

The *Adat* Law toolkit: F.D. Holleman's life and thought in the Netherlands, Indonesia and South Africa

MA Thesis Colonial and Global History, Leiden University

Name: Daniel Sher

Student number: 2070855

Supervisor: Dr Alicia Schrikker

Second reader: Dr Sanne Ravensbergen

Contents

Acknowledgements.....	2
Introduction	3
Methodology.....	5
Structure	6
Chapter One.....	7
Colonial transfers	7
Colonialism, Apartheid and customary law	10
<i>Adat</i> law	15
Chapter Two.....	19
Education and colonial career	19
The <i>adat</i> law of Tulungagung.....	25
Entering the academy	33
The communal trait.....	34
<i>Adat</i> (anti-)fundamentalism	39
Chapter Three	46
Holleman’s position in South Africa.....	46
Primitive and modern law.....	51
Bantu <i>regsgemeenskappe</i> and land law	56
Policy and politics.....	60
Impact and mobility	68
Conclusion.....	76
Bibliography	79
Primary sources.....	79
Secondary sources	81

Acknowledgements

Many thanks are due to all who supported me as I completed this thesis, particularly my family. Thanks to the Skye Foundation, whose financial support made it possible to study at Leiden University. My supervisor, Alicia Schrikker, provided guidance and much-needed feedback. Nicholas Leontsinis gave comments on my drafts. Thanks also to all those who shared their time to discuss this project with me, including Robert Ross, Rob Gordon, and Kees van der Waal. All errors are of course my own.

Introduction

Colonialism and later Apartheid had transformative consequences for customary law in South Africa. 'The native question', as it was known – how best to rule African subjects – occupied successive generations of white colonial administrators, politicians and scholars. From the late 19th Century the answer to this question involved the co-opting of African chiefly authority, and the recognition of customary law, the unwritten norms governing African societies, as a means of maintaining order without needing to massively extend the bureaucracy of the colonial state.¹ While by no means straightforward, this ultimately led to the creation of parallel political structures for black people during Apartheid: the ethnic homelands.

The increasing recognition of customary law, and the move towards 'retribalising' African subjects thought to be in danger of becoming a rootless and radical proletariat, has been well traced from colonialism, through to the Apartheid policy of separate development, which set up the homelands.² So too has the fact that the inclusion of custom and chiefly rule in the state meant a radical distortion of pre-colonial practices.³ This research sits broadly within a body of literature which focuses on the way in which bureaucrats and academics thought about custom; their visions of idealised 'tribal' society and chiefly rule with despotic and patriarchal qualities were often largely reproduced in official state policy, and served to legitimate white minority rule.

Discussion of the intellectual antecedents of these ideas has tended to trace them from British Empire thinking about indirect rule, as well as both German Romantic and American segregationist influences.⁴ However, much of the literature has tended to treat this discussion as an identification of influences and no more. For the most part this research remains situated in a national narrative.

By contrast, the links between South African approaches to customary law, and Dutch colonial practice, have largely been ignored. There has been some recognition of ongoing links between Afrikaners and the Netherlands, far beyond the period of Dutch rule at the Cape.⁵ However, this has for the most part missed the fact that the Netherlands was for much of this time still a colonial power;

¹ Costa, A. "Chieftaincy and civilisation: African structures of government and colonial administration in South Africa", *African Studies* 59, no. 1 (2000)

² Dubow, S. *Racial Segregation and the Origins of Apartheid in South Africa, 1919–36*. Springer, 1989. 113

³ Costa, A. "The myth of customary law", *South African Journal on Human Rights* 14, no. 4 (1998): 530

⁴ See for example, Costa, A. "Chieftaincy and civilisation: African structures of government and colonial administration in South Africa"; Dubow, S. *Racial Segregation and the Origins of Apartheid in South Africa, 1919–36*., Pugach, S. "Carl Meinhof and the German influence on Nicholas van Warmelo's ethnological and linguistic writing, 1927–1935", *Journal of Southern African Studies* 30, no. 4 (2004).

⁵ Dubow, S. "Afrikaner nationalism, Apartheid and the conceptualization of 'race'." *The Journal of African History* 33, no. 2 (1992): 218

connections and inter-migration did not just involve, for example, carrying ‘national’ Dutch experiences to South Africa, but also had the potential to transfer colonial experience and expertise.

The case of F.D. ‘Frits’ Holleman offers a good opportunity to investigate those links. Holleman was born in the Transvaal, trained under the famous professor Cornelis van Vollenhoven at Leiden University in the early years of the 20th Century and went on to work as a colonial judge and civil servant in the NEI. He then shifted into academia, teaching at the *Rechtshogeschool* in Batavia and went on to succeed van Vollenhoven at Leiden in the 1930s, before moving to South Africa mid-career and shifting to working on South African customary law at Stellenbosch University, from 1939 until his death in 1958.⁶

Leiden University, and specifically the *adat* law school, was very much a centre of Dutch colonial expertise. *Adat* law, the uncodified legal norms present in the custom of Indonesian societies, then the Netherlands East Indies (NEI), was first organised into a coherent, unified system by van Vollenhoven.⁷ Advocating for greater recognition and preservation of this system in colonial governance, he argued that *adat* law could not be understood through Western legal categories and developed organically from the spirit of the society.

This study will engage with the question: what was the relationship between F.D. Holleman’s work on *adat* law in the NEI and the Netherlands, and his thought in South Africa? There are a number of sub-questions to this which I will deal with in turn:

- What was Holleman’s theoretical framework during his career in the NEI and the Netherlands, and how did this develop?
- Which elements of his experience and thought did he preserve in South Africa, and which elements were transformed? Why?
- What was the relationship, if any, between Holleman’s political inclinations in South Africa, and his *adat* law framework?
- Which factors facilitated Holleman’s intellectual mobility?

While these will serve to illuminate Holleman’s own trajectory, the study certainly holds broader significance. It stands to indicate a largely-underappreciated influence on South African thinking about customary law, and the impact of theories of *adat* law far beyond their place of origin. Moreover, the structural factors which allowed Holleman and his ideas to travel, suggest connections far broader than a single individual; Holleman’s case has implications for how we think about the ongoing

⁶ Algemeen Handelsblad, 27 January 1958, p2

⁷ Fasseur, C. “Colonial Dilemma” in Davidson, J., & Henley, D., eds. *The revival of tradition in Indonesian politics: The deployment of adat from colonialism to indigenism*. Routledge, 2007. 51

relationship between the Netherlands and South Africa, and indeed a triangular relationship between the Netherlands, Indonesia and South Africa. It may also offer a new lens with which to view the revival of traditionalist politics in both South Africa and Indonesia.

Methodology

This study is primarily an intellectual history of F.D. Holleman's thought, tracing his ideas and experience as he 'careered' through the NEI as a judicial official and university professor, then moved to succeed van Vollenhoven at Leiden University and finally returned to South Africa to teach 'Bantu law' at Stellenbosch University.⁸

Following an individual in this way has allowed me to give the research an explicitly global focus, as Holleman's mobility and thought was not limited to any single set of national boundaries. By contrast to, for example, an intellectual history of customary law which identifies various influences on a specific policy, this approach identifies the continuities and discontinuities in one scholar's thought as they responded to different circumstances. As such it emphasises the connection between different places and policies, and particularly the way experience garnered in one colony may flow to another, shaping developments there as well. Key to this is the fact that Holleman took not only his ideas across these borders, but also his experience: his formative training under van Vollenhoven, and his years working as a judicial official in various parts of the NEI.

While the focus here is on currents of thought, Holleman's work cannot be treated as disengaged from political and social context: I will situate his work in the context of colonial power relations, and interrogate how he positioned himself in segregationist and then Apartheid South Africa.

The main portion of my paper comprises a close textual analysis of Holleman's work, including research reports, journal and newspaper articles, manuscripts and lecture notes. Of Holleman's writing, the texts which I use span the period of 1927-1955, and include examples produced while in colonial service in the NEI, and at Leiden and Stellenbosch Universities. The bulk of my archival sources come from the F.D. Holleman Archive at the African Studies Centre, Leiden, the F.D Holleman Archive at the University Library, Leiden, and the University Archive at Stellenbosch University. Newspapers have been sourced from the Delpher online database.

⁸ The use of the term 'careering', and the approach which focuses on this, is inspired by Lambert, D., and Lester, A., eds. *Colonial lives across the British Empire: Imperial careering in the long nineteenth century*. Cambridge University Press, 2006.

Structure

This study has three main chapters. In the first, I discuss the literature and historiography which I have alluded to above. Holleman's connection of different places allows me to engage with and make connections between two different historiographies, namely the literature on the *adat* law school in Indonesia, and the literature on customary law under indirect rule and Apartheid in South Africa. These two bodies of work occasionally speak to each other, but for the most part run in parallel under different area studies or national historians.

In the second chapter, I examine Holleman's training under van Vollenhoven, his career in colonial service in the NEI and his move into academia, first in Batavia and then at Leiden University, and draw out the changing emphasis and function of his work at these different positions.

I pay particular attention to Holleman's research into the *adat* law of Tulungagung from 1927, to set out his initial descriptions of *adat* law and his research during the period of his colonial service. From there I will consider two high-profile scholarly contributions Holleman made to *adat* law debates while at Leiden: his inaugural address, and an academic dispute with Barend ter Haar. This will help to trace how he described local customs versus how he understood *adat* law as a whole, and what he saw for its future.

In the third chapter, I move on to Holleman's work in South Africa, focusing largely on the materials he created for classes he taught at Stellenbosch, as well as select journal publications. In this section I will use the framework established earlier to trace what of his previous thinking was transposed into a South African setting, and how his understanding of 'Bantu' customary law was different to his basis in *adat* law.

In addition, I use newspaper reporting and secondary literature to map out Holleman's career, Stellenbosch yearbooks to assess his role within the department, and correspondence, publications, departmental memoranda and letters to newspapers to assess his political standpoint and speculate on his influence within the field.

Translations from Dutch and Afrikaans are my own, and the original text is reproduced in footnotes where direct quotes have been used. Offensive terms like 'native' and 'Bantu' are placed in quotation marks to indicate that I do not endorse their uncritical usage, although this is generally dropped after the first usage of each.

Chapter One

This chapter is devoted to establishing the historical fields which I will be engaging, and demonstrating gaps in both content and approach which my research will begin to fill. It will lay the basis for the arguments and analysis of Holleman's work which I undertake in the following two chapters.

I depend here on a well-established body of literature on the progressive incorporation of custom into the system of colonial governance and its accompanying distortion, as well as the ways in which outsider studies of Africans often constituted them as idealised tribal subjects. Despite the richness of this work, much of the discussion on the way in which white administrators, ethnologists and political figures in South Africa thought about custom and customary law, and the usefulness of this to state policy, exists largely – and somewhat understandably – as a national history. Moreover, consideration of Dutch influences on South African thought have tended to focus on 'national' Dutch figures, to the neglect of Dutch colonial experience flowing from the NEI to South Africa.

Further, there is a relative lack of focus on secondary figures involved in developing *adat* law, and that the links of the *adat* school with South Africa have largely passed unnoticed. By tracing Holleman as he moved through the Dutch colonial empire to independent South Africa, and from the civil service into academia, I avoid categorisation within national boundaries; in addition to demonstrating the link between, and commonalities across the *adat* law school and South African thought on customary law, the emphasis on an individual allows for an in-depth engagement with the development of both his experience and ideas as he carried them from one part of the globe to another. Tracing the sometimes subtle changes in Holleman's work raises questions about the reasons why these changes occurred, and why other elements of his thinking continued unchanged.

Colonial transfers

Colonial history is particularly well-suited to a transnational or global approach; nonetheless, much colonial and imperial history has tended to focus either on a single country, or treated an empire as a uniform bloc, with focus largely on the metropole and its policy decisions.⁹ Recently, however, a rich body of work has begun to challenge this in a number of ways. I will make a few broad points before focusing on approaches of particular value to this topic.

⁹ Smandych, R. "Mapping Imperial Legal Connections: Toward a Comparative Historical Sociology of Colonial Law." *Adel. L. Rev.* 31 (2010): 204

In recent years there has been increasing recognition that the process of colonisation transformed both colony and metropole; Comaroff argues that

One of the most persistent myths about the Age(s) of Empire, perhaps, is the idea that a well-formed Euromodernity exported itself to faraway places, there to introduce its already well-refined, highly developed ways and means to “primitive” peoples – either, depending on ideological perspective, as a philanthropic, moral mission or as a callous, often violent, act of conquest. Increasingly, that view has had to be revised: It is clear that “European civilization,” as it was transported abroad, was, in many respects, a somewhat tentative set of cultural, social, and material practices; that it was patently a work in progress, often more aspiration than achievement.¹⁰

What’s more, colonies were often “laboratories” for European powers to develop their medicine, agriculture, and even legal regimes.¹¹ My research does not fall directly within this field, but nonetheless benefits from an approach which stresses colonialism as a work in progress, something which was progressively constructed *in situ* rather than exported as a comprehensive pre-fabricated package.

If one considers colonial experiences to be at least partly a response to contingent circumstances in different places, this raises questions about how and why colonies nonetheless share deep similarities. If empires were not monolithic units, one must interrogate the relationship of one colony to another: what was common, and what was different? What explains the differences? How were commonalities constructed? A global approach here helps in that it looks for connections; a number of historians have begun to investigate communications between colonies, and the ways in which careers of colonial officials spanned and linked multiple sites.

In a study of connections and communications between Britain, New South Wales and the Cape Colony in the 19th Century, Laidlaw uses the idea of webs, or networks, to reveal the structures of empire.¹² She argues that these distant places were connected in important ways, mutually influencing each other, and that beyond official communication, there were significant professional, scientific, political, humanitarian and family links which played a role in shaping their colonial rule.

Lambert and Lester’s *Colonial Lives across the British Empire*, a collection of essays on ‘imperial careering’, is a good example of what can be gained by tracing individual officials’ trajectories through

¹⁰ Comaroff, J. "Colonialism, culture, and the law: A foreword." *Law & Social Inquiry* 26, no. 2 (2001): 310

¹¹ *Ibid.*, 310

¹² Laidlaw, Z. *Colonial connections, 1815-45: patronage, the information revolution and colonial government*. Oxford University Press, 2005.

disparate places.¹³ A key point is that while colonialism involved transfers of goods and people, those people allowed for transfers of ideas and experience. Uncovering the paths taken by individual officials is important to get a picture of the depth and quality of inter-colonial connections, and also to enhance our understanding of colonial policies and ideological currents, based on these officials' earlier experience elsewhere.

One example of this approach is Dale's study of Sir George Grey.¹⁴ A prominent Governor of the Cape Colony, Grey also worked as Governor in Australia and New Zealand. Dale examines the various policies Grey enacted through his career, arguing that:

*Grey did not so much adapt in response to particular situations - take with him lessons from one place to another - as he claimed to have done, but rather ... he laid over each colonial place the ideas about 'native peoples' that were part of his general philosophy of the relationship between society and the individual, views which gave primacy to instilling a rudimentary version of middle-class notions of self-help.*¹⁵

Such analysis helps to explain what underlies a mess of contradictory policy directions through Grey's career. It also offers a useful perspective to historians of any one of those societies in which Grey was active, by revealing decisions in one colony as part of a longer history.

Other accounts do show actors' change over time, tracing individuals while situating them in broader trends:

*Edward John Eyre [another colonial official]'s 'careering across the empire', along with his personal shift from an attitude of liberal-humanitarianism to coercive-authoritarianism, followed a pattern that was similar to other colonial administrators who careered across the British Empire in the early to mid-nineteenth century.*¹⁶

This approach strongly informs my own research. I trace F.D. Holleman's ideas about customary law as he 'careered' through the Netherlands East Indies judiciary, Leiden University and Stellenbosch. While colonial officials had an influence on law, there are relatively few global or transnational accounts of colonial law, particularly through the lens of the mobile judicial officials or legal thinkers.¹⁷ Moreover, much of the literature discussed concerns mobility within a single political grouping, usually

¹³ Lambert, D., and Lester, A., eds. *Colonial lives across the British Empire: Imperial careering in the long nineteenth century*. Cambridge University Press, 2006.

¹⁴ Dale, L. 'George Grey in Ireland: Narrative and Network' in Lambert, D., and Lester, A., eds. *Colonial lives across the British Empire: Imperial careering in the long nineteenth century*. Cambridge University Press, 2006.

¹⁵ *Ibid.*, 174

¹⁶ Smandych, R. "Mapping Imperial Legal Connections", 193

¹⁷ *Ibid.*, 210

the British Empire. Holleman's case is distinctive in this regard; his mobility was from an independent country (the South African Republic or Transvaal) to the Dutch colonial empire to another independent country (the Union of South Africa); even in the Cape Colony, the British had long since superseded the Dutch, and both the Transvaal, and the Union of South Africa had never been under Dutch control. The fact that this mobility was still possible is to some extent a result of historic links and linguistic commonalities, but also stands to reveal important elements of the structure of colonial societies more generally.

Colonialism, Apartheid and customary law

Law is an important avenue for historical study. Chanock argues for understanding law as a way of exercising power and as ideology, given that,

*The oppressions of apartheid have, until the beginnings of its disintegration, characteristically been imposed not by the random terror of the death squad, but by the routine and systematic processes of courts and bureaucrats.*¹⁸

Law has been a crucial partner of colonialism and then Apartheid; Comaroff argues that "cultures of legality were constitutive of colonialism," noting that, in addition to the way in which law laid out economic and political relations in a new colony, it also established colonial ways of "seeing and being":

*It was under legal provisions that the 'nature' of colonial subjects was construed, ethnicized, and racialized, their relations to other human beings, to the earth, and to their own cultural practices delineated.*¹⁹

This point is one which comes through strongly in my later analysis of Holleman's work, regarding, for instance, how it constructed social relations in 'primitive' societies as by definition communally-minded.

Changes to customary law

Customary law has been an important part of colonial and then South African politics and governance since at least the 1880s, when the first moves were made by British administrators to rule conquered

¹⁸ Chanock, M. "Writing South African legal history: a prospectus", *The Journal of African History* 30, no. 2 (1989): 265

¹⁹ Comaroff, J. "Colonialism, culture, and the law: A foreword.": 309

African societies indirectly, through their chiefs, according to customary law.²⁰ This continued and expanded as the land permitted to be occupied by black people was fixed as Native Reserves, linked to a 'retribalisation agenda' with the 1927 Native Authorities Act, and ultimately formed the basis of an entirely separate political arena with the Apartheid-era 1951 Bantu Authorities Act, which began setting up the nominally autonomous or independent Homelands.

Customary law, and the nature of chiefly power, were transformed by their inclusion at the lower levels of the state. I draw here on the classic studies of colonialism in Africa: Ranger and Hobsbawm describe how colonial administrators and local elites collaborated to invent tradition, "transforming flexible custom into hard prescription."²¹ In Mamdani's famous formulation, chiefly rule constituted a "decentralised despotism".²² Colonial states in this understanding were "bifurcated": on the one side, there were modern urban citizens, defined by race and subject to civil power, and on the other, rural African subjects, divided into 'tribes' and ruled by tradition and chiefs. Crucially, however, the two systems were sides of the same coin.

In line with Comaroff's point discussed earlier, the incorporation of customary law into the system of governance was often accompanied by investigations (legal and ethnological) into local systems of property, chiefly authority, and beliefs and rituals. These investigations "laid the ground for 'native administration' and, with it, the terms on which indigenous life-worlds were to be transformed under the sign of modernity."²³

To begin with, incorporating chiefs into administrative structures of the state, and allowing for their appointment and dismissal by government, made them increasingly accountable upwards (to the state) rather than downwards (to their people). Moreover, chiefs were often assumed to hold autocratic powers, and as they became tools of a coercive state they were increasingly equipped with the tools of coercion as well, subverting precolonial practices which had often contained democratic elements.

As officials, ethnologists and others recorded African rituals and customs for the purpose of codifying customary law, they tended to consult people who held power within those societies: chiefs and older men. These informants tended to exaggerate their own power, concealing areas of precolonial female autonomy, for instance, in what would become 'fixed' as the official customary law of a society. Costa

²⁰ Dubow, S. *Racial Segregation and the Origins of Apartheid in South Africa, 1919–36*. 112

²¹ Hobsbawm, E., & Ranger, T., eds. *The invention of tradition*. Cambridge University Press, 2012 (1983). 212

²² Mamdani, M. *Citizen and subject: Contemporary Africa and the legacy of late colonialism*. Princeton University Press, 1996. 18

²³ Comaroff, J. "Colonialism, culture, and the law: A foreword.": 306

describes the colonial-chiefly alliance as government with an essentially patriarchal character.²⁴ He writes that “male elders in particular had benefited from this 'codification of custom' which reinforced their control over women and youth.”²⁵ Chiefs held substantial powers of land allocation, kraal²⁶ heads could claim a share of the earnings of those under their authority, and African women were held to be “perpetual minors” in law.²⁷

Ethnological and legal accounts of societies also shaped and fixed ideas about the nature of African societies, and the nature of their ethnic identity, with ‘the tribe’ held to be a discrete and unchanging form, the basic unit dominating all African social life.²⁸

Some scholars take the critique of customary law to new heights, arguing that not only has colonialism and Apartheid distorted custom, but that the idea of customary law is in itself a misnomer. Costa, for example:

*Through its various incarnations, 'primitive', 'native', 'customary', 'indigenous' law remains other to real law, viewed through a glass tinted by generations of legal anthropologists, the law of others. So enchanted are we by this vision of non-Western law, we fail to see that it is nothing more than a myth, a misconceived idea about Africa's past handed down from generation to generation. It is a myth encapsulated in the very appellation 'customary law' - an oxymoron, eliding the distinction between law and custom, trapped in the belief that African law is not law per se, but a form of custom, primitive practice which predates law.*²⁹

In this view, even if one takes the distortions into account, it is impossible to access some pristine source of the ‘authentic’ customary law, as practitioners have been influenced by the official version even if not totally accepting of it; moreover, the question of who is subject to customary law can only be answered by reproducing Apartheid ethnic and racial categories; “given that the existence of discrete, homogenous ethnic groupings is a colonial fairytale,” there are very real practical obstacles to applying customary law in a modern, plural society.³⁰

While this correctly identifies the consistent ‘othering’ of customary law, it is perhaps overly harsh on the potential to discover alternative, unofficial customary practices; other scholars have noted the

²⁴ Costa, A. "Chieftaincy and civilisation: African structures of government and colonial administration in South Africa", 17

²⁵ Costa, A. "The myth of customary law", 530

²⁶ A kraal is a small, enclosed group of huts.

²⁷ Chanock, M. "Writing South African legal history: a prospectus", 284

²⁸ Costa, A. "The myth of customary law", 530

²⁹ Ibid., 526

³⁰ Ibid., 530

democratic potential of 'living' customary law in allowing women to claim land rights, for example.³¹ Nonetheless the more general point stands, that reconstructing an authentic and workable customary law is far from a practical possibility in many cases.

Despite the major criticisms articulated here, it must be strongly emphasised that customary law was not simply imposed on passive subjects from above. Custom remained an important set of practices for many, offering some barrier to the naked exploitation of the white political and economic system. Delius makes the point well:

*Despite their impoverishment, the rural areas – especially the reserves – represented places of refuge from white authority and from the social corrosion of capitalist relationships. Of course, the reserves were by no means immune to the effects of either of these phenomena but both communal tenure and chiefly authority provided barriers against white officials, employers and the market.*³²

The understandings of custom amongst those who practiced it, did not always align with the ethnicity and traditionalism defined from above. However, it is nonetheless important to study official discourse around custom, as it did indeed affect ordinary people: the recognition of (transformed) customary law, and the co-opting of chiefs into the local administration, had profound consequences for the lives of black South Africans in the Reserves (and later Homelands), and increasingly undermined the popular legitimacy of these institutions.

Volkekunde and ethnology

I have already made reference to the way in which the work of white administrators and researchers studying and thinking about African customs and societies played an important role in constituting Africans as colonial or Apartheid subjects, fixing their identity, way of life, and social norms (at least officially) in a way which could be incorporated in the system of indirect rule.

Costa has placed the shift to an agenda of 'retribalisation' in South Africa in the context of broader late 19th Century changes amongst British Empire administrators and thinkers away from straightforward civilisation-by-assimilation towards preserving the institutions of chieftaincy and customary law.³³ Particularly influential in this was the writing of Sir Henry Maine, legal anthropologist

³¹ Claassens, A., & Mnisi, S. "Rural women redefining land rights in the context of living customary law", *South African Journal on Human Rights*, 25, no. 3 (2009): 491

³² Delius, P. "Sebatakomo; migrant organization, the ANC and the Sekhukhuneland revolt", in Bonner, P., Delius, P., and Posel, D., eds. *Apartheid's Genesis, 1935-1962*. Ravan Press, 1993, 138

³³ Costa, A. "Chieftaincy and civilisation: African structures of government and colonial administration in South Africa", 17

and colonial administrator. While his ideas often consisted of simplistic essentialisms, they also made more palatable the pragmatic incorporation of customary legal systems into the colonial state, as they suggested that even if African political and legal systems were backward, they nonetheless corresponded to archaic European systems.

Dubow has traced strands of segregationist thought, arguing that the first systematic expositions of this were made by English-speaking liberals in service of a paternalist vision of segregation; this was then adapted into an even more repressive version by Hertzog (National Party Prime Minister of the 1920s-1930s) and others.³⁴ The ideological influences of this were the pre-existing indirect rule, as well as racism in the American South, and ideas of eugenics and social Darwinism.

Dubow further mentions the role of the new anthropology departments at South African universities after World War One, arguing that their work on African culture and its apparent essential character was used as the “intellectual authority” for segregationist claims, even if their direct impact on state policy was limited.³⁵ However, he focuses on the early social anthropologists here, and largely excludes the role of the ethnologists or *volkekundiges* at Afrikaans-speaking universities. This tradition was still in its infancy in the 1930s (when his analysis ends), but the foundations of the discipline had by then already been laid at Stellenbosch University by Werner Eiselen.³⁶

Much has been made of the German Romantic influences on *volkekunde* and Apartheid thinking more broadly.³⁷ British indirect rule has also shaped approaches to customary law in ways discussed earlier. However, while British indirect rule is perhaps the obvious antecedent, there is a gap regarding Dutch colonial legal influences on South African customary law and ethnology. There has been some acknowledgement of links between Afrikaners and the Netherlands – for example, the spread of neo-Calvinist theology and nationalism in South Africa.³⁸ However, this has tended to concentrate on the ‘national’ politics of the Netherlands, leaving the fact that the Netherlands was still a colonial power somewhat obscured.

Tracing Holleman’s trajectory, moving from Leiden, to working in the NEI, and finally ending up in the *Bantoekunde* (Bantu studies) department at Stellenbosch, offers a means of investigating the ways in

³⁴ Dubow, S. *Racial Segregation and the Origins of Apartheid in South Africa, 1919–36*. 178

³⁵ Ibid., 159

³⁶ Bank, A. "Fathering volkekunde: race and culture in the ethnological writings of Werner Eiselen, Stellenbosch University, 1926–1936", *Anthropology Southern Africa* 38, no. 3-4 (2015): 163-4.

³⁷ Bank, A. "Fathering volkekunde", 164; Coertze, R. "Aanvang van volkekunde aan Afrikaanstalige universiteite in Suid-Afrika", *South African Journal of Ethnology*, 14, no. 2 (1991): 25-34.

³⁸ Dubow, S. "Afrikaner nationalism, Apartheid and the conceptualization of ‘race’", 218

which Dutch colonial expertise could be transferred to Afrikaners – and other South Africans – who were interested in the Dutch experiences for the resolution of their own ‘native question’.

But his role has largely avoided close scrutiny. While Robert Gordon has highlighted Holleman’s influence in the development of what he calls *jural volkekunde*, that is ethnology/anthropology focused on custom and law, no detailed analysis of Holleman’s work in South Africa or the extent to which *adat* concepts were deployed in a South African context has been done.³⁹

Moreover, most studies of *volkekunde* and segregationist thought treat the intellectual forebears of the South African actors as ‘influences’ and situate the work squarely in the South African context. Costa’s work discussed earlier is a valuable exception, as he situates changes in South Africa within broader British Empire discourse and the imperial experience in India. A further exception is Pugach’s study of the German influence on South African ethnologists and linguists, which examines the relationship between the German linguist Carl Meinhof and his student and collaborator, the eventual South African state ethnologist Nicholas van Warmelo.⁴⁰ This is an approach which puts the exchange of ideas, and their different iterations in different contexts, squarely in focus. This more global approach is one I will follow, tracing Holleman’s ideas through his training in Leiden, his experience working in the Netherlands East Indies, and eventually his return to South Africa.

Adat law

Leiden professor Cornelis Van Vollenhoven claimed to have ‘discovered’ a new and coherent legal system in the Netherlands East Indies (NEI): *adatrecht*, or customary law. In 1901, when he took up a professorship at Leiden University, he embarked on the first systematic analysis thereof. Van Vollenhoven saw all law as expressing something of the spirit of a society, and hoped that recognition of *adat* by colonial authorities would protect traditional Indonesian societies from the incursions of foreign capital and ‘alien’ Western legal systems.⁴¹

In the face of growing calls within the Netherlands to unify the dual jurisdiction (one for Europeans, one for Indonesians) in the NEI, he waged a successful campaign to ensure some statutory recognition

³⁹ Gordon, R. “The white man's burden: Ersatz customary law and internal pacification in South Africa”, in Renteln, A., & Dundes, A., eds. *Folk law: Essays in the theory and practice of lex non scripta* (Vol. 1). University of Wisconsin Press, 1995

⁴⁰ Pugach, S. “Carl Meinhof and the German influence on Nicholas van Warmelo's ethnological and linguistic writing, 1927–1935”, *Journal of Southern African Studies* 30, no. 4 (2004): 825-845.

⁴¹ Fasseur, C. “Colonial Dilemma”, 51

for *adat* law. Moreover, Van Vollenhoven also trained a generation of jurists and scholars with similar views. Fasseur writes that:

*He founded a real 'school' of adat law disciples. His students wrote more than twenty doctoral dissertations on this subject. Not a few of them later reached high positions in the colonial bureaucracy since, from 1902 on, Leiden University had the monopoly of the training and education of future Dutch civil servants for the East Indies administration.*⁴²

Burns has provided the fullest exposition of the intellectual origins and content of van Vollenhoven's ideas. He argues that van Vollenhoven, and the Leiden school of *adat* law more generally, were heavily influenced by Romanticism and the German Historical Legal School, particularly Karl von Savigny. Romanticism was a reaction against Enlightenment liberalism and universalism, arguing that instead of "one universal rational set of laws", different groups of people had different interests and laws based on their different societies; therefore that "rights – or legal values – might best be discovered, not in the writings of the jurists, but in the peculiar practices of a people."⁴³ Von Savigny took nations, rather than individuals, to be the foundational units of human life, and held that law developed organically from the national spirit or *volksgeist*. As such, true law was alive and could not be created, only discovered.⁴⁴

These romanticist first principles fed into the vision of Indonesian society which the *adat* law school expressed. Van Vollenhoven stressed the inapplicability of Western legal categories in understanding *adat*; Indonesian communities were believed to be organic wholes which were fundamentally communal, and characterised by balance and harmony amongst individuals, the environment, and supernatural forces.⁴⁵ Approaches to 'punishment' prioritised restoring harmony or equilibrium over concepts of individual guilt, and the community as a whole retained a perpetual right of allocation over land held by its members. Reid argues that their approach "looks today very much like paternalistic orientalism."⁴⁶

Indeed, the extent to which *adat* represents an unchanged or unchanging precolonial tradition is highly questionable, with some arguing that *adat* was essentially an invention, irrevocably changed by colonial incursion and legislation, the transformation of local societies, and reshaped to align with

⁴² Fasseur, C. "Colonial Dilemma", 51

⁴³ Burns, P. *The Leiden legacy: Concepts of law in Indonesia*. Vol. 191. Brill Academic Publishers, 2004: 45

⁴⁴ *Ibid.*, 232

⁴⁵ *Ibid.*, 4

⁴⁶ Reid, A. "Political 'tradition' in Indonesia: the one and the many." *Asian Studies Review* 22, no. 1 (1998): 26

vested social and political interests. Burns singles out the role of the Leiden Law School for particular criticism in this regard.⁴⁷

In fact, almost all of the claims made about *adat* law by van Vollenhoven and others have come to be questioned. Fitzpatrick, for example, argues that in contrast to assumptions of idealised villages which were self-contained, self-governing, static, unchanging, and subject to communal tenure, modern scholars recognize

*the complex interaction of kinship groups, hierarchical obligations, territorial loyalties, religious bodies, agricultural associations, and external influences in ordinary adat life. Equally, land policy experts take issue with the widespread belief that customary law systems are essentially communalist and static in nature. Recent studies suggest that customary land arrangements are inherently dynamic in the senses that they, first, evolve in response to demographic and economic pressures, and, second, ceaselessly change as a result of strategic power interactions between internal and external participants (including the state itself).*⁴⁸

Burns further questions whether the principles van Vollenhoven held to be foundational to *adat* law, do in fact obtain in all 19 *adat*rechtskringe (*adat* law circles) which he identified. He concluded that the evidence for many of these principles – including *beschikkingsrecht* (communal right of land allocation) and communal responsibility – was extremely thin, and that van Vollenhoven was perhaps guilty of mystifying and over-generalising.⁴⁹ Henley and Davidson note, however, that *adat* law was not a total fabrication: in many cases the compilations of *adat* law represented faithfully recorded local customs: “Before colonialism, many local communities and polities already defined, managed, and defended distinct communal territories.”⁵⁰

While our assessments of Van Vollenhoven and his contemporaries should acknowledge that their work was rooted in genuine attempts to understand and preserve the indigenous law of Indonesia (in contrast to other colonial actors who argued for a single, Western legal system), this does not preclude the fact that they interpreted what they found through a particular lens, that of romanticism. As such the *adat* law project also contained European visions for an ideal Indonesian society, including “the

⁴⁷ Burns, P. *The Leiden legacy*.

⁴⁸ Fitzpatrick, D. “Land, custom and the state in post-Suharto Indonesia”, in Davidson, J., and Henley, D., eds. *The revival of tradition in Indonesian politics: The deployment of adat from colonialism to indigenism*. Routledge, 2007. 136

⁴⁹ Burns, P. *The Leiden legacy*: 189

⁵⁰ Davidson, J., and Henley, D., “Radical conservatism: The protean politics of adat”, in Davidson, J., and Henley, D., eds. *The revival of tradition in Indonesian politics: The deployment of adat from colonialism to indigenism*. Routledge, 2007. 3

orientalist assumption, implicit or explicit in much of the work of the Leiden school, that law, custom, and society in the Indies were governed, and should continue to be governed, by principles radically different from those informing their counterparts in the West."⁵¹

This body of literature forms the basis of my analysis of Holleman's understanding of *adat* law and his original contribution to it. *Adat* scholars' assertions of fundamental differences between Eastern and Western concepts of law kept *adat* law as a somewhat mystical category trapped in premodernity, and dominated by communal interests; this is evident in Holleman's work as well.

If one criticism can be made of contemporary scholarship on the history of *adat* law, it is that much of it continues a narrative centred on van Vollenhoven, leaving comparatively little room for comprehensive consideration of other contributions, including that of his students. Admittedly, Burns' *The Leiden Legacy* extends to *adat* law-trained scholars challenging elements of van Vollenhoven's orthodoxy, and in the case of Barend ter Haar, proposing a transformation of *adat* law. Still, a study of Holleman adds to a relatively sparse section of an otherwise well-studied field. Burns and Henley both make reference to Holleman's role in *adat* law debates, but there has been no fuller study into his specific role.⁵²

Moreover, neither mention his work in South Africa. Consideration of the legacy of the Leiden school has, somewhat understandably, been limited to its effects in Indonesia. Tracing Holleman's mobility would thus add to the understanding of how far *adat* law has travelled, while also allowing for overt connections to be made between two bodies of literature.

⁵¹ Davidson, J., and Henley, D., "Radical conservatism: The protean politics of adat", 20

⁵² Burns, P. *The Leiden legacy*, 99; Henley, D. "Custom and koperasi: the co-operative ideal in Indonesia", in Davidson, J., and Henley, D., eds. *The revival of tradition in Indonesian politics: The deployment of adat from colonialism to indigenism*. Routledge, 2007. 106

Chapter Two

This chapter concerns F.D. Holleman's training under van Vollenhoven and career as he moved through various positions in the Netherlands East Indies (NEI) judiciary and bureaucracy, to a professorship at the *Rechtshogeschool* in Batavia and ultimately to take up the *adat* law chair at Leiden University.

I trace his thinking through these experiences, identifying his relationship to van Vollenhoven and his ideas, and reconstructing his methods and understanding of his own role during his time in the colonial judiciary. For instance, I note his lack of faith in the colonial judiciary, and the way he described local customs. For this last point I use Holleman's 1927 report on *The Adat Law of Tulungagung*, which, although it employed key *adat* concepts like *rechtsgemeenschap* and *beschikkingsrecht*, was more oriented towards careful recording of local customs on land, and presented substantial variations in practice. Despite this, it contained the seed of an idealised understanding of traditional Indies society.

In the latter parts of the chapter I trace this seed to Holleman's time in the academy, during which time it grew into an orientalist and communalist vision as Holleman shifted emphasis, away from recording local practice and towards building the theoretical framework of *adat* law. In identifying Holleman's distinct contribution to *adat* discourse, I depend here on two pieces of work: his 1935 inaugural address at Leiden, and his 1938 debate with Barend ter Haar about the future of *adat* law. These speak to Holleman's understanding of the essence of *adat*, and both represent important connections to the longer legacy of *adat* and the appeal of traditionalism in Indonesia. They also provide a point of connection between Holleman's work in the Netherlands and NEI, and his work in South Africa: the theoretical framework which he laid out in his Batavia and Leiden years would be refitted to a South African context.

Education and colonial career

F.D. Holleman was born in 1887 in the independent South African Republic, or Transvaal.⁵³ He attended school in the Netherlands, and went on to study law at Leiden University under Cornelis van Vollenhoven. This training, and particularly the influence of van Vollenhoven, would to a great extent shape his thinking and the direction his career took.

As mentioned in the first chapter, Van Vollenhoven was the founder of the *adat* law movement, which centred on Leiden, and the first scholar to organise information about the customs of the NEI into a

⁵³ Algemeen Handelsblad, 27 January 1958, p2

coherent overarching system. He was also an influential advocate for greater recognition of *adat* law in governing the lives of colonial subjects in the NEI.⁵⁴

Besides his vigorous public campaigning against issues like ‘legal unification’ – that is, subjecting both Europeans and Indonesians in the NEI to a single code, namely Dutch law, as a way of bringing an end to the dualistic legal *status quo* – van Vollenhoven’s influence was strongly linked to the fact that he worked at Leiden University, which was at that time the institution where future colonial civil servants were trained.⁵⁵ Van Vollenhoven’s disciples gradually dispersed to fill other academic and judicial positions, from where they could similarly advocate for *adat* law. While his supporters were not hegemonic within the *Binnelandse Bestuur* (BB) itself, they nonetheless formed a vocal and influential group, which eventually triumphed over the campaign for legal unification.

Holleman was one of this number. Having passed his doctoral law examination at Leiden in 1911, by June of the following year he had been admitted for legal service in the NEI.⁵⁶ He was married on 6 August 1912, to Adriana van Geytenbeek, and five days later he and his wife left for the NEI aboard the S.S. Rembrandt.⁵⁷

Beginning as a judicial official under the *voorzitter* (chairman or president) of the *landraden* (country legal benches/councils) of Magelang in central Java and then Bangkalan in Madura, Holleman circulated through the NEI, rapidly rising through the ranks.⁵⁸ By September 1915 he had been appointed as a *voorzitter* himself, of the *landraden* of Trenggalek and Tulungagung in East Java.⁵⁹ Here he stayed for three years, hearing cases and conducting the research on Tulungagung *adat* law which I will discuss in the following section of this chapter. In 1918 he moved to the *landraden* of Ambon, Saparua and Banda Neira.⁶⁰ From 1924 to 1928 he worked as a legal secretary and then government secretary in the colonial civil service.⁶¹

Relationship to van Vollenhoven

The influence of van Vollenhoven is clearly evident in Holleman’s work. He frequently namechecked both the scholarly contribution and policy advocacy of the Leiden professor, and as will be shown in a closer analysis of Holleman’s writing, his own thought on *adat* law was largely situated within the framework which van Vollenhoven established. Similarly to van Vollenhoven, he exhorted students to

⁵⁴ Fasseur, C. “Colonial Dilemma”, 51

⁵⁵ *Ibid.*, 51

⁵⁶ *Nieuwe Tilburgsche Courant*, 18 May 1911. P3; *Nederlandsche Staatscourant*, No. 136, 1912. 13 June. P3

⁵⁷ *Nieuwe Rotterdamsche Courant*, 7 Aug 1912. P4; *De Sumatra Post*, No. 240, 1 October 1912. P9

⁵⁸ *Bataviaasch Nieuwsblad*, no. 285, 11 November 1913, p2

⁵⁹ *Het Nieuws van den Dag*, no. 226, 27 September 1915. P3

⁶⁰ *Het Nieuws van den Dag*, no. 302. 23 December 1918. P10

⁶¹ *De Indische Courant*, 15 April 1939. P1

take off their “Western glasses” in order to “become worldly-wise in that other life”; only then would they be able to experience the living society, and understand the alternative legality “according to which everything in that organism occurs.”⁶² Theoretical knowledge was not enough: Holleman made it clear that real experience was required.

Holleman revered van Vollenhoven, and referred to him variously as “my greatest teacher” and “my Guru”.⁶³ There seems to have been a warm relationship between the two; Holleman described it thus:

*As a student I heard his controlled, yet inspiring words. As young landraad voorzitter on Java and in the Moluccas and in the further passage of my life, I experienced the powerful support of his concern, his information, and his friendship.*⁶⁴

His loyalty to van Vollenhoven – and his training within this worldview – meant that he tended to assume what could be called the orthodox Leiden position regarding the preservation of *adat* law, and the inapplicability of western legal concepts to Indonesian society. For example, he was a signatory to a 1925 petition opposing setting up a professorship of Indies studies at Utrecht, on the basis of apparent “danger for free science in the linking of certain material interests with higher education.”⁶⁵ Utrecht was the great rival of the Leiden *adat* school and many of its staff were supporters of legal unification, including notable critics of van Vollenhoven. The material interests mentioned here was likely a reference to the petroleum industry, which funded the Utrecht school.⁶⁶ Van Vollenhoven and the Leiden school, by contrast, were concerned to protect Indonesians from the advances of foreign capitalism, and their claim that under *adat* law, village land was communal and could never be alienated to outsiders, proved a useful bulwark against big corporations’ attempts to acquire that land.

It would be easy to see Holleman simply as an agent of the broader *adat* law school of thought, carrying fully formed ideas from the centre to the periphery and applying them there. This is partially accurate, but incomplete. In important ways, Holleman and his experience in the NEI contributed to the shaping of *adat* law and the thinking around it. For instance, while van Vollenhoven developed the broad schema for *adat* law, he largely did not conduct his own primary research, only visiting the NEI

⁶² The full quote reads “*Pas dan, wanneer Gij Uw westersche bril hebt afgelegd en na moeizaam tasten en vragen wereldwys zijt geworden in dat andere leven, pas dan komt de ervaring, dat Gij ook werkelijk begrijpt dat Gij werkt in een levende maatschappij; dat Gij beseft en ziet die eigen wetmatigheid waarmede alle gebeuren in dat organisme plaats heeft.*” Holleman, F.D. *De Commune Trek in het Indonesisch Rechtsleven*. J.B. Wolters, 1935. 25

⁶³ “*mijn grooten Leermeester*”; “*mijn Goeroe*”. *Ibid.*, 23

⁶⁴ “*Als student hoorde ik zijn beheerscht maar bezielend woord; als jong landraadvoorzitter op Java en in de Molukken en op mijn verderen levensweg heb ik den machtigen steun van zijn belangstelling, zijn voorlichting en zijn vriendschap beleefd.*” *Ibid.*, 23

⁶⁵ “*gevaar voor de vrije wetenschap in de samenkoppeling van bepaalde materiële belangen met het hooger onderwijs.*” *De Indische Courant*, No. 160, 26 March 1925. P2

⁶⁶ Burns, P. *The Leiden legacy*: 77

twice – and briefly at that.⁶⁷ Instead, he relied on ethnographic data collected by missionaries, colonial officials, and increasingly the new generation of jurists whom he had trained. In a 1922 speech, van Vollenhoven referred to Holleman’s research, among others, as contributing to a better understanding of Indonesian legal language and concepts and highlighting poor Dutch understanding of these in the past.⁶⁸ Holleman’s study of the *adat* law of Tulungagung mentions that his primary research on the subject had been done before van Vollenhoven’s volumes on the *adat* law of Middle and East Java had come out; it is almost certain that van Vollenhoven would have leaned on this data for his own compilations.⁶⁹

Methods

During his time as judicial official and bureaucrat, Holleman seems to have been largely concerned with earnest attempts to understand and record the law and custom of the regions in which he worked. This was very much in line with the practical demands of being a *voorzitter*: for much of this time he would have been judging Indonesians according to local custom. His work as legal secretary would have had a complementary focus: that of allowing for efficient governance by aligning with existing social practice. Both these roles were thus to some extent directed towards empirical studies of a local area, rather than broad generalisations about *adat* law as a whole, or the NEI as a whole.

Empirical studies are of course not straightforward technical exercises. What has survived of Holleman’s work is largely published articles or course notes, and there is little detail on his methods and approach to research; still, his occasional mention of these matters can be highlighted sufficiently to comment upon.

As noted, Holleman sought to avoid understanding Indonesian custom through Western concepts, arguing that the real question, for academics as much as for colonial administrators and jurists, was to understand “how the native population themselves see, understand and show their legal forms and norms”.⁷⁰ He described the basic method for discovering these legal forms (at least as an outsider) as follows:

⁶⁷ Davidson, J., and Henley, D., “Radical conservatism: The protean politics of adat”, 33

⁶⁸ De Telegraaf, No. 11.524, 11 April 1922. P9

⁶⁹ Holleman, F.D. *Het adatrecht van de Afdeeling Toeloengagoeng*. Archipel Drukkerij, 1927. 6

⁷⁰ “hoe de Inlandsche bevolking zelve haar rechtsvormen en normen ziet, begrijpt en duidt”. Holleman, F.D. *De Commune Trek in het Indonesisch Rechtsleven*. 22

*by asking and then observing, how that native life proceeds daily; by asking again and again – not only the chiefs, elders or prominent people, but everyone – and then again observing and testing if these pronouncements accord with reality.*⁷¹

This appears a relatively common-sense approach, but was certainly not the rule: anthropologists/ethnologists and colonial administrators frequently failed to include observation in their research, relying primarily on interviews for data, resulting in a set of rules which did not always accord with actual practice.⁷² Further, those actors who were interviewed were often powerful elder men, who tended to exaggerate their own social power, occluding areas of female authority, for example.⁷³ Both of these practices meant that the act of recording often distorted pre-colonial custom. The above quote demonstrates that Holleman was wary of the dangers of such an approach, and had thought about how to get around it.

At various points his work contains evidence of rigorous investigation, presented in a way which is sensitive to change over time. Consider, for example, the following excerpt describing land transactions in Tulungagung:

Various data appear to justify the inference that in this division in the long run, mortgage (gadəkake) as a land contract is making way for ngedol taoenan [another form of land-for-cash loan exchange] and that this latest contract is historically younger than mortgage. In all fifteen of the desas [villages] spread over the whole division, in which I personally investigated the adat law, it seems that ‘ngedol taoenan’ is in vogue, apart from in single desas on the Wilis, mountain desas, with poor, damaged land, where land transactions do not or barely take place. In seven of these desas, precisely those which lie more in intercourse and trade, the land mortgaging does not take place, and in the others, where the institution was still in fashion, the mortgaging was tied to a fixed term...⁷⁴

⁷¹ “door te vragen en toe te zien, hoe dat inheemsche leven zich dagelijks voltrekt; door telkens weer te vragen – vooral niet alleen aan de hoofden, oudsten of de vooropgeschoven specialiteiten, doch aan allen – en dan telkens weer toe te zien en te toetsen of zulke mededeelingen met de werkelijkheid kloppen.” Holleman, F.D. “Het Adatprivaatrecht van NEI in Wetenschap, Praktijk en Onderwijs”, *Tijdschrift van Indische Recht*, 147 (1938): 430

⁷² See for example Gordon, R. “The white man's burden: Ersatz customary law and internal pacification in South Africa”, 372; Gordon, R. “Apartheid's anthropologists: The genealogy of Afrikaner anthropology”, *American Ethnologist* 15, no. 3 (1988): 539

⁷³ See for example Costa, A. “The myth of customary law”, 530

⁷⁴ “Verschillende gegevens schijnen de gevolgtrekking te wettigen dat in deze afdeeling op den duur de verpanding (‘gadəkake’) als grondcontract plaats maakt voor ‘ngedol taoenan’ en dat dit laatste contract historisch ook jonger is dan de verpanding. In alle vijftien over de geheele afdeeling verspreid liggende desa's, waarvan ik persoonlijk ter plaatse het adatrecht heb nagegaan bleek het ‘ngedol taoenan’ in zwang te zijn,

Much of Holleman's writing involves similarly minute, even repetitive, descriptions of variations of customs and legal arrangements in different areas. At the same time, he seems to have been entirely comfortable speaking and thinking in sweeping generalisations, whether it was claiming that "in the pure native society every desire for personal capital is still absent," or attributing the less developed legal institutions of Indonesian society to primitive spirit and mentality.⁷⁵ This dual character – careful empirical research mixed with essentialism – is present throughout Holleman's work, albeit in changing proportions. During his time in the colonial judiciary and bureaucracy Holleman certainly leaned more closely towards the empirical impulse.

Judicial experience

As *voorzitter* of various *landraden*, court cases formed an important part of the body of evidence on which Holleman built his arguments, and he frequently made reference to them, including a mixture of anecdotal evidence ("I remember in practice only one case where the judgement of the landraad was called in [regarding a dispute over a specific land contract]") and broader claims about cases as a whole.⁷⁶ His study on Tulungagung included advice to judges on how to go about applying *adat* law or resolving difficult cases. For example:

*In such uncertain lawsuits it is of the highest importance for the judge to not only know the essentials of the different contracts precisely, but also to be completely informed of all possible particulars that took place at the closing of these contracts, because often only from such particulars, communicated by parties or witnesses in passing, can be discovered what in truth occurred between parties.*⁷⁷

It's clear that he understood the job of judge as an expert one, referencing their skill in sifting through competing claims and unreliable evidence. However, despite his experience on various *landraden*, Holleman saw them as deeply flawed. While he noted that the *landraden* "as a rule are most aware of

behalve in enkele desa's op den Wilis, bergdesa's, met arme, geaccidenteerde gronden, waar bovendien grondtransacties in het geheel niet of bijna niet voorkomen. In zeven van deze desa's, n.l. juist die welke meer in het verkeer liggen, kwam de grondverpanding niet meer voor, en in de andere desa's, waar dit instituut nog wel in zwang was, was de verpanding overal aan een termijn gebonden..." Holleman, F.D. *Het adatrecht van de Afdeeling Toeloengagoeng*. 43

⁷⁵ "in de zuiver Inlandsche maatschappij iedere behoefte aan persoonlijk kapitaal nog ontbreekt". Holleman, F.D. *Het adatrecht van de Afdeeling Toeloengagoeng*. 19; Holleman, F.D. *De Commune Trek in het Indonesisch Rechtsleven*. 20

⁷⁶ "Ik herinner mij uit de praktijk maar één geval waarin de beslissing van den landraad werd ingeroepen." Holleman, F.D. *Het adatrecht van de Afdeeling Toeloengagoeng*. 67

⁷⁷ "In dergelijke precaire rechtsgedingen is het voor den rechter van het hoogste belang, niet alleen dat hij de essentialia der verschillende contracten precies kent, doch ook dat hij volkomen op de hoogte is van alle mogelijke bijzonderheden die zich bij het sluiten van deze contracten voordoen, omdat dikwijls alleen uit dergelijke bijzonderheden, door partijen of getuigen terloops medegedeeld, kan worden afgeleid wat er naar waarheid tusschen partijen is voorgevallen." *Ibid.*, 67

and hold account with the prevailing *adat* law”, they and the other government courts “are unavoidably the most questionable” as regards the *adat*-legal reliability of their judgements.⁷⁸ In the same publication, he wrote, “despite the greatest dedication of the judges”,

*That the professional indigenous and native administration of justice – especially that which is led by legally trained voorzitters and in particular the landraden – is still far from satisfactory, is a fact which I think no expert would contradict.*⁷⁹

The apparent reason for this was that professional judges did not experience the social norms and ‘legal reality’ as a member of the society, but rather as an impartial observer. As such, judges could at best approximate a judgement which would be satisfactory to the native sense of justice – but were not authentic practitioners of *adat* law in the same way as a village chief, for example, and their administration of justice remained alien to their subjects. This conviction that *landraden* were socially inauthentic was based on Holleman’s Romantic understanding of law as the living creation of a society; it must also have made his tenure as a *voorzitter* extremely frustrating.

As will be shown, this lack of faith in the colonial judiciary’s verdicts shaped the kinds of policy proposals Holleman supported or did not support, and the path he thought Indonesian legal development should take. For the time being, the aim has been to trace Holleman’s training under van Vollenhoven and his mobility through colonial service, in order to lay the basis for an analysis of his thought which takes cognisance of this experience.

The *adat* law of Tulungagung

F.D. Holleman’s report on *The Adat Law of Tulungagung* was published in 1927, but the source material for the study was collected earlier, while Holleman was serving as *voorzitter* (chairman) of the *landraad* in Tulungagung from 1915 to 1918, and was already presented in various journal articles and *adatrechtbundels* – this is however the single most comprehensive treatment of Tulungagung which Holleman wrote.⁸⁰ As such it offers a good example of his work while in the colonial service, demonstrating his approach during this time, as has been described above.

⁷⁸ “als regel zich het meest bewust van het geldend adatrecht rekenschap geven”; “onvermijdelijk het meest bedenkelijk moeten zijn”. Holleman, F.D. “Het Adatprivaatrecht van NEI in Wetenschap, Praktijk en Onderwijs”, 436

⁷⁹ “Dat de inheemsche en inlandsche beroepsrechtspraak – vooral die welke geleid wordt door juridisch geschoolde voorzitters en in het bijzonder de landraden – nog verre van bevredigend is, is een feit dat, dunkt mij, geen ingewijde zal tegenspreken.” Ibid., 438

⁸⁰ Holleman, F.D. *Het adatrecht van de Afdeeling Toeloengagoeng*. 6; Het Nieuws van den Dag, 27 September 1915, p3; Het Nieuws van den Dag, 23 December 1918, p10.

Land transfer

Apart from a detailed exposition of *rukun* (peaceful/harmonious conflict resolution) and comments about the resilience of *adat* in the face of Islamic norms, the bulk of this study deals with land use, specifically various forms of temporary and permanent land alienation present in Tulungagung. This is in line with the focus of *adat* law as established by van Vollenhoven – Burns describes van Vollenhoven’s understanding of *adat* law as primarily about “a distinctive set of indigenous rights over land”.⁸¹ These rights were thought to be held by *rechtsgemeenschappe* – jural communities:

*The jural community was either a kin group, a territorial group, or a mixture of both. Each adat law area (adatrechtskring) comprised many jural communities, all conforming more or less to its basic conventions. The members of a jural community followed those conventions as a distinctive lifestyle, and as a system fulfilling most of the functions which in other types of community would have been performed by the law.*⁸²

The most important right which the *rechtsgemeenschappe* had was the *beschikkingsrecht*, or communal right of land allocation. Under this, land remained perpetually communal and could not be alienated, and the *rechtsgemeenschap* retained a right of intervention over land even if it had been allocated to a group member and been put into use.⁸³

Holleman to some extent confirmed this with regard to Tulungagung. He wrote of societies where

*such individual freedom [as in Western society] does not exist, but mutual co-operation is automatic and one where everyone knows and feels obliged to do and to tolerate the unwritten norms to advance the interests – understood by everyone – of the closed desa community.*⁸⁴

The closed *desa* community mentioned was the *rechtsgemeenschap* of van Vollenhoven’s conception. In Holleman’s account – as in much *adat* literature – the *desa* was the basic unit of all social life; no higher or more complex jural communities were mentioned here.

⁸¹ Burns, P. *The Leiden legacy*, 74

⁸² *Ibid.*, 74

⁸³ *Ibid.*, 74

⁸⁴ “*dergelijke individueele vrijheid nog niet bestaat, doch onderlinge samenwerking vanzelf spreekt en een ieder zich verplicht weet en voelt om te doen en te dulden wat ongeschreven normen in het door ieder begrepen belang van de gesloten desagemeenschap vorderen.*” Holleman, F.D. *Het adatrecht van de Afdeeling Toeloengagoeng*. 44

While Holleman's account takes as its basis the understanding of *beschikkingsrecht* described above, it differs in emphasis. At first he articulated what seems a full endorsement of the *beschikkingsrecht* within Tulungagung: "the land (especially agricultural land) is in all things, *desa* territory"; while individuals may be able to inherit family land, "legally the freedom of disposal of the individual is still subordinate to the control of the joint *desa* members, who will judge whether the individual transaction is in the communal interest."⁸⁵

It is clear from this, and other statements, that he was thinking within the framework of the *beschikkingsrecht*. However, his description of actual practice shows that hereditary individual rights to land were firmly established, and that sale, lease, or offering up one's land as surety for a loan, occurred largely at the discretion of these individual rights holders.

Holleman began with an assertion of the difference of Indonesian society even as it related to basic economic transactions. However, he situated this difference in material considerations, namely the fact that in an agrarian society land was the primary means of survival:

*The value of the land for the desa man lies in what the land produces; that is his income. In the first place the land thus has use value, while its exchange value is hardly mentioned.*⁸⁶

As such, land tended to be sold only as a last resort, and generally in a situation of cash scarcity. However, the fact that individuals were reluctant to alienate their land implies that in a meaningful way, they did indeed see it as 'theirs', to be worked for their benefit – in fact, that there was relatively secure individual tenure. Holleman himself confirmed this, stating that:

*In general all lands over which people exercise native ownership rights (hereditary individual ownership) may be sold... The sections of desa land in communal possession are not available for sale...*⁸⁷

⁸⁵ "de grond (vooral bouwgronden), vóór alles desaterritoir is"; "rechtens is de beschikkingsvrijheid van den enkeling nog onderworpen aan het toezicht van de gezamenlijke desagenooten, die zullen beoordeelen of het algemeen dorpsbelang de individueele transactie gedooft." Holleman, F.D. *Het adatrecht van de Afdeeling Toeloengagoeng*, 44

⁸⁶ "De waarde van den grond steunt voor den desaman op dat wat de grond aan product oplevert; dit is zijn inkomen. De grond heeft dus in de eerste plaats gebruikswaarde en de ruilwaarde komt nauwelijks in aanmerking." Holleman, F.D. *Het adatrecht van de Afdeeling Toeloengagoeng*, 71

⁸⁷ "In het algemeen mogen alle gronden waarop men het weike gronden Inlandsch bezitrecht (erfelijk individueel bezit) uitoefent, worden verkocht ...De aandeelen in den communaal bezeten desagrond zijn voor verkoop niet vatbaar..." Holleman, F.D. *Het adatrecht van de Afdeeling Toeloengagoeng*, 73

The image here is one of a *desa* comprising a number of individual plots, alongside properly communal land. Some of the communal land could be allocated to different members of the *desa* at different times on a rotating basis, and there were also fields for the office of the *kepala desa*, or chief.

As noted, Holleman did not see this as a challenge to the communal *beschikkingsrecht*, but rather as something which fitted within that framework. In his earlier quote, members of the jural community checked any transfer of land against the communal interest. But although the chief's permission was required for the transaction to take place, this was largely a formality unless there were doubts over whether the land was indeed owned by the relevant party or whether they had the authority to alienate it.⁸⁸

There were some limits. Holleman wrote that in *desas* in the Tjampoerdarat district, selling agricultural and residential plots and fish pits “may be freely done amongst fellow *desa* members, but the sale thereof to persons from another *desa* is not allowed...”⁸⁹ However, this was no xenophobic impulse, but rather seemingly a ban on absentee landlords: if the stranger settled in the *desa* they could then buy the land.

Regardless, this does not establish the kind of uniform and all powerful *beschikkingsrecht* described at the outset. For one, not all land transactions fell under this prohibition – temporary alienation to a member of another *desa*, it seems, could generally take place. For another, the fact that Holleman needed to specify the region where alienation to outsiders could not take place, suggests that this was not generally the case across Tulungagung. This becomes even clearer in the following quote:

*In respect of ‘ngedol teroes’ [sale] one still finds in a few desas (including Gesikan)... the original exclusivism has maintained the prohibition of permanent alienation of land and even of bamboo chairs to members of another desa.*⁹⁰

Prohibition of sale to outsiders was seen here as part of an old system which had to some extent disintegrated or transformed. This is significant, in that colonial ideas about the land and people they conquered often depend on misconceptions of a ‘tribal idyll’, a static and unchanging place outside of history. While Holleman’s earlier quote suggests that Tulungagung was a harmonious region where everyone knew their place in society and helped each other when in need, and nobody exercised complete individual freedom, when it came to actually describing social practices, Holleman’s work

⁸⁸ Holleman, F.D. *Het adatrecht van de Afdeeling Toeloengagoeng*, 46

⁸⁹ “mag ... vrij geschieden aan desagenooten, doch is de verkoop daarvan aan personen van eene andere desa niet toegestaan”. Ibid., 73

⁹⁰ “men ten aanzien van het ‘ngedol teroes’ in enkele desa's (waaronder ook Gesikan) nog... ontmoet; daar heeft het oorspronkelijk exclusivisme het verbod van blijvende vervreemding van gronden en zelfs van bamboestoelen aan lieden van een andere desa nog steeds gehandhaafd.” Ibid., 66

on Tulungagung demonstrated a sensitivity to social change and the fact that things are not as they once were. The cause of this change, in his understanding, was a community's connection to the outside world, particularly through trade links and the associated profit incentives, increased contact with strangers, and spread of religious beliefs that accompanied this. Increasing commerce, in his words, "demolishes the old *adat*".⁹¹

Rukun

What, then, did the old *adat* entail, beyond the *beschikkingsrecht* already discussed? Holleman made clear that *adat* should be understood through the principles which underlay it. One of these was *rukun*, which received a lengthy discussion in the study of Tulungagung. *Rukun*, he argued, "controls legal life to a great extent" and "tints, as it were, the whole Native society".⁹² As he understood it, it meant roughly the avoidance of disputes, and where they occurred, a willingness to resolve them amicably. Holleman saw in Indonesian society,

*a certain mutual tolerance, an avoidance of disputes through a politics of give and take, a hesitance to cause offence ... a tendency to wait and see whether it will come to that [whether a dispute will come to confrontation] and a felt obligation to abandon one's existing right, to delay its exercise or act more leniently if it is not strictly necessary and especially burdensome for the opposing party.*⁹³

Such a description does to some extent romanticise or idealise social relations in the *desa*, although I tend to concur with Henley, who describes the discussion of communalism here as "much more nuanced" than that which Holleman propounded later, for instance in his inaugural Leiden address.⁹⁴ To begin with, Holleman was at least rhetorically aware of the danger of romanticising social relations, noting that communal or conciliatory norms were not uniformly observed:

It is not my intention to argue that all these preconditions lead to an ideal society in the native world or are everywhere still observed, but rather, just to show that in Native

⁹¹ "de oude *adat* sloop". Holleman, F.D. *Het adatrecht van de Afdeeling Toeloengagoeng*, 47

⁹² "het rechtsleven tot zekere hoogte beheerscht"; "de geheele Inlandsche maatschappij als het ware 'doortint'". Ibid., 17-18

⁹³ "een zekere onderlinge verdraagzaamheid, een vermijden van geschillen door een politiek van geven en nemen, een schroom om te kwetsen ... eene neiging om af te wachten of het wel zoover zal kpmen en een gevoelde verplichting om af te zien van een bestaand recht, dan wel de uitoefening daarvan uit te stellen of te lenigen indien dit niet strikt noodzakelijk is en bovendien pijnlijk voor de wederpartij." Ibid., 23

⁹⁴ Henley, D. "Custom and koperasi: the co-operative ideal in Indonesia", 106

*society there is a strikingly greater inclination to orient oneself according to these forms.*⁹⁵

While such a response does not totally escape the initial criticism, it is notable that at this stage Holleman considered the motivation for practices which fit into this norm, like mutual aid, or a willingness to extend the period in which a loan is repaid, as rational, given the practical realities of surviving in an agrarian economy, including the need for occasional group labour, and the likelihood of requiring assistance in future oneself:

*If someone has more money than he needs at the moment, and his neighbour, short of money, makes a request to him, then he may not think to refuse him the money. The motive here is no philanthropy, but the realisation that he and his neighbours will have countless social interactions and that he cannot withdraw from his duties without himself being placed outside the indispensable help [of his neighbours] tomorrow.*⁹⁶

By contrast, as will be shown, Holleman later endorsed communalism as an almost spiritual or metaphysical principle underlying Indonesian social and legal life.

Further, as with the descriptions of land ownership, while Holleman described *rukun* as a pervasive norm, the picture he presented of Tulungagung society in fact included a great deal of individualism, change, stress and social mobility.

The reluctance of individuals to alienate land was explained in the following way:

*Above all one must not forget that in many cases the loss of land means that he, previously a landowner... must then become a dependent tenant or 'boeroeh' (wage labourer) for another; this means that he sinks back down to a lower status, either temporarily or for good.*⁹⁷

⁹⁵ "Het ligt niet in de bedoeling te betoogen dat al deze voorwaarden voor eene ideale maatschappij in de Inlandsche wereld overal en steeds worden nageleefd doch slechts om er op te wijzen, dat in de Inlandsche samenleving een opvallend groote geneigdheid bestaat om zich naar die vormen te richten." Holleman, F.D. *Het adatrecht van de Afdeeling Toeloengagoeng*. 18

⁹⁶ "Bezit nu iemand meer geld dan hij oogenblikkelijk noodig heeft en klopt zijn buurman, die in geldverlegenheid zit, bij hem aan, dan mag hij er niet aan denken hem dit geld te weigeren. Geen menschlievendheid is hier de drijfveer, maar het besef, dat hij en zijn buurlieden bij tallooze maatschappelijke verrichtingen op elkaar zijn aangewezen en dat hij zich aan zijne verplichtingen niet kan onttrekken zonder het morgen zelf buiten die onontbeerlijke hulp te moeten stellen." *Ibid.*, 19

⁹⁷ "Bovendien mag men niet vergeten dat in vele gevallen het verlies van den grond voor hem beteekent dat hij, vroeger grondbezitter ... dan afhankelijk deelbouwer of 'boeroeh' (loonarbeider) van een ander zou moeten worden; hetgeen voor hem zou beduiden dat hij tijdelijk of voor goed terugzinkt tot een lageren stand." *Ibid.*, 38

Differentiation by status and class, and mobility between classes, provides a rebuff to ideas of societies being made up of a single organic unity, with little or no social distance between members.

While there were strong obligations of mutual aid, if someone needed a cash loan they could also approach a stranger, perhaps a money lender; “this category [of person] very much has an interest in the money being paid back, and so won’t lend it out if they aren’t convinced that the person is able to do so.”⁹⁸ This does not refute the imperatives towards mutual aid, but rather demonstrates the presence of self-interested actors in addition to those close associates who might be obliged to assist.

Moreover, while Holleman insisted that natives in the *desa* had no eye for capital accumulation, in practice he noted that it was quite usual, and accepted, for someone who lent money (and was not a close acquaintance of the recipient) and took temporary control of a villager’s fields, to extract twice the value of the cash lent from the harvest – an effective interest rate of 100%.⁹⁹ While most contracts in which the land was temporarily placed under the control of a money lender guaranteed the return of at least the original sum via the harvest, there were also contracts which had a speculative nature, in which the moneylender stood to gain if conditions were favourable for a good harvest, or for two harvests in a year, but would lose out if they were not.¹⁰⁰

Even the ideals of mutual assistance and good faith were not absolute. Holleman noted that reciprocal aid in agricultural work was giving way to wage labour, as it was proving cheaper to the farmers.¹⁰¹ In relation to the deeds which accompanied land transactions, he wrote that

*Originally perhaps the creation of proof and legal certainty for the future was unnecessary... that time has passed almost everywhere and nowadays, when the contract is closed in front of the kepala desa and witnesses, as representatives of the community - although good faith still prevails... – the kepala, witnesses and parties have in mind that violation of the agreement is possible in future and know that the first two mentioned will then be called to ‘testify’ what was truly agreed upon between the parties.*¹⁰²

⁹⁸ “deze categorie er wel degelijk prijs op stelt dat het geld wordt terugbetaald, zal men tot eene geldleening niet overgaan als de overtuiging niet bestaat, dat de debiteur goed is voor het te leenen bedrag.” Holleman, F.D. *Het adatrecht van de Afdeeling Toeloengagoeng*, 40

⁹⁹ *Ibid.*, 58

¹⁰⁰ *Ibid.*, 60

¹⁰¹ *Ibid.*, 62

¹⁰² “Was oorspronkelijk wellicht het scheppen van bewijs en rechtszekerheid voor de toekomst onnoodig ... dat tijdperk is bijna overal voorbij en wanneer thans de overeenkomst vóór den kepala desa met getuigen, als vertegenwoordigers van de gemeenschap, wordt afgesloten, zijn — hoewel de goede trouw nog praevaleert ... — kepala, getuigen en partijen er wel degelijk op bedacht dat schending van de overeenkomst in de toekomst mogelijk is en houdt men voor oogen dat de beide eerstgenoemden dan geroepen zullen zijn om te ‘getuigen’

Deviations from adat law

Throughout the study on Tulungagung, Holleman differentiated between small, remote *desas* in which the old customs apparently endured, and larger towns and areas where new practices had begun to take root – albeit partially. For example, while he argued that sale of land was traditionally and predominantly only done as a last resort to settle debts or gain much needed cash, this was qualified with the following note:

*I must add immediately that, apparently through the influence of commerce, there are repeated cases of sale of land occurring where the character of debt settlement can be recognised scarcely or not at all.*¹⁰³

While Holleman did not present Indonesian society as static, he did not totally escape the dichotomy of an original, authentic *adat* society, contrasted with the subsequent deviations therefrom. At no stage did he explicitly express that the old *adat* was superior, nor are the changes criticised as unnatural – but he nonetheless asserted that the old ideals were resilient in the face of both commerce and the influence of Islam. For example:

*As trade begins to have more of an effect in different areas ... ‘toeloeng-tinoeloeng’ [reciprocal aid] has diminished and made place for a more commercial standpoint ... [However,] Even when parties are complete strangers the principle of mutual help remains active in a moderate form, so that in adat law the pure ‘businesslike’ position has almost never been reached.*¹⁰⁴

Consequently, his study focused a great deal on the ideal *adat* arrangements. Holleman thought that it was entirely reasonable – and pragmatic – for attempts to develop and administer the law to be based in the ‘pure’ underlying *adat*.

One should not conclude that so-called ‘practical’ judgments still advance legal development; they only do so when they accord with the demands of the legal life of

omtrent hetgeen naar waarheid tusschen partijen is overeengekomen.” Holleman, F.D. Het adatrecht van de Afdeling Toeloengagoeng. 49-50

¹⁰³ “Ik moet hier dadelijk aan toevoegen dat er zich, kennelijk door den invloed van het verkeer, herhaaldelijk gevallen van grondverkoop voordoen, waarbij het karakter van vereffening of schulddelging nauwelijks of niet meer te onderkennen valt.” *Ibid.*, 72

¹⁰⁴ “Al begint ook door den invloed van het verkeer in verschillende streken ... het ‘toeloeng-tinoeloeng’ minder te worden en plaats te maken voor een meer commercieel standpunt ... Zelfs wanneer partijen geheel vreemden voor elkaar zijn doet zich nog het beginsel van onderling hulpbetoon — zij het ook in gematigden vorm — in de geheele verhouding blijvend gelden, zoodat in het adatrecht vrijwel nimmer het zuiver ‘zakelijk’ standpunt wordt bereikt.” *Ibid.*, 39

*those subject to the law, never when they run against the grain or misapprehend the elementary principles of adat law.*¹⁰⁵

While the instinct to root further legal development in the existing ‘legal life’ of Indonesians was laudable, it also placed substantial weight on what Holleman identified as the authentic principles of Indonesian law – the old *adat*. This begins to explain the connection between the empirical research of this study, and the broad generalisations present to some extent here but later to become even more sweeping. In short, while Holleman was sensitive to changing practices, his emphasis on the resilience of an underlying *adat* tradition also acted as the justification for ideological positions which engaged primarily with this idealised *adat* law, rather than with the real changing society.

Despite this, Holleman’s account of Tulungagung for the most part represents a nuanced account of land transactions and patterns of behaviour. While Tulungagung society may have been notably communal, with particular communal scrutiny of land transactions, this co-existed with individual land tenure and self-interested behaviour. There was as yet little suggestion in Holleman’s work that the communal trait pervaded all aspects of mental and social life, nor that *adat* law was underpinned by any metaphysical or spiritual principle.

Entering the academy

Beyond recording local practices in his various postings, Holleman also held various positions in which he was able to influence *adat* thinking more broadly. After working as a legal secretary in the colonial bureaucracy, he entered the academy in 1929, teaching *volkekunde* (ethnology or anthropology) at the *Rechtshogeschool* in Batavia.¹⁰⁶ In 1934, following the death of van Vollenhoven the preceding year, Holleman succeeded his teacher as professor of *adat* law at Leiden University.¹⁰⁷ He remained in Leiden until, on the eve of war in 1939, he returned to South Africa to take up a post at Stellenbosch.

Given the identity of his predecessor, and Leiden University’s relation to training colonial bureaucrats, the Leiden chair was a particularly prestigious position, from which Holleman could assert his interpretation of *adat* – his inaugural address at Leiden, for example, was widely reported and

¹⁰⁵ “Vooral meene men niet dat z.g.n. ‘practische’ beslissingen steeds de rechtsontwikkeling bevorderen; dat doen zij alleen wanneer zij met de eischen van het rechtsleven der justitiabelen strooken, nimmer wanneer zij tegen den draad ingaan of de elementaire beginselen van het adatrecht miskennen.” Holleman, F.D. *Het adatrecht van de Afdeling Toeloengagoeng*, 96

¹⁰⁶ De Telegraaf, No. 13.830, 16 March 1929. P6

¹⁰⁷ De Tijd, 8 June 1934. P2

summarised in the Dutch press.¹⁰⁸ While he certainly saw himself as continuing in the direction van Vollenhoven established, elements of his work here nonetheless represent original and important contributions to what is commonly understood as part of the *adat* school legacy.

In this section I examine two of these contributions. There are important differences between this work, produced once Holleman had been working in a university setting for some time, and Holleman's earlier work as exemplified in his study of Tulungagung. The careful local observations had been largely replaced by broader generalisations, specifically around the understanding of *adat* as overwhelmingly communal, and the continued identification of *adat* law primarily with a metaphysical or spiritual principle rather than a set of concrete rules. Whether or not these represent a changing understanding of *adat* law on Holleman's part, they certainly demonstrate a changing emphasis. Holleman's focus here, on theorising about *adat* rather than recording it, was influenced by his changed position and entry into the academy. His tenure in the academy, and his grander focus during this time, provides a final experience which he would bring to South Africa.

The communal trait

Many critiques of the legacy of the Leiden group rest on the premise that it set up a vision of an extremely communalist Indonesian society in which group identity and needs predominated over individual ones.¹⁰⁹ Despite the leading role of van Vollenhoven in establishing this approach, *adat* law doctrines were shaped by others, including most obviously, his students.

Regarding the origins of *adat* law's communalism, Henley notes that in fact,

The founding and central figure of the adatrecht school, Cornelis van Vollenhoven (1874-1933), had been a highly empirical scholar (albeit not a field researcher) whose prolific work contains only occasional and passing references to the 'communal trait'.¹¹⁰

Holleman himself concurred with this – in his inaugural address at Leiden University in 1935, he quoted van Vollenhoven on the communal trait in Java, but also noted that he had never devoted a study to this in itself, and from 1918 until his death in 1933, had only mentioned it in writing once more.¹¹¹

¹⁰⁸ See for example Algemeen Handelsblad, 10 May 1935. P14; De Telegraaf, 10 May 1935. P10; Het Vaderland, 10 May 1935, p11

¹⁰⁹ Henley, D. "Custom and koperasi: the co-operative ideal in Indonesia", 92

¹¹⁰ Ibid., 95

¹¹¹ Holleman, F.D. *De Commune Trek in het Indonesisch Rechtsleven*. 5

There are certainly ways in which communalism was inherent to van Vollenhoven's ideas – Burns cites collective group responsibility, and collective control of land, as two of his pillars of *adat*.¹¹² Nonetheless, a communal trait in society *per se* was largely not discussed.

Holleman used this as occasion to expound on the topic himself; the address, entitled *The Communal Trait in Indonesian Legal Life*, represents an influential extension of stereotypes about the predominance of the collective in Indonesian society, which went beyond group control of land.¹¹³

The communal trait, Holleman stated, was not a distinct element of Indonesian legal life which could be isolated from the rest of the society, but rather pervaded all interactions within that society. It could be understood in opposition to individuality – the two were present in roughly inverse proportions in all societies, but neither one was ever totally absent.¹¹⁴ Communalism nonetheless implied a subordination of individual freedom to collective interest.

Holleman began by laying out the situation in various Indonesian regions, spanning more communal and more individual societies. Amongst the Dayaks and Toradja, communities were strongly based on heredity, internally differentiated into clans and families but nonetheless forming a tight unit.¹¹⁵ There were expectations of mutual aid, a willingness to compromise and settle amicably in disputes, and group unity in the face of threats. The dominance of communalism is shown in the discussion of the institution of marriage:

*Marriage is completed between individuals and the choice of partner is to a great degree individual preference, but still the engagement, sealing of the marriage and divorce are in no way legal affairs of individually responsible persons. In everything they are members of the group and marriage is a group concern. The extent to which this is the case can be seen clearly from the general social shame attached to an unmarried state, from the link of full citizenship with the married state, and from the public pressure on someone who is responsible for a young woman's pregnancy but is unwilling to marry her.*¹¹⁶

¹¹² Burns, P. *The Leiden legacy*: 191

¹¹³ Henley, D. "Custom and koperasi: the co-operative ideal in Indonesia", 95

¹¹⁴ Holleman, F.D. *De Commune Trek in het Indonesisch Rechtsleven*. 6

¹¹⁵ *Ibid.*, 8

¹¹⁶ "Het huwelijk wordt tusschen individuen voltrokken en ook bij de keus der echtgenooten geldt tot groote hoogte hun individueele voorkeur, maar toch zijn verloving, huwelijkssluiting en echtscheiding geens* zins rechtshandelingen van individueel verantwoordelijke personen. Vóór alles zijn zij leden in de groep en is het huwelijk groepszorg. Hoezeer dit het geval is, komt overigens duidelijk uit aan den algemeenen smaad die ten deel valt aan den ongehuwden staat; aan de koppeling van volwaardig burgerschap aan den gehuwden staat en aan den openbaren dwang jegens dengene die voor de zwangerschap van een meisje verantwoordelijk is, doch haar niet wenscht te trouwen." *Ibid.*, 7

This situation was contrasted with large villages in Borneo, Celebes, Java and Sumatra, where intensifying trade and contact with outsiders had brought social change. Communities based on heredity had been largely replaced by those based on territory or pragmatic association (particularly in Aceh and Java). Mutual aid was increasingly optional, and the promise of reciprocity in agricultural work was to some extent replaced by wage labour.¹¹⁷ However, the communal trait was not totally absent. While mutual competition and trade was common, agreements tended to be entered into in striking good faith, and conflict was still avoided.¹¹⁸

In fact, it seemed that Indonesian societies could not escape this communal bond, which was exercised within *rechtsgemeenschappe*. Holleman went on to lay out his theoretical framework: for him, the nature of individuals' mentality corresponded with the nature of the society within which those individuals were found, which in turn corresponded to the nature of that society's law. Law was connected to society and individual in a living bond. "If the condition of the spirit and psyche of the subject changes, then one also finds the change objectified in legal norms and forms."¹¹⁹

Adat law fitted into a broader dualistic framework of 'primitive' societies and legal systems, in contrast to advanced ones. Here, Holleman relied on the work of German developmental psychologist Heinz Werner, who had theorised about the 'primitive' psyche and spirit.¹²⁰ Primitive thought was more limited to concrete or vivid issues, while advanced thought was more capable of abstraction; primitive thought was affective, emotional, traditional or magical, while advanced thought was rational.¹²¹

Holleman linked this to the relative development of the mental capacity for understanding. Given his claims about the link between mentality, society, and law, a 'primitive' spirit thus gave rise to 'primitive' legal norms.

*The core of the preceding argument lies in the central idea, that the undeveloped nature of the understanding capacity of the spirit is the main cause that given the opportunity, Indonesian thoughts and actions occur in another plan and according to another pattern than ours usually do.*¹²²

¹¹⁷ Holleman, F.D. *De Commune Trek in het Indonesisch Rechtsleven*, 13

¹¹⁸ *Ibid.*, 11

¹¹⁹ "Verandert die gesteldheid van geest en psyche van het subject, dan vindt men die verandering ook, geobjectiveerd, terug in rechtsnormen en -vormen." *Ibid.*, 15

¹²⁰ *Ibid.*, 16

¹²¹ *Ibid.*, 17

¹²² "De kern van het voorafgaand betoog ligt in de centrale gedachte, dat de onontwikkeldheid van het verstandelijk vermogen van den geest de voornaamste oorzaak is, dat bij gelegenheid Indonesisch denken en handelen geschieden op een ander plan en naar een ander patroon dan bij ons gebruikelijk zijn." *Ibid.*, 20

Echoing his assertion of the resilience of *adat* law in Tulungagung, Holleman argued here that while different areas of the archipelago had different levels of development, Indonesian society in general was primitive, no matter how 'rational' it might appear on the surface:

*In the everyday sphere of household, commercial, and political activity it appears that thoughts and actions are almost completely rational – in our sense – and only more intimate knowledge of the life brings to light a world of primitives ... which still lives and has root underneath and behind the apparently rational, and can become evident during any – even mental – stress.*¹²³

These claims are extremely orientalist. Regardless of how advanced the Indonesians *seemed*, Holleman told his audience, they could not be understood using the same concepts as Western people and were still bound at root by custom and group identity. While this account made allowance for the possibility of evolution or development – understood as society becoming more individualistic and rational – it nonetheless asserted that Indonesian society was fundamentally different to Western societies. Firstly, it was communal to the detriment of individual rights. Secondly, it was primitive more generally. And thirdly, this primitive nature was derived from the primitive spirit of Indonesian people, and ran directly to shape a primitive kind of law.

The idea that law was a product of the spirit of societies was based on the Romanticist ideas which influenced the *adat* law school. Both implied that forcing different laws on a people was doomed to failure, as the only law which could flourish was the living law which had taken root in social behaviour.¹²⁴

Holleman's address was also a clear statement of the mystical or spiritual underpinnings of *adat* law. No rational basis or mechanism for the way in which law adjusted to changes in the spirit and psyche of its constituents was explained; it was simply stated as a matter of fact. Moreover, it would seem that Holleman understood the study of *adat* law as something of a mystical journey too, something for which experience, and a radical shift of perspective, rather than just academic study, was required. Holleman told students at the close of his address:

The knowledge of adat law and my information can contribute to making you a passable or better Indies jurist or official and can shorten the road to fortune. Without

¹²³ "In de alledaagsche sfeer van het huishoudelijk, maatschappelijk en staatkundig vertier is het zóó gesteld, dat denken en handelen nagenoeg volkomen rationeel — in onzen zin — schijnen en dat pas meer intieme bekendheid met dit leven aan den dag brengt, welk een wereld van primitiefs ... achter en onder dat schijnbaar rationeële nog leeft en wroet, en bij iedere spanning — zelfs denkspanning — evident kan worden." Holleman, F.D. *De Commune Trek in het Indonesisch Rechtsleven*, 20

¹²⁴ Burns, P. *The Leiden legacy*: 73

*doubt you will reflect fruitfully on the theoretical knowledge acquired, but the experience I sketched to you, you must make your own in practice, and that will be possible... if you bring the inner preparation with you.*¹²⁵

The legacy of the communal trait

The communal trait has become one of the most iconic aspects of *adat* law, and the one perhaps most closely associated with political control. David Henley traces the communal ideal as it related to economic co-operatives, arguing that much of the enthusiasm for co-operatives comes from

*a specific view of Indonesian society and the Indonesian national character, as it has been in the past and should be in the future, which counterposes Indonesian 'collectivism' to the European 'individualism' on which capitalism is based.*¹²⁶

This is precisely the Orientalist binary which Holleman's address helped to establish. Van Vollenhoven's claim that the *adat* law of various areas of the colony showed a common origin was an attractive one for Indonesian nationalists (particularly those who studied law at Leiden) who were looking for a common basis on which to wage an anticolonial struggle.¹²⁷ The NEI had never been a single political entity before colonisation, and so any sign of a shared culture was seized on enthusiastically; cultural coherence showed that there could be a political future as a coherent nation.

Adat principles were held to make up part of a particular Indonesian 'national personality' which was communal and harmonious.¹²⁸ Mohammad Hatta, first Indonesian Vice-President and drafter of sections of the 1945 Constitution, argued in 1963, that the foundations of the Indonesian co-operative movement "lay in *adat* and indeed in *adat* law, which was subject to historical change but continued to embody the collectivist spirit of the past."¹²⁹ As support for this claim, Hatta cited Holleman's inaugural address, as well as an inaugural address by Supomo, *The relationship between individual and community in adat law*.

¹²⁵ "De kennis van het adatrecht en mijne voorlichting daarbij zullen er toe bijdragen om U een bruikbaar of nog beter Indisch jurist of ambtenaar te maken en kunnen U wellicht dien weg naar het geluk wel bekorten. Zonder twijfel zult Gij U onder weg telkens met vrucht bezinnen op de verworven theoretische kennis, maar de beleving die ik U schetste, zult Gij U zelf in de praktijk eigen moeten maken en dat zal U mogelijk zijn ... als Gij daartoe de innerlijke bereidheid meebrengt." Holleman, F.D. *De Commune Trek in het Indonesisch Rechtsleven*. 25-26

¹²⁶ Henley, D. "Custom and koperasi: the co-operative ideal in Indonesia", 92

¹²⁷ Bourchier, D. "The romance of adat in the Indonesian political imagination and the current revival", in Davidson, J., and Henley, D., eds. *The revival of tradition in Indonesian politics: The deployment of adat from colonialism to indigenism*. Routledge, 2007. 114

¹²⁸ *Ibid.*, 116

¹²⁹ Henley, D. "Custom and koperasi: the co-operative ideal in Indonesia", 94

While Henley ultimately rejects the idea that communal harmony was completely an exotic ideal imported from Europe, he nonetheless acknowledges the links between the idealised images of Indonesian village society propounded by *adat* law, and lingering ideas of communalism in Indonesia.

***Adat* (anti-)fundamentalism**

Apart from their assumptions about the superiority of Western law and culture, supporters of legal unification in the NEI in the early parts of the 20th Century had practical reasons to oppose both the policy of legal differentiation between European and indigenous residents in the NEI, and the further recognition of *adat* law by the colonial government. The policy of differentiation was difficult to implement: as migration and mobility increased, people from different areas and customs came into contact more and more frequently. This raised the question of whose customs to apply to a case involving people of different backgrounds.¹³⁰ *Adat* law varied from place to place, and was unwritten.¹³¹ This meant that a judge would need to spend substantial time familiarising themselves with the local *adat* before making a judgement.

While van Vollenhoven and the Leiden school's victory over the move towards legal unification in the NEI succeeded in gaining some state recognition for the system of *adat* law which he had systematically analysed, it did not totally resolve the challenges relating to the implementation of *adat* law. As noted above, *adat* law seemed poorly equipped to deal with difference and diversity; Burns writes:

*The difficulty was general, however: if the adatrecht system consisted of such a coherent and peculiar set of rights as van Vollenhoven had proclaimed for it, then the subjects of that system (native jural communities and the individual members thereof) could hardly interact with legal persons belonging to any other discrete, self-sufficient system.*¹³²

Moreover, if *adat* law was to be a workable alternative, judges would need guidance on how to apply it. Van Vollenhoven had drafted an *adat* law code for this purpose, but

the booklet proved to be too rudimentary an edifice to give a satisfying answer to the question of how adat law could be made operational in practice. For instance, in the chapter on adat penal law... punishable offences were defined as facts that conflicted

¹³⁰ Fasseur, C. "Colonial Dilemma", 57

¹³¹ Ibid., 54

¹³² Burns, P. *The Leiden legacy*, 187

*with adat law and/or facts that violated the good faith required in society, unless the judge was of the opinion that this behaviour had been 'justified by the demands of self-interest'!*¹³³

Such an approach obviously gave massive scope to judges to make judgements at variance with the stated law when they saw fit. This was furthered when van Vollenhoven later became an opponent of *adat* law codification *per se*, in the belief that this would prevent the customs from developing naturally.¹³⁴ Whether or not this concern was valid, an unwritten law left even more scope for judicial arbitrariness; there could be no certainty that two cases with the same legal facts would receive the same verdict from different judges, or from the same judge at different times. Fasseur argues that in these respects, “Van Vollenhoven was less successful in the promotion of a real *adat* alternative that could respond to the needs of modern society.”¹³⁵

An attempt to resolve this deadlock came in 1937, from a Leiden-trained scholar, Barend ter Haar. A professor at the Rechtshogeschool in Batavia, ter Haar gave a speech proposing what represented to some extent a break from van Vollenhoven’s orthodoxy.

Van Vollenhoven had described *adat* law as “the collection of rules of conduct applicable to natives and foreign orientals – which are ‘*adat*’ on account of their uncodified state and ‘law’ because they carry sanctions.”¹³⁶ In this view *adat* (that is, custom) already contained law – the living law – and all that was needed was for this system to be recognised by the colonial government. However, ter Haar argued that although custom may be a source of law, in its present state it was not yet law; it lacked the authority which accompanied other law, which came via legislation, legal codes, and precedent. For ter Haar, “the formal institutions of the state – or of society – were required to transmute folk values into proper law.”¹³⁷ To achieve this he proposed a modified understanding of *adat* law as “that entirety of rules, which is determined in the authoritative judgements and realised in the implementation thereof.”¹³⁸ This excluded customary norms which were simply found in people’s behaviour but not in official verdicts. The mechanism he proposed for the transformation of *adat* into law was thus judicial decision: as judges made rulings, what had been custom would gain the force of precedent, becoming part of the jurisprudence to guide future decisions.

¹³³ Fasseur, C. “Colonial Dilemma”, 61

¹³⁴ *Ibid.*, 61

¹³⁵ *Ibid.*, 61

¹³⁶ Holleman, J. F., ed. *Van Vollenhoven on Indonesian adat law*. Springer, 1981. 7

¹³⁷ Burns, P. *The Leiden legacy*, 200

¹³⁸ “*dat geheel van regelen, dat in de gezaghebbende beslissingen is bepaald en in de uitvoering daarvan verwerkelijk*”. ter Haar, B. *Het adatprivaatrecht van Nederlandsche-Indië in wetenschap, practijk en onderwijs*. JB Wolters, 1937. 4

Judges would not lose all autonomy, given that there would still be clashes of precedents, at which they would need to override one or the other whether on the basis of social development or substantive justice. Still, all judges would need to be informed of relevant case law for matters they were to adjudicate. Over time, the unpredictability of *adat* law decisions would be transformed into a modern, predictable and replicable system of law. In fact, Ter Haar's proposals for modernising *adat* law extended to the setting up of an independent judiciary, entirely separate from administrative functions.¹³⁹ This would lay the basis for *adat* law to eventually become the state law.

Ter Haar's proposals met with a strong rebuttal from F.D. Holleman the following year (1938). Holleman had by this time succeeded van Vollenhoven as professor of *adat* law at Leiden University; he also assumed van Vollenhoven's position as secretary of the *Adat* Law Foundation, and from 1936 was also chairman of this organisation.¹⁴⁰ Given these roles, he was certainly one of the most authoritative voices in *adat* law after van Vollenhoven's death. His expressed position regarding Ter Haar's ideas, which reasserted Leiden orthodoxy, would likely have been the final word on the matter.

Holleman acknowledged the benefits which confining *adat* law to that which was established by judicial decisions would have in smoothing the administration of justice in NEI.¹⁴¹ He could not, however, accept the sacrifice it entailed, and even saw in it the danger of "a new form of tyranny".¹⁴² His argument focused on three main points: that judgements were an arbitrarily narrow source of *adat* law knowledge, that judgements were often unreliable, and that the new system would be unsatisfactory to the native sense of justice.

Holleman began by restating van Vollenhoven's understanding of *adat* law (already mentioned above). In this view, the prevailing law included all legal norms which had been "won... from the legal reality".¹⁴³ Legal and non-legal norms intermingled in the whole of *adat*, and it was the job of jurists to discern which amongst them were truly legal norms. Over time this investigation and sifting became easier: some government officials and missionaries "learned well the native life and gradually also understood better the art of asking and seeing in native style..."¹⁴⁴ While judgements did play some part as a source of *adat* law knowledge, Holleman saw Ter Haar's proposal as an artificial limitation on a larger body of legal norms which may not have had occasion to find expression in a judgement but

¹³⁹ Burns, P. *The Leiden legacy*, 99

¹⁴⁰ Otto, J.M. 'Ten geleide', in Holleman, F.D., *Philippijnsch Dagboek*. Van Vollenhoven Institute, Leiden, 1991. vii

¹⁴¹ Holleman, F.D. "Het Adatprivaatrecht van NEI in Wetenschap, Praktijk en Onderwijs", 430

¹⁴² "een nieuwen vorm van tyrannie". *Ibid.*, 440

¹⁴³ "uit de rechtswerkelijkheid werd gewonnen". *Ibid.*, 430

¹⁴⁴ "het inheemsche leven goed leerden kennen en die allengs ook beter de kunst van vragen en zien in inheemschen trant verstonden..." *Ibid.*, 431

nonetheless held true for that community. In this position, ethnological sources – obtained in the method described above – were essential to record parts of *adat* law which had not been captured in judicial decisions.

Holleman's second point was that judgements were not reliable as sources of *adat* law. In order to establish this, Holleman leaned on the idealised vision of village society he had laid out in *The Communal Trait in Indonesian Legal Life*. Specifically, he spoke of the "pure indigenous sphere" in which village chiefs or headmen upheld the law, rather than professional judges.¹⁴⁵ Chiefs, unlike professional judges, were not external to or independent of society – they were an organ of society which was also one with the society. There was also no separation between governance and the judiciary.

In such a setting, chiefs often issued 'compromise' judgements which prioritised maintaining social order over a strict differentiation of innocent versus guilty parties.¹⁴⁶ There are sound material reasons why this might have been the case: the fusion of administrative and judicial roles in the person of the chief meant that they may have been concerned to maintain their own legitimacy and avoid risking disaffection through harsh sanctions; in modern terms we might describe this as built-in 'political interference' in a case.

Holleman certainly considered the role of the chief in maintaining order as a factor in compromise verdicts, but he seems to have understood this not so much as a matter of the potentially divergent imperatives of ruling effectively and dispensing impartial justice as an almost spiritual virtue in itself. Specifically, he argued that in native society there was *no such thing* as a purely individual dispute. Just as individuals here thought of themselves as group members before they considered their individual freedom,

*so also are their interests mutually intermingled and embedded in the unity of the communal interest within which all share. A dispute is thus also not only a conflict of the individual interests of two individual parties, but also a conflict of far wider scope: a conflict ... in the bosom of the whole interested group.*¹⁴⁷

¹⁴⁵ "zuiver inheemsche sfeer". Holleman, F.D. "Het Adatprivaatrecht van NEI in Wetenschap, Praktijk en Onderwijs", 432

¹⁴⁶ Davidson, J., and Henley, D., "Radical conservatism: The protean politics of adat", 21

¹⁴⁷ "zoo zijn ook hun belangen onderling vervlochten en ingebed in de eenheid van het gemeenschapsbelang waarin allen deelen. Een geschil is derhalve ook niet enkel een conflict van de individueele belangen van twee individueele partijen, maar tevens een conflict van veel wijdere strekking: een conflict ... in den boezem van de geheele belanghebbende groep." Holleman, F.D. "Het Adatprivaatrecht van NEI in Wetenschap, Praktijk en Onderwijs", 433

As such, group members were more likely to accommodate each other's needs and resolve issues through compromise. When disputes did reach the village chief, they were judged not purely on their individual merits, but as against the communal interest. In so doing the chief would be responsible for restoring order and harmony in the community.¹⁴⁸ Consequently, chiefs often did not strictly apply *adat* law. Holleman thus explained this phenomenon with reference to the apparent communal mindset of Indonesians. The conclusion, however, was the same: if judgements often deviated from *adat* law, then they were not good building blocks of the new *adat* law.

Ter Haar would presumably have offered the response that this would simply have to change: legal compromises were not possible if *adat* law was to be modernised and legal certainty achieved. Basing *adat* law on judicial decision would establish precedent; ter Haar noted that this would require judges to make the same decision when the substantial facts were the same, and thus to be guided by previous judicial decisions on similar matters.¹⁴⁹

However, for Holleman, the creative or "admodifying" character of native judges and chiefs was an essential feature of *adat* jurisprudence, which he was reluctant to give up.¹⁵⁰ While he acknowledged that professional judges in the NEI had moved beyond the role of a chief embedded within their community, he argued that judges which succeeded in satisfying the native feeling of justice did so by mimicking the way in which a chief administered justice, including their wide-ranging discretionary power, since the judges themselves suffered an "essential lack of contact with the warm legal reality."¹⁵¹ Judging cases purely on their individual merits, adhering strictly to rules of procedure, and making verdicts which vindicated one applicant and condemned another – "all of which is unsatisfactory to the native sense of justice."¹⁵²

Moreover, requiring judges to be guided by precedent was not a change which Holleman thought would improve the administration of justice in the NEI: it would only alienate it further from the living legal reality, which was, in his view, the source of satisfactory judgements and potential improvements. Precedent would remove individual judicial autonomy, but it would also make judges as a group far more powerful in shaping *adat*. The tyranny of which Holleman warned was "that of judges' law."¹⁵³

¹⁴⁸ Holleman, F.D. "Het Adatprivaatrecht van NEI in Wetenschap, Praktijk en Onderwijs", 433

¹⁴⁹ ter Haar, B. *Het adatprivaatrecht van Nederlandsche-Indië in wetenschap, praktijk en onderwijs*. 6

¹⁵⁰ "admodieerende". Holleman, F.D. "Het Adatprivaatrecht van NEI in Wetenschap, Praktijk en Onderwijs", 434

¹⁵¹ "wezenlijk gebrek aan contact met de warme rechtswerklijkheid". Ibid., 436

¹⁵² "wat allemaal naar inheemsch rechtsbewustzijn onbevredigend is." Ibid., 436

¹⁵³ "een nieuwen vorm van tyrannie... die van rechters-recht." Ibid., 440

The ter Haar-Holleman exchange had no time to influence colonial policy in the NEI: one year later, war broke out, and in 1942 the Japanese occupied the NEI.¹⁵⁴ Holleman himself had by this time left Europe for South Africa. However, this episode is nonetheless instructive for the insight it gives into Holleman's thought on the eve of his departure, and where it left the *adat* debate.

It should be clear from the discussion above that ter Haar's proposals, if implemented, would have made the administration of *adat* law far more manageable, modernising it at the cost of some chiefly autonomy and discretion for deviation. Holleman himself offered no counter-proposal to achieve modernisation, beyond restating the idea that it should come from the living legal reality of the people.

If fundamentalism is the rigid adherence to literal interpretations of a text, Holleman's stance here was a sort of anti-fundamentalism: rigid adherence to an unwritten organising principle. In insisting that *adat* law was found in spiritual or mystical underlying principles, Holleman refused to accept codification or judicial precedent. As such his argument represents the continued assertion of essential differences between Indonesian and Western law and society, an assertion which would keep *adat* locked in the category of the premodern and communal other, and would remain as a subject for legal ethnologists.

Meanwhile, there remained no clear path for *adat* law to become the state law. Burns writes that "the stuff of *adat* was impossible to order: it was just administratively impossible to maintain."¹⁵⁵ The classical *adat* school had been unable to resolve this problem, and Holleman had rejected ter Haar's attempts to do so. Since *adat* law was not a viable practical project, I would argue that its appeal – beyond the empathic impulses of some colonial officials and scholars – lay in precisely the general principles which Holleman asserted here: firstly, regarding the essential difference between Western and non-Western cultures and thought, and secondly, the overwhelmingly communal nature of Indonesian society. These have often been used as in ideologies of control. While van Vollenhoven and others sought to protect Indonesians from the ravages of foreign capital and law,

*the intellectual study and admiration of adat gave the Dutch, toward the end of their sway in Indonesia, a rationale and a terminology with which to make a particular virtue of indirect rule.*¹⁵⁶

The illiberal possibilities within *adat* law were also demonstrated in independent Indonesia. Reeve and Bouchier have demonstrated the links of the *adat* law school concepts to totalitarian or

¹⁵⁴ Burns, P. *The Leiden legacy*, 108

¹⁵⁵ *Ibid.*, 221

¹⁵⁶ Davidson, J., and Henley, D., "Radical conservatism: The protean politics of *adat*", 24

authoritarian tendencies within both Sukarno's 'Guided Democracy' and the 'family principle' of Suharto's New Order.¹⁵⁷ Both arguments flow through the figure of Raden Supomo, an *adat* legal scholar trained under van Vollenhoven, influenced by fascism, and chair of the committee which drafted the 1945 Constitution.

However, the 1945 Constitution was suspended almost immediately, and *adat* as an alternative legal system received relatively short shrift in the unitary republic of independent Indonesia. On this note Henley cautions against ascribing too much influence to colonial scholars at the risk of undermining local Indonesian views.¹⁵⁸ Nonetheless *adat* law has undoubtedly continued to inform traditionalist and communalist ideas of how politics in Indonesia should take place, and has been used to enforce obedience to the state.¹⁵⁹

This chapter has sought to trace Holleman's experience and thinking through his training under van Vollenhoven, his career in the NEI judiciary and bureaucracy, and finally his move into academia. He initially distinguished himself with careful research of local customs and practical advice for judges – notwithstanding a tendency to present an idealised traditional state of affairs in contrast to creeping commercial attitudes. However, as he entered the academy he seems to have shifted focus away from empirical research towards building the systematic schema of *adat* law, making influential and increasingly orientalist generalisations about the communal nature of Indonesian mindsets and legal systems, and opposing measures to modernise *adat* law. At this stage, I argued that this left *adat* law in a particularly impractical situation, which left its appeal largely at the level of traditionalist ideas of how society should be ordered.

¹⁵⁷ Reeve, D. *Golkar of Indonesia: An alternative to the party system*. Oxford University Press, 1985; Bouchier, D. "'The romance of adat in the Indonesian political imagination and the current revival'".

¹⁵⁸ Henley, D. "Custom and koperasi: the co-operative ideal in Indonesia", 106

¹⁵⁹ Davidson, J., and Henley, D., "Radical conservatism: The protean politics of adat", 23

Chapter Three

This chapter deals with Holleman's time in Stellenbosch. I begin by describing Holleman's earlier links to South Africa, his dependence on secondary sources as opposed to the judicial experience and field research he conducted in the NEI, and his attempts to develop a systematic framework for South African customary law. I also describe the academic and political context of the *Bantoekunde* department which he entered, noting the closeness of many *volkekundiges* (ethnologists) to the right wing and the National Party, and their tendency to produce exoticised or romanticised accounts of African society.

Moving to an analysis of Holleman's scholarly and teaching work, I argue that Holleman employed both the same dichotomous framework of primitive versus modern societies he established in his inaugural Leiden address, and the same concepts of the *regsgemeenskappe* (jural communities) and communal *beskikkingsreg* (right of avail or allocation) as in *adat* law. Holleman's course notes here demonstrate the impulse towards an overall systematic for South African customary law. They also helped to emphasise the value of tribes in African life, a point of difference with his work in the NEI.

I consider this further when I examine Holleman's impact and attempt to reconstruct his political position. His paternalist or romantic concern to preserve custom, led Holleman to support the 1951 Bantu Authorities Act, a key element of Apartheid. However, he also criticised Stellenbosch Afrikaners for not being open to cross-racial friendship. I argue that the two are reconcilable in a support for the 'positive' project of separate development.

While Holleman's work is certainly congruent with both this political position, and in some senses provides legal support for it, I will not attempt to prove Holleman's impact on political discourse, nor separate it from the mess of segregationists, *volkekundiges*, and National Party ideologues already at work. Rather, I conclude by considering factors which allowed Holleman to traverse different contexts in the way he did: the generalising tendencies within *adat* law thinking, the bifurcated nature of colonial states, the existence of a community of people thinking about similar issues in South Africa, and the common influence of Romantic thought.

Holleman's position in South Africa

Holleman managed to leave the Netherlands for South Africa shortly before the outbreak of World War Two in 1939, but his contacts with South African students and universities, particularly Stellenbosch, seem to have predated his own passage somewhat. At his prompting in 1937, the Board

of the Royal Institute for Linguistics, Geography and Ethnology of the Netherlands East Indies (the KITLV), of which he was a member, agreed to donate a complete series of *Adatrechtbundels*, the 45-volume compilation of regional *adat* law across the NEI, to Stellenbosch University.¹⁶⁰ Stellenbosch was apparently interested in *adat* scholarship but had no funds to purchase the literature. While this interaction may have been a result of Holleman's own promotion of his field, it also suggests that academics at Stellenbosch – likely in the *volkekunde* and Native Law and Administration departments – were already looking to the example of the Dutch administration of the NEI as a reference point on how to govern a native population.

Holleman also helped to welcome at least three groups of visiting South African students to Leiden during 1938 and 1939.¹⁶¹ The newspaper reports give no indication that Holleman played any special role in these visits, although elsewhere Holleman mentioned that he often hosted the group of Afrikaners studying at Leiden in his home.¹⁶² It would be safe to infer Holleman's ongoing interest in the country of his birth, and Afrikaner universities' and students' interests in cultural and institutional connections with Dutch universities, as well as, in the case of the exchange of *adat* literature described above, also in Dutch colonial practice.

More personally, Holleman sent his three children to South Africa well in advance of his own passage. Most relevant to his work was his son, J.F. 'Hans' Holleman. Born in 1915 in Tulungagung, Hans studied law and *volkekunde* at Stellenbosch from 1935, completing his Masters in *volkekunde* in 1938.¹⁶³ The topic of his dissertation was "Inheemse Regsgemeenskappe by die Zulu" (Indigenous Jural Communities amongst the Zulu).¹⁶⁴ The influence of *adat* concepts is already clear in the use of the term *regsgemeenskappe*; in the foreword of the dissertation Holleman junior explicitly acknowledged his borrowing of the Leiden *adat* law concepts, and the guidance of his father, in understanding 'Bantu law'.

In itself, this is unsurprising. Its relevance here is more in the way it prepared the way for his father's own shift to South Africa. While Frits Holleman left Leiden for Stellenbosch in 1939, it was not until 1941 that he taught classes.¹⁶⁵ He presumably spent this time developing course material and

¹⁶⁰ "Buitengewone Algemeene Vergadering", 20 November 1937. In *Notulen Van De Bestuurs- En Algemeene Vergaderingen van Het Koninklijk Instituut Voor De Taal-, Land- En Volkekunde Van Nederlandsch-Indië*, KITLV, 1937-1938. xii, xviii

¹⁶¹ De Maasbode, 29 Jan 1938. P5; De Maasbode, 24 December 1938. P5; Algemeen Handelsblad, 17 January 1939. P11

¹⁶² Holleman, F.D. "Stem u saam? Hoe hanteer mens die 'moeilike gevalle'?" *Die Eikestadnuus*, 14 October 1955. BPL 3437/3

¹⁶³ Kannemeyer, J. *Geskiedenis van die Afrikaanse literatuur*. Vol. 2. Academica, 1984. 342

¹⁶⁴ Holleman, J.F. *Inheemse regsgemeenskappe by die Zulu*, MA Volkekunde thesis, Stellenbosch University. 1938. BPL 3438/19

¹⁶⁵ Jaarboek, Universiteit van Stellenbosch, 1941. 181

researching the topics he was to teach. However, whereas in the NEI Holleman had built up his knowledge through years of experience in the colonial judiciary before entering academia, there is no evidence of his doing primary research in South Africa. Rather, he depended on existing literature; perhaps his two most prominent sources were his son's research on Zulu society, and the social anthropologist Isaac Schapera, for the Tswana. Indeed, he tended to present the Zulu and Tswana as contrasting ideal types, respectively more communally or more individually oriented, to which all Bantu societies conformed. Regarding land tenure, for example, he wrote:

*The available material is most complete regarding the Zulu and Tswana, on the basis of the information variously from Holleman Junior, and Schapera, so that the description often contrasts the two. Still the description is of universal value, because a) fortunately the Zulu and Tswana are representative of almost all nations and tribes of the southern Bantu and b) it also makes use of the more... sporadic information from all possible writers... which can confirm the Zulu-Tswana information.*¹⁶⁶

To the extent that Holleman depended on secondary sources rather than his own fieldwork, and the degree to which he, particularly in his course notes, attempted to place this data in a broader system or framework, he seems to have been aiming to play a similar role in South African customary law to that which his old mentor van Vollenhoven had for *adat* law in the NEI. Along these lines, Holleman had, before his death in 1958, begun a comprehensive study of Bantu law with his son.¹⁶⁷

When Holleman arrived in Stellenbosch, he took up the position of *professor extraordinaire*, teaching *Naturelle Reg en Administrasie* (Native Law and Administration)¹⁶⁸, which, together with *Volkekunde* (ethnology) and Bantu languages, formed one department known as *Bantoe-kunde* (Bantu Studies). The department was still relatively young, with Werner Eiselen only having established the discipline of *volkekunde* at Stellenbosch (and by extension the country) in the 1920s. The first head of what would become the *volkekunde* department, from 1926 to 1936, the German-educated Eiselen trained a generation of students who would move on to establish or staff *volkekunde* departments in other

¹⁶⁶ "Die voorhande material is egter die mees volledig t.o.v. die Zoeloe en die Tswana, op grond van die gegewens onderskeidenlik van Holleman jr. en van Schapera, sodat die beskrywing ook steeds as't ware die Zoeloe en die Tswana standpunte teenoor mekaar stel. Tog bly die beskrywing van universele waarde, omdat (a) toevallig juis die Zoeloe en Tswana representatief is vir amper alle volke en stamme van die suidelike Bantoe en (b) naas genoemde twee bronne eweens gebruik gemaak is van die meer ... sporadiese gegewens van alle moontlike skrywers... wat die Zoeloe-Tswana gegewens kan bevestig en aanvul." Holleman, F.D. *Bantoe grondereg*. Stellenbosch University, 1952 (1941). 1

¹⁶⁷ Vermeulen, H. "Adatrecht en Volkenkunde", Leiden, 2001. 2

¹⁶⁸ The subject was initially just called *Naturelle Administrasie* (Native Administration). For purposes of consistency I use its later name throughout.

universities.¹⁶⁹ This set the template for how *volkekunde* would be practiced, and its conceptual framework.

While *volkekundiges* and social anthropologists (largely at English-speaking universities) initially collaborated relatively closely, *volkekunde* would split into an entirely separate discipline with a heavily theoretical slant, leaving comparatively little space for empirical observations. Gordon notes that ethnographies would be produced on the basis of minimal fieldwork, and based generally on interviews rather than participant-observation.¹⁷⁰ Sharp argues that the organising principle of *volkekunde* was *ethnos* theory:

*South African volkekunde ... assigns overwhelming explanatory power to the phenomenon of ethnicity, which it conceives in the narrowest, most rigid terms possible. Ethnos theory starts with the proposition that mankind is divided into volke (nations, peoples) and that each volk has its own particular culture, which may change but always remains authentic to the group in question.*¹⁷¹

Bank, though, cautions that this by no means diminished an underlying obsession of *volkekundes* with race.¹⁷² While at Stellenbosch, Eiselen's curriculum included straightforward ethnographies, but also topics such as 'Principles of racial theory', 'Physical anthropology' (including methods for measuring physical racial difference) and 'Racial hygiene' – strongly indicating influences of scientific racism.¹⁷³ This was likely less prominent after the defeat of the Nazis in World War Two, but the obsession with race did not go away, and ethnicity and culture arguably became to some extent masks for racism.

Eiselen had left Stellenbosch by the time Holleman arrived in 1939, but his former students, including P.J. Schoeman and P.J. Coertze, were now working in the department and continuing the pattern which Eiselen had established, including the tendency towards classification based on "cultural essence" and race. Both Schoeman and Coertze were senior members of the *Ossewabrandwag* (Oxwagon Sentinel - OB), a militarist, quasi-fascist and pro-German grouping which opposed South Africa entering World War Two on the side of the Allies.¹⁷⁴

¹⁶⁹ Bank, A. "Fathering volkekunde". 163

¹⁷⁰ Gordon, R. "The white man's burden: Ersatz customary law and internal pacification in South Africa", 372; Gordon, R. "Apartheid's anthropologists: The genealogy of Afrikaner anthropology", 539

¹⁷¹ Sharp, J. "The roots and development of volkekunde in South Africa", *Journal of Southern African Studies* 8, no. 1 (1981): 19

¹⁷² Bank, A. "Fathering volkekunde", 177

¹⁷³ Coertze, R. "Aanvang van volkekunde aan Afrikaanstalige universiteite in Suid-Afrika", 26

¹⁷⁴ Gordon, R. "'Tracks which cannot be covered': PJ Schoeman and Public Intellectuals in Southern Africa", *Historia* 52, no. 1 (2007): 106; Dubow, S. "Racial irredentism, ethnogenesis, and white supremacy in high-apartheid South Africa", *Kronos* 41, no. 1 (2015): 261

Nonetheless, Holleman and Schoeman in particular seemed to be relatively close; at the least Holleman did not find Schoeman's presence problematic. Schoeman had already supervised Hans Holleman's MA thesis research; apart from working together until 1947 – including the war period and thus the entirety of Schoeman's OB activity, Holleman's wife Adriana also later expressed interest in translating Schoeman's *Fanie* books – novels for Afrikaans youth – into Dutch. Frits Holleman contacted a number of publishers in the Netherlands to gauge interest in the books, assuring them of their outstanding qualities.¹⁷⁵ The books, which were prescribed reading in Afrikaans primary schools, demonstrated paternalist and romantic views of Africans, mixing exotic description of their customs with portrayals of extreme submissiveness to whites.¹⁷⁶

The presence of right-wingers in the *volkekunde* and associated departments was neither a coincidence, nor a minority phenomenon: almost all *volkekundiges* were aligned to the Afrikaner Nationalist cause. While a group like the OB was on the fringe of even Nationalist politics and primarily aggrieved about the wartime alliance with the British, this occurred within an atmosphere of white supremacism almost as a given. Many *volkekundiges* were also leading members of the Afrikaner *Broederbond*, a secret society established to advance Afrikaners' economic and political interests.¹⁷⁷ Emphasising one's own cultural distinctness and destiny as a nation – as Afrikaner nationalists were wont to do – could easily be a pivot to classifying the cultural differences of others. Moreover, *volkekunde* was to some extent pragmatically justified, as the study of African 'tribes' would presumably allow for their more efficient rule.

Consideration of the 'native question' was arguably *the* issue which captured Afrikaner Nationalists' attention. In 1943 Coertze, F.J. Language, and B.I.C. van Eeden – all working in the Stellenbosch department of *Bantoekunde* – had written a pamphlet calling for policy of total *apartheid* (racial separation). It was published by the *Ossewabrandwag*.¹⁷⁸ This is not to suggest that Apartheid as it developed from 1948 onwards was the straightforward outgrowth of Afrikaner intellectuals' master plans, but the theoretical expositions undoubtedly helped legitimise the real-world political programme.

There is one final point regarding the political and institutional context which Holleman entered. During the Apartheid era *Volkekundiges* were close to the state; Eiselen himself would eventually become the Apartheid-era Secretary of Native Affairs (working under Hendrik Verwoerd) and a

¹⁷⁵ See for example, Holleman, F.D. *Letter to Uitgeverij Ploegsma*, 9 June 1957. BPL 3437/3

¹⁷⁶ Goodrich, A. *Biltong Hunting as a Performance of Belonging in Post-Apartheid South Africa*. Lexington Books, 2015. 120

¹⁷⁷ Van der Waal, C. S. "Long walk from volkekunde to anthropology: reflections on representing the human in South Africa", *Anthropology Southern Africa* 38, no. 3-4 (2015): 221

¹⁷⁸ *Ibid.*, 221

principal architect of Apartheid. Holleman's time in Stellenbosch – the 1940s and 1950s – represented the peak of the university's power within Afrikaner Nationalist circles. Organisations like the South African Bureau of Racial Affairs (SABRA), ostensibly a Stellenbosch think tank and once again counting a number of *volkekundes* in its membership, was both an enthusiastic supporter of Apartheid and for a time, capable of exerting some influence on what shape the policy of Apartheid took.¹⁷⁹

While not all individual *volkekundiges* wielded extensive political power, *volkekunde* as a whole constituted “a form of knowledge and a form of power” which went beyond academia, and legitimated practices of inclusion and exclusion, justifying Apartheid social engineering.¹⁸⁰ Eiselen's career trajectory, moving from a university *volkekunde* department into government – and particularly the Department of Native Affairs – was not exceptional. Many prominent *volkekunde* scholars did similarly. Others found work in the army, and at black universities in the homelands.¹⁸¹

This, then, was the environment which Holleman entered, and the likely trajectory of his students. While the pattern of scholarship and the political affiliations of the department had already been set, the study of customary law itself was as yet comparatively undeveloped; I will discuss Holleman's effects on the department later, following a closer analysis of his work itself.

Primitive and modern law

Acting as an introduction to his theory for Native Law and Administration students, Holleman's course notes on *Foundations of Primitive Law* also reveal the shift he made when moving from *adat* law in the NEI and Leiden, to customary law in South Africa: from speaking in a relatively *adat*-specific way, Holleman pivoted to a framework of primitive and modern which *all* societies, and laws, could fit into. He had already begun to construct this framework in his 1935 Leiden address on the communal trait; there are a number of points made there which were repeated here. These will be discussed briefly rather than completely restated; I will particularly highlight the case of *rukun*, which I argue Holleman had transposed as an African means of dispute resolution, and the ways in which Holleman had extended his already-expressed views, especially the biological basis for his claims.

¹⁷⁹ Lazar, J. “Verwoerd versus the ‘Visionaries’, The South African Bureau of Racial Affairs (Sabra) and Apartheid, 1948-1961”, in Bonner, P., Delius, P., and Posel, D., eds. *Apartheid's Genesis, 1935-1962*. Ravan Press, 1993. 386

¹⁸⁰ Gordon, R. "Apartheid's anthropologists: The genealogy of Afrikaner anthropology", 535

¹⁸¹ Sharp, J. "The roots and development of volkekunde in South Africa", 16

The continuity began with textbook romanticism, very much in line with the *adat* law heritage, going back to its influence from the German Historical legal school:¹⁸²

*The legal system and culture of a society are creations and products of the spirit of the relevant population group, and these creations reflect and manifest the intention and special condition of the subjective (creative) spirit.*¹⁸³

As emphasised previously, this claim has as a corollary that alternative legal systems will of necessity fail to take root, and will presumably never be applicable to that society.

Despite Holleman's paternalist good will towards 'primitive' societies, he nonetheless constructed a dichotomy which defined them by opposition to an idealised form of the modern society:

*Institutions in primitive societies ... still demonstrate (1) a more communal, (2) more concrete, real or vivid, and (3) more emotionally oriented nature, for example with religious-magical or traditional aspects, while the corresponding institutions in our own and in any other more modern societies, are, by contrast, marked by (1) a more individually oriented, (2) more abstract and (3) more rational or sober ... character.*¹⁸⁴

This too was an almost-verbatim repeat of parts of his Leiden address.¹⁸⁵ Holleman saw South Africa in precisely these dichotomous terms. In another text, he confirmed his expansion of *adat* law theory to universal applicability, explaining the similarity of *adat* law to South Africa in terms of both societies' level of development:

That such a strong degree of similarity in structure, principles and even in details, can nonetheless exist between the two legal systems, that of the Indonesians and that of the Bantu, between which not the slightest degree of genetic connection can be shown, is in itself a remarkable phenomenon; a phenomenon which one can only explain thus, that van Vollenhoven ...discovered and described more than just an Indonesian legal system. He in fact revealed a universal legal system and legal framework for peoples

¹⁸² Burns, P. *The Leiden legacy*, 232

¹⁸³ "die regsinstellings en ander kultuurgoedere [is] die skeppinge en produkte van die gees van die betrokke bevolkingsgroep, maar ook weerspieel en manifesteer hierdie skeppinge steeds die bedoeling en selfs die besondere gesteldheid van die subjektiewe (skeppende) gees." Holleman, F.D. *Grondbeginsels van Primitiewe Reg*. Stellenbosch University, 1950 (1941). 1

¹⁸⁴ "Instellings in die meer primitiewe samelewing ook minder ontwikkel is en nog (1) 'n meer commune en (2) 'n meer reele, konkrete of aanskoulike en tewens (3) 'n meer emosioneel gerigte, d.i. 'n meer religieuse, magiese of tradisionele aspek vertoon, terwyl die soortgelyke instellings in ons eie en in enige ander meer modern samelewing juis, teenoorgesteld, gekenmerk word deur (1) 'n meer individueel gerigte, (2) 'n meer abstrakte en tewens (3) meer rasioneel of nugter-saaklike ... karakter." Ibid., 1

¹⁸⁵ Holleman, F.D. *De Commune Trek in het Indonesisch Rechtsleven*. 17

*who stand on the same or almost the same level of development as the Indonesian people.*¹⁸⁶

While he discussed the religious versus rational, and real versus abstract characteristics in greater detail in his course notes than in the Leiden address, the crux of his framework once again came down to communal versus individual interests. In Bantu societies, “the communal interest and right of the community dominates all individualistic interests and rights”.¹⁸⁷

A further part of the romantic content of the text concerned the *organic* nature of these ‘other’ societies:

*every Bantu is aware of the special position of both [the chief and fellow members of the group] within the super-individual organism. They indeed experience the chief as the ‘organ by extension’ namely the ‘head’ of the organism (the regsgemeenskap); by means of the chief the regsgemeenskap leads and rules itself; the chief as an organ thinks and acts out the being of the organism and is thus in agreement with the will and wishes of the community.*¹⁸⁸

Ideas of harmony and *volkswil* often lend themselves to highly hierarchical or autocratic societies. This has already been noted regarding authoritarianism in Indonesia. Such arguments also laid the basis for a traditionalist endorsement of chiefly rule, regardless of any abuses of this power – this will be seen later in Holleman’s support for the Bantu Authorities Act.

Within this framework, Holleman described characteristics of Bantu law which seem to have been taken directly from *adat* law. *Rukun*, or amicable dispute resolution, is a case in point. In his study on Tulungagung *adat* law, Holleman described *rukun* as a norm underpinning all of Indonesian legal life. It is worth repeating the quote here. In Indonesian society there was, according to Holleman,

¹⁸⁶ “Dat daar tussen die twee regsstelsels: die van die Indonesiers en van die Bantoe, waartussen nie die minste genetiese verband aangetoon kan word nie, nietemin ‘n so sterk mate van ooreenkoms in struktuur, grondbeginsels en dikwels selfs in besonderhede kan bestaan, is op himsself ‘n uiters merkwaardige verskynsel; ‘n verskynsel wat mens waarskynlik alleen so kan verklaar, dat van Vollenhoven... meer ontdek en beskrywe het as net ‘n Indonesiese regstelsel. Toe het hy veeleer geopenbaar ‘n universele regstelsel en regskader vir volke wat op eenselfde of nagenoeg dieselfde ontwikkelingspeil staan as die Indonesiese volke.” Holleman, F.D. *Bantoe grondereg*. 1

¹⁸⁷ “die commune belang en reg van die gemeenskap alle geindividualiseerde belange en regte domineer.” Holleman, F.D. *Grondbeginsels van Primitiewe Reg*. 4

¹⁸⁸ “iedere Bantoe [staan] altyd vooroe die spesiale posisie van albei binne die bowe-individuele organisme. Hulle belewe inderdaad nog die hoof as die ‘orgaan-by-uitstek’, naamlik die ‘hoof’, van die organisme (die regsgemeenskap); deur middel van die hoof lei en bestuur die regsgemeenskap homself; die hoof as orgaan dink en handel uit die wese uit van die organisme en dus in ooreenstemming met die wil en wense van die gemeenskap.” Ibid., 5

*a certain mutual tolerance, an avoidance of disputes through a politics of give and take, a hesitance to cause offence ... a tendency to wait and see whether it will come to that [whether a dispute will come to confrontation] and a felt obligation to abandon one's existing right, to delay its exercise or act more leniently if it is not strictly necessary and especially burdensome for the opposing party.*¹⁸⁹

Compare this to the following quote regarding African attitudes towards disputes:

*...every individual must carefully weigh his own interests against those of his fellow community members; he must avoid difficulty and strife, be compliant and flexible, so as not to disturb the peace and balance in the life of the community. He is directed by how his fellow members think. He must first discuss his intentions with his fellow members and kraal chief, to ensure that he will be acting in concordance with the community interest.*¹⁹⁰

The similarity between the two quotes is striking. In both societies, Holleman saw a cultural willingness to compromise one's own claims in a disagreement, and even an obligation to avoid disputes. Conflict and confrontation seem to have been seen as negative in and of themselves. The key here lies in the second quote – conflict would disturb the “peace and balance” of the community.

While incentives towards amicable dispute settlement are presumably relatively common, *rukun* was initially understood as something highly particular. Indeed, Holleman had argued that it underlaid all of Indies society. This shows Holleman beginning not only to generalise from *adat* law, but also fitting what he found into the concepts he developed in Indonesia, in a way which flattened differences across different social settings.

There were also elements of his vision in the Leiden address which he built on here. For instance, in his Leiden address he had already linked the law of a society to both the spirit of that society, and the critical mental facilities of individuals within that society, so that a primitive legal system cohered with

¹⁸⁹ *“een zekere onderlinge verdraagzaamheid, een vermijden van geschillen door een politiek van geven en nemen, een schroom om te kwetsen ... eene neiging om af te wachten of het wel zoover zal kpmen en een gevoelde verplichting om af te zien van een bestaand recht, dan wel de uitoefening daarvan uit te stellen of te lenigen indien dit niet strikt noodzakelijk is en bovendien pijnlijk voor de wederpartij.”* Holleman, F.D. *Het adatrecht van de Afdeeling Toeloengagoeng*. 23

¹⁹⁰ *“iedere individu by die versorging van sy belange en die uitoefening van sy regte noukeurig rekening hou met die van sy medelede; hy moet gedurig moeilikheid en wrywing met andere vermy, plooibaar en inskiklik wees om nie die vrede en die ewewig in die lewensgemeenskap te verstoer nie. In die verkeer voel en tas die Bantoe gedurig hoe sy medelede dink en daarna rig hy hom. Iedere enigsins belangrike voorneme wat hy het sal hy eers bespreek met medelede en met sy kraalhoof, om te verneem of hy in ooreenstemming met die gemeenskapsbelang gaan handel.”* Holleman, F.D. *Grondbeginsels van Primitiewe Reg*. 3

a primitive society and comparatively less developed critical facilities of individuals in that society.¹⁹¹ He repeated that here, but took it another step further here, arguing indeed that this had a *biological* basis as well, which was apparently established by a higher power. In a section entitled “The biological basis of life communities and the law”, Holleman wrote,

*From experience with biological science we can deduce that humankind carries a specific life plan, which has similarities with other more developed animal species, but which is also different from all the others... The Creator has given a code of principles for each of the types of animals including humans, in [the form of] their life plan.*¹⁹²

The life plans of humans thus gave rise to the condition of their spirit, and also their law and indeed all social order:

*it follows irrefutably that in human society – equally well as in any other of the higher developed animal species – congenital and unchangeable, hereditary characteristics – thus sound biological principles – form the basis not just of all life communities, the organisation thereof and the order within them, but a fortiori everything which the human does as individual or member of a group.*¹⁹³

Little evidence was presented for these claims, beyond brief discussion of various ‘human’ traits found in animals as well. While Holleman did allow for human autonomy in building out the shape of their societies and laws according to their needs and circumstances, he ultimately held that they could not stray from the principles which were innate to them.

While it is true that this may have been just a fuller exposition of Holleman’s already-held principles, it is possible that he was also influenced by the strong trend within Stellenbosch *volkekunde* towards scientific racism and a search for racial difference in physical and biological characteristics – as mentioned previously, the *volkekunde* curriculum for a long time included subjects such as ‘Physical Anthropology’ and ‘Racial Hygiene’.¹⁹⁴ While Holleman did not explicitly mention race or biological markers of race, and indeed suggested that the basic principles of human life were universal, he

¹⁹¹ Holleman, F.D. *De Commune Trek in het Indonesisch Rechtsleven*. 15

¹⁹² “Uit bestaande ervarings van die biologiese wetenskap kan ons o.m. aflei dat die mens-as-soort ‘n spesifiek eie lewensplan saamdra, wat wel in verskillende opsigte ooreenkoms vertoon met die van ander, meer-ontwikkelde diersoorte, maar wat nog van enige ander seer verskillend is... ‘n kode van grondbeginsels het die Skepper vir elkeen van die soorte van diere, die mens inkluis, saamgegee in sy lewensplan.” Holleman, F.D. *Grondbeginsels van Primitiewe Reg*. 14

¹⁹³ “[Dit] volg onafwysbaar dat in die menslike samelewing – ewe goed as in die van enige ander van die hoer ontwikkelde diersoorte – aangebore en onveranderlik ooreerglike, dus suiwer biologiese grondbeginsels die grondslae vorm nie alleen van alle lewensgemeenskappe, die organisasie daarvan en die ordereeling daarbinne nie, maar a fortiori van alles wat die mens, as enkeling of as medelid in groepsverband, verrig.” Ibid., 12

¹⁹⁴ Coertze, R. “Aanvang van volkekunde aan Afrikaanstalige universiteite in Suid-Afrika”, 26

nonetheless set up an extreme form of biological determinism. This has some overlap with scientific racism, in that both support an idea of essential differences between groups as having a biological basis. For Holleman, social and legal differences were *God-given facts* and could not be changed.

Bantu *regsgemeenskappe* and land law

Holleman's account of Bantu law depended strongly on the *adat* concept of *regsgemeenskappe*, and the set of legal relations which that entailed, specifically regarding control of land. This section will demonstrate the transposal of the concepts of *regsgemeenskappe* and communal *beskikkingsreg* (right of avail) to South African societies.

Holleman explained a *regsgemeenskap* as

*a unit which (a) behaves as an autonomous and super-individual or corporate unit within its boundaries (towards its members) and beyond its boundaries (towards strangers and other regsgemeenskappe); and (b) possesses an autonomous administration and especially legal life.*¹⁹⁵

Much of his course notes on *Bantoe-regsgemeenskappe* (Bantu jural communities) concern the structure of *regsgemeenskappe* amongst Zulu and Tswana societies, their relation to smaller and larger *regsgemeenskappe*, and the process of their formation. As noted he depended primarily on the work of his son, for the Zulu social structure, and Isaac Schapera, for Tswana. While the concept of an autonomous, corporate unit within which law is made, was transplanted relatively straightforwardly from the NEI to a South African context, the actual units which corresponded with the concept were somewhat different; at least, Holleman remained sensitive to empirical ethnographic detail, although he nonetheless presented each society as something of as an ideal type. Here he described – based on Holleman junior – the structure of a Zulu kraal (a household or cluster of huts):

If one enters from the kraal gate, behind the animal enclosure in the middle of the horseshoe-shaped ring of huts, is the hut and house of the inkosikazi enkulu [chief's mother], the indlu'nkulu, and where the chief wife or inkosikazi moves after death of her mother-in-law). An imaginary line from the kraal gate to the entrance of the

¹⁹⁵ “*n sodanige eenheid wat: (a) hom van binne (d.i. teenoor sy lede, die groepsgeenote) en na buite (d.i. teenoor groepsvreemdes en ander gelykstandige regsgemeenskappe) gedra as 'n selfstandige en bowe-indiwiduele of korporatiewe eenheid; en (b) 'n eie selfstandige huishouding en (veral) regslewe besit.*” Holleman, F.D. *Bantoe-regsgemeenskappe*. Stellenbosch University, 1952 (1941). 1

*indlunkulu divides the kraal into two halves: the right and left hand sides, which... are ranked as the higher and lower kraal halves respectively.*¹⁹⁶

The tendency to idealise and generalise was already established in Holleman's earlier work. However, in this case it may also have been a consequence of his dependence on secondary literature. Delius writes of the problematic nature of ethnographic data in South Africa:

*A more general problem with much of the material generated by commissions and other accounts [on custom and land tenure] by outsiders was that it was normative, idealised, and rule-centred.*¹⁹⁷

Apart from the ethnographic detail, however, the biggest difference between *regsgemeenskappe* as Holleman described them in South Africa and *rechtsgemeenskappe* in the NEI were the number of hierarchical levels at which *regsgemeenskappe* were present in South African societies.¹⁹⁸ In Tulungagung Holleman exclusively spoke of *rechtsgemeenskappe* at the level of *desas*, or villages.¹⁹⁹ This was consistent with van Vollenhoven and the *adat* school generally, which tended to avoid administrative units larger than the *desa*, instead favouring "an intricate jigsaw puzzle of independent mini-polities".²⁰⁰ However, in South Africa, Holleman painted a picture of concentric circles of ever-more comprehensive *regsgemeenskappe*, each with their own autonomous domain: amongst the Zulu, from a group of kraals, to a tribal ward encompassing multiple kraal groups, to a tribe encompassing multiple wards, and potentially a kingdom encompassing multiple tribes.²⁰¹ Amongst the Tswana, the smallest *regsgemeenskappe* were extended family groups, with tribal wards encompassing multiple family groups, and a tribe encompassing multiple wards.²⁰²

Each *regsgemeenskap* had its own sub-sections, with their own autonomous functions – but united by common interest. Within each small *regsgemeenskap* was the potential to grow into a more

¹⁹⁶ "As mens deur die kraalhek die kraal binnetree staan agter die beeskraal in die midde van die hoefystervormige kring van hutte die hut en huis van die inkosikazi enkulum die indlu'nkulu waarin ook, na die oorlyde van haar skoonmoeder, die hoofvrou van die khosi, die inkosikazi, haar intrek sal neem. 'n Denkbeeldige lyn getrek van die kraalhek na die ingang van die indlunkulu verdeel die kraal in twee helftes: ... die regter- en linkerkraalhelftes, wat... geld as die hoer en die laer kraalhelfte." Holleman, F.D. *Bantoe-regsgemeenskappe*. 8

¹⁹⁷ Delius, P. "Contested Terrain: Land Rights and Chiefly Power in Historical Perspective", in Claassens, A., ed. *Land, power & custom: Controversies generated by South Africa's communal land rights act*. Juta and Company Ltd, 2008. 212

¹⁹⁸ The varying spelling of *regsgemeenskap/rechtsgemeenschap* reflects usage either in an Afrikaans or Dutch context respectively.

¹⁹⁹ See for example, Holleman, *Het adatrecht van de Afdeeling Toeloengagoeng*. 44

²⁰⁰ Burns, P. *The Leiden legacy*, 220

²⁰¹ Holleman, F.D. *Bantoe-regsgemeenskappe*. 5

²⁰² *Ibid.*, 23

complex larger one, and within each large *regsgemeenskap*, the potential to collapse and fragment.²⁰³ While change was possible, Holleman seems to view most of this change as ultimately occurring in an equilibrium: as one grew, another would decline.

The remains of conquered African kingdoms and other polities, which Holleman referred to as tribes, were in some respects impossible to ignore. Still, he was, as ever, capable of broad generalisations about these polities:

*to exclusively consider [the isifunda or tribe] as just an administrative unit... would be doing it an injustice. For Bantu nations in general and the Zulu in particular the tribe (isifunda) represents a historic and traditional value which is infinitely greater than simply 'a regsgemeenskap of larger format than an isigodi (ward)', or an administrative jurisdiction... In its inner shape the isifunda to a large degree retains its historic and traditional value of the highest, the most complete and most independent form, within which the related members of one clan and one clan name (isibongo) could bring their political unit to expression within their own traditional tribal territory.*²⁰⁴

This amounted to little more than an assertion that Africans had a strong tribal identity. As with the *adat* law emphasis on *desa* life which suited bureaucrats looking to extend their control over the countryside, Holleman's emphasis on tribes as the most complete, most authentic expression of African identity was potentially politically useful, whether it was intended as such or not.²⁰⁵

It may also have been a consequence of depending on secondary sources in an environment in which officials and academics frequently valorised 'tribal' life over other more complicated forms of identity which Africans might hold. The tribe described here is to some extent analogous to the nation in modern societies; this dovetailed well with the homelands policy, as tribes could in theory develop along their own lines to become modern nations.

As in the NEI, the most important function of *regsgemeenskappe* was their collective right of allocation of land, the *beskikkingsreg*, which Holleman here called the communal right to land.²⁰⁶

²⁰³ Holleman, F.D. *Bantoe-regsgemeenskappe*, 13

²⁰⁴ "Uitsluitlik [die stam/isifunda] te beskou as 'n administratiewe eenheid ... sou ons die isifunda of stam veronreg. Vir die Bantoevolke in die algemeen en vir die Zoeloe in die besonder verteenwoordig die stam (isifunda) 'n historiese en tradisionele waarde wat oneindig veel groter is, as blootlik die van regsgemeenskap van groter format as 'n isigodi, of die van administratiewe ressort... Na sy innerlike gedaante het die isifunda tot 'n groot mate nog behou sy historiese en tradisionele waarde van die hoogste, die mees volkome en mees selfstandige vorm, waarin die bloedverwante lede van een geslag (clan) en van een geslagnam (isibongo) hul staatkundige eenheid tot uitdrukking kon bring binne hul eie tradisionele stamgebied." Ibid., 19

²⁰⁵ Burns, P. *The Leiden legacy*: 56

²⁰⁶ Holleman, F.D. *Bantoe grondereg*. 2

Each *regsgemeenskap* was autonomous as regards the land within its own borders. Within the *regsgemeenskap*, every group member held an equal right to derive a livelihood from the area, as administered by the chief. According to Holleman this underpinned a whole complex of other, particular and individualised rights – such as the right to forage and graze in common areas, or even the right to access water sources on land which had been allotted to others in the same, or even a higher *regsgemeenskap*.²⁰⁷ This same relationship was present between what Holleman called the ‘Bantu ownership right’ (indicating that it was not the same as the ‘Western’ right of private property) and the communal right: ‘Bantu ownership’ was underpinned by the communal right and was not considered a separate division of the communal land; in cases of communal interest, this right could be rescinded.²⁰⁸

While this is overwhelmingly the same as the system described in the NEI, there were subtle differences. For example, ‘native owners’ in Tulungagung were individuals; here, ownership rights were still held by a group (such as a household or kraal).²⁰⁹

As in Tulungagung, only group members could become owners within that communal area.²¹⁰ Unlike in Tulungagung, however, where land could be temporarily or permanently alienated for cash, in South Africa, cash transfers of land were not permitted: “the ‘Bantu owner’ may not sell, rent, mortgage, and amongst the Tswana also exchange, his land.”²¹¹

Despite presenting hard and fast rules, Holleman was still sensitive to exceptions, and (somewhat) to changing practice. For example he mentioned that the reservation of ‘Bantu ownership’ for a group member was no longer maintained for agricultural land amongst the Tswana; what’s more, there were cases of unmarried Tswana men receiving individualised land ownership (rather than owning land as part of a group).²¹² Indeed, he noted that permanent alienation of land to outsiders, while legally forbidden, happened amongst “most Bantu nations” as an exception, when approved by the tribal chief and group members.²¹³

²⁰⁷ Holleman, F.D. *Bantoe grondereg*, 11a

²⁰⁸ *Ibid.*, 17

²⁰⁹ Holleman, F.D. *Het adatrecht van de Afdeeling Toeloengagoeng*. 73; Holleman, F.D. *Bantoe grondereg*, p11a

²¹⁰ Holleman, F.D. *Bantoe grondereg*. 17

²¹¹ “*die Bantoe-besitter sy grond nie mag verkoop, verhuur, verpand en by die Tswana ook nie vir ‘n ander stuk grond mag verruil nie.*” *Ibid.*, 19

²¹² *Ibid.*, 17,20.

²¹³ “*die meeste Bantoe-volke*”. *Ibid.*, 10

Policy and politics

Holleman's policy proposals will by now be somewhat expected. Having laid out his framework of primitive versus modern societies, Holleman's assertion of essential differences between black and white people justified differential treatment:

*As a matter of fact, difference of mentality and civilisation, and of legal and political institutions between the Bantu and European groups of population is so large and obvious, that these exceptional conditions have at all times been an inducement to furnish different provisions for the Bantu.*²¹⁴

Although such statements fit more closely the rhetoric of the 19th Century than that of the decade which saw the beginning of decolonisation in Africa, this was nonetheless not an exceptional view at the time, particularly in South Africa.

Despite depending exclusively on secondary sources, Holleman's work in South Africa demonstrated a somewhat nuanced understanding of customary law, and he maintained the complex mix of essentialism and sensitive observation which was evident in his NEI scholarship. On the former, he made broad generalisations about gender, describing a law making it illegal to force any woman into marriage as "flying in the face of Bantu law, and of serious nuisance-value in every normal Bantu society".²¹⁵ In fact, one of the major critiques of the codification of customary law by European anthropologists and colonial administrators is that by relying on informants who tended to be elder men, the rights of women and areas of female autonomy in African societies tended to be obscured, extending patriarchal power beyond what it was before colonialism. This applies equally to the South African context.²¹⁶

However, he also described customary law as "living" law, which is subject to change as practice changes, and warned against the dangers of a rigid, prescriptive codification of customary law.²¹⁷ This is a perspective which has gained prominence recently for its democratic potential (although there is no evidence that this potential is what Holleman was interested in), and has been reaffirmed by South Africa's Constitutional Court.²¹⁸

²¹⁴ Holleman, F.D. "The Recognition of Bantu Customary Law in South Africa", in *The Future of Customary Law in Africa*. Leiden University Press (1955). 233

²¹⁵ Holleman, F.D. "The Recognition of Bantu Customary Law in South Africa", 237

²¹⁶ Thipe, T. "Defining Boundaries: Gender and Property Rights in South Africa's Traditional Courts Bill", *Laws*, 2, no. 4 (2013): 490

²¹⁷ Holleman, F.D. "The Recognition of Bantu Customary Law in South Africa", 235

²¹⁸ Claassens, A., & Mnisi, S. "Rural women redefining land rights in the context of living customary law", 491

Holleman was also clearly sensitive to the ways in which colonialism and indirect rule had reshaped chiefly power. He described the mistaken approach of colonial authorities as to assume that chiefs had unlimited power, understanding them to be tribal despots: “To the Law and Regulations the *Rule of Chiefs and Headmen* is invariably of a *single-handed, autocratic* character”; in fact, he argued, chiefs relied heavily on consultation of both their councillors, and assemblies of the entire community, and were generally not powerful enough to rule autocratically.²¹⁹

Nor was he under any illusions about the more creative aspects of indirect rule, such as the invention of new ‘tribes’ for administrative convenience:

*The N.A [Native Administration] Act, 1927, and ensuing Regulations are, however, only concerned with the ‘tribes’ the Government has in the course of time created, largely for the convenience of its Native Administration, and which very often are not identical with the genuine Bantu tribes.*²²⁰

While the power to subdivide ‘tribes’ or create new ones was legally supported, Holleman also noted that “Consultation of the people of the tribes, however, for whom the operation is of vital importance, is not mentioned.”²²¹

Although stopping short of questioning the objective reality of ‘tribes’ in a precolonial setting, Holleman nonetheless displayed awareness of some key ways in which interaction with colonialism had transformed customary law and chiefly power. Indeed, it is continually surprising to see such sensitivity interspersed with sweeping statements about primitive societies, although it is comprehensible when one remembers that his concern was largely to protect and extend recognition of traditional legal systems, and decrease Western legal incursion into African societies.

Where others may have seen the ‘traditional’ societies as so transformed (and integrated into broader socio-economic structures) as to necessitate a uniform common law covering all people, a concern for the ways in which custom had been distorted was for Holleman the first step to reconstructing that custom.

This is evident in his opinions about the extent of so-called ‘detrribalised’ Africans and his rejection of syncretism or forms of representative government for black South Africans. While Holleman admitted that colonialism, administration under foreign legal provisions, Christianity, migrant labour and Western-style education had changed African societies, he argued that:

²¹⁹ Holleman, F.D. “The Recognition of Bantu Customary Law in South Africa”, 243

²²⁰ Ibid., 242

²²¹ Ibid., 242

*To say – as frequently happens – that tribal relations have been ‘hopelessly crippled’ and that ‘the end of all customary law is already in sight’, should unreservedly be called gross exaggerations.*²²²

In line with this, the number of black South Africans living in towns who could be considered ‘detrribalised’ were apparently few, while far more maintained links to the Native Reserves and periodically returned there. In Holleman’s eyes, the continued observance of traditional marriage in cities indicated that most city-dwellers had not, in fact, become ‘detrribalised’.²²³ He was seemingly unwilling to consider the possibility of people developing syncretic lifestyles that reworked and combined elements of the traditional and ‘modern’.

This attitude extended to a rejection of legal syncretism; any combination of customary law with Western law or procedure was subject to criticism. Holleman described an amendment to a law giving chiefs criminal jurisdiction over their subjects as “spoiling the valuable concessions to Bantu customary law it holds, by an excess of safeguards and limitations”; the amendment was surely “a creation of an unimaginative European mind.”²²⁴

Moreover, while he did not articulate an explicit view on the issue of political rights for black South Africans, he rejected even the very limited democracy available to black people in the form of representative local councils in some Native Reserves, such as the Transkei. In his words these had “remained implacably foreign to the Bantu soul and mind”.²²⁵ This demonstrates the link between the framework of romanticism and more practical matters: because African societies functioned as an organic whole, and every African apparently considered themselves merely as representatives of the communal interest, individualised and oppositional electoral politics were therefore inappropriate forms of government. By contrast, chiefs, who Holleman seems to have seen as the bearers of tradition, were no superior entity external to population, but rather ruled as the personification of popular will. As such, Holleman opposed checks and balances to their power as unnecessary.

As discussed earlier, Holleman argued strongly for the extension of customary law recognition. This is most evident in his criticism of the 1927 Native Administration Act. Since the act of Union in 1910, South Africa had had no single coherent approach to ruling black South Africans, reflecting the different policies pursued by different British colonies and the independent Boer states before Union. For example, the Transkei was ruled directly by magistrates and local councils, while Natal still had

²²² Holleman, F.D. “The Recognition of Bantu Customary Law in South Africa”, 250

²²³ *Ibid.*, 251

²²⁴ *Ibid.*, 256

²²⁵ *Ibid.*, 244

remnants of the Shepstone system of indirect rule through chiefs. The 1927 Native Administration Act was thus the first uniform treatment of 'Native Affairs' in South Africa, and enshrined important features of the Shepstone system, including indirect rule, as national policy. For example, the Governor General (a government bureaucrat) was legally considered to be the "Supreme Chief", who could make legislation by proclamation and appoint and dismiss subordinate chiefs.²²⁶ The Act also recognised customary law for the adjudication of some civil cases.

Holleman, however, felt the Act did not go nearly far enough. For one, he was extremely critical of the way in which chiefs in practice formed the lowest rung of colonial administration and just assisted the ranks of Native Commissioners who held the actual power.²²⁷ This suggests that for Holleman an even more radical bifurcation of government was necessary, an interpretation supported by lines such as this:

*There is no reasonable argument why the European personnel of Native Administration, and not the Bantu Chiefs themselves, should directly rule the Bantu population, and why the rule itself should be along incomprehensible European, instead of familiar Bantu lines.*²²⁸

Moreover, Holleman, writing in the early 1940s, felt that customary law recognition had been done "half-heartedly", and had "not advanced as far as we would like to find".²²⁹ Crucially, Africans were still subject in many areas to the same civil and criminal law as whites.

However, the thrust of Holleman's critique was not to argue for a piecemeal inclusion of selected aspects of customary law. Rather, his main focus was a whole *category* of law which had been excluded, namely:

*The legal rules which govern the whole structure and inner composition of the regsgemeenskap (jural community) as an organism, and which determine the relationships between small and large regsgemeenskappe.*²³⁰

Elsewhere he wrote (in English) of 'Bantu autonomous communities', seemingly still referring to *regsgemeenskappe*. Again, he was critical of the 1927 Act in its disregard for these communities. His point about government invention of tribes described earlier forms part of this criticism: instead,

²²⁶ Ibid., 240

²²⁷ Ibid., 240

²²⁸ Ibid., 252

²²⁹ "die erkenning van Bantoereg so halfhartig geskied het"; "erkenning van Bantoereg nie so ver gaan as wat ons wenslik vind nie". Holleman, F.D. *Die Erkenning en Kodifikasie van Bantoereg in die Unie*. Hoofstuk 3, Article 44

²³⁰ Ibid., Introduction, Article B1

government should concern itself with the existing autonomous communities, which he laid out in the following scheme:

*Bantu tribal life and government takes place within a set of four or five autonomous communities, ranging from (compound) tribes, to independent tribal divisions and the smaller tribal wards, to (sometimes) the independent sections thereof, and finally the family groups; the larger each time embracing a number of smaller ones.*²³¹

Significantly, Holleman did eventually see a policy which he understood to recognise these autonomous communities or *regsgemeenskappe*, and emphasised his support for it. The policy was the Bantu Authorities Act of 1951, a cornerstone of Apartheid.

The Bantu Authorities Act built on the reification of traditional authority which had been ongoing since at least 1927, but went much further, strengthening both the power of chiefs over their people and the control of government over chiefs – in fact leaving them accountable primarily to the state, rather than their people.²³² The Act made provision for setting up uniform ‘Tribal Authorities’, made up of a chief and his council, and of regional and territorial authorities as super-bodies with the power to levy taxes and create bylaws. This piece of legislation would begin the process which led towards the establishment of (nominally) self-governing ethnic homelands, although at the time this goal was perhaps less clear.

Importantly, the Bantu Authorities Act of 1951 made chiefly rule and ‘tribal authorities’ the basis of an entire parallel governance structure, rather than merely the lowest rung of the white administration, in the process “demarcat[ing] a distinct and alternative arena of African politics.”²³³ This was partly a move to compensate for the lack of political rights in white South Africa and emphasise the ‘retribalisation’ agenda, but it was also about control of the countryside, including using chiefs to implement the government’s unpopular agricultural programme (known as Betterment), and more broadly to firmly establish the role of chiefs as tools for state intervention in remote rural areas.²³⁴

In terms of Bantu Authorities, far more chiefs than before were recognised and provided with state salaries (dependent on their acquiescence) and the few representative local councils which had been set up in Native Reserves were done away with. Lower headmen were often recognised as chiefs if

²³¹ Holleman, F.D. “The Recognition of Bantu Customary Law in South Africa”, 242

²³² Delius, P. "Sebatakgomo; migrant organization, the ANC and the Sekhukhuneland revolt", 139

²³³ Bonner, P., Delius, P., & Posel, D. ‘The Shaping of Apartheid’, in Bonner, P., Delius, P., and Posel, D., eds. *Apartheid's Genesis, 1935-1962*. Ravan Press, 1993. 28

²³⁴ Delius, P. "Sebatakgomo; migrant organization, the ANC and the Sekhukhuneland revolt", 139

they accepted Bantu Authorities – in Sekhukhuneland the number of recognised chieftaincies went from nine to over 50 by the 1970s.²³⁵

Despite the distortions and fabrications inherent in the project, Holleman greeted the Bantu Authorities Act with enthusiasm. He seems to have seen the Tribal and Regional Authorities which the Act allowed for, as the autonomous jural communities – *regsgemeenskappe* – which he theorised about in the Netherlands East Indies and South Africa.²³⁶ This support for the Act is perhaps unsurprising, given he had already argued for greater recognition of customary law and for chiefs to judge cases unhindered by due process and or other checks. Whether he fully appreciated the broader political project behind Bantu Authorities is difficult to say, although it does not seem that he found what he saw troubling.

His claim (in 1955) that those tribal authorities which had already been set up had met with “a favourable reception in Bantu society” is surprising given that the imposition of Bantu Authorities sparked off arguably the most significant rural rebellions since colonial conquest was completed, as rural people in Sekhukhuneland, the Transkei and elsewhere strongly resisted the government and collaborating chiefs.²³⁷

At the same time, there seem to have been elements of Apartheid which Holleman disagreed with. In an article in the Stellenbosch-based *Eikestadnuus* in 1955, Holleman described various instances of Afrikaners abroad building friendships with various non-white people. His first case in fact concerned his years teaching at Leiden, when he hosted both Afrikaans and Indonesian students in his home. Holleman related that,

*[The Afrikaners] felt uncomfortable and smiled embarrassedly when they were introduced, but the Indonesians were so entertaining and courteous that it was not long before my wife and I looked at each other: how well thoughts and feelings were being exchanged.*²³⁸

The evening was apparently so enjoyable for all concerned that it was repeated several times. If that was not enough to convince the reader, since those Indonesians were “fairly light of skin”, there was

²³⁵ Van Kessel, I., & Oomen, B. ‘One chief, one vote’: The revival of traditional authorities in post-apartheid South Africa. *African Affairs*, 96, no. 385 (1997): 564

²³⁶ Holleman, F.D. “The Recognition of Bantu Customary Law in South Africa”, 252

²³⁷ *Ibid.*, 255

²³⁸ “Hulle het maar snaaks gevoel en verlee geglimlag toe hulle voorgestel word ... maar die Indonesiers was so onderhoudend en hoflik, dat dit nie te lank geduur het nie voor my vrou en ek so onderlangs na mekaar kyk: hoe lekker die gedagtes en gevoelens uitgewissel word.” Holleman, F.D. “Stem u saam? Hoe hanteer mens die ‘moeilike gevalle’?”

another case of an Afrikaner man in the Netherlands building a close friendship with his neighbour, an Ambonese man who was “unnecessarily [sic] dark of colour” – and who even had a Dutch wife.²³⁹

Holleman ended with a challenge to his readers:

*In all honesty we have given friendship and received friendship with these coloured people; we have gone about with them without any shame and could get on with them outstandingly. But... if the same people now wanted to visit us at home in South Africa, would we meet them with the same openness? Shake their hand? And invite them into our household and family circle?*²⁴⁰

While couched as a fairly gentle attempt to convince readers with whom he clearly identified – the article is essentially pitched as ‘How should we treat black people?’ – Holleman was nonetheless challenging the racism around him. The frequent references to the relative shade of these others’ skins show that Holleman was clearly operating from a perspective in which race was a natural dividing line, even if he gave evidence that this divide could be bridged and cross-racial friendship achieved. But still, making a statement such as this to readers in the heartland of Afrikaner Nationalism was not without its risks.

How then should we square this with his support of the Bantu Authorities Act? In fact, the two are consistent, and the thread that links them is the idea of separate development.

To begin with, this article should certainly not be read as evidence that Holleman opposed Apartheid as a whole – at most, it was a challenge to the most overt cases of racism in personal relationships. But Apartheid was also about political and economic structures of control.

I would argue that Holleman’s article is best understood as a criticism of explicit white *baasskap* (mastership/domination), which was one trend within Apartheid. In its stead, his support of Bantu Authorities suggests that he would have preferred the language of separate development, which saw ethnic and racial differences as essentially a source of conflict, and sought to allow each supposedly discrete community to ‘develop along their own lines’. Thus his position could push away from crude racial prejudice, in favour of a solution which laid the grounds for, as he saw it, genuine racial friendship.

²³⁹ “*taamlík lig van vel*”; “*onnodig duister van kleur*”. Holleman, F.D. “Stem u saam? Hoe hanteer mens die ‘moeilike gevalle’?”

²⁴⁰ “*In alle eerlikheid het ons met daardie gekleurde persone vriendskap gesluit en van hulle vriendskap ontvang; ons het sonder enige skroom met hulle omgegaan en kon uitstekend met hulle klaarkom. Maar... as dieselfde persone nou by ons tuiste in Suid-Afrika ons souk om besoek, sal ons hulle an met dieselfde onbevangenheid tegmoet gaan? Hul hand skud? En hulle nooi in ons huisgesin en familiekring?*” Ibid.

In this respect he was entirely consistent with the position taken by a number of Stellenbosch intellectuals in the 1950s, many of whom preferred to speak of separate development rather than Apartheid. SABRA – the Stellenbosch think-tank established as a conservative, Afrikaans counterpoint to the more liberal South African Institute for Race Relations – enthusiastically supported the National Party, but at the same time advocated for far more resources – possibly even additional land – to be put into the Native Reserves, in order to make them viable economically.²⁴¹ This came out of a desire to make separate development more than a rhetorical device; for all the paternalist concern on display, it was also aimed at achieving a total separation of black and white, rather than the mixture of white political control and ongoing dependence on black labour which Apartheid entailed.

Separate development eventually translated into far reaching social engineering in the service of creating ethno-states. Despite the clamour of intellectuals within SABRA and elsewhere, total separation was never really a possibility, given that the idea of separate development was always a legitimating mask for white political and economic domination:

*During the 1950s the reserves were treated essentially as reservoirs of African labour at the disposal of whites. The commitment to separate development was largely the ideological means to legitimise the denial of the franchise to Africans living in the country. The reserves were defined as the permanent political home of all Africans, as a means of excluding them from the polity of white South Africa.*²⁴²

There are other parallels with Holleman's thought, and separate development. Both Holleman and Bantu Authorities seemed to treat chieftainship, and custom, as the cornerstone of any interventions in African life. As discussed earlier, Holleman opposed representative government for Africans in favour of chiefly rule, and while he acknowledged the presence of a few 'detrribalised' Africans in urban areas, he argued that the size of this group was greatly overstated, and the far greater number of Africans who were "temporary and passing residents, who still belong in the reserves and periodically return there."²⁴³ This fits exactly the policy of the 1950s, which sought both to recognise a small number of permanently urbanised Africans, and to extend 'tribal' rule over all others, keeping them tied into the Native Reserves.²⁴⁴ Besides this fact, Holleman's phrasing is almost identical with the infamous Apartheid terminology of 'temporary sojourners' to describe Africans who were denied the right to settle in the cities.

²⁴¹ Lazar, J. "Verwoerd versus the 'Visionaries'", 365

²⁴² Posel, D. *The making of apartheid, 1948-1961: conflict and compromise*. 231

²⁴³ Holleman, F.D. "The Recognition of Bantu Customary Law in South Africa", 251

²⁴⁴ Bonner, P., Delius, P., & Posel, D. 'The Shaping of Apartheid', 31

Impact and mobility

While *volkekunde* had already been well established by Eiselen, and subsequently Coertze and Schoeman, amongst others, the study of customary law had not advanced to the same extent when Holleman arrived in Stellenbosch. University yearbooks from 1939 and 1940, before Holleman began teaching, show that the Native Law and Administration courses were predominantly focused on familiarising students with the state apparatus and legislation dedicated to ruling Africans, with relatively less focus on customary law. The first year curriculum included units on, among other subjects, the structure and functions of the Department of Native Affairs, and the economic and social situation of natives in South Africa “with a special study of the economic and political aspects of the native question”.²⁴⁵ Only one course dealt explicitly with the principles of ‘Bantu’ law.

Admittedly, later years received a continued treatment of select topics of Bantu law, including marriage and inheritance law, and law of property, but the predominant focus remained on the pass laws, labour provisions, and urban and rural native administration. Holleman’s entrance to teaching classes, in 1941, signalled a change in this approach, placing more emphasis on customary law, and particularly adding a broad theoretical framework within which to situate its study. From 1941, three out of the four courses in the first year syllabus related to customary law. This included Holleman’s classes on the *Foundations of primitive law*, and *Bantu regsgemeenskappe*.²⁴⁶ These classes laid out the dichotomy of primitive and modern legal systems, and the autonomous *regsgemeenskappe*, within which law was formed, as the basis for study of customary law and African societies.

Holleman taught the courses on the foundations of primitive law, and the Bantu *regsgemeenskappe* (among others) until his retirement in 1957.²⁴⁷ A departmental memorandum from this time (likely written by the Head of Department, N.J.J Olivier), noted that,

*[Holleman’s] sound legal training in this discipline (he was a student and colleague of Professor van Vollenhoven...), his years of experience in practice, and his particular scholarly approach, brought about the situation that the course in Bantu law and Native law, as it is taught here, has been accepted as a model for the course at other Afrikaans universities...*²⁴⁸

²⁴⁵ “met ‘n special studie van die ekonomiese en politiese aspekte van die Naturellevraagstuk”. *Jaarboek*, Stellenbosch University, 1940. 165

²⁴⁶ *Jaarboek*, Stellenbosch University, 1941. 181

²⁴⁷ *Jaarboek*, Stellenbosch University, 1957. 197

²⁴⁸ “Sy grondige regsopleiding in die rigting (hy was o.m. student en college van Prof van Vollenhoven...), sy jarelange ervaring in die praktyk en sy besondere wetenskaplike benadering het meegebring dat die kursus in Bantoereg en Naturelereg soos dit hier gedoseer is, as model aanvaar is vir die kursusse aan die ander

While his colleagues of many years may certainly have been inclined to both exaggerate Stellenbosch's prestige and eulogise about their retiring partner, this view is to some extent borne out by others.

After his death, the theoretical foundations he bequeathed the department continued to be used; while talk of primitive law had disappeared, and the focus on customary law had once again receded somewhat in favour of a focus on the state bureaucracy, a further departmental memorandum still mentions *regsgemeenskappe* as part of the Bantu law syllabus in 1974.²⁴⁹

Gordon argues that Holleman's teaching had a significant effect: he "trained or profoundly influenced most of the second generation of jural *volkekundiges*."²⁵⁰ During the early 1940s most *Bantoekunde* postgraduate students at Stellenbosch studied Native Law and Administration, Holleman's field.²⁵¹ A student of Holleman's, A.C. Myburgh, went on to head the Centre for Indigenous Law at the University of South Africa, and developed a correspondence course which was widely taken by clerks in the Native Affairs Department. This was certainly a medium for Holleman's ideas to travel through both the academy, and 'practitioners' working in the state.

Another medium may have been SABRA, the Stellenbosch thinktank. During the 1950s, SABRA leadership had regular meetings with top National Party (NP) and government officials.²⁵² Because the National Party was still consolidating its grip on power, SABRA represented an important constituency and thus wielded some influence over NP policy.

Many of Holleman's colleagues in the cluster of *volkekunde*, Native Law and Administration and Bantu languages departments were active in SABRA. B.I.C. Van Eeden, and N.J.J. Olivier were leaders of SABRA. F.J. Language, another lecturer, was also a member.²⁵³ It is not clear whether Holleman was a member of SABRA, but he published in its *Journal of Racial Affairs* twice. In 1952, he published an article arguing for the principle of differential government for Africans which took into account the 'tribal' nature of their society, and cautiously endorsing the Bantu Authorities Act (as has been discussed).²⁵⁴

Afrikaans Universiteite.... "Memorandum oor aanstellings in die Departement Naturellereg en –Administrasie en die Departement Bantoetale..." undated. Bantoekunde U/1F 1953/62. 2

²⁴⁹ Letter from W.J.O. Jeppe to the Dean of Humanities, 22 July 1974. Bantoekunde U/1F 1964/81

²⁵⁰ Gordon, R. "The white man's burden: Ersatz customary law and internal pacification in South Africa", 371

²⁵¹ Coertze, R. "Aanvang van volkekunde aan Afrikaanstalige universiteite in Suid-Afrika", 30

²⁵² Lazar, J. "Verwoerd versus the 'Visionaries', 364

²⁵³ *Ibid.*, 364

²⁵⁴ Holleman, F.D. "Die Regsposisie van die Bantoebevolking en die Grondslae van ons Naturellebeleid", *Journal of Racial Affairs*, 3, no. 3 (1952). 32

Gordon argues that the idea of the jural community is the foundation of separate development and the homelands.²⁵⁵ It is not difficult to see why: if legal institutions are formed organically by autonomous communities, this provides a basis on which to build parallel state structures, free of external influence. Holleman himself provides some support for this idea, writing of “the structure and organisation of those political units which in our society we call ‘states’ and in the Bantu society are called ‘*regsgemeenskappe*’.”²⁵⁶

This is significant in that it also taps into an *adat* law debate about whether the *rechtsgemeenskap* and *beschikkingsrecht* they possessed were the subject of public law (that is, roughly the control a state exercises over its domain) or private law (closer to direct community ownership of land as a legal person).²⁵⁷ Van Vollenhoven supported the private law interpretation, at least partly because the public law interpretation would suggest that *rechtsgemeenskappe* were already somewhat independent proto-states – a threat to the colonial order. However, Holleman here seemed to have endorsed the understanding of *regsgemeenskappe* (that is, within the South African context) as occupying the same position as states. This would certainly have provided theoretical backing for move to create self-governing homelands.

It is also very much in line with SABRA’s broader influence on Apartheid policy in the 1950s, as described by Lazar:

*SABRA was an important organisation precisely because it contributed towards the formulation of the ideological framework within which Verwoerd and his compatriots were able to shape the homeland policy. ... SABRA’s ‘visionaries’ wove the new terminology of equality and self-determination into their language and symbols. Verwoerd and the NP leadership, while rejecting most of the visionaries’ demands and conclusions, still managed to appropriate the ideological paraphernalia in terms of which those demands were phrased, in an attempt to bolster white exploitation, domination and control.*²⁵⁸

There seems to be a clear case that Holleman’s work *could* have had an influence on SABRA’s ideological formulations, which were then to some extent adopted by the NP. Ultimately, however, it is difficult to separate Holleman’s individual contribution here – or, more grandly, the influence of

²⁵⁵ Gordon, R. “The white man’s burden: Ersatz customary law and internal pacification in South Africa”, 370

²⁵⁶ “*die struktuur en organisasie van daardie staatkundige eenhede wat ons in ons samelewing ‘state’ noem en in die samelewing van die Bantoe: ‘regsgemeenskappe’ heet.*” Holleman, F.D. *Grondbeginsels van Primitiewe Reg*. 4.

²⁵⁷ Burns, P. *The Leiden legacy*, 18.

²⁵⁸ Lazar, J. “Verwoerd versus the ‘Visionaries’”, 386

adat law concepts on separate development in South Africa – from the many other strands of segregationist and ethnic nationalist thought at play. Indeed, it would be a mistake to over-extend an argument about Holleman’s influence beyond what has already been stated, particularly in such a field where so many visions of primitive communalism were already in play.

Perhaps a more revealing approach is rather, having already traced his ideas, to reflect on what made Holleman’s – and the *adat* law concepts’ – mobility possible. In doing so, the broader implications of his mobility will also be drawn out regarding the connections between South Africa, the Netherlands, and Indonesia.

The ability to move relatively easily from South Africa to the Netherlands, the NEI, and then back again, is of course to some extent allowed by linguistic commonalities, and Holleman’s trajectory suggests an ongoing connection between the Netherlands and Afrikaners. Still, Holleman left South Africa young, completed his training in another country and worked in a highly specific legal system on the other side of the world. His background may have been enough to induce him to return to South Africa, but that alone cannot explain the application of a legal system developed in Indonesia and the Netherlands with enough success to maintain an academic career in South Africa.

To some extent this was allowed by the nature of *adat* law theory (as it was practiced by the Leiden school): while *adat* law was indeed particular and contingent, there was always a strong impulse within the school towards generalisation. Van Vollenhoven, after all, had collected widely varying data from disparate islands in Indonesia and claimed that they reflected a common origin and functioned as part of the same system. In fact, he believed that there was a larger “Indonesian legal basin”, which shared essential similarities, and had hoped to establish *adat* law stations to investigate all areas which fell within this – including the Malay Peninsula, Madagascar, the Philippines and Taiwan.²⁵⁹ Holleman was in fact the scholar who van Vollenhoven had recommended to begin the research in the Philippines, and so would have been very much in touch with van Vollenhoven’s broader postulates. As noted, Holleman himself of course also extended *adat* law concepts even further, to South Africa, and claimed that van Vollenhoven’s system was of universal value.

This tendency towards systematising and generalising was thus an integral part of *adat* law scholarship. In Holleman’s case, the theoretical framework of primitive and modern law allowed him to *discount* specificities of local situations, or at least – given he was still sensitive to empirical data –

²⁵⁹ Holleman, J.F. “Voorwoord” in Holleman, F.D., *Philippijnsch Dagboek*. Van Vollenhoven Institute, Leiden, 1991. ix

to arrange the data into the same comprehensible schema, and from that data to draw similar conclusions.

At a deeper level his mobility was made possible by the structure of colonial societies generally, all of which were preoccupied with maintaining control of the subject population. Mamdani argues that all colonies were to some extent, bifurcated states.²⁶⁰ One element of this was judicial dualism, resulting in a sharp distinction between people with rights, who participate in modernity and can access a justice system with due process, and people without rights, who are locked in premodernity and subject to newly despotic chiefs: in a word, citizens and subjects. Importantly, Mamdani explicitly includes Apartheid South Africa as a case of a colonial method of rule, rather than treating it as an exceptional or unclassifiable case.

The bifurcation present in both colonial settings – the NEI and South Africa – meant that Holleman's experience was relatively easily adapted to a new setting. It allowed him to tap into real situations when he spoke of policies of differentiation, and governing natives according to their own customs – simply, his experience in the NEI was relevant to his work in South Africa because the two shared structural similarities, notwithstanding their specificities.

The bifurcated nature of colonial states also gave him experience and expertise in dealing with 'the native question' which would have been attractive to Stellenbosch University. Moreover, his ideas could relatively well received there, in part because there was already a body of thought, from colonial administrators, *volkekundes*, and others in South Africa who were engaging in similar debates. Earlier I argued that Stellenbosch, and Afrikaner intellectuals, had demonstrated interest in learning from Dutch colonial experience even before Holleman returned to the country. This is suggestive of the way in which colonial practices could spread across different political units.

This approach is also more revealing than one which attempts to sift through mountains of official discourse to identify Holleman's 'distinct' contribution – in this view, the presence of similar thinking in South Africa *enabled* his mobility; it may even be that his key contribution was not so much the uniqueness of his ideas as the reserves of legitimating expertise which he could offer the young discipline of *Naturellereg* in Stellenbosch.

The work of *volkekundes* has been well covered in this study, but they did not hold a monopoly on the subject. Dubow has described how segregation became prominent as a political keyword in South Africa during the first two decades of the 20th Century, and was temporarily embraced even by some

²⁶⁰ Mamdani, M. *Citizen and subject: Contemporary Africa and the legacy of late colonialism*, 18.

liberals as a sort of midpoint between the extremes of repression and assimilation.²⁶¹ Segregationist legislation entrenched the principle of differential treatment for black and white, and often led towards discourse about different groups of people 'developing on their own lines'. Indeed, even the 1927 Native Administration Act criticised by Holleman was an important turning point in beginning a policy of 'retribalisation'.

Further, Holleman had strong intellectual antecedents in the late 19th Century British Empire, as it embraced a policy of indirect rule. Particularly influential in this was the writing of Sir Henry Maine, legal anthropologist and colonial administrator:

*Maine's most enduring work, Ancient Law, was published in 1861 to an enthusiastic reception from a large audience, who learnt that primitive law conformed slavishly to customary rules, was irrational, inseparably linked with religion, lacked a distinction between civil and criminal law, thought in terms of groups and not individuals as legal units, and was generally on a lower evolutionary plateau.*²⁶²

Maine's influential work on *Ancient Law* was influenced by German romantic jurists such as Karl von Savigny, who argued that the law of a society is a product of the *volksgeist* (popular/national spirit).²⁶³ The *adat* law school – and Holleman's *Foundations of Primitive Law* – was also influenced by von Savigny, as were various Afrikaner intellectuals formulating 'Christian National' thought and proto-Apartheid ideology. This suggests that the supposedly disparate traditions of British indirect rule and Afrikaner ethnologists who helped to legitimate Apartheid, shared a common ancestor. What's more, the influence of romanticism is a final commonality which may have eased Holleman's transition from one country to the next.

If Holleman's debt to romanticism consisted in the idea of the impossibility of tacking on foreign laws to people whose society had not already established them, and the idealised vision of an organic society, throughout his life and career he was consistently near to people who took advantage of the fascist possibilities within these ideas. His colleague in Leiden (they jointly took van Vollenhoven's place, which had been split into two positions), another van Vollenhoven-trained jurist, J.J. Schrieke, was a fascist sympathiser and Nazi collaborator who applied the romantic ideal back to the Netherlands, arguing for "their own native *adat*", an organic *volksrecht* (popular law) rather than a

²⁶¹ Dubow, S. (1989). *Racial Segregation and the Origins of Apartheid in South Africa, 1919–36*, 23

²⁶² Costa, A. "Chieftaincy and civilisation: African structures of government and colonial administration in South Africa", 15

²⁶³ Costa, A. "The myth of customary law", 527

legal code, adjudicated by judges who were “one with the people in spirit”.²⁶⁴ In Stellenbosch, Holleman’s colleagues, Coertze and Schoeman, were both active in far-right militias during World War Two; Coertze was even convinced that whatever politics were necessary should take place through *volksorganisasies* (folk/national organisations) rather than political parties.²⁶⁵ And although their time at the institution did not overlap, one of Holleman’s successors at the Rechtshogeschool in Batavia, Raden Supomo, took *adat* law to its most illiberal expression in his vision of the organic state:

*He argued that according to indigenous patterns of social organization there was no division between rulers and ruled and that the new constitution should therefore not recognize any separation of state and society or political rights.*²⁶⁶

Still, while romantic thought has been identified as an influence on Apartheid and *volkekunde*, this study has also shown that a form of romanticism entered South African discourse having partly been workshopped outside Europe in a colonial environment, rather than merely its German variety.

Finally, *adat* law and more broadly the common heritage of romanticism, offers a new lens to view the revival of traditionalist claims around land and custom in both Indonesia and South Africa.²⁶⁷ In this view, the developments are not simply taking place in parallel, but stem from conceptually related understandings of tradition, and similarly idealised local communalism counterposed against liberal western individualism.

Having traced Holleman’s thoughts to Stellenbosch, I argued that while his basic concepts in South Africa were the same, they were filled with slightly different content; most significantly, in place of autonomous village societies came an emphasis on tribes as the most complete African legal and political forms. This may have been influenced by the ongoing obsession with race, culture and ethnicity demonstrated amongst his colleagues at Stellenbosch, a possibility which also applies to the extension of his understanding of primitive and modern law as having a biological basis. Ultimately, however, the different ethnological data was subsumed in a framework which minimised the

²⁶⁴ De Tijd, 8 June 1934. P2; Davidson, J., and Henley, D., “Radical conservatism: The protean politics of adat”, 26

²⁶⁵ Van der Waal, C. S. "Long walk from volkekunde to anthropology: reflections on representing the human in South Africa", 221

²⁶⁶ Bouchier, D. “The romance of adat in the Indonesian political imagination and the current revival”, 117

²⁶⁷ See for example Davidson, J., and Henley, D., “Radical conservatism: The protean politics of adat”; Thijs, T. “Defining Boundaries: Gender and Property Rights in South Africa’s Traditional Courts Bill”: 485. Gasa, N. “Who killed the Traditional Courts Bill?” Sunday Independent, 2 March 2014.

<https://www.iol.co.za/sundayindependent/who-killed-the-traditional-courts-bill-1654811>. Accessed on 4 January 2017

differences between *adat* law and 'Bantu' law in favour of a judgement based on their general, apparently primitive state.

While Holleman's paternal *adat* concern for the preservation of custom led him to support key elements of Apartheid, namely chiefly rule of the homelands, he was also critical of the overt racism he saw in the country; his concern for good race relations, however, is entirely consistent with supporting even further-reaching social engineering in aid of separate development.

Holleman's ideas had some opportunities to circulate through influential channels; however, it is not possible to identify any causal relationship between his work and state policy. Rather, I have reflected on what allowed his ideas to move at all: the impulse towards flattening the difference of others, the bifurcated structure of colonial states, the presence of other ethnologists and administrators thinking about similar issues as him and perhaps looking to *adat* law and Holleman for a model of practice, and the common influence of Romanticism within all the contexts which he worked.

Conclusion

This study has traced F.D. Holleman's life and career as he moved between metropole, colony, and independent republic. It began by discussing the literature on the history of customary law recognition in South Africa, and its transformation under colonialism and Apartheid; alongside this, I presented some of the existing literature on the way white administrators, ethnologists and politicians thought about customary law, and its use in maintaining white political control. While this literature is extensive, with a few exceptions it has tended to treat the intellectual antecedents of these thinkers as influences, and no more: the site at which research takes place is still South Africa. Comparatively few pieces of research have a multi-national or transnational approach, despite the fact that many of the influences were not indigenous to South Africa. Moreover, the link between *adat* law and South African customary law has largely not been explored.

My approach here was a global one, as is appropriate to a subject whose career was split across borders. In tracing Holleman's ideas, I was able to investigate them far more substantively, identifying what changed and what remained the same. As Holleman 'careered' across the Dutch colonial empire, and then to South Africa in the throes of segregation and later Apartheid, he brought with him not only his ideas, but also his experience.

Holleman's training in *adat* law came under the founder of this system and school of thought, Cornelis van Vollenhoven, who argued for the inapplicability of Western lenses and legal categories in understanding Indonesian law, and in turn for the recognition of these alternative laws in the governance of the Netherlands East Indies (NEI). Regardless of how much paternal or empathic concern was present, the move also essentialised Indonesians, and Indonesian law, as inherently communal.

While the title of this thesis (*The Adat Law toolkit*) is intended to suggest a set of ideas and policy proposals which can be applied across contexts, this should not be taken to mean that his ideas were totally unchanging, or not influenced by local factors. I argued that Holleman applied *adat* law concepts to South Africa, but that this was not a simple transfer of knowledge from the centre to the periphery; rather, running alongside his broad framework, which remained constant, were changes of emphasis, more complexity in some areas, and less in others. This was shaped by the political and institutional context which he found himself in, in South Africa and Stellenbosch University.

The first element of this argument entailed outlining Holleman's *adat* framework. While I did not present this as a single static set of ideas, I analysed elements of it over the course of various texts he produced through his time serving on various *landraden*, and in the colonial civil service, and teaching

volkekunde and then *adat* law during the 1930s at the Batavia *Rechtshogeschool* and Leiden University respectively. I outlined the dual tendencies towards careful empirical reporting and broad generalisations found in Holleman's work. The first was shown most clearly in his study on the *adat* law of Tulungagung, which clearly rested on extensive research and judicial experience from his time there. Nonetheless, even at this early stage, Holleman tended to present social change as a deviation from a single, coherent and authentic tradition.

His work here was in a small way constitutive of the overall *adat* law discourse. However, he would later go on to have a far more marked contribution to *adat* law. As he moved into academia he shifted somewhat away from careful reporting of local customs and placed relatively more emphasis on theorising about the general character and future of *adat* law. Holleman succeeded van Vollenhoven at Leiden and thus constituted, in the second half of the 1930s, arguably *the* authoritative voice on *adat*. His inaugural address of 1935, and his engagement in a debate with Barend ter Haar in 1938, represent two elements of this original contribution. In the first he ascribed a pervasive communal character to Indonesian society, greater than van Vollenhoven had claimed, extending the orientalist subtext of *adat* law. In the second, he maintained the identification of *adat* with a metaphysical underlying principle, and its othering as a premodern and communal system, by pushing back against ter Haar's proposal to transform *adat* into fully modern law through judicial precedent.

Holleman's move to South Africa in 1939 saw him enter Stellenbosch University, a hotbed of Afrikaner Nationalists and right wing academics, many of whom worked within Holleman's department of *Bantoekunde*. These intellectuals were close to the National Party, and, after its electoral victory in 1948, to the state. Both their work studying Africans – in a way which provided simplistic and exotic confirmations of the essential differences between cultures and races – and their own related political positions, provided important legitimation and support for the state to employ a policy of differentiation which eventually used custom and reconstituted 'traditional' authority as the basis for a parallel governance structure, the homelands.

While Holleman applied the *adat* law concepts of *regsgemeenskappe* and communal *beskikkingsreg* over land to South African societies, I argued that this was not without alterations from its expression in the NEI. Instead of the years of first-hand judicial experience and field research to draw on, Holleman here depended on secondary sources – albeit including the research of his son, whose research was based on the same framework as his father. However, his dichotomous framework of a primitive law which was communal, real and magico-religious, versus modern law which was more individualised, abstract and rational, helped to flatten the differences between places to mere ethnographic detail, and fit all forms of law and society into either one end of the spectrum or the

other. A more telling difference was his emphasis on tribes as the most complete Bantu *regsgemeenskappe* (amongst other *regsgemeenskappe* of greater and lesser format), in contrast to his *adat* law focus on villages. This was likely influenced both by the objective fact of the remains of conquered African polities, and by the body of work of *volkekundiges* and others which valorised tribal life.

The support for tribes also provided a neat fit with the Apartheid policy to set up a parallel system of African political life controlled by chiefs and custom. This was begun with the 1951 Bantu Authorities Act, which Holleman supported, both for its recognition of what Holleman saw as the Bantu *regsgemeenskappe*, and the move away from governance of Africans on Western lines. However, he also opposed base racism or unfriendly race relations, a paradox which is resolved when one considers that the ideology of separate development was concerned (at least at the level of rhetoric and ideology) to establish precisely *good race relations* by keeping races apart.

Finally, I argued that Holleman's mobility across these disparate contexts was facilitated by the generalising tendency within *adat* law which minimised differences and inconsistencies across contexts, the bifurcated nature of colonial states which gave Holleman experience in the NEI relevant to the concerns of minority rule in South Africa, the large existing body of ethnological research and theoretical postulates which supported ideas of essential difference and some form of 'developing along one's own lines', within which Holleman could find a place, and the enduring influence of Romantic thought in the Netherlands, Indonesia and South Africa. The fact of Holleman's mobility forces us to consider this triangular relationship more closely in future research; it is clear that even when South Africa had ceased to have any political connection to the Netherlands or Indonesia, its colonial mode of rule, alongside linguistic and other commonalities, allowed people and expertise to flow between the three.

Bibliography

Primary sources

Newspaper sources

Nieuwe Tilburgsche Courant, 18 May 1911

Nederlandsche Staatscourant, 13 June 1912

Nieuwe Rotterdamsche Courant, 7 Aug 1912

De Sumatra Post, 1 October 1912

Bataviaasch Nieuwsblad, 11 November 1913

Het Nieuws van den Dag, 27 September 1915

Het Nieuws van den Dag, 23 December 1918

De Indische Courant, 26 March 1925

De Telegraaf, 11 April 1922

De Indische Courant, 15 April 1939.

De Telegraaf, 16 March 1929

De Tijd, 8 June 1934

Algemeen Handelsblad, 10 May 1935

De Telegraaf, 10 May 1935

Het Vaderland, 10 May 1935

De Maasbode, 29 Jan 1938

De Maasbode, 24 December 1938

Algemeen Handelsblad, 17 January 1939

Algemeen Handelsblad, 27 January 1958

F.D. Holleman Archive, Africa Studies Centre, Leiden

Holleman, F.D. *Bantoe grondereg*. Stellenbosch University, 1952 (1941)

Holleman, F.D. *Grondbeginsels van Primitiewe Reg*. Stellenbosch University, 1950 (1941)

Holleman, F.D. *Die Erkenning en Kodifikasie van Bantoeereg in die Unie*. Stellenbosch University, 1942 (1941)

Holleman, F.D. *Bantoe-regsgemeenskappe*. Stellenbosch University, 1952 (1941)

Holleman, F.D. "The Recognition of Bantu Customary Law in South Africa", in *The Future of Customary Law in Africa*. Leiden University Press (1955)

Main Library, Leiden University

Holleman, F.D. *Het adatrecht van de Afdeeling Toeloengagoeng*. Archipel Drukkerij, 1927.

Holleman, F.D. *De Commune Trek in het Indonesisch Rechtsleven*. J.B. Wolters, 1935.

"Buitengewone Algemeene Vergadering", 20 November 1937. In *Notulen Van De Bestuurs- En Algemeene Vergaderingen van Het Koninklijk Instituut Voor De Taal-, Land- En Volkenkunde Van Nederlandsch-Indië*, KITLV, 1937-1938

Holleman, F.D. "Het Adatprivaatrecht van NEI in Wetenschap, Praktijk en Onderwijs", *Tijdschrift van Indische Recht*, 147 (1938)

ter Haar, B. *Het adatprivaatrecht van Nederlandsche-Indië in wetenschap, practijk en onderwijs*. JB Wolters, 1937.

F.D. Holleman Archive, Main Library, Leiden University – BPL 3437

Holleman, F.D. "Die Regsposisie van die Bantoebevolking en die Grondslae van ons Naturellebeleid", *Journal of Racial Affairs*, 3, no. 3 (1952)

Holleman, F.D. "Stem u saam? Hoe hanteer mens die 'moeilike gevalle'?" *Die Eikestadnuus*, 14 October 1955. BPL 3437/3

Holleman, F.D. *Letter to Uitgeverij Ploegsma*, 9 June 1957. BPL 3437/3

J.F Holleman Archive, Main Library, Leiden University – BPL 3438

Holleman, J.F. *Inheemse regsgemeenskappe by die Zulu*, MA Volkekunde thesis, Stellenbosch University. 1938. BPL 3438/19

Stellenbosch University Archive

Jaarboek, Stellenbosch University, 1940

Jaarboek, Stellenbosch University, 1941

Jaarboek, Stellenbosch University, 1957

“Memorandum oor aanstellings in die Departement Naturellereg en –Administrasie en die Departement Bantoetale...” undated. Bantoekunde U/1F 1953/62

Letter from W.J.O Jeppe to the Dean of Humanities, 22 July 1974. Bantoekunde U/1F 1964/81

Secondary sources

Bank, A. "Fathering volkekunde: race and culture in the ethnological writings of Werner Eiselen, Stellenbosch University, 1926–1936", *Anthropology Southern Africa* 38, no. 3-4 (2015)

Bonner, P., Delius, P., & Posel, D. 'The Shaping of Apartheid', in Bonner, P., Delius, P., and Posel, D., eds. *Apartheid's Genesis, 1935-1962*. Ravan Press, 1993

Bourchier, D. ""The romance of *adat* in the Indonesian political imagination and the current revival", in Davidson, J., and Henley, D., eds. *The revival of tradition in Indonesian politics: The deployment of adat from colonialism to indigenism*. Routledge, 2007

Burns, P. *The Leiden legacy: Concepts of law in Indonesia*. Vol. 191. Brill Academic Publishers, 2004

Chanock, M. "Writing South African legal history: a prospectus", *The Journal of African History* 30, no. 2 (1989)

Claassens, A., & Mnisi, S. "Rural women redefining land rights in the context of living customary law", *South African Journal on Human Rights*, 25, no. 3 (2009)

Coertze, R. "Aanvang van volkekunde aan Afrikaanstalige universiteite in Suid-Afrika", *South African Journal of Ethnology*, 14, no. 2 (1991)

- Comaroff, J. "Colonialism, culture, and the law: A foreword." *Law & Social Inquiry* 26, no. 2 (2001)
- Costa, A. "The myth of customary law", *South African Journal on Human Rights* 14, no. 4 (1998)
- Costa, A. "Chieftaincy and civilisation: African structures of government and colonial administration in South Africa", *African Studies* 59, no. 1 (2000)
- Dale, L. 'George Grey in Ireland: Narrative and Network' in Lambert, D., and Lester, A., eds. *Colonial lives across the British Empire: Imperial careering in the long nineteenth century*. Cambridge University Press, 2006
- Davidson, J., and Henley, D., "Radical conservatism: The protean politics of *adat*", in Davidson, J., and Henley, D., eds. *The revival of tradition in Indonesian politics: The deployment of adat from colonialism to indigenism*. Routledge, 2007
- Delius, P. "Sebatokgomo; migrant organization, the ANC and the Sekhukhuneland revolt", in Bonner, P., Delius, P., and Posel, D., eds. *Apartheid's Genesis, 1935-1962*. Ravan Press, 1993
- Delius, P. "Contested Terrain: Land Rights and Chiefly Power in Historical Perspective", in Claassens, A., ed. *Land, power & custom: Controversies generated by South Africa's communal land rights act*. Juta and Company Ltd, 2008
- Dubow, S. *Racial Segregation and the Origins of Apartheid in South Africa, 1919–36*. Springer, 1989.
- Dubow, S. "Afrikaner nationalism, Apartheid and the conceptualization of 'race'", *The Journal of African History* 33, no. 2 (1992)
- Dubow, S. "Racial irredentism, ethnogenesis, and white supremacy in high-apartheid South Africa", *Kronos* 41, no. 1 (2015)
- Fasseur, C. "Colonial Dilemma" in Davidson, J., & Henley, D., eds. *The revival of tradition in Indonesian politics: The deployment of adat from colonialism to indigenism*. Routledge, 2007
- Fitzpatrick, D. "Land, custom and the state in post-Suharto Indonesia", in Davidson, J., and Henley, D., eds. *The revival of tradition in Indonesian politics: The deployment of adat from colonialism to indigenism*. Routledge, 2007
- Gasa, N. "Who killed the Traditional Courts Bill?" *Sunday Independent*, 2 March 2014. <https://www.iol.co.za/sundayindependent/who-killed-the-traditional-courts-bill-1654811>. Accessed on 4 January 2017

- Goodrich, A. *Biltong Hunting as a Performance of Belonging in Post-Apartheid South Africa*. Lexington Books, 2015
- Gordon, R. "Apartheid's anthropologists: The genealogy of Afrikaner anthropology", *American Ethnologist* 15, no. 3 (1988)
- Gordon, R. "The white man's burden: Ersatz customary law and internal pacification in South Africa", in Renteln, A., & Dundes, A., eds. *Folk law: Essays in the theory and practice of lex non scripta* (Vol. 1). University of Wisconsin Press, 1995
- Gordon, R. "'Tracks which cannot be covered': PJ Schoeman and Public Intellectuals in Southern Africa", *Historia* 52, no. 1 (2007)
- Henley, D. "Custom and koperasi: the co-operative ideal in Indonesia", in Davidson, J., and Henley, D., eds. *The revival of tradition in Indonesian politics: The deployment of adat from colonialism to indigenism*. Routledge, 2007
- Hobsbawm, E., & Ranger, T., eds. *The invention of tradition*. Cambridge University Press, 2012 (1983)
- Holleman, J. F., ed. *Van Vollenhoven on Indonesian adat law*. Springer, 1981
- Holleman, J.F. "Voorwoord" in Holleman, F.D., *Philippijnsch Dagboek*. Van Vollenhoven Institute, Leiden, 1991
- Kannemeyer, J. *Geskiedenis van die Afrikaanse literatuur*. Vol. 2. Academica, 1984
- Laidlaw, Z. *Colonial connections, 1815-45: patronage, the information revolution and colonial government*. Oxford University Press, 2005
- Lambert, D., and Lester, A., eds. *Colonial lives across the British Empire: Imperial careering in the long nineteenth century*. Cambridge University Press, 2006
- Lazar, J. "Verwoerd versus the 'Visionaries', The South African Bureau of Racial Affairs (Sabra) and Apartheid, 1948-1961", in Bonner, P., Delius, P., and Posel, D., eds. *Apartheid's Genesis, 1935-1962*. Ravan Press, 1993
- Mamdani, M. *Citizen and subject: Contemporary Africa and the legacy of late colonialism*. Princeton University Press, 1996
- Otto, J.M. 'Ten geleide', in Holleman, F.D., *Philippijnsch Dagboek*. Van Vollenhoven Institute, Leiden, 1991
- Posel, D. *The making of apartheid, 1948-1961: conflict and compromise*. Oxford University Press, 1991

- Pugach, S. "Carl Meinhof and the German influence on Nicholas van Warmelo's ethnological and linguistic writing, 1927–1935", *Journal of Southern African Studies* 30, no. 4 (2004)
- Reeve, D. *Golkar of Indonesia: An alternative to the party system*. Oxford University Press, 1985
- Reid, A. "Political 'tradition' in Indonesia: the one and the many." *Asian Studies Review* 22, no. 1 (1998)
- Sharp, J. "The roots and development of volkekunde in South Africa", *Journal of Southern African Studies* 8, no. 1 (1981)
- Smandych, R. "Mapping Imperial Legal Connections: Toward a Comparative Historical Sociology of Colonial Law." *Adel. L. Rev.* 31 (2010)
- Thipe, T. "Defining Boundaries: Gender and Property Rights in South Africa's Traditional Courts Bill", *Laws*, 2, no. 4 (2013)
- Van der Waal, C. S. "Long walk from volkekunde to anthropology: reflections on representing the human in South Africa", *Anthropology Southern Africa* 38, no. 3-4 (2015)
- Van Kessel, I., & Oomen, B. 'One chief, one vote': The revival of traditional authorities in post-apartheid South Africa. *African Affairs*, 96, no. 385 (1997)