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Unity in diversity.

The topicality of Professor C. van Vollenhoven

LEIDEN ASIA YEAR

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Dies lecture given by

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Esteemed Rector, thank you for your kind introduction,
Respected guests,

The title of this address, 'Unity in Diversity', is taken from the national motto of Indonesia, *Bhinneka Tunggal Ika*. It is the formula used in an ancient Javanese epic poem to avert a conflict between Hindus and Buddhists. The 'unity' of the title is a necessary prerequisite for stability and prosperity, and diversity is necessary because people are simply different from one another. Without diversity, there can be no respect for man and his uniqueness.

Law can play a role in shaping 'unity in diversity' and socio-economic development. However, when law comes up against strong counter-forces that aim to repress harmony and development, the question arises of what it is that law can still contribute. In the present-day Western world, one person sees populism as a disruptive counter-force, while another attributes this same effect to political Islam. Elsewhere, in the Muslim world, including in Asia, we see populism in the form of demagogues who call on Muslims to turn against their own governments and against pluralism.

In a week's time, on 15 February, elections will be held for the post of governor of Jakarta, a city of over ten million inhabitants; the elections are governed by detailed rules set out in Indonesian constitutional law. A month later, on 15 March, the Netherlands will also be going to the polls. In both elections there is a politician who is surrounded by controversy centring on ethnic undertones and Islam.

In Jakarta, the politician in question is one of the candidates for the governorship, the current governor. Known familiarly as *Ahok*, he is a capable and strong administrator, born in a Christian, Chinese-Indonesian family, and brought up in a loving, devout, Islamic foster family. *Ahok* was previously deputy to *Jokowi*, governor of Jakarta, who was subsequently elected president of Indonesia in 2014. *Ahok* has been accused of blasphemy by the Indonesian Council of Islam Scholars. He had declared at an election meeting that Surah 50 from the Quran, a clause

prescribing that Muslims should not accept leadership by a non-Muslim, is not to be used for political purposes. As a result of this pronouncement, *Ahok* was accused of violating the Quran.

In October and December 2016, hundreds of thousands of Muslim activists demonstrated in Jakarta against *Ahok*, demanding his resignation. However, the executive board of the country's largest Muslim organisation, the N.U., with more than 50 million members, pledged support for him. Curiously, the religious council of that same N.U. did not. As so often happens, this is a case of moderates against puritans.

The blasphemy charge has been investigated by the Indonesian police, and subsequently the Public Prosecution Service initiated a criminal case against *Ahok*. Amidst enormous publicity, witnesses for the defence and the prosecution have presented their views in court. *Ahok's* defence team has convincingly argued that the controversy was actually created by his political opponents; anti-Chinese elements also seem to play a role. Meanwhile, the election campaign is simply carrying on, with television debates and a turmoil of activity on social media. According to the latest polls, *Ahok's* popularity has risen. The court, which is under enormous public pressure, has still not issued any judgement.

In the Netherlands, populist politician Wilders has had some success with his tirades against Islam, immigration and 'the elite' – that are supposedly responsible for criminality, terror and the decline of the country. Wilders is regarded in some quarters with approval and in others with revulsion. In the face of enormous public pressure, a Dutch court of law passed judgement on accusations of racial insults and inciting discrimination. Evidently, in both Indonesia and the Netherlands, judges are being asked to devise a satisfactory resolution to a major socio-political problem with strong ethnic-religious dimensions.

States in Europe, Asia and elsewhere are struggling with their internal divisions, and legal systems are being put to the test. Is there no way for us to learn from one another's experiences? In the Netherlands, debates about identity, Islam and the

constitutional state have been raging for the past twenty years; in Indonesia, for more than a century. A number of prominent Leiden scholars, including Cornelis van Vollenhoven, still feature in the debates in Indonesia.

Van Vollenhoven, a professor from 1901 until his death in 1933, was a brilliant legal scholar who excelled in three different domains: his research on the living customary law, the *adat* law of the Netherlands-Indies; the country's constitutional law; and international law. He uncovered a wide diversity of local *adat* law norms, which he was able to incorporate into an organic corpus of local, national and international law. I will come back shortly to the *Dies* lecture that he delivered a hundred years ago.

Van Vollenhoven was one of the leading authorities in the academic teaching programme for the colonial public service, '*Indologie*', that was famous for its 'ethical' character. Besides law and public administration, students also studied oriental languages and customs, including Islam in its many facets. Along with all this knowledge, students acquired an open attitude. Van Vollenhoven taught, for example, that Indonesian *desa* inhabitants have *adat* rights to their lands and that these lands should not be sacrificed to the interests of colonial agricultural enterprise. About Islamic law, students learned that it was not the classical Sharia norms of religious scholars that should determine the standard for law and justice, but rather the *adat* law norms, as they had matured and been frequently modified by local practices.

Since that time, a valuable tradition has evolved in Leiden of research on law, public administration and society in developing countries, research that combines the analysis of law and development policies with field research in the social sciences. We ask ourselves: how can law, in the often pluralistic and unstable context of developing countries, contribute to democracy, women's rights or environmental protection? How can the rule of law be advanced – not with grand speeches, but with cautious steps in the formation of law and in the social reality of an imperfect world? Twenty years ago, a debate erupted in the Netherlands about the compatibility of Islam with the rule of law. I had lived for some years in

Muslim countries and I was struck by how rapidly a few simple negative opinions about Islam and its normative dimensions, Sharia, became commonly accepted. As a scholar, one then questions whether that really is the case. We therefore set about making a systematic examination of such current opinions. Our study encompassed the legal systems of twelve Muslim countries – in Asia, the Middle East and Africa. For the purposes of this address I will confine my comments to Indonesia, the world's largest Muslim country.

The first current assumption was that Islam is not compatible with democracy and the rule of law. As far Indonesia is concerned, this is largely incorrect. The spectacular reform of the constitution after the fall of Suharto in 1998, with its codification of human rights and the formation of an active Constitutional Court, has indeed legally established both a democracy and the rule of law.

This reflects the predominance of the moderate Islam-oriented, nationalistic parties, who have won all the elections so far. Many devout Muslims, such as former president and N.U. leader Gus Dur, had little time for puritans and their political factions. But, to achieve a political compromise and broad popular support, the national legislator has incorporated a number of Islamic rules in national law, notably in family law.

The second critical assumption is that Islam is not compatible with the rule of law because of the corporal punishments that classical Sharia imposes on particular crimes, such as chopping off a hand, thrashing and stoning. However, the national Indonesian legislator has never enacted such rules. Aceh does, however, have a provincial ordinance that permits thrashing as a possible criminal punishment. Unfortunately, use is sometimes made of this.

A third common assumption was that in Islam women have an unequal, subordinate legal position. This is attributable to the rule of classical Sharia that a man can unilaterally divorce his wife without the need to give any reason, while it is by no means as simple for a woman to gain a divorce. In contrast, the 1974 Indonesian Marriage Act does set out the grounds for a divorce. These grounds are

the same for men and women and for Muslims and non-Muslims. Every Muslim who wants a divorce has to submit an application to the court. For Muslims, the competent court is a regular branch of the national judiciary. Recent socio-legal research among the courts has shown that by far the majority of divorces are initiated by women, and that they tend to be successful.

All in all, what we see is that the rules of classical Sharia are incorporated only to a fairly limited extent in Indonesia's national legislation. This raises the question of whether Indonesian law is an exception in comparison to other Muslim countries. Our comparative research indicates that this is not really the case. We see similar trends in, for example, Egypt, Morocco, Pakistan, Malaysia, Nigeria and Mali. Lawmakers in those countries chose to lay down other rules than those of Sunni Saudi Arabia or Shia Iran, where national interpretations are closer to classical Sharia.

Anyone who assumes that Sharia is all-important and unchanging is opting for a doctrinal theological viewpoint, whereas we prefer to investigate the actual role of Sharia in law and society. We are primarily interested in how people interpret the Sharia in practice. And that, as Van Vollenhoven discovered, can differ from one legal system to another, as well as by historical period, by social group, and ultimately by person and by situation.

So, the actual scope of classical Sharia in society is at times exaggerated and that of national law and of *adat* law is underestimated. This may have to do with the widespread attention for Islamic terrorism. In the Muslim world, terrorists – under the pretext of Islam and Sharia – have frequently turned against the state, carrying out bloody attacks, including in Asia. Hence, major Muslim countries, such as Indonesia and Pakistan are at war with IS, and their governments, armies and police are trying with all their might to prevent attacks.

Their efforts have often been successful even though law and governance have shortcomings in societies that suffer from developmental problems such as poverty, illiteracy, oppression, and alienation. According to puritan populists, all

these problems could be resolved by introducing Sharia. However, further examination shows that this is nothing more than a case of devout, wishful thinking. In any case, their governments and professional jurists have preferred to look to international aid to improve their legal systems.

This was the impetus in the 1980s for Indonesia and the Netherlands to work together on lawmaking, public administration and adjudication. Since then, such programmes of reform have become common, in Eastern Europe, Asia, Africa and the Middle East. Much of our Leiden-based socio-legal research served – and still serves – to support such collaboration. Meanwhile a '*Rule of Law industry*' has emerged that carries out one project after another. But beware – when the striving for the *rule of law* is not supported by insight into the *role of law*, the risk of failure is high. This viewpoint is echoed by the World Bank in its *World Development Report 2017*, entitled *Governance and the Law,* which is to be presented in The Hague next week.

I would now like to take you back once again to 8 February 1917, when Van Vollenhoven delivered his visionary *Dies* address entitled 'Selflessness in Law and State'. A key premise in his address was the proposition that law had already brought about a great deal of peace and prosperity. Van Vollenhoven substantiated this with a broad historical overview of legal development in Europe and Asia. His conclusion was that law should not be underestimated. But, he warned, people can undermine the effectiveness of law. The evidence of this was clearly visible in 1917. Outside, the anguish and chaos of the Great War was raging: hundreds of thousands of refugees were entering the Netherlands; the Ottoman Empire was in a state of collapse, and in the colonies, including the Dutch East Indies, there was growing popular resistance against unjust colonial administration.

Van Vollenhoven summed up the human characteristics that threaten the rule of law in one term, i.e. the old Dutch word '*baatzucht*'. This word encompasses such traits as excessive greed, pride, thirst for power and a sense of superiority – all characteristics that lead to conflict. For the law to function properly, Van Vollenhoven stated, a number of conditions have to be met. I will summarise

these in three prerequisites: there has to be sufficient scope and respect for the public sphere of state and law; officials, particularly those at the top, have to perform their duties honestly and free from self-interest; and, last but not least, everyday citizens must exercise self-control and treat one another with humanity.

These are issues on which Asia and the West may learn from one another. The West has valuable experience with constructing well-functioning states based on the rule of law, and in Asia we may find theories and practices that can help us move towards 'unity in diversity' and Van Vollenhoven's three conditions. Practical life philosophies such as those of the Dalai Lama and older Chinese philosophers like Confucius, Mencius and Lao Zi focus on practising courtesy, on self-control, on consciously rejecting negative attitudes such as anger, indignation and hatred. Professor Michael Puett from Harvard shows in his fascinating book *The Path* how these lessons of Confucianism, Buddhism and Taoism overlap, and how they can help us even in the present day to avoid locking ourselves and the other person in the straitjacket of a single, static identity. We in the West and in the Arabic world often have the tendency to do just that, perhaps as an effect of our monotheistic traditions.

From the experience of Asia, embodied in profound life philosophies that are still relevant even after thousands of years, one may learn about the power and strength that can emerge from 'calm alertness', from 'weakness', from 'not doing' and from 'rituals'. I will illustrate this with an example.

Last year, when the mass protests by Muslim activists against his colleague *Ahok* threatened to get out of hand, President Jokowi did not send in the army. Instead, he went out into the crowd and prayed with them. This is an example of ancient Asian wisdom that we also find in the Dalai Lama's writings: anger and self-interest are best met with humanity, courtesy and rituals. In President Jokowi, Indonesia has a respected leader – humble, honest and humane – who weighs his decisions carefully. Not every democracy succeeds in electing a leader of such calibre.

Esteemed Rector, law has the capacity to advance 'unity in diversity' and development. This requires the enactment of adequate legal rules, but it calls above all, as Van Vollenhoven and Asia's great philosophers have said, for respect from each and every one of us for the public sphere of law and state, so that decent public officials can thrive; it calls for self-control and compassion for our fellow men and women, from whatever ethnic or religious background they may be.

I have spoken.

[1] This text is a translation by Marilyn Hedges from Professor Otto's Dutch-spoken Dies address as it was delivered on 8 February 2017 in the Pieterskerk, Leiden. A more extensive written version in Dutch with notes and references is available on request. Questions and comments are welcome at Vollenhoven@law.leidenuniv.nl

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Jan Michiel Otto (1952) is professor of Law and Governance in Developing Countries. Since 1983 he has served as director of the Van Vollenhoven Institute for Law, Governance and Society (VVI), at Leiden Law School. He studied private law and specialised in development administration at both Leiden and the Free University of Amsterdam. In 1985 he co-founded the Council for Legal Cooperation between Indonesia and the Netherlands, and from that period served on boards and committees. In 1987 he defended his PhD thesis entitled *Aan de voet van de piramide: overheidsinstellingen en plattelandsontwikkeling in Egypte*, [At the foot of the pyramid, state institutions and rural development in Egypt.] He has taught many courses in his field, both in the Netherlands and abroad. He has conducted, published, and supervised socio-legal research on such topics as Indonesian environmental law, law courts, colonial history of law and administration, law-making in China, customary law and traditional authority in Africa, 'good governance' and development policy, Sharia and national law in Muslim countries, formalisation and land governance, access to justice in Libya, and primary justice in insecure contexts: South Sudan and Afghanistan. His *Sharia Incorporated. A Comparative Overview of Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden University Press 2010) is widely read.