of State intervention, but the Constitution tries to combine guarantees of individual rights with the interests of the State. While the Constitution of 1937 had absolutely barred strikes and lock-outs (Art. 139 al. 12), that of 1946 recognizes a right to strike, within the limits of a law to be enacted (Art. 158).

This whole part of the Constitutions of 1934, 1937 and 1946, would require an extensive comparison; its result would probably be that the Constitution of 1946 shows less of a different economic and social attitude than of a different general outlook.

**Family, Education, Culture.**

1891. These are not preoccupations of the first Republican Constitution.

1934. Perhaps the most striking feature is the fact that the indissolubility of the marriage tie, which was already a part of the Civil Code of 1916 (Arts. 315 ff.) was fixed in the Charter of the Union.

The Constitutions of 1937 and 1946 contain a number of articles for the protection of the family, notably of the less fortunate, for the improvement of the situation of illegitimate children, and sundry dispositions which do not require a comparison.

**Education.**

All three of the new Constitutions make provisions for a raising of the standard of education, which in a country with little density of population, and until very lately quite insufficient communications in the Interior, could not yet overcome a high percentage of illiteracy.

The three newer Constitutions improve on one another in correcting this state of facts.

That of 1946 provides in its Art. 170 for a Federal System of schooling, which is to be applied first of all in the Territories, which are under Federal law in most respects. They are not so well developed as other parts of the country, owing to their geographical situation and lack of means. The Federal System is to be applied in other parts of the Union by way of supplement, strictly within the limits of the local deficiency (nos estritos limites das deficiencias locais). Otherwise the States and the Federal District will have their own systems of Education, to which the Union will contribute financially.

This system acknowledges State autonomy, and supplies its deficiency by financial contributions. (See also Arts. 171, 172.)

The last two Titles (VII and VIII) of the Constitution of 1946 deal with the Army and with public officials. A comparison with former Constitutions does not appear to be of general interest.

**ADAT LAW IN INDONESIA**

*Contributed by Max Gluckman, Esq.*

The compilation of the laws of the “primitive” peoples encountered during European expansion into Africa and Asia was undertaken early in the process of colonization. In most areas, administrators found it necessary to record indigenous law to carry out their duties, and as colonial governments began to recognise native customary law they appointed Commissions or individuals to investigate it. Scholars in Europe encouraged residents among the peoples to report on native law, and many theoretical analyses were made of this material. Yet despite these writings, there are few good books on “primitive” law. In general few lawyers or anthropologists have been successful in treating this aspect of native life. Lawyers seem to an anthropologist to fail because they are too rigid in their application of categories, and lawyers complain that anthropologists’ records are inadequate. As an anthropologist I feel anthropologists fail because they lack good categories.

Unfortunately, one of the largest bodies of data on, and analyses of, primitive law has been available to only a few scholars who could read Dutch, that of the
Dutch students of the adat law of Indonesia. Therefore the translation of the standard textbook\(^1\) on adat law is very welcome, and we must hope that it is the harbinger of others. Unless these follow, the work of Dutch scholars cannot influence, as their merit justifies, English, American and Continental workers.

The term adat law (in Dutch, adatrecht) has been adopted in Indonesia to describe what in British colonies is called “native law and custom”. It is from an Arabic word meaning “custom.” The select bibliography at the end of the late Professor Ter Haar’s book shows how much work has been done on it, as also how much remains to be done; and the book itself is proof of the value of these studies.

Ter Haar’s book in itself, though worthy of careful reading, cannot make available to those who do not read Dutch this wealth. From his preface, we learn that “this book has been written for beginners in the study of adat law, particularly for students of the Law College (of Batavia); it will give a general idea, which can make the study of the positive adat law of a particular law-area more fruitful; it will at the same time show field workers the general framework of the adat law with which they have to deal in their particular work.” Ter Haar, therefore, assumed that his readers would be acquainted with the economies and cultures of the peoples whose law he was summarising, and with political, economic and other developments under Dutch rule (on which Furnivall has written the standard work, Netherlands India, Cambridge, 1939.) Very few readers of Adat Law in Indonesia—and there should be many—have this background. The very short, highly compressed accounts of “The Ethnological Background”, “Law in the Native Culture”, and “The Place of Adat Law in the Legal System” (of the Netherlands Indies) written as the Editors’ Introduction, are inadequate.

In fairness to Ter Haar, his book should be reviewed as written for his students who could refer to the background literature. But here I shall partly assess it in its present form, as the only substantial English translation from this literature. I hope that my criticisms of that form (which are not always criticisms of Ter Haar’s analysis itself) will help to encourage the Institutes which sponsored its publication, to make available to us translations of other studies of adat law.

Adat law has been recognised by the Dutch authorities for many years, and scholars exerted their influence in procuring this recognition; it is administered, with other systems of law, in a complex framework of courts.

There is a general system of adat law in Indonesia, within which the Dutch scholars have recognised approximately a score of sub-systems, “law-areas”, which are “cultural-geographic units” for classifying “systems of adat law that are comparably similar within the greater body of Indonesian culture” (Editors’ Introduction pp. 5 ff.). The Editors give a list of these areas but do not summarise their characteristics. Ter Haar in his book does not specifically contrast or work on these law-areas; he sets out the main principles of adat law for the whole region, citing examples and variations without set order or obvious purposive selection. This procedure is partly forced on him, I gather, by the patchiness of reports on various areas, but it follows partly from the mode of his analysis.

Thus he does not work with the basic unit of the law-area, which is apparently a cultural classification. Nor does he group peoples and their systems of law according to their economies; indeed, we are given no account of economic factors, or of the differential influences of Western economy on various areas. Ter Haar’s introduction is a classification of social organization into thirteen types of “autonomous legal communities”. The connotation of the term “autonomous legal community” is not made clear: it appears to refer variously to villages, districts, chiefdoms, in different contexts. Its significance may be clear in Dutch, but it

sounds strange in English: I suppose our equivalent would be "independent political (legal) units".

The internal structure of these communities, as everywhere, is almost always based on local association. "Autonomous communities in which the territorial factor, the common concern with a defined area, has no significance are rare and unimportant" (p. 50); but there are numerous communities in which co-residence is the only bond of unit; and in most areas, the members of a local community are related to one another by real or fictitious kinship ties. In the last type of communities, the patterns of kinship ties between members vary: in some the core of a local unit is an agnatic lineage, in others it is a matrilineal lineage, in others the ties are those of cognatic relationships of various kinds. A few peoples have double unilateral descent, i.e. agnatic and matrilineal lineages exist and possess different rights, but obviously only one of these lineages can be a co-residential unit. Where the unilateral corporate group exists, ties with the kin of the other parent are always important. Groups of this kind form "autonomous legal communities", whether their dwellings are grouped in villages or scattered over "districts"; their members feel and act as groups in relation to each other and to outsiders. Sometimes the position is complicated by conquest by aliens who became aristocrats and placed officials in charge of areas. However, except in a few areas this type of small community, recognising intensive bonds between its members, living and dead, and with its land, which are often cast in magico-religious terms, is found throughout the region. The community settles disputes between its members and with outsiders. Ter Haar's presentation of this background of social organization is clear and concise.

Against it, he considers rights to land and chattels, land transactions, obligations (other transactions), the law of persons (status, relationship, marriage, inheritance), with very short sections on delicts, the time factor in adat law (prescription and limitation), legal terminology, and precedents and the judge. (Unfortunately, it is not always clear whether he is writing of local native judges or of judges appointed by the Dutch Government.) His procedure is to state general rules and illustrate them, in a range of variations, by citations from various societies, indicating the social milieux in general terms, as perhaps: "among the patrilineal Toba-Batak... but among the matrilineal Minangkabau..." I doubt whether this mode of analysis can have been satisfactory even for Ter Haar's students; and it is certainly unsatisfactory for the general reader. One does get a general idea of the principles of adat law, but the total effect is disjointed. One is left with an impression of a lot of tribal names, of whose sitting one is uncertain, who practise various similar customs. Above all, this mode of analysis must fail to bring out, if it exists, the "organic functional structure" of adat law, which was Ter Haar's aim. To achieve this, he would have done better to show, over a range of selected communities, how far each sub-system of adat law is internally consistent with its local economy and social organization, and can be interpreted in the light of those determinants, as well as by its internal logic and unique history. He could then have concluded with a statement of the general principles emerging from those analyses. As the book stands, we can only distinguish by an effort of re-analysis how land rights vary in hunting and agricultural communities, or on fields cultivated in perpetuity and on fields cultivated by slash-and-burn methods. Similarly, though under marriage and inheritance we see the varying results of, say, agnatic and matrilineal lineage structure, in each of these realms of action, we have ourselves to relate the actions in each type of structure. For a social anthropologist this is not very difficult, but I suspect that it will not be easy for those who are not familiar with this type of society. Ter Haar's method also excludes a consideration of the economic basis of legal rules.

This criticism of method arises from the whole approach of modern sociology and social anthropology, which have turned against the wholesale citation of customs from many cultures to the comparison of processes of interaction within
groups of similar or different social structure. A parallel with the former method might be the attempt to write a study in comparative jurisprudence, before separate studies had been made of Roman, Roman-Dutch, English, etc., legal systems. Had Ter Haar presented, even in outline, accounts of legal rights and duties in one of each of his thirteen categories of communities, we could have seen whether adat law in fact has an "organic structure", and whether there are common principles within the whole area. The importance of this "organic structure" is stressed in Ter Haar’s discussion of "The Task of the Judge", where he emphasises that the judge should know the whole social and cultural milieu.

It is extremely likely that there are general rules which are determined by the economic and social setting. For what strikes me, as an anthropologist whose special province is Negro Africa, is the fundamental similarity between adat law and African law. It does seem as if the limitations of primitive economies, and the organization of small local communities on a framework of kinship ties, produce similar legal rules. Land-holding, marriage and inheritance, transactions, reactions to injuries, are controlled by the same sanctions. For example, Indonesians, as in Africa and early European history, generally distinguish between earned property and inherited property. The earner may freely dispose of the former, but not of the latter, the devolution of which is controlled by set rules. But once earned property is inherited, it becomes "family property". Again, in Indonesia, as in Central and South Africa, changing economic conditions and increase of population seem to have produced the same result; the right in land which is stressed is that of all members of the community to some arable land, so that chiefs reduce the period of permitted following and take over individuals’ unused land or fallows for re-distribution to the landless. Ter Haar describes this as an encroachment of the autonomous legal community’s “right of disposal” over the land, on the individual’s “native possessory right”; but its origin lies in the latter right as part of the community’s obligations to all its members.

This brings me to what is undoubtedly one of the most important contributions of the students of adat law—their policy on terminology to which Ter Haar devotes a special chapter. The task of translating rules of one society into a language intelligible to members of another society is basic in all social studies; when translation is from the language of the “primitive” people into a modern European language the difficulties are enhanced. We do not have words for many of their concepts. Ter Haar puts the problem clearly and poses the three possible methods of dealing with it: (1) to seek for the nearest equivalent; or (2) to continue to use the native terms; or (3) to coin "neutral" terms in the recipient language. In a way, it is irrelevant what is done, so long as the terms used are clearly defined. All three methods may be successful with different concepts. Native terms are usually burdensome, especially if many are used, and they have limited application unless they can be Europeanised. Adat law is less cumbersome than, and avoids some of the pitfalls of, the phrase “native law and custom”; but could it be applied to African law? Levirate is an example of a term which can be applied precisely in many societies. Ter Haar concludes that when in doubt it is best to seek for a neutral term, and I agree with him. British anthropologists have failed to reach unanimity on the same problem. Thus they had a long controversy over how to describe payments made by a groom for his bride. "Dowry" was used by some writers but is clearly inapplicable; "bride-price" carried the connotation of sale of the woman which was not in fact present; "bride-wealth" was suggested as a neutral term and used by most, but not all, anthropologists. Now "marriage-payments" is coming into use. When senior adat jurists, like Van Vollenhoven, have suggested neutral terms, the method they seem to prefer, these have been adopted by everyone. They even use as an alternative term for levirate (where a dead man is still married to his widow but she cohabits with a kinsman) substitution marriage, with continuation marriage

as an alternative for sororate (marriage to the deceased wife's sister without further transfer of goods.)

They have applied neutral terms particularly to land-holding and land transactions. The concepts of "communal ownership" and "individual ownership" of land in tribal society have often been posed as mutually excluding alternatives, and this false opposition has led not only to the waste of much polemic and paper, but also to decisions in courts which seem unjust, notably on the Ndebele land in Southern Rhodesia after conquest. The Dutch scholars see that communal and individual rights exist at the same time in the same parcel of land, in what Ter Haar calls a state of tension. The community's rights were described by Van Vollenhoven by the term "right of disposal" (cf. the French "droit du disposition"). "Yet, even this term is etymologically misleading, because no actual right of alienation is vested in the community," says Ter Haar. Van Vollenhoven stressed this, and carefully described the six characteristic features of the right of disposal. This right "is never static. It grows and shrinks in relation to the rights of individual members." By working on a parcel of land, the individual creates a legal relationship between it and himself which is termed "the native right of possession", and derogates from the right of disposal. This native right of possession is quite different from the rights which in developed systems of law are termed usufruct and use, though many writers have applied these to primitive land-holding. Again, Van Vollenhoven (and here Ter Haar) carefully described the powers and duties entailed in the native right of possession: this chapter is the best in the book. The terms, community's "right of disposal" and individual's "native right of possession", particularly the latter, seem to have been selected for their innocuousness rather than their appropriateness, for lack of better terms, and they do not indicate the nature of the rights and duties entailed in them or the relation between individual and community rights. They appear also to have led to the idea that the community's rights in the land are lessened by the individual's rights, and to have produced a somewhat confused account of the struggle between these rights. Therefore I may perhaps be excused if I set out here a terminology I have suggested for similar rights in Africa.

The essence of land-holding in tribal society is that it is a part of the individual's status: as a member of a political unit and within that as a member of a local-kinship group, he has a right to some land in its demesne. Therefore I think "estate" is the appropriate term to describe this right, and speak of the individual's "estate of holding." These estates of holding are held in the hierarchical organization of the society, and an estate-holder has a duty to allot land within his estate to his dependents who have a corresponding right to claim land from him. Ultimately rights in the land vest in the community, perhaps through its chief, who has to divide it into estates. The community or chief may therefore be called "the owner as trustee" (some have suggested "the warden"), who divides the land into "primary estates of holding of primary holders", who are either sub-chiefs, village headmen, or groups within the political unit. Primary holders allot secondary estates of holding to secondary holders, these allot tertiary estates of holding to tertiary holders, and so on. All these estates may exist on the same parcel of land at the same time, and the use of the single term, "estate of holding", brings out the identity of rights and obligations between holders of adjacent estates of holding at all points in the series, as well as to all superior and inferior estate-holders within the series.4

Lawyers may find Ter Haar's references to "the magical balance" in communities, "the cosmic equilibrium", "the magical bond" between land and people, the relation of "the life-circles of individuals" and "the magic life-force of the community", somewhat metaphysical. I do myself, since Ter

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4 Gluckman, Essays in Lozi Land and Royal Property, p. 27 ff.
THE DUALISM IN LAW

Haar describes, but does not show the significance of, the social relations which are basic to these conceptions. For peoples at this stage of culture, the social and natural world has a moral and ritual order, interdependent with the social and natural order. Any disturbance of ritual forces tends to upset the social or natural order, and conversely any upset of the social or natural order is ascribed to ritual disturbances. Misfortunes—famine, illness, accidents, etc.—are ascribed to the wrath of gods or ancestor-spirits, or to witches or sorcerers. In some African societies all misfortunes, not merely injuries patently inflicted by others, are delicts, for they originate legal actions, accusations of witchcraft against neighbours. Even death in war at the hands of an enemy, may found a suit for witchcraft against a neighbour.4

Ter Haar, in his very brief chapter on delicts, does not mention these relations with supernatural agents. But he indicates that not only delicts, but also sales, particularly of land, or incidents of personal history such as marriage, are disturbances of the social order which tend to upset the moral and ritual order of the world. Therefore there is a ritual side to land-holding and land transactions, to alterations of status, to settlements of injuries, etc. This conception can be related to the basic economic and structural conditions of static, undifferentiated societies.

Despite its weaknesses, the book is intrinsically a sound, scholarly study. But it will be still-born unless it is followed by translation of Ter Haar’s sources. If these are made, I hope the editors will check the translators more carefully. Good as the literal work is, there are unhappy phrasings (such as “different than”) and many sentences are too involved for the English ear and eye. Some words are excusable only because the dictionary approves them, as “necrology” for “obituary.” Untranslated Indonesian or Malay words are too numerous, and a glossary is needed.

THE DUALISM IN LAW

[Contributed by Professor R. H. Graveson]

Professor Alf Ross, the Danish legal philosopher and authority on international law, already has the unusual distinction of having published in England a textbook of international law. The thesis of his present work, “Towards a Realistic Jurisprudence,”1 is the view that “the fundamental source of error in a number of apparently unconquerable contradictions in the modern theory of law is a dualism in the implied pre-scientific concept of law which more or less forms the basis of the theories developed.” (Page 11.) By this he means that law is conceived at the same time as an observable phenomenon in the world of facts and as a binding norm in the world of morals or values; in short, as both a phenomenon and a proposition. One cannot hope, in the author’s view, to propound an adequate or convincing theory by adhering strictly either to reality or to validity; while the traditional combination of both methods usually has the effect of concealing the inherent dualism.

Ross develops a hypothesis based on the conclusions of his earlier work,2 that “reality and validity are not logically co-ordinated categories of forms of thought,” validity being merely a word used as a common term for such expressions as those by which certain subjective experiences of impulse are rationalised. Validity, in other words, does not exist as an absolute and independent concept, but merely as a psychological reaction. In the author’s words, “there do not exist any conceptions of validity whatever, but merely conceptually rationalised experiences of validity.” (Pages 12-13.) This seems,

2 Kritik der sogenannnten praktischen Erkenntnis (1933)

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