Transforming traditions:
Myths and stereotypes about traditional law in a globalizing world[1]

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Introduction

Academics and politicians have been struck by the dynamics of the current legal and political processes in Indonesia that are captured under the heading "revitalisation of tradition" in law and religion. They acquired full strength after the fall of the Suharto regime in 1998 and the implementation of a decentralisation policy. All over Indonesia local claims to political authority and natural resources are being reasserted on the basis of adat, adat law or adat societies. Adat in Indonesia has become a generic term to indicate an often undifferentiated whole of morality, customs and legal institutions of ethnic or territorial groups. Before the coming of the scriptural religions it also comprised the world of belief. The revitalisation of adat has its sharpest edges in the revitalisation of adat law and the political and economic claims based on that law.

Similar processes occur in other regions in the world. In many African states, there is a considerable resurgence of chieftainship and customary law. A process of "rejuvenation of chieftaincy" has been going on since the 1980s, which has given African chiefs a relatively stronger role in the state system. The regime change in South Africa has, contrary to earlier expectations, intensified this trend.[2] In many Latin American states, struggles over the recognition of indigenous peoples' rights continue. Indigenous law, Andean law, has become a very important issue.[3] At the same time, there also is a world-wide revitalisation of religious laws including Indonesia that concern assertions of religious pro- and prescriptions for the organisation and conduct of social, economic and political life. In many states, Islamic law as official law is gaining in significance in socio-legal practice. These developments are part of a broader tendency towards changes in the configuration of plural legal orders that includes expanding international and

[1] Substantial parts of this paper are taken from our Van Vollenhoven Lecture 2008 with the title "Traditional law in a globalising world: Myths, stereotypes, and transforming traditions", held at the Van Vollenhoven Institute in Leiden, May 16, 2008.

[2] In the Africanist literature much more attention has been given to the relationships between the state and traditional authorities than in Indonesia. See Van Binsbergen 2003; Van Rouveroy van Nieuwaal and Zips 1998, Van Rouveroy van Nieuwaal and Ray 1996; Oomen 2002, 2005; Skalnik 2004; Comaroff and Comaroff 2004, 2006.

[3] See K. von Benda-Beckmann 1997.

transnational law.[4] Customary and faith based law are being politicised and pushed upwards to the same rank as state law to counter the previous underprivileged positions within the state (Comaroff and Comaroff 2004, forthcoming) Law and rights talk has become fashionable and social and economic relationships are increasingly cast in legal terms. One of the disturbing effects of this "fetishising of law" as the Comaroffs (2006) call it, is that it creates what they call a "poli-cultural" constitutional framework in which ethnicity and religion become new powerful dividing devices. These processes affect the relative significance of state, customary, and religious laws in various domains of socio-political organisation. They exacerbate tensions or open and violent conflicts in which exclusionary politics and violence are legitimated with reference to ethnic legal orders. This also occurs in a number of regions in Indonesia.[5] Much scholarly attention has been devoted to understanding the underlying reasons, the historical conditioning and contemporary triggers for these developments.[6] There also are lively discussions about the resulting reconstitution of local population groups as "natives" or "indigenous peoples" and the cultural, legal and political consequences thereof.[7]

These more recent developments have also rekindled discussions about the changes and transformations of ethnic legal orders, usually called tribal or customary laws that arose in the 1970s under the heading of the "creation of customary law". It was argued and demonstrated that local rules and procedures were interpreted and transformed through the conceptual language and assumptions of the colonialists' (Dutch, French, English) ethnocentric legal categories. To some extent local rules and institutions were wilfully changed in line with social, economic and political interests. The new political and economic circumstances also changed the ways of operation and significance of the local legal orders in contexts out of the colonial courts. The ideological screen of continuity implied in the notion of customary law hid a fundamental discontinuity (Chanock 1985: 4). What was termed and applied as "customary law" therefore often was a new version, a new kind of law, created by courts or in the interaction between the colonial administration and those local experts whom the administration mainly consulted.[8] It could not be considered to be a timeless, pre-colonial local law, which did not prevent actors from asserting an unbroken continuity or from actualising, inventing or reinventing "traditional" legal forms. The local populations were also heavily influenced by laws and regulations made by the colonial governments, especially in the fields of agricultural production, market and trade relations, land and labour relations.

Similar points have been raised with respect to the creation of Indonesian forms of social organisation and the term "adat law" as that part of adat with legal

[4] See F. von Benda-Beckmann et al. 2003; F. and K. von Benda-Beckmann 2006; Davidson and Henley 2007, Bräuchler and Widlok 2007; F. and K. von Benda-Beckmann and Turner 2007.

[5] See for on the violent conflicts in some regions in Indonesia by Davidson, McCarthy, van Klinken, Vel and Bakker.

[6] See F. von Benda-Beckmann et al. 2003; F. and K. von Benda-Beckmann 2006; Davidson and Henley 2007, Bräuchler and Widlok 2007; F. and K. von Benda-Beckmann and Turner 2007.

[7] See Kuper 2003, Barnard 2006; Zips 2006. See also K. von Benda-Beckmann 1997, F. von Benda-Beckmann 1997.

[8] Clammer 1973; Hobsbawm and Ranger (1983); Snyder (1981); Chanock (1982, 1985); Roberts (1984a,b); Woodman (1969, 1987).

characteristics.[9] Many of the recent publications on the revitalisation of customary law and adat law refer to these earlier discussions, stressing the continuity between the earlier and contemporary creations of adat law. For Indonesia, critics deconstructing the "myth of adat" (Burns 1989) pointed their arrows at the Leiden scholar of Adat Law, Cornelis van Vollenhoven (1874-1933) and his followers who formed the so-called adat law school.[10] The first *adat* law scholars, and most prominently and actively van Vollenhoven, tried to capture and systematise the totality of legal universes, ideally of all native peoples, of what they saw as the Indonesian world, which included the Philippines and Madagascar.[11] A vast amount of ethnographic details were collected and published in the *Adatrechtbundels* (45 volumes published between 1910 and 1955). This information was systematised in the *Pandecten van het Adatrecht* (10 volumes published between 1914 and 1936). In terms of quantity and quality, the information gathered and processed during the first three decades of the twentieth century was unique.

The critics argued that adat law was a Dutch invention mainly of Van Vollenhoven and his followers. Van Vollenhoven's academic approach and political attitude towards the adat law of Indonesia was said to have been orientalist, anti-development minded, romantic. These debates also shape the interpretations of current developments in Indonesia (see the contributions in Henley and Davidson 2007). However, we think that these critical deconstructions are in need of re-evaluation. We are not simply interested to set a historical record straight, but argue that while the 'creation of adat law' debates have merit, some points are overstated. Notions of colonial creations of customary or adat law have become dangerously stereotypical in the sense that they are repeatedly asserted without further questioning the empirical or theoretical basis of these assertions and they tend to gloss over important differences between colonial legal orders. We suggest that contemporary interpretations of continuities and change in the significance of adat law may have been distorted by an inadequate analysis of the past. Returning to the work of Van Vollenhoven therefore is more than a return to a past history long gone by. It is necessary to assess current developments. Such an assessment implies the following issues.

First of all, we argue that most interpretations were and are largely based on a legalistic conception of "law" and "customary law". Secondly, while there is general agreement that such transformations occurred (like in all colonies), we think that authors generalize too selectively from transformations occurring in specific contexts, namely from academic writings, interpretations of administrators and court judgements. The

[9] Kahn (1976, 1980); Breman (1987); Kemp (1988). In our research on West Sumatra and Ambon we have analysed many of these transformations in detail, see K. von Benda-Beckmann 1982, 1984; F. von Benda-Beckmann 1979, 1991; F. and K. von Benda-Beckmann 1985, 1994; F. and K. von Benda-Beckmann and Brouwer 1995.

[10] Burns 1989, 2004, 2007. See also Davidson and Henley 2007, Fasseur 2007; Lev 1984. An English language selection has been edited and published by J.F. Holleman 1981.

[11] Van Vollenhoven's division of *adat* laws into *adat* law circles (*adatrechtskringen*) and a full-scale presentation of all aspects of their legal systems set the agenda and provided the categories through which it was to be done. His students later wrote comprehensive accounts of individual *adat* systems, and more specialised accounts of certain fields of law. See e.g. F.D. Holleman (1923, 1927); Korn (1932, 1933); Mallinckrodt (1928); Soepomo (1933); Vergouwen (1933); Djojodigoeno and Tirtawinata 1940. But there was also life outside the adat law school, for instance Willinck's monumental work on the legal life of the Minangkabau (1909), rarely quoted and praised, because he was not part of the adat law "school." See Strijbosch 1980 for a comparison with the Restatement of Customary Law Project in Africa.

question of what these transformations had to do with the other legal realities beyond these contexts is not usually asked and even less answered. We argue that the critiques have underrated the agency of local people and overrated the actual significance of the colonial legal constructions of adat or adat law on the legal life of the population. We also argue that with respect to Van Vollenhoven and Indonesia, the major target towards which the critical deconstructions are directed is misconceived. It focuses mainly on those scholars trying to understand the substance and processes of local legal orders, aware of the danger of legal ethnocentrism, and criticizing ethnocentric misunderstandings. The critique does not address those scholars and courts who really and grossly misinterpreted local normative systems in terms of Dutch legal categories. We shall also show that the major points of critique of the Adat Law School's descriptions of adat law and its significance in legal politics and administration, are largely anachronistic. We will substantiate our propositions with a discussion of the history of the village commons, *ulayat*, because it plays an important role both in the Van Vollenhoven critique and in the discussions of the contemporary revitalisation of adat law. Fully aware of the impossibility to generalise for Indonesia, we focus on the region we know best: West Sumatra, which has always been a central region in any discussion of adat. At the end we shall discuss the Indonesian example in a wider comparative frame and show that there are some major differences in the ways adat has been treated in Indonesia and customary law in Africa. We suggest that these are particularly relevant for the inventions within the court system, but that in other contexts there is less of an invention.

The creation of adat law

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

The allegation of the creation of adat law, most outspokenly argued by Peter Burns,[12] of late in a contribution to the very interesting volume "*The Revival of Tradition in Indonesian Politics*". The editors Davidson and Henley (2007:36) call the concept of adat law "a confusing myth". This implies two propositions. One raises the question of whether there could be anything in adat at all that could usefully be labelled "law". The other is that the term "adat law" did not relate to what was going on in the life of the Indonesian population. Both points are sharpened by the reproach that by speaking of adat law a sharp line was drawn between the legal and the non-legal aspects of adat.

Certainly, the word *adatrecht*, adat law, was a new Dutch concept.[13] Van Vollenhoven was well aware of the fact that the term adat was used in many but not all regions of Indonesia to indicate an often undifferentiated whole of morality, customs and legal institutions.[14] But within these adats (or equivalent expressions), there were more or less institutionalised sets of rules and procedures for marriage, property and inheritance,

[12] Burns (1989, 2004, 2007).

[13] Snouck Hurgronje (1893: 16) was the first to use the term systematically. See also van Vollenhoven (1928:23); Sonius (1981:li).

[14] The generic term adat itself was also an invention, as Van Vollenhoven himself has reported. Muntinghe, a former counsellor of Raffles, was the first to use the term systematically (Memorandum of his to the Commissioners-General of the Netherlands-Indies, Batavia, 14/7/1817, cited in Sonius 1981:li).

political authority and decision making processes; elements with legal quality. Van Vollenhoven spoke of adat law as the totality of the rules of conduct for natives and foreign orientals that have, on the one hand, sanctions (therefore: law) and, on the other, are not codified (therefore: adat). He consciously used this term in order to emphasise that there was *no* sharp dividing line between the legal and the other aspects of adat (van Vollenhoven 1933: 3; J.F. Holleman 1981b: 23). "The use of the term adat law has an even stronger claim to preference because it serves to weaken the notion that a sharp and rigid line separates legal usages from other popular usage, or adat law from the rest of adat. The borderline is, indeed, so vague that it is difficult, and sometimes impossible, to distinguish one from the other".[15] It is difficult to comprehend how Van Vollenhoven's thinking could be so grossly misrepresented by Burns (2004) in alleging that Van Vollenhoven drew a sharp line between the law in adat and other adat and that he identified adat with "*recht*" (law) (Burns 2007: 69).

In talking about rules, institutions and procedures and sanctions as law, Van Vollenhoven thus used a broad analytical concept of law, which is not by definition tied to the state organisation. He did not, as will become a vital point in the comparison with African developments, define adat law as "customary law". Adat was "folk law", people's law, living law; it was dynamic, flexible. Being customary, or being officially accepted by the colonial state, were no elements in its characteristics and legitimation. Van Vollenhoven explicitly distanced himself from the constructions of folk law and customary law that were dominant in European legal systems and the thinking of the historical school. There is nothing mythical about such a conceptualisation. It is simply a broader way of conceptualising law, akin to later social scientific conceptualisations of law that allow for the possibility of legal pluralism, dynamic forms of co-existing interdependent legal orders, having different legitimations and being based on different organisational structures.

Van Vollenhoven was first and foremost a scholar interested in a comparative study of the law of the Indies, including the Philippines, peninsular Malay, and Madagascar. He emphasised the importance of understanding the indigenous laws in their own terms and was incessantly struggling against the unwillingness of politicians, lawyers, and writers on adat to understand what they find "on the floor" in terms of the local population itself and who translated and often distorted them by "jamming" them into Dutch legal terminology.[16] This led to unsystematic, muddled, and distorted images, suitable neither for comparative work nor for sound policies. Instead, he argued for a thorough understanding of the conceptual framework of indigenous adat systems. He also emphasised the importance of understanding the relationships, today one would say embeddedness, of adat institutions. For his endeavour to understand Indonesian adat and the place it had and should have within the Indonesian legal structure, he developed an approach that involved two steps of classification. The first step involved a description at a medium level of abstraction of different local adats that had a high level of communality, for which he created the term *adatrechtskring*, adat law circle. Today we would say he classified along ethno-linguistic lines. His classifications did allow for local

[15] J.F. Holleman's translation (1981: 5); Van Vollenhoven (1918: 9). F. von Benda-Beckmann (1979: 117) later spoke of law *in* adat .

[16] In the 1970s the issue was taken up by the famous controversy between Gluckman (1969) and Bohannan (1969). See also Nader (1969).

differentiation, but he tried to bring out the common features and internal logic from a great variety of sources, knowing full well that adat was not a rigidly structured, logical and consistent whole. In a second step of classification he tried to find common features throughout the Dutch Indies to develop concepts and a comparative analytical framework that could be used beyond the idiosyncrasies of one particular legal order. For this he coined concepts such as "*inlandsch bezitrecht*", "*beschikkingsrecht*" "*inlandsche gemeente*" and "*rechtsgemeenschappen*" in a more substantive sense of having a political structure, laying claims to common property and responsibility for damage to outsiders.[17] Using concepts such as *beschikkingsrecht*, Van Vollenhoven primarily attempted to develop a systematic classification of data by constructing what we could call ideal types in the Weberian sense (see also Lev 1984: 149).

Yet, however impressive the work of Van Vollenhoven was, it was also limited. His descriptions of the 19 adat law circles (compiled between 1906 and 1918) reflect the state of knowledge at the time and that knowledge was limited; the sources often contradictory. The substantive descriptions of the different adat law circles in retrospect are probably the weakest elements in Van Vollenhoven's work. This is not surprising, given the state of information in the first decade of the 20th century and the patchwork data he had to work with.[18] Van Vollenhoven himself does not describe coherent systems. Instead, he makes sure that the deficiencies in knowledge, the credibility of certain sources, divergences between rules and practices, issues of conflict and heterogeneity within adat law regions are documented. So, if Van Vollenhoven is credited for codifying adat laws and that these have been influential, this is another anachronistic diagnosis. The more systematic accounts of adat law in specific adat law regions were only written much later.[19]

On the issue of Islamic law Van Vollenhoven's work is also rather weak, although he paid more attention to Islamic law than later scholars of adat law.[20] He was so preoccupied with adat as folk law that he treated Islamic law largely as a non-native, external legal order. While he did write about pockets of Islamic law in adat law circles, the idea that there might be Islamic folk law did not occur to him (see F. and K. von Benda-Beckmann 1993). Yet we would agree with Davidson and Henley (2007: 32) that it would go too far to see "the science of adat law as being developed to keep Islam at bay", as Bowen (2003: 46) maintains. It is true that the pro-adat, and anti-Islam policy of the colonial government eliminated an alternative and rival constitutional theory at the territorial scale of the colony. However, this policy, in Minangkabau for instance starting

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

[18] He may not have been entirely consistent in this, but we should also realise that he developed his ideas at a time when only scarce and fragmented empirical data was available. And he may have misinterpreted some of that.

[19] See note 11.

[20] This is evidenced by his elaborate summary and analysis of materials on religious law in the Dutch East Indies (Van Vollenhoven 1931: Chapter III). Significantly chapter III is titled 'Religious parts of adat law'. Even in his work there is the tendency to treat the reality of Islamic law mainly in terms of its deviations from the *fiqh* and of its incorporation into adat law, of "*doordringen van stukjes moslimsche wet in het adatrecht*" (Van Vollenhoven 1931:163).

in the early 19th century, long before Van Vollenhoven, had relatively little to do with the adat law science.

Van Vollenhoven's approach entailed a thorough understanding of the processes in which adat law is maintained and reproduced. For him, the "*rechtsgemeenschappen*", "jural communities"[21], corporate units of an organized indigenous society, were the fundamental places where law was being created. They echo the *Verbände* of Weber and Ehrlich and Moore's (1973) semi-autonomous social fields. It is here that Van Vollenhoven and F.D. Holleman have perhaps made their most important methodological and theoretical contributions. The insights into *preventieve rechtszorg*, preventive law care, or *gesteunde naleving*, supported observance, were brilliant. The insights that law, whether adat law, state law or any other law, is used, maintained, and changed and has different consequences in many different contexts, in village transactions and disputing, processes of preventive law care, in court decision making, in local and national politics and legislation, were quite unique and were only gradually taken up in Anglo-American anthropology of law in the 1970s.

In many respects Van Vollenhoven was a pioneer of the very critique towards the transformation of local laws through the ethnocentric and legalistic categories of colonial judges and administrators. He and his students regularly criticised the misinterpretations of other writers, parliamentarians and judges (see Van Vollenhoven 1909). They clearly saw the difference between adat law as interpreted and applied in courts and the local law operating in villages, between "lawyers' adat law" and "people's adat law" (*adat juristenrecht* and *adat volksrecht*), ideas which were developed much later in Anglophone literature in the 1970s (Woodman 1985, 1987).

With the increasing knowledge of *adat* law principles and a pressing need to make them suitable for court and administrative decision making, the character of *adat* law studies changed. His most well-known follower Ter (1937) later developed *adat* law studies into a positive legal science (*positieve rechtswetenschap*), different only from other legal science by the unwritten nature of its object, which had to be extracted form social reality. His approach was directed at finding this unwritten law in order to help colonial judges. It resulted in a kind of case law doctrine for *adat* law, based on the assumption that it was possible in principle to apply to new cases the law as defined in earlier decisions. Influenced by American legal realist ideas, Ter Haar developed his decision theory (*beslissingenleer*): *adat* law was to be found in decisions taken in and outside disputes. Pragmatic reasoning had taken over from the attempt to come to a descriptive account that was as close as possible to the conceptual logic of *adat* systems and their ideas about proper decision making. Ter Haar's approach has influenced post-independence Indonesian *adat* law scholars such as Djojodigoeno, Supomo, and Koesnoe. Descriptions of *adat* law made by later Indonesian *adat* law scholars, though not meant as prescriptive legal codes, were nevertheless clearly and primarily to help guide court decision making (Strijbosch 1980). Within the circle of adat law scholars, however, Ter Haar's new adat law doctrine were disputed and criticized as a transformation that went right against the doctrines of adat decision making processes (see F.D. Holleman 1938, Korn 1941). Thus, the last decades of the colonial period are characterised by differences in approach to the study of *adat* law between on the one hand Ter Haar and others in Batavia, who were heavily involved in designing and

[21] J.F. Holleman's translation (1981: 43). See also Van Vollenhoven (1933[1901]: 3 ff).

developing the Netherlands East Indies' legal system, and on the other hand F.D. Holleman and V.E. Korn in Leiden, who were closer to the spirit of van Vollenhoven and more at a distance from the immediate political and practical concerns.

The myth of the myth of ulayat rights

For a more concrete illustration we turn to the history of *ulayat*, adat, rights to the village commons. In many regions of Indonesia, as e.g. in Minangkabau, village land was mostly under the socio-political control of the village government according to the respective adats.[22] The Dutch called this right of socio-political control *beschikkingsrecht*, in English 'right of disposition' or 'right of avail'.[23] The Dutch adat law scholars considered the right of avail as an expression of Minangkabau political-economic constitutional theory. In the narrow sense, the *ulayat* lands were the village commons. It served for collecting forest products, as grazing land and as a reserve for the expansion of agriculture and horticulture. Village land was usually freely accessible to the members of the village. Sometimes a fee of recognition had to be given for extracting village land resources. A cultivator could acquire individual rights on irrigated rice fields or tree gardens. After a few generations this would accrue to the pool of inherited lineage property. Village land could not be alienated. Outsiders were barred from free access, but they could be given temporary access and withdrawal rights. Thus, the right of avail extended in principle over the whole village territory, with the qualification, that it had been weakened with respect to permanently cultivated agricultural land, which had become the inherited property of lineages or self-acquired property through new cultivation, and thus acquired a special legal status.

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

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

[23] J.F. Holleman (1981:287, 431). For more detailed discussions, see Van Vollenhoven (1919); Logemann and Ter Haar (1927); F. von Benda-Beckmann (1979); for Ambon, F.D. Holleman (1923).

disposition, of the lineage heads who together represent the village, and people had cultivation rights" (Kroesen 1874: 9).

In the early 1870s the economic policy changed. The system of forced cultivation was abandoned and the colony was opened up for Dutch plantations. This was facilitated by the Domain Declaration legislation. The West Sumatran Declaration of 1874 stipulated that land not held in ownership or under ownership-like rights, the waste lands, *woeste gronden* in Dutch, was deemed to be the domain of the state.[24] In a gradual process which Van Vollenhoven in 1919 characterised as "a century of injustice" these rights to village land were increasingly and systematically reduced, creating considerable legal uncertainty and much resentment. This usurpation of huge resource regions was justified by a peculiar interpretation of *ulayat* rights of the colonial administrators, according to which only private rights to land were recognized under the Domain Declarations.[25] Neither the *beschikkingsrechten* of the villages nor the traditional cultivation and gathering rights of villagers on the *ulayat* conformed to the criteria of private law ownership.[26] They were regarded as mere 'interests', subject to the state's political consideration of the 'common good' – that is capitalist economic development by European companies.[27] Since in the colonial legal logic each piece of land needed to have an owner, people like 's Jacob, Nederburgh (1934) and Nolst Trinité (1972) argued that it was 'inevitable' that the state became the owner of that land. A *beschikkingsrecht* of villages, if it had existed at all, would have to be seen as a public right of the village government, which would have been absorbed by the new, overriding public rights emanating from the state's sovereignty. Any public right exercised by village governments over village territories could therefore only be derived from and remained subject to the state's rights. By contrast, Van Vollenhoven and his followers argued that such interpretations were based on a fundamental misunderstanding of the nature of the *beschikkingsrecht*, which had both "public" and "private" characteristics and therefore should fall under the protection clause of the Domain Declarations.[28] While not arguing against sovereign rights of the state over these resources as such, the assumption of private law ownership by the state was a "transmutation of an undeniable and unchallenged right of socio-political control into an ambiguous and confusing right of ownership", as Van Vollenhoven argued.[29]

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[24] The Domain Declaration was contained in the Agrarian Decree (*Agrarisch Besluit*) of 1870. The Domain Declaration for Sumatra of 1874 is reprinted in Logemann and Ter Haar (1927, 106).

[25] There was much disagreement within the colonial administration about the proper interpretation of these Declarations. Van Vollenhoven (1919) noted that four different interpretations were held by the colonial administration. For the most systematic exposition and justification of the state policies and the claim of private law ownership, see 's Jacob (1945).

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

[27] Compare for Kenya**,** Okoth-Ogendo 1979, for India, Shiva 1989.

[28] It is difficult to comprehend how Van Vollenhoven could be accused of treating the *beschikkingsrecht* as private right, as Burns (2007: 76) does.

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

Thus, within the world of academia and legal politics, a number of rather different interpretations circulated. Such interpretations of course are a different kettle of fish from actual legal-administrative practices. Here we also find different ways of interpreting and dealing with the Domain Declaration. The central government in most regions did not recognise *ulayat* rights. In some parts of the colony the non-recognition of ulayat policy was relatively strictly followed and land was given out in *erfpacht* or other concessions to Dutch companies. In other regions without large scale plantations, such as West Sumatra, the regional administration largely condoned or even explicitly recognised the continued existence of the village government's rights over village land, and generally avoided direct interference. Where land or forest areas were given as concessions to outsiders, the agreement of village governments was sought. The Domain Declaration was even called the "secret declaration", because the regional government for some time did not dare publicise the text or put it into practice for fear of popular uprisings.[30] Apart from that, the Domain Declaration in the eyes of many local administrators was simply unjust and illegitimate.[31] The correct legal interpretation and practice was moreover contested between the central government and the local administration.[32]

Ulayat under Suharto and Reformasi

The continuities in *ulayat* struggles occurring after the fall of the Suharto regime in 1998 as part of the revitalisation of adat are striking. The Basic Agrarian Law of 1960 professed to be based upon adat law, but recognised *hak ulayat* in a rather ambiguous way, subject to the state's regulatory control and the 'common interest'. In the new Forest and Mining Laws as well as in the practice of the respective bureaucracies, the state worked on the same legal and political logic as its colonial predecessor. Some expropriations were entirely illegal, many others based on manipulated consent. During the last decades of the Suharto regime, an ever rising number of timber, mining and agricultural concessions, leases and ownership titles had been granted to commercial companies in disregard of the claims of local populations during the last two decades before the fall of the regime.[33] Adat and *ulayat* rights might seem to have been dramatically weakened, especially between 1983 and 1999 during which time the official village organisation based on the neo-traditional Minangkabau village, the *nagari*, had been replaced with the *desa* model.

But with r*eformasi*, the greater political freedom and the ensuing decentralisation policies, the struggle to regain village control over *ulayat* land flared up again, especially after the reorganisation of village government, which marks the abandonment of the *desa* structure and a return to a *nagari* model.[34] While the public struggles for *ulayat* during the repression were on a low level, the Minangkabau population continued to regard the

[30] See Van Vollenhoven (1919); Adatrechtbundel (11, 88); Oki (1977: 105, 109); F. von Benda-Beckmann (1979); Manan (1984: 186); Kahn (1993: 191); F. and K. von Benda-Beckmann 2006a.

[31] Gooszen for instance wrote in 1912 that "without further recognition of any other right the uncultivated land was declared to be state domain. This is illegal (*onrecht*) because land belonging to no one does not exist there, and in particular not in the Padang Highlands." Quoted from Pandecten (I, 1914: 38).

[32] For a case from 1903-1904, which shows the different opinions of the colonial administrators at local, provincial and central level, see Adatrechtbundel (11: 88); F. von Benda-Beckmann (1979: 261-262).

[33] See Lynch and Talbott 1995; Bachriadi et al. 1997; F. and K. von Benda-Beckmann 1999, 2006a.

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

government encroachment on *ulayat* as an illegal infringement on their adat rights, but did not dare oppose it out of fear of repression. *Ulayat* and its insufficient recognition in the agrarian and forest legislation remained an issue in provincial and village politics and academic discussions during and beyond the 1960s. They only were less vocal, more repressed, rarely led to open violence, and did not get the media coverage they are getting now. Moreover, *ulayat* land not directly controlled and exploited by state or private companies was seen as being governed by adat.

In order to claim back *ulayat* land, adat law now is discussed and strategically used in a wide range of contexts and arenas.[35] Many farmers started to cultivate formerly expropriated *ulayat* land. Village Adat Councils have begun to negotiate a share of the profits with companies that are exploiting village commons. Cases trying to invalidate earlier state transactions over village land are taken to court. It is mobilised against state legislation and bureaucracies by an alliance of village adat leaders and local governments, a variety of NGOs, university lecturers and local politicians. A Provincial Regulation on *ulayat* land is under discussion since 2000, heavily contested between more radical adat interpretations of rights to *ulayat* and more state and investor friendly interpretations. In 2008, the provincial parliament finally enacted the Regulation of *Ulayat*, acknowledging in principle the principle that it returns to the original owner, but leaving much leeway for exceptions. There is also a strong continuity in the ways in which claims to *ulayat* are made. The way rights to *ulayat* land are presented follow the classic Minangkabau adat model, which has been reproduced throughout history. It is presented as "pure" adat, although one aims at having this right integrated into hybrid state legislation, as in the struggle for the Provincial Regulation. The Minangkabau recourse to adat is less of an invention than a revitalisation and actualisation of these rights.[36]

Law, science and politics - then and now

Towards the end of the 19th and during the beginning of the 20th century, there raged a debate about the desirability of creating uniform law for the Dutch Indies to replace the co-existence of different laws for various population groups, in order to facilitate economic development. Many recommended the introduction of Dutch law for the whole population. Others wanted to codify adat law to enhance legal certainty and to allow the government to develop this adat law. Van Vollenhoven and Snouck Hurgronje were declared opponents of wholesale codification because it would seriously affect the

[35] These new open claims for *ulayat* are part of a broader process in which the relationship between adat and state law is renegotiated, especially around the reorganisation of village government. It also changed the political interest in religion, which had been directed mainly at the state and its corrupt administration, but now had to re-establish its position vis-à-vis adat as well. The result is a reconsideration of Minangkabau identity and an exclusionary identity politics, though not of the violent kind we have seen elsewhere in Indonesia.

[36] F. and K. von Benda-Beckmann (2007a); Li (2007). Davidson and Henley's conclusion that "any continuity with colonial *adatrecht* is illusory" (2007: 22) is not necessarily warranted. Nor is the reason that makes reference to adat attractive, namely to claim legitimacy for one's cause entirely new as Li (2007) suggests. Davidson and Henley seem to be somewhat ambiguous here, for they also state that in some areas of social life, and at least in some parts of Indonesia, there is continuity in a straightforward continuity of customary community land rights, as Davidson and Henley admit (2007: 36).

flexible and dynamic character of adat.[37] They were not looking for an uncontaminated adat of the past, nor did they want to maintain it. Such an essentialist notion of adat, as was attributed to them, is a far cry from what Van Vollenhoven and Snouck saw as existing or as desirable.[38] Van Vollenhoven and Snouck predicted that forced codification and subjugation to Dutch law would be counterproductive because it would strengthen conservation and hamper development. In their eyes, only gradual development from within the communities in which adat law was generated, though not in isolation, could bring about appropriate social and economic progress without seriously damaging the local social order. That part of adat, which can be called law, could not simply be cut out of its larger context without seriously undermining its social foundations. It would strengthen precisely those features of adat which the legislator sought to change. Customary law can very well develop to live up to modern requirements, but this cannot be done by mere imposition of change. Criticising a local population for not being able to live up to the challenges of a modern economy, while at the same time amputating their legal system and denying them access to economic facilities and markets, was misleading. Economic development would be hampered by subjecting the population to *corvée* labour, systems of forced cultivation, oppressive labour legislation and the large-scale dispossession of their natural resources by the Domain Declarations, not by the fact that adat law is fundamentally differently structured.

Van Vollenhoven was criticised for opposing the introduction of uniform law and for his insistence on the variety of adat laws, which, according to his opponents, was not even law but only messy and imprecise custom, which would hamper economic development and legal certainty. The fact that he engaged himself for a better understanding of these orders, that he minded the violation of these laws, and that he did not believe that a wholesale introduction of state law would do a better job for economic and political development made him unbearably romantic, paternalistic and anti-development oriented in the eyes of many.[39] He was denounced "as a Jacobite against whom the Netherlands of the shareholders and East Indies pensioners had to be called to arms".[40] In our eyes his critique of the large scale reorganisation of the legal order was less an expression of romanticism, but rather a realistic assessment of the probable consequences of such measures. He clearly saw the dangers, when he criticised the legal reform plans in 1915, even without the hindsight that we have after decades of failed law and development projects aiming at supplanting family and inheritance law or land law in other (post) colonial regions and in Indonesia itself. The sharpness of his diagnosis can be seen from later historical experience and some counterfactual speculations. What

[37] Van Vollenhoven (1910) did design "a short adat law code for the whole of the Indies" (*Een Adatwetboekje voor heel Indië*), but this was more a codification of adat principles rather than wholesale codification. See also Davidson and Henley (2007: 21). See also Burns (2004, 2007); Fasseur (2007).

[38] They were interested in the internal logic and dynamics of change within existing adat law, period. In fact it was precisely this essentialist conception of adat of those who wanted to get rid of it that they were fighting against. "The country is too good and promising to be turned into an adat museum", Van Vollenhoven wrote (1919:29). And he was convinced that oriental ideas could be "fertilised with western values" (1933:239).

[39] On Van Vollenhoven's attitude towards legal and economic modernization, see also Sonius (1981), Lev (1984); Fasseur (2007), Burns (2004).

[40] Colenbrander, as quoted by Panhuys 1975: 3.

would have happened if the Dutch had declared the whole of Dutch civil law valid for the whole population, or imposed a uniform land law based on Dutch legal categories? The fate of the Basic Agrarian Law of 1960 and the repeated efforts to push registration of individual ownership titles, lastly aided by a huge World Bank project, are telling. Can we expect that what hardly works now would have worked a hundred years earlier? It would also be interesting to speculate about what would have happened if, for instance, the Dutch had kept their treaty promises, or if they had not issued the Domain Nota and had recognised the villages' rights over their village resources in their favour, if they had negotiated development with those who held the rights?

There are striking parallels with some current accounts of indigenous populations that are barred from commercial exploitation of the natural resources as long as they hold them under indigenous title and for which their indigenous law and not state policies are blamed (F. and K. von Benda-Beckmann 1999). Many contemporary critics of law and development rhetoric[41] echo van Vollenhoven's critique (1933:349[1915]):

> "There is an impolite Latin proverb saying the world wants to be cheated. That one wants to be cheated by the image of great organisations in my view seems to come from mankind's yearning for a beautiful panorama of the future. He who paints the largest canvas, he who opens the most wonderful perspective, who closest approaches a radical transformation of the universe, gets the loudest applause. But nobody asks whether there is a road leading to these goals, or whether this road will be passable in the near future".

The mobilisation of Pan-Indonesian adat

The scope of political claims based upon adat followed logically from the scale of the pre-colonial political organisations. They were bounded by ethnic and regional boundaries. They therefore never threatened the colonial state as a whole. The mobilisation of a Pan Indonesian adat was exceptional. In the 1920s, an all-Indonesian adat was promoted by *Indonesian* intellectuals, in the *Sumpah Pemuda* which later would be used as a legitimizing basis for the struggle for Independence (see Koesnoe 1977:124). Adat law was then recognized as the law which unified the whole Indonesian population. (Koesnoe 1977:126, 133). After Indonesia's Independence, however, the position of adat law *vis à vis* the state and its law has (at least for most legal scholars) fallen back to the old, colonial situation, though some tried to develop an alternative theoretical basis. Koesnoe (1977:156) was the most prominent Indonesian theorist who maintained the view that adat law is more than ethnic group law, but still forms the basis and ultimate legitimation of all Indonesian law; even where it is no longer referred to as adat law but as Panca Sila law.[42] Such efforts to forge an alternative legal foundation to the law of the state may have a contemporary parallel in recent discussions about "African" or "Asian" human rights.[43]

[41] See e.g. Quarles van Ufford and Roth (2005).

[42] See Koesnoe's discussion of the position of adat law according to the Preliminary Constitution of 1950, Koesnoe 1977:138 ff.

[43] See F. and K. von Benda-Beckmann 1993.

The recent emergence of the Alliance of Adat Societies (AMAN) is a new development in which local adat interests are mobilised on a national level (see Moniaga 2007; Acciaioli 2007, Li 2007, Davidson and Henley 2007). It is however a very different movement, that draws its legitimacy mainly from analogy with the notion of indigenous peoples in the sense of ILO convention 169. The alliance itself is also strongly supported (if not created) by foreign donors and national NGOs. Contrary to the Indonesian nationalist politicians in the 1920s, the new remerging intellectual elite, the speakers in AMAN rather are a collection of politically and economically marginalised population groups. It is typical that the more prominent population groups, the Minangkabau, Bali, the old Sultanates, Javanese or Acehnese do not take part in AMAN, and follow their "old" strategy by fighting for their adat law, not needing any international legal legitimation.

Adat law, state law and Islam

The political and scholarly interest in adat was not only inspired by the relation with state regulations. It also arose out of a concern about the actual role of Islam and Islamic law and the extent to which Islamic law should be recognised. Around the turn of the 29th century, there were and are two major positions regarding the role of religious law. Van den Berg, and with him others, took one rather extreme position holding that "it is generally accepted that the family and inheritance law of the population of Java and Madura who have accepted the Islamic faith is governed by Mohammedan law" (Van den Berg 1892:454, 455). In the view of most adat law specialists Islamic legal elements, in order to become folk law, had to become part of adat law. And in this sense they took position that was as extreme as that of Van den Berg. Both standpoints hampered a more careful and differentiated analysis of the relationship between adat and Islam, and adat law and Islamic law.

The critiques reassessed

The Indonesian example first of all shows us the *anachronistic* character of the "right of avail as creation of adat law" discussion. The adat rights over *ulayat* resources that the adat law scholars summarised as *beschikkingsrecht* existed on the ground. Until 1874, and partly afterwards, they were widely recognised by the colonial state, thus decades before the Adat Law scholars discussed and defended them. Though the rights to village commons were expropriated in different degrees, they continued to inform local legal thinking and practice, albeit often as "violated" rights.

This is an instance of a more general point. Emphasising the creation of adat law by adat law scholars, as creating something mythical, something that did not really exist on the ground, tends to obscure that what went on in Indonesian villages and the colonial administration before these scholarly debates. There had been many changes and transformations before colonial state rule. In some parts of the archipelago, the Dutch East Indies Company (VOC) had significantly influenced and often changed local forms of political, economic and legal organisation. On Ambon for instance, one of the spice islands in the Eastern Moluccas, this happened as early as the first half of the 17th century. Many of the new village structures were subsequently incorporated as "adat" by

the local population, although they never fully replaced pre-colonial legal notions (see F. and K. von Benda-Beckmann and Brouwer 1995, Zerner 1994). In the pre-colonial history there have been many transformations, also before the coming of the VOC. The most important was the coming of the great religions, especially Islam, to most regions in Indonesia. As would happen later in colonial times again, many adat concepts and institutions were expressed in Arabic and Arabicised Malay and Islamic law. The concept of adat itself is a case in point. In West Sumatra, for instance, concepts of *hak*, *milik*, *hibah, ulayat (wilayah), umanat* etc. become part of the language of adat. In general, the adat meanings became the meaning of these Arabic-Islamic concepts. The clearest case probably is that the Islamic term *warith* (heirs) was used to is indicate the heirs according to the matrilineal principles of Minangkabau adat. As Abdullah (1966) has argued, this confrontation with a different set of legal prescriptions and logic probably were one of the main reasons for the more adat oriented local leaders and intellectuals to systematize and theorise their adat.

Secondly, the major changes affecting the extent to which the communal rights could be exercised had little to do with the work of Van Vollenhoven and the controversies with his colleagues in Utrecht in the 1920s and 30s. The actual changes were the result of colonial economic and administrative policies and concrete measures, most of them occurring before the academic discussions. The political engagement of the adat law scholars did not stop the ongoing expropriation. Nevertheless and understandably, the colonial administrators and entrepreneurs saw the adat scholars' views as a threat to their freedom to develop and exploit the natural and human resources (Burns 2004: 67).

The critiques also have attached too much significance to what was written and debated in scholarly circles in the last for decades of Dutch rule, and tend to confuse this with the actual operation of local law, and with the ways colonial officials dealt with these issues in practice.[44] The discovery of adat law by Van Vollenhoven and others is not the same as the existence of the rules, principles, decision making processes that scholars tried to capture.[45] The adat rights that Van Vollenhoven wanted to describe and analyse with the concept did exist in many regions of Indonesia, including Minangkabau. They existed quite independently from whatever Van Vollenhoven, Ter Haar and Logemann would write about them in the first three decades of the 20th century. What happened with adat and adat law in different contexts and arenas differed, then and now. More importantly, it was not only the adat law scholars who were engaged in explaining and systematising adat law. In regions such as Minangkabau, also local leaders and intellectuals play a major role in the continuing reproduction of adat and adat law (see Kahn 1993, F and K. von Benda-Beckmann 2007).

Thirdly, it shows that the colonial administrators and lawyers like Nederburgh, Nolst Trénité and 's Jacobs and not scholars like Van Vollenhoven and his followers were the ones who most grossly misinterpreted and transformed the character of

[44] High legal officials, for instance, speaking of the Malayan inheritance law in a case disputed in 1860 (*Maleische versterfregt*) see F. von Benda-Beckmann 1979: 424).

[45] Even the prominent legal historian Fasseur (2007: 51) maintains that the discovery of adat law did not start before the 1880s. That may be true for legal scientists and parliamentarians, but certainly not for administrators, who often had a good understanding of the adats in the region they worked in well before the 1880s.

Minangkabau adat rights to natural resources in terms of Dutch legal categories. Of course there were many weaknesses in the adat law descriptions. We know now that there were different degrees of such socio-political rights. Burns and other critics are right in stating that the six criteria with which Van Vollenhoven characterised his ideal type *beschikkingsgebied* and *beschikkingsrecht* cannot be found everywhere. However, societies with a political structure based on kinship rather than territory may exercise legitimate socio-political control over a certain territory to which various individual and communal rights pertained. However, criticising those who were trying to understand the various legal orders, and the social processes through which they were maintained and changed, those who created neologism in order to capture similarities and differences between Dutch and colonial legal concepts and logic, those who tried to lay bare these misinterpretations as the "creators" and "transformators" - while leaving out of the discussion those who engaged in the most crude distortions and misunderstanding of local legal concepts, principles and institutions were not really discussed, is turning the world upside down. The critique is also inconsistent. On the one hand, Van Vollenhoven and followers are critiqued for an "orientalist assumption, implicit or explicit in much of the work of the Leiden school, that law, custom, and society were governed, and should continue to be governed by principles radically different from those informing their counterparts in the West" (Davidson and Henley 2007: 20), or for the "limited utility of the East-West dichotomy" (Burns 2007: 68). On the other hand they are reproached for not seeing the fundamental differences, differences so fundamental that they could only be expressed in dichotomies such as "law" versus "custom".

Fourthly, Van Vollenhoven did *not* define adat law as customary law. He explicitly distanced himself from the constructions of folk law and customary law that were dominant in European legal systems and the thinking of the historical school. It is also sometimes alleged that he, and other authors on adat law, wrote about adat law as if it had not been influenced by colonisation and presented it as original, pre-colonial adat, instead of the transformed adat that it was. Looking at the literature on adat law, the monographs and the publications in the *Adatrechtsbundels*, we find such statements exaggerated. Van Vollenhoven and other writers were well aware of the fact that adat was subject to change and responsive to other law. Ter Haar's (1929) analysis of the influence of western law on the native population is a classic on the interdependence of different legal orders on legal practices.

Conclusions - Adat aw in Indonesia in a wider comparative context

Indonesia

The claim to village land controlled by the state based on adat law is one of the most visible and politically important aspects in the contemporary revitalisation of adat in Indonesia. In many parts of Indonesia, this is also linked to a revitalisation of religion and religious law. And in most regions, the revitalisation of adat and religion involves more than political, economic and spiritual values, but also feeds into identity politics (F. and K. von Benda-Beckmann 2006b, 2007a). A wide range of moral values based on adat, religion, modernity and conservatism are invoked, and of which adat law is only one. We have also seen that any single of these processes should not be treated in isolation. As a more general point, we suggest that it is necessary to look at the full spectrum of social

and political life and to all relevant arenas instead of singling out one particular new institution. We must see the processes of revitalisation of adat in their dynamic interdependence with, for instance, the "*revitalisation of democratic institutions*" and the revitalisation of religious law, in a context that is ever more influenced by local and translocal developments. Also the promotion of adat law and adat rights is strengthened by the work of donor agencies involved in transmitting models of good governance and participation. Local communities and their law also have a certain appeal for achieving "development from below", or the protection of rights of adat societies seen as indigenous peoples (see Davidson and Henley 2007; Acciaioli 2007, F. von Benda-Beckmann 2007a).

Similar developments can be observed throughout Indonesia. Ethnic identity is often coupled with customary law claims to land and local government control, and this has been used to justify exclusion and violence. This is especially the case as populations become more intermingled. However, putting all the blame on adat or customary law and discarding this altogether as some have done, would miss an important point. Reference to adat or customary law and ethnic identity may be used in the justification of such politics, but they are rarely their causes, although they tend to acquire their own momentum. Many of the problems have been a result of government policies, abuse of state power, and of a failing court system. Reference to adat is often a strategy of last resort; the only accepted way of staking out claims that otherwise may be officially legitimate but for many reasons cannot be pursued.[46] Or, the issues are translated into ethnicity or religion. This is especially important where ethnic identity, adat and religion are strongly intertwined.[47]

Our historical analysis suggests that in most parts of Indonesia the reactivation of adat as such is not as new as some analysts seem to imply (Bourchier 2007: 113), and it may be more diverse. More generally, the fact that law is mobilised in these struggles probably to legitimate claims to political authority and natural resources is also less new than suggested. While the new political freedom after Suharto opened up room for the deployment of legal strategies, political and economic conflicts were also largely expressed in legal terms during times of political repression. This was a safer, although not necessarily successful, way of framing claims than in overt political terms (F. von Benda-Beckmann 1989).

Adat law and Customary law in British Africa

The processes in Indonesia must be seen in the context of similar developments unfolding on a global scale. In most states belonging to what was called the 3rd and 4th world, local populations or indigenous peoples fight for recognition of their laws, for greater political autonomy based on traditional law and control over their natural resources. In most African states, customary laws are mobilised and in many countries neo-traditional chiefs are gaining influence.[48] There is an increasing use of law to legitimate these claims and translate political and economic conflicts into legal ones. The Comaroffs (2006,

[46] See for adat as a jurisprudence of insurgence, F. von Benda-Beckmann (1990).
[47] See also Erb (2007) on Catholicism on Flores and Warren (2007) on Bali.
[48] Van Rouveroy van Nieuwaal and Zips (1998), Oomen (2002); Comaroff and Comaroff (2006); F. and K. von Benda-Beckmann and Turner (2007), Ubink (2008).

forthcoming) have even spoken of a new “fetishisation” of law. In the case of indigenous peoples, the main reference goes to international law, mainly ILO Convention 169.

Apart from similarities there are also striking differences with the developments and interpretations within the British colonies in Africa. Large scale administrative and judicial transformations especially in courts staffed with English judges and under the label of customary law have been amply documented.[49] Discussions in Africa mainly revolved around the creation of customary law.[50]

The use of customary law, without further qualification, can be a confusing semantic trap, a “confusing fiction” (J.P.B. de Josselin de Jong 1948). In the most general sense, custom and customary law refer to rules and procedures based on long terms usage and an assumed continuity between the past and the present. In most state legal systems, "customary law" or “native law and custom” are categories of which the characteristics and substantive content are defined and validated by law makers, judges or legal scientists. One speaks of “customary” rules because these rules have been accepted and used for a long time".[51]

However, the term customary law is often used in a much more off-hand sense for the non-state law of local ethnic or/and territorial communities or functional networks (traders); independent from their recognition by the state and legal science. Customary law here is just one way of saying “non state law”, often used synonymously with folk law, people’s law, traditional law. Rules and procedures of non-state local laws, although referred to as customary, are not always customary in the first sense, i.e., based upon an (assumed) continuity of local legal tradition. Only certain parts of such rules and principles may be incorporated into the systemic category of "customary law" as defined by the courts and legal science, and thereby transformed. One therefore should not confuse these different meanings.

In recent times, the conceptual issue has become even more muddled by a new distinction between old/colonial/obsolete customary law and “living” customary law, as has been developed by courts in the new South Africa (see Sanders 1987; Bennett 2006). The term “living customary law” seems to be the result of a compromise: on the one had the political imperative and legal instruction to take customary law into account in the formal state legal system, yet the felt need to adapt it to contemporary values such as gender and status equality. There is an interesting parallel with the post-revolutionary Indonesia where the notion of living law (mainly living adat law, but not confined to adat law) was a way of reinterpreting adat law as in accordance with the objectives of revolutionary justice, including especially gender equality (see F. and K. von Benda-Beckmann 2008). This living customary law is mainly a lawyers’ customary law. It differs considerably with the local law practiced outside the courts both in Indonesia and in South Africa (Derman and Hellum 2009, forthcoming). The living law of the courts appears to be actually dead law.

There are striking differences between the term customary law as it developed within the English colonial legal system and the terms adat and adat law in Indonesia These differences led to different constraints in invoking it against the state. Within the

[49] Chanock 1985, 1992; Woodman 1969; F. von Benda-Beckmann 2007 [1970].
[50] There also is some (albeit superficial) cross-referencing to between scholars wring on Africa (Chanock (1985: 63) referring, via Hooker 1975, to the work of adat law scholars Van Vollenhoven and Ter Haar.
[51] See van den Bergh 1986: 68 for the definition of Justinian.

Anglo-African context, non-state rules that do not conform to this check of customariness, for instance "modern innovations", do not fall under the concept of customary law.[52] In the words of the Privy Council deciding a case from Nigeria, "it is the assent of the native community that gives custom its validity, and therefore it must be proven to be recognised by the native community whose conduct it is supposed to regulate" (F. von Benda-Beckmann 2007: 163). What is more, the courts reserved the right to change customary law for themselves and abrogated traditional authorities the right to change it. By contrast, adat law started out as folk law, as people's law, as living law; it was considered dynamic and flexible, adaptable to changing circumstances. Being customary was not part of their legitimation. It was quite accepted by the state and the courts that adat authorities have the right to change adat, though the courts also declared changes in adat on their own account. Some adat orders, for instance the Minangkabau, have their own theories of legal change and distinguish those parts of adat that are unchangeable, which have been changed through official decision making processes, or which change with changing habits (F. von BendaBeckmann 1979; K. von BendaBeckmann 1984). Such changes would not eliminate the character of adat law, as would be the case for changed customary law in the African examples, or for indigenous law under the ILO convention, which is predicated upon traditional economic behaviour and life style. However, later on adat law tended to be more and more identified with old and obsolete legal rules and principles, often referred to as "the adat law of Van Vollenhoven and Ter Haar". The fact that many Indonesian adat law scholars simply reiterated the pre-Independence adat descriptions and did not go out to study recent developments only enforced the idea that adat law was ossified. It was this kind of adat law which the post-revolutionary lawyers and judges wanted to get rid off by using the term living law. This resembles current debates in South Africa where the term living law is also used to distance from the standard descriptions of customary laws of people like Shapera (1938). Thus, both the requirement that by invoking customary law one has to prove tradition, and that only courts but not traditional authorities can change it have made customary law less suitable than adat law for claiming rights to land and administrative autonomy. And the descriptions of adat or customary law that were not that of the courts over time came to serve as ossified versions of what was meant to render a flexible perspective.

It therefore is confusing if the two meanings of customary law are identified with each other, and if adat or adat law are translated into the legalistic conception of customary law. Rephrasing adat or adat law as "customary law" or as "custom" therefore indicates an implicit or explicit legalistic perspective on normative plurality. This has regularly been the case with reinterpretations of adat law and what Van Vollenhoven wrote about it, [53] and also frequently happens in many analyses of the contemporary revitalisation of adat processes.[54] In some cases this is the expression of an explicit legalistic and statist conceptionlisation of law. For Burns (1989, 2004, 2007), for

[52] See Chanock 1985: 62, references to Read on African law. "The perception of customary law as continuing body of rules is, then, being replaced by an understanding of its formation in colonial processes" (Chanock 1985: 65).

[53] See P.E. de Josselin de Jong 1980.

[54] A nice illustration is the collection in Davidson and Henley (2007): Adat law is customary law in Davidson and Henly, Fasseur, Acciaioli; Adat is custom for Burns, Li and Henley; adat as culture for Eb and Davidson. Warren for Bali and Biezefeld for Minangkabau just speak of adat and adat law.

instance, who considers only rules "consistently enforced by a sovereign state" as law, adat by definition therefore cannot be law. [55] In other cases, it may be a rather unreflected conceptual usage, which, however, reflects the terminological ways in which many lawyers and anthropologists not familiar with social-scientific perspectives on legal pluralism have been socialised.[56] Apart from this and more important, adat law and customary law have quite different legal-political implications.

The argument of critics of customary law like Chanock, that customary law is an entirely colonial invention, has to be understood against this legal background. For the context of courts staffed with British judges, the qualification might be adequate, but not in to the same extent for Indonesian courts that have always been more amenable to local developments and variety. However, if we consider it from a multi-contextual perspective which we developed in this paper, the differences between Indonesia and Africa might be smaller. What "customary law" was, substantively and procedurally, in the minds and judgements of British judges differed from decision making in the Native and Local Courts, and what happened there was different again from disputing processes within villages.[57] Official versions of customary law primarily play a role in official state court decision making and in the legal literature, but the number of cases reaching that level was and is marginal. These versions may be much less relevant in local courts and in village decision making were most of the cases were dealt with. We have shown for Minangkabau that the adat law interpreted, often misinterpreted, and applied in state courts often differs substantially from the adat used in village contexts. Moreover, whatever is stated to be adat law in courts is often "re-adatised" once the decision leaves the court room, as we have observed both in West Sumatra and on Ambon.[58] What happened in an African Magistrate's court or an Indonesian *Landraad* court could be made undone again in village politics. One should not, therefore, draw too general conclusions from misinterpretations in the literature and in court decisions. These might influence generations of scholars but do not necessarily affect the local populations involved. They certainly do not preclude law to develop further in local contexts. This is not to say that these developments occur in isolation. Focussing too much on the labels adat law and customary law and the inventions by courts prevents one from understanding these other developments in local law.

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[55] Burns makes his arguments on the basis of doctrinal English law, which, however, is not useful as a basis for compararison. Moreover, the term 'law' should be reserved for written law. Rules that are not written in his conceptual framework are mere custom, not law.

[56] It is interesting to note that since the rapid expansion of international and transnational law also many legal scholars, who used to adhere to a narrow, state related concept of law, today no longer have difficulties using a broader concept that includes all kinds of self-regulation, which have not even the remotest relation to sovereignty, the most well known example being the *lex mercatoria* (see F. and K. von Benda-Beckmann 2007b).

[57] F. von Benda-Beckmann in his research in Local Courts in Malawi in the late 1960s has also shown how local courts chairmen interpreted and laid down what they considered to be customary law. Most chairmen shared the (legal realist) conception that it was the application of rules, custom, or whatever, in courts which transformed these rules into law (2007[1970]: 164, 165). They had no doubts that they, the courts, had the right to declare and change the law. The principle that if customary law was to be applied in court it had to be proven by calling witnesses did not play a role in the Local Courts. And about 90% of all civil cases were decided in such courts.

[58] K. von Benda-Beckmann 1982, 1984. F. von Benda-Beckmann 1979, 1984.

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