TITLE: COLONIAL DEVELOPMENT OF ISLAMIC FAMILY LAW IN THE BRITISH STRAITS SETTLEMENTS AND THE NETHERLANDS INDIES

ABSTRACT

This chapter traces how British and Dutch colonial officials gathered and organized knowledge on Islamic law in the British Straits Settlements (Penang, Malacca and Singapore) and the Netherlands Indies (present-day Indonesia) respectively. Despite clear differences between the legal systems and administrative structures of the two colonies, colonial authorities shared a considerable amount of religious literature and knowledge of local Muslim subjects. Through the process of codification and translation, Islamic law, restricted to the realm of personal law, was streamlined since multiple interpretations on a single issue by Muslim jurists and judges were no longer tolerated. In this way, the practice of Islamic law was drastically transformed. While implementing Islamic law, both colonial powers remained guarded against an inadvertent cession of power to colonial subjects. Although they readily dispensed Islamic legal authority within the limited confines of personal law, either directly or through intermediaries, colonial bureaucrats anxiously strove to ensure that their jurisdictions were not encroached upon by local religious laws beyond defined limits. Nonetheless, Dutch authorities were more willing to consult and preserve local religious authorities in leadership positions within the new colonial legal structure, than the British who were able to avoid depending on the local religious elite, by choosing to rely on a rich corpus of judicial precedents, codified and translated legal manuals as well as administrative experience in British India. In contrast to British knowledge of Islam that was more general and expansive within the Empire, Dutch knowledge of Islamic law arose specifically in the Netherlands Indies. Not only that, Dutch bureaucrats seemed to be keener on participating in intellectual debates on Islam than their British counterparts who deliberately avoided discussions on substantive laws. Ultimately however, both the Straits Settlements and the Netherlands Indies were more affected by changes to formal legal administrative structures which remained constantly in flux till the end of the colonial period.
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[This is the first chapter of my dissertation entitled “Courting Jurisdictions: Colonial Administration of Islamic Law pertaining to Arabs in the Straits Settlements and the Netherlands East Indies, 1860-1941”]

COLONIAL DEVELOPMENT OF ISLAMIC FAMILY LAW IN THE BRITISH STRAITS SETTLEMENTS AND THE NETHERLANDS INDIES

Introduction
This chapter examines the development of colonial knowledge of Islamic law in the British Straits Settlements and Netherlands Indies by focusing on laws in books rather than laws in action. During the colonial period, Islamic law was relegated to the realm of personal law which led to a severe reduction of its impact on the lives of Muslim subjects. Through selective codification and translation of certain religious texts, colonial authorities privileged certain sources of Islamic law while downplaying others. The legal regime in the Straits Settlements of Penang, Malacca and Singapore inherited a ready corpus of legal codes, commentaries, translations and judicial precedents produced in British India. Conversely, the development of Dutch colonial conceptions of Islamic law distinctively occurred in the Netherlands Indies, as well as within Oriental institutes located in Leiden and Delft, which likewise, focused on Muslim subjects in the Netherlands Indies in particular.¹ While British authorities in the Straits

¹ For a contemporary discussion on the differences between colonial bureaucrats trained in institutions situated in Leiden and Delft, see P.J. Veth, “Leiden contra Delft in
Settlements were bequeathed with legal literature from India, Dutch authorities attempted to draw heavily upon local adat and ‘wetboeken’ (legal codes) derived from the Islamic legal tradition as practiced in the Netherlands Indies. Legal authority was partially delegated to local religious heads in the Netherlands Indies. In contrast, British colonial officials directly adjudicated cases involving Islamic law, circumventing the authority of local intermediaries. In both the Netherlands Indies and the Straits Settlements, colonial emphasis on documentary evidence found in legal codes and translated manuals fixed the meanings of these laws. Bolstered by the written word, exclusive legal dominance of the colonial state enabled colonial authorities to neatly sidestep the plurality of legal opinions held by Muslim scholars and eventually ignore the spectrum of legal interpretations on a single issue.

**Comparison between Dutch and British administrations**

Although the Dutch and British colonial structures were different, they shared key similarities. Firstly, as mentioned above, both forms of colonialism created divisions in the lives of Muslim subjects between the realms of the personal and the public. Colonial legal administrations ultimately restricted Islamic law to the sphere of ‘personal status,’ a relatively recent legal concept unknown in classical Islamic jurisprudence. In fact, the concept only emerged in the Muslim world at the end of the nineteenth century. 

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*zake der opleiding der Indische Ambtenaren,” IG, 1 (1879) 401-427, 585-605.* In connection with this, there was also a discussion of whether scholars stationed in the Netherlands Indies were more suited to study Islamic law than those in the Netherlands Indies. See “De opleiding tot Indisch ambtenaar” IG, 15, 2 (July-December 1893), 1259-1260.
century, borne out of colonial rule in Egypt.\textsuperscript{2} Within various colonies around the world, Islamic law was restricted to matters of personal law, in line with the ecclesiastical courts and Bishops’ courts in Europe, whose activities were shaped by canon law. In the Straits Settlements and Netherlands Indies, personal law was defined in a limitative way to include marriage, divorce, inheritance and guardianship.

Secondly, since Muslim subjects in both the Netherlands Indies and the Straits Settlements were members of the Shāfi‘ī madhhab (school of law), Dutch and British bureaucrats sometimes shared resources on the madhhab, although no official collaborative projects were formally launched. While the British came to the Malay world armed with practical information about Muslim subjects, the Dutch mostly had to build their knowledge of Islam from scratch in the Indies. Not surprisingly, being equally ignorant of the specific religious practices of local Muslims, British and Dutch colonial projects of translation and codification sometimes overlapped and fed off each other in the Malay Archipelago. Common Islamic legal texts that had been translated were frequently referred to by both colonial powers in legal reports and colonial journal articles.

Thirdly, there was a certain underlying tension in the colonial administration of Islamic law in the British Straits Settlements and the Netherlands Indies. Although Islamic law was recognized and willingly administered by colonial regimes in the realm of personal law, it was clearly not allowed to supplant colonial laws. In fact, the administration of Islamic law was intended to enhance colonial rule over local

\textsuperscript{2} Personal status is translated as ‘Al-Ahwāl al-Shakhsiyya’ in Arabic in the late nineteenth century in Egypt. Jamal J. Nasir, \textit{The Islamic Law of Personal Status} (London; Boston: Graham & Trotman, 1990), 29.
communities, and not to grant more legal autonomy to these communities. Hence, an array of limitations was imposed on the administration of Islamic law in both colonies in order to ensure that an accidental cession of legal authority to colonial subjects did not occur.

Furthermore, general caution steered colonial policies away from an unnecessary reliance on colonial subjects. Despite the fact that most sources on Islam were written in Arabic, on the whole, British and Dutch scholars and bureaucrats did not consult Arab intermediaries extensively due to different reasons. As mentioned before, British colonial officials were endowed with an impressive arsenal of Islamic legal codes, manuals, statutes and case-law, already enforced by the British Indian administration in India. This large corpus of literature, accompanied by crucial decades of administrative experience, granted them a certain level of confidence in administering Islamic law in the Straits Settlements. The Dutch on the other hand, trained their own bureaucrats in Arabic in Dutch institutes. Knowledge of Arabic precluded the need for Arab translators. However, as we shall see, the intricacies of religious laws that required a more refined knowledge of Arabic and Islamic jurisprudence (fiqh) led Dutch bureaucrats based in the Netherlands Indies such as L.W.C. van den Berg and Snouck Hurgronje to readily court the knowledge and religious clout of local Arabs.

Notable divergences in the legal administrative structures of the two colonies led to significant differences in the implementation of Islamic law. Within the Netherlands Indies, the Native Penal Code was formally enforced on the native population from 1873 onwards, while Roman-Dutch law was applied to all inhabitants
in all other cases, except of course, in cases that involved personal law.³ In 1854, the Dutch government implemented a dual legal system on subject populations which was formalized in a Regeeringsreglement (Government Regulation). Article 109 of the Regeeringsreglement of 1854 stated that colonial subjects were classified according to ethnicity, not religion like in the Straits Settlements.⁴ According to this Article, Foreign Orientals (Vreemde Oosterlingen) included Chinese, Arabs and Japanese inhabitants, were subject to the same laws as Europeans under private and commercial law but subject to same laws as ‘natives’ under public law. The dual legal status of Arabs imposed by Dutch colonial authorities simultaneously situated them apart from the bulk of Muslim subject populations due to their ethnicity, but within local Muslim societies due to their religious faith.⁵ To further complicate matters, in terms of personal law, Arabs were grouped with other native Muslims who were not only subjected to Islamic law, but also to local laws known as ‘adat.’ This raises the question as to how these local laws affected the non-indigenous Arab across the Netherlands Indies. The legal structure in the Netherlands Indies ensured that the legal status of Arabs in the Netherlands Indies was different from that of Arabs in the Straits

³ A penal code for Europeans was promulgated in the Netherlands Indies in 1866 and 1898. C. Fasseur, “Colonial Dilemma Van Vollehoven and the struggle between adat and Western Law in Indonesia,” Jamie Seth Davidson and David Henley, The Revival of Tradition in Indonesian Politics: The Deployment of Adat from Colonialism to Indigenism, Routledge Contemporary Southeast Asia Series (New York: Routledge, 2007), 55-56.

⁴ Prior to 1854, society was ordered according to religious faiths. Eric Tagliacozzo, Secret Trades, Porous Borders: Smuggling and States Along a Southeast Asian Frontier, 1865-1915 (New Haven: Yale University Press, 2005), 130.

⁵ Arabs and Indian Muslims in the Netherlands Indies were further singled out when a general distrust of Arabs began to permeate Dutch colonial writings during the late nineteenth century as they were perceived to be active proponents of pan-Islamism in the region. Ibid., 147.
Settlements, where the Indian Penal Code was enforced on all subjects regardless of race and ethnicity, while religious laws applied to Hindu, Chinese, and Muslim subjects in the realm of personal law. In other words, subject populations were classified according to their religion, and not race. Unlike the colonial legal system in the Netherlands Indies which administered the lives of Dutch and subject populations separately, religious laws in the Straits Settlements existed under the overarching umbrella of English Common Law, and cases involving these laws were decided by British judges in colonial courts.

**Universal application of Islamic law**

As we have seen, legal administrative structures in the Netherlands Indies were only formalized in the second half of the nineteenth century. Likewise, the legal structure in the Straits Settlements remained unclear till the end of the nineteenth century. While arguing a case in 1871, a lawyer pointed out that prior to the First Charter of 1807, Islamic law had been enforced in the first Straits Settlement of Penang, but a court judge dismissed this notion since there were no legally constituted Courts to administer the laws at the time. In any case, the Second Charter of Justice in 1826 introduced English Law as the basic law in the Straits Settlements and relegated local laws – Chinese, Hindu and Islamic laws – to the area of family law. However, it was only in 1880 that the first ordinance concerning Islamic family law, the Muhammedan Marriage Ordinance, was promulgated. It stated that the Governor of the Straits

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6 Chinese Laws were not religious laws but a set of customary laws.

7 *Fatimah & Ors. V. D. Logan & Ors.* [1871] 1 KY 1.
Settlements was to appoint a Qadi in each settlement with limited jurisdiction as his decisions were subjected to the Registrar under the Governor’s supreme authority.\(^8\)

British and Dutch knowledge of Muslim subjects in the Malay Archipelago was incomplete and fragmentary. This was hardly surprising, since, as anthropologist Sally Engle Merry points out, in the colonies, staffing was limited, local linguistic knowledge was usually lacking, and a sociological understanding of how custom operated according to social status and shared knowledge of individuals was often missing.\(^9\)

However, British and Dutch administrators dealt with these knowledge gaps in different ways. Towards the end of the nineteenth century, British colonial administrators began to conceive Islam as a religion with adherents throughout the British Empire. To be sure, British authorities observed that religious practice in the Malay Archipelago possessed distinct local form and colouring.\(^10\) This perception was evident in the numerous digests and loose collections of local laws, known as ‘undang-undang’, that were painstakingly collected by British Orientalist William Marsden, and East India Company (EIC) employees such as Thomas Stamford Raffles and William Farquhar from various states in Sumatra, the Malay Peninsular and Java during the early nineteenth century,\(^11\) and by British scholar-officials such as Richard O. Winstedt

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\(^11\) The Asia and Africa Collections in the British Library holds manuscript copies of adat laws, including various versions of the Malacca laws (Undang-Undang Melaka) collected by Crawford, Raffles and Farquhar. See BL Mss Sloane 1293, Mss Add 12398. William Marsden, *The History of Sumatra* (London: Printed for the author, by J. McCreery,
and Richard J. Wilkinson a century later.\(^{12}\) Subsequently, these codes were transcribed into Roman script from the original 'Jawi' script (Malay written in Arabic script). However, it should be noted that these codes were copied from available documentary material in the region and therefore might not be an accurate reflection of laws practiced by local populations who relied on oral transmission of customary laws to a great extent. Despite all these efforts, these legal codes were not eventually implemented in colonial courts in the Straits Settlements. In the end, they tended to be only of scholarly interest, presumably as a form of ethnographic study that would illuminate British understanding of local societies. Beyond scholarly academic interest, these collections of local laws ultimately did not possess any practical value in the Straits Settlements.\(^{13}\)

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\(^{13}\) However, in the Malay States on the Peninsular, such collections aided British legal practitioners immensely when cases involving Malayan rulers on the peninsular were brought to English courts. The Undang-Undang Melaka (Laws of Malacca) was used in
Since Malay adat was not considered as part of the laws of the Straits Settlements, knowledge of Islam proved to be of greater utility from an imperial point of view. From the outset, this imperial worldview was highly conducive to efficient legal administration. While British collection of adat laws could not have been achieved without the cooperation of local ruling elites in Sumatra, Java and on the Malay Peninsular, since they were the purveyors of adat in the region, British knowledge of Islam allowed them to avoid relying on local religious authorities whose rulings were neither legally binding in the colonial state, nor cited in colonial courts. Indeed, local authority was hardly acknowledged in colonial sources in the Straits Settlements.

With the advent of telegraph communications in the 1860s, knowledge of Muslim subjects was further enhanced by a vast imperial network which automatically provided a valuable means of communication across huge geographical expanses especially after the Empire expanded exponentially between the end of the First World War and the beginning of the Second World War following the demise of the Ottoman Empire. Colonial officials stationed in various colonies constantly updated each other on amendments to legal statutes and acts, by corresponding with the Colonial Office in London, who dutifully copied their correspondences and sent them to other British governments throughout the British sphere of influence. These amendments were subsequently announced in colonial government gazettes. In this way, British territories in all forms, including colonies, Protectorates, Mandates, were linked to a

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14 By the eve of the Second World War, memos on Muslim subjects were circulated to Ceylon, Iraq, Palestine, Malay States, Somaliland, Zanzibar, Trinidad and Tobago, Nigeria, Cyprus, Gold Coast and India.
body of knowledge regarding Muslim subjects who were regarded as part of a global community.

At first glance, the application of Islamic law in the British Straits Settlements appeared stable and general, especially since laws were promulgated in advance of the situations to which it applied. The development of Anglo-Mohammedan jurisprudence led to the codification of inflexible rules uniformly applied to all Muslim subjects regardless of their historical background and cultures. In this way, Islamic religious practice was imbued with general unprecedented applicability across British colonies. As legal scholar Marc Galanter pertinently stresses, colonial administrators put forth general rules that were applicable to whole societies. Indeed, legal codes and manuals rather conveniently presupposed a significant degree of similarity amongst Muslim communities across the Empire. Not surprisingly, in the face of immense diversity amongst Muslims subjects, this veneer of stability did not last. Although local communities in the Malay world may have had minimal input in the drafting and administration of religious laws, they certainly aided in regularizing colonial administration of religious laws by repeatedly bring cases to colonial courts. This trust invested in colonial courts strongly implied that during the colonial period, Muslim subjects perceived that Islamic law had not been displaced completely, but rather administered by another form of authority, that of the colonial government, whose clout was apparently accepted, or in certain cases even deliberately sought, by

Muslims. In fact, Muslim litigants pursued their grievances in colonial courts so often that Frederic M. Goadby, a British legal official based in Cairo to remark upon the Muslim subjects’ considerable liberality in allowing secular, non-Muslim courts to administer religious laws in non-family matters, and to accept legislative amendments in family matters.\(^\text{17}\) Within the Malay Archipelago, competing sources of Islamic authority were extended through networks of madrasas and Sufi lineages throughout the region and beyond. Yet, only colonial courts possessed the real power to mete out legally binding rulings over the lives of Muslim inhabitants, especially in the Straits Settlements. Then again, distrust of secular colonial religious authorities might exist in the Straits Settlements and the Netherlands Indies, but this sentiment was difficult to measure due to lack of sources that directly revealed the opinions of local litigants of colonial authorities even as they willingly subjected themselves to colonial authority in religious affairs.

Eventually, the burgeoning Muslim clientele in colonial courts demanded that British judges administer a different set of laws than in British India.\(^\text{18}\) For one, most Muslims in the Malay world were adherents of the Shāfī‘ī madhhab, not Hanafi, and therefore expected their new religious authorities to administer Shāfī‘ī law accordingly. Alas, the impressive corpus of judicial precedents, codes, manuals and

\(^{17}\) Of course, in making this remark, Goadby assumed that these Muslim subjects actually had a choice between religious courts and colonial courts, a luxury which only existed in some colonies. Other colonies, such as the Straits Settlements, were completely deprived of religious courts. Frederic M. Goadby, *Introduction to the Study of Law: A Handbook for the Use of Law Students in Egypt and Palestine*, Third Edition (London: Butterworth and Co., 1921), 47.

\(^{18}\) The clientele was not the relatively powerless as Sally Merry implies in a recent article. This will be examined in following chapters. Sally E. Merry, “Forum: Comment - Colonial Law and Its Uncertainties,” *Law and History Review*, 28, 3 (October 2010), 1068.
statutes proved to be inadequate, for they were based overwhelmingly on Hanafi laws with very small provisions for other sects or madhhabs.\(^\text{19}\) For example, Faiz Tyabji’s list of recommended books for courtroom use by English legal practitioners contained thirteen titles on Hanafi madhhab specifically, but only five on Shafi’i law in particular.\(^\text{20}\) Indeed, the Shafi’i received relatively little notice in colonial literature on the whole, as there were relatively fewer adherents to the madhhab within British India.\(^\text{21}\) Hence, Islamic law in the Straits Settlements was mostly devised in courtrooms, where litigation provided occasions for dialogue between the colonizers and colonized, where subject populations could sometimes speak truth to power.\(^\text{22}\)

Predictably, this led to deep uncertainty in legal rulings in the Straits Settlements, which was evident in law reports. However, in due course, this became less perceptible in the consistent rulings of colonial judges, as we will see in Chapters Three, Four and Five. During the process of adjudication in courts, legal uncertainty arose partly from a reluctance to completely do away with Indian Acts, Statutes and judicial precedents in the Straits Settlements, however jarring they might be. Indian laws were inherited in whole, as the bases of authority, because Hanafi and Shafi’i madhhabs were perceived to share many similarities. The relatively fewer number of differences vis-à-vis commonalities between the two madhhabs did not immediately

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merit the creation of a whole other legal code based on Shāfi’ī laws or a major translation project involving Shāfi’ī legal manuals. Although British authorities recognized that aspects of Indian legislation needed to be modified and expanded in order to accommodate Shāfi’ī law, at base, the core corpus of Hanafi religious laws, as conceived by British officials from the late eighteenth century onwards, remained in force in British colonies with Muslim subjects, regardless of their madhhab. Perhaps a lack of colonial resources determined that the Hanafi-based legal corpus produced in India would have to be sufficient elsewhere too in the Empire. Naturally, the universal feature of Islamic laws devised in India was at odds with the particular legal stipulations of other madhhab especially with regards to family law. For example, since the substantive law of the religious family endowment (waqf) was not defined, beyond a citation of the relevant Act or Ordinance, local courts had the responsibility of dealing with the specific details of the case and identities of litigants before them in particular locations. Consequently, Straits Settlements Law Reports strongly demonstrated highly attentive judgments on religious matters in colonial courts on the part of colonial judges. Bound somewhat to laws inherited from India, judges still found themselves having to address rulings in India, but usually only to explain why these rulings should not be binding in the Straits Settlements.

23 Outside of family law, Hanafi and Shāfi’ī laws were not that different such that the Malay state of Johor on the peninsula could adopt the Hanafite Code of Qadri Pasha in Egypt in the early twentieth century. Ahmad Mohamed Ibrahim, “Recent Developments in the Administration of Islamic Law in Malaysia,” Ahmad Mohamed Ibrahim and Abdul Monir Yaacob, eds. The Administration of Islamic Laws (Kuala Lumpur: Institute of Islamic Understanding, 1987), 2.

24 CO 167/919/14, Mauritius - Muhammadan Waqf, May 10th 1941, J.P Gibson, Colonial Office to India Office, September 11th 1941; C. A. Hooper, Procureur and Advocate General, Explanatory Report on Ordinance no. 9 of 1941, May 9th 1941.
In April 1939, a legal adviser based in Aden Protectorate hinted at the incongruous universal aspect of Indian rulings when he claimed that Section 3 of Act VI of The Mussalman Wakf Validating Act of 1913 pertaining to waqfs had ‘overlooked’ adherents of the Shāfi‘ī madhhab, thus indicating that he expected British legislators in India to be responsible for the legal lives of other Muslims beyond the Hanafi majority in India.²⁵ His complaint typified the frustrated gripe of colonial legal officials outside of India who inherited the formidable Indian legal corpus. Occasionally, attempts were made to not only alter Indian laws to suit the circumstances of specific territories, but ground these changes in statute, such as in the Aden Protectorate in 1938, although this attempt was in the end unsuccessful, ironically due to British policy of colonial non-intervention in religious affairs in Aden.²⁶ In a surprising twist to the ‘universalizing’ trend in colonial administration of Islamic law, Asaf A.A. Fyzee highlights that colonial courts had no particular “rite of religion,” which meant that they had to discover and subsequently, apply the particular laws of the defendant, unlike in Muslim countries where the litigant’s madhhab is not considered by the Muslim judge (qāḍī).²⁷

**Diversity in Netherlands Indies**

In contrast to British default universal application of Islamic law devised in India to other colonies, Dutch impetus to acquire knowledge on Islam arose in the Netherlands Indies itself. While Muslim subjects in the Straits Settlements were subjected to Indian

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²⁶ CO 725/68/11, J.T. Lawrence, Supreme Court Aden to Bernard Reilly, Aden, 9th February 1938.
laws, each community in the Netherlands Indies was perceived to have its own legal culture. In fact, each locale within the Netherlands Indies merited separate in-depth studies published in colonial journals. It was largely observed that two sets of laws governed the lives of local Muslim communities - one 'local', ie. adat, and the other, Islamic. Dutch colonial attitudes towards this unique combination varied. The customs and religious beliefs of specific local ethnic communities residing in Java, Sumatra, Sulawesi, the Moluccas and Borneo were treated in a different way from the outset with remarkably little commensurability across societies. Often, neighboring communities did not even share local legal structures, and much less, legal content. For example, on the island of Sumatra, the Batak and Gayo communities were completely different from the Acehnese further north. Dutch colonial officials largely agreed that each community should be allowed to preserve their own adat and religious laws. Hence, legal administration in the Netherlands Indies was extremely diverse in terms of legal content. In fact, in 1909, nineteen adat law circles were identified by Cornelis van Vollenhoven, the chair of colonial law and administration at Leiden University who championed Dutch administration of adat. In many ways, the rich diversity within the Netherlands Indies, underscored by Cornelis van Vollenhoven, resiliently resisted a unified regime of law, resulting in a polyglot legal culture that conveyed an image of a messy empire. Local legal configurations were largely preserved and not disturbed.

29 In fact, non-contiguous societies within the Malay Archipelago sometimes had more in common with each other. Jan Prins, “Adatlaw and Muslim Religious Law in Modern Indonesia,” Die Welt des Islams, 1, 4 (1951), 286-287.
However, things took a turn in the decade on the eve of the Second World War. Due to efforts by Vollenhoven’s zealous pupil, Barend Ter Haar, the Dutch colonial governments directly interfered in cases involving inheritance from February 1937 onwards despite strong protests from local Muslims, as he considered “the hereditary law of Islam (to be) contrary to the social reality of the Javanese population.”

However, on the whole, Dutch bureaucrats portrayed themselves as distant patrons of the local religious elite without directly administering the lives of colonial subjects, preferring instead to rely on local intermediaries. While the British bypassed the religious elite in passing legal rulings on religious matters, the Dutch preserved local elites within a more formal legal structure consolidated into priesterraden (priest councils) after the issue of Staatsblad 1882 no. 152 that came into force on August 1st 1882. The priesterraden practically functioned as religious courts (raad agama), and were commonly referred to as such. Consequently, the Muslim religious elite who were part of the raad agama no longer had to answer to their sovereigns, the Javanese Regents, whose power over local societies declined since they no longer intervened in Islamic legal matter, thus doing away with debates which had been part of the legal

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32 An institutionalized priesthood does not exist in Islam, as repeatedly emphasized by Snouck Hurgronje to his colleagues, although evidently, several Dutch authorities seemed to regard the qādis and penghulus (village headmen) as akin to priests. Snouck C. Hurgronje, “Iets over Priesteradens,” RNI, 63 (1894), 749, 752.
tradition in Java for so long. Instead, the judgments of the raad agama were now subjected to approval by the secular landraad, the civil courts who possessed more power than the raad agama within the colonial legal structure.

Despite a formal policy of non-intervention, a closer examination of colonial journals reveals that Dutch colonial authorities displayed a keen interest in discussing various aspects of Islamic law in the Netherlands Indies. Unlike British authorities, they frequently demonstrated their knowledge of the Islamic legal tradition and intellectual adroitness in dealing with authentic materials on Islam including the Quran, the Hadiths, as well as numerous texts by Muslim medieval jurists. The vast number of publications on Islamic law created a vibrant intellectual atmosphere amongst the colonial elite. By discussing mainly the religious aspects of laws in journals, they cast local laws in a religious mold at the expense of local adat laws which were not considered part of the Islamic legal tradition. In this way, the raad agama was firmly situated within an Islamic legal framework. Nonetheless, it was not known how these discussions amongst the Dutch colonial elite influenced the substantive religious laws of local populations specifically. In general, Dutch colonial policy of non-intervention seemed to have won out. Muslim subjects were more affected by changes to legal administrative structures rather than legal substance.

Precisely because legal administration in the Netherlands Indies was so diverse and fragmented, incorporating local adat laws and Islamic law in varying combinations, the legal system could only function properly if members of specific communities

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stayed in one place, since otherwise, multiple legal configurations would have to be meted out in one place full of different communities of various origins at particular times.\textsuperscript{34} The dual legal system engendered a tension between indigenous populations and Foreign Orientals, i.e., the Chinese, Japanese and Arab populations,\textsuperscript{35} who tended to be highly mobile and therefore risked being stuck in liminal jurisdictional spaces without any definite recourse to justice in matters of personal law. What were the repercussions for non-indigenous Muslim communities such as Arabs and Indian Muslims, who did not, presumably, subscribe to local adat laws but to Islamic law? How did religious courts that functioned in a racially stratified society deal with these Muslim communities?

**Codification in British India**

The process of streamlining Islamic law in the British Empire was hastened by codification that was systematically conducted under the aegis of modernization and centralization in British India.\textsuperscript{36} Molded by ideas of Indian difference, the very process of codification in British India was a radical break from historical English common legal

\textsuperscript{34} This difficulty was hinted at in an article written in 1850, where the unnamed author harshly suggested that vagabonds with no fixed abode or means of support should be punished. In the same footnote, he commended the Javanese for appreciating both the law of domicile and the competency of local tribunals. “Mahomedaansch-Regt,” RNI, 3 (1850), 113.

\textsuperscript{35} Arabs were not even consistently considered foreign in the Netherlands Indies to complicate matters further.

\textsuperscript{36} While the process of codification did not make much headway in England, British legal practitioners had high hopes for its materialization in British India, and in fact, those based in India harbored hopes that it would be eventually be undertaken in England. This was the unrealized hope harboured by Jeremy Bentham and his followers, Thomas Macaulay and James Mill. Elizabeth Kolsky, *Colonial Justice in British India* (New York: Cambridge University Press, 2010). 70-71.
Prior to colonial codification, the EIC had administered a plurality of legal sources consisting of regional regulations, Acts of Parliament, Hindu and Muslim personal law, Muslim criminal law and British interpretations of the oft-quoted Roman principle of ‘justice, equity and good consciences.’ The process of codification occurred under two phases – the first, beginning in the late eighteenth century under the auspices of the EIC, followed by a second phase from the 1860s onwards. The impetus for early codification attempts was the empowerment of English EIC officers to administer Hindu and Islamic law to Hindu Muslim subjects respectively from the middle of the eighteenth century onwards. The Charter of George II in 1753 granted Hindu and Muslim subjects exemption from Company Courts, and allowed them to have recourse to their own religious laws. Although the EIC could exercise judicial power, it was also an imperial and international endeavour, since codifiers in colonial India referred to the Louisiana Code and the New York Code. Elizabeth Kolsky, “Codification and the rule of Colonial Difference: Criminal Procedure in British India,” Law and History Review, 23,3 (Fall 2005), http://www.historycooperative.org/journals/lhr/23.3/kolsky1.html, paragraph 2 paragraphs 2,8.

Ibid., paragraph 2; Asaf A. A. Fyzee, “Muhammadan Law in India” Comparative Studies in Society and History, 5,4 (July 1963), 412.

The British created two legal codes, Hindu and Muslim, thus forcefully inscribing a Hindu/Muslim binary on Indian societies by completely disregarding the diversity of Indian legal traditions. Personal laws of Jains, Sikhs, Parsis, or tribals were not recognized. Since then, only Parsi personal laws have been recognized. Rosane Rocher, “British Orientalism in the Eighteenth Century,” in Carol A. Breckenridge and Peter van der Veer eds., Orientalism and the Postcolonial Predicament: Perspectives on South Asia (Philadelphia: University of Pennsylvania Press, 1993), 221-222.

Under the Mughals, the administration of Shari’a and a supplementary set of imperial regulations contributed significantly to imperial legitimacy. Aided by a cadre of Qâdîs drawn primarily from the ulama.’ Michael R. Anderson, “Islamic Law and the colonial Encounter in British India,” in David Arnold and Peter Robb, eds. Institutions and Ideologies - A SOAS South Asia Reader, Collected Papers on South Asia (Richmond: Curzon Press, 1993), 170.

Fyzee, “Muhammadan Law in India” 412.
powers from 1661 onwards, by the Charter of Charles II, the administration of justice had been restricted to the Factories of the Company.\textsuperscript{42} Such varied forms of judicial authority within British India was understandably troubling to British authorities.\textsuperscript{43} A firmer legal apparatus was established in 1772 when Governor William Hastings introduced the Adalat System, a watershed moment in the legal history of British India.\textsuperscript{44} Consequently, matters of inheritance, marriage, caste and other religious institutions were to be under the purview of religious laws, since Hastings believed that

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\textsuperscript{42} Ibid., 410.
\textsuperscript{43} The codification of Hindu law developed in parallel to the codification of Islamic law in India. Robert Travers demonstrates how colonial administration of Hindu law was based on books called dharmasastras which British believed pertained to the aggregate of all the rules which a Hindu were supposed to live by. The dharmasastras were transformed into a repository of permanently codified legal provisions pertaining to the religious aspect of life from the late eighteenth century onwards, at the expense of orally transmitted customary laws. Sanskrit expert, Richard W. Larivere argues that before the British invented it, there was no such thing as Hindu law. On the other hand, Niels Brimnes stresses that although books on the ancient laws of India did exist, they did not bind the judges in any way, serving only a rough guide. Indeed, Donald Davis successfully demonstrates how the dharmasastras was only one rhetorical form within the Hindu religious tradition. See Galanter, "The Displacement of Traditional Law in Modern India." For a deeper analysis of the dharmasastras within Hinduism specifically, see Donald R. Davis, “Hinduism as a Legal Tradition,” \textit{Journal of the American Academy of Religion}, 75, 2 (June 2007), 241-267; Lloyd I. Rudolph and Susanne H. Rudolph, \textit{The Modernity of Tradition: Political Development in India} (Chicago: University of Chicago Press, 1967), 251-295; Niels Brimnes, “Beyond Colonial Law: Indigenous Litigation and the Contestation of Property in the Mayor’s Court in Late Eighteenth-Century Madras,” \textit{Modern Asian Studies}, 37,3 (2003), 513-550; Robert Travers, \textit{Ideology and Empire in Eighteenth Century India: The British in Bengal} (New York: Cambridge University Press, 2007), 221; Richard W. Lariviere, “Justices and Panditas: Some Ironies in Contemporary Readings of the Hindu Legal Past, \textit{The Journal of Asian Studies}. 48, 4 (November 1989), 765.\textsuperscript{44} Warren Hastings (governor of Bengal from 1772, governor-general from 1774 to 1885), created two courts in each district, namely the Diwani Adalat which handled civil cases, and the Foujdari Adalat that held trials for crimes and misdemeanours. The civil courts applied Islamic and Hindu laws to Muslims and Hindus, while the criminal courts applied Islamic law universally. M.P. Jain, \textit{Outlines of Indian Legal History} (Delhi: University of Delhi Press, 1952), 57-69.
\end{flushright}
certain beliefs should be respected and should not be under the tyrannical control of common law which local population was thought to be wholly ignorant of.\(^{45}\)

In this way, the Adalat system was responsible for preserving local laws, albeit within a narrower scope than before. In fact, the new system made it compulsory for local experts, Muslim Qāḍīs and Hindu Panditas, to function as juriconsults to assist English officers in both criminal courts and civil courts known as the Mofussil Diwani Adalat in Bengal, Bihar and Orissa.\(^{46}\) From then onwards, although English officers now directly supervised the settlement of disputes, the law of Hindus and Muslims continued to be applied to marriage, inheritance, caste and religious institutions.

Although it was definitely a key turning point in the history of the administration of religious laws, the 1772 judicial plan did not clarify many aspects of judicial administration.\(^{47}\) Nonetheless, it undoubtedly set the stage for English law to increasingly encroach upon Islamic law. As Scott Alan Kugle elegantly points out, the Hastings Regulations subtly introduced a new legal fulcrum, English legal authority,

\(^{45}\) Clause XXIII stated that “(i)n all suits regarding inheritance, marriage, caste and other religious usages or institutions, the laws of the Koran with respect to the Mohamemans and those of the Shaster with respect to the Gentoos shall invariably be adhered to.” Cited in Ludo Rocher, "Law Books in Oral Culture: The Indian "Dharmasastras""," Proceedings of the American Philosophical Society 137, no. 2 (1993). See Rosane Rocher, “British Orientalism in the Eighteenth Century,” in Carol A. Breckenridge and Peter van der Veer eds., Orientalism and the Postcolonial Predicament (Philadelphia: University of Pennsylvania Press, 1993), 215-249.

\(^{46}\) Lauren Benton demonstrates how these experts actually occupied an ambiguous position with in colonial bureaucracy, since they certainly did not occupy the same status as British officials although they were certainly officers of the Company and employees of the courts. Lauren Benton, “Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State,” Comparative Studies in Society and History, 41,3 (2000), 571.

\(^{47}\) Travers, Ideology and Empire in Eighteenth Century India : The British in Bengal, 126.
around which Hindu and Muslim religious laws pivoted. Lauren Benton identified three notable legal trends in British India that occurred during the nineteenth century, namely increasing British control over criminal law, greater direct supervision of policing, and efforts to establish tighter British rule in ‘frontier’ areas within British-controlled jurisdictions. The last four decades of the nineteenth century witnessed the prolific production of legal textbooks, digests and jurisprudential works that led to a consolidation and refinement of legal ideology in the early twentieth century.

However, Islamic law soon lost its place within the realm of criminal law. By the time commercial, criminal and procedural law had been completely codified in 1882, Hindu and Muslim legal codes were strictly confined to personal laws matters, namely in marital law, inheritance, succession, caste and religious family endowments.

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48 Kugle, “Framed, Blamed and Renamed,” 262. On the other hand, the trajectory of criminal law followed a separate parallel course Commissioned by the government, two treatises on Hindu law had been translated by Nathaniel Brassey Halhed in 1776, and Henry Thomas Colebrooke in 1798. Thomas Macaulay, India’s first Law Member and head of the first Law Commission appointed in 1833 was a prominent critic of the complex and chaotic legal system in India who believed that a code of laws was the critical instrument to transform Indian society. His plan to enforce a uniform Code of Criminal Procedure however foundered upon the staunch resistance of the non-official European population, a small but influential constituency in India who highlighted Indian peculiarities engendered by historical, cultural and racial differences. See Elizabeth Kolsky, “Codification and the rule of Colonial Difference: Criminal Procedure in British India,” Law and History Review, 23,3 (Fall 2005), http://www.historycooperative.org/journals/lhr/23.3/kolsky1.html.


51 By 1875, Anglo-Muhammadan law was restricted to family law and certain property transactions, while English law dominated in all other areas.
In keeping with the homogenizing ethic of universal modernity, translations and compilations of Islamic legal manuals were thematically arranged and codified in the style of European civil codes, as opposed to a common law tradition which did not provide a suitable framework for laws to be condensed in a similar manner. On the other hand, in the Netherlands Indies, Arab texts were translated into English with little attempt at codification of laws. In fact, Dutch translators largely preserved the order of presentation in Arabic texts. However, this did not mean that Dutch implementation of Islamic law in the Netherlands Indies was more authentic. On the contrary, in the process of translation, texts were severely redacted and summarized to form significantly shorter works.

Naturally, the extent of colonial willingness to administer Islamic law determined the scope of Islamic legal literature produced by colonial powers. Often, legal codes and translated manuals were published with annotations that expanded upon technical legal terms with specific administrative advice for colonial officials. In the process of codification and translation, substantive law was separated from procedural law that ended up not being recorded at all. Complications in certain areas of law and subtleties were removed as they were regarded as extraneous, and even worse, cumbersome. While some texts attempted to reproduce the content of original works in full, most translations and codes omitted sections on ritual and criminal law.

54 In fact, inconsistencies in legal texts were not regarded as a mark of richness in diversity. Rather, they were easily dismissed as quirks of the past where scholars were believed to be ignorant of the subject matter or ‘carried the law in their heads’ anyway which precluded proper legal codes in writing. Tyabji, “Preface to the First Edition,” xii.
and restricted legal content to matters of personal or family law such as marriage, divorce, wills, guardianship, inheritance, gifts and slavery in keeping with colonial administration that was only concerned with personal law in the colonies. It should be noted that even when sections on ritual and criminal law were published, they tended to be only of scholarly historical interest, portrayed as a reflection of Arab life in the distant past with little administrative relevance to the colonies during the twentieth century.55

In other words, under the guise of codification and translation, a new set of authoritative religious texts was actually borne in the colonies. The codification of religious laws, and selective translation of a few texts proved to be a marked departure from the pre-colonial legal milieu that was characterized by a multiplicity of systems, with no fixed authoritative body of law, no set of binding precedents and no single legitimate way of applying or changing them. Within the realm of Islamic law, the traditional method of Islamic jurisprudence involved extensive references to the Quran, hadiths and legal opinions of Muslim jurists and scholars which were often diverse and even contradictory at times.56

Despite the extensive transformation of Islamic religious texts in the course of codification and translation, British Indian lawyer Faiz Tyabji noted in 1940 that

56 Hindu laws were extremely diverse and consisted of sets of customs that were applied to each particular group in particular circumstances. During the colonial period however, they were divorced from the practical administration of justice. Ultimately, the administration of Hindu law was based on a chain of precedents interpreted by English judges. Bernard S. Cohn, Colonialism and Its Forms of Knowledge: The British India (Princeton: Princeton University Press, 1986), 74-75; Lariviere, “Justices and Panditas,” 763.
colonial legislation had simultaneously simplified laws regarding waqfs (religious endowments) and brought it into “greater conformity with the ancient texts.” This strongly suggests that the Quran, hadiths and original legal manuals produced by Muslim jurists from which colonial codes, compilations and translations were derived, were still indirectly recognized by colonial legal practitioners as being the decisive fundamental primary sources of religious authority, despite not being cited directly in colonial courts.

Undoubtedly, despite explicit claims of non-intervention in religious practices, Dutch and British colonial administrative policies led to a drastic reorientation of Islamic legal practice. Kugle aptly refers to this process as a shift from Islamic law’s ‘substantial rationality’ to a more ‘formal rationality’ implemented by colonial authorities. Indeed, colonial regimes enforced a single interpretation in legal rulings as opposed to the potential multiple outcomes derived from a range of legal authorities that were consulted and relied upon within the Islamic legal tradition. An unnamed British reviewer of a legal manual strongly noted that there were ‘discrepancies’ between the two works on Shafi‘i law translated by L.W.C. van den Berg, clearly indicating an implicit expectation that even colonial translations of original Arabic works should refine and streamline the practice of Islamic law.

58 Kugle, “Framed, Blamed and Renamed,” 270.
Translation

Whereas codification prioritized conciseness, the process of translation generated more complications that challenged attempts for succinct clarity. Precision in translation was hampered by the use of highly specific legal terms. Translators dealt with this problem by consistently preserving certain particular terms such as ‘waqf,’ ‘iddah,’ ‘talaq’ and ‘baligh.’ The preservation of specialization of technical terms could also be part of the British and Dutch colonial attempts to monopolize the discourse, which included impressing the lay public with their specialized skills and command of technical language and literature, as suggested by Sally Humphries.

Considering the multiple inherent difficulties of translation, which will be explored in greater detail in Chapter Two, it was remarkable that translators and codifiers frequently glossed over translation complications that they experienced, apart from cursorily pointing out the lack of equivalent idioms across two languages. Perhaps, this was understandable, as an acknowledgement of complications encountered during the translation process would undermine the authority of these legal manuals since it could possibly cast doubt upon the linguistic capability of translators. Nonetheless, translation errors did not go unnoticed. Inadvertently,

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translation inaccuracies due to ineptitude, language prejudice or the simple lack of precise commensurable terms in the English language contributed to the production of wholly new authoritative texts divorced from the original versions in Arabic or Persian. Furthermore, English translations suffered from having undergone layers of translation removed from the original. For example, the first major translation of an Islamic legal work, Burhān al-Dīn Al-Marghīnānī’s *Hidāya* in 1791 was worked off a Persian version which was already rife with errors. Unfortunately, subsequent corrections were only however made to the Persian translation in 1807, and not Charles Hamilton’s English translation.  

In the process of selecting texts to translate, colonial officials vested authority in some texts while relegating other texts to a secondary status. In the process the nature of authority was made more binding during the colonial period than they actually ever were. Texts which were filled with jurisprudential ruminations and opinions were transformed into collections of binding legal precedents. Even the Quran was erroneously mistaken for a legal code. As a result of this view, colonial officials translated precept stated in Islamic texts directly into practice without deriving any authority from religious intermediaries. The widespread introduction of colonial prejudice that accorded primacy to text over interpretive practice served as one of the most drastic changes in the lives of Muslim subjects. This ran counter to the Islamic

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legal tradition where the authority of the interpreter, and in connection with this, the interpretation, did not yield a system of codes and precedents that oriented future legal decisions.\textsuperscript{65} There were two types of authority in Islamic legal thought – legislative authority that is divine and concretized in foundational texts, and interpretive or declarative authority which belongs to jurists.\textsuperscript{66} The latter is a derivative authority, drawn entirely from the legislative authority of God. The Muslim jurist bears no authority in his person or status in the sense that his declarations are automatically accepted as valid. The authority depends upon the methodology employed by the jurists and his skills. This was markedly different from English Common Law which was regulated by precedent and statutes, as well as legal codes reified in texts produced by the colonial regime.

Texts that were frequently consulted in the Straits Settlements included W.H. Macnaghten’s \textit{Principles and Precedents of the Moohummudan Law} (1825), N.E. Baillie’s 12-volume \textit{A Digest of Moohummudan Law} (1865), Roland K. Wilson’s \textit{Digest of Anglo-Mohummedan Law} (1895), Faiz Badrudin Tyabji’s \textit{Principles of Muhammadan Law} (1919), and Syed Ameer Ali’s \textit{Mahommedan Law} (1929). In addition, L.W.C van den Berg’s

\textsuperscript{65} Nicholas Dirks notes that this was true for Hindu law during the precolonial period in India. Nicholas B. Dirks, “From Little King to Landlord: Property, Law and the Gift under the Madras Permanent Settlement,” \textit{Comparative Studies in Society and History}, 28,2 (April 1986), 322.

translations Al-Nawawi’s Minhāj al-Ṭalībīn (1270), and Ibn Qasim’s Fath al-Qarib were also consulted at times.\(^\text{67}\)

True to form, translators and compilers of legal manuals were deeply entrenched in the colonial system, being either imperial and colonial officials or members of the local legal elite. For example, when his compilation of legal opinions was first published, W.H. Macnaghten was a court registrar in the service of the EIC in Bengal, fluent in several languages including Sanskrit, Persian and Arabic.\(^\text{68}\) N.E. Baillie was the Assistant Secretary to the Indian Law Commission and an attorney to the Supreme Court of Judicature at Fort William in Bengal.\(^\text{69}\) Syed Ameer Ali was a lawyer and judge in Calcutta, while Faiz Badruddin Tyabji was a lawyer and judge in Bombay. Although they were Muslims, they were not trained in the Islamic legal tradition, having been educated in England or at the very least, subject to an English legal syllabus.\(^\text{70}\) Furthermore, their efforts were part of the British quest for clear and uniform principles based on religious texts coincided with the efforts of Indian

\(^{\text{67}}\) The French translation of Fath al-Qarib was published in 1894, while the French translation of the Minhāj was translated in 1882 followed by the English translation in 1914.


\(^{\text{69}}\) In addition, he was also the former Government Pleader in the Court of Sudder Dewanny Adawlut. “A Digest of Moohummudan Law” Law Magazine & Law Review 19,2 (1865): 265.

\(^{\text{70}}\) Gregory C. Kozlowski, Muslim Endowments and Society in British India (Cambridge: Cambridge University Press, 1985), 116.
reformist movements to cleanse their religion of what they perceived as negative customary encrustations.\textsuperscript{71}

Although translators sometimes warned that the texts were actually commentaries on law, such as N.E. Baillie’s \textit{A Digest of Moohummudan Law}, legal texts quickly earned an authoritative status in colonial courts which regarded these texts as the final word on key issues in personal law.\textsuperscript{72} These texts, were in other words, made to stand alone without reference to other commentaries.\textsuperscript{73} This was contrary to Islamic tradition of referring to various sources, especially parallel commentaries, in the process of adjudication. In contrast, legal practitioners in colonial regimes rarely went beyond colonial sanctioned texts to examine the Quran, Hadith or other legal texts not prescribed by their predecessors. Even Muslim members of the colonial elite such as Faiz Tyabji and Ameer Ali merely replicated patterns of colonial codifications in their own volumes in the early twentieth century since they were not trained in usul al-fiqh (roots of jurisprudence) and therefore neglected to challenge British lexicon.\textsuperscript{74} Straits Settlements Law Reports, which will be examined in later chapters, demonstrate that disputes between judges only referred to competing colonial compilations of codes by

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\textsuperscript{74} British colonial officials tended not to be trained in usul al-fiqh (roots of jurisprudence), which was actually basis to any detailed understanding of Islamic law. The first English text on the subject was published only in 1911. Kozlowski, 144. Michael R. Anderson, “Islamic Law and the colonial Encounter in British India,” in David Arnold and Peter Robb, eds. \textit{Institutions and Ideologies – A SOAS South Asia Reader}, Collected Papers on South Asia (Richmond: Curzon Press, 1993), 175.
playing them off against each other which suggests that these codes of religious law were regarded as sufficient.\textsuperscript{75}

**Minhāj al-Ṭalibīn**

One of the most popular reference texts in both the Straits Settlements and the Netherlands Indies was a translation of an Arabic manual known as *Minhāj al-Ṭalibīn* (*Minhāj* for short). Its long history could be traced back to 670/1270 when the Shāfi’ī jurist, Muḥyī al-Dīn Abū Zakariyyā al-Nawawī (631-676/1233-1277), one of the most important authorities on Shāfi’ī law, finished writing the relatively concise volume that usefully devoted much attention to issues in daily life.\textsuperscript{76} Both the French and English translations were the handiwork of European colonial regimes in the Malay world. In November 1882, Dutch Orientalist scholar based in Batavia, L.W.C. van den Berg (1845-1927) published the French translation of the *Minhāj al-Ṭalibīn* in Batavia at the behest of the Dutch colonial government.\textsuperscript{77} Being proficient in Arabic, he had written his doctoral thesis on the contract of sale in Islamic law in 1868 at the Instelling voor Taal-, Land- en Volkenkunde at Leiden. In 1878, he published a book entitled *De Beginselen van het Mohammedaansche Recht, volgens de Imams Aboe-Hanifat en asj- Sjafe‘i*. It was regarded


\textsuperscript{77} Van den Berg’s choice of French instead of Dutch suggested that he meant the three volumes to be of wider use than just within the Dutch colonies. However the publication of original Arabic in the same volume suggested that it was also meant for anyone who understood Arabic, as pointed out by Snouck Hurgronje in his review of the translation. C. Snouck Hurgronje, “Minhādj at-tālibin, Le guide des zéles croyants,” *IG* (April 1883), 7.
as an authoritative volume by Dutch colonial administrators who frequently cited it.\textsuperscript{78}

After serving as an advisor to the Dutch colonial government from 1869 to 1887, he later returned to Holland to become a professor at the Indische Instelling te Delft. In keeping with the comparative legal interests of Dutch colonial officials, under each subject heading, Van den Berg appended the corresponding Code Napoléon where applicable. The translated edition by Van den Berg was rare in that the original Arabic was printed alongside the French translation, although the volume was far from being a literal translation. Translations usually did not include the original text. The translation of the \textit{Minhāj} reproduced all the chapters found in the original, even those which were not likely to be relevant to Dutch colonial administration in the Netherlands Indies.

Nawawī’s volume, in the original Arabic, as well as local translations in the region, were perceived to be influential amongst local subject populations by both Dutch and British colonial officials prior to the process of translation.\textsuperscript{79} The \textit{Minhāj} was

\textsuperscript{78} For examples of citations, see R. V. Hoothuysen, “Pensionen en Onderstanden aan de nagelaten betrekkingen van in een door den dienst gesneuvede, ongekomen of overleden Europeesche landsdienaren,” \textit{IG}, 11,2 (July-December 1889), 1161; O.J.H Graaf van Limburg Stirum, “Eenige mededeelingen over den rechtoestand der Inlandsche Christenen in Britisch-Indië,” \textit{IG}, 15,1 (January-June 1893), 950.

in very specific ways, a mukhtasar, an abridged manual, since it was gloss of a larger
volume by ʿAbd al-Karīm b. Abī Saīd Muḥammad Al-Rāfīṭī's (555-623/1160-1226) Al-
Muḥarrar, which was itself a summary of a much lengthier work - the original Al-Wajīz fī
Fiqh al-Imām al-Shāfīṭī written by Abū Ḥāmed Muḥammad ibn Muḥammad al-
Ghazālī (1058-1111). Since Van den Berg's translation Minhāj was not a true translation
but an abridgement of Nawawī's volume, it loosely, and superficially, resembled a
mukhtasār (albeit an unconventional one as Van den Berg was not a Muslim jurist)
being an abridged handbook derived or condensed from a longer work. Indeed, Van
den Berg's translation shared several characteristics with the mukhtasār. Aimed at
specialists, scholars and educated people, Van den Berg's version relieved its time-
pressed readers of lengthy discussions, appendices and chains of transmitters, offering
only the essentials in order to make the work more accessible to its intended audience,
in this case, colonial legal practitioners. British translator of the Minhāj, E.C. Howard,
was truly convinced that if Van den Berg's French translation had been a literal

Islamic Law Reform and the Theory of Legal Change," American Journal of Comparative
Law, 42, 2 (Spring 1994), 270.
<http://www.brillonline.nl/subscriber/entry?entry=islam_COM-0792>
translation of Nawawi’s edition, it would have been unintelligible. In this way, a text borne out of the colonial project inserted itself into the Islamic legal tradition of the Netherlands Indies as part of a chain of authoritative ‘mukhtasars’ that affected the lives of local Muslims.

Van den Berg and Snouck Hurgronje, on the advice of Sayyid ‘Uthmān bin Yahyā, emphasized that two latter commentaries of Nawawi’s translation of Minhāj should be consulted alongside the Minhāj. The British translator, E.C. Howard echoed Van den Berg’s exhortations for cross-referencing to two other mukhtasars as well, since, he warned, it was not always possible to decide a question by reference to the Minhāj alone. However, subsequently, colonial law reports and articles only privileged the Minhāj while neglecting the other mukhtasars or glosses despite being urged by translators and scholars, most probably because these mukhtasars had not been

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83 Since the issue of consensus in Islamic law was a major concern of his, Snouck strongly believed in tracing the genealogy of texts, which cause him to often cite the works that Nawawi’s work was based on and led to. C. Snouck Hurgronje, Sajjid ‘Uthmān’s Gids voor de Priestertraden (Batavia: H.M. Van Dorp & Co., 1895), 6–8. Two works are considered the two most authoritative works of the Shāfi’ī madhhab were particularly emphasized by Snouck. The first work is the large volume Al-nihāyat al-muḥtāj ila sharh al-Minhāj fī al-fiqh ‘alā Madhhab al-Imām al-Shāfī‘ī by the jurist Muhammad b. Ahmad b. Hamza al-Manūfī al-Miṣrī al-Anṣārī Shams al-Dīn Al-Ramlī (919-1004/1513-1595) that was completed in 1566. The second was Tuhfat al-muḥtāj li sharh al-Minhāj (909-974/1504-1566) by Abu ‘l-‘Abbās Ahmad b. Muḥammad b. Muhammad b. ‘Alî b. Ḥadīj Shihāb al-Dīn Ibn Ḥadīj al-Haytamī which he began writing in 1551. E.C. Howard singled out the same two texts as well, although Van den Berg referred to three more texts including Al-Rāfī‘ī’s Al-Muḥarrar from which Nawawi’s work was derived, and Zakariyā al-Anṣārī’s (d. 926/1520) Fath al-Wahhab (n.d.), and Abū ‘Alī Djalāl al-Dīn Muḥammad b. Ahmad b. Muḥammad b. Ibrāhīm al-Anṣārī al-Shāfī‘ī’s al-Maḥallī’s (791-864/1389-1459) text which were glosses of Nawawi’s work.

translated into a European language.\textsuperscript{85} In both British and Dutch territories, the Minhāj was consulted on various significant issues ranging from animal slaughter to legal age of majority to the exclusion of all other glosses of Nawawī’s work and earlier glosses of Al-Ghazali’s text.\textsuperscript{86} In this way, the Minhāj was regarded as a legal code - self-contained, and therefore made to be sufficient although it had never been so within the Islamic legal tradition anywhere in the world prior to the colonial period.

In his preface, Van den Berg admitted that he translated Minhāj precisely in order to help the Dutch colonial government administer local institutions. The Minhāj was selected because it was a volume that was already widely consulted by adherents of the Shāfī‘ī madhhab in the Netherlands Indies.\textsuperscript{87} Unlike earlier editions of books on Islamic law produced by Dutch bureaucrats, Van den Berg referred directly to the Arabic manuscript instead of relying on inaccurate Malay or Javanese translations that were already available.\textsuperscript{88} Van den Berg preempted his critics by confessing that it was indeed difficult to translate subtleties, doubles-entendres and ellipses especially in a subject as dense, nuanced and complicated as religious practice from Arabic into a

\textsuperscript{85} Occasionally Dutch officials alluded to the Al-Nihāyat by Al-Ramlī. Snouck Hurgronje referred to most glosses in his articles. For example, see C. Snouck Hurgronje,
\textsuperscript{86} In Dutch colonial publications such as Juynboll’s handbook which consulted other works of reference, Van den Berg’s translation of the Minhaj was still the most oft-cited work. Juynboll, Handleiding Tot De Kennis Van De Mohammedaansche Wet Volgens De Leer Der Sj.Fi‘Tische School.
\textsuperscript{87} Snouck wrote the review in February 1883. C. Snouck Hurgronje, “Minhādj at-tālibin, Le guide des zéles croyants,” IG (April 1883), 6.
European language.\textsuperscript{89} To help with his translation, Van den Berg consulted dictionaries and glossaries produced by Reinhart Dozy (1820-1883) as well as A.W.T. Juynboll, and consulted personally with Michael de Goeje, an Arabic professor in Leiden, on the intricacies of translating from Arabic to French.\textsuperscript{90}

The translation of Nawawi’s \textit{Minhāj} was not a purely Dutch endeavour, however, since in his acknowledgements, Van den Berg also expressed his gratitude to Moḥamad ibn Ḥasan Bābahīr, a Hadhrami member of the ‘chambre de tutelles et successions à Batavia’ for explaining modern Arabic morals and customs, especially in matters related to prayer and Haj pilgrimage.\textsuperscript{91} Evidently, he was the head of the Arab community in Batavia,\textsuperscript{92} known for “his considerable faculties for judging.\textsuperscript{93} He was named one of the outstanding (‘uitstekende’) men of Hadhramaut alongside an Islamic scholar in Batavia, Sayyid Uthmān bin Yahyā (1822-1913), a religious teacher, who was

\textsuperscript{90} In addition, he consulted Reinhart Dozy’s Arabic dictionaries and A.W.T. Juynboll’s glossaries published in \textit{Tanbih} originally by Abū Ishāq al-Shirāzi published in 1879.
\textsuperscript{91} Van den Berg mentioned that Moḥamad ibn Ḥasan Bābahīr originated from Saiyun and had been on a pilgrimage to Makkah. L.W. C. van den Berg, \textit{Minhadj At-Talibin – Le Guide des Zeles Croyants: Manuel de Jurisprudence Musulmane Selon Le Rite de Chafi’i}, (Batavia: Imprimerie du Gouvernement, 1882), xiii.
\textsuperscript{92} “Die Arabier in Ostindischen Archipel,” \textit{Österreichische Monatsschrift für den Orient}, 13 (1887) 119.
\textsuperscript{93} He assisted Van den Berg in yet another publication in 1886 on the Hadramis in the Malay Archipelago specifically. L.W.C van den Berg, \textit{Le Hadramout et les Colonies Arabes dans l’Archipel Indien} (Batavia: Imprimerie du Gouvernement, 1886).
also a mufti in Batavia and the Honorary Advisor for Arabic Affairs (Honorair Adviseur voor Arabische Zaken).\textsuperscript{94}

Subsequently, Dutch colonial bureaucrats profusely cited Van den Berg’s translation of the Minhāj, though it was, by no means, unchallenged. In fact, shortly after its publication, a scathing review of Van den Berg’s translation by Snouck Hurgronje was published in the journal De Indische Gids in April 1883.\textsuperscript{95} Snouck relentlessly pointed out the numerous errors in Van den Berg’s translation in his disparaging reviews of Van den Berg’s publications on the whole.\textsuperscript{96} In his quest for accurate conceptual interpretation of Islamic law, Snouck debunked what he deemed imprecise in Van den Berg’s translations.

Nonetheless, the usefulness Van den Berg’s work did not immediately suffer from Snouck’s harsh criticism. Within a year of its publication, his translation had reached England lauded as a welcome edition in British dependencies the Malay world, precisely because it was a manual of Shāfi’ī law.\textsuperscript{97} Translated into French, instead of Dutch, it was considered potentially useful to “any European establishment” in a

\textsuperscript{94} Tijdschrift voor Nederlandsch-Indië, 16, 1 (1887), 429. The publication in question is L.W.C. van den Berg, Le Hadhramout et les Colonies Arabes dans l’Archipel Indien (Batavia: Imprimerie du Gouvernement, 1886).

\textsuperscript{95} Snouck wrote the review in February 1883. C. Snouck Hurgronje, “Minhādj at-tālibin, Le guide des zéles croyants,” IG (April 1883), 1-14.

\textsuperscript{96} Although Snouck shared similar ideas on colonial administration in the Netherlands Indies with his rival, Van den Berg, their relationship remained strained. Michael Francis Laffan, Islamic Nationhood and Colonial Indonesia: The Umma Below the Winds (New York: RoutledgeCurzon, 2003).

review in a British publication.98 Despite garnering positive reviews, the French translation did not seem to be frequently cited in court cases, perhaps due to British officials’ language capabilities.

Yet, British colonial officers had to wait more than three decades for an English translation of Van den Berg’s French version to be published. The translator was E.C. Howard, a district judge in Singapore, who had “therefore enjoyed the peculiar advantages in acquiring a knowledge of this branch of Mahomedan law.”99 This was certainly not the first time independent Dutch and British colonial projects benefitted each other in the colonial administration of religious laws. Earlier, Van den Berg had cited Hamilton’s translation of the Hidaya in his first book De Beginselen van het Mohammedaansche Recht, volgens de Imams Aboe-Hanifat en asj- Sjafe’i on both Hanafī and Shāfīī madhhab publications in 1878.100 Translations of the Minhāj were not the only one that was referred to by both Dutch and British colonial legal scholars. In fact, volumes by C. Snouck Hurgronje, Th. W. Juynboll, M. Th Houtsma, I. Goldziher was also listed as potential reference texts in British and Dutch colonies signifying a certain shared intellectual milieu concerning Islamic law in the region.101

Amongst British colonial officials stationed in the Malay world, Howard’s translation was especially valuable since legal textbooks on Shāfīī law were fewer in

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100 L.W.C. van den Berg, De Beginselen van het Mohammedaansche Recht, volgens de Imams Aboe-Hanifat en asj- Sjafe’i (Batavia: Ernst and Co., 1878), 1.
101 A comprehensive list of texts was found in Faiz Badrudin Tyabji, Muhammadan Law: The Personal Law of Muslims, (Bombay: N.M. Tripathi and Co., 1940), 89-93.
number, as most colonial officials in British India were keener on translating literature on Hanafi law, as we have seen. Being a manual of Shafi'i law specifically, translations of the Minhaj frequently became reference texts for colonial lawyers and judges in courts, not only in Netherlands Indies, Malaya and the Straits Settlements, but also in Southern India, Egypt and the Aden Protectorate.\(^{102}\) Howard’s translation proved to be one of the unusual attempts by a British official based in the Malay Archipelago to produce a work on Islamic law.

In contrast, Dutch scholar-bureaucrats such as Snouck Hurgronje, Ch. W. Margadant, Th. Juynboll, J.G Schot and L.W.C. van den Berg published copiously in colonial journals on various issues broadly ranging from Islamic theology, history, criminal law, family law rituals to Sufi tariqahs. Within the narrower realm of law, the incompatibility of Islamic courts and European law of evidence, and practical matters such as fees for ‘priesterraden’ (priest councils) and for litigants were discussed in colonial journals. This energetic flow of knowledge on Islam pulsed through Dutch colonial bureaucracy. Frequently, officials’ publications were derived from theoretical postulates on Islam rather than empirical observations in the Indies.

Dutch scholars eagerly engaged in intellectual conversations with each other which were not always cordial especially in book reviews.\footnote{While colonial bureaucrats such as I.A. Nederburgh was exceedingly gracious and praised his opponent (M.C. Piepers) even as he was criticizing him, particularly bitter debates occurred between Snouck Hurgronje and his peers, especially L.W.C. van den Berg who was actually senior to him within the ranks of colonial bureaucracy. A question addressed to Snouck Hurgronje after the publication of his book De Atjehers was publicly described as unthinking (‘onbezonnen’) in the title of a one-page response to said question. Snouck responded to the question in articles full of invectives in the journal Javabode in 1899, and even went to the extent of calling one of his challengers, an incompetent lawyer (‘een onbevoegd advocaat’). For examples of Snouck’s diatribes see, “Een Antwoord van Dr. Snouck Hurgronje op een onbezonnen (?) Vraag,” IG, 22, 1 (January-June 1900), 236-237; IG, 23, 1 (1901), 569-570.} Written in a scholarly style, these book reviews, or rather, ‘besprekingen’ (literally: discussions) of books on Islam in the Netherlands Indies published in nearly every issue of Dutch colonial journals tended to be highly erudite, critical, fervent and impassioned.\footnote{The best example of this is Snouck’s critical review of Van den Berg’s Lodewijk Willem Christiaan van den Berg, De Beginselen Van Het Mohammedaansche Recht, Volgens De Imâm’s Aboe *Hanîfât En Şjâ‘î”î*, 3. druk. ed. (Batavia; Ernst, 1883). Snouck accused Van den Berg of being lacking in legal expertise (‘gebrek aan rechtskunde’) and being a quasi-practitioner (‘quasi-beoefenaar’) for making fundamental mistakes despite having specialized in Islamic law for more than a decade by then. Van den Berg (and earlier, D. Louter) had called him out on account of his youth. See C. Snouck Hurgronje and A. J. Wensinck, Verspreide Geschriften Van C. Snouck Hurgronje (Bonn, Leipzig; K. Schroeder, 1923).C. Snouck Hurgronje and A. J. Wensinck, Verspreide Geschriften Van C. Snouck Hurgronje (Bonn, Leipzig; K. Schroeder, 1923).C. Snouck Hurgronje and A. J. Wensinck, Verspreide Geschriften Van C. Snouck Hurgronje (Bonn, Leipzig; K. Schroeder, 1923).C. Snouck Hurgronje and A. J. Wensinck, Verspreide Geschriften Van C. Snouck Hurgronje (Bonn, Leipzig; K. Schroeder, 1923).C. Snouck Hurgronje and A. J. Wensinck, Verspreide Geschriften Van C. Snouck Hurgronje (Bonn, Leipzig; K. Schroeder, 1923).C. Snouck Hurgronje and A. J. Wensinck, Verspreide Geschriften Van C. Snouck Hurgronje (Bonn, Leipzig; K. Schroeder, 1923).C. Snouck Hurgronje and A. J. Wensinck, Verspreide Geschriften Van C. Snouck Hurgronje (Bonn, Leipzig; K. Schroeder, 1923). 59-221.} Often, these review-discussions offered new and original analyses on issues addressed in books and articles on Islam written in English, French, German and Dutch. The prodigious amount of review-discussions on Islam published in colonial journals suggested that these scholar-bureaucrats were invested in debates on Islam in the region beyond practical administrative purposes. Indeed, many of them were members of academic associations.
such as the Indisch Genootschap, founded by P.J. Veth, and Leidsche Maatschappij van Letterkunde.\textsuperscript{105} Scholarly analysis of Islamic texts contributed to a highly charged intellectual atmosphere within elite colonial circles that sometimes even verged on acrimony during the late nineteenth and early twentieth centuries.\textsuperscript{106} Nonetheless, it remained unclear as to how these fervent exchanges had any bearing on the finer details of practical application, or substantive content of religious laws throughout the colonial period. How authoritative and influential were these Dutch colonial writings? How deeply did they manage to cut through social ranks and formal legal hierarchies within the Netherlands Indies?

In contrast to the vibrant world of Dutch intellectual discussions, one would be hard-pressed to find a critical review of a legal digest, or code of Islamic law written by a fellow British official or scholar, judged mainly by the author’s knowledge of the content of Islamic law. This was partly because in contrast to their more scholarly Dutch counterparts, British authorities tended to steer clear of debating the myriad understandings of Islamic law, by faithfully sticking to well-worn codes and manuals of Islamic law supplemented by formidable collection of legal precedents that had already been employed extensively. Hence, English manuals and codes were assessed solely on the basis of practical significance. The substance of laws that had been codified was rarely examined in detail, much less debated upon. On the whole, reviews tended to be extremely positive, complimentary and encouraging of scholarly ventures that could

\textsuperscript{105} IG, 22, 2 (July-December 1900), 1534.
potentially ameliorate colonial administration of religious laws. An exception to this rule was a review of Roland Knyvet Wilson’s *A Digest of Anglo-Muhammadan Law* (1895) which was heavily criticized for producing an extremely cumbersome volume with a long addendum (8 pages long) at the beginning that corrected many errors in Islamic law found in the book, and for neglecting to mention recent works on Islamic law.\(^{107}\) The reviewer considered Wilson’s confused and inaccurate mode of presentation practically unhelpful. By picking on a very specific case involving the exclusion of uterine descendants in inheritance cases, the reviewer betrayed his own preoccupation with functional instructions in legal manuals, rather than historical veracity, or depth of knowledge of legal maxims. Once again, practical considerations remained a priority for the British official, not the substance of Islamic law.

Thus, Howard’s venture in translating a dense volume of Islamic law was rare for a British judge, though no less necessary, judging from the warm reception his volume received. His translation received a resounding endorsement in *The Straits Times* who called it an “exceedingly well-done” translation with “clearness of diction” that was “more helpful than the Koran,” since it was “a complete code of rules of living for all classes and conditions of men and women who are followers of the Prophet.” Howard’s translation was considered particularly valuable because “there are few

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Englishmen who can read a law book in French with as much confidence and ease as when it is in their own language.”

**Dutch colonial literature on Islamic law**

While administering the lives of highly diverse societies, structural concerns inevitably became the focus of Dutch colonial literature as well.\(^{109}\) Within the realm of family law, it seemed that marriage laws seemed to be a major preoccupation of Dutch scholars.\(^{110}\) In particular, marriages between a non-Muslim and a Muslim spouse confounded the scholar-bureaucrat who attempted to devise laws regarding several permutations produced by diverse colonial populations.\(^{111}\) Dutch officials were stumped by the various complications that a mixed marriage entailed. For example, what laws governed a marriage between a Muslim man and a non-Muslim woman, or a Muslim woman and a non-Muslim man?\(^{112}\) In association with marriage laws, inheritance laws were also often discussed. Yet another area which was discussed in detail was the legal

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108 Interestingly, the rest of the review dealt with war conditions in Europe, and the issue of slavery in Muslim societies, rather than addressing the translation’s usefulness in administration of Islamic law in the British colonies. “Minhaj et Talibin,” *The Straits Times*, January 18\(^{th}\) 1915, 6.

109 A major preoccupation, which is outside the focus this dissertation is ‘grondsrecht’ (land laws) which referred to communal rights of land disposal centered on the figure of the ’grondvoogd’ (land chief).


111 F.C. Hekmeijer, “Bouwstoffen voor een regeling van het huwelijksrecht en voor de invoering van den burgerlijken stand onder de Inlandsche Christenen op Java,” *IG*, 20, 2 (July-December 1898), 1305-1315.

112 There were, of course, several different permutations of mixed marriages amongst colonial subjects in the Netherlands Indies.
age of majority within the Netherland Indies.\footnote{The two main players in the debate R.H. Kleyn and M.G. Smalt who argued back and forth from 1895 till 1897. R. H. Kleyn, “Meerderjarigheid van den Inlander en de Staatsblande van 1819 no. 60 en 1839 en 1839 no. 22,” \textit{RNI}, 66 (1895), 317-338; M.G. Smalt, \textit{RNI}, 67 (1896), 263-282; R.H. Kleijn, “Meerderjarigheid van den Inlander. Een Woord van Repliek,” \textit{RNI}, 67-97; “Meerderjarigheid van den Inlander,” \textit{RNI}, 68 (1897), 201-206.} Apparently, procedures introduced by the Dutch colonial government enacted by government functionaries in the priesterraden transformed Islamic legal practice especially with regards to women, according to Islamic scholar Sayyid ‘Uthmān, whom Snouck quoted at great length.\footnote{For example, in the absence of a wali, one of the qāḍīs could become a woman’s wali. Since the qāḍī was one of the ‘priests’ in the priesterraad, a council set up by the Dutch colonial administration, the Dutch government effectively represented the woman.} There were also marked absences. Actual laws concerning the increasing numbers of Christian natives remain a blind spot for a very long time in colonial legislation although knowledge of their presence throughout the Indies was evident in colonial journals.\footnote{In contrast, Hindu laws (usually restricted to Bali) and Chinese laws were elaborated upon in colonial journals. C. Fasseur, “Colonial Dilemma - Van Vollehoven and the struggle between adat and Western Law in Indonesia,” Davidson and Henley, \textit{The Revival of Tradition in Indonesian Politics : The Deployment of Adat from Colonialism to Indigenism}.}

One of the earliest issues that were debated in the 1880 pertained the extent of Islamic practice in the Netherlands Indies vis-à-vis ‘adat’ a highly complex mixture of local laws with Hindu elements and Islamic law as well. Indeed, the tension between adat and Islam ran deep in Dutch colonial debates and carried over to the postcolonial period. Scholars such as Solomon Keyzer and his pupil, L.W.C. van den Berg strongly believed that Islamic law formed the core belief system while adat was the deviation
from this core. On the other side of this debate was Cornelis van Vollenhoven who held the opinion that Islamic law was secondary to adat. In reality, the debates were more nuanced and were certainly not typified by two powerful polar opposites constantly jostling with each other. For example, C. Snouck Hurgronje sometimes highlighted the prominent role of Islam in the lives of Muslim subjects while at other times, he argued that local laws still played a huge part in the lives of Muslim subjects. Van Vollenhoven vehemently opposed L.W.C van den Berg’s argument that law in the Indies followed religion since he strongly believed that indigenous adat laws formed the core body of laws that governed the lives of local communities, supplemented by religious laws which played a secondary role.

In connection with this, the judicial powers of the raad agama were of particular concern to some colonial bureaucrats. Through the ubiquitous institution of raad agama, the class of qaḍīs were professionalized and their authority, legitimized by the colonial government. The laws that the raad agama were to impose within each community were regarded as a single set of laws by the Dutch colonial government.

118 R. Michael Feener, Muslim Legal Thought in Modern Indonesia (Cambridge, UK ; New York: Cambridge University Press, 2007).
although in actual fact, it consisted of two different sets of laws with considerable overlap between the two, as mentioned before. The first set of laws was adatrecht, which was specific to the locale. More importantly, adatrecht remained unwritten and uncodified especially if it largely consisted of customary law.\textsuperscript{120} The second source of law was Shari’a that was the product of Islamic jurisprudence (fiqh), precisely translated as ‘plichtenleer’ by Snouck Hurgronje.\textsuperscript{121} Shari’a was also specific to the locale, but written and recorded in abundant well-established written literature, unlike the more elusive adatrecht which was orally transmitted or demonstrated through customary law across generations. In contrast to English Common Law, one of the cornerstones of Dutch civil law states that custom does not bind, unless the law refers explicitly to it. With little basis in written law, adatrecht was not legally binding. Thus, not surprisingly, adat laws ran the risk of not being considered actual law by priests, litigants, lawyers, and the colonial state, which meant that rulings based on adat, even if meted out, within the government-appointed raad agama, were potentially illegal.\textsuperscript{122} Conversely, this meant that the application of Islamic law could be expanded to include more areas of life, which Nederburgh claimed, had indeed occurred over time by 1893, only slightly more than a decade after raad agama was formally instituted in Java and

\textsuperscript{120} Some adat laws were originally issued by a written edict. Jan Prins, “Adatlaw and Muslim Religious Law in Modern Indonesia,” \textit{Die Welt des Islams}, 1, 4 (1951), 284.
\textsuperscript{121} Jan Prins claimed that Snouck defined ‘plichtenleer’ as Shari’a but he clearly used the word to refer to fiqh. Jan Prins, “Adatlaw and Muslim Religious Law in Modern Indonesia,” \textit{Die Welt des Islams}, 1, 4 (1951), 285. For Snouck’s definition, see C. Snouck Hurgronje, \textit{Nieuwe Bijdragen Tot De Kennis Van Den Islam} (Leiden: 1882).
\textsuperscript{122} I.A. Nederburgh, “Verhandelingen – Nog Een over Priesterraden Antwoord aan Mr. M.C.P.” \textit{RNI}, 61 (1893), 288, 299.
Madura. Nederburgh was worried as he found it highly incongruous that Islamic law should be implemented in such a widespread manner to colonial subjects when adat actually formed the basic core of laws of local populations. This unprecedented authority granted to priesterraden gave way to widespread application of ‘pure’ Islamic law divorced from local ‘national’ customs, i.e. ‘adatrecht’ to the open dismay of some colonial officials who were convinced that the real law of the native was adat, modified by Islamic law. Moreover, he argued, Islamic influence over local societies should be curbed in the face of pan-Islamism during the late nineteenth century that could lead to anti-colonial uprisings in the Netherlands Indies.

Yet a more immediate concern was at hand for Nederburgh and Piepers. They considered it extremely crucial for the jurisdiction of priesterraden to be properly demarcated precisely because the management of land laws and tax laws could potentially be in the hands of priesterraden, as these laws could easily be linked with laws of inheritance, distribution of family estates, zakat and guardianship of minors which lie within the realm of personal laws under the jurisdiction of the priesterraden.

123 This was lamented by Nederburgh who believed that the institution of priesterraden, considered too independent of Dutch colonial administration, led to the unnecessary promotion of Islam in the Indies. I.A. Nederburgh, “Nog Een over Priesterraden Antwoord aan Mr. M.C.P.” RNI, 61 (1893), 299.
125 The term ‘nationaal’ was used by Nederburgh and Piepers to denote each community with their own priesterraden.
126 As Eric Tagliacozzo points out, from the 1870s onwards, Islamic conspiracies were imagined around all corners at different places at different times. Tagliacozzo, Secret Trades, Porous Borders: Smuggling and States Along a Southeast Asian Frontier, 1865-1915.
or the raad agama.\textsuperscript{127} Hence, due to their wide jurisdiction in personal law, members of the priesterraden and wealthy elite possessed the opportunity to conveniently ensure their own benefit through the application of Islamic law.\textsuperscript{128} To prevent this jurisdictional exploitation which could potentially harm the collection of colonial revenue and lead to legal chaos, colonial officials such as Nederburgh and Peipers urged the legislature to properly define what laws were binding and enforceable in the colony, and in the process, hopefully curb the jurisdiction of the priesterradden with regards to Islamic law specifically. In actual fact, Nederburgh and Piepers did not have cause to worry as the landraden (civil courts) had to affirm the rulings of the priesterraden which were relatively weaker and unlikely to cross over to civil court jurisdiction. Nonetheless, Nederburgh’s and Piepers’ deep concerns suggested that the priesterraden in Java and Madura did overreach their authority.\textsuperscript{129}

Despite such frequent exhortations for clarity in legal jurisdictions in colonial legal journals, administration of religious and adat laws remained murky throughout the colonial period. The nature of laws administered by the raad agama were never truly defined beyond general aims by colonial authorities anywhere in the Netherlands. This was partly due to the fact that colonial knowledge on adat, sometimes even

\textsuperscript{127} Property owned by minors were controlled by their guardians, which opened them up to all sorts of potential exploitations. E.E.G. Joakim, “Voogdij bij het Inlandsch Recht,” \textit{RNI}, 99 (1912), 93.

\textsuperscript{128} I.A. Nederburgh, “Nog Een over Priesterraden Antwoord aan Mr. M.C.P.” \textit{RNI}, 61 (1893), 305. In addition, the more loosely defined adat was also abused by Dutch colonial officials. Kees van Dijk, “The Study of Islam and Adat In Java,” in Antlöv and Hellman, \textit{The Java That Never Was: Academic Theories and Political Practices}.

erroneously equated with Islamic law, as we have seen, remained sparse till the late nineteenth century, and it was only after 1901 that adat was examined more systematically under the leadership of Cornelis van Vollenhoven. In 1909, the Royal Institute of Linguistics and Anthropology established the Commissies van het Adat led by Snouck Hurgronje, as Chairman, and Carpentier Alting in order to organized data collected by printing them in a series of publications known as Adatrechtbundels. The abundant literature however hardly clarified legal administration. John Bowen aptly describes the Adatrechtbundels as “endlessly detailed and innocent of the slightest conclusion” a quality that could very be extended to the entire corpus of scholarly discussions on Islamic law and adat in colonial journals as well. Although Dutch scholars wrote with clear sophistication and fervor on adat and Islam, it was vague as to where the weight of authority landed in the Netherlands Indies, where the role of the colonial bureaucrat often shaded into that of the intellectual keen on exploring facets of local religions and customs but for the most part, seemingly unwilling or unable to shape the law in religious courts beyond enacting structural changes that were of course no less transformative to the lives of colonial subjects. For the most part, until 1937, when Barend Ter Haar successfully pushed for Islamic inheritance laws to be removed, the promulgation of Islamic law remained the purview of the

130 C. Fasseur, “Colonial Dilemma Van Vollehoven and the struggle between adat and Western Law in Indonesia,” Davidson and Henley, The Revival of Tradition in Indonesian Politics: The Deployment of Adat from Colonialism to Indigenism. 53-54. For example, see “Commissies voor het adatrecht,” RNI, 94 (1910), 331-336.

131 In 1917, the Adatrechtstichting (Adat Law Foundation) was established in Leiden.

government-appointed officials within the raad agama, whose decisions were in turn subjected to the secular landraad.

**Local Arab influence in the development of Islamic law**

Colonial elite ensured that the production of legal codes and manuals in the Netherlands Indies profited extensively from Arab help in the figures Moḥamad ibn Ḥasan Bābahīr, and to a much larger extent, Sayyid ‘Uthmān bin Abdullah bin Yaḥyā. Due to his collaborative relationship with Snouck Hurgronje, Sayyid ‘Uthmān bin Yaḥyā had the opportunity to directly influence the colonial administration of Islamic law. His writings were reviewed and discussed extensively by Snouck in colonial journals granting them a wider audience amongst colonial administrators, beyond local Muslim communities. Sayyid ‘Uthmān bin Yaḥyā’s writings had a direct bearing not only on the marriage practices of the Arab community in the Netherlands Indies but also in Singapore, where, according to Sumit Mandal, the “Sayyid colony” resided. In 1881, Sayyid ‘Uthmān bin Yaḥyā wrote a widely-read handbook on main points of Islamic law in the Indies, *Kitab al-Qawanin al-Shariyya* (Book of Administration of Islamic Law) that was reprinted as revised and expanded edition in 1894. Written in Jawi (Malay in Arabic script) for officials of the ‘raad agama,’ the book translated into the Dutch under the title *De Gids over Priesterraden* in 1895. In the book, Sayyid ‘Uthmān stressed the importance of marriage of equality between daughters of Sayyids who were

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134 Ibid., 161.
descendants of Prophet Muhammad and other Sayyids. He stated that a marriage between the Sayyid’s daughter and a non-Sayyid should not be condoned. This issue will be explored in greater detail in another chapter.

Conclusion

Although the intellectual debates amongst the Dutch colonial elite faintly recalled the necessary debates amongst Muslim legal practitioners in the Islamic world, colonial administrators had undoubtedly torn the Islamic legal structures asunder by restricting Islamic law to the realm of personal law. Legal-administrative necessities within the Netherlands Indies gave rise to Dutch knowledge of Islam which was highly localized and specific to the region. On the other hand, sources of British knowledge of Islamic law in the Straits Settlements were derived from British India where British colonial officials had already tried their hand at administering Islamic law for several decades before expanding their control further east. Hence, British knowledge tended to be more general and expansive, and less focused on the religious practices of local inhabitants within the Straits Settlements per se.

Although colonial legal structures in the British Straits Settlements and the Netherlands Indies were very different, in many cases, the practice of law in both territories were similar in that law seemed to emerge spontaneously on the spot. Indeed, legal practice in the region was on the whole, highly unpredictable, and thus should be examined more closely, case by case, in order to elucidate legal trends in colonial court judgments. Although colonial experience in administration of Islamic law in British India provided British bureaucrats with a certain level of confidence that

135 Ibid., 158.
obviated the need for local intermediaries, legal codes and translations produced in 
India were mostly unhelpful because they pertained to Hanafi law. As a result, Shāfi‘ī 
legal doctrine were usually investigated on the spot on a case-by-case basis by colonial 
legal practitioners, as cases were brought before them in courts. This was not out of the 
ordinary since English Common Law operated on a case-law system of legally binding 
judicial precedents (stare decisis) anyway. What was striking however was how 
unhelpful the legal precedents in India were, which made them effectively non-binding 
in the end in the Straits Settlements.

Within Dutch territory, although theoretical postulates were intensely 
discussed in colonial journals, legal practice on the ground remained largely unknown 
to colonial bureaucrats in charge of a vast and unwieldy highly decentralized colonial 
state. The multiple roles of the village leaders (panghoeloe) were examined by Snouck 
and his successors, such as G.A.J. Hazeu and R. Kern, Advisors of Native and Arab 
Affairs, but often, they were too specific, geographically, to present a general picture of 
religious administration throughout the Netherlands Indies.¹³⁶ Often, policy changes 
were enacted without specific reference to raad agama’s actual rulings. In fact, specific 
examples of penghulus’ rulings were rarely alluded to. Even research findings focused 
on the Netherlands Indies published in several volumes of Adatrechtbundels did not offer 
any conclusion beyond detailed descriptions of empirical observations. Rather, changes

¹³⁶ The penghulu functioned as the qāḍī, the muftī, the marriage official, zakat official, 
mosque administrator and director, C. Snouck Hurgronje, “Serie IJ: Godsdienstig Recht 
en Godsdienstige Rechtspraak,” Adatrechtbundel, 1 (1910), 206-208. Snouck’s last 
successor, G.F. Pijper sought to find out more about legal administration on the ground 
from the 1920s till 1951 but it was published late in 1977. G. F. Pijper, Studiën over De 
that were enacted reflected spontaneous waves in the intellectual currents amongst elite colonial intellectual circles more than actual exigencies in the lives of Muslim subjects.

Through the early twentieth century, colonial administration of Islamic law was unremittingly in flux. Very little was actually fixed in colonial legal administrative policies. In the Netherlands Indies, this was a period when Dutch scholar-bureaucrats continually wavered between the two separate legal strands of ‘adat’ and religion. Although religious authority was formally delegated to the government-appointed raad agama, Dutch authorities intervened at times to implement corrective measures that undoubtedly interfered with the administration of religious laws. In the Straits Settlements, British legal practitioners were forced to devise legal rulings as cases were brought before them in court since manuals and codes based on Hanafi law did not provide much aid. The reliable Shāfī‘ī legal manual Minhāj was only translated into English in 1914, and even so, it was hardly comprehensive and did not provide all the solutions required. Moreover, the different status of the Straits Settlements, being supposedly originally uninhabited without legally constituted courts, compared to British India which was previously ruled by Mughal emperors with a recognized developed legal system, necessitated a different kind of legal administration than in the latter, although the nature of this difference was never formally defined. Curiously however, despite this well-connected global community that produced abundant legal material, only British (English and Irish) and Indian cases and statutes were cited in the Straits Settlements when it came to cases involving Islamic law up till the end of the

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137 Fatimah & Ors. V. D. Logan & Ors. [1871] 1 KY 1.
colonial period. This strongly suggests that English Common Law deeply impinged upon Islamic law, even as British administrators claimed to administer Islamic law over Muslim subjects in the realm of personal law.

During the colonial period, language difficulties restricted colonial legal practitioners to Islamic legal texts that had been translated into European languages. This phenomenon propelled L.W.C van den Berg’s and E.C. Howard’s translation of the Minhāj to even greater prominence at the expense of the other members of the family of mukhtaṣars that were linked to it. However, from the colonial perspective, this was not necessarily considered a loss, for it could very well be part of the process of streamlining religious legislation. As Elisa Giunchi recently points out, translators admitted that translations were done precisely to clarify ambiguities in the text and to choose the ‘correct’ opinion among contradictory ones.138

Certain Arab scholars in the Netherlands Indies aided colonial officials in producing key texts that formed the basis for colonial knowledge on Islam in the region due to their linguistic capabilities and deep knowledge of Islam. Nonetheless, with the exception of the prolific Sayyid ‘Uthmān, their assistance to the creation of legal textbooks were not cited by later scholars, such that their intellectual importance in the region receded into the background. Instead, colonial sources reveal that their contribution to colonial administration of Islamic law in both the Straits Settlements and the Netherlands Indies mainly came in the form of extensive litigation in colonial courts. The following chapters will focus on these cases.