Universiteit Leiden
The Netherlands

Courtrooms of conflict. Criminal law, local elites and legal pluralities in colonial Java

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Citation

Ravensbergen, S. (2018, February 27). *Courtrooms of conflict. Criminal law, local elites and legal pluralities in colonial Java*. Retrieved from https://hdl.handle.net/1887/61039

Version:	Not Applicable (or Unknown)
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Note: To cite this publication please use the final published version (if applicable).

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Title: Courtrooms of conflict. Criminal law, local elites and legal pluralities in colonial Java
Issue Date: 2018-02-27

3 — Laws of Java

The dual legal system with its pluralistic courts that had been anchored in early nineteenth-century Java was founded on the core principle that the Javanese population would be adjudicated according to their "own" laws and customs, insofar as these were as they were not in contradiction with "the general principles of equity and justice".[1] There are two complicated aspects to this phrase, which led to much ambiguity. First, it remained vague about what the "general principles of equity and justice" were.[2] Second, it was unclear what *the* "native laws and customs" of Java were exactly. There was simply no agreement on this among the Javanese themselves. Regional differences and a multitude of religions and legal traditions made this an incredibly complicated question—impossible in fact—to answer. In spite of these ambiguities, legal codification remained a primary goal for the Dutch. This chapter discusses the efforts to codify criminal law in colonial Java. In doing this, I will focus on two aspects: the extent to which legal pluralities occurred in the codification of colonial criminal law in Java, and the influence of (a lack of) local informants consulted by Dutch officials drafting the codifications.

3.1 The VOC Compendia, 1602–1799

Although VOC contracts with local rulers generally emphasized that religious groups would retain their own laws and rituals, in practice VOC

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[1] The principle was constituted in the 1819 Provisional Regulations, article 121, and in the 1854 Colonial Constitution, article 75. The Provisionial Regulations spoke of "native laws", whereas the Colonial Constitution spoke of "religious laws", but also included the "local institutions and customs". This had to do with the ignorance of and discussions among the Dutch regarding Javanese-Islamic traditions. I will elaborate on this later in this chapter. S 1819, no 20, art.121: *In het opmaken der condemnatien zullen gevolgd worden de inlandsche wetten en gewoonten van het eiland, behoudens echter dat dezelve niet strijdig zijn met de algemeen bekende beginselen van regt, en de bevelen mitsgaders de wetten van het Gouvernement.*; RR, art.75: *..worden door den inlandschen regter toegepast de godsdienstige wetten, instellingen en gebruiken der inlanders, voor zoover die niet in strijd zijn met algemeen erkende beginselen van billijkheid en regtvaardigheid.*

[2] Although this kind of expressions can be found in legal codes up to today, the term "general" was particularly problematic in the colonial situation with its various unequal legal constructions.

officials did intervene.[3] Interference with Javanese legal systems was often related to the VOC's economic interests, concerns about peace and order, and its attitude towards Islam. We have seen in chapter 2 how this altered the composition of courts, but it also impacted the laws applied by these courts. During the eighteenth century, several VOC officials in Java collected laws and unwritten customs and compiled compendia consisting of both substantive and procedural laws.

The impact of the VOC on legislation in Cirebon is apparent, one indicator being a change in the procedure of presenting evidence. According to Javanese traditions, evidence was presented by oral accounts by expert witnesses, historical information, and natural landmarks. Around 1740, this system of evidence had been completely replaced by written documents, which referred to a procès-verbal and Javanese-Dutch legal texts.[4] In 1765, Cirebon's laws were collected and published as the *Pepakem Cheribon*.[5] Dutch resident Pieter (P. C.) Hasselaer (1757–65) compiled this code in cooperation with the tumenggung and jaksas of the sultans. It contained both criminal and civil laws and was based on several written Javanese legal texts.[6] Some of these texts demonstrate Islamic influences, but this was either not known or acknowledged as such by the Dutch.[7] In chapter 2, we discussed how Dutch residents in this area attempted to (without much success) curb the power of the Islamic officials in legal cases. The increasing influence of Islamic law in Cirebon would nevertheless continue during the eighteenth century. This depended on the personal preferences of the sultan, according to colonial archivist De Haan: "Whereas a pious Sultan would give preference to the advice of the 'temple priests,' a less devout one would definitely consult the 'old women' as

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[3] Steenbrink, *De Islam Bekeken Door Koloniale Nederlanders,* 61.
[4] Hoadley, *Selective Judicial Competence*, 124.
[5] Ball, *Indonesian legal history,* 60-71.; "Javaansch Regt. Cheribonsch Wetboek (Papakkum)", *Het regt in Nederlandsch-Indië: regtskundig tijdschrift* 3 (1850): 71-99,143-174, 217-234.
[6] As addressed in Chapter 2, the Javanese-Hindu legal traditions followed the pradata and padu division in legal issues. However, in the Pepakem Cheribon the VOC divided the Javanese laws alongside the European criminal and civil law system.
[7] Ball, *Indonesian Legal History*, 73.; Kern, *Javaansche Regtsbedeeling,* 6. The Javanese law books from which the Pepakem Cirebon was drawn were *Raja Nistaja, Undang-Undang Mataram, Jaja Lengkara, Kutara Manawa* and *Adilulah (Suria Alam).*

being the bearers of the unwritten traditions."[8] VOC officials, however, preferred jaksa verdicts over those of the Islamic courts although the authority of the jaksa courts was gradually minimised as well, since the Dutch considered the unanimous judgments required in these court as unwieldy. Instead, a preference was given to judging through the tumenggungs acting in the name of the sultan.

Nonetheless, in general the VOC regarded and accepted Islamic law as a legitimate part of the Javanese legal tradition.[9] In 1761, for example, the Freijer Compendium was published for the Ommelanden. Although Governor General Jacob Mossel's plan to introduce landraden in western Java had met resistance from the Council of the Indies, they agreed on a compilation of the existing customs of succession, inheritance, community goods, and marriage among the local population. This compilation was to be used by the Board of Aldermen's and other colonial courts. Chiefs of the several communities in Batavia and the Ommelanden were asked to write down their civil laws and customs. Subsequently, Native Commissioner Diederik (D. W.) Freijer used the collected information to draft one codification. For this, he cooperated with Islamic "priests" and VOC officers.[10] Criminal laws were not collected, because in Batavia criminal cases were adjudicated according to VOC regulations and European laws.

For the landraad of Semarang (1747) the Dutch—on the initiative of Governor General Van Imhoff—had also compiled a special compendium of Javanese laws. Yet, this one was mainly about criminal law. For the compilation of this so-called Semarang Compendium, or the Mogharaer Code, Islamic officials were asked for advice.[11] According to the Dutch, it was drawn from the Islamic legal text *Mogharaer* (and possibly another legal text called *Moghalie*). Much remains unknown about the compendium, but it is clear that the content of the Semarang

[8] De Haan, *Priangan.* Part 1, 406 *"...hield den devoot Sultan zich liefst aan eene uitspraak van "tempelpaapen," een minder vrome besliste niets zonder raadpleging van "oude wijven" als draagsters der ongeschreven traditie."*
[9]Steenbrink, *De Islam bekeken,* 64. In 1681 for example, a regulation was made to pay a fee to the Islamic officials who took the oath of the Islamic witnesses in the board of aldermen in Batavia.
[10] Ball, *Indonesian Legal History*, 71–73.
[11] Ball, *Indonesian legal history,* 69–70.; Kern, *Javaansche regtsbedeeling*, 99. Kern argues that the *bupatis* had wished to take back the pradata cases from the regional *surambi* courts, this being the reason for an Islamic focus in the Semarang Compendium

Compendium does not correspond with the Islamic *al-Muḥarrar* to which it refers.[12] In practice, European laws and punishments were often applied and imposed.[13] Either way, as already described, the compilation of compendia by the Dutch would continue during the eighteenth century.

All compendia were the result of VOC officials being advised by local informants in combination with the consultation of written texts. More research has to be conducted on VOC officials' investigations into the Javanese legal traditions before we can say more about the legal sources the texts were based on or, moreover, about the process through which the compendia came into existence. It is clear, though, that the VOC officials had to rely on local informants who provided them with information on relevant Islamic-Javanese, Hindu-Javanese, and other local laws and customs. Needless to say, the applied laws derived from various legal traditions were not at all static and underwent several changes during the eighteenth century. Various informants—either the jaksas in towns or countryside, the penghulus affiliated with the royal courts, penghulus in the regions further from the royal centre, as well as teachers of various Sufi orders—could advocate different applications of all these traditions.

Different Sufi orders (*tariqas*) existed alongside each other at the end of the eighteenth century, the Shattari tariqa being the most common in Java. But Islam was not only performed through tariqa *shaikhs* (*leermeesters*, or teachers). With the decline in power of the Javanese royal courts, more Muslims followed one of the tariqas. In the eighteenth century, the same important *Shafi'i* books were read by most pupils (*santri*) in Islamic schools (*pesantren*, in the case of the Shattari tariqa, often called *pondok*), causing an increasing uniformity in Islamic schooling.[14] At the same time, the regional customary laws and legal practices continuously blended in with *Shafi'i* traditions.

From the sixteenth century to the eighteenth, when Islamic law gained influence in Java, controversies between the penghulu and the jaksa grew. In Mataram, penghulu courts became increasingly more important than the older jaksa courts. In Cirebon, despite Dutch attempts to prevent

[12] Kooria, "Dutch Mogharaer, Arabic al-Muḥarrar and the Javanese Law-Book."
[13] Ball, *Indonesian legal history,* 70.
[14] Laffan, *The makings of Indonesian Islam.* 26-27, 34-39. Over time, Javanese kings declared several villages with an Islamic religious function, such as a sacred grave or a religious school, free from tax duties. These villages were called *perdikan*.

this, Islamic law practices by the penghulus also increased, and there was an increasingly limited space for Javanese law specialists, the jaksas. In part 2, we will take a closer look at the position of the penghulus and jaksas, and the consequences of the expanding role of Islamic law and Dutch responses to this, on the criminal law practices in the pluralistic courts. For now, it is sufficient to realise that the Dutch who used the knowledge of the penghulus and jaksas were influenced by them when compiling compendia. Who they chose as their informants certainly mattered. In Cirebon, they picked the jaksa, in the Northeast Coast the penghulu. This led to very different legal compendia for the two regions.

Eventually, however, the increasing dominance of Islamic law was inevitable. The regulations of the early nineteenth-century Cirebon landraad points to a definite dominance of Islamic law. Remarkably, the Pepakem Cheribon is not mentioned in the regulations, having been superseded by the Semarang Compendium. On 25 June 1808, Resident Van Lawick requested that the Hoekoem Sarak (possibly a reference to *hukum shariah,* or sharia law) be sent to him; he meant the Semarang Compendium, which he was obliged to use in Cirebon.[15] The instruction of the Cirebon landraad indeed mentions the Hoekoem Sarak "as used in Semarang."[16] This shows the transition to more Islamic law, since the Pepakem (1765) was based on Javanese-Hindu codes, whereas the Semarang Compendium (1749) was based on Islamic law. Minor criminal cases, such as petty thefts and deceit, were dealt with by the jaksas in the still existing jaksa courts. According to the instructions, they followed the Freijer Compendium and the Semarang Compendium.[17]

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[15] De Haan, *Priangan.* Part 4, 629. *"Den 25 Juni 1808 schrijft diezelfde Resident: "Alhier heeft men altijd zeer willekeurig en op een wetbock wat niemant regt verstaan kan, in het uitsprccken van vonnissen te werk gegaan," zoodat hij den Secretaris Gcneraal vcrzoekt, hem te doen geworden "het wet boek of Hoekom Sarah (het beschreven recht van den Islam) bij den Landraad te Samarang in gebruik ... Ik insteere hier te meer op, alzo de bepaling is, dat men vooreerst volgens dat wetboek zal te werk gaan, voor zo verre er geene vaste en nadere wetten bepaald zijn.' Dus toen had de Pepakem finaal afgedaan."*

[16] NL-HaNA 2.21.004.19 Van Alphen en Engelhard 019A, no.259. "Memorie Instructif: Derde afdeeling Regterlijke Magt", Art.9. *"De manier van procedeeren word door de wet bepaald, en moet geschieden ten aanzien van den Javaan met Javaan, of Cheribonder met Cheribonder, na de Hoekom Sarak of Compendium der Mahomedaansche Wet, welke bij den Landraad te Semarang in gebruik is geschieden."*

[17] NL-HaNA 2.21.004.19 Van Alphen en Engelhard 019A, no.259. "Memorie Instructif: Zesde afdeeling Orde voor de Jaxa's van de sultans en de overige regentschappen."

3.2 Dutch Confusions over Javanese Laws, 1803–48

The Asian Charter of 1803, as discussed in chapter 2, recommended continuing the VOC practice of subjecting the Javanese population to their own laws and customs. The charter even favoured reducing the intermingling of Dutch with Javanese laws that had taken place during the VOC era. It advised the legal system to be "cleaned from abuses that had crept in, being incompatible with native laws and customs."[18] From 1803 until 1848, the Dutch search for Javanese laws to apply would therefore continue, leading to confusion among Dutch jurists and officials who were, more than before, aiming at a simple, ready-to-apply solution—an approach incompatible with the plural legal landscape in Java at the time. The combining of the Dutch and Javanese legal traditions was therefore often ad hoc. It continued uninterrupted nonetheless, with far-reaching consequences for criminal law in particular.

"General Principles of Justice"

Arriving in 1808, Governor General Daendels agreed with the Asian Charter that local Javanese legal systems should not be altered too abruptly, but from a self-serving perspective. He aimed at keeping the peace by maintaining Javanese legal traditions, but was not in favour of applying local laws when they went against his own interests. Therefore, he told the residents to use their daily experience in the courts to find out where the local legal system had to be reformed.[19]

The resolutions announced by Daendels show that he responded pragmatically to the given circumstances and adjusted his policy regarding criminal law accordingly. In 1808, for example, a Javanese man named Setjo was imprisoned in Semarang. He had confessed to murder, but the Semarang landraad decided to not prosecute him because he could not be tried according to the Javanese laws. In response to this decision, the Political Council (*Raad van Policia*) decided to adjudicate Setjo at the Council of Justice according to colonial laws. By doing this, however, they

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[18] Asian Charter, 1803, art. 86. In Mijer, *Verzameling van instructien,* 253. *"De rechtspleging, onder den Inlander, zal blijven geschieden volgens hunne eigene Wetten en Gewoonten. Het Indisch Bestuur zal, door gepaste middelen, zorgen, dat dezelve in die Territoiren, welke onmiddellijk staan ondere de Opperheerschappij van den Staat, zoo veel mogelijk, werde gezuiverd van ingeslopen misbruiken tegen de Inlandsche Wetten of Gebruiken strijdende.."*

[19] Ball, *Indonesian legal history,* 100.

took him away from his "competent" (*competente*) judge—the landraad—and since this was against the idea of applying Javanese laws, Daendels decided to intervene using a political measure. Setjo was forced to work on a chain gang until he could be tried.[20] Apparently no solution was found in which suspects like Setjo could be adjudicated under Javanese laws, because some months later Daendels decided in his "Regulations for Landraden and Landgerechten in Java" that judges could deviate from Javanese laws in cases where the application of those laws would mean that someone could not be convicted.[21]

Daendels introduced several of these kinds of interventions in the application of Javanese laws and customs. When crimes threatened "peace and order," in particular, Daendels preferred European laws to Javanese ones. He aimed at a situation in which Europeans laws were applied in cases that were a direct threat to the safety, as is clear from a letter written in 1809. In the missive, Daendels reminded J. Kloprogge, resident of Japara, that he was only allowed to apply Javanese laws in cases which were "in direct connection with the morals and customs of the Javanese."[22]

As a general policy Daendels proposed leaving it up to the resident to administer justice in cases that were a threat to the public safety (such as robbery) together with two assessors; it does not mention whether they had to be European or Javanese. All other criminal cases, manslaughter arising from "disputes out of hate and envy between Javanese and Javanese," for example, could be left to a pluralistic court that would apply local laws.[23] Daendels asked the High Council to elaborate on this plan, but it was never actually implemented. Interestingly, had it been, it might unintentionally have led to a situation relatively close to the Javanese *pradata-padu* division.

Altogether, Daendels made three exceptions regarding the application of Javanese laws. The first were cases that Javanese laws did

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[20] Van der Chijs, *Nederlandsch-Indisch Plakkaatboek.* Part 14, 768-769. Plakkaat, May 26, 1808. "Inmenging in rechtszaken."

[21] Van der Chijs, *Nederlandsch-Indisch Plakkaatboek.* Part 15, 649. Plakkaat, April 4, 1809. "Voorschriften voor landraden en landgerechten Java."

[22] Daendels, *Staat der Nederlandsch Oostindische Bezittingen.* Attachment "Organique Stukken Batavia", thirteenth of the Winter season, no.35. "..*in een direct verband staande met de zeden en gewoonten der Javanen*."

[23] Daendels, *Staat der Nederlandsch Oostindische Bezittingen.* Attachment "Organique Stukken Batavia", thirteenth of the Winter season, no.35. "..*disputen uit haat en nijd van Javanen tot Javanen."* The pluralistic court was the Landgerecht.

not cover. Daendels decided for example, that cases should be tried if, according to Javanese law, the "aggrieved person" (*beleedigde persoon*) or his or her descendants were not allowed to demand justice or were still minors. In these, the prosecutor (*fiscaal*) would demand justice in name of the government. The Javanese regents strongly disapproved of Daendels' measures, but their complaints were of no avail. The second exception concerned cases in which the Dutch considered the penghulu's recommended punishment too light or too severe. Mutilating punishments, for example, were abolished, although burning was officially still allowed (see chapter 6). The third exception involved cases in which the Javanese procedures did not lead to enough proof to convict.[24]

In fact, these three exceptions together meant that European laws were given priority over Javanese laws if the European judge (the resident) decided so. At the same time, however, Daendels did not deviate from the general principle that the Javanese were to be tried according to their own laws and customs. Even in criminal cases, the Javanese laws still had to be followed. And he introduced the penghulu as a legal advisor at the law courts in the Priangan, the Ommelanden, and Banten.

During the British interlude, Raffles was similarly ambivalent on the issue of the local laws. He stated that Javanese laws were only to be followed when they did not contradict "the generally acknowledged legal principles or the colonial regulations," without defining what was meant by "generally acknowledged."[25] On the other hand, Raffles emphasized that it was important for the colonial officials to know the ancient institutions of the island, and he appointed both the jaksa and penghulu as legal advisors in the pluralistic courts.

With the return of Dutch rule to Java, the vague and ambivalent interpretation of "acceptable" was more or less maintained and certainly not clarified. The Provisional Regulations of 1819 stated that the pluralistic courts had to administer justice according to the "native laws and customs," although only if "those were not in opposition with the generally known principles of justice, and the orders as well as the laws of the

[24] Ball, *Indonesian legal history*, 98–100.
[25] Raffles, *The History of Java*, Vol.1, 287. "*..de algemeen erkende rechtsbeginselen noch met de koloniale verordeningen*."

government."[26] Thus, if the colonial government encountered a Javanese law or custom with which they disagreed, they could easily diverge from the principle of the application of local laws by drafting a new colonial rule or observing it as in contradiction to "generally known principles of justice." Simultaneously, however, the penghulu and jaksa continued to act as legal advisors in the pluralistic courts, and no one in 1819 suggested fully replacing the Javanese or Islamic laws with colonial criminal laws.

Colonising Javanese Laws, 1819–48

Although the jaksas, penghulus, and Javanese members of the pluralistic courts were responsible for the transfer of their knowledge of Javanese law and custom, there was the continuous ambition among the Dutch to compile a criminal code for the colony. About the Netherlands itself, it is said that the nineteenth-century was "littered with wrecks of stranded criminal codes."[27] This shows both how complicated it was to compile a criminal code and also how strong codification fever was during the nineteenth century. This was no different in the colonies. In the 1820s attempts were made to codify a substantive and procedural criminal code for the Netherlands Indies. Even though they failed, the discussions among those involved in the drafting process show how jurists in the Dutch East Indies struggled with the idea of including local laws in criminal colonial law.

In 1824, Merkus prepared instructions for the Javanese and European members of the landraden.[28] In the manual, the court members were made familiar with their moral responsibilities as judges. Following upon Merkus's work, former Attorney General of the High Council Johannes (J. C.) Ellinghuijsen designed more extensive regulations for the substantive and procedural criminal law for the landraden and circuit courts. Included as an attachment to these drafts was the eighteenth-century

[26] S 1819, no.20. Art.121: *"In het opmaken der condemnatien zullen gevolgd worden de inlandsche wetten en gewoonten van het eiland, behoudens echter dat dezelve niet strijdig zijn met de algemeen bekende beginselen van regt, en de bevelen mitsgaders de wetten van het Gouvernement."*
[27] Bosch, *Strafrecht. De ontwikkeling van het strafrecht in Nederland*, 75.
[28] ANRI AS R. December 31, 1824, no.22. "Voorschriften ten dienste van de regters inde Landraden en regtbanken van Ommegangen, in de administratie der criminele justitie."; Mijer, "Bijdrage tot de geschiedenis der codificatie in Nederlandsch Indie", 295. Merkus prepared the instructions on commission of Governor General van der Capellen.

Semarang Compendium. Ellinghuijsen had incorporated the Islamic punishment *tacir (tazir*) in his draft as well; which was an arbitrary correction in minor crimes and meant that it was up to the judge to decide what the punishment would be. However, a marginal comment perhaps written by Ellinghuijsen notes: "Superfluous, will not be applied by the judge."[29] Neither Merkus's nor Ellinghuijzen's instructions were introduced, and they were stored away in the archives.

The same happened to several other proposals for new regulations compiled in 1830 by a committee that included Merkus and Van der Vinne.[30] This committee designed a draft regulation largely based on the Provisional Regulations of 1819 together with some resolutions announced subsequently. Notably, this regulation primarily focussed on the current colonial experiences of Dutch jurists and administrative officials and not necessarily on the Javanese customs. Yet, the desire to codify Javanese laws remained. In 1828, Governor General Léonard (L.P.J.) burggraaf du Bus de Gisignies decided that the VOC's Freijer Compendium—in which civil Islamic laws had been collected—had to be updated.[31] Regarding criminal law, however, a definitive shift had occurred. The VOC's Semarang Compendium—with mainly criminal laws—was no longer mentioned.

The tendency to emphasize Dutch laws over Javanese, continued steadily. In 1830, the Dutch jurist G.C. Hageman was specially appointed as president of the Supreme Court in Batavia, because of his experience in the committees that had designed the Dutch legal codes between 1814 and 1816.[32] One of his special assignments was to produce a criminal code for the Netherlands Indies. Hageman was in favour of introducing as many Dutch laws as possible in the colony. He also expected this to be possible, since the introduction of the foreign French legislation to the Netherlands

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[29] ANRI AS R. December 31, 1825, no.22. Letter from Ellinghuijsen. November 15, 1824. *"Overbodig, wordt toch niet toegepast door de rechter."*

[30] Immink, *Regterlijke Organisatie,* Introductie, II. P. Merkus (who had become a member of the Council of the Indies), Supreme Court member G.J.C. Schneither, temporary member and registrar of the Supreme Court H.J. Hoogeveen, chief baljuw of Batavia J. van der Vinne and *advocaat-fiscaal* (prosecutor in special courts such as the cassation court) F. van Teutem.

[31] Van Heijcop ten Ham, *De Berechting van Civiele Zaken en van Misdrijven*, 28.; S 1828/55.

[32] Van Kan, *Uit de Geschiedenis onzer Codificatie,* 4. Briet, *Het Hooggerechtshof van Nederlands-Indië,* 220, 247-250.

had been proven possible as well. Thus, whereas the colonial committees before 1830 had mainly engaged with the codification of a typical colonial legislation based on earlier Dutch colonial ordinances, Hageman decided that Dutch law—as applied in the Netherlands—itself had to be followed more thoroughly.

Hageman's stance would not make him popular among some of the colonial jurists and officials based in Batavia, who thought colonial Java very different from Dutch circumstances. Not long after his appointment, Belgium had separated itself from the Netherlands and Hageman decided to wait for more news on new legal codes in the Netherlands before starting with drafting the colonial codes.[33] When, in 1836, Hageman was urged to finally make a start with his research into the Indies' legislation, he responded that he did not consider it necessary to change the current procedures in criminal cases in the Indies. A member of the Council of the Indies, obviously annoyed, wrote in the margins of the letter: "The President displays such little knowledge of the workings of the Criminal laws among the Natives."[34] Thereafter, the Council of the Indies repeated its assignment again and decided—a few days later—to give him a second assignment on top of the first one: Hageman also had to start a research into the "nature of Javanese criminal laws." Again, a comment pencilled in the margins of this resolution reflects little trust in Hageman. The commentator questioned whether Hageman would understand why an investigation into Javanese criminal laws would be part of his assignment to proposed changes in the Dutch East Indies' legal system.[35] A few months later, Hageman resigned as president of the Supreme Court without completing a single legal code.

In 1839, colonial jurist Pieter Mijer lamented that he did not expect the introduction of new colonial legal codes soon, by which he meant mainly a substantive criminal code for the non-European population.[36] He was right. In 1847 and 1848, several legal codes were introduced, but a criminal code for non-europeans would not be introduced until 1872. In 1848 only the "most urgent" provisions regarding criminal substantive

[33] ANRI AS R. February 20, 1836, no.2. Letter G.C. Hageman, December 19, 1835.
[34] ANRI AS R. February 20, 1836, no.2. Marginalia. *"Hoe weinig kennis toont de President te hebben van de werking van de Kriminele wetten bij inlanders."*
[35] ANRI AS R. February 23, 1836, no.14. In the margins of the resolution.
[36] Mijer, "Bijdrage tot de geschiedenis der codificatie in Nederlandsch Indie," 296.

laws were regulated.[37] This regulation mainly concerned a description of the allowed punishments.[38] Flogging and branding were abolished, but beatings with a rattan were still allowed.[39] Whereas Javanese convicted of theft faced flogging or chain labour, Europeans were not to be condemned to hard labour or flogging but would most likely spend some years in prison.[40] Imprisonment was not considered suitable for the "native" population, because they would not experience the sitting down in a prison as a punishment due to their lazy nature, as explained in 1849 in a law journal: "Everyone well acquainted with Native customs, will easily understand the usefulness of this [chain gang labour], because generally imprisonment is not seen as a punishment by the Natives, who desire nothing more than ease and quiet. Moreover, labouring outside is much more positive to the health condition of the Natives."[41]

It is certain that punishments for Javanese convicts were harsh. A comment in the margins of a pardon request file from 1845 reflects the

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[37] S 1848, no.6. "Bepalingen ter regeling van eenige onderwerpen van strafwetgeving, welke een dadelijke voorziening vereischen."

[38] S 1848, no.6. "Bepalingen ter regeling van eenige onderwerpen van strafwetgeving, welke een dadelijke voorziening vereischen." Art.20. The following punishments could be imposed to "natives and those equal to them': death penalty, punishment "next to death" (chain labor with a minimum of ten and a maximum of twenty years outside of the island where the verdict had been made and preceded by display under the gallows), forced labour up to ten years outside or in chains (outside or on the island where the verdict had been made and this could also be in change for a certain amount of financial compensation for the labor executed, if this was decided as such by the judge), imprisonment up to five years and, finally, a beating with a rattan could be imposed by the judge as a punishment as well. As an additional punishment a maximum of forty rattan strokes could be imposed. The resident also obtained the right to impose rattan flogging by police law, in that case there was a maximum of twenty strokes.

[39] Remarkably enough, this was six years earlier than in the Netherlands, where the predominantly conservative Eerste Kamer (senate) had stopped the reform. There, abolition of corporal punishments would only be official in 1854, although since 1848, flogging and burning would not be performed anymore.

[40] S 1848, no.6, art.8. Bepalingen ter regeling van eenige onderwerpen van strafwetgeving, welke een dadelijke voorziening vereischen. The punishments allowed to impose on Europeans were: death penalty, house of correction (*tuchthuis;* with a maximum up to twenty years and display under the gallows in case of the punishment "next to death'), banishment from the Netherlands Indies (often to the Netherlands), being declared infamous (*eerloosverklaring*) or imprisonment.

[41] Schill, "Iets over de omschrijving der straffen," 438. "*Elk een die met de Inlandsche huishouding bekend is, zal de nuttigheid daarvan spoedig doorgronden, daar toch eene eenvoudige opsluiting in het algemeen, voor den inlander, die niets liever dan gemak en rust verlangt, geene straf te noemen is, en daarenboven de arbeid in de open lucht voor de gezondheidstoestand van Inlanders veel voordeeliger is te achten.*"

existing doubts on the logic behind the replacement of the death penalty with twenty years' chain labour: "It is truly impossible to denote twenty years of chain labour as a pardon," stated one of the members of the Council of the Indies in a note, attached to a pardon request. "Few natives would survive twenty years of chain labour, or even half of it, I believe."[42]

The other regulations—a procedural code (*Inlandsch Reglement,* hereafter Native Regulations) and the regulations of the judicial administration (*Reglement op de Regterlijke Organisatie,* hereafter Court Regulations)—were finalized, although not without heated discussions between the committee and prominent colonial officials. The regulations were initially compiled in the Netherlands, by a committee consisting of experienced colonial judges, presided by over by the jurist C. J. Scholten Oud-Haarlem.[43] Both the organisational Court Regulations and the procedural Native Regulations took the Provisional Regulation of 1819 as a starting point, and likely also the never introduced draft regulation of 1830. At the same time, however, they attempted to formalise and equalise the Indies' legal codes with the Dutch codes. Clearly, this was not always welcomed by the colonial administrators. Van der Vinne wrote fierce responses against a too-rapid introduction of European legislation to the local population. However, he was also not in favour of the application of local laws. Instead, it appears that he was aiming for a conservation of the existing colonial legislation with its significant influence and control by the colonial administrative officials. Administrators were particularly opposed to curbing the power of the resident vis à vis police magistracy and presiding over the landraad, as proposed by Scholten van Oud-Haarlem.[44] Eventually, after Scholten Oud-Haarlem's premature resignation in 1845,

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[42] ANRI, AS B. November 3, 1845, no.1. Marginalia, member of the Council of the Indies (name unknown). "*Eene gratie kan men het waarlijk niet noemen iemand twintig jaar kettingarbeid te laten verrigten ... Ik geloof dat er weinig inlanders zijn die twintig jaren kettingarbeid of zelfs de helft overleven.*"

[43] Van Kan, *Uit de Geschiedenis onzer Codificatie*, 12. The president was the prominent jurist C.J. Scholten Oud Haarlem. Also seated in the committee was the lawyer Gérard (G.J.C.) Schneither who had been part of the 1830 committee with Merkus. Later, the circuit court judge B.G. Rinia van Nauta would participate in the committee as well. (The committee had started off in the Netherlands Indies, but when Scholten Oud-Haarlem returned to the Netherlands, he continued the work there with a new committee. Pieter Mijer had been a member of the first committee)

[44] Van Kan, *Uit de Geschiedenis onzer Codificatie,* 37, 47. Administrators opposing reforms regarding the residents as landraad presidents were foremost from J. van der Vinne, J.C. Baud and H.J. Hoogeveen.

due to his opposition on this issue, jurist H.L. Whichers would finish the legal codes in 1847 and 1848, avoiding this controversial subject. I will discuss the long-drawn-out issue of the separation of judicial and administrative powers—and its consequences for the Javanese—in part 3 of this dissertation.

In any case, the emphasis was firmly placed on a confirmation of existing Dutch-colonial criminal laws, and Javanese informants were no longer consulted on criminal law issues. Scholten van Oud-Haarlem had obtained information only from prominent Dutch officials and judges. And even regarding civil law, Javanese knowledge holders were ignored during the legislative process. During the early 1850s, Whichers attempted to introduce the application of Dutch law to the Javanese population in civil and commercial law. He sought information from the Councils of Justice in the Netherlands Indies, residents, the Chinese councils, and Arab chiefs, but made no use of Javanese informants.[45] It is outside the scope of this research, but relevant to note that while opinions differed, officials consulted generally believed that the Chinese could be subject to the Europeans laws, but that this was inappropriate for Arabs and Javanese due to their Islamic faith and, in the case of the Javanese, also due to their assumed 'inferior civilisation.' So, Whichers proposed to declare European civil and commercial law applicable to all foreign Asians—both Chinese and others—and to introduce these European laws gradually to the Javanese population. Due to major resistance by Governor General Rochussen the reform was ultimately abandoned despite its approval by the Supreme Court, Attorney General, and Council of the Indies. The regulation was implemented only for the Chinese.[46]

Altogether, the new colonial legislation for the Javanese confirmed the already existing difference in colonial policies regarding civil and criminal law. Whereas most fields of civil law continued to be

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[45] Van Kan, *Uit de Geschiedenis onzer Codificatie*, 164.

[46] According to Rochussen, only when the entire Javanese population would have become Christian, it would be possible to introduce European legislation: "I observe the demolition or disintegration of the Javanese society as imprudent and unauthorized, as long as no other fully developed civilization exists to replace it, and this is improbable as long as the Native remains Muslim and has not become a Christian." (*Ik acht de slooping of verbrokkeling der Javaansche maatschappij gewaagd en onstaatkundig, zoolang men er geene andere volstandige maatschappij voor in de plaats kan stellen en dit laatste is niet denkbaar, zoolang de Inlander Mohamedaan blijft en geen christen is.)* Cited in: Van Kan, *Uit de Geschiedenis onzer Codificatie,* 164–166.

administered through Javanese religious and customary laws, criminal law was more firmly placed within the Dutch-colonial legal traditions. An *Indies' Journal of Law* article published in 1850 confirms the completion of this process. The editors had taken interest in the Javanese and Islamic law and thought that the landraad officials and judges of the landraad of Semarang might benefit from knowledge of them when administering justice in criminal cases. Therefore, they printed the Semarang Compendium in the journal. Interestingly, however, they had been unable to find a single copy of the compendium in Java itself, for the Semarang Compendium had fallen into disuse by that time.[47]

A strange situation occurred. Although the starting point of judging the Javanese according to their own laws and customs was maintained, the colonial government made no effort to compile compendia of local laws, and the VOC compendia were no longer applied. Moreover, no substantive colonial criminal law code for the Javanese population was produced in 1848, since only procedural and institutional aspects of the pluralistic courts were confirmed in regulations. From this, it seems that either the consultation of the jaksas and penghulus—permanent advisors in the pluralistic courts—had led to a system in which Dutch judges did not have to be knowledgeable about Javanese laws, because the local advisors were present in the courtroom for advice anyway. Or, another possibility, in practice Dutch laws were applied after all. In parts 2 and 3 of this dissertation, I will investigate whether in practice the jaksas, penghulus, and Dutch and Javanese court members applied local laws and customs in the pluralistic courts.

3.3 Dutch conflicts over Javanese laws, 1848–72

The colonising of Javanese criminal law together with the introduction of advisors in the pluralistic courts—who held the knowledge about local and religious laws and customs—had removed the need to record Javanese laws. Yet, there was still the formal aim in the regulations of applying local laws to the Javanese population in criminal cases, as well. In the process of debating about a criminal code for the local population, the influence of proponents of closely following the Dutch criminal code was rapidly rising. Both during the compilation of article 75 of the Colonial

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[47] "Javaansch-Mahomedaansch regt," 362.

Constitution (*Regeringsreglement*) in 1854, and during the eventual introduction of the Criminal Code for Natives in the Netherlands Indies (hereafter: Native Criminal Code) in 1872, these liberal jurists came into conflict with the proponents of the application of Javanese laws and customs. In the meantime, the only Dutch who still attempted to define the Javanese laws were academics in Delft and Leiden, in the Netherlands. Thus, between 1848 and 1872 three types of Dutch actors were involved in the discussions on colonial law: colonial jurists and officials still convinced of the importance of applying local laws; Dutch scholars specialised in Islamic law, who did not have a lot of influence in this period; and an increasing number of liberal jurists.

The Ambivalent Article 75

During the first half of the nineteenth century, in colonial criminal law, the content of Javanese laws had increasingly been removed from the equation. Nonetheless, the colonial constitution of 1854 was stipulated to retain the "religious laws, institutions, and customs of the natives" insofar as these did not contradict the "generally acknowledged principles of equity and justice."[48] However, by this time the Dutch state and society had changed

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[48] RR 1854, art.75. In fact, Article 75 repeated articles from various previous colonial regulations, in particular art.121 of the 1819 Provisional Regulations. The Governor General still held the right to draft legislation, in liaison with the Council of the Indies, and to declare this applicable to the local population if necessary. In other cases, the Javanese religious and local laws and customs were applied insofar as not in contradiction with the "general acknowledges principles of equity and justice": "*Voor zooveel de Europeanen betreft, berust de regtspraak in burgerlijke en handelszaken, alsmede in strafzaken op algemeene verordeningen, zooveel mogelijk overeenkomende met de in Nederland bestaande wetten. De Gouverneur-Generaal is bevoegd om, in overeenstemming met den Raad van Nederlandsch Indië, de daarvoor vatbare bepalingen der verordeningen, des noodig gewijzigd, toepasselijk te verklaren op de inlandsche bevolking of een gedeelte daarvan. Behoudens de gevallen waarin zoodanige verklaring heeft plaats gehad, of waarin inlanders zich vrijwillig hebben onderworpen aan het voor de Europeanen vastgestelde burgerlijke en handelsregt, worden door den inlandschen regter toegepast de godsdienstige wetten, instellingen en gebruiken der inlanders, voor zoover die niet in strijd zijn met algemeen erkende beginselen van billijkheid en regtvaardigheid. Naar die wetten, instellingen en gebruiken wordt, onder gelijk voorbehoud, ook door den Europeschen regter gevonnisd in zaken der aan zijne regtspraak onderworpen inlandsche hoofden en bij de kennisneming in hooger beroep van door den inlandschen regter, in burgerlijke en handelszaken, gedane uitspraken. Op die wetten, instellingen en gebruiken wordt door één Europeschen regter, bij zijne regtspraak naar de voor Europeanen vastgestelde wetgeving, zooveel mogelijk acht gegeven, wanneer inlanders, biten het geval waarin de bij het 2e lid bedoelde verklaring heeft plaats gehad, of het geval van vrijwillige onderwerping aan gezegde wetgeving in de bij wettelijke bepalingen aangewezene gevallen, als verweerder in*

profoundly and much more discussion was possible in the Parliament in The Hague on this ambiguous article 75.

The phrase "general principles of equity and justice" led to especially fierce discussion in the Dutch parliament. At first, among those members of parliament who had never been to the Netherlands Indies there was a lot of misunderstanding about the term "native court" (*inlandsche rechtbank*), which referred to the landraden. Liberal jurist Johan R. Thorbecke—chief drafter of the Dutch Constitution of 1848—wondered if Javanese judges would understand what exactly these "general acknowledged principles" were. He was the only one to note that even Europeans could not agree on these general principles: "I cannot suppress the notion, that with regard to these principles, there does not exist consensus on this anywhere, and most likely also not between us and the Native judge."[49] Another member of parliament, the conservative (*anti revolutionair,* counter revolutionary) baron Willem van Lynden, had done some superficial reading into Islamic and Javanese legal traditions and quoted from the law code *Hangger Pradata*, that cutting off the right hand was applied in theft cases, while the left foot was amputated after a second theft: "repeat offenders find themselves in a precarious position. For each repetition of a crime they lose another arm or leg," he concluded to show his disapproval of applying Islamic laws. The experienced Indies official and former Governor General Jan Jacob Rochussen had to interrupt the debate to explain that the so-called "native courts" were presided over by Europeans and that the *Hangger Pradata* was only executed in the princely lands in Central Java, where mutilating punishments had been abolished in 1847. This explanation reassured Van Lynden about the "mutilated Javanese". However, during the ongoing discussion, Jean Chrétien Baud passed him a book about local laws that made Van Lynden worry again, because it described a legal system that conflicted with European legal

burgerlijke of handelszaken voor hem te regt staan. Bij de regtspraak over inlanders, in het 3de en 2de lid van dit artikel bedoeld, neemt de regter de algemeene beginselen van het burgerlijk en handelsregt voor Europeanen tot rigtsnoer, wanneer het de beslissing geldt van zaken, die bij de hiervoren bedoelde godsdienstige wetten, instellingen en gebruiken niet geregeld zijn"

[49] "Handelingen Tweede Kamer 1853–1854", August 3, 1854, 1343. Thorbecke: *"Ik kan evenwel de opmerking niet onderdrukken, dat ten aanzien dier beginselen geene overeenstemming bestaat ergens, en waarschijnlijk ook niet tusschen ons en dien inlandschen regter."*

traditions. Van Lynden gave the example of women who, according to these *adat* rules, could not claim an inheritance.[50]

This scene is not described here to demonstrate the lack of knowledge that many members of parliament had about the Netherlands Indies. In fact, most of their contributions to the debate were reasonable and legitimate. Apart from a lot of confusion, the outsider views of some politicians show the discrepancy between theory and reality. Van Lynden pointed out that the differences in the several legal traditions in Java were so different from each other that article 75 had to be "a mere phrase which seems well, but in effect comes to naught."[51] The liberal Daniël Van Eck also expressed his concerns about the conflicting laws. He imagined law courts where European and Javanese judges with contradicting laws combatted each other. In reality, this was not the case, which shows that theory was not followed. Indeed, in reality, European criminal laws had already proven dominant. This was almost literally confirmed by the Minister of Colonies Charles F.P. Pahud: "That the legislation in the Indies is as much as possible based on the Dutch legislation, will not—so I trust—be refuted by anyone."[52]

Rochussen considered article 75 to be realistic though. He compared the situation in the landraad with the traditional Javanese royal courts where the king—in this case the Dutch resident—represented all the power, and could decide whether he would follow the advice of the council members or deviate from it if it was not in accordance with the Dutch principles of equity:

> According to the local [i.e., *Indische*] notions, the administration of justice is the duty of the sovereign. According to these notions, judges do not differ from assessors, who inform the sovereign (...)

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[50] "Handelingen Tweede Kamer 1853–1854", August 3, 1854, 1344. Accessed through www.statengeneraaldigitaal.nl Van Lynden: *"Men ziet dat de recidivisten er niet best aan zijn. Voor iedere herhaling van misdrijf een arm of been minder,"*

[51] "Handelingen Tweede Kamer 1853–1854", August 8, 1854, 1346. Accessed through www.statengeneraaldigitaal.nl Van Lynden: *"een loutere phrase, die fraai schijnt, maar in der daad op niets uitloopt."*

[52] "Handelingen Tweede Kamer 1853–1854", August 8, 1854, 1346. Accessed through www.statengeneraaldigitaal.nl Pahud: *"dat de wetgeving in Indie zooveel mogelijk is gebaseerd op het Nederlandsche regt, zal, naar ik vertrouw, door niemand worden gelaakt."*

> Hence, the European official represents the sovereign in the law courts. He will receive advice based on the strict laws of Islamic or ancient local laws or customs, and he will deviate from it in the event that the advice is in contradiction with the principles of equity and justice, as noted in this article.[53]

Thus, according to Rochussen the president of the landraad was actually a sole judge, even though this is not how it was defined in the colonial regulations, because the landraden were collegiate courts where Javanese priyayi were voting members. Minister Pahud, on the other hand, argued that European laws were followed. Van Eck concluded from this that article 75 was a dead letter. In the end, however, a majority of members of parliament followed Rochussen, and article 75 would be included in the Colonial Constitution of 1854. In parts 2 and 3 of this dissertation, we will take a closer look at the practice in the pluralistic courts to see if article 75 was a dead letter in reality.

Dutch Scholars and Islamic Texts

In 1842, a Royal Academy was established in Delft to train future colonial officials. Governor General J. C. Baud had taken the initiative to promote such training because he was worried by, among other things, the lack of knowledge of local languages among colonial officials with judicial responsibilities. Baud had prevented the death penalty being applied to three innocent Javanese when he had reviewed the procedural documents of the case and found that the president of the law court, due to his poor knowledge of the Javanese language, had convicted the wrong persons.[54]

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[53] "Handelingen Tweede Kamer 1853–1854", August 8, 1854, 1345. Accessed through www.statengeneraaldigitaal.nl Rochussen: *"De regtspraak is volgens de Indische begrippen het regt van den souverein. Regters zijn naar die begrippen niet anders dan assessoren, die den souverein voorlichten... . En nu is de fictie dat de souverein of de vertegenwoordigers van de souverein, na gehoord te hebben wat regt is en hoe de lieden van zijne rade hem adviseren, alleen beslist, alléén regt spreekt. Nu vertegenwoordigt in die regtbanken een Europeesch ambtenaar den souverein, die hoort wat regt is en wat men hem aanraadt, en wanneer hij dit onbillijk vindt en strijd met die regels van billijkheid en regtvaardigheid, waarvan in dit artikel sprake is, dan wijkt hij van dat strenge regt af, dat hem is voorgedragen als te zijn hetzij het Mohammedaansch hetzij het oud landsregt of gebruik."*

[54] Fasseur, "Van Vollenhoven and Law in Indonesia", 241-242.

Some of the professors of this school in Delft, did research on Javanese-Islamic law. However, their work seems to have had barely any influence on the drafting of a criminal code for the Javanese population.

The professors observed the Javanese laws to be of a merely Islamic character. They were working in Delft and would search from there for written sources of Islamic law produced in the Indonesian archipelago. Albert Meursinge (1812–50) was the first, publishing a *Handbook of Islamic Law* in 1844. In the preface, Meursinge wrote that he had written the handbook, after his appointment to teach at the Royal Academy, and found that no such handbook existed. It had not been possible either to make use of British books on Islamic law, because a different "sect" (*sekte,* referring to the Hanafi madhhab) within the Islam followed in the British colonies. According to Meursinge, using the existing VOC compendia would not be a proper solution, because these were a multitude of collected provisions without "coherence and without any reasoning" and finding a "guidance of general principles" in this text, to be used by judges, was too hard.[55]

Therefore, Meursinge had been searching for a text that could clarify the Shafi'i legal doctrine. The result of this endeavour was the publication of a text owned by professor Caspar G. C. Reinwardt, who had received the manuscript as a present from the Raja of Gorontalo (Sulawesi). It was a copy of a text written halfway the seventeenth century by a "priest in Achin [Aceh]" who had travelled to Arabia and produced the Malay text commissioned by his sultana. This original was a version of Abd al-Ra'uf's *Mir'at al-tulib* (Mirror of the Seekers), which came close to being a kind of handbook since it listed common principles which were subsequently explained.[56] Meursinge published the Malay text in the Arabic script, and decided to not translate it into Dutch, because he considered it a suitable text for students to learn the language. Besides, Javanese readers would also be able to read it now: "when, however, he is developed well enough to be able to understand and follow the line of

[55] Meursinge, *Handboek van het Mahommedaansche Regt.* Introduction II-III. "*Schier geheel uit eene menigte van als mogelijk onderstelde gevallen en de aanwijzing van hetgeen de wet in ieder van die gevallen bepaalt; alleen met dit onderscheid, dat men ze hier zonder zamenhang en zonder alle redenering aantreft; waardoor het moeielijk, ja dikwijls onmogelijk wordt, in dien verwarden doolhof een' leidraad van algemeene beginselen te vinden, die de regter bij zijne beslisising te volgen heeft.*"

[56] Laffan, *The makings of Indonesian Islam*, 94-95.

argument."[57] Meursinge emphasized in his preface that the publication had cost him a lot of effort, because according to him the Islamic jurists often proceeded "quite arbitrarily and indistinctly."[58]

In 1853, another Delft scholar, Salomon Keyzer, published a Dutch translation of a Javanese translation of an Islamic text, al-Haytami's *Tuhfat al-muhtaj* (Gift of the Needy), better known among the Dutch as the *Kitab Toephah*. Just as Meursinge, Keyzer focussed on the Islamic written traditions, or the 'pure' Islam, and did not make use of local informants. He used a version of the *Kitab Toehpah* from the archive of Nicolaus Engelhard,[59] translated by the regent Soerja Adi Menggala at the beginning of the nineteenth century (exact year unknown).[60]

Although Keyzer observed that Islam was important to the Javanese, he did not hold their knowledge of Islam in high esteem. In 1856, Keyzer argued that the "laws" referred to in article 75 were Islamic, the "institutions" Hindu, and the "customs" (*adat*) Javanese. However, he disagreed with this grouping and was convinced of the dominance of Islam and considered *adat* a poor substitute (*uitvloeisel*) for Islam. The Javanese would be unaware of the insights into their own religion caused by a lack of knowledge, argued Keyzer: "Such substitutions are simply regarded as customs or usages by the Javanese, because the Islamic law books are scarce, most Javanese rarely read, and because these books are usually written in Arabic, a language mastered by only a few Javanese."[61]

He also did not expect much from the knowledge of the penghulus about their own religious law. Keyzer thought that the absence of qadis and muftis explained the "ignorance" of the penghulus. He considered them "priests" who were made responsible for legal advice. Keyzer seems not to have been fully aware of the longer tradition of penghulu courts in Java

[57] Meursinge, *Handboek van het Mahommedaansche Regt.* Introduction VII. "*wanneer hij overigens genoeg ontwikkeld is om den gang der redenering te kunnen vatten en volgen*."

[58] Meursinge, *Handboek van het Mahommedaansche Regt.* Introduction VIII. "*..vrij willekeurig en verward..*"

[59] Laffan, *The makings of Indonesian Islam*, 96.

[60] Keyzer, "De codificatie van het inlandsch regt op Java", 56.

[61] Keyzer, "De codificatie van het inlandsch regt op Java", 45-56. "*Zulke uitvloeisels worden onder de Javanen eenvoudig als gebruiken of gewoonten beschouwd, omdat de boeken over het Mohamedaansch regt schaars zijn en de Javaan over het algemeen al heel weinig leest en omdat zij bovendien meestal in het Arabisch geschreven zijn, een taal, waarmede maar een zeer enkele onder de Javanen voldoende bekend is om ze te kunnen verstaan.*"

and their workings. In his articles, he only compared the conditions in other Islamic colonies such as French Algeria and British India. He suggested making a start with the codification of Islamic laws based on the *Kitab Toehpah* as a guideline for both penghulus and European judges. However, Keizer also stated that in order to appreciate Javanese laws, his students in Delft first had to study the "pure" Islamic legal literature, to understand the derogations in law in the Indies.[62]

Scholars of this period were not at home in the Indies, thereby making themselves rather useless to practical implications for colonial law. They studied texts instead of talking to Javanese penghulus or *kyais* (Islamic teachers not in service of the colonial government) to obtain information of Islamic law, and underestimated the level of knowledge these Javanese teachers and officials had. Moreover, whereas they regarded mystical Sufi orders as misleading mystical powerholders guilty of malfeasance, they saw the more reformist sects such as the Wahhabis as equally dangerous.[63] It was only during the 1860s that more information was collected on both the traditions of Javanese Islam and the contemporaneous influx of knowledge and Islamic reforms from Mecca. Ironically, this information came not from research by scholars, but from Christian missionaries interested in the practiced religion of Java. Whereas the Protestant minister Wolter R. baron van Hoëvell had during the 1840s, and without really speaking to the *kyais*, stated that the Javanese were actually not Islamic, later missionaries such as Gerhardus J. Grashuis, A. W. P. Verkerk Pistorius, and C. Poensen took an interest in and published on the *pesantren*.[64]

Although both Meursinge and Keyzer were certainly looking for a connection with contemporary legal practices in Java and made strong claims about it, they were based in the Netherlands and did not interact with Javanese informants or experts. And even though they clearly wanted their knowledge to be applied in Java, they did not exercise influence on the Dutch committees drafting colonial legal codes. Instead, these committees focussed on Dutch legal traditions combined with the needs in

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[62] Keyzer, "De codificatie van het inlandsch regt op Java", 56; Cees Fasseur, *De Indologen*, 262.; Keyzer, *Het Mohammedaansche strafregt naar Arabische, Javaanse en Maleische bronnen,* introduction (vii).
[63] Laffan, *The makings of Indonesian Islam*, 99, 107.
[64] Laffan, *The makings of Indonesian Islam*, 110–115.

colonial Java, and were therefore more interested in the experiences of Dutch residents and the few Dutch jurists present in Java.

The Native Criminal Code of 1872

As the debates on both article 75 and the nature of Javanese law show, making a colonial criminal code became a real challenge because opinions among the Dutch involved in the process differed so widely. During the 1850s and 1860s, liberal jurists would increasingly gain importance in both the Netherlands and Java (we will say more about this in part 3) and, therefore, the idea of introducing European laws to the local population gained more widespread acceptance. In 1866, former Supreme Court Judge F.F.L.U. Last was assigned to design one criminal code for the "natives and those with them equated." The assignment explicitly stated that "the provisions of the Criminal Code for Europeans in the Netherlands Indies should be followed and copied as much as possible."[65] The Criminal Code for Europeans had been introduced in the colony earlier that year and was based on the French penal code.[66]

Last himself was not in favour of applying European laws to the Javanese population, though. He interpreted his assignment with article 75 in mind, and commenced collecting Islamic and local laws. This took quite a long time and his approach was not approved upon by other colonial jurists, who in these years increasingly argued from a liberal viewpoint.[67] T. H. der Kinderen, director of the new Department of Justice established in 1870, subsequently designed a criminal code that was in fact a reworking of the Criminal Code for Europeans. The Native Criminal Code was introduced in 1872.[68]

The law code was translated into Javanese, although the quality of the translation was criticised by the chief jaksa of Pekalongan, Raden Mas

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[65] NL-HaNA 2.10.02 MvK, Openbaar Verbaal. August 20, 1866/67; "Besluit 27 junij 1866 no.2. Commissie voor de zamenstelling van een Strafwetboek voor Inlanders met deze gelijkgestelde personen", *Het Regt in Nederlandsch Indië* 23 (1867): 435-436. *"zoveel mogelijk zullen gevolgd moeten worden en overgenomen de bepalingen van het (...) vastgesteld Wetboek van Strafrecht voor Europeanen in Nederlandsch-Indië."*

[66] Jonkers, *Handboek van het Nederlandsch-Indische Strafrecht*, 2.

[67] Winckel, "Het ontwerp-strafwetboek voor inlanders en daarmee gelijkgestelden", 3. According to Winckel, Last "destroyed" the by him collected Javanese laws after his assignment had been withdrawn.

[68] When the Native Criminal Code was introduced in 1872, the legal authority of the indigenous, Old Dutch and Roman law was abolished.

Pandji Hadiningrat. He discarded the translation for its poor quality: “Those who contain some knowledge of the Javanese language will have to admit that the translation not only distinguishes itself by its lack of clarity ... but also by significant alterations and violations, to such an extent that the meaning of some articles is even in direct opposition to the original text.”[69] Translations in Malay of the Criminal Code were produced in 1888, 1890, and 1898, to be used by jaksas and local landraad members.[70]

In the Native Criminal Code, there was no direct reference to any Javanese or Islamic law. The explanatory note nonetheless says that the “nature of the native” had been considered. For example, adultery was punished less severely compared to Europeans.[71] However, in fact, room was only left for Javanese, Islamic, and local laws and customs—as advised by the penghulus and court members—in article 37 of the criminal code, which offered space for mitigating circumstances.[72] In chapters 5 and 9, we will discuss if and how this worked out in practice. In any case, as the ethnologist G. A. Wilken described it a decade later, the Native Criminal Code of 1872 had been drafted with “full neglect of the Islamic and Native legal notions.”[73] The liberal jurists of this period did not consider this to be a problem at all. To the contrary, they observed it to be a favour to the Javanese to give them a “more civilised” law, or, as Dutch jurist W. A. J. Van Davelaar stated in 1884, “we present something truly

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[69] Hadiningrat, "Boek-bespreking", 61-65. *“Wie eenigszins kennis bezit van de Javaansche taal toch zal moeten zeggen, dat de vertaling zich niet alleen onderscheidt door onduidelijkheid (...) maar ook door belangrijke wijzigingen en verminkingen, zoo zelfs dat er artikelen gevonden worden, die lijnrecht strijden met den oorspronkelijken tekst.”*

[70] See for example: Redeker, *Boekoe kaädilan hoekoeman atas orang bangsa Djawa dan lain bangsa, jang di samaken dengen bangsa Djawa di India Nederland dengan pengertijan jang ringkas, aken di pake oleh Djaksa-Djaksa, dan Lid-Lid dari Landraad dan dari Raad Sambang*. Samarang: Van Dorp & Co, 1888.

[71] Der Kinderen, *Wetboek van strafregt voor inlanders in Nederlandsch-Indië, gevolgd door eene toelichtende memorie*, 180. Explanatory note art.254.

[72] Der Kinderen, *Wetboek van strafregt voor inlanders in Nederlandsch-Indië, gevolgd door eene toelichtende memorie*, 139. Explanatory note art.37. In case of death penalty, the judge at the European courts was not allowed to decide impose a milder punishment due to mitigating circumstances. At the pluralistic courts this was possible. *“met opzigt tot Inloanders is het echter noodig geacht deze bevoegdheid aan den regter te schenken, omdat het maar al te vaak in de praktijk voorkomt, dat zij de zwaarste misdrijven plegen uit beweegredenen, die inderdaad vallen in de termen der verzachtende omstandigheden, in dit artikel opgenomen.”*

[73] Wilken, “Het strafrecht bij de volken van het Maleische ras”, 512. *"met algeheele verwaarloozing der Mahomedaansche en Inlandsche rechtsbegrippen."*

higher compared to that we have taken away from them; we only advance the development process."[74]

3.4 Adat Law or Unification, 1872–1918

The Native Criminal Code of 1872 reflected the beliefs of the liberal jurists in universal laws; the application of different laws to various population groups did not fit their ideology. In part 3, I will elaborate on how this influenced criminal law practice in the pluralistic courts, and how Dutch jurists applied the ideology in a rather selective and self-serving manner. In any case, at the end of the nineteenth century, this dominance of the legalistic liberal approach would slowly diminish. A new generation of colonial jurists became interested in the nature of both Javanese-Islamic and Javanese-customary law. Representatives of this new generation rebelled against the liberally-oriented jurists. During this period, the disparities between proponents of Dutch, colonial, or customary law would become less clear. Regarding criminal law, the outcome would nonetheless be a "liberal" unified criminal code in 1918, but with maintenance of a separate criminal procedural law and the maintenance of separate courts for the non-European and European population groups.

Arab informants and Adat "Discoverers"

Whereas discussions on Javanese-Islamic law no longer influenced the development of the substantive Native Criminal Code of 1872—which was fully based on Dutch-colonial laws—the increasing colonial intervention in the religious courts in the period from 1872 to 1890 did influence the Dutch perspective on Javanese legal traditions in general. Also, the so-called "discovery" of Javanese customary (*adat*) law led to new visions among colonial jurists. Therefore, we will now shortly explore these two issues and their corollaries.

A fear of Islam had always been apparent among the Dutch, but it would intensify during this period. Partially due to increased steamship traffic, as a result of the opening of the Suez Canal in 1869, the number of Indonesians performing the *haj* grew. After a revolt in Cilegon (in Banten) in 1888, which had religious facets, the fear increased. In 1882, the

[74] Van Davelaar, *Het strafproces op Java en Madoera,* 6. *"...stellen wij werkelijk iets hoogers in de plaats van "t geen wij hun ontnemen; wij verhaasten alleen het proces van ontwikkeling."*

religious law courts were placed under more direct colonial governance to supervise the Islamic judiciary more closely. Initially, the Dutch were hesitant to intervene in the religious courts for fear of negative consequences. Therefore, rather than ignore scholars, as in earlier decades, now they *did* consult scholars during the decision-making process. The discussions on the religious courts were not held by the liberal Supreme Court members, who had little knowledge of Islamic law. Instead, a number of Dutch scholars who specialised in Islam and Islamic law, and their Arab counterparts, were influential. Most prominently, L.W.C. van den Berg and Christiaan Snouck Hurgronje would be consulted as specialists and functioned as advisors of the government.

Van den Berg was a pupil of Keyzer, but his research displays more awareness of the Javanese practices of Islam and Islamic law. In 1874, he compiled the handbook *The Principles of the Islamic Law according to the Imams Aboe-Hanafit en asj-Sjafe'it*, based on both Hanafi and Shafi'i legal principles and intended for use by Dutch students and the presidents of landraden and circuit courts.[75] In 1879, Van den Berg was appointed a government advisor on Islamic law and was closely involved in the implementation of the 1882 reform, which brought the religious courts under direct colonial control. Van den Berg also translated Nawawi's *Minhaj al Tilanbin.*[76] This was the first legal Islamic text directly translated from Arabic by a Dutch scholar. The predecessors of Van den Berg had always worked with Malay or Javanese translations or interpretations. Van den Berg was in close contact with an Hadrami informant, Hasan Bãhabir, who assisted him while translating the *Minhaj*. Bãhabir was the Arab captain and a member of the Orphan Chamber (*Weeskamer*) in Batavia.[77] Van den Berg also collaborated with Javanese informants. In 1887, he produced a list of books used in Javanese *pesantren,* collected with the help of Chief Jaksa Adiningrat.[78]

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[75] Van den Berg, *De Beginselen van het Mohammedaansche Recht.* Introduction (*voorrede,* page 1) and 146. Van den Berg also included a chapter on criminal law, although he noted that this part of Islamic law had almost completely lost its "practical purpose" (*praktische belang*) for the Dutch.

[76] Kooria, *Cosmopolis of Law,* 33. The *Minhaj al Tilanbin* is a foundational text of the Shafi'i madhhab, from the thirteenth century.

[77] Yahaya, *Courting Jurisdictions,* 68-69.

[78] Laffan, *The makings of Indonesian Islam*, 116.; Van den Berg, *De Mohammedaansche geestelijkheid,* 14.

Christiaan Snouck Hurgronje was the second government advisor on Islamic affairs, and he presented himself as an innovator in the field of Islamic studies. He disagreed with older scholars who claimed that the Javanese would not be "real" Muslims—a claim often made by colonial officials as well. Simultaneously, Snouck Hurgronje observed himself the founder of adat law, a codification project of local Indonesian customary laws that he developed in collaboration with the Dutch jurist Cornelis van Vollenhoven.[79] Snouck Hurgronje was interested in both written and unwritten laws and was of the opinion that previously only the missionary C. Poensen had done proper research into these local legal traditions. At first, Snouck Hurgronje was based in the Netherlands and received most information through his informant, Aboe Bakar, who resided in the Hejaz. He was also in contact with Regent Soerianataningrat of Lebak, who informed him on the legal texts circulating in Java. Then, in an ultimate endeavour to mingle with Muslim communities, Snouck Hurgronje went to Mecca. Thereafter, he went to the Netherlands Indies, where he would stay until 1906. He was appointed a government advisor in 1889 and his first action was a tour of Java, during which he visited several *pesantren*.[80]

Once arrived in the Netherlands Indies, Snouck Hurgronje would partly be influenced by, as Van den Berg was, Arabs residing in Java. From 1888 onwards, Snouck Hurgronje was an ally of Sayyid Uthman, a Hadrami born in Batavia. In a direct response to the revolt in Banten, Uthman had been appointed advisor on Arabic affairs by the colonial government in 1891.[81] He was critical of the local customary elements in Javanese Islam practices and was, for example, against the prints of talismans on the back pages of Quran verses.[82] Due to his aversion of several tariqats, Uthman was not all that popular among the Javanese, but because of his cooperation with Snouck Hurgronje he did manoeuvre himself into the position of advisor on Islamic legal issues. He also exercised influence on the religious courts in Java by producing the regulations for these law courts in 1881, when they were brought under the supervision of the colonial administration.[83] Uhtman wrote a handbook

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[79] Otto, *Sharia Incorporated,* 440.
[80] Laffan, *The makings of Indonesian Islam*, 137, 141-142, 147-154.
[81] Yahaya, *Courting Jurisdictions,* 96-99.
[82] Laffan, *The makings of Indonesian Islam*, 57.
[83] Laffan, *The makings of Indonesian Islam*, 162.

entitled *Kitab al-Qawanin al-Shar'iyya,* which was translated as *De Gids voor de Priesterraden* (The guide for the priest courts) in 1894. In the words of historian Nurfadzilah Yahaya, "Sayyid Uthman shrewdly allied with Snouck [Hurgronje] in order to gain influence, not just over the Arab communities, but over the entire Muslim community in the Netherlands Indies and beyond."[84]

The objectives of the Arabs complemented the codification fever of the nineteenth-century Dutch. As a diaspora group, the Arabs had an interest in a uniform and universal Islamic legal system. It was also in their interest to develop a uniform Islamic legal system in the Netherlands Indies and other colonies, in particular because of their marriages with local women. One consequence of Dutch scholars being informed by Arab informants, however, was that the Arabs considered themselves much more knowledgeable about Islamic law than the Javanese, who were not taken seriously in this regard. Moreover, Van den Berg and Snouck Hurgronje were getting tangled up in the competition between the rival Arab informants Hasan Bãhabir and Sayyid Uthman.[85] The translations and opinions by Van den Berg and Snouck Hurgronje were often shaped after advice of Arab informants, who had their own interests in influencing the legal system.[86]

Although influenced by his Arab informant, theoretically Snouck Hurgronje agreed with Van Vollenhoven that, according to the reception theory (*receptietheorie*) they developed, adat law was dominant in the lives of ordinary Indonesians, and Islamic law was only acceptable if it had already become part of the local legal tradition.[87] Above all, Islamic law

[84] Yahaya, *Courting Jurisdictions,* 102, 122.

[85] Even though Snouck Hurgronje argued to completely disagree with Van den Berg, who he thought misinterpreted Islamic law, in practice the two men did not differ as much as often believed. Theoretically, Van den Berg followed the idea of receptio in complexu which stated that generally Islamic law ruled the lives of Indonesian muslims, whereas Snouck was a proponent of the reception theory, stating that adat law was dominant in the lives of ordinary Indonesians. In practice, however, Van den Berg seems to have been aware of the influence and validity of adat in religious court verdicts. And, as discussed below, Snouch Hurgronje futhered the influences of Islamic legal ideas from the Middle East. For a discussion on the competition between Van den Berg and Snouck Hurgronje, see: Van Huis, *Islamic courts and women's divorce rights in Indonesia,* 73-77.

[86] Yahaya, *Courting Jurisdictions,* 50, 81-83.

[87] Van Huis, *Islamic courts and women's divorce rights in Indonesia,* 74. The reception theory was in contrast to the receptio in complexu which stated that generally Islamic law ruled the lives of Indonesian muslims; Burns, *The Leiden Legacy*, 236-237. In this, Van

had to refrain from political life. In practice, however, Snouck Hurgronje was inconsistent. As legal anthropologist Stijn van Huis has argued, "his opinion with regard to the content of judgments of penghulus reveal a prescriptive and puritanical stance on Muslim family law issues. … Thus, Snouck Hurgronje, the renowned adat law scholar, actually promoted Islamic law at the expense of traditional practice, whereas Van den Berg tended to recognize the judicial tradition of the penghulus."[88] The ambivalent attitude of Snouck Hurgronje would also influence the selection process of penghulus for the pluralistic courts, as will be discussed in chapter 6.

In the Netherlands, however, the reception theory and the adat school would gain importance in the early twentieth century and regarding research into adat law, contrary to Islamic law, the Dutch depended on local informants. Van Vollenhoven, in particular, relied on Indonesian informants for his adat law collections. He did not do the field work himself, and most of the collecting information was done by his Indonesian students. Political scientist Dan Lev has argued that the collection of the adat law itself was not free of political aspects as well, since it was often directed against Islam and stimulated by local elites, who, like the Dutch, felt threatened by Islamic influences in society.[89]

Unification and Continued Segregation

Towards the end of the nineteenth century, the interest in Javanese laws would also gain a foothold among the colonial judiciary. With regard to

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Vollenhoven observed Germany as how not to do it. There, his idol Von Savigny was eventually caved for Roman law instead of following German local laws. Van Vollenhoven was determined to not make a mistake like that in the Netherlands Indies, and not allow any more Dutch or Islamic elements.; Van Vollenhoven, *De ontdekking van het adatrecht,* 11. Van Vollenhoven argued that the VOC compendia were of better quality that the "younger mayhem" (*jongere wanwerk*) of Der Kinderen. Van Vollenhoven emphasized the importance of understanding local laws and ordering them. Therefore, he promoted the segregated legal system, although according to his ideology the co-existing legal systems had to be equal instead of unequal as it had been the case until then.

[88] Van Huis, *Islamic courts and women's divorce rights in Indonesia,* 77.

[89] Daniel S. Lev, "Colonial Law and the Genesis of the Indonesian State," 66. "…from fear, both Dutch and local, of Islamic expansion, the adat law scholars spent much intellectual energy proving that Islam had made few inroads into adat. This was not a realistic or even theoretically sensible view of the interweaving evolution of Islamic and other values in the changing societies of Indonesia. But it served to transform adat increasingly into the conservative legitimating sumbol of local authorities, who appreciated the help, against Islamic challenges."

criminal law, prominent jurists divided into those who were in favour of the adat school versus those who, in line with the liberal tradition, continued to strive towards unification of all laws for both the non-European and European population.[90]

On Wednesday, 10 October 1906, for example, the Dutch parliament in The Hague discussed the two opposing ideas on how the legal system for the Indonesian population should be organised: unification or adat law. The former Minister of Colonies A.W.F. Idenburg had proposed effectuating greater equality in the legal status of the various population groups in the Netherlands Indies. Idenburg was a proponent of unification and proposed to alter article 75 of the Colonial Constitution. However, participants in the debate in Parliament were looking at this subject from several diverse perspectives and had different solutions in mind for clarifying the legal principles through which to govern the Indonesian population.

Henri van Kol, a member of the Social Democratic Workers' Party (Sociaal Democratische Arbeiders Partij, or SDAP), was convinced that law had to adjust to the society and not vice versa. Therefore, Indonesians had to be judged according to customary law. The French, and also the Germans, had been inspired by the Dutch example of dualism during the Colonial Congress in 1900, and now, Van Kol lamented, this went out of the window due to the urge for unification:

> During the conference in Paris in 1900, where representatives of all powers, men who have won their spurs in the field of colonial politics, have declared unanimously that the preservation of the native institution in each field is the duty, and should be the aim of, every colonial Power. To date, we have set an example in this. Now, one plans to wilfully destroy that which is found desirable in our colonial politics. In France and Germany, where they recognized the wrong of the Europeanising of

[90] L. W. C. van den Berg had become a proponent of unification in the 1890s, because he wanted to improve the position of the Christian 'Natives', being the spokesman of the Christian political party (ARP; *Anti-Revolutionaire Partij*) in Dutch Parliament, 1911-1923. Fasseur, "Cornerstone and Stumbling Block", 39-40.

> the law, they have abandoned this approach, and now we would be taking this route that others are departing from.[91]

Van Kol also presented himself as a follower of Van Vollenhoven, who regarded Islamic law of little importance in the Netherlands Indies. Van Kol had a very narrow understanding of reception theory and discarded all Islamic influences on Javanese legal traditions. He argued that "adat is purely native and is, foremost in Malay countries, in direct opposition to that which the Quran preaches."[92] J. H. De Waal Malefijt, a member of the Protestant-Christian Party (Anti Revolutionaire Partij, or ARP) was diametrically opposed to the followers of the adat school. He believed that the road to unification had been travelled long since, and that the process had to be accelerated.

In the end, Minister of Colonial Affairs Dirk Fock, who had been a private lawyer in Semarang and Batavia from 1880 to 1898, was in favour of unification, and on 30 December 1906, a legislative proposal to unify both substantive and procedural—and both civil and criminal—law was accepted. A committee led by Stibbe was assigned to compose the drafts. However, due to firm opposition from the followers of the "adat law school," in particular by Van Vollenhoven, the unified civil and procedural codes never became "effective law."[93] In the mid-1910s, the ideas of Van Vollenhoven won out over unification.[94] Thereafter, in civil law cases, the adat school prevailed. In the New Colonial Constitution (Indische Staatsregeling) of 1925, Islamic law was officially declared secondary to

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[91] "Handelingen Tweede Kamer", October 10, 1906. www.statengeneraaldigitaal.nl Van Kol: "*Op het congres te Parijs in 1900, waar vertegenwoordigers waren van alle mogendheden, mannen, die op het gebied der koloniale politiek hun sporen hadden verdiend, werd eenstemmig verklaard, dat handhaving van de inlandsche instelling op elk gebied, de plicht en het streven moet zijn van elke koloniale Mogendheid. Daarvan hadden wij tot heden het voorbeeld gegeven en thans gaat men het goed wat in onze koloniale politiek gevonden wordt, moedwillig vertrappen. In Frankrijk en Duitschland, waar men het verkeerde heeft ingezien van het Europeaniseren van het recht, keert men er op terug, en nu zouden wij den weg gaan inslaan, die door anderen verlaten wordt.*"

[92] "Handelingen Tweede Kamer", October 10, 1906. www.statengeneraaldigitaal.nl Van Kol: *"Adat is zuiver inlandsch en vaak vooral in Maleische landen in lijnrechten strijd met hetgeen de Koran leert."*

[93] Fasseur, "Cornerstone and Stumbling Block," 40.

[94] Bloembergen, *De Koloniale vertoning,* 57.

adat law.[95] In civil law practice, the different interpretations within the adat school became visible. Land law—often decided over by landraden—would be influenced by Van Vollenhoven's adat school, and customary laws were applied. Family and divorce issues, however, remained subject to the religious courts and became, partly due to the interference of Snouck Hurgronje, of a more Islamic character.[96]

The so-called "discovery of the adat law" of the early twentieth century, however, was of minor influence on criminal law. The unification of the Criminal Code of 1918 became the only colonial law code that would be unified for both Europeans and non-Europeans—mainly because the Native Criminal Code of 1872 was already based on Dutch law. This was supported by a fairly broad majority, due to the particular importance of criminal law for the colonial government. Leiden law professor Carpentier Alting expressed this as follows in a speech in 1907, when he became the new chair of Main Subjects of Contemporary Law, Criminal Law, and Criminal Procedural Law of the Netherlands Indies: "The state, whenever regulating in the field of criminal law, acts as the maintainer of the rule of law and [the state], when doing so, cannot obey any other will than his own, he cannot accept any other principle as true than the one which has become his possession after centuries of pondering."[97] Carpentier Alting chose a middle road in the adat versus unification debate, claiming that he was convinced that civil cases could be decided by adat law, though observing that this would be impossible in the case of criminal law.[98]

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[95] S 1925/415, art.134 (2).
[96] Van Huis, *Islamic courts and women's divorce rights in Indonesia*, 77-78.
[97] Carpentier Alting, *Rede Indisch strafrecht,* 19. *"De Staat, waar hij regelend optreedt op het gebied van strafrecht, handelt als handhaver der rechtsorde en Hij kan daarbij niet gehoorzamen aan een anderen wil dan zijn eigene, geen ander beginsel als het ware aannemen dan hetwelk zijn eigendom is geworden na eeuwen van denken."*
[98] Carpentier Alting, *Rede Indisch strafrecht,* 24. Interestingly, Carpentier Alting—and Van Deventer had done this as well during the 1906 debate in parliament—referred to the British policy regarding this subject and in particular to Macauley who had argued that legal certainty had to be top priority. In case of civil law, legal certainty was achieved if the law aligned with that what the people observed as just. In criminal law this was different, because here the state had to decide what was just. Again, he referred to a Brit, Sir John Strackey, who had defended the introduction of the Indian Penal Code of 1860— based on European legal principles—with the argument that a European government was the representative of civilization at war with barbarity. Carpentier Alting thought this last part to be of a too strong character, but he did agree with Strackey.

Also, Carpentier Alting thought that the colonial criminal code should be different than the Dutch criminal code, because it had to be adjusted to the types of crimes that existed in a particular society. He gave the example of *wang teboesan* (theft, after which the person robbed received back the stolen goods in return for money), a crime identified by Carpentier Alting as typical for the Netherlands Indies.[99] This would be implemented in the unified Criminal Code of 1918. The Criminal Code was almost identical to the Dutch Criminal Code, with a few articles unique to the Netherlands Indies. Divination was prohibited, as well as wearing amulets and organising cock- or cricket fights without official permission. Other articles reflected colonial administrative concerns, such as designating "deliberately spreading lies to foment trouble" as a crime. Furthermore, "coercion by a civil servant to confess or provide a statement" was penalised.[100]

When examining the informants consulted, the political debate in the Netherlands on unification was often based on the practical experience of colonial jurists, private lawyers, or judges. It was a European discussion in which political colour prevailed. Defending the rights of Christian Indonesians, the interests of Liberals, or the convictions of Socialists all played their part. Although the influence of the adat law school was limited in the case of criminal law, there were consequences for criminal law practice. Criminal cases could potentially be influenced by customary law. For example, in cases of adultery, which penalised by the colonial Criminal Code, whether a marriage was legitimate was decided according to adat law.[101] Of greater impact, however, might have been the extent to which judges were influenced by the general ideology of the adat law school. It exceeds the scope of this research, but it would be interesting to investigate whether the interest in adat law caused the landraad presidents to make their judgments based on flexible interpretations of colonial criminal laws defending this by referring to a difference in civilization, race, and culture (see epilogue). Finally, punishments such as the death penalty and forced labour continued to exist in the unified criminal code, but were in practice

[99] Carpentier Alting, *Rede Indisch strafrecht,* 28.
[100] Fasseur, "Een vergeten strafwetboek, " 37-53.
[101] Jonkers, *Vrouwe Justitia in de Tropen.* 10–19.

only imposed on Indonesians.[102] There was a unified criminal code, but punishments continued to be applied unequally.

Moreover, and with considerable impact, criminal procedural law would never be unified, and the dual law court system was never abolished, causing an ongoing inequality between Europeans and non-Europeans. If, after a lengthy pre-trial detention, a suspect was put on trial, there were fewer legal guarantees for non-Europeans than for Europeans. For example, the European procedural code stated that an accused should receive the indictment at least one day before the court session. He also had the right to see the list of witnesses. Moreover, he was defended by a lawyer. Javanese suspects did not have all these legal guarantees: "Until the day of his trial, he does not know—along formal lines—more about the case for which he has been apprehended, than that he is being held in pre-trial detention. And it is left to him to guess and surmise which facts and which crime he will be accused of, which witnesses will be called by the Public Prosecution Service, and which pieces of evidence will be presented in his accusation." Thus, the accused had no means to prepare for his defence and, according to the jurist J. J. C. Gaijmans, he also held "none of the least protection against the Public Prosecution Service."[103] The consequences of the dual character of procedural law were plentiful. House searches by the police and pre-trial detention are examples of this, as will be further discussed in part 3. The local population had fewer legal guarantees and the police and justice system had all kinds of coercive instruments: "Coercion against person, coercion against goods, of the accused, of the witnesses, of other persons."[104]

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[102] Ravensbergen, "Nederland hield doodstraf in Indië in stand." If a governer general was an opponent of the death penalty, such as D. Fock (1921-1926) he would always grant mercy. In the later years 1929-1936, however, death penalty was imposed on 27 non-Europeans suspected of murder, of whom only 13 were granted mercy.

[103] Gaijmans, *De Landraden op Java en Madura*, 70. *"Tot op den dag zijner verschijning ter terechtzitting is hem, langs wettigen weg, niet meer van de zaak, waarvoor hij in rechten is betrokken, bekend, dan dat hij zich in voorloopige hechtenis bevindt, en wordt het hem overgelaten te raden en te gissen welke feiten en welk misdrijf hem ten laste worden gelegd, wie de getuigen zijn waarvan het Openbaar Ministerie zich zal bedienen, en welke bewijsstukken ten zijnen bezware zullen worden voorgebracht."*

[104] Idema, *Landraad-strafprocesrecht*, 117. "*Dwang tegen den persoon, dwang tegen het goed, van beklaagde, van getuigen, van derden.*"

3.5 Conclusion: The Impact of Informants

Javanese jaksas, Islamic penghulus, Dutch residents, Delft scholars, Arabs, and local investigators: the informants whom the Dutch selected to serve as specialists, to determine which "native laws and customs" should be applied, came from a diverse range of backgrounds. Much emphasis has been put on how the Dutch would only have "discovered" adat law at the end of the nineteenth century. However, in earlier periods officials, scholars, and judges were very well aware of the existence of local customs in the Javanese legal traditions. They all just dealt with it differently. Throughout the nineteenth century, most observers agreed on the importance of Islamic law to the Javanese. It was only the adat law school, in the early twentieth century, that believed Islamic influences to be harmful to the preservation of adat. Yet, Islamic influence on the legal system were already present, and increasingly dominant, from the eighteenth century.

During the nineteenth century, the tendency in colonial criminal justice was towards an increasing prominence of European laws, with a residual role for Islamic and customary laws. This culminated in the Native Criminal Code in 1872, which was largely based on the Netherlands Indies' Criminal Code for Europeans of 1866. The informants consulted were increasingly Dutch colonial officials instead of Javanese experts. However, due to a fear of Islam and despite a lack of knowledge of the Javanese legal system, the Dutch colonial government would not formally diverge from the policy of adjudicating the Javanese population according to their own laws, customs, and traditions.

It does not clarify much to speak of a dichotomy—a division in two strands—between the supporters and opponents of the preservation of customary law. Instead, if a division is necessary at all, it would be more correct to speak of a division into four strands: strict proponents of the export of Europeans law to Java (concordance principle); proponents of a "colonial law" based on European laws, but adjusted to the Netherlands Indies—and colonial power interests—and therefore lacking some of the "enlightened" European legal principles such as the separation of powers (rule of law) as we will see in part 3, below; proponents of the application of Javanese law and a combination of Islamic and customary laws; and proponents of "recovering" adat law by removing Islamic principles and traditions from customary law. These divisions were not stable, but

differed by the subject matter at hand or the constellation of power interests at play. Moreover, proponents of a distinct colonial law based on European antecedents often used the arguments of those who supported the application of Javanese law as though they favoured this direction, although some jurists, such as Merkus, at certain times attempted to combine a sincere interest in Javanese laws with the development of a colonial law.

Without exception, however, all four strands aimed at an "improvement" of Javanese legal traditions, not excepting followers of the third strand such as Snouck Hurgronje, who intervened extensively in justice as applied by Javanese religious judges. Also, without exception, throughout the nineteenth century, while investigating Javanese law, the Dutch merely discussed the Javanese but did not talk *with* them.

Fig.9 Landraad session in Banyumas, between 1897 and 1903. [KITLV no.119285].

Fig.10 Landraad session (landraad president De Flines), ca. 1915. [Stadsarchief Amsterdam, archive De Flines, no.856].