De organisatie van regelgeving voor Nederlands Oost-Indië: stelsels en opvattingen (1602-1942)

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Summary

This research deals with a central aspect of constitutional law for the Dutch East Indies, viz the division of the competence to issue rules; with opinions of Dutch administrators, politicians and scholars of constitutional law on the relation between the Netherlands and the Dutch East Indies; and with the connection between this division and these opinions. The research therefore deals with aspects of colonial history, more specifically with colonial history of law and colonial history of ideas, with respect to the Dutch East Indies.

Between 1602 and 1942 different systems of division of the competence to issue rules have been developed, partly on the basis of the aforementioned opinions of Dutch administrators, politicians and scholars of constitutional law. These systems and the opinions that partly underlie them will be described and analysed. With this is also intended to gain insight into the evolution of the systems and opinions; especially into the degree to which there has been continuity in this evolution.

Systems, opinions and their connection

In order to describe and analyse the systems of division of the competence to issue rules and the opinions that partly underlie them the years from 1602 to 1942 have been divided into five periods:
1. 1602-1795, the period of the Dutch East India Company;
2. 1795-1816, a transitional period;
3. 1816-1848, a period of autocracy;
4. 1848-1927, a first period of constitutionalism;
5. 1927-1942, a second period of constitutionalism.

To each of these periods a chapter has been dedicated.

The period of the Dutch East India Company (1602-1795) is discussed in the first chapter. In this period the Netherlands were a confederation: the Dutch Republic. The most important organ of the confederation were the States General. The States General dealt with external affairs. Among those affairs fell the supervision of the Dutch East India Company. This Company, established in 1602, traded to the Indonesian archipelago, and was also invested with public authority over the areas it took possession of as part of its trade activity.

In the period of the Dutch East India Company there existed a rather vaguely formulated and only to a limited extent thought-out system of division of the competence to issue rules for the areas in the Indonesian archipelago which were under Dutch rule. In this system the States General had the highest competence to issue rules for the Dutch East Indies. The 'Heren XVII', the board of directors of the
Dutch East India Company, had supplementary competence to issue rules and were responsible to the States General. Finally there was the Indian government, an organ of the Dutch East Indian Company, consisting of a governor-general and a Council for the Dutch East Indies. The Indian government had competence to issue rules, which it practised in subordination to the ‘Heren XVII’.

In practice the system functioned inadequately. The States General hardly used their competence. Because of this both in the Dutch Republic and in the Dutch East Indies organs of the Dutch East Indies Company soon started working on their own initiative. The Indian government for instance enacted the major part of the rules for the Dutch East Indies, and practised its competence to issue rules largely autonomously because of the bad connection between the Dutch Republic and the Dutch East Indies.

The transitional period (1795-1816) is discussed in the second chapter. The year 1795 saw the end of the Dutch Republic. The Batavian Republic (1795-1806) was set up, followed by the Kingdom of Holland (1806-1810), the annexation by France (1810-1813), the United Netherlands (1813-1815) and the Kingdom of the Netherlands (from 1815). From 1795 onwards the Dutch East Indian Company was gradually dismantled in the Netherlands, leading to the liquidation of the Company in 1800. In the Indonesian archipelago Company-rule was *de facto* continued until 1808. This rule was followed by the periods of government of governors-general Daendels (1808-1811) and Janssens (1811) and by the British interim rule (1811-1816). In the year 1816 the areas the British had occupied in the Indonesian archipelago were transferred to the Kingdom of the Netherlands.

All in all the transitional period saw continually changing constitutional states of affairs. As a consequence many systems for the division of the competence to issue rules for the Dutch East Indies were developed, none of which functioned during a longer period of time. Nevertheless the transitional period was of great importance for the development of constitutional law for the Dutch East Indies. In this period well thought-out systems for the division of the competence to issue rules for the Dutch East Indies were developed for the first time, and it was unequivocally declared that Dutch possessions in the Indonesian archipelago were state-owned property, to be managed by constitutional bodies. From now on commercial enterprises, like the Dutch East India Company, were no longer allowed to play a part in the management.

The transitional period was also important for another reason. In this period people started thinking seriously about the relation between the Netherlands and the Dutch East Indies. Overseas territories were still seen first and foremost as possessions seized for the benefit for the mother country, but for the first time people started giving attention to the well-being of the indigenous population. The latter happened especially from 1803 onwards: in 1803 a report was published that explicitly stated that Dutch administration had a duty to provide for the indigenous population and should strive for the
The protection of this population. The protection had to lead to greater well-being and greater prosperity for the indigenous population. That benefit for the mother country might be difficult to reconcile with attention to the well-being of the indigenous population, was hardly realized, if at all.

The period of autocracy (1816-1848) is discussed in the third chapter. From the year 1816 until 1942 the Kingdom of the Netherlands held sovereignty over the Dutch East Indies. In the years 1816-1848 there was an autocratic system for the Dutch East Indies on the basis of the Dutch Constitution of 1815 and the Dutch Constitution of 1840. The competence to issue rules, and the competence to govern in general, rested with one organ, viz the King. The King answered to no one (there was no political ministerial responsibility for acts of the King in this period) and could turn over and take back his competence as he saw fit. In practice the major part of the rules for the Dutch East Indies was enacted by organs at that place. The bad connection between the Netherlands and the Dutch East Indies made this practically unavoidable. Nevertheless in this period, especially from about 1825, it was tried, and for the first time with some success, to keep organs in the Dutch East Indies on a tighter rein.

As regards the relation between the Netherlands and the Dutch East Indies, in this period the notion that the Dutch East Indies were there for the benefit for the mother country kept existing side by side with the notion that the Netherlands had a duty to provide for the indigenous population. New for this period, a rudimentary discussion started on the best way to provide for this population. On the one hand there was the point of view of the Council of State, expressed in 1814, that the duty to provide implied westernizing indigenous society to a certain extent. On the other hand there was the point of view of governor-generaal Van den Bosch, expressed in 1831 and following on the above-mentioned report of 1803, that the duty to provide implied preserving the customs and traditions of the indigenous population. In later years, especially in the twentieth century, this discussion would be resumed time and again, with far-reaching consequences for the constitutional and political development of the Dutch East Indies.

The first period of constitutionalism (1848-1927) is discussed in the fourth chapter. In 1848 the Dutch Constitution was thoroughly revised. The revision had far-reaching consequences for the constitutional law for the Dutch East Indies: the autocracy of the preceding period was replaced by constitutionalism. A certain degree of separation of powers came into being, the representative body got involved in the issuing of rules for the Dutch East Indies, and this body received supervising competence. It did take some time before constitutionalism was fully developed: the introduction of the rule of confidence in 1868 completed constitutionalism, and only in the last quarter of the nineteenth century did it start to function satisfactorily.

The foundations for constitutionalism for the Dutch East Indies were laid down in the Constitution
of 1848. They were elaborated in the Government Regulation Act of 1854. Under the system of the Constitution of 1848 and the Government Regulation Act of 1854 there were three organs with the competence to issue rules:

- the legislature (government and parliament), with the competence to issue acts;
- the Crown (the King inviolable and the minister responsible), with the competence to issue Royal decrees;
- the governor-general, with the competence to issue ordinances in accordance with the Council for the Dutch East Indies.

This order was also an order of ranking: the legislature had the highest competence to issue rules for the Dutch East Indies, followed by the Crown and finally by the governor-general.

In addition there were two organs with administrative competence: the Crown and the governor-general. Because the constitutional revision of 1848 introduced political ministerial responsibility and because the governor-general was a civil servant subordinate to the Crown, parliament (or the States General) could supervise regulating and administrative competence of both organs. As a consequence the independence of the governor-general was restricted to a considerable extent. It is true that the governor-general still enacted the major part of the rules for the Dutch East Indies, but because of the political ministerial responsibility and the rule of confidence, he was constantly supervised by the Crown, who could give him orders at all times, and by the States General. The Crown and the States General could force the governor-general to either change his policy or resign.

During the first period of constitutionalism more than before consideration was given to the relation between the Netherlands and the Dutch East Indies. From 1850 onwards the view that the Dutch East Indies were there for the benefit of the mother country gradually faded into the background (although this did not alter the fact that the Dutch East Indies were still there for the benefit of the Netherlands). Gradually people started seeing the Dutch East Indies as part of the Kingdom of the Netherlands, albeit a subordinate part. Following on this the thought occurred that in due course the Dutch East Indies ought to be given self-government after a western model, in which organs at that place should autonomously govern the internal affairs, with as little supervision from the Netherlands as possible. Finally the view that the Netherlands had to provide for the indigenous population was emphasized more strongly than before. Moreover the latter view got a constitutional and political component: the indigenous population in due course was to play an active part in future self-government after the western model for the Dutch East Indies.

Eventually this range of thought led to the ethical policy, which was the leading principle of Dutch colonial politics from the year 1901 until approximately 1920. The ethical policy had four basic assumptions:

- the Indian government (viz the governor-general) should be given more autonomy;
more autonomy requires the creation of a supervising and possibly co-regulating organ for the Dutch East Indies, preferably in the form of a representative organ chosen by the population of the area;

- the population of the Dutch East Indies, especially the indigenous part of it, is not ready for the creation of a representative organ, and should first be educated to participate in self-government;

- the education of the indigenous population will take a long time, and should preferably not lead to independence for the Dutch East Indies.

Under the influence of the ethical policy in 1916 the ‘Volksraad’ (People’s Council) was set up. The Volksraad was a representative organ for the Dutch East Indies that assembled from 1918 onwards, and on which members of the indigenous population also served. The setting up of the Volksraad brought no changes to the existing system of division of the competence to issue rules for the Dutch East Indies. The Volksraad is best typified as a training institute for the benefit of especially the indigenous population of the Dutch East Indies. Thus the setting up of the Volksraad was a careful move towards self-government after the western model, and towards a system of division of the competence to issue rules for the Dutch East Indies in which the indigenous population also plays a role.

The second period of constitutionalism (1927-1942) is discussed in the fifth chapter. The constitutional revision of 1922 brought important changes to the colonial articles of the Dutch Constitution. These articles had not been revised since 1848. The revision seemed to make a increasing degree of self-government for the Dutch East Indies possible, but the elaboration of the revised colonial articles of the Dutch Constitution in the Indies’ Polity Act of 1925 was such that more self-government, and a larger role for the indigenous population in self-government, remained very difficult to achieve. The Constitution of 1922 and the Indies’ Polity Act introduced some small changes to the system of division of the competence to issue rules, but the relation between government bodies in the Netherlands and the Dutch East Indies did not change substantially: the organs in the Netherlands remained the more important ones.

Under the system of the Constitution of 1922 and the Indies’ Polity Act there were four organs with the competence to issue rules:

- the legislature (government and parliament), with the competence to issue acts;
- the Crown (the King inviolable and the minister responsible), with the competence to issue Orders in Council;
- the governor-general, with the competence to issue ordinances in accordance with the Volksraad;
- the governor-general, with the competence to issue government regulations.

This order was also an order of ranking: the legislature had the highest competence to issue rules for the Dutch East Indies, followed by the Crown, by the governor-general in accordance with the Volksraad, and finally by the governor-general alone. In issuing ordinances there was cooperation between the
governor-general and the Volksraad, but the governor-general was the more important party in the cooperation. The Volksraad gave the governor-general binding advice during the enactment of ordonnances, but the Dutch Indies' Polity Act made it possible for the governor-general to ignore this advice, if the governor-general and the Volksraad had differences of opinion on the desired content of ordonnances.

As before there were two organs with administrative competence: the Crown and the governor-general. Because there was political ministerial responsibility and because the governor-general was a civil servant subordinate to the Crown, parliament (or the States General) could supervise regulating and administrative competence of both organs. As a consequence the independence of the governor-general was restricted to a considerable extent. It is true that the governor-general either with or without the cooperation of the Volksraad still enacted the major part of the rules for the Dutch East Indies, but because of the political ministerial responsibility and the rule of confidence, he was supervised by the Crown, who could give him indications (a euphemistic term for orders) at all times, and by the States General. The Crown and the States General could force the governor-general to either change his policy or resign. The Volksraad played a very small part at best in supervising the governor-general. The governor-general was responsible to the Volksraad, but this responsibility was noncommittal: the Volksraad could not force the governor-general to change his policy, nor could it force him to resign.

As regards the relation between the Netherlands and the Dutch East Indies: the foregoing shows that under the new system there was hardly any increase of self-government and hardly any larger role for the (indigenous) population in self-government, if at all. This lack of development was connected with changes that took place from about 1920 in both Dutch colonial thinking and Dutch colonial policy concerning the constitutional and political relation between the Netherlands and the Dutch East Indies.

In Dutch colonial thinking a more conservative movement came into being. Representatives of this movement assumed that the education of the indigenous population, that should lead to participation in self-government, would take much longer than representatives of the ethical policy had expected. They also felt that self-government did not necessarily have to take up western and democratic forms, and should at least take indigenous customs into consideration. Furthermore they emphasized, to a larger extent than representatives of the ethical policy had done, the preservation of a close relation between the Netherlands and the Dutch East Indies. And finally they took for granted that in this relation the leading role would rest with the Netherlands.

In Dutch colonial policy the conservative movement gained the upper hand from approximately the year 1925. As a consequence the ethical policy was pushed aside by a ‘post-ethical policy’, at least in the sphere of constitutional law and politics. The Dutch Indies' Polity Act for instance came into being under the influence of this post-ethical policy. And proposals to revise the system of division of the competence to issue rules, that were made in the nineteenthirties by indigenous members of the
Volksraad and that were in keeping with the ethical policy, were rejected by the Netherlands under the influence of the post-ethical policy.

**Evolution of systems and opinions**

As regards the systems of division of the competence to issue rules there is to some extent continuity. This continuity concerns two offices and one principle. The office of governor-general and the office of member of the Council of the Dutch East Indies were called into being at the beginning of the period of the Dutch East India Company, and still existed in 1942. In constitutional law for the Dutch East Indies especially the office of governor-general always remained important. Besides there was the principle that regulations that lay down the division of the competence to issue rules were made by organs in the Netherlands, and that those regulations gave organs in the Dutch East Indies supplementary competence. This principle, which for a long time was difficult to put into practice because of the bad connection between the Netherlands and the Dutch East Indies, was maintained until 1942.

Beside this continuity there are several clear breaks. The first break can be dated 1795. Before that year there was a rather vaguely formulated and only to a limited extent thought-out system of division of the competence to issue rules for the Dutch East Indies. From the year 1795 onward systems were designed beforehand.

The second, less radical break can be dated 1816. In that year, for the first time, there was a system of division of the competence to issue rules that was put into practice for a longer period and that functioned. This system was, like the later systems of the transitional period, an autocratic one.

The third break can be dated 1848. From this year onward until 1942 autocracy was replaced by constitutionalism. A certain degree of separation of powers came into being, the representative body got involved in the issuing of rules for the Dutch East Indies, and this body had supervising competence. Of course it should be kept in mind that this new system was restricted to Dutch organs in the Netherlands and in the Dutch East Indies. As far as constitutional law is concerned, this third break is the last one. From the start of the twentieth century onward there were attempts to actively involve the indigenous population in constitutionalism, but until 1942 these attempts hardly led to tangible results, if at all.

As regards the opinions on the relation between the Netherlands and the Dutch East Indies there are two closely connected problems: the relation between both areas, and the duty the Dutch had towards the indigenous population. Concerning both problems there was hardly any continuity: there were no constants that kept their validity between 1602 and 1942. Nor were there clear breaks in the thinking on both problems, rather it was a matter of gradual developments.

In the period of the Dutch East India Company there was no systematic thinking on the relation between both areas or on the duty the Dutch had towards the indigenous population. The Dutch East
Indies were first and foremost seen as possessions seized for benefit, and there was hardly any concern for the well-being of the indigenous population.

In the transitional period two things happened. Firstly the liquidation of the Dutch East India Company in 1800 made it clear that the Dutch East Indies were state property. Secondly a long-lasting combination of ideas came into being: the idea that the Dutch East Indies had been seized for benefit was combined with the idea that the Dutch had a duty towards the indigenous population.

In the period of autocracy there was no development concerning the first problem. The Dutch East Indies were still seen as state property seized for benefit. Concerning the second problem there was some development. A discussion was started on the best way to provide for the well-being and prosperity of the indigenous population.

In the first period of constitutionalism there was a gradual development as far as both problems were concerned. The view that the Dutch East Indies were there for the benefit of the mother country faded into the background, and the thought occurred that in due course the Dutch East Indies ought to be given self-government after a western model, in which the indigenous population in due course had to play an active part. The culmination of this gradual development lay in the year 1901, when the ethical policy became the leading principle of Dutch colonial politics.

As the discussion of the systems of division of the competence to issue rules has shown, both the thought of self-government and the thought of an active part for the indigenous population in this self-government to a large extent remained wishful thinking. This was mainly the consequence of a change in Dutch colonial thinking from about the year 1920 onward and in Dutch colonial policy from about the year 1925 onward. The change led to the post-ethical policy, which was more cautious than the ethical policy had been. This change can be regarded as the last of the gradual developments in the Dutch opinions on the relation between the Netherlands and the Dutch East Indies before 1942, the year that saw the de facto end of the Dutch East Indies.