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VAN VOLLENHOVEN
ON
INDONESIAN ADAT LAW

Selections from
HET ADATRECHT VAN NEDERLANDSCH-INDIË
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CHAPTER I

ADAT, ADAT LAW, NATIVE LAW

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[3] He who turns from the law of the Netherlands to the law of the Dutch East Indies enters a new world.

He has learned to visualize law as a body of rules codified in statutes and decrees: outwardly distinct from rules of morality, conduct, and aesthetics, internally a fairly comprehensive and coherent whole, divided into four major segments — constitutional law, private law, administrative law, criminal law — each in turn organized on firm well-tested lines. He has become accustomed to think that the composition of these rules needs no other historical explanation than can be traced to the deliberation and resolutions of certain persons and institutions (Cabinet Ministers, Parliaments, Government Commissions), and that its prospects of future development will be determined only by further deliberations and resolutions.

Of the insight that law is but one phenomenon in a ceaselessly flowing society, engaged with other phenomena in a restless interaction of one contending force against another, he has grasped no more than the colourless phrase that the law must take into account the needs of society. And even if he does not feel entirely satisfied with this view of the law of his motherland he has to admit that the great majority have, consciously or unconsciously, accepted it, and that it does suffice for our everyday Dutch legal practice.

How different in the Indies! Here, too, codified law, but only for a numerical minority of legal situations and relationships. Here, too, fixed outlines in the field of uncoded law, but varying widely [4] according to the people concerned and their stage of development. Here, too, changes of the law by deliberate decisions, but many more by spontaneous and unconscious transformation. Viewed through the eyes of a codist the legal inventory of the Indies presents a jumble, an incomplete, inadequate and untidy whole; but when explored by one whose desire for knowledge and explanation of the living law

on earth is inspired by the very diversity of its past and present manifestations, this same inventory becomes an inexhaustible source of instruction.

It is not difficult to sketch in broad outline the present-day relations of codified to uncoded law in the Dutch East Indies. For Europeans and for those ranked as Europeans — numbering about 80,000, and all falling under the same codes of law — the position is similar to that in the Netherlands: written law is preponderant, and customary law the exception. On the other hand, for the 34 million natives (taking the archipelago as a whole), the constitutional, administrative and criminal law is partly codified, and the private law only very rarely; for them, then, uncoded law is the dominant rule. And finally, the category of 600,000 foreign orientals, ranked as natives: their law is in an intermediate position, for although they have far less uncoded law than the natives, their uncoded law is far more extensive than that of the Europeans and those ranked as such.

For these reasons the Dutch East Indies possesses a body of law of a type not found in the Netherlands — the uncoded law of natives and foreign orientals — or, should one wish to make use of Beseler's antithesis (*Volksrecht und Juristenrecht*, 1843), a 'lawyers' law' for westerners side by side with a 'popular law' for the rest of the population. But this oriental popular law has only this in common with the thimbleful of customary law of the Europeans and those classed as such: it is uncoded.

If this is the relative position of codified and uncoded law in the Indies nowadays, it hardly needs mentioning that there was a time when the islands of the archipelago knew nothing but uncoded law. It may be assumed that before the advent of Hindu civilization — dated, for Java, to the fifth century, and nowadays even to the [5] first century, A.D. — only the indigenous law of the Malayo-Polynesians was found in our archipelago. To this law foreign contributions have been made by Hinduism since the eighth century, and by Islam since the fourteenth and fifteenth centuries; and the late Middle Ages saw the arrival of the Chinese with their own popular law. But with all this, the total law of the archipelago remained uncoded. It was only when the Europeans (Portuguese, English, Dutch) arrived upon the scene in the sixteenth and subsequent centuries, that western regulations began to replace or supplement the uncoded law of the orientals. But even now, in areas where

European influence has penetrated slightly if at all, the only law is still the uncoded law of the population.

Since they are a part — indeed, the most important part — of the complex of law in the archipelago, the oriental legal institutions have to be considered in a common frame together with the western law. On the other hand, it is obviously impossible to divorce these legal institutions from the non-legal elements of popular customs and beliefs. Both these aspects are found in the ethnology of the Indies; and the best part of what we know about the popular law of the Indies we owe to ethnological studies. If, therefore, this uncoded law can be divorced neither from other ethnological material nor from the rest of the law of the Indies, a separate legal treatise can only be warranted if, from the outset, this twofold coherence is constantly kept in mind.

In a study of the uncoded law of the natives and foreign orientals the subject-matter therefore seems easily defined. But not the name! Neither legislation nor learned usage has been able to think up a technical term for this legal material which is both short and apt. And this point deserves the more attention because the multiplicity of terms in use reflects a host of greater and lesser misconceptions.

The *Regeringsreglement* [Constitution of the Netherlands East Indies, 1854]¹ itself already provides three terms instead of one: [6] 'religious laws, institutions and customs' (s. 75(3)); 'religious laws or ancient sources' (s. 78(2)); 'popular institutions' (s. 71(3)).

In the rest of the East-Indies legislation the first of these expressions is often repeated, sometimes in a slightly modified form, such as: 'the religious laws, popular institutions and customs'. (—) But every now and then, other terms have been used,² for instance: 'the written law or old established custom' (—); 'native law' (—); 'local institutions and usages' (—); 'the popular institutions' (—); 'local usage' (—); and so on: a whole regiment of terms instead of one good name.

And if only one of these terms could be used; but in one the religious element is over-emphasized, while in another this aspect is completely ignored, and in a third not only the law of the people, but also all other matters of customs and manners are included. It therefore provoked amazement that the original draft (1904-1905) of the bill to amend sections 75 and 109 of the 1854 Constitution retained [7] the existing deficient terminology. The preliminary report of the Dutch Lower House (—) suggested 'customary law'. But this term, too, would be equally useless, because many parts of the uncoded law of the natives and foreign orientals can be pointed out which

are based not on custom but on statutory or other written provisions (such as village by-laws, princely edicts, the rules of Islamic school-law and of Chinese imperial law).

Legal practice, again, gets along with yet another word: it uses 'the law' (i.e., in a broad sense, the codified law) as against 'adat'. The latter term — the Arabic word [*ʿādat*] for 'custom' — has found a place in many indigenous languages, either simply as *adat* or '*adat*' (Javanese, Malay, Acehnese), or as *ngadat* (Javanese), *ödöt* (Gayonese), etc. Its appearance would suggest an association with the term the Indonesian himself would use, but this impression is wrong. For one reason, there is hardly any question of a fixed terminology in Indonesian languages. In Java, for instance, the word *adat* is used for all that is custom or ought to be customary: they speak of '*adat*' in connexion with festivities, visits, homage, the preparation of food, the rice stock, and so on. In this sense the people of Minangkabau use, besides *adat*, also *limbago*, or *adat limbago*; and it has sometimes been said (Kooreman, 1901:146, 148f.) that '*adat*' here represents 'law, or a binding rule of custom', as against non-obligatory customs referred to as *limbago*. But it would be wise not to rely too much on such distinctions (so often based on the pretentious prattle of indigenous authorities who want to impress the European investigator). In Minahasan Malay — and elsewhere, in the Moluccas — one uses *adat kebiasaan* or 'customary *adat*'.³ The coupling of words, also known outside the Moluccas, is apparently intended to clarify the word *adat*. In the language of the Batak, at least of the Karo-Batak,⁴ the term *adat* is uncommon, and popular custom is referred to as *basa* or *bicara*.

But the more important reason is that, in speaking of *adat*, the Indonesian never (or hardly ever?) includes those elements of the religious laws which are not rooted in 'the old law of the land'. These [8] religious elements are distinguished from *adat* under such not very strict terms as *agama* (Javanese), *hukōm* (Acehnese and Gayonese) and *hukum agama* (southern Sumatra). If, therefore, this naturalized word '*adat*' is being used to indicate the legal matter covered by section 75(3) of the *Regeringsreglement* (which includes both indigenous and religious law) it fosters misunderstanding.

Is there, perhaps, another indigenous word which means 'law' in an objective sense? Apparently not. There are literary words, such as *rajaniti* in Javanese (from Sanskrit, and actually meaning royal conduct); but even if these meant the same as what we understand by 'law', they would obviously not serve our purpose.

If, therefore, the legal material popularly known as adat is to be defined in such a manner as to include only the 'adats that have legal consequences' (Snouck Hurgronje, 1893:357), and to avoid all confusion with other native interpretations, then the simplest solution would be to speak of 'adat law'. Casually or incidentally this term has been used in an objective (occasionally also in a subjective) sense by various authors: Snouck Hurgronje, Nederburgh, Juynboll, Scheuer. (In most of these sources⁵ the term is synonymous with 'indigenous law' to the exclusion of religious elements.) And last but not least, adat law has already been used in a number of official papers.⁶ The term is evidently viable and fulfils a need.

[9] Should 'adat law' be accepted, its technical meaning must not, of course, be confused with that of other terms such as 'indigenous law' or 'native law'. 'Indigenous law' has a more restricted meaning, because it refers to adat law minus its foreign religious elements. 'Native law' (in the accepted English sense) again covers a wider field, because it embraces both the codified and uncoded law applicable to natives, and in the Indies therefore also includes any Native Criminal Code or Native Code of Procedure.

Confusion is bound to arise unless the terminology is fixed:

I NATIVE LAW:

A. Adat Law of Natives:

- (1) Indigenous Law
- (2) Religious Elements

B. Codified Law for Natives

II LAW OF THE FOREIGN ORIENTALS:

A. Adat Law of foreign orientals:

- (1) Popular Law
- (2) Religious Elements

B. Codified Law for foreign orientals

The use of the term adat law has an even stronger claim to preference because it serves to weaken the notion (already refuted above) that a sharp and rigid line separates legal usage from other popular usage, or adat law from the rest of the adat. The borderline is, indeed, so vague that it is often difficult, and sometimes impossible, to distinguish the one from the other. This problem, for instance, became evident where a human penalty is added to the vengeance of gods or spirits (*pantang, rebu, pemali*) upon the contravention of certain

prohibitions; or where mortal man himself can invoke such a state of *pantang* as regards a thing or action (e.g. by putting up mystical signs in order to prevent entry into a certain forest). It also obtains when a degenerate adat in Java prescribes (—) that a contribution [10] (*sumbangan*) made by an invited relative or friend to a wedding feast should, if of any value, be reciprocated at a later date by a gift of exactly the same value and preferably also of the same kind, when a wedding or similar festivity takes place in the house of the donor. If, later, the fulfilment of such an adat gives rise to a dispute or even litigation, it may be difficult to decide whether this is a matter of law or merely of etiquette. And again, there are marriage prohibitions in Java which may be ignored, provided that the appropriate mysterious protective measure (*sarat*) has been complied with (—).

But this overlapping of custom and customary law need not prevent a separation of the two, because in many instances it is easy to distinguish the adats with legal consequences, and to set them apart from adats without legal consequences (such as: the Acehnese adat forbidding men to fetch rice from the granary; or the Batak adat prohibiting initiates to appear in public within seven days after their circumcision; or the Javanese adat prescribing the use of yellow *ketan*-rice on many occasions; or mourning customs everywhere).

As a matter of fact, one will repeatedly find that this adat law contains provisions (e.g. with regard to clothing, the shape of houses, moral conduct) which, in the Netherlands, one would never expect to see classified as 'law'; but if they carry an enforceable sanction, how could this name be denied to them?

To adat law, interpreted in this sense, this study will be devoted. We have already a number of monographs on it; but we lack additional material and co-ordination. Moreover, there is no foreign study which could serve as a model.

If the publication of this book had to wait for the preliminary arrangement of all this material, it would not appear within the next ten years. And in the meantime the men on the spot, who have the finest opportunity of enriching our knowledge of this law, would be deprived of any guide.

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CHAPTER II

THE ELEMENTS OF ADAT LAW

[September, 1906]

[14] The collection of rules of conduct applicable to natives and foreign orientals — which are 'adat' on account of their uncoded state, and 'law' because they carry sanctions — has not been derived from a single source. As with the languages and ethnic groupings, the influence of history is noticeable. Against the Malayo-Polynesian background of the indigenous languages, Sanskrit, Arabic, Portuguese and Dutch words and usages appeared as the result of the arrival of Indian, then Moslem, and finally European, foreigners. Against the Malayo-Polynesian background of indigenous beliefs and customs the imprint of Hindu, Moslem and Christian shapes and shades became visible. Likewise, the languages and customs of the Chinese and Arabs in the Indies were subject to non-Chinese and non-Arabic influences. It was no different with the adat law of these peoples. Here, too, the indigenous Malayo-Polynesian law is still the background of the adat law of the Indonesians, whether autochthones like the Batak, Dayak, and Toraja, or immigrants like the members of the Malayan race. But among the 34 million-odd Indonesians of to-day (—) only a minority estimated at less than 3 million has remained pagan, adhering to an animistic-fetishistic religion (Badui, Tenggerese, many Batak, the inhabitants of the interior of Borneo and Celebes, the people of New Guinea, the Baliaga in Bali, etc.). The majority follows one or other [15] of the world's great religions, as can be seen at a glance from the map (not always accurate) of the distribution of religions attached to the *Koloniaal Verslag* of 1896: one million Hindus (Bali and Lombok); more than 30 million Moslems (Java, Madura, Sumatra, the coastal areas of Borneo and Celebes, Ternate, Lombok, etc.); 310,000 Christians (260,000 Protestants and 50,000 Roman Catholics in the Minahasa, Ternate, Amboina, Bataklands, East Java, Central Java, etc.). And so it will also be found that into the adat law of non-pagan natives (—) there have slipped elements now of Hindu,

now of Moslem and now of Christian, origin, or a combination of these elements in areas where Islam has succeeded Hinduism (Central and East Java) or Christianity Islam. Similarly, the adat law of the foreign orientals consists mainly of the popular law peculiar to each group (550,000 Chinese, 28,000 Arabs, 17,000 Indians, Bengalese and others), but here, too, foreign religions have left their mark. Consequently, anyone wishing to investigate the adat law of the present day or that of centuries ago, will, like the philologist and the ethnologist, have to be prepared to strike deposits of foreign origin. It has already been indicated (p. 4) how Indonesian linguistic usage distinguishes between original and foreign elements of adat law by placing the adat of the ancestors on the one side — e.g. the *adat poyang* in southern Sumatra (Wilken, 1891:237, 177) — and parts of the religious law on the other.

All this seems simple enough. And yet here lies probably the greatest obstruction to a straightforward study of adat law, an obstruction which has, in fact, blocked the way to this study until recent years. It can be put in one sentence: it is the wholly erroneous supposition that law follows religion, that the pagan Indonesian therefore has pagan law, the Hindu Hindu law, the Moslem Moslem law, [16] the Christian native Christian law (insofar as this may exist) — a supposition which is based on nothing, which is emphatically contradicted by the facts, but which, both in our Indies and elsewhere, has wielded, and is still wielding, its obnoxious influence.

The Dutch East Indies Company was apparently able to stay free from such a prejudice, because the few activities which brought it into the field of adat law give no reason to suspect it of this misconception. According to Mayne (1892:42) the Company¹ in 1707 ordered that the legal usages of the Tamil people of Jafna in Ceylon should be recorded, that is, not Hindu law but Dravidian popular law. This collection was subsequently submitted to, and approved by, twelve 'Moodelliars' or prominent natives, and finally proclaimed as an authoritative law-book under the name 'Thesawaleme'.²

In Batavia, in 1750, a 'compendium of the principal Javanese laws' received official approval, but although it professes to be an extract from a Moslem law-book, it appears to be indigenous rather than Islamic in character (*Plakaatboek* VI:14-37). In 1759 the Government of the Indies sanctioned a compendium, composed at Macassar in 1775, of 'native laws at the courts of Boni and Goa, in use from time immemorial until the present day'.³ Admittedly, the Company in 1754

authorized Freijer⁴ to draw up a 'compendium of the principal Mohammedan laws and customs', but this collection deals with the very sections of the Moslem law ('inheritance, marriages, divorces') which had, in fact, largely become operative. Its approbation⁵ in no [17] way aimed at forcing the Moslem law upon the population, as is clearly revealed in the Resolutions of 1804 and 1805.⁶ And in 1768, under the influence of the Company, there came into being the collection of princely laws known as the Cirebon Law Book or *Pepakem Tjerbon*,⁷ which also refrains from confounding Islamic law with the law of Moslem natives.

In British India, on the other hand, this misconception was already firmly enthroned during the time of the British India Company by Warren Hastings (1772-85), the Daendels* of that country. When Warren Hastings sets about organizing the administration of justice in Bengal, and also wants to prescribe something for the indigenous law, he provides in section 23 of his 'Plan for the Administration of Justice' of 1772,⁸ and later in section 27 of the Ordinance of the Government of Bengal of the 11th April, 1780:

'that in all suits regarding inheritance, marriage, and caste, and other religious usages or institutions, the laws of the Koran with respect to Mohammedans and those of the Shaster [the books of Hindu law] with respect to Gentoos [Hindus] shall be invariably adhered to'.

In 1781 this provision, with the addition of the word 'succession', is re-enacted in section 37 of the amending Ordinance of July 5th, and with extensions confirmed in an Act of Parliament of the same year (21 Geo. III, c. 70) with regard to the jurisdiction of the Supreme Court at Calcutta. This Act, having stipulated that the inhabitants should retain the benefit of 'all their ancient Laws, Usages, Rights and Privileges', provides in section 17 'that their Inheritance and Succession to Lands, Rents, and Goods, and all Matters of Contract and Dealing between Party and Party shall be determined, in the Case of Mahomedans, by the Laws and Usages of Mahomedans, and in the Case of Gentûs, by the Laws and Usages of Gentûs'. To this, section 18 adds that also the rights and powers of family elders and family headmen shall be upheld 'according as the same might have been exercised by [18] the Gentû or Mohamedan law' (Cf. Ilbert, 1898:59, 253-54, 283,

* [Governor-General of the Dutch East Indies (1807-1811) and a man whose name has become a byword for ruthless driving power. - Ed.]

388-91). In the same manner, in section 15 of his Plan, Hastings had recommended a provision with regard to prescription, with the remark that this was in accordance with Islamic law as well as with Hindu law and 'the legal Practice of the Country'.

With what result? It was gradually being realized that there, too, the adat law of the people is by no means the same as the religious laws of the various population groups (ibid:393f., 402f.). There, too, a little more study began to be devoted to indigenous law in particular.⁹ But on this point the administration of justice in British India still seems to cling too much to the old fallacy, and with damaging results. Listen to Mayne's lament (1892:41f.):

'It is much to be regretted that so little has been done in the way of collecting authentic records of local customs. The belief that Brahmanism was the law of India was so much fostered by the pundits and Judges, that it came to be admitted conventionally, even by those who knew better. The revenue authorities, who were in daily intercourse with the people, were aware that many rules which were held sacred in the Court, had never been heard of in the cottage. But their knowledge appears rarely to have been made accessible to, or valued by, the Judicial department... (And yet) what rich materials are available, if they were only sought for.'

It is certainly not surprising that the application by the courts there of Hindu law instead of adat law has proved an oppressive burden for those who seek justice (Van der Lith, 1882:234). And most certainly it serves no purpose to turn to British India, which itself has lost the trail, in order to find out what our own government policy with regard to adat law ought to be (Bl. 1904-5, 121(4): par. 6).

Neither Daendels, nor Raffles, nor the Commissioners-General and Governors-General of the Indies in the first half of the last century [19] seem to have followed Hastings' example. Thus Freijer's compendium, renovated by Du Bus with regard to the law of inheritance (ISb. 1882 no. 55) does not displace one jot of indigenous law but has, like the compendium of 1760, only been published 'in order to be sustained when and where applicable'.

But it was to be different — why? — with the framing of the legislation of 1 May, 1848,¹⁰ and also with the discussion [in 1851-54] of the bill on the *Regeringsreglement*. On several occasions during the debate in the House,¹¹ though only once or twice in the documents themselves,¹² it was evident that Cabinet Ministers and Members

failed to understand the problem, and that they considered the 'religious laws, institutions and customs' of the people to be virtually identical with Moslem or Hindu law. Consequently, instead of placing indigenous law first and the religious element second, the words 'institutions and customs' were placed after 'religious laws', thus following the phrasing of the legislation of May, 1848. The idea was certainly not to provide a new place for religious law in the adat law; it was merely a question of continuing the law in force, as is evident from such terms as 'continuous' in section 11 of the *Algemeene Bepalingen*,¹³ (—) and 'ancient religious laws, popular institutions and customs' in [various judicial regulations].¹⁴ But if the choice of name was inappropriate for the existing adat law, this was due to lack of knowledge, and not because a change was wanted. Since then this error has recurred again and again in various shapes.

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[20] All these formulations seem to indicate that, in general, unconsidered opinion still regards the adat or adat law of the Indies and the religious laws of the Indies as virtually synonymous, instead of recognizing that indigenous law forms the bulk, and the scraps of religious law merely the incidentals, of adat law.

It might nevertheless be possible that this way of representing matters, although historically incorrect, could be justified on practical [21] grounds, on the assumption that the three religious laws had eaten so deeply into the adat law that hardly anything remained of the Malayo-Polynesian law or of the popular law of foreign orientals. But this argument, too, falls down. For in the adat law of Hindu Indonesians, Hindu law is, on the whole, of no consequence, except in connexion with princely government and the caste system. In the adat law of the Moslem Indonesians and foreign orientals no Islamic law applies, except with regard to the administration of religious justice, religious levies, parts of family law, inheritance and pious foundations; and even in these cases it applies by no means fully or universally. Finally, in the adat law of Christian natives and Christian foreign orientals (if these exist) (—) the influence of a possible Christian law can only rarely be recognized, as in marriage law, or in provisions about interest on loans. Also in practice, therefore, the religious laws occupy only a secondary position; and as far as the three million pagan Indonesians are concerned, they do not apply at all.

And yet, at least as regards Islamic law, outward appearances

sometimes suggest a wider sphere of operation. After all, for many aspects outside the scope of the above-mentioned subjects (administration of justice, levies, family law, pious foundations) Arabic-Moslem terms are found in Moslem areas of the Archipelago; right of ownership is *milk* (*milik*, *milék*, etc.); common property *sarakat*; offer and acceptance *ijab* and *kabul*; blood-price is *diah* (*diat*, *diët*); and custom itself, *adat*. Does it not follow, therefore, that Moslem law governs also these subjects? A counter question may provide the answer. Our own Dutch legal language is, unfortunately still overburdened with Roman law terminology, such as *reivindicatio*, *mora*, *negotiorum gestio*, *actio pauliana*, *ab intestato*, *venia aetatis*. In criminal law one speaks of *furtum usus* and *crimen repetundarum*, in constitutional law of *forum* and *fiscus*, in international constitutional and administrative law of *jus postliminii* and *capitis deminutio*. But who would draw from this the conclusion that we are still governed by the system of Justinian? It is mere learned pretence! We meet with a similar pretence — but more excusable, because an Indonesian versed in holy writings is expected to see the operative field of Islamic law as widely as possible — when [22] terms derived from Moslem law are affixed to common Indonesian legal concepts which for centuries have had indigenous names (such as *bangun*, for blood-money). Such usages are no proof of a wider sphere of operation of Islamic law.¹⁵

However, although the influence of Islam is restricted mainly to the aspects indicated above, in a few regions and during certain periods, it did go further. For instance, here and there in the native states in the Outer Provinces [i.e. the islands outside Java and Madura], and also in the Principalities of Java, capital offences were taken to a religious court. Further, about 1866 it was discovered (Bb. no. 1835) that the religious court in Lebak dealt with the pledging of agricultural plots. And, according to Snouck Hurgronje, it appeared from fragments discovered in the archives of the old-time *pakih* [principal religious judge] of Banten, that various contracts about transfer of ownership used to be concluded and registered *in optima forma* before the judge or his representative, mainly in accordance with the provisions of Islamic law. In Aceh — again according to Snouck Hurgronje — the number of people who lost their right hand as punishment for theft used to be fairly large, and many of them were exiled to Pulo Wè. Islam has sometimes gained a measure of influence, too, on issues the principal aspects of which remained governed by Malayo-Polynesian law, for instance, the

determination of the amount of blood-money.¹⁶ But the relation of religious and indigenous law is not in the least reversed by such examples; they only serve as a warning that we should no more indiscriminately deny the influence of Islam than others have indiscriminately accepted it.

This secondary, purely incidental, significance of the religious laws for the adat law of the Indies has not only been most lucidly expounded, but (at least for Islam) also fully explained historically by Snouck Hurgronje — casually in his *Mekka* (1888-9),¹⁷ extensively in *De Atjehers* (1893-4),¹⁸ again in the *Zeitschrift der Deutschen [23] Morgenländischen Gesellschaft* (1899),¹⁹ and finally in his *Gajoland* (1903).²⁰ These conclusions have been summarized in Juynboll's textbook on Islamic law.²¹ They also fully conform with what Liefcrinck writes about Hindu law,²² and what Nederburgh vividly and clearly demonstrates²³ in connexion with the implications of section 75 of the *Regeringsreglement*. And all these arguments find powerful support in Carpentier Alting's information on adat law in the Minahasa.²⁴ In this area there are a few pagans and Moslems, but the great majority are Christian. Does this mean a sharp, triple distinction in adat law, and practically no pagan law? Not even remotely so! It is in the main the old indigenous pagan law that has remained for all people, with the result that the pagan, Moslem and Christian Alfur inhabitants all have virtually the same law, except with regard to the conclusion and dissolution of marriages, which are practically the only matters in which differences occur. Even more significantly, the adat law of the Moslems in the Minahasa, far from being uniform, sometimes shows marked differences, depending on whether these people are of Minahasan or other Menadonese origin, or from other islands. What then, in the face of facts like these, remains of the identification of religious law and adat law?

For no part of our material is an accurate assessment of the relation between indigenous law and the religious elements so essential as for the adat law of Christian Indonesians (Javanese: *serani*, or *kĕristĕn*; Malay: *serani*). They are found, mostly in small groups in different areas in the Indies: in west, central and east Java, and various Batak areas, in Nias, at Sawahlunto, in Borneo, the Minahasa, Bolaëng-Mongondow (Menado), south Celebes, at Posso (central Celebes), in the Ternatan archipelago, in New Guinea, Amboina, Timor, Sawu, Sumba and Sumbawa — a total of 260,000 Protestants and 50,000 Roman Catholics. Is it necessary to say that, living in areas so far

[24] apart and having been converted at widely divergent periods, the Christian people differ vastly from one another? And that there is nothing more dangerous than to label them all with the same tag?

It (—) soon becomes evident that, in order to understand the adat law of the Christian Indonesians, one must first of all ask whether they became Christian after having been pagan, or after having been Moslem. If they were converted from paganism — like the Batak, Minahasan, or New Guinea Christians — then they have *ceteris paribus* retained their old adat law, except for some points which were incompatible with Christianity or ousted by Christian regulations. In this case the pretext that nobody would be able to identify their adat law²⁵ is simply untenable.²⁶ But if Christianity has followed upon a few centuries of Islam — as in Java — the problem becomes serious. Islam usually introduces a greater or lesser part of its family law and law of inheritance, and this by means of the administration of justice by Moslem religious courts. Suppose now that a Moslem becomes a Christian. For him the religious jurisdiction in terms of sub-section 78(2) of the *Regeringsreglement* falls away, and henceforth a government court will have to judge disputed matters of family law and inheritance for him. But according to what rules? Already centuries ago Islam must have driven out the greater part of the indigenous marriage law and important aspects of the indigenous [25] law of inheritance; but Islamic law does not avail him who abandons Islam. What then can a government court accept as such a person's law of marriage and inheritance if his village by-laws, or the Mission concerned, have failed to formulate a new adat? In this case the court faces a vacuum, and no one knows what law should be applied to the marriage or to its dissolution or to the distribution of the estate. For even assuming that one could speak of a Christian law on these points, (—) this could not indiscriminately be imposed as adat law upon such persons. And though a distinct adat might have developed among a group of Christian Indonesians or in an Indonesian Christian parish, even this possibility can be discarded if the conversion is limited to a few individuals only. The judge might now resort to the shock-treatment suggested in section 75(6) of the *Regeringsreglement* and prescribe a diluted form of western law for the unfortunate Christian litigant; but he then knows for certain that he dispenses a kind of justice which will suit the litigant only in exceptional cases. Some time ago there seems to have been a *landraad* [government district court] in Java which, in desperation over an

inheritance dispute, persuaded the Christian involved to become a Moslem again for the occasion, in order that his case might be decided by a religious court (whose jurisdiction, incidentally, was highly questionable, since the parties did not fall under its jurisdiction at the time the inheritance fell due). After the case he could then re-embrace the Christian faith! The need must have been very pressing if an officer of the judiciary had to resort to such measures. When, in another case, the official of a land-registry in Kediri [central Java] refused to register the widow and children of a Christian Javanese as heirs to his land unless they could produce a certificate from the Moslem 'council of priests',²⁷ its *penghulu* rightly refused to have anything to do with the matter.²⁸

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[26] The Missions often know a way out. Church marriages, baptismal certificates, marriages dissolved by church councils, although they admittedly circumvent law and old adat, are acceptable as new adat. In many cases, however, the Missions are unable to rectify existing defects. One need only think of the complications which may arise when a Christian and a Moslem native have a common right to land, or when they jointly lay claim to a deceased's estate. (—) Also, for Christians who turn Moslem, the added presence of religious elements may pose thorny legal problems (Carpentier Alting, 1902, I(1):137). It cannot be denied that there is every reason for wise legislation in these matters, if only to eliminate obstructive rules.

The question perhaps arises whether the relationship between the indigenous and religious elements in adat law deserved such full discussion. But then, see how, even nowadays, many misconceptions on this point exist everywhere. De Louter, in the latest edition of his manual of constitutional and administrative law (1904:476), admits that 'no interpretation of law, based on a Moslem or other foreign source of law, can ever be correct if there is no conclusive evidence of its having penetrated the legal consciousness of the people, and of its acceptance as part of their customs'. But he subsequently (p. 480) speaks of a disregard for Islamic and native legal concepts in the Native Criminal Code, although neither in the Indies, nor elsewhere, are the traces of Moslem criminal law worth mentioning. Kleintjes [27] (1903, II:44) admits that 'only such religious laws may be considered as have been accepted by the natives of the country, and as have been developed with and by the adat'. But a moment earlier (p. 43) he had turned this relationship upside-down by demanding

an investigation 'into the extent to which the religious laws had been altered by local customary law, popular institutions and customs'; and elsewhere (p. 55) he protests against the idea that Javanese Christian natives should, in terms of section 75 [*Regeringsreglement*], be subject to 'the Moslem law' (which could never be their religious law) 'as modified by and integrated with local custom'. De Savornin Lohman (1901:431) appears to accept the identity of adat law and religious law, stating that 'for those natives who have embraced Christianity... the religious laws, institutions and usages which governed them before their conversion, are of no consequence'.

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The Government of the Indies itself, in its commentary²⁹ on the Native Criminal Code of 1872 (highly deficient on the subject of adat law), repeatedly gives pride of place to the Islamic law as the historical law of the Moslem Indonesians. Court decisions confusing the issue are legion. And on November 24, 1896, the Minister, Kuyper, even taught the Dutch Lower House that 'the criminal law for the [28] native was wholly founded on the verdicts of the Koran', whereby he ignored not only the fact that in government courts adat criminal law had been replaced by the Native Criminal Code, but also that, had adat criminal law still been valid, it would not have been Moslem criminal law, and, even had it been Moslem criminal law, it would have had to be looked for not in the Koran but in entirely different books.

In view of all this uncertainty and confusion on a major issue, one might certainly have expected from the Minister a clear statement of the attitude of the Government towards the much disputed constituents of adat law, when he introduced his bill (Bl. 1904-5, no. 121) for the progressive replacement of adat law. But this much is certain: whether due to caution or to lack of perspicacity, both the theory of reception and the opposite doctrine could be read from the voluminous commentaries. As a result the government proposed the retention of the ambiguous phrase: 'religious laws, institutions and customs'.

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Fortunately, in the legislation itself — a better guide than ministerial explications — there are both early as well as more recent symptoms which reveal that, in several fields, the worthlessness of religious laws had to be recognized. [For instance, the words of] sub-section 71(3) of the *Regeringsreglement*, 'Where these provisions... are not in accordance with the institutions of the people... they shall not be

applied', show an awareness of the fact that, at least as far as the organization of the indigenous villages was concerned, the religious laws were irrelevant. (—) And such examples can easily be multiplied (see p. 3, above).

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[29] But, regrettably, all this is again outweighed by the provision instituting an advisership to government courts of justice. It is a concession to a false conception of adat law, which dates back to the 1st May, 1848, but which has exerted its evil influence to the present day.

What was the legislator's aim with this advisership? He wanted to be certain that the government judiciary, when applying adat law (i.e. the 'religious laws, institutions and customs') as a court of first instance, would have the benefit of advice on relevant points of adat law from a native or foreign oriental. Section 7 of the Judicial Code (a Royal Decree of 1848) provided for such expert advice in the government administration of justice throughout the Indies.

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[30] What connexion has this advisership with our enquiry into the elements of adat law? It is this: the choice of adviser prescribed for these cases makes it as clear as daylight how badly the religious laws were confused with adat law by the legislation of 1848.

Before 1901, section 7 provided no adviser in adat law cases involving pagans (—), but the rules of procedure in the Outer Provinces prescribed (unlawfully) the advice of either a headman or a person of the same nationality and religion as the native litigant. In 1901 this provision was legalized and made general. No objections, of course. Before 1901, if the litigant was Hindu, section 7 prescribed no adviser, but sections 11 and 26 of the Bali regulations³⁰ provided for the advice of the *pedanda*, the Hindu priest. The Bali regulations must have assumed that the Hindu Balinese have Hindu law as their adat law, for otherwise this provision is hard to explain. The wise arrangement mentioned above for pagan natives was, in 1901, made generally applicable to Hindu natives as well; but has this changed or improved judicial practice in Bali and Lombok?

If the litigant is Moslem (by far the most common case), advice is given by a Moslem religious official (incorrectly called a 'priest') or by another Moslem considered to be versed in the scriptures. But should this adviser (in Java he would be the religious judge at the regency capital, who is usually also head of the mosque) have a knowl-

of the Outer Provinces never introduced one; in 1891, the conflict between section 7 and some other sections of the legislation was decided in favour of the omission of an adviser for Christian natives (ISb. 1891, no. 230).

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Are these Christian natives then without any adat law on which advice should be obtained? Or are government courts so well-informed that advice would be superfluous? But then, is not three-quarters of the adat law of these natives exactly the same as that of their Moslem compatriots on which the judge is supposed to be so ill-informed? The omission can only be explained by the legislator's assumption that the law for Moslems is Islamic law, a law which, obviously, cannot provide for Christian natives; and that for this reason the adviser on the law of Moslem natives must be unsuitable as an adviser in respect of Christian natives.

After all this, little more need be said about advisers on the adat law of foreign orientals, because here the same misconception is repeated. Before 1901, it was doubtful whether section 7 prescribed a Chinese headman or a Moslem scripturist [*ulama*] as an adviser on Moslem Chinese. In 1901 this question was settled in favour of the Moslem scripturist; and, if one considers that Moslem Chinese easily tend to identify themselves with Moslem natives, this may probably be regarded as a wrongly based conclusion. For Christian Chinese (assuming these are still to be classed as foreign orientals, see p. 17 above) no adviser has been required since 1891. As regards Moslem Arabs (in eleven of the Outer Provinces where the European law of property at present does not apply to all foreign orientals, and where this point may therefore be of relevance) a Moslem scripturist is the adviser, also in matters (law of property, etc.) not strongly affected by Islamic law. For Christian Arabs no adviser was required [33] from as early as 1848. For other Moslem foreign orientals (—) a Moslem religious functionary or a reputed scripturist acts as adviser. So here, too, adat law and religious law have been muddled up.

Is there then no use at all for an adviser on Moslem law? He will conceivably be useful in two cases. First, if Moslem law is applicable, but the matter cannot be taken to a Moslem religious court ('council of priests', etc.) simply because sub-section 78(2) of the *Regerings-reglement* requires both parties to be either natives or foreign orientals of one kind. In accordance with sub-section 78(1) the dispute must then come before a government court, which has to apply Moslem

edge of any law at all, it will be of whatever Moslem law he has picked up at a religious seminary or elsewhere. But the kind of case in which Moslem law is applicable is, in fact, taken to the religious court (the so-called 'council of priests' in Java), and not to a government court. Ninety-nine per cent of the adat law cases with which [31] a government court deals are governed, however, by the indigenous law. If, therefore, a *penghulu* in Java is called in to advise on adat law, but explains instead the nature of Moslem law — e.g. the Moslem law of sale or of pledging or of cutting off the right hand, as one writer after another has parroted — his advice is worthless. This is not because the judge cannot follow him (—) (in civil cases he may do so, while in criminal cases he has to take note of what the adviser says), but because such advice involves something not contemplated in section 7, which had in mind adat law and not lifeless Islamic school-law. It is as though a judge in the Netherlands, needing to be enlightened on Friesian legal usages, were to be read a passage from the Code of Justinian!

Yet the fault is not with the *penghulu* who must in this situation regard himself as a *mufti* or consultant on Moslem law. It lies with the legislator of 1848, who stipulated the wrong adviser, and with the legislator of 1901, who perpetuated the error. There is a tendency to justify these legislators by imputing to them the wish to have the religious law of the people heard in the court house, as happens in Aceh Major where, in the administration of justice by the *ulèëbalang* (chief), the *kali* or religious judge is sometimes heard as a mere formality (Snouck Hurgronje, 1893:101). But this interpretation is clearly contradictory to both the old and the new wording of section 7, which refers not to religious law, but to adat law as meant in sub-sections 75(3) and (4) of the *Regeringsreglement*.

And now the Christian natives. With regard to this category the legislator has had to eat the bitter fruit of his ill-considered choice. Had he realized the vast difference between adat law and religious law, he would have understood that an adviser competent to advise on the indigenous law of a Moslem litigant, will also be competent to advise on the identical indigenous law of a Christian litigant. Or, to put it differently, that if the *penghulu* cannot cite the Malayo-Polynesian law of the Christian Javanese he will be equally unsuitable to act as an adviser on the very same Malayo-Polynesian law of the [32] Moslem Javanese. But what happened? In 1848, no provision was made for an adviser for Christian natives, and the regulations

law as given by the Moslem adviser (—). Secondly, if a question of Moslem law crops up in a government court: for instance, whether someone is an heir under Islamic law (unless it is assumed that such a question should be referred to a religious court); or whether, within the period of recall, a repudiated wife is still a spouse for the purposes of the section dealing with theft within the family.³¹ Except on these rare occasions advice on Moslem law serves no purpose.

The existing legislation therefore gives practitioners ample excuse for the fact that so many of them have come to have a wrong conception of the elements of adat law.

On the other hand, it would be incorrect to assume that the priority given to religious law, and the identification of it with adat law, has always resulted from an inadvertent mistake, misconception or error. Honesty requires that the name be mentioned of the man who has defended the viewpoint disputed here with scholarly conviction, and who has expressed his conviction in a series of articles. He is Mr L. W. C. van den Berg (—), from 1878 to 1887 adviser to the [34] Government of the Indies on Oriental languages and Islamic law, from 1887 to 1900 professor at the Indological Institute at Delft, and since 1902 adviser on legislative matters to the Department of Colonial Affairs (—). His doctrine is the theory of a *receptio in complexu* of Hindu law by Hindus, of Moslem law by Moslems, and of Christian law (insofar as it exists) by Christians. According to this doctrine, the law of the natives (and foreign orientals) is conditioned by their religion until the contrary is proved, because by accepting a religion they also 'virtually' accept its religious law. If the contrary or 'exception' is proved for one or more subjects (whole institutions or merely subordinate points), such exceptions should be regarded as 'deviations' from a religious law which has been accepted *in complexu*. The founder of this doctrine thinks that his willingness to admit such counter-evidence proves his 'open mind' and his 'unbiased appreciation' for the 'national sense of justice of the Queen's dark-skinned subjects'. In other words, the adat law of the natives (and foreign orientals) in the Indies is not shaped by the indigenous law with occasional intrusions in the form of fragments of religious law, but, to the contrary, by religious law plus deviations! According to the founder of this doctrine, it is 'not even difficult also to point to parts of the Indies where, as the result of extraordinary circumstances, Islam has been almost fully, if not entirely, accepted' (1884:151).³²

[35] (—) Van den Berg has discussed the reception of Hindu law

particularly at the beginning of his treatise on Indonesian communities in Java and Madura (1901a:1-140).

The reception of Islamic law has been worked out in [several of his papers³³ the first of] which is a perfect example of a *receptio* consisting of deviations only.

Finally, it seems that the reception of the Christian law must be understood in the surprising sense that Roman Catholic natives accepted canon law but Protestant natives a vacuum (there being no Reformed religious law) — which vacuum may as well be filled therefore with Roman-Dutch law (1887:53). This vexing reception appears to have been denied the benefit of further elucidation.

It may now be asked on what grounds the religious law has been accepted, in these writings, as the 'key-note'. It is based on the author's gratuitous assumption that certain crude similarities, for example, regarding village institutions, or rates of interest, can only be explained as derivations from some religious school-law. Or he assumes that certain categories of Islamic prescriptions, for example, the general principles of the law of obligations, or the rules governing the nature, requirements and consequences of particular contracts, 'have virtually penetrated the legal consciousness of the people' (1897:94). The answer to the question of why indigenous law may be ignored, even though it remains active, seems to be that such deviations from Islam do indeed occur, but do not 'result from a different sense of justice',³⁴ or are 'a product of individual arbitrariness or ignorance' (1892:455). And should one ask what remains of this reception doctrine with respect to the countless aspects of which even [36] the author himself cannot deny that 'reception with deviations' is evidenced by deviations only, one would only learn that adat law is strikingly similar to Islam in all those major principles — a subject's obedience to his sovereign, no contract without consensus, and so on — which, as it happens, are the same here, there and everywhere (—).

This supposition, according to which ancient indigenous legal usages are 'deviations' from a much younger Islam, finds its most amusing parallel in the habit Moslem sages have of labelling as innovations (Arabic: *bid'ah*, pl. *bida'*) (—) old-Arabic practices which survived Islam. Certain Moslem (above, p. 12) or Hindu words (e.g. *deça*, territory, associated with the Javanese *désa*, village) which have become fashionable sometimes serve the purpose of the reception theory. Well considered, however, they no more prove the operation of the religious law than the use of *litterae patentes*, *Concordia res*

parvae crescunt, and *armamentarium Hollandiae* proves Roman influence on the Dutch Republic.

It should further be noted that this theoretical structure has two other peculiarities. First, it is wholly framed in the style of Justinian: just as the legists of the late Middle Ages (and after) squeezed our common law into the matrix of Roman law, so the completely unsuitable form of Justinian's and the French codes has been chosen as the only conceivable frame for 'juridical construction'. And secondly, out of 'sloth and sheer idolatry of law books' (Snouck Hurgronje, 1893:19), the material for the indigenous law has largely been lifted from native codes and law books such as *Der Kinderen* used to flourish, from princely edicts or legal treatises which introduce or recommend new rules rather than describe the existing adat, that is, from books which usually had only a very limited and ephemeral influence on the living adat law, or no influence at all.

[37] The result of this theory of reception, of this Roman systematization, and of this trust in native law books, is that adat law, as construed by Van den Berg, is worlds apart from real adat law, and there is no shadow of doubt that no Indonesian would recognize his own law in this construction.

But the reception theory has repeatedly — one might say, everywhere — been disputed and refuted, in particular by Snouck Hurgronje, Piepers, Nederburgh, Bergsma (of the agrarian investigation in Java), Van der Lith, and, in passing, by Van Ossenbruggen and the American scholar Clive Day.³⁵

A subsequent effort by Van den Berg (1897:83-84 *n*) to explain away the difference in principle between his ideas and those of his opponents — a difference which, in the beginning, he considered to be 'of great importance' (1895:309) — naturally missed the aim (—).

If the purport of this chapter on the elements of adat law had to be summed up in a few words, it would be this: the vast bulk of adat law is still the indigenous Malayo-Polynesian law, and there is a question of religious elements only in the areas, for the issues, and in the measure in which this law has been changed or replaced by Hinduism, Islam or Christianity.

There is, however, a final warning: sometimes, and then in entirely different ways, religion may have exercised a profound influence on the adat law of natives or foreign orientals. A Dayak of Borneo who embraces Islam will for this reason be accepted as a Malay by the

Moslem Malays of this island, though they may have not a drop of blood in common; and as a consequence he will sooner or later become [38] subject to their adat law. A Chinese in the Indies who becomes Moslem will for this reason be absorbed into native society — regardless of whether his kin have been living for generations in the archipelago or whether he has freshly arrived from his homeland — and after a generation many will be ignorant of his origin. He comes gradually under the sway of the adat law of the natives, or at least, he drifts in many respects away from the law of his compatriots. The Mission in northern Halmahera, by managing to bring the roving population into villages to facilitate evangelization and education,³⁶ has thereby made a great change in their life and created new legal needs.

A Christianity that 'cometh not with observation' * may also in the archipelago gradually bring about the renovation of law which Fustel de Coulanges so strikingly described in the fifth book of his *Cité antique*. And yet even in these instances the constituent parts of adat law do not make way for religion; religion is, however, one of the factors determining the kind of community to which a person belongs, or the conditions of life and the impulses at work in it.

* [Cf. Luke 17:20-21, King James Version.]