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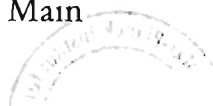
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“In as far as in accordance with the conditions of these lands and practicable.”

European and native law in the Dutch East Indies

Almost from the outset of the Dutch domination in the East Indies, law was a matter of primary concern to the VOC, the East India Company, which was charged with the government and administration of justice in its territories.

The first trip of the Dutch to the Far East, the mysterious source of pepper, nutmeg and other spices, was in 1598–1601 by Houtman and De Keizer, who sailed around the Cape of Good Hope and then eastwards. After the exploration of this route, until then only known by the Portuguese, who had already set up a trade empire of their own, Dutch capitalists were very eager to invest, and investment companies abounded. In order to conserve resources and combine forces, the States-General had these companies amalgamated in 1602 into one large share holding company: the *Verenigde Oost-Indische Compagnie* (United East Indian Company), generally called for short the *VOC* or *Compagnie* (Company) and the first share holding company in the modern sense of the word. It had a board in the Netherlands, consisting of seventeen directors and thus often called the Lords Seventeen (*Heeren Seventien*).¹ The States General had chartered the VOC to exercise a monopoly in the trade between the Far East and Europe. The basic idea was to make profit for the shareholders by acquiring spices in the east for a low price and selling them in the west for the highest price. The first objective was reached by either laying hands on the

¹ In the Netherlands there were also depots and shipyards in five different locations. The Company needed ships and developed itself into an industrial ship builder: every six months a new standardised ship was launched, equipped and manned, the so-called East-India-man. The death toll on the voyage differed but could be high. The trip to the Indies would take 6 to 12 months, and shipwreck was not uncommon. Further, bookkeeping was a highly developed aspect of the Company.

spice producing areas or controlling them indirectly, the second objective by being the sole offeror in the market, thus by being a monopolist. In both objectives the Company succeeded for more than a century.² The States General had also delegated any public authority the Dutch Republic might have, by virtue of conquest, over land or sea in the Far East. And so the VOC, originally a trading company, saw itself burdened with the duty to govern and administer justice. It was a duty it tried to perform conscientiously; in any case the VOC Board issued proclamations to that purport which the government in the East Indies, the Council of India – consisting of the Governor-General and six ordinary Councillors, and usually called the High Government – had to execute.

Following a previous formulation, the government in Batavia issued in 1632 the law which was applicable in line with the wishes of the VOC board in the Netherlands:

“Further it is ordained, in general, that for issues not dealt with hereby specifically, the law, statutes and customary laws in use in the United Netherlands will be observed and maintained. And if these are lacking (for such issue), then the written imperial laws will be used and observed, in as far as these are in accordance with the conditions of these lands and practicable.”³

This meant that for any legal problem the local enactments had priority. Local could mean at Batavia or any other trading post of the

² This monopoly the VOC had to establish for itself in an unofficial war with its competitors: the Portuguese, whose monopoly it wanted to take over, and the English who tried to do the same. Soon after the foundation of the VOC the Spice Islands or Moluccas were taken out of the sphere of Portuguese influence and forcibly conquered. Then the cultivation was concentrated on a few islands, controlled by the Dutch. Spice trees on other islands were destroyed, and an insurgency of locals on Banda bloodily smothered. Also forts along the route to the west were taken from the Portuguese: Malacca, forts on the west and east coast of India and Ceylon (Sri Lanka), and the Cape of Good Hope. An attempt by the English to replace the Portuguese was averted. So by the middle of the seventeenth century the spice trade was concentrated in the hands of the Company, which permitted no competition. Dividends were high.

³ “Voorts is generalijcken gestatueert, dat van wat saecken in desen niet bijzonder geordonneert sij, geobserveert ende onderhouden sullen worden de rechten, statuten ende costumen, in de Vereenighde Nederlanden gebruijckt; ende daer deselve mede sullen comen te deficiëren, geuseert ende achtervolght sullen worden de beschreven keijzerlijke rechten, voor soo veel die met de gelegentheijt van dese landen overeen comen ende practicabel sullen sijn.” (J.A. VAN DER CHIJS, *Het Nederlandsch-Indisch Plakaatboek 1602–1811*, 17 Vol., Batavia, 's Hage 1885–1900 [hereafter cited as: NIP], 1.593–594: Batavian Statutes, closing section).

Company for the local situation, or at Batavia for Batavia and all other posts.

If this did not resolve the matter, then the solution had to be sought in the laws, statutes and customary laws of all the provinces and regions of the republic of the seven United Provinces, the Netherlands. This is already remarkable, since there were legal variations between the provinces and towns. On the other hand, some statutes were common to all, for example the criminal ordinances of Charles V and Philip II, who had been Lords of all the Netherlands.

There were problems here. If we remind ourselves of the high risk of death due to scurvy, tropical diseases, accidents or hostile actions, and the great variety of the Company servants' origins, it is not surprisingly that these showed up first in the law of succession. The VOC board had prescribed that for intestate succession the law of the home town of the deceased should apply. But how could one know, in Batavia, what this law was, if it was an obscure town in, for example, Overijssel? There were law books in Batavia, but only of a more general character. In the outposts the situation was even more primitive. So the government in Batavia decided in 1625 that the law on intestate succession of the province of Holland as established by the Edict of 1599 should apply.⁴ In 1632 Gregorius Cornely, from Middelburg in the province of Zeeland, died aboard ship at sea. He had made no will, and his two children in Batavia died soon thereafter. His widow claimed his estate, but his next of kin Jan Crone from Middelburg did the same, basing himself on the laws of Zeeland which stated that the goods had to return to the side of the family they came from. Cornely had merely temporarily resided in India, and his domicile had remained Middelburg. Thus his children had also been domiciled there, and therefore the Zeeland laws applied: the children had inherited the estate from Cornely, so it should revert to his kin and not to his wife. The VOC board agreed that all those who sailed on the Company's ships were merely temporarily resident in the East and remained domiciled wherever they came from. Consequently the law of the domicile applied.⁵ It is not clear what law applied to those Europeans who were allowed to settle in Batavia as free citizens and therefore, logically, would have changed domicile. One would expect the Edict as prescribed in 1625 to apply, and this may have been the reason why

⁴ 16 June 1625, NIP (n. 3), 1.126.

⁵ 2 December 1634, NIP (n. 3), 1.365-369.

it was included in the Batavian Statutes in 1642 in spite of the Cornely case. As for the others, at the request of the East Indies government the VOC Board declared the Edict of 1599 applicable for all who died intestate in the Indies.⁶ As to penal law, in 1632 the criminal ordinances were also declared applicable, and they would remain so until 1866.⁷

This point needs some elaboration, since it is paradigmatic for the subsidiary application of Dutch law in the Indies. Contrary to the situation in the Netherlands, there was, in general, legal uniformity in all the territories of the VOC. Predominant in application was the Roman Dutch law as used in the most important province of Holland and West-Friesland and as systematised in the books of Grotius, Van Leeuwen and others. Local variations existed, but they were basically of public, not private law character, and in any case they did not play any part in East Indian law.

The third source of law was Roman Law as laid down in the *Corpus Juris Civilis*. It could be applied if it fitted the particularities of the region.

Yet the Dutch laws could be adapted or restricted, leading to an East Indian blend of Roman-Dutch and Dutch customary law, and we find examples of this. In 1638 the Batavian custom that a verdict gave a creditor preference over the bankrupt debtor, was declared contrary to Dutch and Roman law and abolished.⁸ On the other hand the Company gave itself a preferential right for reclaiming loans and advances,⁹ which was more than the preferred authorities normally had for outstanding tax debts.¹⁰ Fideicommissary bequests to natives were declared forbidden.¹¹ Adoption was also a rather free adaptation of the Roman adoption. There is no question, however, of the application of the principle of concordance between the legal systems of homeland and colony, as we know it from the nineteenth century, when the latter's private law has to be as much as possible in accordance with that of the motherland.¹²

⁶ 10 January 1661, NIP (n. 3), 2.341–342.

⁷ F. DE HAAN, *Priangan*, Vol. I, [Batavia] 1910, p. 415*; NIP (n. 3), 1.263–263: both the substantive criminal law and the law of criminal procedure of the Netherlands.

⁸ A proclamation of the Council of Justice 30 March 1638, NIP (n. 3), 1.419.

⁹ 18/21 February 1640, NIP (n. 3), 1.436–437.

¹⁰ See S. VAN LEEUWEN, *Het Rooms-Hollands-Regt*, Amsterdam 1708, pp. 347–348.

¹¹ R 2 March 1760, repeating an earlier prohibition.

¹² Contrary to J. BAILL, *Indonesian Legal History 1602–1848*, Sydney 1982, p. 28.

The law we are talking of is private law, not penal and administrative law; and the law of procedure in civil, not in criminal cases. All this was of importance for all who lived in territory directly governed by the Company. Only exceptionally were national laws applied, and primarily in the field of succession (as we have seen for the Europeans, where initially the town of origin prevailed). For Europeans, mostly Dutch but also others who had engaged with the Company, there were no exceptions. For the Chinese and natives there were some exceptions which we shall deal with in a moment. In territories at a distance or indirectly governed by the Company native law was applied "in as far as tolerable" (as is said for East Java), but this may well apply only to the criminal law. Regarding the penal and administrative law and its procedure, this was applicable to all inhabitants of VOC territory regardless of nation, unless the law made a distinction.

To discuss possible interaction we have first to consider what law applied to those other than Europeans. First the law of family, marriage and succession.

For the Chinese this was the law of the Chinese empire, whether or not they were domiciled in Batavia.¹³ In 1619, when there were about 400 Chinese in Batavia, a captain was appointed over them, who was empowered to decide minor civil cases.¹⁴ But in 1640 a College of Boedelmeesteren (Non-Christian Estate Chamber) for Chinese and other non-European estates was instituted because of the many frauds committed.¹⁵ This College functioned as executor of estates. The terms of its 1640 instruction do specify the law applicable: the College should work according to the statutes and customary laws of the Chinese nation. But the section also adds: under sufficient financial guarantees, namely for potential creditors. The Company had learnt its lesson a few years before, when its major Chinese debtor Jan Con had died insolvent.¹⁶ It shows the limits of foreign law: the government decided

¹³ See for example on the law of marriage G. MACCORMACK, *Ethical Principles and the Traditional Chinese Law of Marriage*, in: *The Irish Jurist* 21 (1986), pp. 247–271.

¹⁴ 11 October 1619, NIP (n. 3), 1.599.

¹⁵ 26/31 May 1640, NIP (n. 3), 1.438–439. It was abolished in 1648 (NIP [n. 3], 2.123–124) but reinstalled in 1655 (NIP [n. 3], 2.212).

¹⁶ For good reasons: the Company lost much (27,636 3/8 rials) when Jan Con died insolvent: see L. BLUSSÉ, *Testament to a Towkay: Jan Con, Batavia and the Dutch China Trade*, in: *All of One Company. The VOC in biographical perspective. Essays in honour of Prof. M. A. P. Meilink-Roelofs*, Utrecht 1986, pp. 3–41. Jan Con exploited as early as 1637 a sugar plantation near Batavia and was granted in that year an immunity from the tax on sugar for ten years, in exchange for which he was obliged

that creditors of the *de cuius* should be protected, regardless of what the Chinese law might say.¹⁷ Also it decided that Chinese women were incapable of controlling their legacy or inheritance during their lifetime (a rule later changed), whereas (Chinese) men were incapable only until their 25th birthday, irrespective of what Chinese law had to say about this.¹⁸ As to marriage and divorce, in 1717 the Government decided that previous permission of the captain of the Chinese was always required. Public notaries could not process acts of divorce without this, nor could the Boedelmeesteren make over the estate, but this functioned as a restriction on Chinese law which allowed of repudiation of one's spouse.¹⁹ Although it is not recorded for the early days, adoption, unknown in Dutch law but allowed in the Chinese, was also permitted. In a criminal case the Aldermen absolved a Chinese of seduction of a Chinese girl and permitted him to marry her. The High Government annulled this sentence and the marriage, and allowed her father to litigate without precedent procedure ("rauwelijks") against him.²⁰ But no marriage before the Aldermen was prescribed. Again protection of third parties prevailed. In order to know the Chinese law the captain and lieutenants of the Chinese were asked, which led to a small collection of material on the law of family, marriage, divorce and succession, confirmed in 1761.²¹ In 1766 Tallefert and Alting proposed to introduce community of property between spouses, a proposition which was rejected, but not because it conflicted with Chinese law.²²

to sell all his sugar to the Company at the market price at Bantam: 7 November 1637, NIP (n. 3), 1.416.

¹⁷ It did not allow this (F. DE HAAN, *Oud Batavia*, Batavia 1935 [2nd rev. ed.], p. 389). See also J. TH. VERMEULEN, Some Remarks about the Administration of Justice to the Chinese of Batavia by the Company, in: *Tan Yeok Seong, Collected Writings from the Ya-Yin studio*, Singapore 1983, vol. III, pp. 93–103.

¹⁸ NIP (n. 3), 1.442–443, section 13.

¹⁹ 31 March/6 April 1717, NIP (n. 3), 4.93–95; so repudiation was no longer possible: F. DE HAAN, *Oud Batavia* (n. 17), p. 389.

²⁰ R 27 July 1728.

²¹ Haksteen's Compendium of Chinese law, 22 May 1761, NIP (n. 3), 7.476–490.

²² The first issue was the proposal to establish a community of property between Chinese spouses in order to make the goods of the women collateral for the debts of the husbands. If they wanted they could still exclude such community of property by ante-nuptial agreement. In many cases the husbands put assets in their wife's name, with the result that after their death their creditors could not recover their claims. This happened often and with fraudulent purpose. Governor Van der Parra objected that creditors could ask for security, and an ante-nuptial agreement would have to be registered by a notary and would therefore be expensive. Tallefert and Alting thought otherwise. But the Governor-General, since he already foresaw a majority for his

Indeed it is said of a Chinese captain in 1666 that he had community of property with his wife in the Dutch manner.²³ On the other hand, testaments made before a public notary were unknown in China but practised in Batavia.²⁴ We can say that the Chinese were allowed to live according to their own laws in the matter of family law, marriage, divorce and succession, but not further, and that these laws were adapted in a European way when considered desirable.

As to the Jews, all their communities in the colonies under the sovereignty of the States-General fell under the Parnassim of the Portuguese Jews in Amsterdam, as was implicitly confirmed in 1740. This extended to family law, in this case to the ketuba, the engagement, which, if performed, excluded community of property, gains and losses. But whether this found application in the East Indies is not known.²⁵

A similar situation of relative autonomy existed for the natives (usually called Mahometans since religion was important, or simply natives, or after their origin). Regarding succession their statutes and customary laws were to be applied, not only in Batavia, but also in the territory governed by the Company.

In 1678 the Mataram empire ceded sizable parts of Java to the Company, including Semarang, Cheribon and the Preanger (the large area southwest of Batavia). Formally the Court of Aldermen (later the Sheriff) and the Council of Justice were competent outside Batavia for the entire territory of the former kingdom of Jacatra and the Council after 1708 for certain delicts in the Preanger, but this was not enforced, and was formally abolished in 1766.²⁶ The native authorities retained

opinion, proposed to ask the opinion of the Captain and Lieutenants of the Chinese about this. All others did not see any problem in this, although it was already known that according to Chinese custom wives, children and even grandchildren were liable for the debts of their husbands, fathers and grandfathers, and the proposal would have been in accordance with this custom. Yet since the Governor himself was opposed to an introduction of community of property, it was not to be expected – thus our reporter – that they would dare to express themselves contrarily (pp. 6–8 of the MS, to be published in *Het "Rapport van L. Taillefert en W. A. Alting betreffende het Alphabetisch Receuil van J. J. Craan" [der statutaire wetten en reglementen & c. van Nederlandsch Oost. Indie] van 29 Augustus 1765* by A. J. B. Sirks. One might wonder why Van der Parra, Van Riemsdijk, Van Basel and Hartingh were so opposed to this. Did they have good business contacts with the Chinese?).

²³ DE HAAN, *Oud Batavia* (n. 17), p. 389.

²⁴ DE HAAN, *Oud Batavia* (n. 17), p. 389.

²⁵ See C. VAN BIJNKERSHOEK, *Observationes Tumultuariae*, Tom. IV, no. 3195, Haarlem 1962. There were Jewish communities in the colonies of the West Indian Company: the oldest synagogue of the Americas is on Curaçao.

²⁶ DE HAAN, *Priangan I* (n. 7), pp. 407*, 410*.

their jurisdiction in civil and criminal matters; only some had to report to the Governor-General. The Company servants were only to see to it that the Javanese statutes or customs were respected. This did not concern Europeans, who were excluded from their jurisdiction.²⁷ Also the pangerang of Cheribon, who had been accorded the political supervision in 1706 over the Preanger heads, had to avoid interfering with it.²⁸ The observance of the Javanese laws, prescribed and organised in 1708 (the Resident and Commissioner had to see to its application), was once more underlined in 1715.²⁹ These laws included, apart from the customary law (the adat), the ordinances of the kings of Mataram.³⁰ It would seem that in Cheribon the sultans hesitated between the adat and the Islamic prescriptions, an opposition which existed also on a lower level in the native law at the time and even today.³¹ In 1734 a murderer resident in the Preanger was tried before the Aldermen in Batavia and then sent back to undergo his punishment, although, as it is said, he should have been tried and executed in the Preanger.³² Yet in criminal matters the Javanese custom of fines did not appeal to the European preference for corporal punishment (in the Mataram kingdom bodily punishment was a prerogative of the king, and the jaksas in the Preanger could only fine).³³ Here the Commissioner for Native Affairs in the Preanger in practice more and more took over criminal jurisdiction, and so European standards and penalties were imposed (such as forced labour on a chain gang), besides much politically inspired justice.³⁴

In line with this policy, the Company stimulated the recording of local laws. It feared that unfair administration of justice would harm commerce.³⁵ For example, in 1717 the law of the Ceylonese, the Thesawalamai, was recorded;³⁶ in 1750 a compendium of the most

²⁷ 31 December 1708, NIP (n. 3), 3.616–617.

²⁸ 8 April 1708, NIP (n. 3), 4.20–21.

²⁹ DE HAAN, Priangan I (n. 7), pp. 405*–406* (on the organisation of the indigenous jurisdiction in Cheribon and the Preanger); 16 April 1715, NIP (n. 3), 4.64–65.

³⁰ DE HAAN, Priangan I (n. 7), p. 412*.

³¹ DE HAAN, Priangan I (n. 7), pp. 406*, 412*.

³² High Government 22 June 1734.

³³ DE HAAN, Priangan I (n. 7), p. 409*.

³⁴ See DE HAAN, Priangan I (n. 7), p. 411*, and further on the question in A. J. B. SIRKS, *Law in Tempo Dulu*, to be published, Ch. 1.

³⁵ J. BALL, *Indonesian Legal History* (n. 12), pp. 37–64.

³⁶ S. J. VAN KAN, *Uit de Ceilonesche Rechtsgeschiedenis*, in: *Berichten Koloniaal Instituut* 102 (1943), pp. 441–451.

important Javanese laws was established, said to have been drawn from a Mahometan law book (the Mogharaer), and was to be used by the Semarang court (mainly penal law) for the administration of justice in the vast area of East Java.³⁷ It has been called an ill-drafted compendium with harsh (Muslim) punishments (cutting off hands etc.).³⁸ In 1754 the recording was ordained for the Preanger,³⁹ as a result of which another compendium of Mahometan laws appeared in 1760, dealing with the law of succession, marriage and divorce.⁴⁰ The first title of this compendium (on succession) was again declared in force in 1828, to be abolished in 1848.⁴¹ And also in another residency, Cheribon (east of Batavia) the law was recorded in 1768: the Pepakum Tjerbon, a compilation of older autochthonous lawbooks, in Javanese with a Dutch translation. Its aim was to permit the native judges to judge better; but it also served the Dutch, since they could now control the sentences awarded. The original Javanese law was law with strong Hindu influence, to which some Islamic law was later added (but not in the Preanger, where Gobius, resident in 1714–1717, resisted this influence). These laws were not influenced by European law, except for the fact that they were recorded or re-recorded and, in the case of the Javanese law, this time not in the original poetic form – a Hindu trait – but in the western way: in sections under appropriate headings. Further, the scope was restricted at the will of the government, depending on whether it involved private or public law.⁴²

Among the Mahometans were counted the Moors, from the Portuguese *mouro*, Muslim, a group of Indian origin who had adopted Islam. In 1648 they already had a small mosque and a second one was built between 1744 and 1748.⁴³ There was also another group from India present in Batavia, the “*Jentieven*”, from the Portuguese *gentio*,

³⁷ 31 December 1750, NIP (n. 3), 6.14–37.

³⁸ J. BALL, *Indonesian Legal History* (n. 12), pp. 68–70.

³⁹ 1 October 1754, NIP (n. 3), 6.735: to judge according to certain rules and orders, as regarding the law of succession, estate and (marital) community (of property) (“volgens sekere regelen en ordres, zo aangaande het regt als de successie, erffenis en gemeenschap”); to be collected by an experienced “staat en landkundige” (ethnologist) and to be printed in the native languages.

⁴⁰ In accordance with the proclamation of 13 December 1754; 25 March 1760, NIP (n. 3), 7.392–407.

⁴¹ 3 Augustus 1828, Stb. 1828, no. 55: DE HAAN, *Priangan*, Vol. IV, [Batavia] 1912, p. 683, § 2436.

⁴² For a fine survey see J. BALL, *Indonesian Legal History* (n. 12), pp. 67–77.

⁴³ DE HAAN, *Oud Batavia* (n. 17), p. 378.

heathen.⁴⁴ They seem to have been small shopkeepers⁴⁵ and in 1700 received permission to burn their dead.⁴⁶ Both groups were also known as "Klingen" since they came from Kalinga.⁴⁷ Since the ignorance of their laws regarding marriage and divorce caused confusion and fraud (presumably in the matter of marriage and succession), these rules too were compiled and published in 1752.⁴⁸

How were these laws applied? In the area of criminal law there was, as said, in the Preanger a growing tendency for the VOC to interfere with justice, which inevitably led to a more European treatment of the cases. In East Java the Javanese laws were applied only in so far as tolerable to the Company.⁴⁹ As to the application of the private law within the territories where the natives exercised their own jurisdiction, adat and Islamic law competed. The sultans often favoured the latter, whereas the jaksas held to the adat. Where the VOC itself directly administered justice, basically in Batavia and environs, the former Jacatra kingdom and its strongholds on Java, the situation was complicated because of the competition between Indo-European law and the various national laws.

Two interesting cases have been preserved. The native Regent of Tjiandjoer (Ciandur) had his testament drawn up in Batavia in 1736, as had the native Regent of Kampongbaroe (Kampongbaru) in 1759.⁵⁰ Both declared that they had made their wills in accordance with the laws and maxims of their nation. De Haan suggested that without this declaration they would have been subjected to European (Indian-Dutch) law, but this is not compelling since the Regents were not domiciled in Batavia (where this law applied). In 1806 it was stated that the estates of persons from the Regencies, who had died intestate in Batavia, would devolve according to the succession law of their

⁴⁴ DE HAAN, *Oud Batavia* (n. 17), p. 378.

⁴⁵ 20 April 1739, NIP (n. 3), 4.453, section 9: "De jentive en andere boetiqueros, die onder het dak van het inlands wagthuijs ... en ook op andere plaatsen hunne winkels opzetten ..." (The Jentive and other shopkeepers [NB: the Portuguese word is used], who set up their shops under the roof of the native guardhouse ... and also in other places)

⁴⁶ DE HAAN, *Oud Batavia* (n. 17), p. 378.

⁴⁷ DE HAAN, *Oud Batavia* (n. 17), p. 379. Kalinga and Coromandel lie north of Paliacate on the east Indian coast.

⁴⁸ 14 January 1752, NIP (n. 3), 6.164-166; included in the *New Batavian Statutes of 1766* 41: 26-32 (NIP (n. 3), 9.416-417).

⁴⁹ 30 November 1747.

⁵⁰ 22 September 1736, before Schoute, and 6 June 1759: DE HAAN, *Priangan IV* (n. 41), p. 686.

Regency.⁵¹ The Regents may have wanted to state the obvious, for certainty's sake, to evade possible conflicts with European law. The reason for their making a will may have been that they wanted to deviate from the general law of intestacy, to evade Islamic additions or the adat. In any case, their wills were valid. Since it was decided in 1766 that non-Christians could not establish *fideicommissa* of real estate (this was considered a privilege of Christians),⁵² it must have been possible for them to opt for the application of European law on testaments to their wills. Yet this does not imply that it applied anyway. The succession law in the compendia was only for intestate succession.

As to family law, there was a case in 1674 in which a person from the Moluccan island of Amboina, domiciled in Batavia, litigating with another Amboinese, also domiciled in Batavia, about the marriage gift of his deceased sister, who appealed to the customary law of Amboina. Indeed on Amboina the governor applied this law to the local Amboinese, but in Batavia such appeal was invalid. Outside of Amboina judges were not allowed to apply such customs which had nothing in common with "our" laws. They were free to use their own law amongst each other as they pleased, but the court would not do so. This differentiation from the Javanese and Chinese may be due to the sheer number of these, in contrast to the smaller group of Amboinese.⁵³

And what about the private law outside of the area of family, marriage, divorce and succession? Apart from the fact that the lack of rules on, for example, contracts in the above mentioned compendia and codes indicates no wish or need to apply these, there was, to all appearances, no deference to national particularities in this matter, in any case not in Batavia. Minor cases may still have been decided by the Chinese captain, and here Chinese law was perhaps applied,⁵⁴ but

⁵¹ HR 8 August 1806, an order for the Chinese and Non-Christian Estate Chamber to act "naar de wetten en costumen van de regentschappen, waartoe de overleedene personen behooren" (according to the laws and customs of the regencies the deceased persons belonged to); also DE HAAN, Priangan I (n. 7), p. 417*.

⁵² Although for these now restricted to first usufructuaries; thereafter the property was unrestricted; 11 November 1766.

⁵³ "oude costumes, gantsch geen gemeenschap hebbende met onse wetten" (old customs, having nothing in common at all with our laws), and "aen der parthijen eijgen vrije en onbedwongen wille en geliefte gelaten om se onder haer te observeren ofte niet" (leaving it to the parties' own free and unrestricted will whether to observe these amongst each other or not); Resolution of the High Government 22 Juni 1674, NIP (n. 3), 2.573; DE HAAN, Priangan IV (n. 41), p. 678.

⁵⁴ Extortion and arbitrariness occurred under Ben Con and Jan Con. See L. BLUSSÉ (n. 16).

major cases were to be referred to the government, that is the Aldermen (who in 1739 complained that the Chinese captain and Council were encroaching on civil and criminal cases outside their jurisdiction).⁵⁵ In the Batavia Court of Aldermen originally two Chinese were seated in every litigation between Chinese.⁵⁶ But already in 1626, seven years after the foundation of Batavia, it is stated that they serve only to interpret,⁵⁷ and after 1666 there were no longer Chinese in the Court at all.⁵⁸ This implies that the judges cannot any longer have been interested in the applicable Chinese law, and that they applied the European and subsidiary Roman-Dutch law. Indeed, there is no trace whatsoever of any other law here. Whenever the government orders squatters on land not yet distributed in property to regularise their possession by getting a letter of title, no distinction is made in the matter of nationality.⁵⁹ Houses and land of Chinese, burdened by mortgage, could be transferred without problem to Europeans in 1740. For all matters, therefore, the European law of property and mortgage was applicable, or else property could not be transferred.⁶⁰ Traders from Boni (a region on Sulawesi) sold and transferred their slaves without problems in Batavia.⁶¹ The Dutch appointed native clerks and teachers, Chinese contracted with Dutch: throughout the application of European law, based on the local ordinances, the Netherlands laws and the Roman-Dutch law is silently assumed to apply. Another argument that this was indeed the case is the conception the VOC had regarding the territory of the former kingdom of Jacatra. It was conquered territory and thus the full property of the conqueror, who naturally applied his law to it, as is evident from the granting of land first in fealty, then in full and allodial property.

To sum up: in the territories governed by the Dutch we find several legal systems. In Batavia and other towns the application of European private law was the norm, with exceptions for Chinese, Mahometan and Jentive law regarding family, marriage, divorce and succession. In the regions outside of Batavia, such as the Preanger and Cheribon, or

⁵⁵ DE HAAN, *Oud Batavia* (n. 17), p. 386.

⁵⁶ NIP (n. 3), 1.475.

⁵⁷ J. A. VAN DER CHIJS, *Daghregisters gehouden int Casteel Batavia vant passerende daer ter plaetse als over geheel Nederlants-India 1628-1682*, Batavia, Den Haag 1888-1931, p. 252, for the year 1626.

⁵⁸ DE HAAN, *Priangan IV* (n. 41), p. 676.

⁵⁹ See NIP (n. 3), 1.

⁶⁰ NIP (n. 3), 4.517-519, R 13 dec. 1740.

⁶¹ NIP (n. 3), 4.235, in 1729.

Ceylon and in other areas, native private law prevailed for the natives. In case of a conflict between a European and a native, European law probably prevailed. Criminal law outside the former kingdom of Jacatra was gradually set on a European footing, and the administrative law was, in principle, the same for all.

The next question is whether there were also native influences on East Indian European law, in spite of the predominance of the latter and of the desire of the Company to let every nation live as much as possible in accordance with its own private law system. There are in fact cases of such an influence or of a desired adaptation.

Adoption may have been introduced under the influence of and modelled upon existing practices of adoption on Java. Adoption as such did not exist in the Netherlands, nor was it ever introduced with the reception of Roman law. On Java, on the other hand, there existed a kind of adoption, a limited adoption, one might say. It consisted of accepting a child as one's own child in order to give it care and a good education. It could not include the acceptance of the adoptive father's family name, since Javanese do not have a family name. It did not entail succession rights. In this respect the link between the adoptive child and his natural parents was not broken. Muslim law did not change this, since it does not recognise adoption. The adoption which we see manifested in Batavia by the end of the seventeenth century is specifically for the purpose of rearing a child (and thus cannot have been copied from the Chinese, where adoption was even posthumously possible to provide for a successor who would continue the ancestral cult).⁶² Adoption was done by way of an act, made by a public notary, and the Church accepted it because it supported the idea of Christian upbringing. It is therefore conceivable that the introduction of adoption, possible because Roman law was applicable if there were other prescriptions lacking and if this was in agreement with the particularities of these regions, was due to the Javanese customary adoption. That it could have more consequences in East Indian law, leading to a full adoption, and that it was also used for other purposes, such as legitimising illegitimate children, does not alter this fact.

A case in which the desire for the introduction of a Javanese legal form into East Indian law is with certainty attested, occurred at the beginning of the eighteenth century. In 1714 Cornelis Chastelein died,

⁶² But where it did not imply, at least in the nineteenth century, a right of succession.

a remarkable man (one of the first to criticise the Company), who was very interested in developing agriculture on Java and who owned, as one of the first Europeans, a landhouse far from Batavia, in Depok. (One has to keep in mind that it was still unsafe there, both because of criminals and runaway slaves and because of wild animals, for rhinoceros and tigers still roamed freely; but Chastelein loved nature.) In his testament he freed his Christian slaves and donated to them, in perpetual fideicommissum, this landhouse with the estate in Depok. Nowadays it is a foundation, the Yayasan Depok. He wanted them to live there, governing themselves (but the government would not allow that). He also asked the government to allow his freed slaves to make a valid testament in the way non-Christians did, that is, instead of going to the public notary, who resided in Batavia at a long distance, orally in the presence of two or three witnesses.⁶³ There is no evidence, however, that this was granted to the people from Depok. Yet in 1846, on the eve of the introduction of the Civil Code for Europeans and partly for Chinese in the East Indies, it was expressly stated that the "nuncupative" testaments would remain valid only if they had already been confirmed by death. The abuses this kind of testament had led to justified this strict ruling.⁶⁴ By "nuncupative" such orally made testaments must have been meant. It is not clear, however, whether testaments made by Europeans or by Chinese were meant; further research might clarify this.

Another case were the so-called Particuliere Landerijen (Private Estates), where native law did prevail for some time.⁶⁵ These Estates lay in the area of Jacatra, conquered in 1619. In the beginning they were given in free tenure,⁶⁶ but already in 1627 it is said that these

⁶³ See for the testament S. J. BERCKHOF, Cornelis Chastelein en de stichting der Christen-gemeente van Depok, in: *Ned. Zendingstijdschrift* 7 (1895), p. 231 (on pp. 212–239 the text of Chastelein's testament, with his codicil); DE HAAN, Priangan IV (n. 41), p. 679.

⁶⁴ H. L. WICHERS in his report on the transitional articles regarding the introduction of the Civil Code for the East Indies, *Het Recht in Nederlandsch-Indië* 13 (1856), with pp. 377–378 on art. 74.

⁶⁵ On this see C. H. VAN RHEE, Particuliere Landerijen in Nederlands-Indië en het zogenaamde erfpachtsrecht (1836–1912), in: *Ars Aequi* 40 (1991), pp. 973–983, and the same, De rechten van de inheemse bevolking op de gronden der particuliere landerijen op Java vóór 1836, in: *Twaalf bijdragen tot de studie van de rechtsgeschiedenis van de negentiende eeuw etc.* (1993), pp. 145–162.

⁶⁶ See 16 August 1620, NIP (n. 3), 1.65–66, sub 1o ("te leene gegeven" [given in fealty], "betaelt soodanige chyns ofte erfpachte" [paying such levy or ground rent]; their possessors could alienate and mortgage the lands).

Estates were free patrimonial and allodial lands, free from feudal servitude.⁶⁷ Thus they were owned in full property, without restrictions. Their owners were also granted the right to request *corvées* from the people on their lands. It is these *corvées* which distinguished these Estates from other lands, owned as private property. The Dutch were of the opinion that they were entitled to give these lands since they had conquered the Kingdom of Jacatra. The conquest gave them, as victors, full property in this land. Consequently, in other areas on Java the Dutch never granted property in land.

This entailed, however, a legal conflict. Property in real estate was unknown on Java. As we now know from Van Vollenhoven's researches, but what was hardly known until even the end of the nineteenth century, on Java it is the community, comprising of one or more villages, which has the power of disposition over land. Development of an uncultivated piece of land by a member of this community brought about a personal connection between developer and land. Often he could even sell his land to somebody else from the community. But as soon as he could no longer cultivate it, the land reverted to the community. This could give it to another person, in the first case to the heirs, if the cultivator had died. The community could also withdraw land if its cultivator had trespassed against the community. If there was a prince, things were slightly different. The prince represented in his person the right of the community. Because of this a situation could arise in which a prince could demand from cultivators an indemnification, and this situation would then resemble a lease. Van Vollenhoven defined this situation as "cultivation right" (*bewerkingrecht*) contrary to the other "native possession right" (*inlands bezitsrecht* or *haq milik*).

The introduction of an absolute property right in land could lead to a conflict of law, certainly when it concerned large tracts of land outside Batavia, as indeed it did. Natives occupied parts of the Private Estates, started to cultivate these and believed that they now were entitled to these parts (of course for as long as they, or their descendants, cultivated it, according to their law). The owners were of course of a different opinion. Their right was absolute and could not be restricted

⁶⁷ 1 April 1627, NIP (n. 3), 1.216–217. The restrictions, which included a tax of 25% on every alienation, were detrimental to the development of agriculture around the town. There remained, however, a tax of 10% on every alienation of real estate within and outside the city.

in this way. However, they were not supported in this. In 1806 the government forbade owners of Private Estates to take the rice fields away from natives who had set them up. Moreover, they had to give these fields in preference to family members of the first cultivator if he had died. Yet as soon as the cultivation of these rice fields stopped, they were permitted to ask the Commissioner for Native Affairs to have its occupants removed. Further, they were no longer permitted to remove tenants whose rice was still in the fields.

It is clear that we find here a restriction on the European conception of property, inspired by Javanese customary law. Later on, however, the government wanted to formalise this and then the adage applied: *Jede Konsequenz führt zum Teufel*. It granted the natives who on their own account developed agriculture on Private Estates long lease or hereditary tenure: in Dutch, "*erfpacht*", emphyteusis. Soon the question arose, whether this was the European emphyteusis or something new and *sui generis*. In 1862 a native long lessee erected a rice-husking plant on his land. The owner thought that this was not allowed (not being agriculture). The native replied that, since the East Indian Civil Code (the NIBW), in force from 1 May 1848 onwards, contained emphyteusis and was as identical as possible with the Dutch Civil Code, according to which in the Netherlands an emphyteuticary (*erfpachter*) was entitled to this, an emphyteuticary on Java was therefore fully entitled to the same. The court decided in favour of the native and by that equiparated both rights and regulations. Against this the Supreme Court decided in 1872 that the native emphyteusis was of a different kind from the European emphyteusis. It was relegated to the realm of native law (although it was a European addition), but it still remains remarkable that in the case of land, to which European law was applicable, a right of native law could apply.

A third kind of interaction is, where both European and native law are intruded upon by a third legal system. How do they interact? There is a fine example of this in the area of penal procedure. The jury system is completely unknown in Dutch law (and native law). Not only that. When Napoleon occupied the Netherlands in 1810 and made it part of his empire, an occupation which lasted only three years, French law was also introduced, including the French Penal Code and its jury system. There was no voluntary and enthusiastic reception of that code (nor of its sister, the Code Civil), and as soon as the French had left, the jury system and all other parts of the civil and penal code which the Dutch considered alien were abolished. But the jury system had also a

short life in the East Indies. In 1811 the British occupied the Dutch possessions there, and they introduced the jury there in 1814, both for the Europeans and the Javanese and other nations. It was not a great success. There were simply not enough Europeans to make it work, and a jury needs people who are objective. As to the Javanese, here there was really a great misunderstanding of their culture. Their jury consisted of five persons, including at least one village head. Those acquainted with Javanese culture know that it is considered impolite not to have the older and higher ranking person speak first, and then not to agree with him, even if one disagrees, or at any rate to express such disagreement strongly. This cannot have contributed to the functioning of the native jury. As soon as the British left East India in 1816 the jury was abolished there as well.⁶⁸

As to the codification period, the movement in the early 19th century was towards a separation of legal systems. For the Europeans a civil code was envisaged, while for the Javanese a code comprising civil and penal law was advocated by some. In fact, the latter already existed in the form of the two compendia of the years 1750 and 1760. The first title of the 1760 compendium, on the law of succession, was still declared to be in force as late as 1828. The idea behind the European civil code was to abolish as far as possible the differences between private law for Europeans and Dutch in the home land (or what was so called). However, this implied also that any native influence was to be suppressed. Indeed, the commissioners for the codification, Scholten of Oud-Haarlem and Wichers, vehemently opposed any retention of East Indian institutions. Some managed to survive, such as both the Estate Chambers, the *corvées* on the Private Estates, the transport of real estate before the Court of Aldermen and, for a certain period, adoption.⁶⁹

The reason for this must have lain in the wish to have legal unity for the Europeans in motherland and colonies; not for legal segregation, since until 1855 it was a very serious option to declare the civil code also applicable to the native population. But that wish for unity led inevitably, after the option was rejected – because the government feared that Javanese society would be too much disrupted – to a legal

⁶⁸ See H. D. LEVYSOHN NORMAN, *De Britsche heerschappij over Java en onderhoorigheden (1811–1816)*, 's-Gravenhage 1857.

⁶⁹ See J. VAN KAN, *Uit de geschiedenis onzer codificatie*, Batavia 1927, pp. 76–86.

segregation, for which definitions of the groups involved had to be introduced in 1848.⁷⁰ It should at once be added that it was always possible for anybody to transgress this segregation. This segregation was based on the personality principle, but also in some areas on the territorial principle (no property in land was possible outside Batavia and environs), and on the nature of the transaction (some transactions implying a so-called voluntary submission in the case *sub actu*).

As a result, we see on the one hand European private law, which consisted of law emanating in the East Indies, based on and as far as possible identical to the private law of the Netherlands (and no more subsidiary validity of Dutch and Roman law), applied to those registered as Europeans (on account of birth or equalisation with Europeans), or those who voluntarily subjected themselves to this, or as a result of the nature of the transaction to the parties involved. Further, the government could declare parts of the civil and commercial code applicable to natives living on Java and Madura. On the other hand there were the laws of the different nations living in the East Indies. First there were the nations such as the Javanese, Balinese, Batak and other, who were indigenous. Here 19 regions of customary law (*adat*) were distinguished. This law was duly registered and developed (being customary law, it could change). Then there were nations such as the Chinese and Japanese, who had come from abroad. The Japanese were put on an equal standing with the Europeans. This had certain consequences. For example, adoption, possible in Japan, was not now possible for those domiciled in East India. For the Chinese, on the other hand, the law of the Chinese empire applied, although sometimes this might be tinged with an East Indian interpretation. They, for example, could still adopt (as could, of course, members of indigenous nations which knew this institution). But certain parts of the civil and commercial code were applicable to Chinese living on Java and Madura.

Regarding the penal law, the old system survived until on 1 January 1873 the Penal Code for Natives and Foreign Orientals came into force (that for Europeans had been promulgated in 1866).

But the segregation was not to last forever. In 1911 a universal Penal Code was promulgated. The application of *adat* penal law had,

⁷⁰ In the *Algemene Bepalingen van Wetgeving*, Stb. 1847: to be introduced at the same time as the civil and other codes. It was already partly done by the introduction of the Registers in 1828.

however, already been heavily influenced by European law, and so the transition was really not that great. It had been said already in 1798 by Van Hogendorp that in penal law differences would be minimal and easily overcome. Even unification of the private law was contemplated: in 1923 a draft for a universal Civil Code was presented. Further, the adat law was supplemented by written law introducing, for example, the (European private law) possibility of "mortgaging" land held according to adat, in order to get loans ("credietverband").⁷¹

Such was the situation at the outbreak of the second world war. Every population group had its own private law, but the European law was definitively dominant where it concerned contracts, torts and commercial affairs. Conflicts were dealt with in a branch of law called the intergentile law. This resembled the *ius gentium* the *praetor peregrinus* in Republican Rome had to apply. After the war,⁷² when Indonesia had become independent, this was a problem the Indonesians had to deal with. How did they adapt the law to a unitary republic? In principle all law remained in force unless it was contradictory to the Indonesian Constitution.⁷³ In a recent survey Pompe distinguishes three phases. In the first phase, 1945–1959, continuity of the Dutch influence prevailed. In law the distinction between nations in private law was lifted in the famous Jakarta Lorry decision. Two men, Murat and Hutabat, lived in Jakarta. Murat bought from Hutabat a lorry. They agreed that he would pay the moment the lorry would be delivered. But Hutabat refused to deliver the lorry. Murad, however, wanted the lorry. What to do? The basic question was, which law was applicable. In European law, according to the Indian Civil Code, Murad would only have become owner if the lorry had been delivered. Now he could merely claim damages. In the adat Murad would have become owner by mere purchase, and would have been able to claim the lorry as his property. In the colonial era this law would have been applied because both Murad and Hutabat would have been considered natives. But this was no longer the colonial era. The judge decided first that since the distinction between nations had been abolished by the Republic, he was free to choose the applicable law.

⁷¹ For a good survey see S. GAUTAMA and R. S. HORNICK, *An Introduction to Indonesian Law. Unity in Diversity*, Bandung 1983, pp. 2–21, pp. 179–181.

⁷² For the vicissitudes of the judiciary under the Japanese occupation, see S. POMPE, The effects of the Japanese administration on the judiciary in Indonesia, in: *Bijdragen tot de Taal-, Land- en Volkenkunde* 152 (1996), pp. 573–585.

⁷³ GAUTAMA and HORNICK, *Introduction to Indonesian Law* (n. 71), pp. 4–5.

As to that, he then decided that the gravamen lay in the place and object of the contract. Since these were Jakarta and a lorry – a large city not belonging to a particular adat, and a very European object – the European law, i.e. the Civil Code, was applicable. Murad had not become owner.⁷⁴ We see how the old legal system is used, but in a new context.

Then, however, due to the New Guinea crisis, there was strong opposition to the European law. Well known is the letter of the Supreme Court of 1963, in which it stated that the Civil Code was no longer in force, with the exception of the chapter on mortgage (one had to think of the consequences for the financial world). It remained mere guidance for judges. The Commercial Code remained in vigour since it concerned international norms. (One may wonder how peculiarly national a norm like tutelage over lunatics is.) But this letter caused great confusion. If mortgage remained legal, how about property on which it had to be established? Did the maintenance of this title imply the maintenance of all legal figures, to which reference was made in it? And was it in any case possible to abolish a Code merely by a letter of the Supreme Court? Incidentally, there is no problem in penal and administrative law, since here no distinction between peoples was made.

Since 1966 the situation has changed. The European, Netherlands inspired law slowly retreats, although in a verdict of the Jakarta Court of Appeal of 1966 the letter of 1963 was called just a memorandum. But this verdict is hardly known and is not of interest anymore. Another reason is that slowly laws are replaced by new laws which at once deal with the former problem. Yet there is a certain continuity in spirit. In drafting new laws, one sees that the Indonesian lawgiver builds on the old system, and particularly on the European law, but adapts and innovates it at the same time. And of course Indonesians are open to influence from other legal systems as well, such as the Anglo-American. The position of adat has been eroded, but it may retain influence according to Fitzpatrick.⁷⁵ One reason for the erosion is that there have been no new research into its development since 1942, and to judge on the basis of reports more than 30 years old is not sound. Another reason

⁷⁴ S. POMPE, *De doorwerking van het Nederlandse recht in Indonesië*, Leiden 1994, pp. 9–10.

⁷⁵ See D. FITZPATRICK, Disputes and Pluralism in Modern Indonesian Land Law, in: *Yale Studies in International Law* 22 (1997), pp. 171–212.

is that the nature of the Indonesian Republic is unitary, which means that there cannot be a division into various groups of inhabitants each with their own laws. Whether it is possible to distinguish and develop universal adat-principles remains to be seen.⁷⁶ A substitution for this, against the European law, might be the Muslim law, of which a growing influence is discernible. In the end, we may perhaps expect in the private law area an amalgamation of the various legal components of the former colonial world and the present international world, and since the adat law with its open character seems to be on the losing side, it would be a movement in private law towards a codified system, which is already the case in penal and administrative law.

⁷⁶ The experience with the Basic Agrarian Law of 1960 leads to scepticism on this point; see FITZPATRICK (n. 75), who argues that adat authority should be the basis of modern Indonesian law reform.