Adat Law, the Sea and Colonial Interests:
The Case of The Dutch East-Indies

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Introduction

In 1928 the Leyden expert on Indonesian *adat* law, professor Van Vollenhoven, noted that, strange as it seemed in view of their protracted connections to the East-Indies, the Dutch only discovered the existence of this body of law at the end of the nineteenth century (Van Vollenhoven 1928). His explanation was that the colonial administration only intensified its interference with the indigenous societies after about 1860, while penetrating (and pacifying by military means) ever more regions beyond the central island of Java. Certainly, this interference was accompanied on the part of the administrators by a strong urge to apply uniform rules, inspired by the Dutch legal system, to the different local situations. This tendency was mitigated to some extent by the practical consideration that their colonial rule could profit from taking account of, and partly accommodating, the indigenous law systems. Still it is hard to escape the conclusion that the colonial admistration followed a rather selective course - taking account of *adat* law only when it suited its own best interests.

This article is concerned with the discovery of *adat* law regarding coastal waters. In this case, the inducement was the question of how the colonial government should react to the intention of (partly foreign) business firms to exploit pearl and mother-of-pearl banks, lying off the coast of several islands. Who could claim jurisdiction over these banks - the colonial government or the so-called self-ruling principalities, in whose coastal areas the banks were located? To answer this question the colonial administration had to learn whether the *adat* law of these principalities contained some notion of a 'territorial sea', or at least of preferential disposal over coastal waters.

The Inquiry

The international law of the sea traditionally takes into account three maritime zones. First, inland waters, under the full sovereignty of the coastal state. Second, the territorial sea, a belt along the coast over which this state may claim extended rights (short of complete sovereignty). Third the high seas, beyond any coastal jurisdiction. During the Middle Ages and in the early modern period, it was common practice among European states to almost completely disregard the notion of the high seas. They claimed sovereign rights over extended coastal sea areas. As far as their still limited naval means allowed, they jealously guarded their rights over these areas. The extremes to which this practice led are well exemplified by the attempt of the Spanish and Portugese crowns to divide - backed by papal authority - the oceans between them, after the first

extra-European voyages undertaken by ships flying their flags (Alexandrowicz 1967). The Spanish and Portugese claims were soon to be challenged in the legal sphere by Grotius' notion of 'Mare Liberum', while politically and militarily they were undermined by the growing might of the Dutch and English East India Companies. No less important, however, was the fact that in the East Indies (in early modern times to be understood as the Indian Ocean, east of the island of Madagascar, and its borderlands) the notion of the high seas occupied an important place in the legal system of the coastal societies. Grotius, who was familiar with several of these systems, might even have been influenced by this fact when eleborating his concept of 'Mare Liberum' (Alexandrowicz 1967). However this may be, it is important to note that, at the time of their first acquintance, European and East Indian states held rather different views as to the legal partitioning of the seas. The above mentioned tri-partite division was much more strictly adhered to by the latter. As the Western and East Indian parties learned to treat each other at this time as political equals - as exemplified in the legally binding treaties they concluded - the first must have known the relevant juridical notions of their counterparts (Resink 1958; Van Kan 1935). Among others, the so-called Bonggai Treaty of 1637, concluded between the Dutch East India Company and the Macassarese principality (Southwest Celebes, present day Sulawesi), may attest to this fact.

Their political equality and the acceptance by the Europeans of the East Indian coastal states as equal parties in the development of international law, gradually disappeared towards the end of the eighteenth century. The next century opened the period of ever greater western dominance, in which hardly any traces were left of the former international and legal systems. Certainly, as the Dutch gradually extended their hold over the Indonesian archipelago, they took notice here and there of the existence of unwritten *adat* law. However, this knowledge remained fragmented and superficial for the time being, and it only seldom came to the attention of government circles. The latter, moreover, were hardly interested in these fragments for policy purposes. Indigenous law was at the time simply considered of such a low order - compared to European legal systems - as to be almost irrelevant (Van Vollenhoven 1928).

This order of things only changed when the colonial authorities decided - pushed by political developments in the mother country - to introduce a more liberal economic system in the East-Indies. This decision made room for private investments, and soon the authorities in Batavia had to decide how to react to requests for business enterprises by Western firms and capital. What complicated these decisions were considerations of national security and (in slowly growing measure) care for the interests of the local population. Was it wise to allow these firms, among which foreign ones were in principle to be accepted on an equal footing, direct access to self-ruling principalities, who - under Dutch sovereignty - still kept (nominally at least) some vestiges of their former indepedence? Especially worrisome was this consideration when the principalities bordered the sea. How could the colonial authorities attract and channel foreign investments, while avoiding losing control over these easily accessable indigenous states? The solution to this problem was to decide on the legal status of the belt of coastal waters that washed their shores. Who could claim jurisdiction over these areas? In practice, the beginning of an answer was to ascertain whether the self-ruling principalities traditionally extended legal claims over these waters.

Government involvement started in 1886 when the resident (the highest ranking local civil servant) of Amboina approached Batavia for advice concerning the request of British and Australian firms to exploit the pearl banks in the vicinity of the Aru islands. In his opinion it was impossible to honour these requests. After all, the local inhabitants claimed the right of disposal over the banks. Each coastal village knew exactly the extent of the coastal waters it considered its own, while their chiefs had to cede part of the catch as tribute to the rulers of the islands.[1] Confronted with this problem, the administration realized that before long it could expect comparable requests by other business interests in other parts of the archipelago. In order to avoid ad-hoc decisions, it was necessary to ascertain in general terms the legal status of the coastal seas. An investigation into this matter was clearly called for, and the possible granting of concessions had to await its outcome. Without such an inquiry, it was even impossible to ascertain who exactly was empowered to honour the requests and cash their profits - the colonial government or the principalities?[2]

Other aspects of the research were, first, that it attested to the near complete ignorance of the colonial goverment of that time as to matters concerning *adat* law and, second, that the colonial administration needed an economic and external stimulus to rectify this neglect. Be that as it may, in the course of 1893 the results of the investigation, conducted by the residents in the relevant areas, reached Batavia.[3] They covered the following resorts - Aceh, the East coast of Sumatra, the Western part of Borneo (present day Kalimatan), and the Southern and Eastern part of this island, the Southern part of Celebes, Menado (also part of Celebes), Ternate and Timor (Van Vollenhoven 1910, 1934). Other ressorts, the Lampongs for instance, as well as Amboina, Bangka and Billiton, were not considered. These areas were directly governed by the Dutch and it had been decided in the meantime that the colonial admistration was the sole authority to decide on business requests (while keeping an eye on the interests of the local population).

As for Aceh it was discovered that the local chiefs did claim jurisdiction over a belt of coastal sea (the *labuan pukat*) with a - locally varying - breadth of about 2.000 metres from the beach. People who were born and lived there were free to fish in this zone, that is to say - they were exempted from paying tribute to their chiefs. This right also extended to strangers, married to resident women, while strangers without this social characteristic had to pay ten percent of their catch to the local chief (in practice, however, this tribute did not exceed five percent). Every fisherman who wanted to sell or export his surplus catch, was obliged to cede part of his profit. The sultan and the chiefs were free to transfer this right - as a favour - to another person, provided the beneficiary was a resident of the locality. Should the latter die the grant returned to the donating authority. For Sumatra's East coast, on the other hand, the inquiry did not reveal a comparable situation. Still, the princes regularly claimed ten percent of all fishing in the vicinity.

As to the Western resort of Borneo, it was found that *adat* law did not contain any regulations as to local jurisdiction over the coastal seas. People of the several coastal districts were completely free to fish anywhere they wanted and did not regard any part of the coastal seabelt out of bounds. True, the prince of Sukadana expected to receive ten percent of the fishing in his district, but fishermen were free to decide whether to pay this tribute or not. The prince, moreover, had never

attempted to enforce this rule. Likewise in Sambas, non-residents were expected to ask permission from the prince to fish in coastal waters, but none of them ever did so. Elsewhere, in Mampawa, the local ruler had earned a well deserved reputation for money grubbing, but even he did not tax coastal fisheries. Boundary disputes as to the neighbouring seas, moreover, were unheard of. For the whole of this ressort the inquiry had found but one instance that seemed to indicate the existence in *adat* law of relevant jurisdiction. In Pontianak, fishermen who constructed bow-nets in places that fell dry at low-tide had to notify the local chieftain. Having done so, however, they were free to keep all of the catch.

In Borneo's Southern and Eastern ressort *adat* law contained the notion that the princes were entitled to raise taxes from any fishermen's catch, to be paid traditionally in kind (*tripang*, a kind of sea cucumber, fish or turtle skin). Only for pearls and mother-of-pearl - mainly dived for by non-residents - did the tax collector expect money in a fixed yearly tribute. In former times, this tax was raised per *pikol* (a measure of weight, a *pikol* being a kind of yoke) but when the princes noticed that this led to cheating, they resorted to the yearly tribute, to be paid in advance. The reefs and banks that the fishermen and divers frequented were divided in *pentjarian radja* and *pentjarian negri*. The former category contained the crown demesne, the princes being allowed to consider the tribute as a personal income. The taxes for the latter, on the other hand, were expected to be used for the benefit of the land. In South-Celebes and Menado the notion of a princely right of disposal over the coastal waters certainly existed in *adat* law. The investigation had only been able, however, to trace rather vague rules as to the breadth of these waters, and to the preferential rights of the local inhabitants (Adatrechtbundels 1933).

As to Ternate, it was found that the local population was free to fish and dive for pearls in water with a depth of less than three fathoms. Beyond that depth all economic activities were the prerogative of the prince who was free to dispose of this right as he chose (De Clercq 1890). Finally, the inhabitants of Timor appeared to be free to catch fish and *tripang* and to dive for pearls anywhere in the seas surrounding the island. No belt of coastal water was set apart in *adat* law for the exercise by local chiefs and princes of any right of preferential disposal.

Goverment Policy

The inquiry confirmed beyond doubt that the self-ruling principalities had developed in their body of *adat* law the notion of a coastal sea, of varying breadth, over which they could exercise certain exclusive rights of disposal. This outcome was in line with what was known about the relevant parts of *adat* law in several directly ruled areas, such as Amboina, Western Java and Banggai (Eastern Celebes) (Van Vollenhoven 1910, 1934; Dormeier 1945). It was now up to the colonial administration to decide how to react to these data. This proved to be rather difficult, however, as several high ranking civil servants took different lines as to the proper accommodation between the rights of the colonial power and the subordinate, but nominally still self-ruling principalities. Some of the civil servants were of the opinion that Batavia could take no other course than to accept *adat* law. This meant delegating to the principalities the ensuing right to decide on the granting of concessions to exploit the economic treasures of their coastal seas. Others maintained that this policy choice would undermine the authority of the colonial administration, as it must inevitably lead to unwelcome, foreign interference in the Dutch sphere of influence. The self-ruling principalities were seen in this view as the colony's soft underbelly, as *adat* law prevented the Dutch from effectively sealing off the East-Indian islands on the seaside.[4]

In this way the tendency to accept the rule of *adat* law clashed with considerations of colonial rule and power. As the government in Batavia and its advisers were unable to find an easy way out of the problem, it was decided to draw the Colonial Department in the Hague into the discussion. Initially, the opinions here were as divided as those in Batavia. One section of the Department declared that the self-ruling principalities had accepted a position as vassals under Dutch colonial rule. In its opinion this meant that they could never exercise more extensive rights (over land and water) than their liege lord. Dutch rule, moreover, was responsible for everything pertaining to the East-Indies. Consequently, it was up to the colonial government to decide what to do or not to do in the coastal waters washing the islands. In this respect it would, moreover, be erroneous to differentiate between the self-ruling principalities and the directly ruled lands.[5]

The secretary general of the Colonial Department (its highest cvil servant), A.E. Elias, was inclined to follow the line of these arguments. In one important respect, however, he went one step further. The afore-mentioned section had belittled the rights of the principalities under *adat* law. The secretary-general simply denied their existence. He argued for the impossibility of an indigenous notion of some kind of 'territorial sea', as the concept could only have been brought to the East-Indies by the Dutch. International law - to which this notion belonged - was, after all, a Western invention, the outcome of endeavours to regulate the relations between civilised, Christian states. This line of thought led to the conclusion that the Dutch were masters over coastal waters, not as lawful successors or liege lord to the local princes, but in their own right - as representatives of a European power.[6]

This rather extreme opinion did not remain unanswered for long. Van Vollenhoven, at this time a civil servant with the Colonial Department, tried to correct his superior. He argued that the notion of a belt of coastal water over which the ruler or the inhabitants of the adjacent land could exercise certain, sometimes far reaching, rights, was a well-known and wide-spread phenomenon in the lands bordering the Indian Ocean. It certainly was no European invention. This meant, in his opinion, that - in order to find a solution to the problem at hand - the colonial government had to redefine its relation to the self-ruling principalities and their traditional prerogatives. Simply to deny the existence of these rights amounted to high-handedness and could undermine the moral position of the Dutch in respect to the principalities, their rulers and the local inhabitants.[7] Other advisors, however, were not impressed by these learned arguments. They followed a more practical line, fearing for the consequences of unimpeded and uncontrolled access of foreign business interests into the East-Indian waters. Such a development could in the end be harmful to Dutch political control. The government in Batavia, in other words, did indeed do well to place its relations with the principalities on a new and firmer footing - but only to give itself in the process more power to interfere in these areas.[8]

Confronted with these varying opinions, the minister for Colonial Affairs

chose to follow the advice of his secretary general. In Batavia, however, not all colonial authorities embraced his point of view. The Council for the East-Indies, the highest advisory body to the governor-general, pointed out, for instance, that the inquiry among the self-ruling areas gave definite proof of the fact that they were familiar in their *adat* law with the notion of some kind of 'territorial sea', even if its details differed from the concept in contemporary international law. The Council added that, according to its opinion no such thing existed as a body of international law that had its roots exclusively in Europe. Lawyers and statesmen from this continent had, of course, contributed important elements to that legal system. This, however, did not mean that international law was only relevant to the regulation of relations between European states, and had to be acknowledged only in this context. International law pertained to the connections between all sovereign states, with the exception perhaps of the most primitive ones. These latter, however, were certainly not to be found among the self-ruling principalities in the East-Indies - nor among the directly ruled ones, for that matter. The fact that trade and navigation were age-old occupations among the peoples of the archipelago, made it perfectly understandable that their *adat* law contained rules regulating the use of coastal waters. In effect, it would have been the absence of any notion of a 'territorial sea' in *adat* law that would have struck the Council as remarkable.[9]

In the Hague, secretary general Elias was not inclined to let these arguments pass. He stuck to his guns, but thought it wise to shore up his position with the help of legal experts of international repute. First, he repeated his opinion that the notion of jurisdiction over coastal waters could not have originated in *adat* law. It was a strictly European concept, not to be found outside the confines of European international law. As confirmation of this view, Elias pointed to a study, used by the Law Faculty of Leyden University, *Das Völkerrecht, systematisch dargestellt*, by the German professor F. von Liszt. International law, Von Liszt maintained, was the product of the intercourse between civilised, Christian states. Extra-European political entities could only join this system, first when they acquired these characteristics, and second when a European state acted as an intermediary, for instance as their colonial overlord. The secretary general could not agree more. In a note written for the minister for Colonial Affairs, he emphasized that only civilised and completely sovereign states were deserving of a place in the international law system. On both counts, the indigenous communities and principalities in the East-Indies were excluded. So, Elias repeated as his conclusion: jurisdiction over coastal waters fell to the colonial government - not as successor to the rights of these native states, but because only the Netherlands formed part of the system of international law.[10]

Following Von Liszt again, Elias continued with the hypothesis that, originally, the territorial sea was intimately connected to the security of the coastal state. Seen in this light, it was no surprise that the breadth of the relevant belt of coastal water was traditionally measured in international law by the power of coastal artillery. This fact too pleaded against the existence of the notion of a territorial sea in *adat* law. After all, this notion would have to be connected then to the power of indigenous, shore-based weapons (the bow, sling or spear), amounting to very little. Native, uncivilised states, concluded Elias, had always been unable to defend their coasts without the help of ships. This was proof that shore-based, exclusive jurisdiction over coastal waters could not have grown out of an indigenous institution. Elias could not deny, of course, the outcome of the inquiry. These findings, however, could in his opinion only have resulted from recent additions to *adat* law, no doubt inspired by the conception and practice of the Dutch. It was one thing to leave to local inhabitants the idea of more or less exclusive fishing rights in the waters adjacent to their shores. It was fundamentally wrong to allow indigenous states to keep up on this basis the pretensions of sovereignty under the system of international law and to act accordingly. That would not only be directly harmful to Dutch colonial interests vis-a-vis the native peoples. It would also undermine the Dutch position in relation to other Western powers.

A Blind Eye to *Adat* Law

These ideas were very much at odds with those advocated by the Council of the East-Indies. A position of compromise was taken by T.M.C. Asser, an expert on international law, consulted by the minister for Colonial Affairs. Asser sided with the Council as to the question whether non-European states had been independent contributors to the system of international law. In his opinion, that was beyond doubt the case, as this system was no exclusive preserve of Christianity. So, the notion of exercising (more or less exclusive) jurisdiction over coastal waters could very well have been indigenous to the East and not necessarily copied from the Dutch. On the other hand, this notion also had its meaning in constitutional law and this offered, according to Asser, the colonial authorities a way out of the problem. The colonial government could both accept the rights of native states and peoples as to their coastal waters, and present this institution as an internal affair. The Dutch after all, had presumed overlordship over all native entities, while the latter had not contested (or been able to contest) this situation. So, in all contacts with outside parties - be they public or private - the government could lawfully represent these local entities.[11]

This practical advice was eventually taken by the minister, who made no use, however, of Assers remarks as to the non-European contributions to international law. On the contrary, his letter to the governor-general in Batavia, conveying his decision, was full of allusions to Von Liszt and Christian-European states as the fountainhead and preservers of international law.[12] His decision placed the sovereign rights over the coastal waters of the self-ruling principalities firmly in the hands of the colonial government. In this way, the outcome of the inquiry was negated, and the government was recognized as the sole authority entitled to deal with business firms, interested in exploiting the riches of the coastal seas. As to their traditional fishing rights, however, the principalities were allowed to continue their established practices. Still, the colonial government emphasized that this gesture did not in the least restrict its own sovereign rights.

Just before the Second World War it was sarcastically noted by a Dutch scholar that the Dutch were only ready to recognize *adat* law if they thought this act would bring them financial profit (Resink 1940). The fate of the above-mentioned inquiry may attest to the fact that this remark contained more than a grain of truth. It also proves that the times in which Asian states fully participated in the making

of international law and were recognized as equal parties in this process, were in the course of the ninenteenth century conveniently forgotten. International law and its roots were restricted to a select group of 'civilised', European, Christian states. Political entities that did not match these characteristics could only be objects, not subjects of international law. Evidence to the contrary was ignored or reasoned away. Many volumes by acclaimed scholars on *adat* law were not able to change this fact of colonial life.

A few years after these occurrances Van Vollenhoven returned to the problem. In a lecture before students at a civil service academy he drew attention to the right of disposal in *adat* law over waste lands and the coastal sea. One aspect of this right was the exclusion of non-residents from the cultivation of these lands and from fishing in those waters (except after paying some kind of tribute). Another was the impossiblity of alienating these areas permanently. He noticed that the colonial government more often than not showed a lack of appreciation of this right. Van Vollenhoven contributed this attitude to the fact that the right of disposal did not fit neatly into the Dutch legal system. As a concept it had no equivalent in Dutch law, the colonial government quite wrongly placing it in the category of constitutional law (as, by the way, Asser had done) and comparing it to the concept of the territorial sea. By applying the uniform rule of a standard breadth (of three seamiles) for this sea to all the islands, it deprived the local population and princes of their traditional right of disposal over more extended areas - and this without any compensation. It gave, Van Vollenhove lamented, the indigenous peoples 'stones for bread'. This complaint, however, fell on deaf ears. The colonial government was not in the least inclined to change its policy (Van Vollenhoven 1909, 1917, 1934; Van Asbeck 1916).

Conclusions

The facts and events analysed here reflect a situation of legal pluralism that was not confined to the Dutch East-Indies, nor for that matter to the colonial setting in general. It may for instance be found in centralizing or modernizing states in which peripheral provinces or communities still cling to their traditional legal systems, or in heterogenous societies that are divided along ethnic or religious lines. Sometimes this legal pluralism is characterized by friction and tensions between its constituent parts, though the pattern of their interrelation need not follow the developments in the Dutch East-Indies. Still, legal pluralism forms a potentially instable situation that often asks for special institutional arrangements to preserve a balace that is acceptable to all parties concerned.

It would be of interest to compare the various political and socal contexts in which legal pluralism can be found. Of even greater interest is to discern the ways in which this pluralism stabilizes or changes itself (Von Benda Beckman 2001). These comparisons lay outside the scope of this article. Hopefully, however, it performs the function of stimulating further research in the dynamics of legal pluralism, especially of course as it relates to the uses of inland or coastal waters.

Notes

[1] Letter of the resident D. Heijting to the governor-general of the Dutch East-Indies C.H.A. van der Wijck, January 13th 1886, 172. National Archives (NA), Archive of the Ministry for Colonial Affairs (MCA), Mailreports (MR) nr. 6451.

[2] Report by the Council of the Dutch East-Indies, November 20th 1891, nr. XXV. NA, MCA, Public Files (PF) September 28th 1896-41.

[3] NA, MCA, PF September 18th 1896-48, and NA, MCA, MR nr. 6505.

[4] See for the relevant discussions the papers in NA, MCA, PF September 18th 1896-48.

[5] This note can be found in NA, MCA, PF April 4th 1899-38.

[6] Note by the secretary general in NA, MCA, PF April 4th 1899-38.

[7] NA, MCA, PF April 4th 1899-38.

[8] See the papers in NA, MCA, PF April 4th 1899-38.

[9] Report by the Council of the Dutch East-Indies of August 25th 1899, nr. XV. NA, MCA, PF September 20th 1902-34.

[10] Report by the secretary general of October 10th 1901. NA, MCA, PF September 20th 1902-34.

[11] Asser's letter to the Minister for Colonial Affairs T.A. van Asch van Wijck, November 9th 1901. NA, MCA, PF September 20th 1902-34.

[12] The Minister for Colonial Affairs J.W. Bergansius to the governor-general W. Rooseboom, September 20th 1902-34.

References

Adatrechtbundels.

1933 Part 63, *Borneo, Zuid-Celebes, Ambon enz.* Den Haag: Martinus Nijhoff.

Alexandrowicz, C.H.

1967 *An Introduction to the History of the Law of Nations in the East Indies. 16th, 17th and 18th Centuries.* Oxford: Clarondon Press.

De Clercq, F.S.A.

1890 *Bijdrage tot de Kennis der Residentie Ternate.* Leiden: E.J. Brill.

Dormeier, J.J.

1945 *Banggaisch Adatrecht.* Den Haag: Martinus Nijhoff.

Resink, G.J.

1940 Verwaarlozing van Adoptie naar Adatrecht in het Ambtenarenrecht. *Indisch Tijdschrift van het Recht* 152(1): 2-19.

1958 *Indonesia's History between the Myths. Essays in Legal History and Historical Theory.* Den Haag: W. van Hoeve Publishers.

Van Asbeck, F.M.

1916 *Onderzoek naar den Juridischen Wereldbouw.* Amsterdam: A.H. Kruyt.

Van Kan, J.

1935 *Uit de Rechtsgeschiedenis der Compagnie. Deel II, Rechtsgeleerd Bedrijf in de Buitencomptoiren.* Bandoeng: A.C. Nix & Co.

Van Vollenhoven, C.

1909 *Miskenningen van het Adatrecht. Vier Voordrachten aan de Nederlandsch-Indische Bestuursacademie.* Leiden: E.J. Brill.

1910 *Het Adatrecht van Nederlandsch-Indië.* Leiden: E.J. Brill.

1917 Grondgebied. *Encyclopaedie van Nederlandsch-Indië. Deel I.* Den Haag: Martinus Nijhoff.

1928 *De Ontdekking van het Adatrecht*. Leiden: E.J. Brill.
1934 *Staatsrecht Overzee*. Leiden: H.E. Stenfert Kroese.
Von Benda Beckman, F.
2001 *State, Religion and Legal Pluralism: Changing Constellations in West Sumatra (Minangkabau) and Comparitive Issues*. Halle: Max Planck Institute for Social Anthropology.