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LAW AND NON-DEVELOPMENT: THE DUTCH "LIBERAL POLICY" FOR INDONESIA, c. 1860-1901

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Americans generally assume that changes in law lead predictably to social and economic changes. Among Americans professionally concerned with law, the dominant paradigm for jurisprudence is probably Roscoe Pound's. In it, the proper function of law is to recognize, protect and advance important social interests. Laws are written, administered, interpreted and applied in ways which advance social objectives. Lawyers are "social engineers," experts at social problem-solving who use the law to achieve social ends.[1] Obviously law and lawyers can only perform such a function if law is a reliable social tool.

One major social interest which law is assumed to be able to advance is the interest in "development." While definitions of development vary, most typically it means economic growth and institutional modernization.[2] Changing the law of a nation or region presumably starts a kind of socioeconomic chain reaction which leads to higher productivity, commercialization, industrialization, and a "take-off" into sustained economic growth.[3] The American experience would seem to bear out this assumption. Law has been intimately related to economic growth at virtually every

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1. Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489 (1912); *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 802, 940 (1923); SOCIAL CONTROL THROUGH LAW (1942). The concept of an intellectual paradigm is borrowed from T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

2. Burg, *Law and Development: A Review of the Literature and a Critique of 'Scholars in Self-Estrangement'*, 25 AM. J. COMP. LAW 492, 502 (1977). See the works Burg cites in his note 38, and also Nyhart, *The Role of Law in Economic Development*, 1 SUDAN L. J. & REPORTS 394 (1962).

3. The concept of economic "take-off" was first suggested by W. ROSTOW, THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO (1960). For the elements of economic development in the classic scheme, illustrated with the first (English) historical example, see P. DEANE, THE FIRST INDUSTRIAL REVOLUTION (1965).

stage of American development, allowing capital accumulation, facilitating industrial investment and profit, encouraging re-investment.[4]

Thanks in large part to these American assumptions about law as an instrument of development, the 1960's saw the emergence of a field of legal scholarship and activity now known as the "Law and Development Movement." Americans sought to put their skills of social engineering through law at the disposal of the underdeveloped Third World, particularly the newly decolonized African states. American lawyers became advisors to regimes overseas, or taught at their law schools, or did research abroad funded by the Agency for International Development or the Ford Foundation. The movement hoped to engineer social progress in the Third World through law reform.[5]

The assumption that law is a predictable instrument of social change has not often been tested. As John Henry Merryman has pointed out, even scholars in the "Law and Development Movement" have rarely looked at the historic experiences of cultures other than American to see whether changes in their law achieved the socioeconomic goals for which they were intended. Most such scholars have shown little interest in research drawing on the humanities and social sciences as well as law. But Americans are not the only people who have tried to change society through law. In particular, as Merryman notes, European colonial administrations of the 19th and 20th centuries were in closely analogous situations. By the later 19th century most were concerned with development of their colonies and most tried to use law as an instrument of progress in those colonies. Their example is particularly relevant to "Law and Development" since many of the Third World nations which are objects of that movement's energies now were colonies then. Yet "Law and Development" scholars have rarely looked at colonial administrations' efforts to change society through law.[6]

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4. See for example S. LIPSET, THE FIRST NEW NATION: THE UNITED STATES IN HISTORICAL AND COMPARATIVE PERSPECTIVE (1963); M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977); J. HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1863-1915 (1964). For a general review with special reference to Hurst's work, see Auerbach, *The Relation of Legal Systems to Social Change*, 1980 WIS. L. REV. 1227.

5. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977), esp. 457-459, 473-475. For specific examples of American lawyers in Africa, their recruitment, functions, and contributions, see Johnstone, *American Assistance to African Legal Education*, 46 TULANE L. REV. 657 (1972); J. BAINBRIDGE, THE STUDY AND TEACHING OF LAW IN AFRICA 68ff. (1972); "A Reporter at Large," *Fifty-Two People on a Continent*, 42 THE NEW YORKER 101 (1966).

6. Merryman, *supra* note 5, at 467-468, 472. A significant exception to the generalization is

The Dutch colonial administration in what is now Indonesia in the late 19th century offers a particularly instructive example of an attempt to use legal change to stimulate social and economic change in the direction of development. The Dutch program for the development of the East Indies from the 1860's rested on fundamental changes in three areas of law: land law, the law of contract, and the structure of the courts.[7] Under the changes in land law, while the government retained original title to land it would be able to lease it to investors for periods of up to seventy-five years. It could not, however, lease land which natives* had under traditional cultivation. Native rights to land and livelihood had to be respected; the government would lease out only underdeveloped, unproductive land. Natives could not sell land which they cultivated for their own subsistence, but they could lease it to investors for up to twenty-one and one-half years. The investors' payments for such leases went to the natives. As for contract, compulsory planting and compulsory labor in the islands, whether by government or by private landlords, was gradually ended. The government abandoned its monopoly of the spice trade and its near-monopoly of sugar and coffee. Natives as well as Europeans got

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Y. GHAI AND J. MCAUSLAN, PUBLIC LAW AND POLITICAL CHANGE IN KENYA (1970), which however emphasizes political aspects of development. For a general introduction to imperialism and colonialism, see W. SMITH, EUROPEAN IMPERIALISM IN THE NINETEENTH AND TWENTIETH CENTURIES (1982).

7. To this and the following summary of the Liberal Policy, see generally P. Carey, *Aspects of Javanese History in the Nineteenth Century*, in THE DEVELOPMENT OF INDONESIAN SOCIETY 45 (H. Aveling, ed., 1980): P. VLEKKE, NUSANTARA: A HISTORY OF THE EAST INDIAN ARCHIPELAGO 283-288 (1943); D. LEV, ISLAMIC COURTS IN INDONESIA 11-15 (1972); W. WERTHEIM, INDONESIAN SOCIETY IN TRANSITION 244-250 (1959); S. TAS, INDONESIA: THE UNDERDEVELOPED FREEDOM 68 (1974); J. FURNIVALL, NETHERLANDS INDIA: A STUDY OF PLURAL ECONOMY 157-173 (1944). Dating the beginning of the Liberal Policy is difficult as the program came in stages. Most surveys of Indonesia use 1870, the year of the Agrarian Law and Agrarian Decree that altered land law, and of the end of compulsory sugar raising. However, forced production of pepper ended as early as 1862 and similar operations for six other crops were dismantled between 1862 and 1866. Compulsory labor was severely limited in 1864. On the other hand, government coffee production continued through the 19th century, dwindling slowly away from about 1870 to 1917. The stages reflect the growing strength of Parliament against the Dutch crown and of the Liberal Party in Parliament against the Conservative. Furnivall at 165; C. DAY, THE POLICY AND ADMINISTRATION OF THE DUTCH IN JAVA 323-335 (1904); E. KOSSMANN, THE LOW COUNTRIES 1780-1940, at 265-275 (1978). It may be stretching a point to include reorganization of the judiciary in the Liberal Policy, since its legislative separation from the executive dates back to 1854. However, the first steps to actually implement the principle came only in 1869 and Islamic courts were not reorganized until 1882. Furnivall at 157, 189; Lev at 11-15. See below, section 2.

* The author and the editors are aware of the controversy that this word has caused in the past when it sometimes had a pejorative connotation. In this article it is used merely as a simplified way of saying "indigenous people." Eds.

complete freedom of contract and would labor only for wages which they bargained for. Finally, the Dutch set up an independent judiciary to make the leases and contracts enforceable for native and European alike. These courts would decide disputes either on Dutch law or on traditional Indonesian law, depending on the identity of the parties and the nature of the transaction.

Collectively these changes, particularly after 1870, became known as the "Liberal Policy." The program was "liberal" in the sense that Adam Smith and Jeremy Bentham were liberal, *i.e.*, classical 19th-century liberalism and laissez-faire capitalism. Before the changes, the principal economic stimuli in the colony had been the government monopolies and the forced cultivation of certain export crops. Liberal theory held that getting government out of the economy would naturally lead to an increase in prosperity and growth. The policy's authors intended its benefits to extend to European and native alike. Europeans would of course begin the developmental process, but Indonesians would, they thought, soon learn to imitate Western private enterprise and share in the general economic expansion.[8] Nor, it would seem, was this goal merely rhetoric, window-dressing for world consumption. When by the turn of the century it became apparent that native welfare had not improved, the "Ethical Policy" of 1901 backed up the committment with guilders from the Netherlands home treasury. Funds came into the Indies for agricultural extension programs and irrigation projects, health services, and education to boost natives toward a more competitive position.[9]

In spite of these efforts, while in one sense the East Indies "developed," the native Indonesian economy never "took off." Exports boomed, going from a value of 96 million guilders in 1870 to 674 million in 1914. But the benefits went to the private Dutch and other international investors, not to the Indonesians. The principal productive unit which emerged was the "plantation," typically a Dutch corporation which raised export crops—sugar, tobacco, rubber, tea—largely on land leased from natives. Salaried (Dutch) managers ran them; natives worked for minuscule wages on them.[10] J.H. Boeke, for example, speaks of a "dual economy" in Indonesia, with Dutch, other Europeans, Japanese and Chinese controlling

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8. J. LEGGE, INDONESIA 81-83 (1964); INDONESIAN ECONOMICS: THE CONCEPT OF DUALISM IN THEORY AND POLICY 4 (W. Wertheim, ed. 1961); Vlekke, *supra* note 7, at 284.

9. Legge, *supra* note 8, at 83-88; Wertheim, ECONOMICS, *supra* note 8, at 7; Vlekke, *supra* note 7, at 326-328.

10. Legge, *supra* note 8, at 87; M. CALDWELL AND E. UTRECHT, INDONESIA: AN ALTERNATIVE HISTORY 30-34 (1979).

the growth economy of large-scale enterprise and commerce, while Indonesians were left with peasant cultivation and coolie labor. Clifford Geertz maintains that Dutch policy, whatever its intentions, worked to prevent the appearance of native entrepreneurs and so of native economic development.[11] In fact, most observers would agree that even today Indonesia is not only still underdeveloped but quite likely to remain so.[12]

This essay will look at what went wrong with the "Liberal Policy's" experiment in social engineering through law in Indonesia. It will examine the policy's laws circa 1860-1901 and attempt to put them in an historical and social context. It focuses on the island of Java, where Dutch control and Dutch energies were greatest. It is an effort to show that our understanding of the relation between law and development can be improved by utilizing materials from other disciplines, particularly history and anthropology. And if that is true for one of the most complex areas of the underdeveloped world, then presumably similar investigations into past colonial experience elsewhere can also bear useful fruit.

On the surface, the laws of the "Liberal Policy" appeared to strike a balance between development and economic protection of the natives. But this essay will show that placed in the legal and social environment of Indonesia in which they had to operate, the laws actually blocked native economic development. Drawn up by Westerners with individualist cultural assumptions, they collided with the community-oriented native culture. Provisions ostensibly protecting the natives discouraged the appearance of native entrepreneurs. A professed concern for preservation of traditional Javanese law in the courts contained a hidden racial agenda: the Dutch had one law for themselves and another, of inferior status, for natives. However, the essay also suggests that better-designed law would not have led to better results. For the Javanese villager, the state's law had for centuries been something to ignore or avoid whenever possible. Changing it was scarcely likely to trigger the far-reaching changes in behavior which development requires. Law is a predictable tool for social and economic change primarily in situations which recapitulate American

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11. J. BOEKE, ECONOMICS AND ECONOMIC POLICY OF DUAL SOCIETIES AS EXEMPLIFIED BY INDONESIA (1953); cf. Wertheim, ECONOMICS, *supra* note 8, a scholarly discussion of Boeke's ideas. C. GEERTZ, AGRICULTURAL INVOLUTION: THE PROCESSES OF ECOLOGICAL CHANGE IN INDONESIA (1963); PEDDLERS AND PRINCES (1963).

12. Compare the evaluations of, for example, Caldwell and Utrecht, *supra* note 10; Tas, *supra* note 7; N. VREELAND, INDONESIA: A COUNTRY STUDY (1983); A. SIEVERS, THE MYSTICAL WORLD OF INDONESIA: CULTURE AND ECONOMIC DEVELOPMENT IN CONFLICT (1974); B. MAY, THE INDONESIAN TRAGEDY (1978).

conditions: no great cultural gap between the makers and the objects of the law, and a culture which puts great value on formal law.

1. *Indonesian Culture Meets Dutch Policy*

a. *Community and diversity in Indonesian law*

Modern Indonesia's motto is "unity in diversity." Whatever the degree of unity, certainly the archipelago offers diversity. Its boundaries, which were also, for the most part, the boundaries of the Netherlands East Indies in the late 19th century, enclose some 3,000 islands, inhabited by perhaps 300 different ethnic groups, stretching across 3,000 miles of sea between the Indian and Pacific Oceans.[13] The two systems of agriculture which characterize the settled areas of the islands are almost polar opposites. In the "Outer Islands," the islands other than Java and Bali, agriculture uses a semi-nomadic, slash-and-burn method called swidden (or *ladang*). In the tropical climate, regrowth occurs so quickly that the most practical approach to farming is rotation among various plots, burning the growth for an ash fertilizer. Such areas are thinly populated. In Java and Bali, however, rich volcanic soil is terraced and flooded for *sawah*, rice paddies. The extraordinary productive capacity of the *sawah* method, plus the high caloric yield of rice, makes possible an almost incomprehensible population density. Java today almost certainly has over 70 million people on an island smaller than the state of Illinois, with some sections approaching 2,000 persons per square kilometer.[14]

Indonesia's geographic, ecological, and ethnic mix, together with its historic experience, has generated cultural diversity. The principal population, mainly of Malay stock, probably emigrated from the Asian mainland in bits and pieces, gradually over a period from perhaps 2500 B.C. to 1000 B.C. Unlike the riverine civilizations familiar to us from textbooks—ancient Sumer, Egypt, China, the Indus valley etc.—Southeast Asian civilizations generally could obtain high agricultural yields without complex irrigation systems. Thus village-level organization usually sufficed to produce a comfortable subsistence. Indonesia was no exception to that generalization. Comparatively under-populated through most of its history (probably until the 19th century), with new, potentially fertile land almost

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13. J. PEACOCK, INDONESIA: AN ANTHROPOLOGICAL PERSPECTIVE 94 (1973); Legge, *supra* note 8, at 3.

14. Geertz, INVOLUTION, *supra* note 11, 2-37, including an excellent description of both swidden and *sawah*.

always "around the corner" waiting to be cleared, Indonesia saw no organization more elaborate than small communities—most of them probably rotating through a wide land area using swidden agriculture—for centuries.[15]

When states finally appeared, probably in the 6th or 7th centuries A.D., they appeared not primarily for economic and political functions, as Western rationalists would expect, but for religious, philosophical, and spiritual functions. From India, strong Hindu and Buddhist influences gripped the islands. Monarchs materialized as god-kings who calmed and ordered the turbulent earthly society by meshing it with the cosmic harmony. The king, especially in Java, was seen as the one and only medium linking man's micro-cosmos with the gods' macro-cosmos. To help him with these tasks, he surrounded himself with courtiers. For these monarchies, status concerns were essential to harmony. The culture which developed at these courts became obsessed with maintaining fine gradations of status. Javanese became in effect two languages: one used when addressing a superior, another highly different form for addressing an inferior. Society was held together by the mutual obligations of *kawala* and *gusti*, a highly personal bond of master and servant. The extent to which these concepts filtered through to the rest of the population can still be seen in the popularity of the *wajang kulit*, a lengthy play which uses puppets to cast shadows on a screen, and focuses on the relation of status and harmony. In the old Javanese states, king and courtiers came to be seen as virtually of a different substance from villagers, divine or semi-divine. There was a kind of spiritual division of labor: the village strove to remain in harmony with the natural order as the court sought harmony with the supernatural. Since villagers had wholly different functions, villages retained considerable autonomy in non-spiritual matters like economic production and day to day administration in spite of the principle of divine monarchy.[16]

A surprising number of these traditions survived Indonesia's gradual conversion to Islam during the late 13th through the 16th centuries. Islam doctrinally is a religion of strict monotheism with no intermediaries between man and God. But Java is a long way from Mecca, and Sufi

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15. Legge, *supra* note 8, at 4, 26-27. See generally D. HALL, HISTORY OF SOUTHEAST ASIA (3d ed. 1968); G. COEDES, THE INDIANIZED STATES OF SOUTHEAST ASIA (repr. 1975); M. OSBORNE, SOUTHEAST ASIA: AN INTRODUCTORY HISTORY (1979).

16. S. MOERTONO, STATE AND STATECRAFT IN OLD JAVA (1968); C. GEERTZ, THE RELIGION OF JAVA 261-278, 289-308 (1960); Heine-Geldern, *Conceptions of State and Kingship in Southeast Asia*, 2 FAR EASTERN Q. 15 (1942); Peacock, *supra* note 13, at 14-18, 28-29.

mystics, more interested in spiritual experience than doctrine, apparently took a major role in the conversion process. Whatever the explanation, except for some coastal traders and an ever-present trickle of returnees from the pilgrimage to Mecca, most Indonesians came only to refer to themselves as Muslims, call God Allah, honor the name of Muhammad, and otherwise go on about largely the same philosophical-spiritual business as they had before.[17] Bali never converted to Islam. Elsewhere, while the kings could no longer officially be gods themselves, nevertheless their role remained primarily magical, one of assuring harmony with the cosmos.[18] Geertz describes the religion of modern Java as a syncretistic mixture of Malay animism and concern with spirits, Hinduism, and Islam. Further, while one can only describe positions on a spectrum rather than self-conscious groups, each of the major cultural forces—Malay, Hindu and Islamic—has left its imprint more strongly on a particular segment of the population. As a rough generalization, Geertz identifies an *abangan* version of the mixture which stresses the animistic Malay heritage, most common among the peasants of village communities; a version which stresses the Hindu concerns with status and harmony with the supernatural, most common among the *prijaji*, the descendants of the king's courtiers and bureaucrats; and a *santri* version which struggles for a closer approximation to the Islam of the Qur'an, most common among traders and peoples of the coast. The *abangan* version dominates numerically; even today probably 80% or more of the population lives in village communities.[19]

Each of these cultural influences has also left its imprint on Indonesian law. From the village peasant tradition, showing affinities with customary law of the Malay peninsula, came law which treats the village community, the basic social unit, as also the basic legal unit. The definition of that unit varies with the region. Dutch scholars of the late 19th and early 20th centuries, looking particularly at patterns of social and cultural organization, especially kinship and village systems, identified nineteen distinct law areas in the islands—for example, three on Java, five on Sumatra. Some communities are determined by kinship ties (including, in the Minangkabau law area of Sumatra, matrilineal kinship and female dom-

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17. G. Drewes, *Indonesia: Mysticism and Activism*, in UNITY AND VARIETY IN MUSLIM CIVILIZATION 284 (G. von Grunebaum, ed. 1955). C. Berg, *Indonesia*, in WHITHER ISLAM? 250-258 (H. Gibb, ed., 1932).

18. Peacock, *supra* note 13, at 27-29.

19. C. GEERTZ, ISLAM OBSERVED: RELIGIOUS DEVELOPMENT IN MOROCCO AND INDONESIA (1970); Geertz, RELIGION, *supra* note 16.

inance). Others, particularly on Java, Bali and Madura, are territorial, i.e. defined by the fact of sharing the same lands and village regardless of kinship. But in virtually all such law areas, individual rights existed principally as a part, fragment or share of community rights, defined and limited by the community. The goal of the system was justice for the community first and only secondarily justice for the individual. Disputes were typically resolved within the village, before headmen or chiefs or a village council, and decided in ways which restored harmony to the community. Judicial "decisions" in village law were really a process of mediation, of finding a mutual adjustment to which both parties could agree, rather than declaring a winner and loser. Typically a party responsible for an injury made some restitution to the community over and above whatever he gave the injured individual.[20]

From Hindu influence came law of the monarchy and its court which focused not on rights but on obligations. Legal principles for the court were derived from philosophies which explained the natural world and ordered the relations of individuals as they simultaneously ordered the relations of both individuals and groups to the non-natural, spiritual, non-empirical world. One's place in the world, set by one's caste, class, sex, family position etc., determined the nature of one's legal obligations. In the phrase of M.C. Hoadly and M.B. Hooker, "the oriental legal universe is just another alternative explanation of the human condition."[21]

In tension with these, and with a distinctly limited role, came Islamic law. Thanks to the popular identification with Islam, Arabic provided key words in the Indonesian legal vocabulary, like *hukum*, law; *adat*, customary law, and, with Malay-Indonesian prefixes and suffixes, *pengadilan*, court, from Arabic *adil*, just.[22] But only Muslims of the *santri* variety were inspired to comply with the totality of Islamic law. In fact, still today most *abangan* Indonesians tend to ignore even the "Five Pillars" (the basic duties of all Muslims: profession of faith, prayer, alms, the

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20. B. TER HAAR, ADAT LAW IN INDONESIA (1948), esp. 49-51 (a map of the 19 law areas is printed on the endpapers); also E. Hoebel and A. Schiller, *Introduction* to ter Haar, esp. 7-10. M. HOOKER, ADAT LAW IN MODERN INDONESIA 54 (1978). Jaspan, *In Quest of New Law: the Perplexity of Legal Syncretism in Indonesia*, 7 COMP. STUD. IN SOC'Y & HIST. 252 (1964/65). *Cf.* H. SONIUS, INTRODUCTION TO ASPECTS OF CUSTOMARY LAND LAW IN AFRICA AS COMPARED WITH SOME INDONESIAN ASPECTS (1963); S. ROBERTS, ORDER AND DISPUTE: AN INTRODUCTION TO LEGAL ANTHROPOLOGY (1979).

21. M. HOADLEY & M. HOOKER, AN INTRODUCTION TO JAVANESE LAW 1-5 (1981).

22. Lev, *supra* note 7, at 5.

fast of Ramadan, and the pilgrimage).[23] At maximum, Islamic law was used to decide some matters of family law and inheritance, and even for those subjects the customary law of village and royal court showed stubborn persistence. In part, Islamic law was little-used because the court which ostensibly decided cases with it was in fact often controlled by *prijaji* responsible to the monarchy. On Java, for example, the mosque typically was administered by a *penghulu*, a civil servant from the *prijaji* appointed by the administrator of the district, who had no ties whatever to the *ulama*, Islamic religious scholars. The *penghulu* also sat as judge in the "Islamic" court. He decided cases with customary law as often as not. But Islamic law was also little-used because the nominal Muslims simply chose not to follow it. Even in modern Indonesia, whether or not to use Islamic law for inheritance is a heated issue.[24]

Then came the Dutch regime with its Western concepts of law. In fairness, the Dutch did not try to run roughshod over Indonesian legal tradition. Consistently their policies included at least an attempt to respect native law.[25] The real problem was that the Dutch never knew what native law was. Until the later 19th century, most Dutch took the Indonesians' nominal adherence to Islam at face value and assumed that their law must be basically Islamic. (Not that the Dutch knew much of Islam either; in the court reorganization of 1882, they called the new Islamic courts *priesterraden*, "priests' courts." Since Islam at least officially has no intermediaries between man and God and equality of all believers, its leaders cannot be called priests.) Christiaan Snouck Hurgronje, perhaps the founding father of modern Western scholarship on Islam, finally disabused his countrymen of that impression.[26]

The Dutch legal scholars, however, may have overreacted. Professor Cornelis van Vollenhoven is famous as the "discoverer" of Indonesian customary law. Both he and Snouck Hurgronje called it *adat* law, after the Arabic word for custom, and non-Islamic native law is still so known. But van Vollenhoven had worked out his theories of Indonesian law while

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23. Peacock, *supra* note 13, at 27, 98, 146-147. Geertz, RELIGION, *supra* note 16, at 11-120. Note for example that at the *selametan*, the common meal which is central to *abangan* religious life, it is usually necessary to hire someone who can recite basic Islamic prayers.

24. H. BENDA, THE CRESCENT AND THE RISING SUN 13-16 (1958). Lev, *supra* note 7, at 10-14, 20-30. Hooker, *supra* note 20, at 91-109.

25. S. GAUTAMA & R. HORNICK, AN INTRODUCTION TO INDONESIAN LAW: UNITY IN DIVERSITY 1-5 (1972).

26. Benda, *supra* note 24, at 20-31, 83-86. Hooker, *supra* note 20, at 94-95. Lev, *supra* note 7, at 8-14. Vlekke, *supra* note 7, at 303-312.

still at Leiden without having seen the Indies, and may have found the law he wanted to find. Van Vollenhoven belonged to the historical-scientific school of jurisprudence. A fierce opponent of codes, a follower of Friedrich Carl von Savigny, he believed that the only true law was that produced by communities through history. (Christopher Columbus Langdell of Harvard, the inventor of the casebook method, was an American with a closely analogous position.) Van Vollenhoven and his students went to the other extreme, concluding that Islamic law was part of Indonesian law only to the extent that it had been "received" into the *adat* law through community behavior and practice. His work defined the nineteen law areas, and he sent his students across the islands to find the law through historical research. The Dutch regime became increasingly attracted to van Vollenhoven's approach, probably not least because nineteen law areas seemed less likely to bring the islands together in opposition to Dutch rule than did universalist Islam. His influence became so strong that by the 1930's, appeals courts for natives were deciding cases on the basis of decisions from 14th-century Hindu-Javanese kingdoms.[27]

In fact probably the best interpretation of the fragmentary evidence is that there was no one system of Indonesian law, neither *adat* nor Islamic. Modern Westerners, with a concept of territorial law, assume that other societies must have a single system of law. In so doing they forget the West's own past. In the Middle ages, Europe had a more personal law, and the law applicable to one's case depended on who he was and what political authority he and a court accepted. In England throughout the llth, 12th and 13th centuries, royal courts and the customary courts of manor lords literally formed competing legal systems. Often they vied with each other for legal business. Frequently they operated on thoroughly different principles of substantive law, ignoring each other's pronouncements. For example, under the royal law serfs could neither buy nor sell land. But countless manor courts recognized serf titles to land through purchase, and the right to sell such titles to others, well into the 13th century. Persons chose the court and the law they wanted, the law that would protect their interests, at least until the power of the crown grew enough to restrict that choice.[28]

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27. van Vollenhoven, *The Study of Indonesian Customary Law*, 13 ILL. L. REV. 58 (1919). G. RESINK, INDONESIA'S HISTORY BETWEEN THE MYTHS 5 (1968). A. VANDENBOSCH, THE DUTCH EAST INDIES 176-188 (2d ed. 1944). Benda, *supra* note 24, at 66-89. Lev, *supra* note 7, at 17, 20-24, 196-197.

28. See P. HYAMS, KING, LORDS AND PEASANTS IN MEDIEVAL ENGLAND (1980); S. MILSOM,

Indonesian law, or at least the law of Java, probably worked much the same way. There were three competing systems, roughly corresponding to the three main formative forces of Indonesian culture and the three principal positions on the Indonesian religious spectrum. For peasants there was village custom and village justice by the headman or council, which might be labelled *abangan* law. For *prijaji* there was the Hinduized law of the royal court. And for *santri*, there was Islamic law. No doubt the three influenced each other, but it also seems likely that they were separate systems of justice which ignored each other as often as they could, submitting only when power or circumstances dictated that they could not. That Islamic law amounted to a competing system in Indonesia, often ignored by the peasant mass, is well documented. Whether village and royal law should be seen as separate systems is less certain. But at the very least, there would be nothing surprising about ties between a constellation of religious attitudes and a constellation of attitudes to law.[29] And there is evidence that villagers perceived royal law not as decisions of a higher court to be followed as controlling, but rather as alien impositions to be complied with only when necessary. Hooker describes the monarchies as "to a large degree legally divorced from the populations amongst whom they existed. . . . Their actual influence on the *adat* rules by which the great mass of their populations lived was . . . quite slight."[30] Conversely, most of the village law, for example interests in land and how to acquire them, did not appear in the law books of the Javanese kings (or in the Islamic law treatises in use in the Indies).[31] A remnant of the system competition probably survives in the struggle over the role of Islamic law in modern Indonesia, which Daniel Lev has shown to be more a struggle over the political legitimacy of judicial institutions than

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HISTORICAL FOUNDATIONS OF THE COMMON LAW (lst ed. 1969); E. Thompson, *The Grid of Inheritance*, in FAMILY AND INHERITANCE: RURAL SOCIETY IN WESTERN EUROPE 1200-1800 at 328 (J. Goody, J. Thirsk, and E. Thompson, eds., 1976). For examples of serf land transactions, *see, e.g.*, CARTE NATIVORUM (C. Brooke and M. Postan, eds., 1960). Cf. the distinction between "official law" and "local law" in M. Galanter, *The Modernization of Law*, in MODERNIZATION: THE DYNAMICS OF GROWTH 153 (M. Weiner, ed., 1966).

29. H. BERMAN, INTERACTION OF LAW AND RELIGION (1974).

30. Hooker, *supra* note 20, at 9-10. See also ter Haar, *supra* note 20, at 22, 78, 86; Peacock, *supra* note 13, at 18-19; Moertono, *supra* note 16, at 90-92; B. Haga, *Influence of the Western Administration on the Native Community in the Outer Provinces*, in THE EFFECT OF WESTERN INFLUENCE ON NATIVE CIVILIZATIONS IN THE MALAY ARCHIPELAGO 171, 188-189 (B. Schrieke, ed., 1929).

31. Darmawi, *Land Transactions Under Indonesian Adat Law*, 3 LAWASIA 283, 310 (1972).

over the content or value of particular substantive law provisions.[32] At any rate, it seems likely that pre-colonial Java was characterized by not just legal pluralism but competition of legal systems, with what might be called an *abangan* system, a *prijaji* system, and a *santri* system. A native gave his loyalty, his feeling that his interests would be protected, to one of these on the basis of his cultural-religious attitudes and affinities, tempered by political realities.

b. *The collision over land tenure*

The suggestion may be particularly important for understanding a major problem of the Dutch regime, the question of native land tenures. From the rather despotic way monarchs handled land, installing lords on it apparently where they chose and forcing villagers into labor on royal lands, the royal assertion that all land belonged to the ruler seemed borne out by reality. But most villages operated as if the village community itself had the original rights to the land, and either the chief or the village council determined individual holdings and allocated underdeveloped parcels. The contradiction is easier to explain, though perhaps no easier to resolve, if in fact the Dutch faced two competing systems which did not recognize each other's titles to land.

Almost certainly the village system of rights to land had its origin in the days before monarchies and in the days when the semi-nomadic swidden agriculture predominated in Java. It seems to rest on an assumption of an abundance of arable land, anticipating that individuals and groups would move and particular plots go into and out of cultivation. A functioning social community of persons—in Java and Bali usually called the *desa*—"disposed" over a particular area of land, both cultivated and uncultivated. Individuals and families acquired rights to the use of particular plots of land only through membership in the *desa*, and maintained those rights only as long as they worked the land for the benefit of themselves, their families, and the *desa* as a whole. Where the issue at the bottom of estates in land in the Anglo-American system is the relation of one individual's interest in land to the interests of other individuals, the issue for customary land tenures in Indonesia was the relation between an individual's interest and the community interest. Roughly, the more labor and capital an individual invested in a plot, and

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32. Lev, *supra* note 7. See for example p. 25: ". . . what was really at issue was less the justice of given rules . . . than the political legitimacy of given institutions."

the longer he worked it, the closer the ties between him and the land and the weaker the community interest. But the community interest was slow to extinguish, and depending on the traditions of the particular *desa* that interest might require reassignment of the plot on the occurrence of certain conditions or even at regular intervals.[33]

While each *desa* probably had its own peculiarities, some examples drawn from frequently recurring patterns can illustrate how the system worked. A *desa* claimed to exercise community interest over an area of land to the exclusion of persons not members of that community. All members of that *desa* then had common rights to hunt, gather produce or honey or timber, and take water in that area. A member could however begin to establish a more individual relation to the land by marking it, making an appropriate sacrifice to the spirit world, and beginning to clear it. At this point he acquired what Dutch scholars would later call a "right of preference" in that plot which limited the group's common rights to its products. (One could lay claim to the fruits of a particular tree by a similar marking and sacrifice.) With further clearing and cultivation, or by planting an orchard, or by building a housing compound, he acquired the fullest possible personal bond with the land, usually called *jasa*, or by the Arabic loan-phrase *hak miliq*. He and his family were entitled to its yield and others were excluded. His *jasa* right could be sold to another member of the *desa* or descend to his heirs at his death.[34]

The tenure, however, was far from absolute. In Javanese tradition, all material objects, including land, were subject to the joint care of the group for the benefit of the group as a whole and of the spirit world. The function of land was to provide subsistence for members of the *desa*; any other use disturbed natural harmony. So for example one could not alienate one's *jasa* to someone outside the community, though it could be leased to such a person for a season (and the lease was renewable). A lease to an outsider, however, also required permission of the chief or council, and the *desa* expected a share of the payment. Transfer of a *jasa* right to another member of the *desa* also required the presence of the chief or council (as representatives of the community) to be valid, and *desa* members could object to the transfer and make their own offers.[35]

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33. Hooker, *supra* note 20, at 118-120; ter Haar, *supra* note 20, at 81-97; Tas, *supra* note 7, at 3-4; van der Kroef, *Land Tenure and Social Structure in Rural Java*, 25 RURAL SOCIOLOGY 414 (1960).

34. ter Haar, *supra* note 20, at 83-84, 96; Darmawi, *supra* note 31, at 289-290; H. KANO, LAND TENURE SYSTEM AND THE DESA COMMUNITY IN 19TH CENTURY JAVA 11 (1977).

35. ter Haar, *supra* note 20, at 49, 83, 87, 93; Darmawi, *supra* note 31, at 287-289, 295-296; Kano, *supra* note 34, at 29.

Also, subsistence, not market production, was the natural use of land. If the holder of a *jasa* generated a surplus beyond what was necessary to feed his family, he needed a special license from the village authorities to sell that surplus on the market, and again the *desa* got some share in the return.[36] Rights were maintained by productive use. If he failed to continue to work the land or live in the house, if he left the *desa*, or if on his death he left no heir, or none capable of working the land (or, later, of performing labor services for the prince), the land returned to the community's disposal. It returned through the same interests out of which it had come: the former *jasa* holder typically retained a "right of preference" as long as irrigation dikes or house pilings were still visible, or until the natural growth had reached a specific height and thickness. Thereafter it was community land again, until another *desa* member sought to reclaim it.[37]

In another variation, one held, not an interest in a particular plot of land, but a share in communal ownership of the *desa*'s land. One worked a plot for a time, then at more or less regular intervals the *desa* recaptured and reassigned all land in proportion to the shares. In this system, typically one's share was descendable and devisable, but could not be sold or leased even within the *desa*.[38] Neither system should be confused with a true commune. Economic and social stratification existed. In *jasa* areas, certain families, believed to be founders, held both *jasa* rights in the best land and also household compounds (*gogol* tenure). They also had the greatest magico-religious responsibilities in the sacrificial rites and purification rituals that kept the balance between the material and non-material worlds. Others, who had either land or house rights, but not both (*lindung*), had lesser status and lesser responsibilities. Finally, the landless or servants (*nusup*), typically newcomers to the *desa* (one could work one's way in after long residence and permission of the authorities), had few responsibilities. In communal ownership areas, some had larger shares than others. Chiefs, especially in communal ownership areas, enjoyed the benefits of extra land or shares (*bengkok*) that went with the office.[39]

The systems are not totally incomprehensible in terms of Western concepts. For someone from the Anglo-American legal tradition, it may

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36. ter Haar, *supra* note 20, at 83; Boeke, *supra* note 11, at 24.

37. ter Haar, *supra* note 20, at 82-85, 96; Kano, *supra* note 34, at 12.

38. ter Haar, *supra* note 20, at 85; Kano, *supra* note 34, at 15; Darmawi, *supra* note 31, at 291; van der Kroef, *supra* note 33, at 415-417.

39. ter Haar, *supra* note 20, at 54, 70-74; Kano, *supra* note 34, at 22; Darmawi, *supra* note 31, at 287-289; van der Kroef, *supra* note 33, at 425; Peacock, *supra* note 13, at 19.

help to think of the maximum individual tenure, the *jasa* interest, as something like a fee simple determinable, with the community retaining an interest roughly analogous to a possibility of reverter. One is also reminded of concurrent estates, where the holder of an undivided interest cannot interfere with the rights of the other holders of undivided interests, though tenants in common and the like have simultaneous equal rights whereas the *jasa* holder acquired rights distinctly superior to those of the community. Communal ownership areas had a structure similar to that of a business corporation. But in either system, one searches in vain for an individual fee simple absolute. Only the community as a whole is a unit capable of holding rights in land comparable to Western "ownership."

At least the outlines of this system must have been worked out before the kingdoms materialized, and almost certainly the *desa* had the original rights to the land. The monarchs, with both stronger political power than any village and the power of a religious figure whose existence and well-being was considered vital to the harmony of his people with the cosmos, then made despotic inroads on the land controlled by *desas*. The villager's world-view required him to defer to the monarch, at least in form. So monarchs planted their *prijaji* in control of land, took labor services from the village, and claimed that they were the original owners of the land. They in fact acquired a share of what the land produced.[40] But the villagers were not convinced that monarchs' land titles thereby became legal and that they had their tenures from the monarch. Villagers continued to dispose over as much land as they could, and villagers avoided royal demands whenever they could. And as long as arable land was abundant, a *desa* which faced unreasonable burdens from a king could simply move in a body to new land, and many did.[41] In short, royal law did not recognize community titles and the *desa* law did not recognize royal and *prijaji* titles, a situation not unlike the status of serf titles in royal as opposed to manor courts in medieval England. Since the king was particularly interested in labor services (without them, his land was worthless), in practice most villages furnished the services as a group, thereby "buying off" the king for a time, and continued to administer their *desa* system of interests in land as if the king did not exist.[42]

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40. ter Haar, *supra* note 20, at 53, 75-78; Peacock, *supra* note 13, at 19; Moertono, *supra* note 16, at 60-61, 115-116; Hooker, *supra* note 20, at 9-10, 118-119. Cf. analogous developments in Malaya, D. WONG, TENURE AND LAND DEALINGS IN THE MALAY STATES 8-20 (1975).

41. Peacock, *supra* note 13, at 19; Moertono, *supra* note 16, at 75-76.

42. Peacock, *supra* note 13, at 28-29; Moertono, *supra* note 16, at 75-76, 90-92; Kano, *supra* note 34, at 15, 29; Tas, *supra* note 7, at 32.

Nineteenth-century Europeans were woefully unprepared by their culture to understand or deal with such a complex of native interests in land. The Dutch approached issues of land tenure with their own system's concept of ownership derived from Roman law, significantly more absolute than the Anglo-American estates in land.[43] Nevertheless, even English legal culture in the era of individualism offered few reference points for such things as communal ownership and competing systems of title. In fact, the crucial decisions about land tenure in Java were made by an Englishman, Stamford Raffles (later famous as the founder of Singapore).

As a side effect of the Napoleonic Wars, England took over all Dutch claims in Indonesia between 1811 and 1816. Raffles, as administrator, set out with, by his lights, the best of intentions, to end what he considered an oppressive, exploitative Dutch system in Java based on tribute in crops. Instead, he would introduce a free trade economy based on individual private property in land in which Javanese could fully participate. But he did not know what the existing native system of tenure was, and without that knowledge he could not decide what measures would alter it toward private property in land. If Javanese already had individual titles, he wanted to respect them. If not, the best solution was government control of land from which both Europeans and Javanese could purchase private titles. So, he appointed a Land Commission to find out. Of the four members of that Commission, only one spoke Javanese, and he was a Dutchman who considered the Javanese so lazy that they could never participate in the economic development of the islands.[44]

While waiting for the Commission to report, the finances of Java approached a crisis. If the government owned the land, a sale of unoccupied land was an obvious solution. Raffles himself, knowing that the lords and *prijaji* disposed of land in a fairly high-handed manner and took labor services, decided that the Javanese system must be "feudal." All land was held from the crown, he thought, lords and *prijaji* holding directly, chiefs holding from lords and *prijaji*, commoners from chiefs, all on condition of produce and services. The Commission's preliminary report indicated that all "regents" (lords and *prijaji*) unanimously said that all land belonged to the sovereign. It found individual natives occupying particular *sawah* fields, with custom apparently protecting that

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43. Sonius, *supra* note 20, at 19-20.

44. J. BASTIN, RAFFLES' IDEAS ON THE LAND RENT SYSTEM IN JAVA AND THE MACKENZIE LAND TENURE COMMISSION 20-21, 28, 65, 117, 124 (1954) (Verhandelingen van het koninklink Institut voor Taal-, Land- en Volkenkunde XIV).

occupancy; it found that each *desa* had "pretended property" in uncultivated lands; but it considered such claims a mere pretence. So Raffles went ahead with the sale of land, even buying some himself. He justified it on the theory that the sovereign had the original title to all land, and that the English had succeeded to the rights of the sovereign.[45]

Raffles also instituted a land rent system on the same theory. But as his advisors went around Java putting it in place, reports came back that the villagers behaved as if they had individual property rights in land, and that chiefs, so far from being manor lords, were usually elected by the community. In an attempt to reconcile the conflicting data, Raffles decided that in Java the sovereign had the original title to land and the right to dispose of it, the individual cultivator had a hereditary right of occupancy on cultivated land, and no one in between had any rights. The chiefs and regents, however, would stay in place, as government employees collecting the sovereign's land rent. When the Dutch reoccupied Java in 1816, they simply accepted Raffles' conclusions and continued his system.[46]

So the colonial regime was launched on an error in land policy that persisted as long as the Dutch remained in Indonesia. The Dutch claimed all land and collected rent on it, a claim which the *desa* did not recognize. Conversely, the Dutch did not recognize the community interest in land, both cultivated and uncultivated, though they did respect, after a fashion, individual *jasa* rights which derived from that community interest. Further, if Raffles had intended to create a Javanese peasantry with individual private property in land, his policy decision worked to directly undercut his intention. While the evidence is thin, it seems likely that in long-settled areas, *jasa* rights had begun to turn into something like individual tenures. As the right passed from generation to generation, the community asserted its controls less and less often and the individual gained greater dominion over the land. In some *desas*, the limits on selling to outsiders had dwindled to a mere opportunity to match the outsiders' offer. In others, land may have simply become fully alienable without regard to community rights. By using the *desa* chief as a land rent collector, however, Raffles and his Dutch successors caused a rebirth of community interests. Though in theory imposed on individuals, in practice the land rent was collected from villages. In theory an amount equal to the value of two-fifths of the crop produced, in practice the amount of the land

45. *Id.*, at 28, 35, 57-84, 92.

46. *Id.*, at 92, 118, 146-177. Tas, *supra* note 7, at 34. D. KROPVELD, THE LAWS OF NETHERLAND EAST INDIA RELATING TO LAND 26 (1911).

rent was set by haggling between Dutch officials and each *desa* chief. Rates varied widely, and they related more to the political skill of the chief than the productivity of the land. Individual burdens within the village had to be allocated by the village. Not surprisingly, the village turned to traditional institutions to allocate those burdens. To meet the regime's demands, the *desa* was virtually forced to re-assert community rights over land.[47]

Then in 1830 the Dutch expanded on Raffles' system. When the Netherlands government had taken over the Dutch East India Company in 1796, it had also absorbed its debt of 140 million guilders. In 1830 Belgium, at that time the only industrialized area of the Low Countries, split off from the Netherlands. The Dutch regime needed revenue. To that end Johannes van den Bosch, the colonial minister, in 1830 proposed what became known as the "Culture System": to develop Java by giving peasants the option of either paying the land rent, or cultivating one-fifth of the *sawah* in a crop chosen by the Director of Cultures and turning that crop over to the government. He intended that any surplus the crop produced over the land-rent be returned in cash to the *desa*.[48]

Put into place, the Culture System meant that the government got huge amounts of free labor for a massive sugar, coffee, and indigo-raising operation on *desa* land. Like land rents, the practice of the Culture System never matched the theory. It was imposed on villages, not individuals. Its burden fell very unequally, with the regime demanding large portions of land and labor from some *desas*, little or none in others. Participation in the system did not release a *desa* from land rent as van den Bosch had proposed, since land rent receipts more than doubled between 1830 and 1850, though the regime did make payments for crops and perhaps applied them toward the land rent. Probably, as in the case of land rents, there were as many different arrangements as there were villages. The major component of the system was labor, not land: while the Dutch regime used only about 20% of the *sawah* land in Java for its crops (about 5%

47. Day, *supra* note 7, at 243-258. Sonius, *supra* note 20, at 30; ter Haar, *supra* note 20, at 84; Kano, *supra* note 34, at 29; van der Kroef, *supra* note 33, at 416; Darmawi, *supra* note 31, at 292. Note that Kano, at 20, has evidence that in at least one area, communal ownership was established only *after* the coming of Dutch rule, as a means of distributing the rent and labor burdens imposed on the villages. *Cf.* Day at 303-304.

48. Kossman, *supra* note 7, at 163-164. Furnivall, *supra* note 7, at 115-133. Vlekke, *supra* note 7, at 269-271, 283. Legge, *supra* note 8, at 69-73. "Culture System" came into English as a literal translation of the Dutch *Cultuurstelsel*. "Cultivation System" or "System of Government-Controlled Agricultures" would come closer to the meaning of the word. Vlekke, *supra* note 7, at 269.

of all arable land), some 70% of peasant families owed labor services. The former royal *prijaji* became Dutch-paid civil servants administering the system, taking a percentage of the value of the crops raised in their districts.[49]

The Culture System bolstered even more the community structures and interests in the village at the expense of the individual. The regime, via their hired *prijaji*, sought the right to use cultivated land from the *desa* chief, and again he could only draw on community interests in land to meet the burden placed on him. The Dutch wanted sugar and indigo grown in rotation, and the system was easier to manage if their crops were grown on contiguous blocks of land. The regime also found it simpler to deal with a chief or a *desa* council than to make private arrangements with individuals. From the peasants' side, since most communities distributed labor service obligations to those who had *jasa* rights, landholding became as much a burden as a benefit. The pressures encouraged the sale of access rights to land or even redistribution of it in order to bring in more persons to share the demands for labor services. A redistribution also would help insure that no one family would lose all its rice land to export crops. All of these pressures favored the strengthening of community interests in land at the expense of individual ones. The effect of Culture System policy was to block the emergence of individual peasant entrepreneurs and strengthen the communal *desa* structure.[50]

The Culture System also did little to weaken, and may have strengthened, the traditional system of using status and social obligation as a means of mobilizing labor (rather than individual initiative and economic rewards). For labor on the fields the Dutch took over, and for work in transport and processing, again the government used the *prijaji* and the *prijaji* turned to the chiefs. The regime considered field work a part of

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49. See generally Day, *supra* note 7, at 243-344, and Furnivall, *supra* note 7, at 115-173. Of the most recent work, Robert van Niel believes that villagers received crop payments only if the crops' value exceeded the land rent obligation (and had to make up the difference if the crops were worth less than the rent), while C. Fasseur thinks that crop payments were separate from land rent collection, though land assessments tended to be raised to an amount which would not quite swallow up the expected crop payment. R. van Niel, *Measurement of Change Under the Cultivation System in Java, 1837-1851*, INDONESIA no. 14, at 89 (1972), and *The Function of Landrent Under the Cultivation System in Java*, 23 J. OF ASIAN STUD. 357 (1964). C. Fasseur, *Some Remarks on the Cultivation System in Java*, in PAPERS OF THE FIRST DUTCH-INDONESIAN HISTORICAL CONFERENCE 1976, NOORDWIJKERHOUT, THE NETHERLANDS 101 (1978).

50. G. van der Kolff, *European Influence on Native Agriculture*, in Schrieke, ed., *supra* note 30, at 103, 111. See also the works cited in note 49 *supra*.

raising the crop and so it went unpaid. To the peasant, such work was indistinguishable from the old *corvee* for the monarch, levied as it was by the same authorities. Labor transporting the crops, or in mills processing those crops, supposedly fell outside the system and so in the eyes of the Dutch was recruited by individual contracts for wage labor with the natives. However, the *prijaji* recruited it in the same way, and often "forgot" to pay the wages. Traditional *desa* law had no concept of contract, i.e. mutually binding promises to perform in future. Transactions were typically simultaneous transfers of, for example, land for cash. The villager understood labor as a contribution to the community or as a forced service to a superior authority, but not as a commodity to be sold. The *prijaji* made little effort to educate them. They also often collected the land rent too. The *tani* of the village can perhaps be forgiven for thinking that little had changed, that he still delivered a share of crops and forced labor services to a despotic sovereign.[51]

The Dutch, in following Raffles' lead, also set up a head-on collision between competing systems of land tenure. The regime recognized native occupancy rights only on cultivated land. It felt free to dispose of uncultivated land in any way it wished. But, as we have seen, uncultivated land was just as much a part of the *desa* system of interests in land as the terraced *sawah* plots. The community gathered wild products from it. Ambitious individuals looked to it to expand their holdings. Some communities expected to rotate their agriculture through it periodically. The Dutch assumed that such "waste" land was unclaimed. In fact, if one considers the *desa* community interest in uncultivated land a valid claim, by the mid-19th century there was probably scarcely an unclaimed parcel anywhere on Java. Whoever the Dutch installed on such land would be an interloper in the eyes of the villagers.[52]

By the mid-19th century, then, the culture of Java had changed surprisingly little despite Dutch rule, including its legal culture. The Javanese were still largely oriented toward community and status obligations, not individuals and economic incentives. Land was held ultimately by communities. Individual tenures remained subject to community rights on the land which restricted its sale and required it to be used for

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51. See Fasseur, *supra* note 49, and P. Creutzberg, *Paradoxical Developments of a Colonial System*, in PAPERS, *supra* note 49, at 119; also Wertheim, TRANSITION, *supra* note 7, at 236-244, and Sievers, *supra* note 12, at 108. On the lack of contract in *adat* law see also Darmawi, *supra* note 31, at 297-299; Gautama and Hornick, *supra* note 25, at 127-131.

52. Darmawi, *supra* note 31, at 293; Vandenbosch, *supra* note 27, at 245. Compare van der Kroef, *supra* note 33, at 417.

community goals. Labor was organized by traditional figures in ways that strongly resembled the fulfilling of traditional social and political obligations. In a very real sense, rather than the Dutch remaking the existing system, the existing system absorbed the Dutch. They had succeeded not only to the sovereign rights but to the role of the old kings. Like the Hinduized monarchs, they had made despotic inroads on the customary land law of the village. The Dutch claims, however, were broader and more thorough than those of any king, since they ran to all undeveloped and fallow land on the island. The *desas* had responded to overweening kings before by moving to vacant land beyond their reach. Now, as both population and Dutch efficiency grew, increasingly there was no vacant land beyond Dutch reach. Into this situation came the development laws of the "Liberal Policy."

2. *The Liberal Policy: Ideals and Reality*

a. *Classical liberalism, capitalism, and the Liberal Policy*

The "Liberal Policy" sought to develop Indonesia through capitalism. Though development would begin with capital from Holland and other outside sources, once a "take-off" had been triggered natives were expected to imitate the successful Western methods and participate in Indonesia's growth. One way to evaluate the policy is on its own terms: whether the legal changes it introduced were, in the Indonesian legal context, likely to lead to capitalist development. Such an analysis requires two related questions: how capitalist were the laws, and were they likely to enable capitalism to emerge in native culture. To explore either, we must begin with an understanding of capitalism.

Capitalism, historically, is a component of classical liberalism, tracing its lineage back to Jeremy Bentham and Adam Smith. Classical liberalism (the modern exponents of similar theories are "libertarians") is a political, social, and economic philosophy of individualism and free market exchange. From its beginnings it was not only a political theory but what today we would call a "program for economic development"—its principles were, to its supporters, not only true and right but would also produce the greatest possible wealth and prosperity for a community or nation. While one cannot do justice to the system in a few paragraphs, a summary of major points may be useful.

Classical liberalism-capitalism rests on at least five basic assumptions. First, all individuals are equal. The assumption is not that they ought to be equal, but that they *are* equal. Obviously they are not equal in talent and ability, for example, but they are equal in all the respects of which

a political, social, economic or legal system should take cognizance. Second, the individual is the basic social and economic unit. Groups wider than individuals—communities, classes, nations—are mere abstractions. The prosperity and well-being of any group, like a nation, comes by allowing individuals to reach their maximum possible individual prosperity. Third, individuals reach their maximum possible individual prosperity by being left free to make their own economic decisions in competition with each other. Each individual will make rational decisions which will maximize his satisfactions and minimize his dissatisfactions. Since a major satisfaction is the accumulation of wealth, individuals will tend to make decisions which lead to profit. Fourth, prosperity is reached when individuals can freely acquire and employ economic resources as they wish in their decisions. Since individuals seek profit, resources will be employed in productive activities which generate profit. Fifth, the most efficient mechanism for allocating economic resources is the price mechanism of exchanges on a free competitive market. The basic factors of an economy, land, labor, and capital, will go to where they can be of best use if they are bought and sold as commodities in free exchanges. Individuals will acquire them and employ them for productive activities. If the activity fails to generate a profit, the market will reallocate that resource from the individual who cannot use it productively to another who can, as the successful buy up resources from the unsuccessful. The complete absence of plan is thus more effective in allocating resources than any plan can be. Through individuals using them to seek profit, land, labor and capital are put to work where they generate growth and expansion for the long-term benefit of all.[53]

Capitalism therefore rests legally on individual equality before the law, freedom of contract, and the transformation of land and labor into marketable commodities. Classical liberals historically have put capitalism into place in large part by changing traditional law in these directions. Equality before the law is an essential tenet of the system. Each individual must be free to pursue his self-interest and advance as far as his talents

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53. See particularly L. HOBHOUSE, LIBERALISM (1964; orig. 1911). That liberalism was a program of economic development was obvious from the time of Adam Smith's AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1937, orig. 1776). O. TAYLOR, HISTORY OF ECONOMIC THOUGHT 49-117 (1960) is an excellent guide to Smith. Jeremy Bentham's AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1923; orig. 1780) refined the concept; see Taylor, 118-145. For the ideological movement in historical context see E. HOBSBAWM, THE AGE OF REVOLUTION 1789-1848 (1962), esp. 277-285. A modern statement of similar principles is R. NOZICK, ANARCHY, STATE AND UTOPIA (1974).

will take him, neither blocked by the barrier of a hereditary nobility nor burdened by serfdom or slavery. The key figure in capitalist development is the individual entrepreneur, accumulating capital, investing it in productive enterprises, making a profit, re-investing in more productive enterprises. Freedom of contract protects his market decisions on the allocation of resources. Each individual presumably makes his own economic arrangements in his own self-interest. Any interference with contract interferes with each man's pursuit of profit and with the market mechanism that places resources in the hands of those who will presumably use them most productively. Land and labor must become marketable commodities to be allocated through that mechanism. For example, land should be as free as possible from restraints on alienation so that entrepreneurs can acquire it and re-orient agriculture from production for subsistence to production for the market. Labor must be separated from legal obligations tying it to land, and from forms of dominion like serfdom which lords of the land had over labor. The market will then allocate labor to productive commercial and industrial as well as agricultural activities. Freedom of contract also supports the movement of labor as a commodity, for contract is an individual's "liberty to break away from the customary way of doing things and to fashion for himself, by negotiation with others, a changing position in society."[54]

Classical liberalism and capitalism obviously stood at virtually the opposite pole from the dominant values and culture of Java. Neither the *abangan* nor the *prijaji* systems, separately or in interaction, shared any of the five assumptions. On Java, individuals were not equal and no one thought they should be. Status differentiation was crucial to harmony with the cosmos. The family and the *desa*, not the individual, were the basic social and economic units. Communities made economic decisions, drawing on values of cooperation and harmony, not competition. An individual used land, labor and capital subject to limits imposed by the community. Resources were allocated by custom or by social and political obligation. And, of course, not only did the Dutch regime not keep its

54. The quote is from J. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 301 (1974; orig. 1924), summarizing Sir Henry Maine. On the legal and economic transformations necessary for a capitalist economy see Commons, esp. 214-246, 283-306; Hobhouse, *supra* note 53; Hobsbawm, *supra* note 53, esp. 74-86, 180-257. *Cf.* R. SEIDMAN, THE STATE, LAW AND DEVELOPMENT 58-61, 80-81 (1978). The same cutting away of custom and tradition applies when capitalism meets a non-Western society; see the works of Eric Wolf, e.g. EUROPE AND THE PEOPLES WITHOUT A HISTORY (1982), PEASANT WARS OF THE TWENTIETH CENTURY (1969).

hands off the economy; it owned and operated the major facilities of production for export.

The "Liberal Policy" developed in the Netherlands Parliament as an ideological reaction to the Culture System. It also developed out of a struggle for power between the Parliament and the Dutch crown dating back to the European revolutionary year 1848. The Constitution of the Netherlands of 1815 had given the king complete control over colonies. Parliament, having successfully limited royal authority in domestic affairs in the first years after 1848, gradually began to apply the same principles to colonial policy, beginning with a Constitutional Regulation for the Indies in 1854. The miserable condition of the natives under the Culture System drew some sympathy, particularly after "Multatuli" (Eduard Douwes Dekker) published in 1860 what might be called the "Uncle Tom's Cabin" of Dutch colonialism, the novel *Max Havelaar*. But in the eyes of the Liberal Party representatives to the Dutch Parliament, the real crime was that government was running the economy of the Indies, choking off the free play of economic forces. Liberals began laying plans to cut off government monopolies and forced cultivation, and to develop a new policy toward land.[55]

Parliament made its first significant inroads in 1860, when it rejected the budget of the Minister of Colonies for that year. It got full control of the colonial budget in 1864. Between 1862 and 1866 Parliament brought the monopoly of spices and the forced cultivation of tea, indigo and tobacco to a halt. By 1870 even the lucrative compulsory production of sugar was at an end, though a remnant of the Culture System in coffee would stagger on until 1917. Legislation cut back peasant labor services to a one-day-per-week maximum in 1864. Interest in a new land policy was obvious by 1866 when Parliament proclaimed that native rights to property under their customary law would be respected. However, the legislators were only a little less ignorant of the native system than Raffles had been. Like him, they were not opposed to learning if they could, so they funded a survey. The investigators went out, armed with a 26-item questionnaire, in 1868-69. In the end, however, like Raffles before them, Parliament could not wait. Before the survey could report, it passed the Agrarian Law of 1870.[56]

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55. Vlekke, *supra* note 7, at 283-288; Day, *supra* note 7, at 323-333; Kossman, *supra* note 7, at 265-275.

56. Day, *supra* note 7, at 334-335, 400. Furnivall, *supra* note 7, at 157-165. Kano, *supra* note 34, at 5-9. Reporting of the survey proceeded at an academic pace. Its findings were not assembled

b. *"Private property in land"*

The Agrarian Law and Agrarian Decree of 1870 together formed the cornerstone of the Liberal Policy. The legal changes were justified as measures to get government out of its monopoly position and let laissez-faire capitalism bring growth and prosperity to the Indies. The colonial laws of 1854 had forbidden the governor-general of the Indies from selling land but had allowed him to lease uncultivated land for terms of up to twenty years. Cultivated land cleared and used by natives could not be rented. The new Agrarian law did not repeal those sections, but rather added to them. The governor-general now could lease land for a term of up to seventy-five years. He was bound however not to convey land in a manner which violated the rights of native Indonesians, and in particular not to attempt to lease land "which has been cleared by natives or which is owned by a village as pasture area or on some other basis," except in the public interest, and then only on payment of compensation. The law also gave natives the right to rent the land they occupied to non-natives for the first time. Holders of *jasa* rights in land also could apply to convert the right into a Dutch *eigendom* tenure (roughly a fee simple absolute), and have that title recorded in the Dutch land registry. Shortly after Parliament passed this law, the king issued an Agrarian Decree that "without prejudice to" the provisions of the new law requiring the governor-general to respect native rights, "all land which is not proved to be *eigendom* land shall be deemed the domain of the state."[57]

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until 1872; it published volumes in 1876, 1880 and 1896. The results appeared as W. BERGSMA, EINDRESUME ONDERZOEK NAAR DE RECHTEN VAN DEN INLANDER OP DEN GROND OP JAVA EN MADOERA (3v. 1876-96). Kano's work is an English-language summary of the survey's results.

57. Gautama and Hornick, *supra* note 25, 75-81. As translated by them, the texts are as follows:

A. The original laws of 1854:

1. The Governor General may not sell land.

2. The prohibition in paragraph 1 above does not cover small pieces of land which shall be used for the expansion of cities and villages or for the construction of government buildings.

3. The Governor General may lease land, in accordance with provisions determined by ordinance. Lands which have been cleared by Native Indonesians or which are owned by villages as pasture areas or on some other basis may not be rented.

B. The amendments of the Agrarian Law of 1870:

4. The Governor General may convey a right of *erfpacht* in land for a period not longer than 75 years, in accordance with provisions which shall be determined by

Some of the provisions can be explained by reference to other points of Dutch law. The old twenty-year leases of "state" land had not been popular with investors, in part because the length of the lease did not allow enough time to recoup an investment in long-term crops like coffee or rubber, but also because no mortgage could be raised on such a lease. The seventy-five year term, actually a different interest known as *erfpacht* which carried full rights in land except for a reversion at the end of the term and a slight restriction on waste, was mortgageable and so itself became a means of raising capital for development.[58] The Agrarian Decree was the theoretical and procedural underpinning of the state's right to grant such tenures. Only a holder of *eigendom* could convey *erfpacht*, so for complete security of *erfpacht* titles the theory that the sovereign was the owner of the land was cemented in royal decree. The decree also shifted the burden of proof in a title proceeding. The state began with a rebuttable presumption of title to all land. Otherwise it would have been required affirmatively to prove title.[59]

Even against this legal backdrop, however, the changes seem riddled with inconsistencies. Were these laws capitalist? Supposedly they were intended to get government out of the economy. Yet government remained in ultimate control of the major resource, land, distributing it to investors initially and retaining a reversion after seventy-five years. They created two distinct legal classes of land: land held under Dutch tenures with

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ordinance.

5. The Governor General should guard against conveyances of land which violate the rights of Native Indonesians.

6. The Governor General may not seize land which has been cleared by Native Indonesians or which is owned by a village as pasture area or on some basis, except in the public interest based on article 133, or for the needs of agricultural enterprises based on a higher regulation, and with the payment of just compensation.

7. Land which is held by a Native Indonesian with a right of *miliq* shall, upon proper application of its owner, be converted into land with right of *eigendom*, with such conditions and limitations as shall be prescribed by ordinance and noted on the land deed, that is conditions regarding the owner's responsibilities toward the State and village and limitations on his power to sell such land to non-Natives.

8. Transfers of land or the rental of land by Native Indonesians to non-Natives shall be executed according to regulations promulgated by ordinance.

C. The Agrarian Decree of 1870:

1. Without prejudice to articles 5 and 6 of the Agrarian Law, the following principle shall be observed, to wit, that all land which is not proved to be *eigendom* land shall be deemed the domain of the State.

58. Gautama and Hornick, *supra* note 25, at 76-78, 90.

59. *Id.* at 80.

rights and duties defined by the Dutch Civil Code, and land held under native tenures defined by customary law, which always faced the threat of dispossession from the state by its superior title under the Agrarian Decree. Supposedly the legislators intended to respect native property rights. But the new law and the decree, taken together, comprised the firmest statement yet of the state's claim to uncultivated communal land. After the results of the survey began to appear, it became clear that the Dutch regime could not in fact comply with the law since the law contradicted itself. If the governor-general had respected all the rights of the native population to land under *desa* law, including community interests, he simply would have had no significant amount of land left to lease to European investors. In the end the regime maintained a theoretical claim to all land held under native law and in practice carved its leases mostly out of uncultivated land.[60]

Even with these weaknesses, were the laws likely to encourage the development of native capitalism? If an Indonesian was to share in the economic development of Indonesia, he needed access to capital. The only resources he had on which to raise capital were his land and his labor. The laws permitted natives to lease land but did not specify whether or not they could sell it. An ordinance of 1874 clarified the point, and underscored the *desa* limits on individual alienation of land. Native land could not be sold to non-natives. In most cases, of course, only non-natives would have had sufficient capital to buy it. The measure was explained as a protection to keep natives from squandering their essential means of subsistence. So it was, but it also strongly tended to keep natives farmers, not entrepreneurs.[61] Also, land held under native law could not even legally be mortgaged until 1908. Even after 1908 it could only be mortgaged to specific colonial banks, and in practice the procedure was not implemented until 1931.[62] Thus land was a commodity for the Dutch but not for natives. Europeans who held one of the state's *erfpacht* tenures could buy, sell or mortgage those tenures; natives with *jasa* rights

60. Actually there was also a small third class of land, use rights held in private estates, mostly by Chinese. Gautama and Hornick estimate 200,000 parcels of "Dutch land" and 10,000,000 parcels of "native land." *Id.*, 80-84. See also Vandenbosch, *supra* note 27, 245-247; Darmawi, *supra* note 31 at 293.

61. Gautama and Hornick, *supra* note 25, at 83, 92, 105; van der Kolff, *supra* note 50, at 114. The protection might have been more valuable if it had not been possible for Europeans to "induce" natives to surrender their rights in land to the government, which would then in turn lease the land to Europeans. Vandenbosch, *supra* note 27, at 254.

62. Gautama and Hornick, *supra* note 25, at 108-112.

could not. Enrolling a *jasa* tenure as Dutch *eigendom* did not solve the problem, since the law specifically provided that any community limitations on land use or transfer would have to be recorded with it. Like Raffles' land policy, the legal changes of the Liberal Policy would tend to discourage, not encourage, the emergence of a native capitalist economy based on individual private property in land. Dutch law merely reinforced the restraints on alienation which had always existed in the *desa* system.[63] As long as those restraints remained, native land could not become an individually-owned commodity.

The one opportunity for natives to accumulate capital which the Agrarian Law opened up was the chance to lease land. From the standpoint of economic activity, this was no token opportunity. As the plantation system developed, far more plantation crops were grown on village land than on land held from the state. Over the next seventy years after the Agrarian Law, the regime conveyed about two million hectares of land to foreign investors in *erfpacht*. But investors also leased something like 250 million hectares of prime land from natives for plantation production in the same period.[64] However, the native Indonesian culture proved more resilient than the solvent of outside investment. Lease payments came in, but did not create entrepreneurs.

One reason was that the plantations followed the same path in dealing with villages that the Culture System had opened up. The corporation did not construct plantations by acquiring their own land; they merely borrowed some for a while. And they arranged to borrow it through traditional authorities like *prijaji*, chiefs, or village councils. Sugar was Java's principal plantation crop, and it fit into *sawah* as follows. Western investors arranged through authorities for a complex series of season use rights on village land in a rotation cycle. The transactions blended smoothly into the preexisting *desa* law which allowed outsiders use rights for a season upon payment of the rent in advance. Regulations eventually permitted negotiation for such leases covering a cycle of up to twenty-one and one-half years. Geertz describes the interlocking system of rotation

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63. *Id.*, at 81, 84, 87. In fact there is evidence that Western Administrators serving as judges invented community rights over land for *desa*s where they had not previously existed. B. ter Haar, *Western Influence on the Law for the Native Population*, in Schrieke, *supra* note 30, at 158, 161.

64. Gautama and Hornick, *supra* note 25, at 79. These estimates cover all of Indonesia. While the major plantation activity was sugar growing in Java, there were other significant projects in the Outer Islands, notably tobacco in the Deli region of Sumatra. See for example T. Wie, *Plantation Agriculture and Export Growth: Patterns of East Sumatra's Prewar Development* in PAPERS, *supra* note 49, at 17.

by which sugar moved through village lands. Any given field was in cane for its growth season of fifteen to eighteen months and then in the hands of the villagers for rice and dry crops for eighteen months. The *desa*'s fields were divided in thirds, and plantings were staggered so that at no time was less than a third of the land in village crops nor less than a third in cane.[65]

Since the transactions came into the village under traditional authorities and fit traditional law, the lease payments became a community asset, not the resource of an individual entrepreneur. Under *desa* law, the entire community expected to share in payments for use of land by outsiders. Lease payments thus became fragmented into portions distributed among all members of the *desa*. The entire arrangement also further strengthened the community interests over land at the expense of the individual. Some mechanism was necessary to ensure that no one family lost all its rice land to plantation sugar in any given season. The community interest, with its power to re-allocate holdings, was the natural device at hand. In fact, there is some evidence that *desas* with developed systems of *jasa* rights actually shifted to a communal ownership system during this period. A system with shares rather than rights in a particular plot, and with regular redistribution of land, was a rational response to the inroads of plantation leasing.[66] Leasing, like the other provisions of the Agrarian Law, made the native economy more communal, not more capitalist.

Of course, in theory a native might still have chosen to use his access to land, when he had it, to try to grow a crop for the market instead of for his own subsistence. If successful, he could have been launched toward capital accumulation. Realistically, however, both economic and cultural pressures militated against that alternative. Thanks to the leases, the *desa* had in any given season less land on which to grow its own food than it had had before. The *tani* still needed to eat. If he planted sugar and did not make a profit, where would he get his rice? The gamble must have seemed frightening. And, of course, in sugar cultivation he would have been a small producer competing with the plantation. The plantation owned the grinding mill to which he would have had to turn if his sugar were to have any market. *Desa* values also held for subsistence over

65. van der Kolff, *supra* note 50, 122-125. Geertz, INVOLUTION, *supra* note 11, 86-89; a chart on p. 88 illustrates the complex rotation system.

66. Geertz, INVOLUTION, *supra* note 11, at 90-91. Also, later land surveys showed that the stronghold of communal possession was Central Java, which was also the stronghold of sugar: Vandenbosch, *supra* note 27, at 249; cf. Kano, *supra* note 34, at 15, 20. Van der Kroef, *supra* note 33, at 421, does not think that community rights were strengthened in this period.

market activity, and, if he were successful, called on him to distribute a portion of his profit to the community. Even a "rational" Westerner would probably have chosen to grow rice for his own subsistence under those conditions.

The gamble was made harsher because the period of the Liberal Party and plantation economy also corresponded to a time of unprecedented population growth on Java. In 1870 the island probably held about 16 million people, but by 1900 it had 28.4 million, by 1930 41.7 million. No one can fully explain why demographic growth came just at this time, but Java was part of a global phénomenon of geometric increases in population which continues to this day.[67] The *desa* thus had more mouths to feed at precisely the same time it had less land on which to raise food. The Javanese response to that population explosion shows clearly the strength of the communal impulse in its culture and the weakness of individualism. The *desa* managed to find ways to create more means of access to the land it had left, not by fragmenting *jasa* titles but by multiplying use arrangements. A villager of high status with *gogol* tenure acquired more status in the community if he could provide opportunities for labor to those of lower status. By so doing he became a superior in the *kawala-gusti* relation so dear to Javanese ideas of social harmony. One did not, of course, provide labor through wage work, since *desa* law lacked a concept of contract. Rather one used rights on one's land to hire labor, in an arrangement fairly analogous to sharecropping. The holder of a *jasa* right, or of a communal share, conveyed from that right a right of access to land to another individual. The latter "paid" for that right of access with a portion of the crop from the land, leaving a portion of the crop for himself. However, since the right of access was itself an interest in land, the holder of a right of access could in turn "sell" a portion of his access right to others, in reality laborers for him who would be paid by a portion of his portion of the crop. The possible fragmentations of the right of access were virtually endless. In fact, the social ideal of sharing and gaining status in this way was so strong that

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67. Geertz, INVOLUTION, *supra* note 11, at 69-70. Globally, growth dates back to the late 18th century; for some examples, see F. BRAUDEL, CAPITALISM AND MATERIAL LIFE 1400-1800, at 1-65 (1973). Climate changes, as in Braudel, and expansion of the food supply through the cultivation of crops originating in the Americas, as in A. CROSBY, THE COLUMBIAN EXCHANGE 165 ff. (1972), have been suggested as explanations. The soundest suggestion, however, since growth seems to persist in the face even of reductions in food supply, may be William McNeill's, that global exposure to disease over time (thanks to global trade contacts) left populations with far greater immunities and resistance to epidemic disease. PLAGUES AND PEOPLES 196-207 (1976).

frequently holders of *jasa* rights would put out all their land in such sharecropping arrangements and themselves become sharecroppers for someone a bit higher on the status scale than themselves.[68]

In such ways the Javanese achieved what Geertz has called "agricultural involution"—the internal elaboration of a basic pattern of agriculture into ever more complex, finer, more nuanced relationships to provide more niches for more persons. In such a system no one individual thrived; Geertz also calls it "shared poverty."[69] The development of capitalist private enterprise in Java meant plantations, and plantations pushed the native *tani* even farther away from the position of an individual landowning peasant who might have participated in a market economy.

c. *"Freedom of contract"*

Another plank of the "'Liberal Policy" platform, however, was freedom of contract. The policy's supporters worked for legislation which did away with all forms of forced labor. All natives must be paid a wage to which they had voluntarily consented. These measures, at least, were truly capitalist. The question is whether, given the other laws and the existing conditions, they could introduce capitalism into the native economy. Western investors did not develop an industrial sector on Java, so natives could not become factory workers. Slots for wage labor existed principally in the plantation system. The corporation which leased land also built and ran a central mill for its sugar, managed by Europeans, but employing some Javanese at grinding time. It also seasonally employed natives to clear fields, plant, dig irrigation ditches, harvest, transport cane to the mill and so forth. Such positions are not typically springboards for rapid upward mobility. Also, in an era of expanding population, supply and demand determined that wages in such jobs remained pitifully low. Further, the laws had repealed compulsory labor, but not the hierarchical structure of Javanese culture. They also provided no institution which would teach the *tani* the niceties of the Western will (voluntary) theory of contract. The plantation managers recruited labor in the same way they arranged to lease land. They worked through traditional au-

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68. On the strong social value of sharing through a dominant-inferior relationship, see Peacock, *supra* note 13, at 17, 29ff., and Moertono, *supra* note 16, *passim*. On the type of legal transaction described here, see Gautama and Hornick, *supra* note 25, at 129ff; Darmawi, *supra* note 31, at 302ff; Hooker, *supra* note 20, at 122. On its result in the plantation era, see Geertz, INVOLUTION, *supra* note 11, at 96-100.

69. *Id.*, 80-82, 96-103.

thorities, paying *prijaji* and chiefs a commission. The *tani* so recruited naturally analogized his new relation to the old drafts of labor under the kings and during the Culture System, which came through the same authorities. Since *desa* law had no concept of a labor contract, he did not understand that he could refuse the terms and demand higher wages. His labor was an obligation, not a negotiation. In this way the former serf for the monarchs became a coolie for the plantation.[70]

The government of the Indies became aware of a problem in short order, as natives responded with what were probably traditional resistance techniques going back to royal times, refusing to work or running away. But to the Dutch, such behavior just meant breach of contract. An 1872 regulation provided that any native breaking a labor contract was subject to fine or imprisonment. By 1880 the Dutch Parliament passed what became known as the "Coolie Ordinance," a significant retreat from pure freedom of contract. Employers were required to use a model contract drawn up by the government for any laborers recruited from significant distances away. Either party breaking the contract was subject to a fine or imprisonment. Supposedly the legislation would provide mutual protection for both the plantation and the laborer. But, of course, the plantation manager, having capital, paid a fine; the coolie, having none, was imprisoned. The legislation produced no increase in wages; in fact, what data we have suggest that real wages for native laborers dropped continuously from 1870 to at least 1900.[71] Technically labor was no longer compulsory, but traditional authorities demanded it, and the *tani* who refused ended up in prison. In the Indies, contract totally failed to provide a "liberty to break away from the customary way of doing things."

The legal changes introduced by the "Liberal Policy" thus were only partly capitalist, and provided little realistic opportunity for Javanese to enter into the economic development of Java. In fact, virtually the only new "opportunity" created for natives was seasonal plantation labor at paltry wages. Though the Dutch government no longer dominated the economy, Dutchmen still did. As late as 1939, capital invested in the East Indies was 1% German in origin, 1% Japanese, 2 1/2% American, 5%

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70. Schiller, *Labor Law and Legislation in the Netherlands Indies*, 5 FAR EASTERN Q. 176 (1946). Wertheim, TRANSITION, *supra* note 7, at 244-250. Peacock, *supra* note 13, at 58; Geertz, INVOLUTION, *supra* note 11, at 87-89. See also Vandenbosch, *supra* note 27, at 284; van der Kolff, *supra* note 50, at 124-125.

71. Schiller, *supra* note 70, at 186; Vandenbosch, *supra* note 27, at 284-286; Wertheim, TRANSITION, *supra* note 7, at 248-249.

French and Belgian, 13 1/2% British, and 75% Dutch.[72] The *tani*, as Geertz points out, neither stayed a traditional villager isolated from the capitalist economy nor became a peasant producing for it. Nor, for that matter, was he reduced to a landless worker. "The Javanese cane worker remained a peasant at the same time that he became a coolie, persisted as a community-oriented household farmer at the same time that he became a wage laborer. He had one foot in the rice terrace and the other in the mill."[73] He also owned virtually no share in, and had virtually no control over, the economy of his own island. The real change which the Liberal Policy had made from the Culture System was that profits now went to private Dutch capitalists instead of the Dutch government.

d. "*An independent judiciary*"

The Liberal Policy also made changes in the courts. Those measures, however, need to be seen against a change in the law that the Liberals did *not* make. On the justification of respect for native traditions, the colony had long had separate law for separate racial groups. As a result, Dutch and natives were not equal before the law. The new courts ensured that they would stay unequal.

The practice of leaving natives under native law had been followed since the first Dutch inroads into the Indies. The practice was codified in 1855, when article 109 of the colonial laws established three distinct categories of law for the islands.[74] There was law for "Europeans" (*orang*

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72. *Id.*, 101-102.

73. Geertz, INVOLUTION, *supra* note 11, at 89.

74. Gautama and Hornick, *supra* note 25, at 4-5. The provisions, somewhat amended, reappeared as portions of articles 131 and 163 of the East Indian Government Act, translated by Vandenbosch, *supra* note 27, at 189-190:

> Article 131:
>
> 2. In the ordinances regulating civil and commercial law:
>
> a. for Europeans the laws in force in the Netherlands shall be followed, departure from which laws, however, may be made either because of special circumstances in the Dutch East Indies or for the purpose of making it possible to subject one or more of the other population groups or divisions thereof to its provisions;
>
> b. the natives, the foreign Asiatics, and the subdivisions into which both of these groups of the population are divided, so far as their apparent social needs demand it, shall be subject either to the regulations applying to Europeans, modified so far as is necessary, or to regulations applicable to Europeans and natives in common, while for the rest the legal rules, tied up with their religions and customs prevailing among them, shall be respected, from which, however, departure may be made whenever the general

Eropah), defined as Dutch or other Europeans and their descendants, Australians, Americans, and, interestingly, Japanese (according to a treaty of 1896). Law for persons in this category consisted basically of the Dutch codes, with a few local alterations and omissions. There was another law for natives (*Bumiputra*). Under the article, law for these persons would be written regulations drawn from Indonesian *adat*, with customary law serving "temporarily" until the regulations were drawn up. In fact few regulations were written and the unwritten customary law served for most situations. A third type of law, that for Foreign Orientals (*orang Timur Asing*), applied to all persons neither "European" nor native (the category was later subdivided into Chinese and non-Chinese). In this category, law was the Dutch codes except in family law and intestate succession. Supposedly the categories were necessary to allow people to maintain their customs and religions. Yet Chinese, for example, could not maintain many

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interest or their apparent social needs demand it.

Article 163:

1. Whenever provisions of this law, of general and other orders, regulations, orders of police, and administrative regulations, distinguish between Europeans, natives, and foreign Asiatics, the following rules obtain for their application:

2. To the provisions for Europeans the following are subject:

a. all Netherlanders;

b. all persons of European origin not included under 'a';

c. all Japanese and, further, all persons having their origin elsewhere, not included under 'a' and 'b,' who in their own country would be subject to a family law based upon the same principles as the Netherlands law;

d. the legitimate or illegitimate acknowledged children and further descendants born in the Dutch East Indies of persons dealt with under 'b' and 'c'.

3. To the provisions for natives are subject all persons, with the exception of native Christians whose legal position is to be regulated by ordinance, who belong to the indigenous population of the Dutch East Indies, and who have not gone over to any of the other population groups than those of the natives, and also those persons who belonged to a population group other than that of the natives, but who have assimilated themselves to the indigenous people.

4. To the provisions for foreign Asiatics are subject all persons with the exception of those among them who have accepted Christianity and whose legal position is to be regulated by ordinance, who do not fall under the terms of the second and third clauses of this article.

5. The Govenor General may, in agreement with the Council of the Dutch East Indies, declare the provisions for Europeans applicable to persons not subject to them. The declaration of applicability is binding from the point of view of law upon the legitimate and illegitimate acknowledged children born thereafter and further descendants of the person concerned.

6. Each may in accordance with rules to be laid down by ordinance determine through the court to which category of persons he belongs.

of their customs, since for most purposes they were under the Dutch codes. And the Ambonese, the one native group which had significantly converted to Christianity (today's "South Moluccans"), were still classed as natives, and so were under *adat* law, not the "Christian" Dutch law.[75]

The effect, and probably the motive, of having these categories of law was to insure Dutch domination of Indonesia by dividing and ranking its inhabitants. As we might expect, separate law was inherently unequal. For disputes involving persons from more than one category, an elaborate body of choice-of-law doctrines grew up. However, if one of the parties was Dutch, somehow the doctrines nearly always chose Dutch law. For example, there was the principle of "presumptive submission." If a native voluntarily participated in a transaction of a type unknown to native law, he was presumed to have submitted to European law for purposes of that transaction. Since native law included no true contracts, little commercial law, and few business organizations of the Western type, almost any transaction beyond village barter fit the principle. If for some reason presumptive submission did not apply, other rules available reached the same result. For example, in contracts, choice-of-law rules favored the law of the "milieu" of the contract, the law of the person who occupied an overwhelming social or economic position over the other, or, on a public offer, the law of the offeror. In short, the native found himself under Dutch law for virtually every economic contact with a Dutchman. (Eventually legislation ended some of the charade of choice-of-law rules: Dutch labor law became binding on all persons in 1879 and by 1918 all were under the Dutch criminal code.) The system dictated racial law, and made Dutch law superior in any inter-racial contact. Modern scholars have called the Netherlands East Indies a caste society; law reinforced the caste lines.[76]

The principle of racial law carried over into racial courts. The Liberal Policy established what in Dutch eyes was an independent judiciary. Previously, Europeans had been under Dutch law and tried in Dutch

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75. Gautama and Hornick, *supra* note 25, at 3-15. The ordinances for native Christians permitted by the legislation were never promulgated.

76. *Id.*, 1-3, 15-23, 162-170. Schiller, *Conflict of Laws in Indonesia*, 2 FAR EASTERN Q. 31 (1947). R. Kollewijn, *Interracial Private Law*, in Schrieke, *supra* note 30, at 204. S. Kartodirdjo, *Social Stratification in Colonial Society: the Role of Education in Social Mobility*, in PAPERS, *supra* note 49, at 130. Needless to say, the system of three groups of persons for legal purposes created particularly bewildering problems in land tenure, since there were also two types of land for legal purposes. A native might purchase "Dutch land," or a Dutchman inherit *jasa* rights from a native mother. Usually such cases were resolved by using the legal group for the land, not the person.

courts, while native justice had been a function of the Indies executive branch. Colonial administrators had served as judges over natives as a kind of sideline to their other duties. The Constitutional Regulation of 1854 announced a principle of separation of executive and judiciary, although it was only slowly and imperfectly implemented. The system refused to recognize the justice of the *desa* community as a legal means of dispute resolution, and would not enforce its decisions. Instead, it established courts for different categories of law and persons. For Europeans, the trial court level was the residency judge (*residentiegerecht*); appeals went to the superior court (*raad von justitie*) and eventually to the Supreme Court (*Hooggerechtshof*). Natives went to an entirely separate set of courts. They had a district judge (*districtsgerecht*), regency judge (*regentschapsgerecht*), and superior native court (*landraad*). Throughout the period of the Liberal Policy there was no provision for an appeal from one system to the other, though by 1938 Javanese and some others could appeal from the superior native court to the *raad von justitie*. The status and quality of the native courts is perhaps best indicated by noting that the superior native court, the highest court for natives, had the same chairman and the same clerk as the court of the residency judge, which was the lowest court for Europeans.[77] After 1882, the Dutch additionally reorganized and controlled the Islamic courts. However, they left it to the local Islamic community to pay the salary of the judges, leading to high fees and/or bribes.[78]

Not surprisingly, the natives did not find these courts as independent as the Dutch did. "Independence" in practice meant only that some of the justices were not currently employed by the Dutch regime. Java's *landraad* became independent by Dutch standards in 1869 when a Dutch lawyer replaced the Dutch Resident as chairman. After 1870 some of the regents on native courts were gradually replaced with pensioned civil servants. But in the native court system, only the chairman of the superior native court (*landraad*) had to be a lawyer. Other judges could be, and usually were, current or former administrative officials. Judges in the native system, like those in the European, overwhelmingly were ethnically Dutch, and had only minimal knowledge of *adat* law.[79] They cannot have

77. Furnivall, *supra* note 7, at 124, 157, 187-188, 295. Hoebel and Schiller, *supra* note 20, at 14-18. ter Haar, ADAT, *supra* note 20, at 26. Lev, *The Supreme Court and Adat Inheritance Law in Indonesia*, 11 AM. J. COMP. L. 205, 206-207 (1962). The Dutch finally accepted village justice as part of their legal system in 1935.

78. Lev, ISLAMIC COURTS, *supra* note 7, at 11-14.

79. Furnivall, *supra* note 7, at 189; Lev, SUPREME COURT, *supra* note 76, at 307.

provided much protection for a *tani* in a dispute with a Dutchman.

Further, procedural rules limited the scope of the native courts. In a conflict between a native and a European, the basic rule was that one chose the forum of the population group of the defendant. Choice of law rules also affected the choice among these courts. European courts were considered competent in both European and *adat* law, but native courts were presumed to specialize in native law. Thus, if European law applied, litigation normally was before the European courts.[80] Each set of courts also had its own rules of procedure, different in substance and complexity, which tended in practice to make them inaccessible to many natives. The Dutch courts, then, were another manifestation of alien power which the natives ignored when they could, as they had earlier ignored the courts of the monarchy. Most natives continued to use the village justice of their own *desa* for dispute resolution, even though the Dutch did not recognize and would not enforce its judgments. For that matter, where Dutch authority was loose enough, natives also used, and even began cultivating, the "waste" land to which both the Dutch and the *desa* claimed title.[81] As far as the native was concerned, the Liberal Policy had changed little. As in the Culture System, indeed as in the days of the monarchies, an outside power made despotic inroads on the village. The villagers did not really perceive the distinction, so important to the Liberals back in Holland, that the economic contacts now came from private Dutch investors and their salaried Dutch managers instead of from the Dutch government, and that the courts were a branch of the Dutch government with no formal ties to the Dutch investors. To the *tani*, the meaningful change of the Liberal Policy was that there were more Dutch making more inroads than before. On balance, the *tani* probably saw the situation more accurately than did the Dutch liberals.

The Liberal Policy failed to bring capitalist development to the natives of Indonesia. Some of its laws simply were not capitalist. The fundamental principle of classical liberalism, equality of everyone before the law, was never the law of the Indies. Natives stood under a different law with second-class status in a legal system that underscored Dutch domination. Natives had second-class courts which were of little protection to them if they tried to sue a Dutchman. Native land was not even legally a commodity. Only Dutch land could be freely bought and sold on the

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80. Hoebel and Schiller, *supra* note 20, 14-18. Gautama and Hornick, *supra* note 25, 162-170.

81. Kollewijn, *supra* note 76 at 229; ter Haar, *Western Influence, supra* note 63 at 159; Haga, *supra* note 30, 182, 189.

market. By preserving customary interests in land, the Agrarian Law of 1870 itself undermined its ostensible goal of native development. Community forms of tenure are totally unsuitable for commercial development in a capitalist economy.[82] Other laws, though facially capitalist, were inadequate to create a truly capitalist economy in a heavily communal and status-oriented culture. In theory natives had freedom of contract, but without equality that freedom was worse than useless, and indeed the regime limited it significantly even during the Liberal era. Labor never truly became a commodity, though it was priced as one, one for which the supply greatly outran the demand. In practice labor was allocated by political power, impressed by *prijaji* or chiefs onto plantations in a neo-serfdom thinly disguised as contract. Above all, most Indonesians had no chance to accumulate capital, no chance at entrepreneurship. Dutch investors had the only realistic opportunity to raise crops for export. And even if a few natives had been successful, the law itself drew a color line that was virtually an absolute barrier to advancement.[83] The Liberal Policy's laws brought some capitalism to Java—enough capitalism to disorganize and distress the village. But the laws did not encourage, indeed scarcely permitted, the village to become capitalistic.[84] True development remained the private property of the Dutch and their European partners. To borrow Sir Henry Maine's classic distinction, only the Dutch had the law of contract; the Indonesians remained in the law of status.

3. *Conclusion: Law, Culture and Change*

Do changes in law lead predictably to social and economic changes? The story of the Liberal Policy in the Netherlands East Indies suggests that the question does not admit of a simple "yes" or "no" answer. The policy's authors got part, but only part, of the development they anticipated. Westerners responded largely as predicted, investing in enterprises which massively increased production for export. Natives did not, and did not significantly share in the development of the islands. This difference, however, suggests a possible refinement of the inquiry. The answer

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82. Sonius, *supra* note 20 at 26.

83. Kartodirjo, *supra* note 76; J. Meyer Ranneft, *The Economic Structure of Java*, in Schrieke, *supra* note 30, at 71-84.

84. The phrasing was suggested by the language in Sievers, *supra* note 12, at 125. The point would seem to fit in either Boeke's or Geertz's interpretive approach (cf. note 11 above). See Sievers' effort to reconcile Boeke and Geertz, at 279-294. *Cf.* also the "dualistic legal situation," modern law imposed with "discomfort" on local law, described for colonialism by Galanter, *supra* note 28, at 159-163.

may depend on the nature of the interaction between the culture that makes the law and the culture to which the law is addressed.

In looking at the partial failure of the Liberal Policy's laws, two factors in particular stand out; the design of the laws, and the likelihood that they would alter behavior. Both factors were related not only to each other but to the cultural environments of Dutch and natives. The Dutch, who designed the laws, came from a Western individualist, capitalist culture and thought that individualism and capitalism would develop the Indies. They produced laws which would promote at least a measure of individualism and capitalism. The laws did alter the behavior of Westerners, especially Dutch, in the Indies in the desired direction. But natives, with a communal, subsistence-oriented culture, responded by continuing to pursue communal, subsistence goals. The laws produced the desired response principally among those who shared the same cultural values as the authors of the laws.

The design of the laws, as we have seen, was far from truly capitalist. The policy attempted a logical and practical contradiction: to make the *tani* a capitalist producer while keeping his communal institutions intact, preventing him from converting his land into a commodity, and holding him in an inferior legal status. In retrospect, the policy looks like a highly sophisticated legal program for keeping natives down. However, the hopes for native participation expressed when the policy began probably were not empty rhetoric. When the policy did not work, the next policy (1901) poured money into the Indies for the benefit of the natives. It is no doubt much easier for us to see the logical contradiction than it was for them. We have over a hundred years of hindsight and the benefit of anthropological studies on the difficulties traditional communities have interacting with a capitalist economy. The laws probably took the shape they did because they came out of a struggle in the Dutch Parliament. Conservatives insisted that the government could not play a totally passive role in the Indies, that native traditions should be respected and that natives needed protections. The legislation that emerged was a compromise.[85]

In fairness to the Conservatives, it is very far from certain that a program of ideologically pure capitalism would have worked any better to develop the native economy. In Mexico until the mid-19th century, many Indians held land through their communities in a kind of corporative arrangement roughly similar to the communal ownership systems of some

85. Vlekke, *supra* note 7, at 283-286.

Javanese *desas*. After the victory in 1867 of Benito Juarez and the *Reforma* movement, which was ideologically dedicated to classical liberalism and capitalism, such corporations were broken up. The Indians instead held individual private parcels which were fully alienable. The result was that within a couple of generations, the Indians had lost most of those parcels to great landowners. Real wages also dropped by 1900 to about one-quarter of what they had been in 1800.[86] Or another example with some relevance to Java: capitalism "developed" Cuba in the early 20th century with sugar for export. Giant land-factory combines, owned by non-Cuban (especially American) investors, came to own not just mills but also massive amounts of land around them. Cuba became virtually a single-crop country and a large segment of the population became landless, surviving only on seasonal wage-work for the plantations. The entire Cuban economy rose or fell with the price of sugar.[87]

The real significance of the "Liberal Policy" legislation is that it reflected things which bound Dutch politicians together better than the divisions it ostensibly compromised. First of all, the laws were passed in relative ignorance of the actual situation of the natives. Parliament did not even bother to wait for the returns from the survey of tenures it had ordered before passing the Agrarian Law. The action reflects a fairly common Western assumption of the period, that they, as Westerners, would know the best solution for the Indies. The parties might argue, and eventually compromise, over how much capitalism was good for Indonesia, but hardly anyone doubted that the best solution would be worked out in Holland rather than Java. Second, and most important, Liberals and Conservatives agreed that the Dutch would continue to dominate Indonesia. They searched for a way in which natives would not have to suffer for that domination, but ongoing Dutch control was never questioned.[88] Thus it simply would not have occurred to anyone that keeping separate legal categories for Europeans and natives was improper or any barrier to development. Common assumptions like these would not have been debated. The design of the laws reflected these assumptions. And for those unstated goals, the law worked. Major decisions about Indonesia continued to be made in Holland, though now as much by the

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86. H. PARKES, A HISTORY OF MEXICO 233, 295, 305-310 (3d ed. 1970); R. SINKIN, THE MEXICAN REFORM 1855-1876: A STUDY IN LIBERAL NATION-BUILDING (1979); N. WHETTEN, RURAL MEXICO (1948); Wolf, PEASANT, *supra* note 54, at 11-16.

87. H. THOMAS, CUBA: THE PURSUIT OF FREEDOM (1971); L. NELSON, RURAL CUBA (1950); Wolf, PEASANT, *supra* note 54, at 254-260.

88. Vlekke, *supra* note 7, at 281-293; Legge, *supra* note 8, at 79-90.

directors of Dutch corporations as by the government. Dutch capital joined the Dutch regime in ruling Indonesia.

As for the likelihood that the laws would change behavior, that too related to cultural assumptions. The Liberal Policy assumed that *tanis* would be motivated by the legal and economic incentives the program offered. In fact, in the peasant *abangan* culture, social needs were at least as great a motivation as economic ones, and the law of the state was not and never had been a major factor in behavior.

For social rewards in the Javanese culture, the *tani* needed to direct his energies toward the community and toward agricultural subsistence, not toward individual competition and the accumulation of capital.[89] Using his land as a commodity, for example, would have been totally inconsistent with these social goals. Thus very few Javanese took advantage of the provision in the Agrarian Law which allowed them to register *jasa* rights as Dutch *eigendom*. Had land been freely alienable, one still doubts that the *tani* would have sold it away from the community. In modern Indonesia, *jasa* rights have been legally converted into individual private property, but in rural Java sales away from the *desa* are still rare.[90] The communally proper use of land that provided social rewards was fragmenting rights on it into more opportunities for work, which was precisely what most landholders did. Competition for economic gains could disturb harmony; the social mechanisms of the *desa* worked toward cooperation.

The law of the state also had not been much of a factor in behavior, at least voluntary behavior, at the *desa* level in centuries. The village *abangan* culture arguably had its own legal system throughout the colonial period, as distinct from the Dutch state as it had been from that of the kingdoms.[91] Once monarchs had appeared and made demands on both

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89. The primacy of social needs is central to Boeke's thesis of "dualism," *supra* note 11. Geertz thinks that Boeke has exaggerated his point, but would not deny the great importance of social needs in shaping economic conduct, cf. his THE SOCIAL CONTEXT OF ECONOMIC CHANGE (1956); see also Sievers, *supra* note 12, at 279-294. In this context it is worth mentioning that the "founding father" of capitalist thought, Adam Smith, never expected that economic behavior would stem solely from purely economic considerations; see Taylor, *supra* note 3, at 28ff.

90. Such at least is the implication one draws from Gautama and Hornick, *supra* note 25, at 87, 90-95; Hooker, *supra* note 20, at 112-124; Darmawi, *supra* note 31, at 308 ff.

91. Such language of course runs afoul of the positivist definition of law, in which only the law of the state is law. Whatever that definition's value for the Western tradition, students of traditional non-Western cultures have found that either they must abandon use of the term "law" or else develop definitions of law which do not require the presence of a Western-style state. As used here, a system which allocates rights and duties in a society, which has authority and can effect sanctions, as the *desa* system did, is a legal system whether it stems from a state or not. Cf. Galanter,

land and persons. The *desa* had complied or moved, but had never accepted the demands as legal. The Dutch regime and Dutch capitalists now supplanted the monarchs, and made more demands more efficiently. Population growth increasingly closed off the alternative to move, so the *desa* complied more frequently. Nevertheless the evidence suggests that the *desa* still remained within its own legal-political system as much as possible and ignored the Dutch system when it could. The regime claimed all uncultivated land, but *tanis* exercised their rights to develop such land until the Dutch threw them off it. The regime did not recognize village justice, but most villagers continued to take their disputes for resolution by village chiefs or a village council under *desa* tradition anyway. In fact, village justice persists today, technically incorporated into the legal system of the modern Indonesian state but actually continuing much as it always has.[92] The commands and demands of the formal legal system of the state simply were not very important to most Javanese natives in the Liberal era.

There is, of course, a common thread between a cultural attitude favoring community harmony and a side-stepping of formal law. As Daniel Lev puts it, speaking of contemporary Indonesia,

> Particularly in Java, but elsewhere too, substantive rules [of law] are easily and quickly sacrificed under the influence of an elaborate concern with avoiding tension, conflict and bitterness. Rights tend not to be pressed, and seldom ever raised; rights are for courts, and their mention is frequently regarded as an expression of hostility and antagonism, producing conflict rather than harmony.[93]

Village justice, with its emphasis on reconciliation, simply was and is more appropriate for a society with these values than a Western-oriented legal system with winners and losers. In contemporary Indonesia, even highly commercial segments of the population are largely uninfluenced by formal law, since they strongly prefer not to use the state's courts for

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supra note 28; P. Bohannon, *Law and Legal Institutions*, 9 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 73-78 (1968); Berman, *supra* note 29, at 12. The precise issue here can perhaps be reconciled with the positivist school, however, on the issue of legitimacy. One suspects that the *desa* simply did not recognize the monarchies or the Dutch regime as legitimate, and thus as effective lawgivers. Cf. H. KELSEN, GENERAL THEORY OF LAW AND THE STATE 115-117, 401 (1949).

92. See the works in note 81 above and Hooker, *supra* note 20, at 140-152. For a modern study of village justice in action, see M. JASPAN, THE REDJANG VILLAGE TRIBUNAL (1971).

93. Lev, ISLAMIC COURTS, *supra* note 7, at 191. See generally D. Lev, *Judicial Institutions and Legal Culture in Indonesia*, in CULTURE AND POLITICS IN INDONESIA 246 (C. Holt, ed., 1972).

dispute settlement.[94] If the law of the modern Indonesian state does not often alter the behavior of urban merchants, then one should not be surprised that the law of the Dutch colonial state did not alter the behavior of village farmers.

Such cultural attitudes, including such an attitude toward the law of the state, are not antithetical to development. In Japan, for example, the group interest has historically been more important than the individual interest, with the individual largely merged into a group. The Japanese place a high value on the natural order and social harmony, and seek compromise in resolving disputes. Most Japanese dislike formal law, abhor trials, and look to social, not legal, mechanisms to adjust tensions and settle disputes.[95] And Japan, of course, represents probably the most successful example of development of a non-Western country there has yet been. Beginning with the "Meiji Restoration" of 1868, Japan went from a largely traditional, agrarian society to a major industrial and military power in less than two generations.[96]

Such a culture can be developed, but it will not find development solely, or even primarily, through changes in formal law. The clique which guided Japan after Meiji indeed changed Japanese law, mainly importing the French codes. Certain principles from those codes, notably equality before the law and the abolition of samurai privilege, probably had some impact on Japanese development. But no one claims that even this wholesale adoption of French law significantly changed Japanese behavior.[97] Japan industrialized and modernized not on individualism and capitalism but through an ideological revolution that made development the great national project of the community of Japanese. In structure, Japanese development came through family and group enterprise, not individual entrepreneurs. A community spirit pervaded businesses from the profusion of productive "mom and pop" firms up to the huge "families" of the multiple-industry *zaibatsu*, and government took a leading role in economic planning. Social cooperation became not a barrier

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94. For example rubber traders, Burns, *Civil Courts and the Development of Commercial Relations in Northern Sumatra*, 15 L. & Soc'y Rev. 347 (1981).

95. On Japanese cultural attitudes and their relation to law, see especially Kim & Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 Int'l Comp. L. Q. 491 (1979); T. Kawashima, *Dispute Resolution in Contemporary Japan*, in Law and Japan: The Legal Order of a Changing Society 41 (A. von Mehren, ed., 1964).

96. A concise treatment of Japanese development is E. Reischauer, Japan: The Story of a Nation (3d ed. 1981); see also W. Beasley, The Meiji Restoration (1972).

97. Kim and Lawson, *supra* note 95; Y. Noda, Introduction to Japanese Law 41-62 (1976). On equality and behavior, see especially 58-62.

but the linchpin of Japanese modernization. Even today, few Japanese would expect formal law to regulate conduct in advance. Shared national and community values do that far more effectively than law ever could.[98]

Robert Seidman has postulated a "Law of Non-Transferability of Law." He finds a "nearly universal failure of transferred law to induce behavior in its new home similar to that which it induced in its original site."[99] Probably he overstates the case. Regimes have borrowed other regimes' laws since ancient times, with the spread of Roman law only the most obvious example.[100] Nevertheless Seidman's points are particularly well taken for the cases of Western law imposed on non-Western cultures which he directly addresses. How one responds to law, he points out, is a function not only of the content of the law but also of one's physical environment and of the non-legal institutions—social, political, economic, religious and so on—which influence one's choice of behavior. Thus the same law in a different cultural context will yield different behavior.[101]

Most "Law and Development" scholarship has begun with the assumption that law will change behavior predictably. There is a general awareness of a "gap" between the law on the books and human action, and an occasional admission that some laws seem to create no behavior changes whatsoever, but little effort to define or explain that "gap."[102] In fact the modern assumption that law can be a predictable and effective tool for social engineering may be culture-specific. The concept is a distinctly American theory.[103] When the 19th-century Dutch used law in the hope of change, they assumed, as good classical liberals, that they were merely removing barriers to the drive for economic gain present in every man. They did not expect law to alter behavior, but rather merely

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98. Kim and Lawson, *supra* note 95, at 509-510. Reischauer, *supra* note 96, especially at 109-204. H. Borton, JAPAN'S MODERN CENTURY (2d ed. 1970). Compare the two forms of economic development in modern Indonesia, individualist in Modjokuto and group in Tabanan, described in Geertz, PEDDLERS, *supra* note 11. Geertz, INVOLUTION, *supra* note 11, at 130-143 makes interesting comparisons between Japan's development and Java's non-development from c. 1870. I do not intend to suggest that there were not also significant differences between Japan and Indonesia relevant to the likelihood of development of each. In particular, Japan in 1868 already had widespread consciousness of a national identity and a tradition of social efficiency. Reischauer at 132-136.

99. Seidman, *supra* note 54, at 29-36; quote at 34.

100. See, e.g., A. WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974).

101. Seidman, *supra* note 54, at 35-36.

102. Burg, *supra* note 2, at 505-512.

103. Merryman, *supra* note 5, at 466, points out the lack of such a concept outside the United States. See also Seidman, *supra* note 54, chapter 2.

to release it.[104] The modern American notion assumes that legal change properly designed can direct men toward new behavior. While its proposals usually fall short of pure coercion, they at least include an element of affirmative influence not present in the classical liberal model the Dutch drew on. But the American experience with law differs in important ways from that of other countries, particularly non-Western ones like Indonesia. Behavioral experiments with law in the United States enjoy several advantages that would tend to make their results more predictable. For one thing, they are not cross-cultural. Americans make law for other Americans. For another, the non-legal institutions of the United States tend to value the law of the state highly, making obedience to law more likely. Law is arguably a major component of the American ideology. The United States was founded by men who believed in an early version of classical liberalism. They expected legal changes to lead to social and economic changes, and Americans, while abandoning many of the classical liberals' "*laissez-faire*" principles, have largely retained their vision of the role of law.[105] Resolving disputes through formal law is as natural to Americans as it is unnatural to the Japanese. Thus Americans usually face few cultural and institutional pressures that work against obedience to law.[106]

It is time to stop being surprised at a "gap" between law and behavior, and instead to begin to accumulate reasons why in a given situation the

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104. Vlekke, *supra* note 7, at 284, and works cited in note 53 above. It is not at all clear that a true classical liberal would have responded favorably to the modern American theory that seems to give law a capacity to coerce changes in behavior. Individual freedom from state coercion was central to classical liberalism.

105. At the very least, law is a major component of the American political creed. J. SHKLAR, LEGALISM (1964); A. DE TOQUEVILLE, DEMOCRACY IN AMERICA 284 (1899). Note also the place of lawyers as the dominant intellectual force in the early national period: R. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE (1984). One symbolic example is the American treatment of May 1, which in most European countries is celebrated as a workers' day, but here is Law Day. On America's classical liberal roots, see especially R. PALMER, THE AGE OF THE DEMOCRATIC REVOLUTION (1959-64).

106. In this context it may be worth noting that America's most famous example of a "gap" between law and behavior, Prohibition, arguably involved an intra-American cultural conflict on a small scale: rural persons making laws for urban, or more precisely persons of a new "bourgeois interior" lifestyle, strongly oriented to the nuclear family, making laws for those of a more open, more public lifestyle. N. CLARK, DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION (1976); J. TIMBERLAKE, PROHIBITION AND THE PROGRESSIVE MOVEMENT 1900-1920 (1963), especially 149ff. On the other hand, even the Prohibition-era "gap" in the United States seems significantly smaller than the "gap" between Dutch and Javanese in the era of the Liberal Policy. For example, Clark argues that Prohibition was far from a complete failure in altering behavior. Even after Repeal the old saloon was gone, public drunkenness massively reduced from its previous level, and in general drinking a much more private activity than before Prohibition.

"gap" may be larger or smaller. In lands unlike the United States, there is not much evidence that law regularly promotes the goal it intends and some suspicion that in some circumstances it can work against its goal.[107] The Dutch experience in Indonesia supports that suspicion. The Liberal Policy's laws for the Indies were intended to bring development to both Westerner and native. In retrospect, they were well designed for Western exploitation and very badly designed for native development.[108] If anything, they made native development even less likely than it had been before they were passed. For all his sensitivity to non-legal institutions, Seidman's principal remedy for the "gap" is better communication of the law to the people.[109] In Java, however, it seems highly unlikely that any amount of better communication of the laws would have made any difference to native development.

The analysis here suggests one reason for a "gap." The reliability of law as a tool of social engineering will relate directly to the compatibility of the law with the culture. A "gap" will exist when a law designed on one set of cultural assumptions is applied to a people with a different set of cultural assumptions.[110] The Dutch of the later 19th century were simply incapable of designing laws that would promote development among the natives of Java. Their culture assumed that Dutch were superior to Indonesians. Therefore the argument that natives needed "protection" had appeal, and so the provisions that kept natives out of the capitalist economy found their way into the law. Their culture and their classical liberal principles assumed that Javanese, given the opportunity, would naturally want to imitate Dutch capitalists. In Javanese culture, social motivations were at least as strong as economic ones, and the society prized cooperation, not competition. Dutch culture also assumed that the social unit which reacted to law was the individual. In fact, the relevant Javanese unit was more often the *desa* community. A plan designed for atoms will not get the predicted result if applied to molecules.[111]

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107. Burg, *supra* note 2, at 514; Trubek & Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1083. For pointed critiques of the latter article, see Burg, *supra* note 2, and R. Seidman, *The Lessons of Self-Estrangement: On the Methodology of Law and Development*, in YEARBOOK OF THE SOCIOLOGY OF LAW (R. Simon, ed., 1977).

108. Compare Seidman, STATE, *supra* note 54, at 33.

109. Burg, *supra* note 2, at 512; Seidman, STATE, *supra* note 54, at 99-129.

110. Compare Hiller, *Language, Law, Sports and Culture: the Transferability or Non-Transferability of Words, Lifestyles and Attitudes through Law*, 12 VAL. U. L. REV. 433 (1978). repr. in L. MARASINGHE AND W. CONKLIN, LAW, LANGUAGE AND DEVELOPMENT 151 (1985).

111. Paraphrasing Kim and Lawson, *supra* note 95, at 499.

Crucial among the cultural assumptions which lead to a "gap" are the cultural attitude to formal law and the attitude toward the legitimacy of the regime making the law. The Dutch tended to obey formal law and looked on their lawmaking for Indonesia as legitimate because they looked on their regime as legitimate. The Javenese traditionally sidestepped formal law, and perceived the Dutch as occupying essentially the same slot as the old kings. The *desa* had never accepted the right of the kings to make law for it. If the Dutch had somehow designed the perfect law, there is still no reason to think that it would have changed Javanese behavior. One can visualize a law much more appropriate to the Indonesian situation, one which provided for community rather than individual development, which encouraged expansion and growth by social cooperation rather than competition—in short, a law promoting development on the Japanese rather than the Western model. But if enacted as formal law by the Dutch, the most likely result still would have been that the Javanese would simply have ignored it, as they had ignored formal law from the state for centuries, and proceeded about their own social and economic business at their own pace in their own way.

The American assumption that law reliably leads to social and economic change, when applied to other cultures with other attitudes to law, expects far too much of law—just as the Dutch expected far too much of law in Indonesia. Today, much of the energy once put into the "Law and Development" movement has dissipated or gone off in other directions.[112] Nevertheless underdeveloped countries are still borrowing other cultures' laws in the hope of stimulating development, with or without the active assistance of American legal scholars. Their rulers should realize, as the Dutch did not, that in some cultures law alone simply will not create the desired change and may even be counter-productive. Changes in law can of course support activities for which a stimulus already exists, as Japanese legal change probably supported development. But the Japanese population had already been galvanized into creative action by an ideological revolution. One would hope that before borrowing, policymakers would make thorough studies of the history and culture of both the land that designed the law and the land expected to receive it. In short, one would hope that before borrowing, they would spend some time reflecting on the meaning of the Dutch failure with law and development in Indonesia.

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112. Merryman, *supra* note 5, at 459-460.