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

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4 — Local Advisor Controversies

The penghulu-jaksa controversy provides a unique window into how pre-colonial legal pluralities were incorporated in the emerging colonial courts in Java, and how courtroom conflicts emerged and evolved. This chapter focusses on the Dutch motivation in appointing Islamic penghulus, rather than jaksas, as the main legal advisors in criminal cases. It also explains why, despite a desire for uniformity among Supreme Court members in Batavia, the consultation of local legal advisors remained central to the colonial legal system. The consequences of this tension between the Supreme Court and the policy of maintaining pluralities are scrutinized in order to further understand the complexities of colonial state formation in the early nineteenth century.

4.1 Advising together, 1800–19

As discussed before, in most Javanese regions the pre-colonial jaksa held the knowledge of Javanese laws while he also was the policing and prosecuting authority and had been the judge in *padu* cases. Due to the increase of Islam and Dutch power, he lost a significant portion of his role as judge to both Islamic penghulus and administrative—Javanese and Dutch—officials during the eighteenth century. Over time, his policing and prosecuting responsibilities would become his primary task. The struggle between jaksas and penghulus in certain regions was still ongoing around 1800 though. The archivist De Haan wrote on Cianjur (in West Java): "In Cianjur around 1800—where piety had settled in the palace—a fierce conflict arose between the patih, son of the regent, who wished to apply Islamic law, and the jaksas armed with old Javanese legal codes. The jaksas were forced into compliance by the patih with firm support of the rattan."[1]

The first penghulus in Java were most likely prominent local converts to Islam. Their knowledge about implementation of sharia was at

[1] De Haan, *Priangan* Vol. 1, 412. *"Omstreeks 1800 bespeuren wij te Tjiandoer, waar de vroomheid haar zetel in de dalem had opgeslagen, een heftig conflict tusschen den Patih, zoon van den Regent, die Moslimsch recht toegepast wil zien, en de met hunne oud-Javaansche wetboeken gewapende djaksa's, die nu door den vroomen Patih met krachtige ondersteuning van de rattan tot meer meegaandheid worden overreed."*

first especially needed for concluding Islamic marriages.[2] During VOC times, in Batavia, at the Board of Aldermen, the "Islamic priest" (then still referred to as *molla*) was a well-known face, since he took oaths.[3] As described in earlier chapters, during the eighteenth century, the position of the penghulu had been subject to several dynamics simultaneously taking place in Java and his position, and the influence of the Islam in general, displayed a rising trend. The penghulus in Java were not only judges, but also administrators, imams of the mosque and religious teachers. They also operated as muftis, people consulted by the ruler for an explanation of Islamic laws.[4] All these positions were not necessarily carried out by one person. There could be several Islamic officials in one residency. It was an unwritten rule that the position of penghulu was hereditary.[5] Many, although not all of them, were hajis. Family law cases—marriage, inheritance, and divorce—were decided on by the religious courts, consisting of penghulus, who were under the responsibility of the regent from 1820.[6] During the nineteenth century, the penghulu maintained his various functions and he was also appointed as an advisor to the pluralistic courts.[7]

Although Daendels has been identified as the first person to add the penghulu as an advisor to the landraad,[8] in Cirebon penghulus were already present in the landraad in the early nineteenth century. They are mentioned in the landraad of Cirebon regulations as officials in the council. The jaksa, on the other hand, is only mentioned as the official in service of the "native prosecutor." Besides, the Javanese prosecutor took an oath in an Islamic manner "under the Quran" (*onder den AlKoran*). In this oath, he also submitted to the king of Holland and the governor general. At the

[2] Hisyam, *Caught between Three Fires*, 14.
[3] Van der Chijs, *Nederlandsch-Indisch Plakkaatboek.* Part 15, 975. Plakkaat, November 22, 1809. "Toekenning aan den molla of inlandschen priester bij het collegie van Schepenen eener maandelijksche toelage van 15 rijksdaalder." Previously, the "native priest" received a similar compensation from the city budget (*stadskas*).
[4] Hisyam, *Caught between Three Fires*, 19.
[5] Hisyam, *Caught between Three Fires*, 43.
[6] S 1820/22. "Reglement op de verpligtingen, titels en rangen der Regenten op het eiland Java." Art. 13: *"De Regent heeft toezigt over de zaken van de Mahomedaansche Godsdienst, en zorgt dat aan de Priesters het oefenen van hun beroep, overeenkomstig de zeden en gewoonten der Javanen, worde vrijgelaten, zoo als in huwelijkszaken, boedelscheidingen en dergelijken."*
[7] Pijper, *Studiën over de Geschiedenis van de Islam in Indonesia,* 66.
[8] Ball, *Indonesian legal history,* 97.

same time, he promised to follow Islamic laws insofar as they were written down in the Semarang Compendium.[9]

We discussed in chapter 2 how Daendels established several pluralistic law courts in western Java, where the penghulu fulfilled a position. In the Priangan, the penghulu was given an extra prominent position, because Daendels gave him responsibility for the population censuses, which were of importance for the Priangan system. In exchange, the penghulu received additional tax revenues.[10] Daendels also established pluralistic law courts in the Northeast Coast of Java, but in his report on this, Daendels did not mention the penghulu in his description of the Landgerechten—the later landraden—of that particular region. He did mention that the peace courts (*vredesgerigten*, the later *regentschapsgerechten*) were constituted of "*regenten, bepattijs, pangoelons.*"[11] It is not completely clear, though, whether Daendels correctly understood the then existing Javanese legal system. On the Javanese administration, he wrote:

> Thus, the regents stayed at the head of affairs. After them, two bupatis followed, one called the inner- and the other outer-bupati [*Binnen-* and *Buiten-Bepatty*; among other duties, the inner-bupati was responsible for police affairs]. Ranked after them was the chief jaksa or chief priest. He was responsible for the maintenance of the religious institutions and ceremonies, and also for the conservation of all customs and habits, et cetera.[12]

From this citation, it seems that Daendels was either (wrongly) under the

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[9] NL-HaNA 2.21.004.19 Van Alphen en Engelhard 019A, 259. "Memorie Instructif", supplements.
[10] Van Huis, *Islamic courts and women's divorce rights in Indonesia*, 119-124.
[11] Daendels, *Staat der Nederlandsch Oostindische Bezittingen*, 43.
[12] Daendels, *Staat der Nederlandsch Oostindische Bezittingen*, 41. *"De regenten bleven dus aan het hoofd der zaken. Op hen volgden twee bepattys, de een een Binnen- en de ander Buiten-Bepatty genoemd. [de binnen-bepatty zorgden onder andere voor de politie, sr] Op de Bepatty's volgde in rang de Groot Jaxa of Opperpriester. Deze was belast met de handhaving der godsdienstige instellingen en plegtigheden, en tevens met de zorg voor de instandhouding van alle plaatshebbende burgerlijke inrigtingen, gewoonten, gebruiken enz."*

impression that the jaksa and penghulu were one and the same person, or he was consciously leaving it as an open question since in some regions the jaksa, and in others the penghulu, was observed as the head of religious affairs.

Altogether, it seems that during Daendels' administration the penghulu was part of the pluralistic courts in western Java—Cirebon, Bantam, and Priangan—whereas this was not the case in the residencies of the Northeast Coast region. This resembles the situation of the VOC landraden, where the landraad of Cirebon did receive advice from the penghulu during court sessions, while the landraad of Semarang probably did not, although the penghulus were involved in the compilation of the Semarang Compendium. It is possible that in Daendels' time the penghulu also acted as an advisor to the landdrost of the Ommelanden, because the landdrost was permitted to work with two Javanese or Chinese experts as assessors.[13]

The historian John Ball has argued that Daendels' appointment of the penghulu as a legal advisor "illustrates the European over-emphasis of the religious part of Javanese law." The jaksa would have been much more knowledgeable about Javanese laws and customs, so it would have made more sense to appoint him. However, as Ball also admits, by that time the jaksa had already become less important as a judge, whereas the penghulu courts in many regions had expanded their jurisdiction.[14] Besides, the penghulu courts had made use of a combination of local and Islamic laws as well. Thus, Daendels' preference for the penghulu may have been inspired by the idea that Islam was the main component of Javanese law; but it is also possible that he considered the penghulu the most knowledgeable official regarding Javanese legal traditions in general.

Raffles chose a different approach. He rightly understood the pre-colonial Javanese legal system as consisting both penghulu and jaksa courts.[15] This led to his policy that in the landraad the jaksa and the penghulu were *both* asked to explain the local and religious laws and customs.[16] He was aware of the declining influence of the jaksa, but wished to maintain his position: "The priests also exercise a considerable influence

[13] Ball, *Indonesian legal history*, 97.
[14] Ball, *Indonesian legal history*, 97.
[15] Raffles, *The History of Java*, Volume 1, 277.
[16] Raffles, *Substance of a Minute*, 164.

and although the power the jaksa, or law officer, is essentially reduced since the establishment of Mahometanism, and a great part of his authority transferred to the panghúlu or Mahometan priest, he is still efficient, as far as concerns the police and minor transactions."[17]

Raffles seems to base himself here on information about the situation in Java at that time. He reported on the situation in Japara (Northeast Coast, close to Semarang) before the arrival of the British—his informant is unknown. He described the *surambi* courts in which the penghulu presided and in which four religious officials were seated: "The forms of the court are regular, orderly, and tedious; all evidence is taken down in writing, and apparently with much accuracy." The regent would pronounce the eventual verdict. The jaksa courts consisted of the chief jaksa and other jaksas: "the function of this court being of less importance of a more mixed nature, and less solemn because less connected with religion, are still more subject than that of the penghulu to the rude interference of the executive authority."[18]

It is also remarkable that Raffles made the advice of the penghulu and the jaksa of a more binding nature. If the regent in a regent's court (*bupati* court) case wanted a decision that ran counter to the advice of the jaksa and the penghulu, he had to inform the resident, who would issue a final decision.[19] This was the same for the landraad (resident's court) where the resident had to inform the governor general if he wished to deviate from the advice of the jaksa and penghulu.[20] The jaksa and

[17] Raffles, *History of Java.* Vol. 1, 269.

[18] Raffles, *History of Java.* Vol. 1, 269. Raffles had also collected a number of old Javanese legal texts, such as the *Suria Alam*, which he added as an attachment (Appendix C) to the *History of Java.*

[19] Raffles, *History of Java.* Appendix D. "Regulation A.D. 1814, Passed by the Honourable The Lieutenant Governor in Council on the 11th of February 1814, for the more effectual administration of justice in the Provincial Courts of Java." Art.77.

[20] Raffles, *History of Java.* Appendix D. "Regulation A.D. 1814, Passed by the Honourable The Lieutenant Governor in Council on the 11th of February 1814, for the more effectual administration of justice in the Provincial Courts of Java." Art.105–106. *"In every instance where the opinions of the Panghulu and Jáksa are in accord with the judgment of the Resident, and in which the punishment fixed to the crime does not amount to imprisonment or transportation for life, the sentence of the Resident shall be final, and be immediately carried into execution. (Art.106) But whenever the opinions of the Panghulu and Jáksa shall be in opposition to that of the Resident, or in which the punishment of the crime shall amount to imprisonment or transportation for life, all the proceedings shall be immediately transmitted to Government, with the Resident's statement of the reasons and regulations on which he has formed his opinion; but he shall delay the pronouncing sentence, until the approval of the Honourable the Lieutenant Governor shall have been obtained."*

penghulu were also required to write down and sign their opinions in the vernacular language, and send this and the resident's statement to the government.[21] In the circuit courts, the judge also had to apply the local law as advised by the penghulu and jaksa, but he was allowed to deviate from this advice, although he had to explain why he had decided to do so.[22]

Despite his interest in the Javanese legal system and the appointment of both the jaksa and the penghulu as advisors in government lands, Raffles did not treat the penghulu in the princely lands of Central Java with much tact, and he violently conquered the sultan's palace (*kraton*) there. Also, he introduced the requirement that all persons not subject to the sultan but residing in the princely lands be tried by colonial law courts in criminal cases. This provoked anger both at Diponegoro's royal court and among the Islamic clerics.[23] It even brought these two groups closer to each other, whereas before the issue of Islam had divided them. Historian Peter Carey argues how this added to Diponegoro's strength in the years before the Java War: "Unlike the issue of Islamic religious practice, which tended to divide Diponegoro's court and santri supporters, the former favouring a less strict observance than the latter, British moves against the competence of the royal and religious courts in criminal cases united the two groups. Diponegoro's demands to be recognized as the regulator of religion with special competence over issues of criminal justice thus had widespread resonance."[24]

There are also indications that the influence of the jaksas and penghulus on criminal law was not equally strong across Java. Resident A. S. Cornets de Groot of Gresik (Northeast Java) wrote a report in 1823 describing the duties fulfilled by the Javanese officials in that area before 1819. He described how the jaksa (*djeksa*) prosecuted crimes and presided over civil cases. His house was situated to the left of the regent.[25] There

[21] Raffles, *History of Java.* Appendix D. "Regulation A.D. 1814, Passed by the Honourable The Lieutenant Governor in Council on the 11th of February 1814, for the more effectual administration of justice in the Provincial Courts of Java." Art.107.
[22] Raffles, *History of Java.* Appendix D. "Regulation A.D. 1814, Passed by the Honourable The Lieutenant Governor in Council on the 11th of February 1814, for the more effectual administration of justice in the Provincial Courts of Java." Art.168.
[23] Carey, "Revolutionary Europe and the Destruction of Java's Old Order." 167–188.
[24] Carey, "Revolutionary Europe and the Destruction of Java's Old Order." 179.
[25] Cornets de Groot, "Verslag over residentie Grissee over 1822", 14:2, 268; 15:1, 87. The Resident Cornets de Groot (of Gresik) translated "djeksa" into "sincere judgement or judge": "*Het woord Djeksa betekent "opregte uitspraak of regter.*"

was also a *nijaka*, a judge, without whom the regent could not render a judgment. *Nijaka* is a term in sanskrit meaning "subordinate," but Cornets de Groot translated it as "local judge" (*plaatselijke rechter*). He did not note which laws were applied, so we are not certain what kind of judge the *nijaka* was. It is interesting, though, that the penghulu seems to have had no voice in criminal justice. This is remarkable because the penghulus were without doubt important in this area. There was a holy grave in Gresik, which was one of the first areas in Java in which Islam was established. Cornets de Groot did mention in his report that the penghulu took care of this grave, and decided over marriage and divorce cases.[26] It is possible that the penghulus were attending the criminal cases, or that the other judges were applying Islamic law, but this was not noted down by Cornets de Groot. In any case, Raffles introduced both the jaksa and the penghulu as advisors in all landraden and circuit courts in Java.

The combined advice-giving by the jaksa and penghulu was maintained by the Dutch in the Provisional Regulation of 1819. It provided a more defined role for the procedures followed by the advisors. During a court session, first they were asked for their advice (*gevoelen*), and during a second round they would advise with the court about the punishment that should be imposed according to the "native laws."[27] There was one big difference compared to Raffles' time, however: after 1819, the court was no longer obligated to follow the advice of the penghulu and the jaksa. The Javanese members of the court—who regained their right to vote—and the Dutch president could decide to ignore the advice and decide otherwise without informing a higher authority about it. Unfortunately, I have been unable to find the deliberations of the committee that designed the regulation of 1819 in the archives, so the exact rationale for this remains unclear. It is clear, however, that due to this the position of the regents was strengthened and that of the jaksas and penghulus diminished. This was contrary to Raffles' policies who, in his turn, did this the other way around.

[26] Cornets de Groot, "Verslag over residentie Grissee over 1822", 15:1, 93.

[27] S 1819, no.20, art.112. "*Het onderzoek afgeloopen zijnde, zal het gevoelen van den hoofd-jaxa en van den hoofd-panghoeloe over de zaak worden gevraagd, en tevens de straf welke de inlandsche wetten stellen op de misdaad, waarvan de gevangene wordt beschuldigd."*

4.2 Advisors and Prosecutors, 1819–48

Slowly but steadily, between 1819 and 1848 the jaksa in the colonial pluralistic courts would transform into the public prosecutor, whereas the penghulu remained an advisor. This happened gradually in practice, and it was eventually formalized in the regulations of 1848.

There were regional differences in this process. Some procedural documents are preserved from the landraad of Gresik from the time it was presided over by Resident A. S. Cornets de Groot in the early 1820s. In these cases, it is shown that both the jaksa and the chief penghulu were provided advice in the landraad. On Wednesday, 12 December 1821, for example, during a court session six persons were tried on suspicion of cattle theft and hiding and fencing buffalos. Resident Cornets de Groot was president, the first secretary G. J. Evertreich acted as the registrar. The four Javanese members were the Regent Tumenggung Djoyo Adie Negoro of Gresik, the Police Chief Djoyo Negoro, the City Patih (*Patty Kotta*) Djoyo Duromo, and Ingebij Merto Dipoero. Chief Jaksa Rekso Dirdjo and Chief Penghulu Merto Agomma were present as well.[28] Three suspects were accused of having stolen two buffalos from the Javanese Proyo Troeno (alias Po Sonno) two months before. Another suspect had hidden the buffalos and another two had bought the buffalos from the thieves for twenty-five guilders even though they knew the buffalos were stolen. The four thieves had divided the gains among themselves. During the court session, the jaksa presented two witnesses. One declared that the suspects had told him they were planning on selling the buffalos; the other was the victim, who declared that he had gone to the regent because a lower-ranking chief was not making any progress with the police investigations, probably because one of the suspects was a chief himself. The regent had believed this story and immediately imprisoned Singo Diwongso, a *kamitoea* (village chief). The members of the landraad declared all the suspects guilty after the jaksa and penghulu had delivered their advice. A week later, a Chinese suspect was tried by the landraad and the jaksa and penghulu again offered their advice.[29] In all four preserved cases from Gresik, the jaksa and the penghulu either separately gave similar advice or advised jointly. The procedure changed slightly depending on the session

[28] ANRI IZ, no.121. Landraad case Pa Bajang, Pa Giena, Singo Wongso, Tro yoijo, Singo Dewongso and Songo Wingso. Grisée, December 12, 1821..
[29] ANRI IZ, no.121. Landraad case Pa Moor. Gresik, December 20, 1821.

though. During one, the landraad members declared the suspect guilty and only asked the jaksa and penghulu for their advice afterwards. In another session, the jaksa and the penghulu were asked for their advice before the court ruled on the defendant's guilt.[30]

In Semarang, the jaksa and penghulu gave joint advice as well. On Thursday, 24 May 1830, the landraad of Semarang gathered to try a theft case. Four Javanese coolies were suspected of having committed a theft in the house of a Chinese trader. Assistant Resident Dirk Donker presided over the landraad because the resident was absent. The two Javanese court members were the priyayi Kyai Adipathij Soero Adi Hendjolo and Raden Soerio Wenoto. The president and members followed the joint advice of the Chief Jaksa Raden Ingebeij Nitie Nedoro and the Chief Penghulu Hadjie Mahmoed to condemn three suspects to be flogged and to perform five years of hard labour (without chains). They advised acquitting the fourth suspect due to a lack of evidence. Thus, also in Semarang, according to the procedural documents, the jaksa and the penghulu gave joint advice. In the procedural documents a short and unspecified reference was made to "the Islamic laws."[31]

The advice giving at the landraden in the suburbs of Batavia was organised differently. Here, the jaksa and the penghulu were asked for their advice separately—and they often disagreed. Whereas in Semarang the jaksa and the penghulu were both clearly legal advisors, in the vicinity of Batavia the jaksa represented the colonial institutions rather than the local traditions. On 9 November 1831, at the landraad of the south quarters of the Ommelanden, the chief penghulu Imam Achmad Redjap advised cutting off the right hand of a farmer named Dril. He was suspected of the theft of a headscarf at the bazar and robbing a person near the post office. Then, the jaksa Raden Soeria referred to Article 120 of the 1819 provisional regulations, in which all cruel and mutilating punishments were forbidden, and recommended thirty rattan strokes and two years of chain

[30] ANRI, IZ, no.121. Landraad case Pa Bajang, Pa Giena, Singo Wongso, Singo Diwongso and Singo Krongso. Gresik, December 12, 1821, Landraad case Pa Moor. Gresik, December 20, 1821. Landraad case Singo Tjindro. Gresik, December 12, 1821.

[31] ANRI, GS Semarang, no.4114. Landraad case Soedoo, Padjidin, Goedik and Sidik. Semarang, May 24, 1830. "*de Mahommedaansche wetten."*

labour. The court members followed the jaksa's advice, which was similar to his plea as a prosecutor.[32]

Thus, from the procedural documents from the Northeast Coast regions, there is no apparent conflict between the jaksa and penghulu regarding the content of the applied laws, insofar as this is possible to conclude from the documents. In Batavia and Ommelanden, there was disagreement between the penghulu and the jaksa; but this could be because the jaksa was already acting more like a public prosecutor who represented the colonial administration, while the penghulu gave substantive advice based on Islamic laws. Moreover, it could be of influence that in Batavia and Ommelanden the jaksa and penghulu were only (officially) appointed in 1819.

In 1825, an evaluation by colonial officials was done on how the introduction of the landraden in the cities had been received. The Council of Justice in Semarang stated in their report that the advisors of the landraad were both the penghulu and the jaksa, advising on Islamic laws and local customs and traditions, respectively. It also emphasized that the Javanese members of the landraad, the majority of the members in the collegiate court, were likely to be influenced by the advice of the chief jaksa and the chief penghulu: "The advice is in all probability based on Islamic laws, or the customs and usages of the natives. Due to this, their opinion will inevitably be of major influence on the Native chiefs who constitute the majority of the members of the landraad."[33]

It becomes clear from the evaluation written by the resident of Semarang though, that the influence of the penghulu at the landraad there was observed as more considerable than that of the jaksa. He concluded that decisions in the landraad were made according to Islamic law, because the Javanese members would listen to the penghulu who would advise according to the Quran: "They predominantly will follow the advice of the Chief priest, who never deviates from the Quran."[34]

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[32] ANRI, GS Tangerang, no.28/I. Landraad case Dril. South Quarters of the Ommelanden. November 9, 1831.

[33] ANRI, AS, B. December 13, 1825, no.3. Letter from the Council of Justice. December 27, 1824. *"...dit gevoelen is waarschijnlijk gegrond op Mahomedaansche wetten, dan wel het komen en gebruikelijkheden onder den Inlander, en daar haar lieden opinie noodwendig op de Inlandsche hoofden, die het meerder getal der Leden van den Landraad uitmaken, van een groote influentie moet zijn."*

[34] ANRI, AS, B. December 13, 1825, no.3. *"...die meest al in het advies van den Hooge Priester, welke nimmer van de Koran afwijkt, het meest belang stellen."*

The colonial regulations also reveal the changing position of the jaksa in the pluralistic courts. In the Provisional Regulation of 1819, the penghulu and jaksa still took the same oath—in the hands of the landraad president—during the acceptance ritual of their office, in which they committed to answer all questions asked on the "written law or the long-established *local* custom."[35] Eleven years later, however, in the never-introduced law codes of the Merkus Committee of 1830, it appears that the penghulu already was considered to be more suitable as an advisor than the jaksa. The explanatory note stated that the jaksa would no longer be asked for his knowledge of Javanese laws, because he was not very knowledgeable about this anyway: "One has left out the advice provided by the jaksa (*jaxa*) regarding the native legislation, after bringing in his plea, since the necessity has not been proven. Especially not, since the penghulus understand and master this subject better than the jaksas."[36] Maintaining the penghulu as an advisor at the pluralistic courts did not come from the heart though. The committee report mentions that they had decided to maintain the position of the penghulu, merely because they did not dare to stop inviting him as an advisor. However, the advice from the penghulu was hardly ever followed in criminal cases, according to the committee:

> Although one has to confess, that this advice—whenever based on the native laws—has little or no value, since it was almost never followed in criminal cases. Also, regularly, the president of a Landraad has great difficulties in preventing the views of the assessors [that is, the Javanese court

[35] S 1819, no.20, art.154: *"Ik beloof en zweer het mij opgedragen ambt met ijver en trouw te zullen waarnemen; dat ik alle de mij gedane vragen hetzij in geschrifte of bij monde, opregt en naar mijne beste kennis zal beantwoorden, en zonder partijdigheid opgeven wat de geschreven wet of van ouds gevestigde plaatselijke gewoonte is, en niets dat niet met zoodanige wet of gewoonte is, en dat ik geene giften, gaven of geschenken zal aannemen voor het uitbrengen van mijn gevoelen, wanneer het door eenige regtbank gevorderd zal worden."*

[36] NL-HaNA, 2.10.47 Wetgeving van Nederlands-Indië. No.73. Explanatory note, 1830. Explanation of the articles 207 and 212. *"... men heeft echter het nader advies van den jaxa, ten aanzien der inlandsche wetgeving, na eenmaal zijnen eisch te hebben ingebragt, vermeent te moeten weglaten, als zijnde de noodzakelijkheid daarvan niet gebleken, vooral niet, daar de panghoeloe's te dien opzigte de zaak beter dan de jaxa's verstaan en meester zijn."*

> members] to be biased in the direction of the advisor, when the advice was in conflict with the generally acknowledged principles of justice and legal decrees.[37]

Thus, despite the reference to the slight application of local laws by the pluralistic court, this citation also suggests that the members of the pluralistic courts were influenced by the penghulu. This is further confirmed by a letter written by Circuit Court Judge Rinia van Nauta based in Semarang in 1838. He was even of the opinion that the penghulu should be turned away from court, because he influenced the assessors.[38]

In the next chapter, we will delve deeper into the advice given by the penghulus and how Javanese-Islamic laws were applied in practice. For now, it is enough to know that in the Court Regulations of 1847, the jaksa was no longer officially an advisor. The advisory position of the penghulu in the pluralistic courts was maintained. From then on, the oath taken by the jaksa referred only to the colonial regulations to be followed when he executed his responsibilities.[39] The oath taken by the penghulu had changed only slightly, and still referred to the written laws and to the "long-established custom," the only difference being that the word "local" was not mentioned anymore.[40] The advice of the jaksa had now become his

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[37] NL-HaNA, 2.10.47 Wetgeving van Nederlands-Indië. No.73. Explanatory note, 1830. Explanation of the articles 207 and 212. *"…ofschoon men moet bekennen, dat deze adviezen wanneer zij op de inlandsche wetten zijn geschoeid, wienig of geene waarde hebben, Als bijkans nimmer, vooral in het crimineele, opgevolgd wordende, en het daarbij den voorzitter van eenen Landraad dikwerf vele moeiten kost, om indien die adviesen strijdens zijn met de algemene beginselen van regt en wettelijke bepalingen, het gevoelen van de assessoren niet daar naar te zien overhellen."*

[38] NL-HaNA, 2.10.47 Wetgeving van Nederlands-Indië. No.76. "Ingekomen brief bij de Indische commissie van 1837 inzake een suggestie van een rechter te Samarang om zowel de panghoeloe's — hoofden van de moskee — als de assessoren bij rechtszittingen te weren," 1838.

[39] RO, 1847, art.114. *"Ik beloof en zweer dat ik de mij opgedragene bediening met ijver, eerlijkheid en onzijdigheid zonder aanzien van persoon, zal waarnemen; dat ik nimmer eenige giften of geschenken zal aannemen van eenig persoon, van wien ik weet of vermoed, dat hij eenige zaak heeft, of zal krijgen, in welke mijne ambtsverrigtingen zouden kunnen te pas komen; en dat ik mij bij de uitoefening mijner bediening in alles zal gedragen overeenkomstig de wettelijke bepalingen, en de krachtens deze aan mij gegevene Instuctiën en Bevelen."*

[40] RO, 1847, art.8 in connexion to art.114: *"Ik beloof en zweer de aan mij opgedragene werkzaamheden met ijver en trouw te zullen waarnemen; dat ik al de aan mij gedane vragen, hetzij in geschrift, hetzij in bij monde opregt en naar mijn beste kennis zal*

plea as the prosecutor. Besides, one or two Chinese advisors were added to the pluralistic courts in cases where Chinese were involved.[41]

4.3 Local Advisors versus the Supreme Court

As discussed in part 1, in colonial criminal law two contrasting Dutch practices predominated. First, there was the formal policy of separate jurisdictions, deriving from the belief that it was best to administer justice over the Javanese population according to their "own" laws and customs. It was this policy the pluralistic courts were supposed to carry out, and the reason why the local legal advisors had been attached to them in the first place. However, the second approach aimed at more uniformity among the pluralistic courts in Java and was vividly expressed by several Dutch Supreme Court judges in Batavia. The Supreme Court judges did not necessarily oppose the segregated legal system itself, with its simpler procedures and harsher punishments for the Javanese than for Europeans. However, they were often formalists striving for uniform practices among the landraden throughout Java and so did not necessarily favour the courts' pluralistic character and the application of local laws recommended by Javanese court officials. The quest for uniformity fit with contemporaneous developments in the Netherlands, which also sought a uniform legal system with less regional variety.

The tensions between the pluralistic and uniform aims became apparent quite early in the nineteenth century. In the evaluation of the

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beantwoorden, en zonder partijdigheid opgeven, dat de geschrevene Wet of van ouds gevestigde gewoonte is, en niet, dat niet met zoodanige Wet of gewoonte overeenkomstig is; dat ik mijn gevoelen, wanneer mij dit door den regter wordt afgevraagd, naar waarheid en in alle opregtheid zal uitbrengen, en dat ik geene gaven of geschenken heb aangenomen noch zal aannemen, die mij zijn of mogen worden aangeboden om mij hiervan te doen afwijken."

[41] RO, 1847, art.7. *"Wanneer Oostelingen, de Mahomedaansche godsdienst belijdende, of Chinezen, in burgerlijke zaken of in strafzaken van welken aard ook, in eersten aanleg als verweerders of beklaagden zijn betrokken, en zij, met opzigt tot de in geschuld zijnde zaak, niet regtens zijn, of zich niet vrijwillig hebben onderworpen aan de wettelijke bepalingen voor Europeanen, zullen voor zoo veel de Mahomedanen aangaat, een priester van hunne godsdienst, en voor zoo veel Chinezen betreft, één of twee hoofden, of bij ontstentenis van deze, één of twee daartoe geschikte personen van dien landaard, door het geregt of, bij regterlijke collegiën, door den President aan te wijzen, de teregtzittingen bijwonen; en zal het gevoelen van zoodanige advyseurs worden ingewonen, bepaaldelijk ten aanzien van de ter zake betrekkelijke godsdienstige of andere Wetten of gebruiken, ten einde daarop bij het doen der uitspraak worde gelet. De inhoud der aldus uitgebragte advysen, moet in de notulen, of in het proces-verbaal der teregtzitting, worden opgenomen."*

introduction of the landraden to the cities in 1824, the resident of Surabaya mentioned that at the landraad the "Javanese method of evidence" was applied and that "religion and laws" were followed. Also, people were now judged by their own chiefs, and the language spoken in court was Javanese, so that litigants could now understand the proceedings. All of this, he considered a major improvement over the earlier situation. The number of civil cases had increased, from which he concluded that the local population was willing to use the landraad and knew how to find the new institution.[42] However, he pointed out that difficulties appeared when cases were appealed at the Council of Justice, because there the judges were not trained in applying Javanese laws and customs. In response to this evaluation, the Supreme Court decided that the landraden should henceforth register in their verdicts precisely how they had applied Javanese laws.[43] The procedural documents examined for this dissertation show that probably very few landraden ever followed this rule. References to local laws do not come any further than the description "according to the Islamic laws" or "according to the native laws." From the preserved procedural documents, it seems that advisors advised the Javanese members of court, after which the voting started. Therefore, the Dutch president probably only communicated with members about the verdict and not with the advisors directly. Moreover, the higher courts such as the Councils of Justice and the Supreme Court were not informed about the Javanese laws and customs.

Although based in Batavia, the Supreme Court's activities impacted the practices of the regional pluralistic courts because each criminal verdict was sent to the Supreme Court for review, a policy originating from VOC times, when all verdicts of the landraad of Semarang were sent to the Supreme Court for confirmation.[44] The Supreme Court also circulated guidelines to the lower courts for creating at least a degree of uniformity in the application of criminal law to the Javanese and

[42] ANRI, AS, Bt. December 13, 1825, no.3. Letter from the Resident of Surabaya, January 26, 1825. One of the court members in the Landraad of Surabaya was the former prime minister (*rijksbestuurder*) of the Princely Land of Solo, where the legal system was partially independent from the colonial administration. The number of civil cases had increased to 258, from 30 March to 31 December (number before is not mentioned, but the Resident states the increase is remarkable).

[43] ANRI, AS, Bt. December 13, 1825, no.3; S 1825, no.42.

[44] Gaijmans, *De Landraden op Java*, 2; Ten Ham, *Berechting van Misdrijven door Landraden*, 32 (footnote 2).

Chinese population. They sent their disgruntled remarks on sloppy verdicts to the residents—to achieve more uniformity in the legal system and leave less room for regional diversity. In 1822, for example, the resident of Semarang was reprimanded for applying punishments that were not appropriate according to the Supreme Court in Batavia. The convict Senen had been punished with two years of work on a chain gang for theft, whereas in another case Pak Sidah had been given three years of chain labour for only planning a theft.[45]

We must be careful, however, not to see all Supreme Court members as of one mind. In particular, Merkus was not in favour of too much uniformity, as discussed in earlier chapters. He was convinced of the advantages for the Javanese population of a justice system applying local laws. It was one of the reasons, he pleaded—from 1821 onwards—for the introduction of pluralistic courts in the cities. During the discussions on this topic, he had provided the example of buffalo theft, which had to be punished with flogging, branding, and four years on a chain gang labour according to colonial regulations. However, this was not in accord with Javanese laws, which prescribed that if an owner had left his buffalo unsupervised, and had let them walk around freely in the meadow, buffalo theft had to be punished with a mild fine.[46] Other judges of the Supreme Court were not convinced by this argument.

To the contrary, they were concerned about the lack of uniformity between the landraad verdicts, and they thought it "incomprehensible" that Merkus was not concerned about these regional differences. They gave the example of burglary; one landraad decided on fifty rattan strokes and six months of the chain gang for this crime, whereas another imposed three

[45] ANRI, GS Semarang, no.4113. Letter from the Supreme Court to the Resident of Semarang, July 29, 1822.

[46] NL-HaNA 2.21.007.57 Schneither, no.14. Letter attorney general to the supreme court. Batavia, July 16, 1821. *"Volgens de in vroegere jaren gemaakte en thans nog bestaande wetten moet degeenen die aangemelde misdaad (buffel en veediefstal) schuldig bevonden worden, gestraft worden met geesseling, brandmerk en tot vier jaar kettingarbeid. Klaarblijkelijk is deze strafbepaling hare oorsprong verschuldigd aan begrippen uit het vaderland herwaards overgebragt, daar dezelfde lijnregt strijdig is met heteen bij de Javasche wetten omtrent dezelfde misdaad worden gevonden. Volgens deze toch wordt juist in tegenoverstelling van de Nederlandsche wetten, de diefstal van een in de weide loopend en door iemand bewaakt wordend beest, eenlijk met restitutie en eene zeer ligte straf geboet, waarschijnlijk om dat zoodanig een beest niet blijkende in iemands bezit te zijn, eenigzins als res nullius te beschouwen is. Wordt nu zulk een dief voor een raad van justitie, te recht gesteld zoo ondergaat hij de straf welke bij uitheemsche wetten is gesteld."*

years of forced labour in similar cases.[47] The Supreme Court also denounced the regulations of 1819 for leaving too little space to overrule local laws. According to the Supreme Court, this led to "ridiculous verdicts" and, therefore, they were in favour of formalizing which Javanese laws would continue to exist and which would not. They also thought this had to wait until the criminal code of the Netherlands was finished, though, because the law in Java had to be in concordance with this. Temporarily, a provisional regulation could be made for buffalo, horse, and cattle theft.[48] However, as discussed in the previous chapter, the attempts by Merkus and others would be consigned to the archives, the principle of applying Javanese-Islamic laws would be retained in the Colonial Constitution, and it would take a few more decades before a criminal code was introduced.

Thus, the uncertain circumstances regarding criminal law practice continued, and knowledge of this topic among most Dutch officials would not increase. Preserved files of pardon requests also show that Supreme Court members did not possess much knowledge of Javanese laws and customs. In 1827, for example, a Javanese wrote a request for his son, who used to be the *demang* (district chief) of Pajaragan (in the Besuki residency) and had been condemned to death for murdering his brother. He had not personally committed the murder, but he had ordered it. The father—or the writer of the request written in Arabic, possibly a *kyai*—refers in the letter to relevant texts in Islamic books that discussed murder on contract:

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[47] NL-HaNA 2.21.007.57 Schneither, no.14. Report Supreme Court. Batavia, 16 januari 1822. *"De verschillende aard der vonnissen die het Hof van alle kanten dezer resorten ontvangt, en die de revisie van de Procureur-Generaal passeert met zijn conclusien, ter approbatie, dan is het onbegrijpelijk dat die dat verre van den anderen verschillen kunnnen over een en dezelfde misdaad, door weinig of geene omstandigheden verzwaren, bij voorbeeld, op huisbraak, doorgraving, stelen, zelfs sommigen met geweld en kwetzing, wijdt den een der Inlandsche Raden tot 50 rottingslagen en zes maanden ketting, een ander tot 100 rottingslagen, een derde drie jaren klinken in de ketting, een vierde geesseling, drie en zeven jaren kettingarbeid, een vijfde geesseling, bandmerken, 10 en 20 jaren bannissement in de ketting, en dan weder tot geene lijfstraf."* In 1824, they again wrote disapprovingly on the regional differences in legal practices: "A dissimilarity that is so significant that ... a crime punished in one residency with flogging and three years of banishment in chains, is punished in another residency with fifty to one hundred rattan strokes and one-and-a-half to three years of chain labour." ANRI, AS, R. December 31, 1825, no.22. Letter Supreme Court, Batavia, January 5, 1824. The letter was a response to Merkus' manual for the Javanese and European members of the Landraden. See also Chapter 3.2.2.

[48] NL-HaNA 2.21.007.57 Schneither, no.14. Report Supreme Court. Batavia, 16 januari 1822.

> The book *Tahrie* says: ... if he does not commit violence, then he who gives the order, will not be prosecutable, but only the assassin.
>
> The book *Nahayan* says, in a similar case, that those who order the assassination are prosecutable, whereas others are of the opinion that both he and the assassin are guilty, thus depending on the view of the judge.[49]

The father requested that this be taken into consideration when deciding over the fate of his son. However, in his "considerations and advice," the attorney general did not comment or even mention the arguments made by the father at all. Instead, he argued—making use of terms in Latin—that the convict "since long had been possessed with the *animus nocendi* [criminal intent] regarding his brother," and, he also concluded, "the *dolus malus* [bad or evil deceit] manifests itself here very clearly."[50]

The Dutch-centric stance of the Supreme Court is remarkable, especially when compared with legal practices in British India. There, the *Indian Law Reports* produced by the higher colonial court are even characterized as a "new source" of Islamic law in South Asia. British colonial judges drew extensively on Islamic legal sources, which had been translated and reworked into handbooks by British jurists, and they referred to earlier comparable cases. This was very different in the Netherlands

[49] ANRI, AS, R. October 12, 1827, no.21. Letter Hongga Troena to governer general, Besuki, July 27, 1827. *"In het boek Tahrie wordt gezegd: ... indien hij geen geweld pleegt, zoo zal hij die het bevel geeft, niet strafbaar zijn, maar alleen de moordenaar. In het boek Nahayan wordt gezegd dat in het zelfde geval, degeen die den moord gelast strafbaar is, terwijl anderen van mening zijn, dat hij benevens de moordenaar schuldig is, hangende zulke van het gevoelen van den regter af."* The letter was translated from Arabic to Dutch by the chief official of the department of Native Affairs. It is the only example I found of a concrete reference to a Islamic (or Javanese) legal text in the archive files dealing with criminal law. Mahmood Kooria shared his expertise on this matter and attempted to trace the law texts referred to: "Tahrie" possibly refers to the Taḥrīr, but he did not find the citation itself in this text (neither in the core-text nor in its three commentaries). The second citation (from the book "Nahayan") comes from the Nihayat al-zayn, and parts of that sentence are also in the Minhaj al-Talibin and the Tuhfat al-muhtaj. For a discussion of the long genealogies of the Minhaj, Tuhfat and Nihayat, see: Kooria, *Cosmopolis of Law.*

[50] ANRI, AS, R. October 12, 1827, no.21. Letter Attorney General Hork to the Supreme Court, Augustus 31, 1827. *"...reeds lang met de animus nocendi ten aanzien van zijnen broeder is bezield geweest ... de dolus malus straalt hier ten klaarte door."*

Indies, where the Supreme Court deemed Islamic law too hot to handle. In the case of criminal law, Islamic law was clearly circumvented, as discussed before, but in civil cases there seems to have been no attempt to get involved with Islamic legal traditions and ideas, either. Legal historian Yahaya presents the telling example of a civil case administered in 1884 by the Dutch Supreme Court in Batavia on *waqf*, an Islamic religious institution managing alienated land. The land had been abandoned since 1815, during the British interregnum, therefore the verdict refers to earlier British legal documents on this case. The difference in style is significant, as Yahaya points out: "The [Dutch] report was remarkably devoid of religious references. Nowhere was the word 'waqf,' or even 'trust,' or 'endowment' used. While the British law report of the same waqf [quoted in the Dutch law report] cited Javanese and Islamic law, Dutch authorities cited only Roman and Dutch law in Java."[51]

The differences between colonial justice in India and Indonesia are plentiful, but it is noteworthy here that in the British colonies justice was administered by a British judge who, until 1875, made use of the Anglo-Muhammadan Law, a civil and criminal Anglo-Islamic code produced by the British themselves. The Dutch, on the other hand, relied on Javanese intermediaries such as the penghulu, but also Javanese court members who held the right to vote on the verdict. This might have taken away the necessity for the Dutch to obtain in-depth knowledge on local legal traditions themselves. The result was a criminal law practice that was almost completely based on European legal traditions—even before the introduction of the Natives Criminal Code of 1872—because the Supreme Court demonstrated little interest in the local laws.

When it was in their own interest, though, the Supreme Court could refer to the advisors of the pluralistic courts in their argumentation. In 1840, for example, writing about a Javanese condemned to death for murder, the resident of Kediri suggested taking into account the "uncivilized state in which the Javanese in some areas of the inner regions still are." However, this did not convince the attorney general, because the penghulu and the jaksa—"knowledgeable Natives of writings and law ...

[51] Yahaya, *Courting Jurisdictions*, 28, 134, 115.

who are supposed to fully understand the circumstances and the notions of the people"—had concurred with the verdict.[52]

4.4 Conclusion: Advisors and Prosecutors

The early nineteenth-century colonial state continued the VOC policy of legitimizing colonial law through local knowledge holders. In response to the already existing jaksa-penghulu controversy in Java, the successive colonial governments until 1819 decided each in their own way on where and who to accept as legal advisors in the local pluralistic courts. After 1819, the jaksa and penghulu were asked for their legal advice together. In practice, the penghulu would increasingly be seen as the knowledge holder of Javanese-Islamic legal traditions, whereas the jaksa was gradually removed from this role. This was formalised in the regulations of 1848.

The Supreme Court has been praised by Dutch legal historians for attempting to moderate the extremely harsh verdicts given to Javanese convicts.[53] However, from the perspective of the pluralistic court's aims, a remarkable aspect of this effort was the complete disregard of local Javanese laws and customs, which differed among different Javanese regions. At the same time, despite the ignorance of the Dutch residents and Supreme Court judges regarding the contents of the local legal regimes, the penghulu remained the pluralistic law courts' advisor. The doubts held by the Dutch regarding Islamic law and the Native Criminal Code on Dutch laws in 1872—two developments discussed in part 1—did also not keep the penghulu from being appointed a legal advisor in the pluralistic courts. Therefore, in the next two chapters, we will investigate the developing careers and strategies—the marginalisation and agency—of, respectively, the penghulu and the jaksa in the pluralistic courts over the course of the rest of the nineteenth century.

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[52] ANRI, AS, Bt. January 24, 1840, no.2. Letter Resident D.G. van Teijlingen of Kediri to the governor general, November 5, 1839: *"den ongeciviliseerde staat, waarin den Javaan nog op sommige plaatsen in deze binnenlanden verkeert."* Letter (temporarily appointed) Attorney General C. Visscher to the Supreme Court, November 16, 1839: "…*inlandsche schrift- en wetgeleerden (...) die den staat en de begrippen van het volk geacht worden volkomen te kennen."*

[53] Termorshuizen, "Revisie en Herziening," 339. Briet, *Het Hooggerechtshof van Nederlands-Indië*, 143.