PhD-research conducted by A. Arfiansyah, whose thesis is scheduled to be defended later this year.

tion. Other examples I have not considered include the recent return to traditional forms of government in West Sumatra and Bali (72), the continued ascendancy of adat elites in the bureaucracy of Eastern Indonesia (73), the role of adat leaders in family law in Mukomuko (74), and many others (75).

Most of these instances of legal pluralism do not concern the state-recognised version Van Vollenhoven championed. Even if such formal legal pluralism has made a come-back in Aceh, and to a lesser extent in other places, the large majority of Indonesians today are officially subject to national laws and not to adat. Migration, capitalism, globalisation, education and other processes associated with modernity have changed Indonesia in such a way that not much has remained of the adat communities who made up the large majority of Indonesia's population in the first decades of the 20th century.

However, legal pluralism still is omni-present. Communities or other semi-autonomous social fields create their own rules and the state has to do something with them. In some fields, such as family law, the state has adapted itself to the situation and found more subtle ways than confrontation or coercion to address the living law. This adaptation is in line with the ideas of Van Vollenhoven and Ehrlich. In family law, Indonesia has codified living law (Van Vollenhoven), but left room for the judiciary and the bureaucracy to adapt the resulting formal legal provisions to the situation at hand (Ehrlich). Informed by local knowledge, street-level bureaucrats involved in family law matters will even transgress statutory limits to

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(72) About West Sumatra see the impressive study by Franz and Keebet VON BENDA-BECKMANN, *Political and legal transformations of an Indonesian polity: the Nagari from colonisation to decentralisation*, Cambridge University Press, 2013. See also Jacqueline VEL, Adriaan BEDNER, *Decentralisation and village governance in Indonesia: the return to the nagari and the 2014 Village Law*, in « The Journal of Legal Pluralism and Unofficial Law », 47 (2015), 3, pp. 493-507.

(73) Jacqueline VEL, *Uma politics; An ethnography of democratization in West Sumba, Indonesia, 1986-2006*, Leiden, Brill, 2008.

(74) PhD-research that is currently being conducted by Al-Farabi at the Van Vollenhoven Institute.

(75) See also David HENLEY, Jamie DAVIDSON, *The revival of tradition in Indonesian politics: The deployment of adat from colonialism to indigenism*, Routledge, 2007, and the special double issue of « The Asia Pacific Journal of Anthropology », 20 (2019), 5/6, *Changing Indigeneity Politics in Indonesia: From Revival to Projects*.

accommodate the living law in seeking practical solutions for mundane issues as teenage pregnancy, adultery, violent husbands — in short, for the problems commonly found in an imperfect world.

Where it concerns land tenure the situation is quite different. Here accommodation occurs as well, but the stakes are higher and violence is around the corner. Captured by elite interests, both at the national and regional level, the state is not prepared to give in to those claiming rights outside the system it has designed and communities championing their rights almost always find themselves at the losing end.

The ultimate reason is that the interests of capital have outweighed the interests of local land-users. This has translated into a legal system where the two positive features found in family law discussed above have been absent. The Indonesian government has created a legal system along the preferences of the colonial bureaucrats Van Vollenhoven so despised: a unified land law predicated on individual land rights with the broadest of preferential rights for the government. On top of that, the judiciary and the land bureaucracy have seldom used their jurisdiction within the constraints of this system to accommodate local systems of land rights within the state legal framework (76).

So where does this leave Van Vollenhoven? It is beyond this article to engage with the critiques of his work, some of which I have addressed in passing. Generally, I feel that he has not been treated fairly by authors as Burns, Bourchier and Lev, who have tended to portray him as a romantic who promoted a 'pure' adat law and despite his good intentions left Indonesia ill-prepared for the future (77). As regards adat law I think Van Vollenhoven's conception was closer to Ehrlich's living law than these authors concede. A similar and convincing argument has been made by Franz and

(76) It is striking, for instance, how courts hardly play a role in the struggles over land discussed by LUND, *Nine-Tenths of the Law*, cit.

(77) BURNS, *The Leiden Legacy*, cit.; BOURCHIER, *Illiberal democracy*, cit.; Daniel S. LEV, *Colonial law and the genesis of the Indonesian state*, in « Indonesia », 1985, 40, pp. 57-74.

Keebet von Benda-Beckmann, in an article showing how Burns misrepresents several key-concepts of Van Vollenhoven (78).

On one point I think the critique does make sense: Dan Lev's argument that in supporting adat law the colonial state reinforced the power of the Indonesian local elites who served their own interests and helped them in sustaining their power after Indonesia became independent. This is not something Van Vollenhoven was unaware of — no one could be after having read Multatuli's indictment of the adat heads' abuse of power in his 1866 novel *Max Havelaar* (79). One way in which he addressed it was to conduct research into adat law in a manner that did not represent only the views of adat leaders. However, this was a problem caused by the colonial system that he could not resolve.

When it comes to land law no one today will deny the utter unfairness of the colonial system. But it is precisely this unfairness Van Vollenhoven was fighting. The situation would most likely have been worse if he had not championed the rights of Indonesians against colonial capital. Respect for adat law was an important bulwark in that defence. It is telling that most of the attacks against Van Vollenhoven's ideas by his contemporaries came from colonial capitalists. If they would have been served by the recognition of adat, why would they have been so adamant in pursuing the introduction of Western legal codes?

This is also why I think the comparison between Van Vollenhoven and Malinowski makes sense. Their argument in favour of legal pluralism forced the state to justify its legal policies to « civilise » others. Ehrlich offered tools for doing this beyond « traditional » adat law, which ran a risk of being labelled as backward and outdated. In the case of Indonesia this is where Ter Haar came in, who tried to adapt the adat policies to modern times. Justice would

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(78) Franz and Keebet VON BENDA-BECKMANN, *Myths and stereotypes about adat law: A reassessment of Van Vollenhoven in the light of current struggles over adat law in Indonesia*, in « Bijdragen tot de taal-, land- en volkenkunde/Journal of the Humanities and Social Sciences of Southeast Asia », 167 (2011), 2-3, pp. 167-195.

(79) This novel, accusing the adat heads of maladministration and the colonial government of condoning this, appeared in 1860 and had a huge impact on debates concerning the colony in the Netherlands.

be supported if Indonesian judges today would follow this line of thinking and pay more attention to the living law.