COURTING JURISDICTIONS: COLONIAL ADMINISTRATION OF ISLAMIC LAW PERTAINING TO ARABS IN THE BRITISH STRAITS SETTLEMENTS AND THE NETHERLANDS EAST INDIES, 1860-1941

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This dissertation examines the administration of Islamic family law in the British Straits Settlements and the Netherlands Indies through the lens of Arab merchants in colonial courts from 1860 till 1942. During this period, Arab communities tended to seek justice and accountability in colonial legal arenas because they had opportunities to influence colonial legal administration through political and social means.

The first chapter explores the collation of knowledge of Islamic law in the Straits Settlements and the Netherlands Indies. While British knowledge of Islamic law was based on existing legal precedents and legal codes brought over from British India that ultimately proved to be of limited use in the Straits due to different schools of law between Muslims in India and Southeast Asia, Dutch knowledge of Islam came from Oriental academies in the Netherlands and the Netherlands Indies itself.

The second chapter situates Arabs within the complicated plural society of the Netherlands Indies. Inconsistently classified as ‘Foreign Orientals,’ they were subjected to European laws in some matters and local customary laws in others due to their intimate connections with local communities, creating a sense of legal unpredictability. The third chapter examines how Arab petitioners in the Straits Settlements requested British intervention in religious affairs in 1875 specifically in matrimonial matters which led to the promulgation of the Mohamedan Marriage Ordinance that was introduced in 1880.

While colonial legal regimes provided repositories of bureaucratized records that were useful for highly mobile Arabs, they placed limitations on institutions such as family endowments (waqf), analyzed in Chapter Four. Banned entirely in the Netherlands Indies, the waqf partially failed in the Straits Settlements for not fulfilling the definition of ‘charity’ and for contravening the English Common Law which forbade the alienation of immoveable property in perpetuity. These restrictions however provided a boon for beneficiaries who repeatedly disputed the status of waqfs in British courts in the hope that the waqf be declared void so that they could benefit from the sale of the endowments. By focusing on Arabs’ legal strategies, the dissertation highlights how European legal systems ultimately rooted diasporic Arabs through legal means in specific locations despite their mobile ways.
I have been remarkably fortunate to incur huge debts to various people in many places while preparing this dissertation.

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<td>KY = Kyshe’s Reports (Magistrates’ Appeals)</td>
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<td>CO = Colonial Office</td>
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<td>HRNI = Het Regt in Nederlandsch-Indië</td>
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<td>IG = De Indische Gids</td>
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<td>IOR = India Office Records</td>
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<td>ITVHR = Indisch Tijdschrift van het Recht</td>
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<td>KITLV = Koninklijk Instituut voor Taal-, Land- en Volkenkunde</td>
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<td>MC = Malayan Cases</td>
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<td>SGHC = Singapore High Court</td>
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<td>SLR = Singapore Law Review</td>
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<td>SSLR = Straits Settlements Law Reports</td>
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<td>ST = The Straits Times</td>
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In a letter dated November 30 1911 to the daily newspaper *The Straits Times*, a Muslim reader wrote:

“The Mohamedans, as you know, Sir, have a great dislike of outside interference in their religious affairs. This is quite natural. They allow you to legislate in other directions, but touch their religion and you tamper with their most sensitive feeling.”

Despite clear awareness of the sensitivity of the issue, colonial interference in Islamic law was actually prevalent, sometimes even solicited by the Muslim community itself in Southeast Asia, beginning from the closing decades of the nineteenth century. By examining several cases involving Arabs in the Malay Archipelago, I compare British and Dutch colonial administration of Islamic law from 1860 until the spread of the Second World War into Southeast Asia in 1942. In particular, I examine the legal strategies of members of the Arab diaspora. Despite constituting only 5% to 7% of the population in the Netherlands Indies and 0.1% of the British Straits Settlements, they were legally influential in the Netherlands Indies and the British Straits Settlements.

By adopting historian Lauren Benton’s perspective of modified positivism which is not derived from legislation or from agreements among polities but from proliferating practices and shared expectations about legal processes across time, I show that legal strategies were usually determined by many factors other than religious devotion.２ The shari’a, as a system of practical reason morally binding on each faithful individual, exists independently of Muslims anyway.３

Colonialism created divisions in the lives of Muslim subjects between the personal and public spheres by restricting Islamic law to the realm of the family in line with the ecclesiastical courts and Bishops’ courts in Europe. Marital matters, inheritance, religious endowments and child custody were thought to be uniquely connected with the very substance of Islam anyway which conveniently fed into Dutch and British official policies of non-intervention in religious affairs.４

Not only did they restrict Islamic law to the realm of the family, British and Dutch authorities also effectively removed this domain from the purview of religious scholars who were trained in religious educational institutions to adjudicate disputes in accordance with their understanding of the law.５ The process of codification, initiated by the Dutch and the British, not only reduces a complex aggregation of practices into a single code, but also systematizes legal procedure and content so that it has an internal

logic and more crucially, operates as a closed system.\(^6\) Uprooting law from its bases in religious schools and the general forms of social life it had once been embedded eventually made Islamic legal practices more rigid in these colonies.\(^7\)

A focus on colonial impositions on religious practice has led scholars to launch their works on Islamic law during the colonial period with the unquestioned assumption that Muslims constantly preferred to adhere to Islamic law. At the expense of exploring litigants’ particular strategies in specific cases, these scholars implicitly adopt an anti-colonial perspective that provides a limited lens which privileges colonial impediments to Islamic legal practices, when in fact, colonial administration of Islamic law from the nineteenth century onwards presented yet more opportunities for Muslim subject populations to negotiate Islamic legal practices in new, unprecedented ways. In other words, the effects of colonial rule on Islamic law were ambivalent and complex. As imperial historian Martin Wiener cautions, neither the narrative of celebration nor that of indictment prepares us for the complex struggles in courtrooms, where both sides often appealed to the inheritance of the rule of law.\(^8\)

While historians have focused on legal consciousness (the awareness of rights and the use of litigation) in British India and Africa during the colonial period, scholars

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\(^7\) Due to European influence, even the rulers of Muslim-majority societies, such as the Egyptian elite and Ottoman rulers, turned away from shari’a-based law during the nineteenth century. For more on Egypt, see Clark Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of Islamic Law into Egyptian Constitutional Law* (Leiden: Brill, 2006) and Nathan J. Brown, *The Rule of Law in the Arab World, Courts In Egypt and the Gulf* (Cambridge: Cambridge University Press, 1997).

have thus far neglected to examine litigants’ experiences in colonial Southeast Asia. In so doing, I illuminate litigation strategies in colonial courts from the perspective of highly litigious Arabs in Southeast Asia. In connection with this, I examine whether non-state law could be enforced by other norms with social consequences. For example, what role did legal opinions (fatwas), published in Malay and Arabic periodicals circulating in the Malay world, play? In tandem to this, I explore how social norms were actually enforced by colonial courts themselves. In fact, I demonstrate how social norms that bear on trust and reputation, though difficult to verify, actually informed colonial judges’ decisions after being influenced by Arab witnesses in courts. Rather than avoid using formal legal rules to resolve disputes because this option ran the risk of severing their relationships, close-knit diasporic societies, such that of the Arabs in Southeast Asia, chose to enforce social norms through heavily formal, state-centered

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10 The fact that they were highly litigious was not surprising since proprietary classes possessed both the institutional skills and material means to litigate. In this manner, colonial courts became a popular site for “intra-elite disputes.” Michael R. Anderson, "Themes in South Asian Legal Studies in the 1980s," South Asia Research 10, 2 (1990): 167.

legal settings. Evidently, the considerable cost of court and counsel were outweighed by the potential gains of litigation.

The study of colonial administration of religious laws has critical contemporary relevance since law was certainly one of the most important and enduring cultural forms of colonial legal regimes. For one, Roman-Dutch law was inherited by the postcolonial nation-state of Indonesia, and English Common Law is currently enforced in the independent states of Malaysia and Singapore. More importantly, compendiums of codified Islamic laws and legal manuals produced by British colonial officials are still utilized by Singaporean and Malaysian courts today. Similarly, in Indonesia, adatrecht, a body of a law-like traditional rules constructed by the Dutch, made its way into postcolonial Indonesian jurisprudence. While the complex histories of colonial administration of personal laws in South Asia, Africa and the Middle East have been

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15 Roman-Dutch Law was derived from two sources – Germanic Custom and Roman Law. Its application was uneven throughout the United Provinces that later formed the Netherlands till the nineteenth century. In 1809, Roman-Dutch law was superseded by the Napoleonic Codes that influenced the existing codes in the Netherlands. R. W. Lee, *An Introduction to Roman-Dutch Law* (Oxford: Clarendon Press, 1953), 1-23.
16 See Ritu Birla, *Stages of Capital: Law, Culture and Market Governance in Colonial India* (Durham: Duke University Press, 2009); Bernard S. Cohn, *Colonialism and Its Forms of*
critically examined by scholars, the colonial administration of Islamic law in Southeast Asia has not been examined in much depth. Works by legal experts of Southeast Asia offer trenchant analyses of legal content produced by colonial scholar-officials but stop short of tracing the practical consequences of colonial legal policies on Muslim subject populations. Perspectives from contemporary Malaysia, Indonesia and Singapore, on the other hand, tended to divorce the laws of the nation-state from its colonial origins.


This approach is incongruous especially since, as Iza Hussin has recently shown, laws devised by colonial and local elites have had long-lasting repercussions in the construction of national identity during the postcolonial period. Her study, which bridges the divide between colonial and postcolonial periods, further reveals that the cordonning off of marriage and divorce (personal law) from commercial law (public law) was not just an imposition by colonial authorities but also by Muslim rulers who perpetuated this division as well. I aim to examine ways in which local subject populations engage with colonial legal frameworks.

**Early History of the Netherlands Indies**

The early legal history of the Malay Archipelago remains hazy and starts to become distinct only in the mid-nineteenth century. The Dutch East India Company (Vereenigde Oostindische Compagnie, VOC) started to make headway into the Malay world in the early seventeenth century by establishing their base at Ambon before finally establishing a

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permanent base in Batavia in 1619. By 1800, when the VOC was dissolved, its territories came under direct rule of Dutch government. In 1854, the Dutch government implemented a dual legal system on subject populations which was formalized in Article 109 of the Regeeringsreglement (Government Regulation). The article classified colonial subjects according to ethnicity, not religion like in the neighbouring Straits Settlements. So-called Foreign Orientals (Vreemde Oosterlingen), including Chinese, Arabs and Japanese inhabitants, were subject to the same laws as Europeans under private and commercial law but subject to same laws as ‘natives’ under public law. The dual legal status of Arabs imposed by Dutch colonial authorities simultaneously situated them apart from the bulk of Muslim subject populations due to their ethnicity, but within local Muslim societies due to their religious faith. To further complicate matters, in terms of personal law, Arabs were grouped with other native Muslims who were not only subjected to Islamic law, but also to local laws known as ‘adat,’ defined against Islamic law. This raises the question as to how these local laws affected the non-indigenous Arabs across the Netherlands Indies. The legal structure in the Netherlands Indies ensured that the legal status of Arabs in the Netherlands Indies was different from that of Arabs in the Straits Settlements, where the Indian Penal Code was enforced on all subjects regardless of race and ethnicity while religious laws applied to Hindu, Chinese, and Muslim subjects in the realm of personal law.

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23 Prior to 1854, society was ordered according to religious faiths. Eric Tagliacozzo, Secret Trades, Porous Borders: Smuggling and States Along a Southeast Asian Frontier, 1865-1915 (New Haven: Yale University Press, 2005), 130.
24 Arabs and Indian Muslims in the Netherlands Indies were further singled out when a general distrust of Arabs began to permeate Dutch colonial writings from the 1880s onwards as they were perceived to be active proponents of pan-Islamism in the region. Ibid., 147.
25 Lev, Islamic Courts in Indonesia, 27.
While the British bypassed the religious elite in passing legal rulings on religious matters, the Dutch preserved local elites within a more formal legal structure consolidated into *priesterraden* (priest councils) after the issue of Staatsblad 1882 no. 152 that came into force on August 1st 1882. The *priesterraden’s* judgments were subjected to approval by the secular *landraad*, the higher civil courts within the colonial legal structure.

**Early History of the Straits Settlements**

The earliest British settlement, Penang, was ‘founded’ in 1786 by Captain Francis Light, a former country trader who joined the East India Company. According to the Treaty of London in 1824, the British gained Malacca from the Dutch, and together with Singapore which was founded in 1819, formed the Straits Settlements. The Second Charter of Justice in 1826 formally introduced English Law as the basic law in the Straits Settlements and relegated local laws – whether Chinese, Hindu or Islamic – to the area of family law. Despite this charter, the following chapters will demonstrate how the legal structure in the Straits Settlements remained vague and undefined till the end of the nineteenth century.

While Dutch bureaucratic-scholars of the day attempted to delve deeply into the rich intellectual history of Islamic law and *adat*, British judges tended to focus solely on the practical aspects of legal administration in the colonies. By contrast to Dutch cerebral ruminations on the application of suitable laws in the Netherlands Indies, the process by which common-law courts displaced local customary laws in the Straits Settlements was a procedural and administrative triumph. All three settlements were

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retrospectively declared ‘uninhabited’ in 1858 by Benson Maxwell, the future Chief Justice of the Straits Settlements, which meant that the customary laws of Malays were neither respected nor enforced. English law became the default law instead of local customary laws.\(^{27}\) By contrast to Dutch ultimate prioritization of local adat, British authorities were under the impression that Penang, the first Straits Settlement, was part of the Malay state of Kedah, which presumably applied Islamic law in all matters.\(^{28}\) Hence, all Muslims, regardless of ethnicity, were subjected to Islamic law in the realm of family law under British rule.\(^{29}\) British judges would preside over all cases involving Islamic law.

Since Malay adat was not considered as part of the laws of the Straits Settlements, knowledge of Islam proved to be of greater utility from an imperial point of view. This imperial worldview was highly conducive to efficient legal administration from the outset. While British collection of adat laws could not have been achieved without the cooperation of local ruling elites in Sumatra, Java and on the Malay Peninsula, since they were the purveyors of adat in the region, British knowledge of Islam allowed them to avoid relying on local religious authorities whose rulings were neither legally binding in the colonial state, nor cited in colonial courts. Indeed, local authority was hardly acknowledged in colonial sources in the Straits Settlements.

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\(^{27}\) Although there were reportedly four Malay families residing in Penang when Francis Light arrived in 1786, the island was retrospectively declared “uninhabited” in the Charter of 1807, when the law of England was transported into Penang. James Low, “An Account on the Origin and Progress of the British Colonies in the Straits of Malacca,” *Journal of the Indian Archipelago and Eastern Asia* 4 (1850): 11.


\(^{29}\) For an interesting discussion of this issue, see *Fatimah & Ors. V. D. Logan & Ors.* [1871] 1 KY 255.
Hence, while the Netherlands Indies experienced a deliberate preservation of local laws and legal structures across the Archipelago. British territories witnessed the steady absorption of local legal systems into the dominant English legal system.

**Colonial law**

Certainly, colonialism affected legal practices in significant ways. The history of colonial impact on customary laws in Africa and South Asia is well documented. Writing against British colonial anthropologists who erroneously implied that laws remained unchanged by colonialism, later legal anthropologists situated law firmly within the colonial context by demonstrating how colonialists appropriated definitions of customary law and administered their particular versions of local laws.\(^{30}\) Hence, customary law was exposed as a mere historical construct. Adopting a similar view, anthropologists of British India including Nicholas Dirks and Bernard Cohn examined the political and economic effects of law in a colonial setting in terms of language and adjudication that chipped away at old conceptual and institutional linkages.\(^{31}\) They demonstrated how Hindu and Islamic law was purposefully collected by East India Company (EIC) officials to produce law digests and codes on personal laws that were accessible to EIC administrators during the late eighteenth century. I argue, however, that these codes and digests had limited applicability throughout the British Empire during the nineteenth and twentieth centuries.


\(^{31}\) Cohn, *Colonialism and its Forms of Knowledge*; Dirks, *Colonialism and the Making of Modern India*. 
While I draw heavily upon the critical work of legal historian Lauren Benton who traces how empires instituted legal pluralism that led to ambiguous jurisdictions, I further argue that the ambiguity arose precisely because law that was applied to white settlers and British subjects was not as justly applied to colonial subjects overseas. Far from it, the establishment of legal plural orders in the Straits Settlements and the Netherlands Indies did not lead to equality for all legal jurisdictions. Although family law was supposedly the purview of personal laws governed by religious precepts and local customs in both the British Straits Settlements and Netherlands Indies, it was constantly under siege from European colonial rulers who seemed to push for its demise altogether. The field of colonial law had never been a neutral arena anyway.

Sally Engle Merry and Ronen Shamir emphasize that law was simultaneously a site of domination, as well as a site of resistance and struggle. Martin Chanock and Sally Falk Moore have convincingly shown how it was a site of domination, borne by economic and moral imperatives of colonialism. By the early twentieth century, Islamic family law had become a powerful political symbol and a battleground for cultural ideas

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33 According to Sally Engle Merry, a legal system is pluralistic in the juristic sense when the sovereign commands different bodies of law for different groups of the population varying by ethnicity religion, nationality or geography, and when the parallel legal regimes are all dependent on the state legal system. Sally E. Merry, “Legal Pluralism,” Law and Society Review 22, 5 (1988): 871.
throughout the world.\textsuperscript{36} In light of general European colonial suspicion of the relevance of Islamic law in the modern era, it is not surprising that historian J.N.D. Anderson triumphantly pointed out in 1968 that patriarchal power in Muslim families had been kept in check since the beginning of the twentieth century, mostly due to colonial reforms in the Islamic world.\textsuperscript{37} He stressed how women could now turn to the court to request for an annulment of marriage and that a wife’s obedience to her husband was no longer enforced and women’s custody rights over their children have been extended by the second half of the twentieth century.\textsuperscript{38}

Since the late 1970s, several scholars have thankfully challenged Anderson’s views on Islamic family law. Annelies Moors points out that flexibility, fluidity and variability, rather than rigidity, were the hallmarks of Islamic law before colonial codification.\textsuperscript{39} She further argues that Islamic law was capable of accommodating individual needs and allowed for change, as well as divergent interpretations at any point in time. By contrast, codification made Islamic law much more rigid. In this way, legal reforms in the twentieth century did not necessarily increase women’s options. Furthermore, under colonial rule, a greater emphasis was placed on written and official documents during the twentieth century than before, which put illiterate Muslim

\begin{itemize}
\item \textsuperscript{36} Annelies Moors, “Debating Islamic Family Law,” in Social History of Women and Gender in the Modern Middle East, eds. Margaret L. Meriwether and Judith E. Tucker (Boulder: Westview Press, 1999), 168.
\item \textsuperscript{37} Anderson, “Eclipse of the Patriarchal Family,” 221-234.
\item \textsuperscript{38} However, he argued that the welfare of Muslim women had not made sufficient progress since Muslim women were still constantly under the threat of divorce that was much more prevalent than polygamy during the twentieth century.
\item \textsuperscript{39} Moors, “Debating Islamic Family Law,” 144.
\end{itemize}
women at a disadvantage.\textsuperscript{40} Moors argues that men’s power over their wives were far from absolute in the first place. A woman’s property was kept separate from the husband’s since marriage was a contract did not result in a community of goods. Moreover, a husband is obliged to provide his wife with a proper dower which is to be her exclusive property.\textsuperscript{41} As we will see, Moors’ incisive criticism of Anderson’s analysis captured the very tensions that Muslims faced in colonial courts presided over by British judges determined to protect women and curtail patriarchal power in the Straits Settlements.

**Islam and Adat in Southeast Asia**

With a few exceptions,\textsuperscript{42} scholars who trace the early Islamization of Southeast Asia largely concur that Muslims of various origins, including South Asians, Arabs, Chinese and other denizens of the Archipelago, collectively spread Islam to the region in waves over several centuries in a pacifist mode through trade and intermarriage.\textsuperscript{43}


\textsuperscript{41} He also has to provide his wife with a proper maintenance to the level she was accustomed to.


Considering the pervasiveness of colonial legacies in the region, it should not come as a surprise that colonial inflections are reflected in the history of Islam in Southeast Asia as well. Yet, the impact of European colonization has yet to be studied.

In 1955, Dutch scholar, J.C. van Leur, described Islam as “a thin and easily flaking glaze” on the Malay Archipelago.\(^4\) By contrast, the most influential expert on Islam in the Netherlands Indies, colonial Dutch official, Christiaan Snouck Hurgronje wrote extensively on the issue throughout his career till his death in 1936. Snouck’s bifurcation of Acehnese society into two – secular ‘uleebalang’ and religious ‘ulama’ – presented in his classic two-volume work, *De Atjehers*, spawned similar taxonomy by later scholars.\(^5\) The most pervasive configuration of Muslim societies in Southeast Asia is the one espoused by anthropologist Clifford Geertz who separated Muslims in Java into three distinct groups - ‘priyayi,’ ‘santri’ and ‘abangan’ in his works,\(^6\) although James Siegel and Heather Sutherland have questioned this simplistic view.\(^7\) This typology was later echoed by historian Merle Ricklefs in slightly different variations.\(^8\) Geertz’s view was effectively countered in 1985 by historian William Roff who criticized

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\(^{5}\) Christiaan Snouck Hurgronje, *De Atjehers* (Leiden: Brill, 1893-1894).


the lack of nuance that has beset the study of Islam in Southeast Asia thus far. More so than Geertz, Ricklefs prefers to underscore the mystical side of Islam in Southeast Asia which synthesized Hindu, Buddhist and Islamic elements thus breaking out of the orthodox/non-orthodox dichotomy. The plethora of works on Minangkabau society (in Sumatra) specifically underscore the interplay between adat and Islam which runs through Muslim societies in Southeast Asia. Yet, none of these works actually explored the effects of European colonization on Islamic law.

Parallel to this rather naïve assessment of Muslim society was a similarly harsh view of Islamic legal practice in the region. As I show in Chapters One and Two, adat was incongruously defined in opposition to Islamic law by the early twentieth century, contrary to the fact that several centuries of Islamization had actually led to an amalgamation of both customary law and Islamic legal principles in the region. On the whole, Dutch colonial officials largely believed therefore that local adat laws, instead of Islamic legal principles, should be accorded primacy in the Netherlands Indies.

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52 Since there was no official commission to study adat laws systematically till 1909, these opinions were mostly culled from sporadic observations throughout the Indies by individual officials and scholars. Indeed it was only during the first half of the
Because of the highly localized nature of legal administration of particular communities throughout the Netherlands Indies, laws collected throughout the Netherlands Indies did not have wide general applicability. Local particularisms were continually emphasized, in opposition to the universal nature of Islamic law. The phenomenon in Dutch territories lay in stark contrast to legal codes devised by British officials whose works were cited throughout the vast British Empire, although, as we shall see, the specific religious beliefs and customary practices of colonial subjects in British colonies challenged this view of general applicability.

The body of laws known as adat comprised a mixture of pre-Islamic rituals and Islamic laws that were rooted in various local traditions. Clifflowerd Geertz offers a very succinct definition of adat – reducing it to “traditions, customs and customary laws” that was “something halfway between social consensus and moral style.” In a more recent work, anthropologist Michael Peletz offers a more nuanced definition of adat as he historically examines the institutionalization of adat in the Malay States on the Peninsula, as well as later divergences between what was deemed adat and Islamic

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53 A precise definition eluded both the British and the Dutch colonialists.  
law. By adopting a historical approach, he presents adat as something that changes across time, unlike Geertz who portrays it as something unchanging through time.

Although there were multiple attempts by the colonial elite to codify and systematically organize adat laws with varying levels of detail and precision, adat laws ultimately remained largely unwritten in both colonies. This was understandable considering that laws were remarkably diverse comprising a highly localized, complex mélange of traditions in each particular location. In the Straits Settlements, which supposedly did not have any indigenous inhabitants, adat did not seem to have any practical application beyond being a point of interest for British scholar-officials, presumably as a form of ethnographic study that would illuminate British

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56 It should be noted that adat should not be equated with English term ‘law’ or the Dutch word ‘recht’ since the term carries stronger overtones of ‘rights’ and ‘justice’ than the English word ‘law.’ Jan Prins, “Adatlaw and Muslim Religious Law in Modern Indonesia,” Die Welt des Islams 1, 4 (1951): 283; Peter Burns, The Leiden Legacy : Concepts of Law in Indonesia (Leiden: KITLV, 2004).
57 In parallel to the recording of adat laws, knowledge of Chinese customary laws and Hindu laws were gathered by both British and Dutch colonial officials. For example, see “Police-rol te Batavia. Begrip van vaderlijke magt onder de Chinezen,” Het Regt in Nederlandsch-Indie (1850), 25-31; “Bijdrage tot de Kennis van de Hindoe-Adat op Bali,” HRNI, 82 (1904): 100-103.
58 Small legal communities, for example, managed to escape the imposition of Dutch conceptions of adatrecht to a significant degree. Moreover, since ‘adatrecht’ sometimes ran counter to principles in Islamic law, it was sometimes challenged by local communities. See Prins, “Adat law and Muslim Religious Law,” 283-300. Laws regarding inheritance were extremely varied within Southeast Asia. Communities subscribed to the patriarchal, matrilineal, and parental systems of inheritance. Lukito, “Law: Customary,” Suad Joseph, ed. Encyclopedia of Women and Islamic Cultures, Brill, 2010. Brill Online, 13th December 2010 http://brillonline.nl/subscriber/entry?entry=ewic_COM-0109 For more on the matrilineal societies such as the Minangkabau of West Sumatra and Negri Sembilan, see Maila Stivens, Matriliny and Modernity: Sexual Politics and Social Change in Rural Malaysia (St. Leonards, NSW: Allen & Unwin, 1996).
understanding of local societies elsewhere on the Peninsula. An exception to this would be law governing ‘harta syarikat’ or ‘harta sepencarian,’ property acquired by the couple during marriage, that was actually applied in the Straits Settlements.

By stark contrast to general British indifference to adat in the Straits Settlements, ‘adatrecht,’ sometimes referred to as indigenous law (‘Inlandsche wet’) or indigenous customary law (‘Inlandsche gewoonterecht’) was duly enforced in the Netherlands Indies. Yet, right up until the outbreak of the Second World War, opinion remained divided between colonial officials who believed that Islamic law was the law of subject populations, and those who believed that adat, which included Islamic law to varying degrees, was far more suited as the legal basis in the Netherlands Indies. In actual fact, both factions could only vaguely ascertain that their choice of default system of laws for local subject populations was the more suitable one as no systematic

59 Customary laws were not taken into consideration in courts at all since the Straits Settlements were supposedly uninhabited. Neither were these territories under the rule of any Malay ruler. In certain British territories, such as Somaliland, Kenya and Zanzibar, Islamic law was regarded as a third distinct system alongside the English and customary laws. Territories where Islamic law was administered as a form of native law and custom included Northern Nigeria, Ghana, Sierra Leone and Nyasaland. Gambia and Tanganyika experienced a mix of these two legal systems. However, in most of the countries mentioned above, either in Islamic or native courts, or in British courts staffed with local judges and qadis, unlike in the Straits Settlements where religious disputes were arbitrated by British judges solely in British colonial courts. J.N.D. Anderson, “Colonial Law in Tropical Africa: The Conflict Between English, Islamic and Customary Law,” Indiana Law Journal 35, 4 (Summer 1960): 437-442.


study could encompass such a huge colony beyond the occasional commissions appointed to research *adatrecht*. Some officials believed local *adat*, played a bigger role than Islamic law, except in marital matters and inheritance, which was thought to be under the purview of Islamic law, though not completely. Islamic law, which some scholars considered to be ‘foreign’ law in the Netherlands Indies, was more likely to be imposed on ‘foreign’ Muslims such as the Arab (and Indian) communities to a significant degree, and contrary to M.B. Hooker’s dismissive argument that the Arabs “disappeared into the Native group” within the legal arena.

Rather, members of the Arab diaspora faced peculiar challenges in legal sites different from native Muslims. I examine how members of the Arab diaspora dealt with the dialectic between Islamic law as practiced in Arabia with local *adat* in the Netherlands Indies and universal conceptions of Islamic law held by British colonial officials. Thus far, scholars who focused on the Arab diaspora in Southeast Asia have tended to emphasize their roles in the various modern reform movements dating from the seventeenth to the early twentieth centuries. In connection with this, their active

64 Islamic law, as foreign law, was associated with Arab tribes, who formed the first Muslim communities. Ibid.
participation in print journalism in the early twentieth century has also been extensively documented.\textsuperscript{67} While Arabs played prominent roles in these movements, their approach to Islamic law seemed to have remained largely unchanged. It seemed that their ideas for religious reform did not extend to legal practice in the colonies. In fact, as this dissertation will show, British colonial conceptions of Islamic law were largely adhered to by Arab litigants, and while Arabs in the Netherlands Indies frequently challenged Dutch ethnic classifications of their communities, they hardly ever tried to tamper with the content of Islamic law. By contrast, as subsequent chapters will demonstrate, customary Islam (defined by Nile Green as patterns of Muslim religiosity that while evolving in the centuries before the emergence of the more competitive religious economy of the nineteenth century still held sufficient) was largely upheld in the realm of law, despite the fact that there were reformist elements


amongst Arabs in the region. In other words, Islamic law was not subjected to an agenda of change.

**Diasporic complications**

However, Arab communities in Southeast Asia did complicate the practical administration of Islamic family law in two significant ways. Firstly, although they were classified as ‘Arabs,’ they were in fact ethnically mixed, the majority being locally-born, with only a nominal claim to being Arab – a category that was strictly determined by patrilineal descent. As a consequence, Dutch colonial officials who privileged *adat* over Islamic law could not clearly identify which sets of *adat* laws were applicable to Arabs residing in the Netherlands Indies. Secondly, since they were highly mobile, Arab communities in the regions simultaneously demonstrated the tension which emerged from the potential portability of colonial subjecthood that confronts the limits of legal jurisdiction.

Arab identities were complex precisely because they had settled in the archipelago for centuries before the advent of European colonization. Since the seventh century, Arab and Persian merchants and sailors had travelled across the Indian Ocean to the Malay Archipelago on their way to China. Although ports in Malay

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Archipelago, collectively referred to as ‘zabaj’,\(^{70}\) started out as transit points for Arab traders, they became ports of settlement after 879 when foreign vessels in the port of Canton, including Arab vessels, were expelled following the massacre of foreign merchants in the port.\(^{71}\) Arab shipping to the Malay world started to increase as well as a result.\(^{72}\) This was not surprising since port emporia in the Archipelago situated at the intersection of two trading circuits - the Indian Ocean and the South China Sea - were crucial meeting places for merchants, emissaries and representatives hailing from various places stretching from Arabia to China,\(^{73}\) creating what Sugata Bose calls an “inter-regional arena.”\(^{74}\) Arab ships had to pass through the Straits of Malacca, “the gullet of world sea trade,” in order to sail up to China right till the middle of fourteenth century.\(^{75}\) Arab trade reopened with China by 979, and by 1178, it surpassed that of the

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\(^{71}\) Di Meglio, “Arab Trade with Indonesia and the Malay Peninsula,” 109-110.


\(^{73}\) K.N. Chaudhuri identifies three trading circuits in all. The westernmost circuit stretched from the Red Sea to the southwest tip of India, the middle circuit from the southeastern coast of India to the Straits of Malacca and Java while the easternmost circuit runs from the Straits of Malacca to the ports of Southeast China. K. N. Chaudhuri, *Trade and Civilisation in the Indian Ocean: An Economic History from the Rise of Islam to 1750* (Cambridge: Cambridge University Press, 1985). Also see Abu-Lughod, *Before European Hegemony*, 251-260.


\(^{75}\) Arabs had already settled in Canton as early as the fourth century. Van Leur claims that foreign traders including Arabs mostly traded in high-quality products as well as luxury goods, although M.A.P. Meilink-Roelofsz convincingly argues against this view. These products included ivory, tortoise shell, copper camphor, pepper, gum lac, benzoin, frankincense, cotton, tobacco, cinnamon, nutmeg, cloves, mace, camphor, porcelain, sandalwood, musk, diamonds, indigo, drugs, tin, iron, steel and perfumes and gums of Southern Arabia. Van Leur, *Indonesian Trade and Society*, 76, 111; Chao, *On the Chinese and Arab Trade*, 16; For M.A.P. Meilink-Roelofsz’s rebuttal, see M.A.P. Meilink-
Javanese and Sumatrans (from the kingdom of Srivijaya).\textsuperscript{76} Trade flourished till the ascension of the Ming Dynasty however when once again Muslim inhabitants, including Arabs were massacred forcing them to retreat south to the Malay Archipelago which possessed a more favorable climate, not least due to recent conversions to Islam of several merchant rulers.\textsuperscript{77} Circulation of Arab traders in the Southeast Asia survived the Ming dynasty’s withdrawal of a powerful Chinese fleet from the Indian Ocean in 1435 and the subsequent rise of Portuguese maritime power lasted which lasted until the end of the sixteenth century.\textsuperscript{78} The arrival of the VOC heralded Dutch dominance in Southeast Asia on the tail of Portuguese decline.

Works on Arab diaspora have been rather sparse compared to the much richer scholarship on the Chinese diaspora in Southeast Asia have been examined in further

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Bartolomeu Dias rounded the Cape of Good Hope in 1487 and Vasco De Gama reached India in 1497. The Portuguese nonetheless could not compete within the well-established Indian market which led them to develop tactics of naval warfare centered on crucial port–cities instead on the perimeter of the Indian Ocean such as Socotra, Ormuz, Goa and Malacca which was captured in 1511, although the Portuguese never managed to dominate trade in the region. The Portuguese had longer lasting cultural impact in the eastern archipelago in the islands of Maluku specifically Tidore, Ternate and Ambon. See Sanjay Subrahmanyam, \textit{Improvising Empire: Portuguese Trade and Settlement in the Bay of Bengal, 1500-1700} (Delhi: Oxford University Press, 1990).
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Most probably, this is because the Chinese population in Indonesia (currently estimated to be between 1.5% to 3% of Indonesia compared to 29.4% of Malaysia and 74% of Singapore) have been the systematic target of mob violence and victim of mass rioting in Indonesia, the latest incident occur in May 1998, during the Asian financial crisis. Arabs communities however, have received less attention perhaps because they have assimilated more seamlessly into indigenous communities in Malaysia and Singapore.

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81 For a discussion of the painful assimilation policies of the Chinese communities in Indonesia that began in the 1960s, see Mary F. Somers Heidhues, Peranakan Chinese Politics in Indonesia (Ithaca: Cornell University Press, 1977).
This study bridges the area studies divides between Near Eastern Studies and Southeast Asian Studies by focusing on the Arab diaspora who travelled back and forth across the Indian Ocean. Thus far, literature on the diaspora have either examined Arab communities in both British and Dutch territories separately or offered sweeping generalizations about the entire region without careful comparison. While historians of the Indian Ocean such as Engseng Ho and Nile Green have recently underscored movement and flexibility in the lives of itinerant Muslims, I emphasize that law in particular territories nonetheless had the potential to lock diasporic communities into particular sociological configurations forcing them to act and structure their lives in certain ways. In fact, legal exigencies ensured that colonial boundaries determined the legal lives of Arabs based in Southeast Asia. Following the suggestive insights of historian of Tamil diaspora, Sunil Amrith, I argue that diasporic consciousness emerged out of absence from the original homeland, or as Amrith puts it, as “a consciousness of immobilization” rather than mobility. Indeed, legal sources constantly demonstrate how diasporic visions were always limited and contingent. Colonial laws and legal structures along with their legacies in postcolonial nation-state have real implications. 

Lex domicili, the law of domicile, was a key component of colonial law in the realm of

84 Sunil S. Amrith, “Tamil diasporas across the Bay of Bengal,” American Historical Review 114, 3 (June 2009): 549.
family law precisely because marital matters, normally governed by personal law, were associated with landed property which were in turn governed by civil law in both colonies. That said, Arabs in both colonies were subjected to vastly different legal structures. While the whole religious administrative structure came under British colonial purview in the Straits, jurisdiction for Arab residents, classified as “an intermediary community” between natives and Europeans, were neither defined nor carefully circumscribed in the ethnically stratified Netherlands Indies. Instead, jurisdictions were hammered out in action in competition with each other in transactions that occurred within the formal settings of colonial courts. As we shall see, this resulted in a higher degree of indeterminacy, ambiguity, uncertainty and manipulability of laws.

By contrast, in British colonies subjected to English Common Law, there was visible continuity which contributed to a sense of certainty with regards to conceivable legal outcomes. As historian Thomas Metcalf has shown, British officials generally aimed towards achieving commensurability of legal administration of law in all territories. Furthermore, the common law system which made judicial precedents legally binding ensured a high degree of predictability in legal rulings. Law reports published in colonial legal digests, evidently, provided a form of security to future litigants especially in common-law countries. Indeed, historian Alan Guenther provocatively asserts that the printing of the Indian Law Reports by the various high

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courts in British India created a new source of Muslim law in South Asia. In the Straits Settlements itself, a report in The Straits Times in October 1869 specifically lauded the fundamental utility of law reports in the press. More importantly, colonial institutions provided written records that were particularly vital for European colonial officials who placed high value on written titles, in contrast to the Muslim world where, until the late nineteenth century, an oral pronouncement generally sufficed as a legal contract. Colonial legal regimes which provided repositories of bureaucratized records were understandably more useful for highly mobile Arabs.

Undoubtedly, colonial governments imposed their own conceptions of Islamic law on Muslim subjects. In my first chapter, I trace the development and formulation of colonial knowledge of Islamic law in the British Straits Settlements and the Netherlands Indies. As we shall see, British knowledge of Islamic law was based on existing legal precedents and legal codes brought over from British India that ultimately proved to be of limited use in the Straits due to different religious practices between Muslims in India and Southeast Asia. By 1875, British legal authorities had discovered to their dismay that the more important decisions in Indian courts were inapplicable to a large proportion of the native population in the Straits Settlements. In contrast to early British confidence in administering Islamic law in the Straits, Dutch colonial officials were more tentative in their exploratory discussions which were

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87 Although, it was only after 1880 that law reports began to be produced more conscientiously. “The Indian Penal Code,” ST Overland Journal, October 16th 1869, 3.
89 “Mahomedan Marriage Divorce,” ST, September 11 1875, 1.
based on the illustrious and extensive scholarship of Orientalists in the academies located in Leiden and Delft, as well as empirical observations within the Indies itself.

Chapter Two situates Arabs within the far more complicated plural society of the Netherlands Indies. Inconsistently classified as ‘Foreign Orientals’ by Dutch bureaucrats, they were subjected to European laws in some matters and local customary laws in others creating a sense of legal unpredictability. As part of a diasporic community who shared the same faith as the majority of indigenous inhabitants with whom they frequently intermarried, Arabs appeared simultaneously local and foreign in the eyes of Dutch officials. Hence, although they frequently appeared in courts, their legal status was never ascertained in the Dutch colony till the end of the colonial period. Like their counterparts in the Straits, Arabs based in the Netherlands Indies requested for more colonial intervention to counter the arbitrariness of local Muslim qadis in granting divorces to their local wives. Their repeated requests for separate religious courts from local Muslims and for a more centralized, standardized judicial system in the vast colony were ultimately unsuccessful. Unlike British colonial courts in the Straits, Dutch colonial courts refused to directly administer marital contracts. However, Arab religious experts were able to steer Dutch religious policies by acting as advisors to high-ranking Dutch bureaucrats in charge of Muslim affairs. The chapter therefore focuses on one such Arab advisor, Sayyid ‘Uthmān bin Yaḥyā (1822-1914), who wrote a popular guidebook of Islamic law intended for Muslim judges in religious courts at the request of his close friend and patron, Christiaan Snouck Hurgronje, the Dutch advisor for Arab and Native Affairs. Sayyid ‘Uthmān promoted a stricter implementation of Islamic law that did not tolerate
the influence of customary law. His influence however was far-reaching since his fatwas (legal opinions) transcended colonial, and even regional boundaries as they were sought in Singapore and Aden as well. In this way, he presents an ideal case-study on Arab linkages within the Malay world and beyond.

Both Chapters Three and Four then expose the limits of legal transplantation within the British Empire. The Shāfi‘ī school of law in Southeast Asia, as opposed to the Hanafi school of law in South Asia, presented British judges with new situations not encountered in British India. Particularly Arab conceptions of marriage equality, known as kafā‘a, baffled British judges in courts. Arab litigants attempted to influence British colonial rulings on marriages in order to police marriage practices, especially concerning Arab women who were encouraged to marry Arab men of the same status. However, Arab women, who brought their cases to colonial courts precisely in order to escape patriarchal authority, were usually successful.

Chapter Four specifically examines the status of the family endowment, more commonly known as ‘waqf.’ Banned in the Netherlands Indies, the family waqf thrived in the Straits Settlements, but rarely in its entirety, since it tended to partially fail on two counts—first, for not fulfilling the definition of ‘charity’ as stipulated by English Common Law, and secondly for running against the English Law of Perpetuities which strictly forbade the permanent alienation of immoveable property. However, these restrictions provided a boon for beneficiaries who repeatedly disputed the status of waqfs in British courts in the hope that courts would declare the waqf void so that they could benefit from the sale of the endowment.
Despite constituting less than 1% of the entire Muslim population in Singapore, the Arab elite were remarkably able to steer the direction of British policy regarding Muslim religious affairs in the late nineteenth century. They astutely turned to the British colonial administration to enact changes to legal administration of Islamic law in their bid to counter the dominance of local Muslims who formed the majority of the Muslim population in 1875. From 1875 to 1880, over 100 Arabs based in Singapore actively campaigned to vest legal authority in the colonial state religious affairs. Their efforts led to the issue of the Mohamedan Marriage Ordinance of 1880 by the Legislative Council in the Straits Settlements. The ordinance led to the establishment of a centralized marriage registrar and the official recognition of qāḍīs by the colonial government. The ordinance would not have been passed without inducement of members of the Arab community, along with other unidentified Muslim residents. Not content with the draft of the non-compulsory bill that was eventually passed in 1880, these Arab petitioners persisted in urging the government to have a bigger hand in the actual appointment of qāḍīs who primary duty was to solemnize marriages and grant divorces to women under special circumstances such as when their husbands were proven to be unable to fulfill their duties.

Why were Arabs so intent on working through colonial legal channels, yet resist wrangling positions within government themselves? It was likely that the petitioners, being mobile merchants who frequently travelled, considered themselves unsuitable candidates for any sort of permanent role within colonial bureaucracy. Their itinerant lives which tended to produce far-flung relations made notarial attestation by
centralized depositories all the more crucial.\textsuperscript{90} This did not mean that legal authority was completely relinquished and placed in the hands of colonial authorities by members of the Arab elite. Rather, authority was ceded in order only to ensure that some form of coercive mechanism was enforced in legal matters. Members of the Arab community relentlessly attempted to influence colonial courts to pursue their own goals. As we will see in Chapters Two and Three, social policing of Arab communities in Southeast Asia remained, to a significant extent, in the hands of Arab religious and wealthy elite. Partly, this was because conflict resolution procedures were not always defined centrally in relation to the state anyway. The ability to resolve domestic conflicts was dispersed over many institutions. In times of crises, non-binding \textit{fatwas} were, for example, eagerly solicited from various muftis and religious scholars in the immediate region and across the Indian Ocean. These \textit{fatwas} could not be enforced by the colonial legal regime and required strong social consensus to influence society. This phenomenon pointed towards alternate social and religious discourses of power that existed alongside colonial discourses of power. In this way, Arab residents in the Straits Settlements existed within two legal regimes – Islamic and colonial – simultaneously. This phenomenon collapses the binary distinction between a colonial/European legal zone and a local/religious legal zone, thus supporting Lauren Benton’s influential view of legal history that breaks out of this unhelpful scheme.\textsuperscript{91}

Since they preferred to work within colonial institutional frameworks, the Arab elite tended not to cross boundaries for legal recourse. Instead, they largely chose to


\textsuperscript{91} Benton, \textit{Law and Colonial Cultures: Legal Regimes in World History}. 
remain in separate colonies. I will elucidate the different ways European colonization firmly rooted these Arabs despite their mobile ways through legal means.
“(A) great many cases decided in India were cited by [a British lawyer in Singapore] but these cases are no authority here; as they were decided on the Mahomedan law which is not in force here.”

- British judge in Singapore (1872)

Introduction

This chapter examines the collation of colonial knowledge of Islamic law in the British Straits Settlements and Netherlands Indies. Overwhelmed by the amount of Islamic jurisprudential material that had developed since the seventh century, both colonial powers deliberately shied away from referring to the existing rich legal Islamic literature. Indeed, the British had a rich inheritance of their own for the legal regime in the Straits Settlements of Penang, Malacca and Singapore had on hand a ready corpus of legal codes, commentaries, translations and judicial precedents produced in British India since the late eighteenth century. Conversely, the development of Dutch colonial conceptions of Islamic law distinctively occurred in relation to the Netherlands Indies, even as Dutch officials inherited an orientalist tradition focused on the birthplace of

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1 Fatimah & Ors. v Logan & Ors. [1871] 1 KY 255.
Islam in Arabia. From the mid-nineteenth century onwards, Dutch authorities attempted to draw heavily upon local adat and wetboeken (legal codes) derived from the Islamic legal tradition as practiced specifically in the Netherlands Indies. In the interests of preserving structural continuity, legal authority was partially delegated to local religious heads in the Dutch colony. By contrast, British colonial officials directly adjudicated cases involving Islamic law, thus circumventing the authority of local intermediaries, as we will see in Chapters Two and Three.

Colonial prejudice that accorded primacy to text over interpretive practice led to one of the most drastic changes in the lives of Muslim colonial subjects by the early twentieth century. Pure textual authority ran counter to the Islamic legal tradition where the authority of the legal interpreter (judge) and the legal interpretation, did not yield a system of codes and precedents that oriented future legal decisions. By contrast, the traditional method of Islamic jurisprudence involved extensive references to the Quran, hadiths and legal opinions of Muslim jurists and scholars which were often diverse and contradictory. In other words, the pre-colonial Islamic legal milieu was characterized by a multiplicity of systems, with no fixed authoritative body of law,

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2 For a contemporary discussion on the differences between colonial bureaucrats trained in institutions situated in Leiden and Delft, see P.J. Veth, “Leiden contra Delft in zake der opleiding der Indische Ambtenaren,” IG 1 (1879): 401-427, 585-605. In connection with this, there was also a discussion of whether scholars stationed in the Netherlands Indies were more suited to study Islamic law than those in the Netherlands Indies. See “De opleiding tot Indisch ambtenaar” IG 15, 2 (July-December 1893): 1259-1260.

3 There were two types of authority in Islamic legal thought – legislative authority that is divine and concretized in foundational texts, and interpretive or declarative authority which belongs to jurists. The latter is a derivative authority, drawn entirely from the legislative authority of God. The Muslim jurist bears no authority in his person or status in the sense that his declarations are automatically accepted as valid. The authority depends upon the methodology employed by the jurists and his skills. Bernard G. Weiss, The Spirit of Islamic Law (Athens: University of Georgia Press, 1998), 65.
no set of binding precedents and no single legitimate way of applying or changing them. Colonial legal literature, however, removed complications and subtleties in certain areas of law since they were regarded as extraneous or cumbersome. In the process of colonial codification and translation, traditional religious literature which were filled with jurisprudential ruminations and opinions were reduced to collections of binding legal precedents.

**Codification in British India**

In the British Empire specifically, the process of streamlining Islamic law was hastened by codification that was systematically conducted under the aegis of modernization and centralization in British India during the late eighteenth century. Although Islamic law was recognized and administered by colonial regimes in the realm of personal law from the late nineteenth century onwards, it was not allowed to supplant colonial laws. In fact, the administration of Islamic law was intended to enhance colonial rule over local communities without granting more legal autonomy to these communities. Hence, legal authorities had to ensure that an accidental cession of legal authority to colonial subjects did not occur. General caution steered colonial policies away from an unnecessary reliance on colonial subjects. The process of codification

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4 In fact, inconsistencies in legal texts were not regarded as a mark of richness in diversity. Rather, they were easily dismissed as quirks of the past where scholars were believed to be ignorant of the subject matter or ‘carried the law in their heads’ anyway which precluded proper legal codes in writing. Faiz Badrudin Tyabji, *Muhammadan Law: The Personal Law of Muslims* (Bombay: N.M. Tripathi and Co., 1940), xii.

5 Molded by ideas of Indian difference, the very process of codification in British India was a radical break from historical English common legal tradition. Some British philosophers such as Jeremy Bentham and his followers, Thomas Macaulay and James Mill harbored hopes that it would be eventually be undertaken in England. Elizabeth Kolsky, *Colonial Justice in British India* (New York: Cambridge University Press, 2010), 70-71; Guenther, “A Colonial Court Defines a Muslim,” 293.
occurred in two phases, the first, beginning in the late eighteenth century under the auspices of the EIC, was followed by a second phase from the 1860s directly overseen by the metropolitan state. The Charter of George II in 1753 had already granted Hindu and Muslim subjects exemption from Company Courts, and allowed them to have recourse to their own religious laws. A firmer legal apparatus was established in 1772 when Governor Warren Hastings introduced the Adalat System, a watershed moment in the legal history of British India. Subsequently, matters of inheritance, marriage, caste and other religious institutions were to fall under the purview of religious laws, since Hastings believed that certain beliefs should be respected instead of being held under the tyrannical control of common law which local populations were thought to be wholly ignorant of. The Adalat system made it compulsory for local experts, namely Muslim Qādis and Hindu Pandits, to function as juriconsults to assist English officers in both criminal courts and civil courts known as the Mofussil Diwani Adalat in Bengal.

6 The British created two legal codes, Hindu and Muslim, thus forcefully inscribing a Hindu/Muslim binary on Indian societies by completely disregarding the diversity of Indian legal traditions. Personal laws of Jains, Sikhs, Parsis, and certain tribes were not recognized. Since then, only Parsi personal laws have been recognized. Rosane Rocher, “British Orientalism in the Eighteenth Century,” in Orientalism and the Postcolonial Predicament: Perspectives on South Asia, eds. Carol A. Breckenridge and Peter van der Veer (Philadelphia: University of Pennsylvania Press, 1993), 221-222.
8 Warren Hastings (governor of Bengal from 1772, governor-general from 1774 to 1885), created two courts in each district, namely the Diwani Adalat which handled civil cases, and the Foujdari Adalat that held trials for crimes and misdemeanours. The civil courts applied Islamic and Hindu laws to Muslims and Hindus, while the criminal courts applied Islamic law universally. M.P. Jain, Outlines of Indian Legal History (Delhi: University of Delhi Press, 1952), 57-69.
9 Clause XXIII stated that “(i)n all suits regarding inheritance, marriage, caste and other religious usages or institutions, the laws of the Koran with respect to the Mohamedans and those of the Shaster with respect to the Gentoos shall invariably be adhered to.” See Rocher, “British Orientalism in the Eighteenth Century,” 215-249.
Bihar and Orissa. In this way, the Hastings Regulations subtly introduced a new legal fulcrum - English legal authority - around which Hindu and Muslim religious laws pivoted.

Thereafter, English legal authority swiftly encroached upon local religious laws. By the time commercial, criminal and procedural law had been completely codified in 1882 in India, Hindu and Muslim legal codes were strictly confined to personal laws matters, namely, marital law, inheritance, succession, caste and religious family endowments. The last four decades of the nineteenth century also witnessed the prolific production of legal textbooks, digests and jurisprudential works that led to a consolidation and refinement of legal ideology in the early twentieth century.

**British view of adat and Islamic law**

Since codified laws imported from India were promulgated in advance of the situations to which they applied, the application of Islamic law in the British Straits Settlements was potentially stable and general. Codified laws in India supposedly applied to all Muslim subjects regardless of their historical background and cultures. In this way, Islamic religious practice was imbued with general unprecedented applicability across

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10 Lauren Benton demonstrates how these experts actually occupied an ambiguous position with in colonial bureaucracy, since they certainly did not occupy the same status as British officials although they were certainly officers of the Company and employees of the courts. Lauren Benton, “Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State,” *Comparative Studies in Society and History* 41,3 (2000): 571.
11 Kugle, “Framed, Blamed and Renamed,” 262.
12 By 1875, Anglo-Muhammadan law was restricted to family law and certain property transactions, while English law dominated in all other areas.
the British Empire. Moreover, the advent of telegraphic communications in the 1860s provided a valuable link across huge geographical expanses, especially after the Empire radically expanded between the end of the First World War and the beginning of the Second World War following the demise of the Ottoman Empire. Colonial officials stationed in various colonies constantly updated each other on amendments to legal statutes and acts, by corresponding with the Colonial Office in London, who dutifully copied their correspondences and sent them to other British governments throughout the British outposts and administrative centers. These amendments were subsequently announced in colonial government gazettes. In this way, British territories in all forms, including colonies, Protectorates, and later, Mandates, were linked to a body of knowledge that regarded Muslim subjects as part of a global community.

However, British authorities acknowledged that religious practice in the Malay Archipelago possessed distinct local form and coloring, as was evident in the numerous digests and loose collections of local laws, known as ‘undang-undang’ which included both Islamic law and local customary laws known as adat. After all, these legal codes had already been painstakingly collected by British Orientalist William Marsden, as well as EIC employees such as Thomas Stamford Raffles and William

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15 As legal scholar Marc Galanter emphasizes, colonial administrators put forth general rules that were applicable to whole societies. Marc Galanter, "The Displacement of Traditional Law in Modern India," Journal of Social issues 24, 4 (1968): 65-91.
16 By the eve of the Second World War, memos on Muslim subjects were circulated to Ceylon, Iraq, Palestine, Malay States, Somaliland, Zanzibar, Trinidad and Tobago, Nigeria, Cyprus, Gold Coast and India.
18 Lists of adat laws never aspired to the status of a legal system, and did not resemble a normative system of jurisprudence. M.B. Hooker, Adat Laws in Modern Malaya (Kuala Lumpur: Oxford University Press, 1972), 85.
Farquhar from various states in Sumatra, the Malay Peninsular and Java during the early nineteenth century. This was followed by British scholar-officials such as Richard O. Winstedt and Richard J. Wilkinson a century later. However, these legal codes were never implemented in colonial courts in the Straits Settlements. Hence, such collections tended to be only of scholarly interest, presumably as a form of ethnographic study that would illuminate British understanding of local societies. In other words, beyond scholarly academic or antiquarian interest, these collections of local laws were never deemed to possess practical value in the Straits Settlements.

Since local adat was not officially considered as part of the laws of the Straits Settlements, knowledge of Islamic law proved to be of greater utility from an imperial perspective.

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21 Adat laws were implemented in the Federated and Unfederated Malay states in the Qadi courts and Sharia courts. Ahmad Ibrahim, Towards a History of Law in Malaysia and Singapore (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1992), 9.

22 However, in the Malay States on the Peninsular, such collections aided British legal practitioners immensely when cases involving Malay rulers on the peninsular were brought to English courts. The Undang-Undang Melaka (Laws of Malacca) was used in Pahang, Johore and Kedah. See Yock Fang Liaw, Undang-Undang Melaka - the Laws of Melaka (The Hague: M. Nijhoff, 1976).
point of view. Indeed, in this way, the British imperial worldview was highly conducive to efficient legal administration, at least from the outset. While British collection of adat laws could not have been achieved without the cooperation of local ruling elites in Sumatra, Java and on the Malay Peninsular, since they were the purveyors of adat in the region, British knowledge of Islamic law gathered in British India allowed them to conveniently avoid relying on local political and religious authorities altogether.

Yet, this ideal view of Islamic legal practices in the British Empire was limited in the Straits Settlements. Firstly, the legal structure of the Straits Settlements remained indistinct right up until the last quarter of the nineteenth century. While arguing a landmark case in 1871, a lawyer pointed out that prior to the First Charter of Justice in 1807 which placed the Straits Settlements under the government of Fort William of Bengal, Islamic law had been enforced in the first Straits Settlement of Penang. However, a court judge quickly dismissed this notion since there were no legally constituted Courts to administer the laws at the time.23 In any case, the Second Charter of Justice in 1826 had introduced English Law as the basic law in the Straits Settlements and relegated laws of colonial subjects – whether Chinese, Hindu and Islamic – to the area of family law. However, it was only in 1880 that the first ordinance concerning Islamic family law.

Entitled “An Ordinance to provide of the registration of Marriages and Divorces among Mahomedans, It not only provided for the appointment of Qadis but also defined the modifications of the Laws of Property to be recognized in the case of Mahomedan Marriages.” It stated that the Governor of the Straits Settlements was to

23 Fatimah & Ors. V. D. Logan & Ors. [1871] 1 KY 1.
appoint a Qadi in each settlement with limited jurisdiction as his decisions were subjected to the Registrar under the Governor’s supreme authority.  

**Mohamedan Marriage Ordinance (No. V) of 1880**

Prior to 1880, laws, including the legal definition of ‘marriage’ above, were devised in courts in the Straits Settlements rather than during legislative council meetings. Due to the absence of legislation on Muslim marriages, judges’ opinions were understandably highly varied, although in general, court rulings became consistent over time. As late as 1879, no law had given effect to the recognition of Muslim marriages, and it was only by similar decisions of colonial courts that Muslims marriages were seen as valid, although some judges continued to express doubt about the status of Muslim marriages in law reports. At a legislative council meeting in 1880, the Attorney-General stressed that English law was imposed by default for so long without any official legislation for Hindu and Islamic laws, precisely because the Straits Settlements was a “new colony,” previously uninhabited. During the same meeting, the Chief Justice even commended his predecessor and contemporary colleagues in the Straits Settlements for avoiding interpreting Islamic law.

Yet, by this time, British authorities were already confronted with problems in resolving marital disputes amongst Muslim residents. Although British authorities largely agreed that local laws and customs in each territory were important and should be applied whenever possible, this legal policy caused serious complications in practice.

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27 Ibid.
in territories such as the Straits Settlements that had been declared unequivocally ‘uninhabited.’

The difficulty is rooted in the immense diversity of the Muslim communities based in the Straits. Each ethnic Muslim community in the Straits Settlements not only appointed their own judges (qādīs), but also demanded that colonial courts recognized their diverse sets of customary laws as promised. Marital disputes presented a particular conundrum for legal authorities due to frequent intermarriages amongst diverse Muslim communities consisting of Indians, Arabs and Malays, as well as numerous communities from the Netherlands Indies.

In their petition to the British colonial government in 1875, the Arab complainants, who formed the majority of 143 memorialists, did not allude to this diversity that precluded standardization of laws of marriage and divorce for Muslims before 1880. Rather, they chose to emphasize the ineffectiveness of local qādīs. They stated that that the existing mode of recording Muslim marriages and divorces had produced ill-kept entries in the qādīs’ books. Worse, sometimes no books were kept since the qādīs tend to rely only on verbal evidence of persons involved. Thus, it was extremely difficult to prove the validity of marriages, legitimacy of progeny and property titles. The memorialists suggested that a Muslim registrar be appointed under the supervision of the Registrar General whose functions and duties correspond to that of the Mahomedan Registrar by the Bengal Act no. 1 of 1876. They strongly recommended that no marriages and divorces should be recognized except those


\[29\] Mahomedan Marriage Divorce, *ST*, September 11 1875, 1.

\[30\] Members of this higher class Arabs kept pushing for the Bill to be made compulsory. “The Legislative Council, 6th July,” *ST Overland Journal*, July 12 1880, 3.

\[31\] Verbal testimony was not only adequate, but even preferred in Islamic courts.
solemnized by certain qualified qāḍīs licensed by the Government. Each qāḍī should be answerable to the Mahomedan Registrar, a government-appointed British official.

The Legislative Council dragged their feet on the issue since British legislators and administrators were generally reluctant to interfere in religious matters anyway. Five long years after the petition was received, information was finally procured from various colonial governments in Ceylon, Madras, Calcutta and Bombay on the administration of Islamic law in these places. It was swiftly discovered that the administration of Muslim marriages in these places were, in fact, only in their nascent stage. The writer of the legislative report noted that:

under these circumstances, clearly the only course open for our Legislature is to await the passage of this law, in order that we may profit by the wider experience of India, and reap the benefit of the legal talent that will be brought to bear upon the Bill before it becomes law. We should thus be afforded some fixed data for the preparation of a similar law for this Colony, instead of groping in the dark, as we shall otherwise be compelled to do.

Although British India generally formed the authoritative backdrop for legislation in the Straits Settlements, Indian Acts and Statutes had limited applicability over Muslims in the Straits Settlements. While courts had quickly passed judgment on colonial subjects who appeared before them, legislative committees preferred to exercise caution and wait for their own counterparts in India to take the lead. This was significant especially since the British administration in North Borneo had already

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32 The replies from Madras and Calcutta covered a list of Acts in force and Bills under consideration, while those from Bombay and Ceylon were more detailed. “The Mahomedan Law of Marriage and Divorce,” October 21 1875, 1.
33 “Mahomedan Marriage Divorce,” ST, September 11 1875, 1.
applied Islamic law to Muslim inhabitants in the territory.\(^{34}\) Instead of learning from neighbouring British territories like North Borneo (later Sarawak) with similar customs to Muslim inhabitants of the Straits Settlements, the legislative council members viewed the matter of legislation over Muslim subjects in the Straits Settlements solely vis-à-vis British India.

Benson Maxwell probably played an important role in pushing the Bill through since he had presided over key cases involving Muslim marriages. Moreover, as we have seen, he, more than any other British official, had thought through the issue very thoroughly. According to a newspaper report, the impetus for this legislation in 1880 was in fact a case involving a deceased woman’s property.\(^{35}\) Not surprisingly, considering the impetus, the most important part of the Bill was thought to be the portion concerning women’s welfare.\(^{36}\) Ironically however, women in the Straits Settlements, who adhered to the Shāfi‘ī madhhab were not in fact deprived of a recourse for aid prior to 1880, as they had been going to qāḍīs in order to be granted divorces without the husband’s pronouncements, usually in the husband’s absence. Rather ironically, British anxiety in fact stemmed from the qāḍīs power to grant

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\(^{34}\) According to a contemporary article in *North Borneo Herald*, Islamic law, was administered by European magistrate, assisted by Imams who were salaried officers of the Government selected from amongst Muslim subjects on account of their exceptional knowledge of Mahomedan law and custom. The article praised these men for being “very intelligent and painstaking,” and highly respected by fellow Muslims. “British North Borneo,” *ST*, November 3\(^{rd}\) 1883, 3.

\(^{35}\) The case was not named but it occurred either in 1880 or just before.

\(^{36}\) “Mahomedan Marriages Ordinance,” *ST Overland Journal*, July 19 1880, 2. Even an attempt to prevent a Muslim convert, originally a Christian, to marry another wife whilst still being legally married to his Christian Wife was promulgated in law precisely in order to protect the Christian woman who might potentially be deserted by her Christian husband who was thought to have only “pretended” to turn Muslim.

divorces, but hardly in general. It was only when such divorces were later contested in colonial courts that colonial judges would criticize qādis' unchecked powers. Hence, the qādis' powers to marry women off to their chosen partners and grant divorces were curtailed by British authorities who sought to impose order in the family lives of Muslim subjects.

The ‘Mahomedan Marriage Bill’ (as it was first known) was proposed in June 1880 by Legislative Council, who stressed, nonetheless, that the Bill was not compulsory. It was divided into three parts- the first part providing for the registration of marriages and divorces so as to facilitate proof in Court, the second for the recognition of qādis appointed by the Muslim public, and the third part deals with the rules regarding the rights of widows and children of Muslims dying intestate. According to the Bill, the function of the qādi in the Straits Settlements was restricted to presiding over matters of marriage and divorce. It is rather telling that his function within the colonial state was only delineated within the Mohamedan Marriage Act, and

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37 In contrast, there was no provision in the Hanafi code of Muslim Law enabling a married Muslim woman to obtain a decree from the Courts dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for and under certain other circumstances. The Hanafi jurists however have clearly laid down that in cases in which the application of Hanafi Law causes hardship, it is permissible to apply the provisions of the ‘Maliki’, Shafi’i or Hanbali Law. The law was passed in 1939 by British colonial legislation who explicitly sought to ameliorate the plight of Muslim women. IOR/L/PJ/7/1065, “Muslim Dissolution of Marriages Act 1939.”

38 Compulsory registration of Chinese marriages was also not an option considered by the British government, although it was desired by a number of Chinese ladies and a limited number of Chinese gentlemen of “advanced views.” Maurice Freedman, “Chinese Family Law in Singapore,” In Family Law in Asia and Africa, ed. J.N.D. Anderson (London: George Allen and Unwin Ltd., 1968), 53.


40 The qādi was in a powerful position as he could represent women in certain cases when a wali was absent.
nowhere else. This implied that the qādis were restricted to solemnizing marriages only. Their official roles were carefully circumscribed and their general function as judges were not formally recognized. The Legislative Council deliberately stopped short of appointing qādis, preferring instead to only recognize them, since qādis were not even appointed by “the Indian Government with all its experience, and it would therefore be unsafe as the result could not be known.”

The Mahomedan Ordinance V of 1880 placed qādis squarely within colonial bureaucracy, officially as a ‘deputy registrar of Muslim marriages.’ Qādis were therefore effectively transformed into civil servants by the Act as they were effectively integrated into the ranks of the Registrar. Qādis in the Straits Settlements already kept registers, which were readily produced in courts. The bill ensured that proper steps were taken to preserve documents. Every month, a qādi had to appear before the Registrar in order to deposit copies of all entries made in his registers and indexes verified on oath. The qādi’s books and seals of office were to be given up to the Registrar upon his death. Records were kept in standard format in either English or Malay and preserved by the state. By 1920, English translation of all certified copies became mandatory.

According to the Mohamedan Marriage Ordinance of 1880, conflicts of laws between residents of diverse ethnic origins could theoretically be averted since Muslims could only contract a marriage

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43 For example, see Fatimah & Anor v. Armootah Pullay 4 Ky 225.
44 In 1869, a barrister-at-law R.C. Wood had complained about the problem of itinerant qādis taking their registry with them when they leave the colony. Robert Carr Woods, A Selection of Oriental Cases Decided in the Supreme Courts of the Straits Settlements (Penang: S. Jeremiah), n.p.
45 Mahomedans Ordinance no. 26, ss.5, 7. Laws of the Straits Settlements, Volume 1, 312.
46 Mahomedans Ordinance no. 26, s. 8. Ibid.
according to Islamic law. In this way, marital unions could now be tracked more efficiently too. 47

The bill proposed in June 1880 was deemed severely insufficient by the memorialists who craved the imposition of more stringent rules by colonial authorities. 48 The Legislative Council noted that the “great bulk” of the Muslim inhabitants of Singapore adamantly required compulsory registration and demanded that the qāḍīs should be appointed and not merely recognized by the Straits Settlements government. 49 In a report to the India Office in London, Attorney-General of the Straits Settlements, Thomas Braddell stressed that the Ordinance was of “a very special character” because it required British officials to appoint Qāḍīs. 50 In this way, authority was vested by these Muslim memorialists, who were mainly Arabs, in colonial legal institutions. Instead of trying to wrest religious authority from the secular colonial power, these memorialists were ceding more religious authority from the hands of Muslim qāḍīs to non-Muslim colonial authorities. This lends credence to William Roff’s argument that in Singapore, Arabs, more so than other Muslims, lived fully as members of a colonial society governed by British law. 51

47 A Muslim subject could not contract a legal monogamous marriage under statute law and at the same time contract more marriages in front of a Muslim Qāḍī for example. Anderson, “Colonial Law in Tropical Africa,” 441.
50 The only suggestion received from the India Office is for the words “and issue of deceased children” to be added after the word “children” whenever it occurs. In the proposed Bill submitted. IOR/L/PJ/6/68 File 422, T. Braddell, Attorney-General’s Office, Singapore to Undersecretary of State, India Office, London August 31 1880.
51 Roff, “Murder as an aid to social history,” 92. In 1939, Arabs donated so much money to the Malayan Patriotic Fund in support of the British colonial government that they
By sending a detailed petition, the Muslim memorialists not only displayed a high level of knowledge of the legal workings of the Empire but willingly participated within the colonial legal structure. However, they were not members of the Legislative Council. Neither were they represented within the legal profession. The first Arab lawyer only appeared in 1948. In council meetings, their views were represented by two British gentlemen, Mr. Bishop and Mr. Shelford. Thus, their voices were not directly heard in the legislative council. Rather, British intermediaries had to push their agendas through council meetings. Members of the Arab elite could not directly participate in debates during council meetings, despite their high motivation to operate through colonial legal channels.

The key to this strong desire for more centralized colonial authority over the lives of Muslim subjects possibly lies in the fact that Arab residents might not possess much authority in the Straits Settlements at this point in time. Being highly mobile merchants, and as part of diasporic communities with property holdings and children and wives at various place throughout the Malay Archipelago, India, and Hadhramaut, these Arabs could certainly benefit from better record-keeping and clearer merited their own headline in *The Straits Times*. “Arab Donations to Patriotic Fund,” *ST* October 6th 1930, 12.

52 A copy of this petition could not be found.
53 The only local member was a wealthy Chinese businessman named Whampoa Hoo Ah Kay. The first Muslim representative on the Straits Settlements Legislative Council was a Malay named Eunos Abdullah appointed in 1924. Since the Muslim elite, not to mention, litigants in court, in the Straits either Indian Muslim or Arab, it was interesting that they colonial government picked a Malay. “Hon. Inche Unos: Reception by United Islamic Association,” *ST*, March 25 1924, 10; Mark R. Frost and Yu-Mei Balasingamchow, *Singapore: A Biography* (Singapore: National Museum of Singapore, 2009), 196.
54 His name was Syed Hassan bin Mohamed Salim Almenoar. Muslim Correspondent, “Passes Law Exams: Muslim Notes,” *ST*, July 12 1948, 5.
unambiguous legislation facilitated by a more centralized efficient colonial legal regime. This ties in with Max Weber’s argument that authoritarian powers could offer an abstract formalism of legal certainty provided by juridical formalism that enables the legal system to operate like a technically rational machine.\textsuperscript{56} As mentioned before, there were numerous qādis since each community elected its own qādi.\textsuperscript{57} Each qādi did not possess any territorial jurisdiction, and his authority was limited to Muslims who voluntarily recognized him.\textsuperscript{58} The existence of several qādis within each settlement was construed as a problem by the memorialists, who believed that this might lead to highly disorganized records, if any at all. More importantly, each qādi might favour his own community over another, putting the highly mobile Arab migrant without influential footing in the colony at a disadvantage. Since Arab men frequently married local women, they would be at a disadvantage in most marital disputes since the women would most likely consult their own qādi. It was not uncommon for an Arab merchant to return to Southeast Asia to find himself unceremoniously divorced from his local wife. Considering these potential problems, it was not surprising that Arab petitioners insisted that only one qādi should be appointed by the government who would have the monopoly on supervision in each settlement. British colonial legal

\textsuperscript{57} The Legislative Council narrowed the number of Muslim communities to three distinct and discrete groups – Arab, Indian and Malay, although there were actually many more ethnic communities, including Muslims who originated from other parts of the Malay Archipelago. Moreover, each community sometimes appointed more than one qādi. “The Legislative Council, 6\textsuperscript{th} July,” \textit{ST Overland Journal}, July 12 1880, 3.
\textsuperscript{58} “Pinang,” \textit{ST}, February 28 1854, 7.
apparatus provided valuable sense of predictability regarding the legal consequences of qadis’ actions.  

The memorialists, through Mr. Bishop and Mr. Shelton, gave two examples of grievances that could be alleviated by the introduction of a compulsory system of marriage registration. The first example was that of a woman who was pregnant by her husband and wished to receive some kind of redress from him which she was entitled to, according to Islamic law. Unable to prove her marriage, as there was currently no system of marriage registration in the colony, she risked being in great hardship. The second example was of a man who finds himself divorced from his wife who, or whose family, had bribed the qāḍīs into granting her a divorce. The children of polygamous unions ran the risk of being illegitimate. For Muslims who often travelled, it was useful to have records in one place, rather than in separate mosques for example, as was common practice, prior to 1880, when the Imam of a mosque solemnized a marriage. In order to avoid corruption, authority could be centralized if the Governor of the Straits Settlements appointed only one qāḍī for each settlement.

Despite the Arabs’ relentless exhortations for heightened colonial involvement in Muslim marriages, the Legislative Council, headed by the Attorney-General, was generally reluctant to make the Bill Compulsory. He argued that the lower classes of Muslims would not find it easy to register their marriages, as opposed to the higher classes of Arabs, who happened to be the main class of memorialists clamouring for

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60 Apparently, this was generally true, according to the Attorney-General. “The Legislative Council, 6th July,” ST Overland Journal, July 12 1880, 3.

compulsory laws.\textsuperscript{62} Furthermore, British authorities were determined not to be involved in matters of religion during the second half of the nineteenth century, anyway. Personal law was governed by religious laws outside the scope of a uniform civil code precisely because the colonial state was reluctant to intervene in matters close to the heart of religious doctrine and practice.

Direct attempts at legislative efforts by Muslims were limited. As we shall see, Muslim communities based in the colony aided in regularizing colonial administration of religious laws by repeatedly bring cases to colonial courts. This implied that Muslim subjects perceived that Islamic law had not been displaced completely, but rather, simply administered by another form of authority, that of the colonial government, whose clout was apparently accepted, or in certain cases even deliberately sought, by Muslims. Muslim litigants apparently pursued their grievances in colonial courts so often by the early twentieth century that a British legal official based in Cairo remarked upon the Muslim subjects’ considerable liberality in allowing secular non-Muslim courts to administer religious laws and in accepting colonial legislative amendments in family matters.\textsuperscript{63} In making this remark, he, of course, assumed that there was actually a variety of legal channels available to colonial subjects. Even if competing sources of Islamic authority were extended through networks of madrasas and Sufi lineages throughout the region and beyond within the Malay Archipelago, only colonial courts possessed the real power to mete out legally binding rulings over the lives of Muslim inhabitants, especially in the Straits Settlements. Distrust of secular colonial religious

\textsuperscript{62} “The Legislative Council, 6\textsuperscript{th} July,” \textit{ST Overland Journal}, July 12 1880, 3.

authorities might have existed in the Straits Settlements and the Netherlands Indies, but this sentiment is difficult to measure due to a lack of sources that directly reveal the opinions of local litigants of colonial authorities even as they willingly subjected themselves to colonial authority in religious affairs.

Eventually, the burgeoning Muslim clientele in the Straits Settlements demanded that British judges administer a different set of laws than in British India. To begin with, most Muslims in the Malay world were adherents of the Shāfi‘ī madhhab, not Hanafī, and therefore expected their new religious authorities to administer Shāfi‘ī law accordingly. Alas, the impressive corpus of judicial precedents, codes, manuals and statutes proved to be inadequate, for they were based overwhelmingly on Hanafī laws with very small provisions for other sects or madhhabs. In 1875, Colonial Secretary of the Straits Settlements Richard F. Morgan professed to be ignorant of the madhhab that was dominant in the Straits. Even as late as 1940, Faiz Tyabji’s list of recommended books for courtroom use by English legal practitioners contained thirteen titles on the Hanafī madhhab specifically, but only five on Shāfi‘ī madhhab in particular. Indeed, the Shāfi‘īs received relatively little attention in colonial literature on the whole, since there were relatively fewer adherents to the

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64 The clientele was not the relatively powerless as Sally Merry implies in a recent article. This will be examined in following chapters. Sally E. Merry, “Forum: Comment - Colonial Law and Its Uncertainties,” Law and History Review, 28, 3 (October 2010): 1068.

65 The term ‘madhhab’ has been translated as ‘sect,’ ‘rite,’ and most commonly as ‘school.’ However, as Joseph Schacht and George Makdisi warn us, it did not signify any definite organization, nor a strict uniformity of doctrine within each school, nor any formal teaching, nor any official status, nor even the existence of a body of law in the Western meaning of the term. Joseph Schacht, An Introduction to Islamic Law (Oxford: Clarendon Press, 1964), 28; George Makdisi, “The Significance of the Sunni Schools of Law in Islamic Religious History,” IJMES 10 (1979): 1.


67 Tyabji, Muhammadan Law, 90.
madhhab within British India. R.K. Wilson’s 500-page digest of Anglo-Muhammadan laws only dedicated 32 pages to Shāfi‘ī law. Hence, as subsequent chapters will demonstrate, Islamic law in the Straits Settlements was mostly devised in courtrooms, where litigation provided occasions for dialogue between the colonizers and colonized.

In April 1939, a legal adviser based in Aden Protectorate hinted at the incongruous universal aspect of Indian rulings when he claimed that Section 3 of Act VI of The Mussalman Wakf Validating Act of 1913 pertaining to waqfs had ‘overlooked’ adherents of the Shāfi‘ī madhhab. He pleaded with British legislators in India to be more attentive to the legal lives of other Muslims beyond the Hanafi majority in India. As we will see in later chapters, his complaint typified the frustrated gripe of colonial legal officials outside of India who inherited the formidable Indian legal corpus. Occasionally, attempts were made to not only alter Indian laws to suit the circumstances of specific territories, but also ground these changes in statute. One such attempt was made in the Aden Protectorate in 1938, although the effort ran aground ironically due to British policy of colonial non-intervention in religious affairs in Aden. In a surprising twist to the ‘universalizing’ trend in colonial administration of Islamic law, Asaf A.A. Fyzee argued in favour of British colonial legal system which, he

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71 CO 725/68/11, J.T. Lawrence, Supreme Court Aden to Bernard Reilly, Aden, 9th February 1938.
claimed, had no particular “rite of religion,” thus compelling judges to discover and subsequently, apply the particular laws of the defendant more fairly, unlike in Muslim countries where the litigant’s madhhab was not even considered by the qāḍī.  

During the process of adjudication in courts, legal uncertainty arose partly from the reluctance to completely do away with Indian Acts, Statutes and judicial precedents in the Straits Settlements, however jarring they might be in the Straits Settlements. Indian laws were inherited in whole, as the bases of authority, because Hanafi and Shāfī’ī madhhabs were perceived to share many similarities. The relatively fewer number of differences vis-à-vis commonalities between the two madhhabs did not immediately merit the creation of a whole other legal code based on Shāfī’ī laws or a major translation project involving Shāfī’ī legal manuals.

**Legal Diversity in the Netherlands Indies**

In stark contrast to the clean legal slate in the British Straits Settlements, the Netherlands Indies built over extant Islamicate polities. In comparison with British default universal application of Islamic law formulated in India to other colonies, Dutch acquisition of knowledge on Islamic law in the Netherlands Indies was far more localized. Unlike British colonial officials who were more inclined to impose English Common Law upon Islamic law, Dutch colonial officials preferred to preserve local legal structures. This led to a more pronounced legal pluralism in the colony. By the end of

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72 Fyzee, “Muhammadan Law in India,” 412.
73 There were actually key differences within the legal stipulations of other madhhabs especially with regards to family law. Outside of family law however, Hanafi and Shāfī’ī laws were not that different such that the Malay state of Johor on the peninsula could adopt the Hanafite Code of Qadri Pasha in Egypt in the early twentieth century. Ahmad Mohamed Ibrahim, “Recent Developments in the Administration of Islamic Law in Malaysia,” in *The Administration of Islamic Laws*, eds. Ahmad Mohamed Ibrahim and Abdul Monir Yaacob (Kuala Lumpur: Institute of Islamic Understanding, 1987), 2.
the nineteenth century, the Dutch judicial system in the Netherlands Indies had bifurcated into two – one for Europeans and another for Natives and Foreign Orientals including Arabs.74 The judicial hierarchy reserved for Europeans consisted of the Appellate Judicial Council (Appellate Raad van Justitie) of which there were six throughout Netherlands Indies (which also heard appeals from Natives and Foreign Orientals), and the Supreme Court (hooggerechtshof) in Batavia which had jurisdiction over the entire Netherlands Indies forming the only tether to the seat of Dutch political authority for other courts.75 Their jurisdiction extended to all civil and commercial disputes (except some involving natives) within the European community, including criminal acts committed by Europeans. Cases involving colonial subjects tended to be heard in three government courts – the district court for minor cases, the regency court for more substantial issues, and the landraad which heard all significant criminal and civil matters among Natives and some Foreign Orientals.76 From 1882 onwards, family law comprised laws of inheritance, marital laws and guardianship under the jurisdiction of the priesterraden, a court which existed under the purview of the landraad (in Java and Madura). Usually, the landraads were presided over by local administrators.

74 John Ball and Daniel S. Lev believed that Dutch colonial self-interest geared towards efficient exploitation led to the establishment of dual court system. Cees Fasseur however argues that this choice was made of caution since Dutch officials were anxious not to stir anti-colonial rebellions by imposing Western law on populations that were presumably tied to adat law. John Ball, Indonesian Legal History, 1602-1848 (Sydney: Oughtershaw, 1982), 236; Daniel S. Lev, “Colonial Law and the Genesis of the Indonesian State,” Indonesia 40 (October 1985), 57-60; Cees Fasseur, “Colonial Dilemma Van Vollehoven and the struggle between adat and Western Law in Indonesia,” The Revival of Tradition in Indonesian Politics: The Deployment of Adat from Colonialism to Indigenism, eds. Jamie Seth Davidson and David Henley (New York: Routledge, 2007), 52.

75 Both the Appellate Judicial Council and the Supreme Court were staffed by lawyers based in the colony who were mostly Dutch and Eurasian, some of whom had earlier trained in Holland. Lev, “Colonial Law and the Genesis of the Indonesian State,” 70.

76 Ibid., 71.
rather than Dutch administrators since they tended to manage affairs of local populations. Members of the priesterraden and landraad were appointed by the colonial legal regime.

One of the most contentious issues among Dutch officials debated in the 1880s pertained to the extent of Islamic practice in the Netherlands Indies vis-à-vis adat. The tension between adat and Islam ran deep in Dutch colonial debates and would carry over to the postcolonial period. During the late nineteenth century, scholars such as Solomon Keyzer and L.W.C. van den Berg, believed that Islamic law formed the core belief system while adat was the deviation from this core.77 The prevalent Dutch view of local laws that was frequently equated with Islamic law underwent a significant shift from the 1880s. During early twentieth century, adat law proponent Cornelis Van Vollenhoven, the chair of colonial law and administration at Leiden University, vehemently opposed L.W.C van den Berg’s argument that law in the Indies followed religion since he strongly believed that indigenous adat laws formed the core body of laws that governed the lives of local communities, supplemented by religious laws which played a secondary role.78 In reality, the debates were more nuanced and were certainly not typified by two powerful polar opposites constantly jostling with each other. For example, the influential Dutch Advisor for Native and Arabic Affairs, Christiaan Snouck Hurgronje had long highlighted the prominent role of Islam in the

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78 Feener, Muslim Legal Thought in Modern Indonesia.
lives of Muslim subjects, while still maintaining that local *adat* laws still played a huge part in the lives of Muslim subjects.\(^79\)

The efforts of Van Vollenhoven and his disciples won out in the end. In 1909, nineteen *adat* law circles in the Netherlands Indies were identified by Van Vollenhoven in 1910. In many ways, this rich legal diversity within the Netherlands Indies, emphasized by Van Vollenhoven time and again, resiliently resisted a unified regime of law, resulting in a polyglot legal culture that conveyed an image of a messy empire. Although legal historian Daniel S. Lev claims that Dutch colonial legal system produced an archipelago-wide state under the same colonial legal regime that was unprecedented,\(^80\) local legal configurations were largely preserved and not disturbed as a result of the preservation of *adat* laws.

The dominance of highly localized *adat* meant that there was remarkably little commensurability across societies. Often, neighboring communities did not even share local legal structures, and much less, legal content. For example, on the island of Sumatra, the Batak and Gayo communities were completely different from the Acehnese further north.\(^81\) Dutch colonial officials largely agreed that each community should be allowed to preserve their own *adat* and religious laws. Hence, legal administration in the Netherlands Indies was extremely diverse in terms of content.


\(^{80}\) Elsewhere he hinted that the influence of Islamic law had created an archipelago-wide state. Lev, “Judicial Institutions and Legal Culture,” 248; Lev, *Islamic Courts in Indonesia*, 4.

\(^{81}\) In fact, non-contiguous societies within the Malay Archipelago sometimes had more in common with each other. Prins, “*Adat*law and Muslim Religious Law,” 286-287.
was not only that legal content was different. The geography of the Indonesian archipelago prevents law from being applied uniformly as well since centralized legal systems were never established.82

Despite strong opinions, on the whole, Dutch bureaucrats portrayed themselves as distant patrons of the local religious elite without directly administering the lives of colonial subjects, preferring instead to rely on local intermediaries. While the British bypassed the religious elite in passing legal rulings on religious matters, the Dutch preserved local elites within a more formal legal structure consolidated into priesterraden also known as raad agama after the issue of Staatsblad 1882 no. 152 that came into force on August 1st 1882.83 The priesterraden effectively functioned as religious courts or priesterraden.84 Consequently, the Muslim religious elite who were part of the priesterraden no longer had to answer to their sovereigns, the Javanese Regents, whose power over local societies declined since they no longer intervened in Islamic legal matter, thus doing away with debates which had long been part of the legal tradition in Java.85 Instead, the judgments of the priesterraden were now subjected to approval by the secular landraad, the civil courts that possessed more power than the priesterraden within the colonial legal structure. Should disputes occur between Islamic Courts and Civil Courts, the matter was to be resolved under the advice of the secular High court

82 Lauren A. Benton, A Search for Sovereignty: Law and Geography in European Empires, 1400--1900 (Cambridge: Cambridge University Press, 2010), 31-32.
83 For a full text of the law, see Hanstein, “S. 1882, No. 152,” Islamisches Recht, 140-141, 171-175.
84 An institutionalized priesthood does not exist in Islam, as repeatedly emphasized by Snouck Hurgronje to his colleagues, although evidently, several Dutch authorities seemed to regard the qādis and penghulus (village headmen) as akin to priests. Christiaan Snouck Hurgronje, “Iets over Priesterraden,” HRNI, 63 (1894): 749, 752.
85 Ibid., 752.
and the Council of the Indies. As a result, personal law was not guaranteed as it was in the British territories.\textsuperscript{86}

In 1922, a commission was established to investigate the \textit{priesterraden}, although the resulting regulations were implemented only in 1937. Since it was finally recognized that there was no priesthood in Islam,\textsuperscript{87} the \textit{priesterraden} came to be known as the \textit{penghulu gerecht} with the \textit{penghulu} (village chief) as judge and two clerks.\textsuperscript{88} The most damning reform was the removal of all property affairs from the \textit{penghulu gerecht} to the jurisdiction of the \textit{landraden} including cases involving inheritance and religious trusts known as \textit{waqf}.\textsuperscript{89} Adat law proponents which included highborn Javanese aristocrats argued for the primacy of \textit{adat} laws which were more equitable than Islamic law.\textsuperscript{90} Due to efforts by Vollenhoven’s zealous pupil, Barend Ter Haar, the Dutch colonial governments directly interfered in cases involving inheritance from February 1937 onwards, despite strong protests from local Muslims, as he considered the hereditary law of Islam “contrary to the social reality of the Javanese population.”\textsuperscript{91}

The judicial powers of the \textit{priesterraden} were of particular concern to Dutch colonial bureaucrats precisely because it was through this institution that an entire

\textsuperscript{86} Hefner, Shari’a Politics, 286-287.
\textsuperscript{87} Snouck was particular adamant about misnomer ‘priesterraden.’ Christiaan Snouck Hurgronje to the Director of Education, 13 March 1900, \textit{Ambtelijke Adviezen Van C. Snouck Hurgronje, Eerste Deel} (’s Gravenhage: Martinus Nijhoff, 1957), 657-660; Christiaan Snouck Hurgronje to the Director of Justice, \textit{Ambtelijke Adviezen Van C. Snouck Hurgronje, Eerste Deel} (’s Gravenhage: Martinus Nijhoff, 1957), 762.
\textsuperscript{88} Lev, \textit{Islamic Courts in Indonesia}, 18.
\textsuperscript{89} Ibid., 50.
\textsuperscript{90} For more on comparison between Javanese adat law and Islamic law, see Ibid., 20.
\textsuperscript{91} Barend Ter Haar, cited in Van Dijk, “The Study of Islam and \textit{Adat} In Java,” 54. Barend Ter Haar was a champion of \textit{adat law}. For more on Barend Ter Haar’s views on \textit{adat} specifically, see Daniel S. Lev, “The Supreme Court and \textit{Adat} Inheritance Law in Indonesia,” \textit{Legal Evolution and Political Authority in Modern Indonesia: Selected Essays} (The Hague: Kluwer Law International, 2000), 99-118.
class of local qāḍīs were professionalized and their authority legitimized by the colonial government.\textsuperscript{92} The laws that the priesterraden imposed on each community were regarded as a single set of laws by the Dutch colonial government although in actual fact, they consisted of two different sets of laws with considerable overlap between the two, as mentioned before. The first set of laws was adatrecht, which was specific to the locale. More importantly, adatrecht remained unwritten and uncodified especially if it largely consisted of customary law.\textsuperscript{93} The second source of law was Shari’a that was the product of Islamic jurisprudence (fiqh), precisely translated as plichtenleer by Snouck Hurgronje.\textsuperscript{94} Shari’a was also specific to the locale, but written and recorded in abundant well-established written literature, unlike the more elusive adatrecht which was orally transmitted or demonstrated through customary law across generations.

In contrast to English Common Law, one of the cornerstones of Dutch civil law states that custom does not bind, unless the law refers explicitly to it. With little basis in written law, adatrecht was not legally binding. Thus, not surprisingly, adat laws ran the risk of not being considered actual law by priests, litigants, lawyers, and the colonial state, which meant that rulings based on adat, even if meted out within the government-appointed priesterraden were potentially illegal.\textsuperscript{95} Conversely, this meant


\textsuperscript{93} Some adat laws were originally issued by a written edict. Prins, “Adat law and Muslim Religious Law,” 284.

\textsuperscript{94} Jan Prins claimed that Snouck defined ‘plichtenleer’ as Shari’a but he clearly used the word to refer to fiqh. Ibid., 285. For Snouck’s definition, see Christiaan Snouck Hurgronje, \textit{Nieuwe Bijdragen Tot De Kennis Van Den Islam} (Leiden: s.n., 1882).

\textsuperscript{95} Nederburgh, “Nog Een over Priesterraden Antwoord aan Mr. M.C.P.” 288, 299.
that the application of Islamic law could be expanded to include more areas of life, which J.A. Nederburgh, one of the principal architects of Indies colonial law, claimed, had indeed occurred over time by 1893, only slightly more than a decade after priesterraden was formally instituted in Java and Madura.\textsuperscript{96} Nederburgh was worried as he found it highly incongruous that Islamic law should be implemented in such a widespread manner to colonial subjects when adat actually formed the basic core of laws of local populations.\textsuperscript{97} This unprecedented authority granted to priesterraden gave way to widespread application of ‘pure’ Islamic law divorced from local ‘national’ customs, i.e. ‘adatrecht’, to the open dismay of some colonial officials who were convinced that the real law of the native was adat, modified by Islamic law.\textsuperscript{98} Moreover, he argued, Islamic influence over local societies should be curbed in the face of pan-Islamism during the late nineteenth century that could lead to anti-colonial uprisings in the Netherlands Indies.\textsuperscript{99} A similar perception of mounting Islamic threat was absent in the Straits Settlements law reports and articles of the day. It was extremely crucial for the jurisdiction of priesterraden to be properly demarcated precisely because the management of land laws and tax laws could potentially be in the hands of

\textsuperscript{96} This was lamented by Nederburgh who believed that the institution of priesterraden, considered too independent of Dutch colonial administration, led to the unnecessary promotion of Islam in the Indies. Ibid., 299. For more on J.A. Nederburgh, see Ann Stoler, "Sexual Affronts and Racial Frontier: European Identities and the Cultural Politics of Exclusion in Colonial Southeast Asia," \textit{Society for Comparative Studies in Society and History} 34, 3 (July 1992): 536-539.


\textsuperscript{98} The term ‘nationaal’ was used by Nederburgh and Piepers to denote each community with their own priesterraden.

\textsuperscript{99} As Eric Tagliacozzo points out, from the 1870s onwards, Islamic conspiracies were imagined around all corners at difference places at different times. Tagliacozzo, \textit{Secret Trades, Porous Borders}. 
priesterraden, as these laws could easily be linked with laws of inheritance, distribution of family estates, zakat (alms-giving) and guardianship of minors which lie within the realm of personal laws under the jurisdiction of the priesterraden. Due to their wide jurisdiction in personal law, members of the priesterraden and the wealthy elite possessed the opportunity to conveniently ensure their own benefit through the application of Islamic law. It was therefore essential for landraden (civil courts) to affirm the rulings of the priesterraden which were relatively weaker and unlikely to cross over to civil court jurisdiction. Nonetheless, Nederburgh’s and Piepers’ deep concerns suggested that the priesterraden in Java and Madura did sometimes overreach their authority.

Despite frequent exhortations for clarity in legal jurisdictions in colonial legal journals, administration of religious and adat laws remained murky. The nature of laws administered by the priesterraden were never truly defined beyond general aims by colonial authorities anywhere in the Netherlands. This was partly due to the fact that colonial knowledge on adat remained sparse till the late nineteenth century, and it was only after 1901 that it was examined more systematically under the leadership of Cornelis van Vollenhoven. In 1909, the Royal Institute of Linguistics and Anthropology established the Adat Commissions led by Snouck Hurgronje, as

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100 Property owned by minors were controlled by their guardians, which opened them up to all sorts of potential exploitations. E.E.G. Joakim, “Voogdij bij het Inlandsch Recht,” RNI, 99 (1912): 453.
101 Nederburgh, “Nog Een over Priesterraden Antwoord aan Mr. M.C.P.” 305.
103 Fasseur, “Colonial Dilemma Van Vollehoven and the struggle between adat and Western Law in Indonesia,” 53-54. For example, see “Commissies voor het adatrecht,” RNI, 94 (1910): 331-336.
Chairman, and Carpentier Alting in order to organized data collected by printing them in a series of publications known as *Adatrechtbundels*. However, this collection hardly clarified legal administration since it remained incomplete. Anthropologist John Bowen aptly describes the *Adatrechtbundels* as “endlessly detailed and innocent of the slightest conclusion” a quality that could very be extended to the entire corpus of scholarly discussions on Islamic law and *adat* in colonial journals as well.

**Direct Colonial Engagement with Shari’a**

Debates pertaining to *adat* ran in tandem to avid discussions on Islamic law. Although both British and Dutch colonial officials preferred not to deliberately alter the substantive content of Islamic law, the process of codification and translation inevitably alters the nature of existing religious texts. Dutch and British efforts to translate a popular Arabic manual known as *Minhāj al-Ṭalibīn* (*Minhāj* for short) for example significantly redacted the original text. In November 1882, Dutch Orientalist scholar based in Batavia, L.W.C. van den Berg (1845-1927) published the French translation of the *Minhāj al-Ṭalibīn* at the behest of the Dutch colonial government. Being proficient in Arabic, he had written his doctoral thesis on the contract of sale in Islamic law in 1868 at the *Instelling voor Taal-, Land- en Volkenkunde* at Leiden. In 1878, he published a book entitled *De Beginseelen van het Mohammedaansche Recht, volgens de Imams Aboe-Hanifat en asj- Sjafe’i*. It was regarded as an authoritative volume by Dutch colonial

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104 In 1917, the *Adatrechtstichting* (Adat Law Foundation) was established in Leiden.  
105 Bowen, Islam, Law, and Equality in Indonesia, 48.  
106 Van den Berg’s choice of French instead of Dutch suggested that he meant the three volumes to be of wider use than just within the Dutch colonies. However the publication of original Arabic in the same volume suggested that it was also meant for anyone who understood Arabic, as pointed out by Snouck Hurgronje in his review of the translation. C. Snouck Hurgronje, "Minhādj at-ṭālibīn, Le guide des zéles croyants," *IG* 5 (April 1883): 7.
administrators who frequently cited it.\footnote{For examples of citations, see R. V. Hoothuysen, “Pensionen en Onderstanden aan de nagelaten betrekkingen van in een door den dienst gesneuvelde, ongekomen of overleden Europeesche landsdienaren,” IG 11,2 (July-December 1889), 1161; O.J.H Graaf van Limburg Stirum, “Eenige mededeelingen over den rechtoestand der Inlandsche Christenen in Britisch-Indië,” IG 15,1 (January-June 1893): 950.} After serving as an advisor to the Dutch colonial government from 1869 to 1887, he later returned to Holland to become a professor at the Indische Instelling te Delft.

In keeping with the comparative legal interests of Dutch colonial officials, under each subject heading, Van den Berg appended the corresponding Code Napoléon where applicable. The translated edition by Van den Berg was rare in that the original Arabic was printed alongside the French translation, although the volume was far from being a literal translation. Translations usually did not include the original text. The translation of the Minhāj reproduced all the chapters found in the original, even those which were not likely to be relevant to Dutch colonial administration in the Netherlands Indies.

The Minhāj was, in very specific ways, a mukhtasar, an abridged manual, since it was gloss of a larger volume by ‘Abd al-Karîm b. Abî Sa‘îd Muḥammad Al-Râfî ’î’s (555-623/1160-1226) Al-Muḥarrar, which was itself a summary of a much lengthier work - the original Al-Wâjîz fî Fiqh al-Imâm al-Shâfî‘î written by Abû Hâmed Muḥammad ibn Muḥammad al-Ghazâlî (1058-1111).\footnote{For a convenient diagram created by Syed ‘Uthmân bin Abdullah bin Aqîl bin Yahyâ, depicting the complete genealogy of texts derived from monumental work of Al-Ghazâlî. see C. Snouck Hurgronje, “Serie IJ: Godsdienstig Recht en Godsdienstige Rechtspraak,” Adatrechtbundel 1 (1910): 218. Also, see C. Snouck Hurgronje, “Minhâdjd attâlibin, Le guide des zéles croyants,” IG (April 1883): 6. Syed ‘Uthmân’s scheme was reproduced in Th. W. Junyboll’s handbook in the form of a list. Theodor Willem Jan Juynboll, Handleiding Tot De Kennis Van De Mohammedaansche Wet Volgens De Leer Der Şjâfi`Tische School (Leiden: Voorheen E.J. Brill, 1903), 374-376.} The long history of the Minhāj could be traced
back to 670/1270 when the Shāfi‘ī jurist, Muḥyī al-Dīn Abū Zakariyyā al-Nawawī (631-676/1233-1277), one of the most important authorities on Shāfi‘ī law, finished writing the relatively concise volume that usefully devoted much attention to issues in daily life.¹⁰⁹ Since Van den Berg’s Minhāj was not a true translation but an abridgement of Nawawī’s volume, it loosely, and superficially, resembled a mukhtaṣar (albeit an unconventional one as Van den Berg was not a Muslim jurist).¹¹⁰ Indeed, Van den Berg’s translation shared several characteristics with the mukhtaṣar. Van den Berg’s version relieved its colonial legal practitioners of lengthy discussions, appendices and chains of transmitters, offering only the essentials in order to make the work more accessible to its intended audience.¹¹¹ British translator, E.C. Howard, was truly convinced that if Van den Berg’s French translation had been a literal translation of Nawawī’s edition, it would have been unintelligible.¹¹² In this way, a text borne out of the colonial project inserted itself into the Islamic legal tradition of the Netherlands Indies as part of a chain of authoritative ‘mukhtaṣars’ that affected the lives of local Muslims. A Straits

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Both Van den Berg and Snouck Hurgronje, on the advice of Arab advisor on Islamic affairs, Sayyid 'Uthmān bin Yahyā, emphasized that two latter commentaries of Nawawi's translation of Minhāj should be consulted alongside the Minhāj. The British translator, E.C. Howard echoed Van den Berg’s exhortations for cross-referencing to two other mukhtasars as well, since, he warned, it was not always possible to decide a question by reference to the Minhāj alone. However, subsequently, colonial law reports and articles only privileged the Minhāj while neglecting the other mukhtasars, most probably because these had not been translated into a European language. In both British and Dutch territories, the Minhāj was consulted on various significant issues ranging from animal slaughter to legal age of majority to the exclusion of all

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114 Since the issue of consensus in Islamic law was a major concern of his, Snouck strongly believed in tracing the genealogy of texts, which cause him to often cite the works that Nawawi’s work was based on and led to. C. Snouck Hurgronje, Sajjid 'Uthmān’s Gids voor de Priesterraden (Batavia: H.M. Van Dorp & Co., 1895), 6-8. Two works are considered the two most authoritative works of the Shāfī madhhab were particularly emphasized by Snouck. The first work is the large volume Al-nihāyat al-muhtāj ila shārī al-Minhāj fi al-fiqh ‘alā Madhhab al-Imām al-Shāfī‘ī by the jurist Muḥammad b. Aḥmad b. Hamza al-Manūfī al-Miṣrī al-Anṣārī Shams al-Dīn Al-Ramlī (919-1004/1513-1595) that was completed in 1566. The second was Tuḥfat al-muhtāj li shārī al-Minhāj (909-974/1504-1566) by Abu 'l-'Abbās Aḥmad b. Muḥammad b. Muḥammad b. ‘Alī b. Ḥadjar Shīhāb al-Dīn Ibn Ḥadjar al-Haytamī which he began writing in 1551. E.C. Howard singled out the same two texts as well, although Van den Berg referred to three more texts including Al-Rāfi‘ī’s Al-Muharrar from which Nawawi’s work was derived, and Zakariyyā al-Anṣārī’s (d. 926/1520) Fath al-Wahhab (n.d.), and Abū ‘Alī Djalāl al-Dīn Muḥammad b. Aḥmad b. Muḥammad b. Ibrāhīm al-Anṣārī al-Shāfī‘ī’s al-Maḥallī’s (791-864/1389-1459) text which were glosses of Nawawi’s work.
115 Howard, Minhaj et Talibin, n.p.
116 Occasionally Dutch officials alluded to the Al-Nihāyat by Al-Ramlī. Snouck Hurgronje referred to most glosses in his articles. For example, see C. Snouck Hurgronje,
other glosses of Nawawi’s work and earlier glosses of Al-Ghazali’s text. In this way, the Minhaj was regarded as a legal code - self-contained, and therefore made to be sufficient although it had never been so within the Islamic legal tradition anywhere in the world prior to the colonial period.

In his preface, Van den Berg admitted that he translated Minhaj precisely in order to help the Dutch colonial government administer local institutions especially the volume was already widely consulted by adherents of the Shafi’i madhhhab in the Netherlands Indies. Unlike earlier editions of books on Islamic law produced by Dutch bureaucrats, Van den Berg referred directly to the Arabic manuscript instead of relying on allegedly inaccurate Malay or Javanese translations already available in the Indies. Rather prudently, Van den Berg preempted his critics by confessing it was indeed difficult to translate subtleties, doubles-entendres and ellipses especially in a subject as dense, nuanced and complicated as religious practice from Arabic into a

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117 In Dutch colonial publications such as Juynboll’s handbook which referred to other works of reference, Van den Berg’s translation of the Minhaj was still the most oft-cited work. Juynboll, Handleiding Tot De Kennis Van De Mohammedaansche Wet.


European language.\footnote{L.W. C. van den Berg, 	extit{Minhadj At-Talibin} – 	extit{Le Guide des Zeles Croyants: Manuel de Jurisprudence Musulmane Selon Le Rite de Chafi'i} (Batavia: Imprimerie du Gouvernement, 1882), xii.} To help with his translation, he consulted dictionaries and glossaries produced by Reinhart Dozy as well as A.W.T. Juynboll, and consulted personally with Michael de Goeje, an Arabic professor in Leiden, on the intricacies of translating from Arabic to French.

The translation of Nawawi’s 	extit{Minhāj} was not a purely Dutch endeavour, however, since Van den Berg also expressed his gratitude to Moḥamad ibn Ḥasan Bābahīr, the Arab Captain and a Hadhrami member of the Orphan Chamber of Batavia, for explaining modern Arabic morals and customs, especially in matters related to prayer and Haj pilgrimage.\footnote{Van den Berg mentioned that Moḥamad ibn Ḥasan Bābahīr originated from Saiyun and had been on a pilgrimage to Makkah. Ibid., xiii.} Evidently, Ḥasan Bābahīr was the head of the Arab community in Batavia,\footnote{“Die Arabier in Ostindischen Archipel,” 	extit{Österreichische Monatsschrift für den Orient}, 13 (1887): 119.} known for “his considerable faculties for judging.”\footnote{He assisted Van den Berg in yet another publication in 1886 on the Ḥadramis in the Malay Archipelago specifically. L.W.C van den Berg, 	extit{Le Hadramout et les Colonies Arabes dans l’Archipel Indien} (Batavia: Imprimerie du Gouvernement, 1886).} He was named one of the outstanding (‘uitstekende’) men of Ḥadramaut alongside an Islamic scholar in Batavia, Sayyid Uthmān bin Yaḥyā (1822-1913), a religious teacher, who later became a mufti in Batavia and the Honorary Advisor for Arabic Affairs (Honorair Adviseur voor Arabische Zaken).\footnote{Untitled, 	extit{TN} I 16, 1 (1887): 429. The publication in question is van den Berg, 	extit{Le Hadramout et les Colonies Arabes dans l’Archipel Indien}.}

Within a year of its publication, Van Den Berg’s translation had reached Britain and was lauded as a welcome edition in British dependencies in the Malay world, precisely because it was a manual of Shāfi’i law. Translated into French, instead of
Dutch, it was considered potentially useful to “any European establishment.”

Despite garnering positive reviews, the French translation did not seem to be frequently cited in court cases, perhaps due to British officials’ language capabilities. Yet, British colonial officers had to wait more than three decades for an English translation. The translator was E.C. Howard, a district judge in Singapore, who had “therefore enjoyed the peculiar advantages in acquiring a knowledge of this branch of Mahomedan law.”

This was certainly not the first time independent Dutch and British colonial projects benefitted each other in the colonial administration of religious laws. Earlier, Van den Berg had cited Hamilton’s translation of the *Hidaya* in his first book, *De Beginselen van het Mohammedaansche Recht, volgens de Imams Aboe-Hanifat en asj- Sjafe’i*, on both Hanafī and Shāfi’ī madhhabs published in 1878.

Amongst British colonial officials stationed in the Malay world, Howard’s translation was especially valuable since legal textbooks on Shāfi’ī law were fewer in number, as most colonial officials in British India were keener on translating literature on Hanafī law, as we have seen. Being a manual of Shāfi’ī law specifically, translations of the *Minhāj* frequently became reference texts for colonial lawyers and judges in courts, not only in Netherlands Indies, Malaya and the Straits Settlements, but also in Southern India, Egypt and the Aden Protectorate. Howard’s translation proved to be one of the

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128 British reviewers of Van den Berg’s French translation emphasized the book’s importance by highlighting the fact that there were many Shāfi’ī colonial subjects within the British Empire in the late nineteenth century. Review, *The Journal of the Royal
unusual attempts by a British official based in the Malay Archipelago to produce a work on Islamic law.

By contrast to British reticence in religious affairs of colonial subjects, Dutch scholar-bureaucrats such as Snouck Hurgronje, Ch. W. Margadant, Th. Juynboll, J.G Schot and L.W.C. van den Berg continued to publish copiously in colonial journals on various issues ranging from history and criminal law to family law rituals to Sufi tariqahs (orders). Within the narrower realm of law, the incompatibility of Islamic courts and European law of evidence, and practical matters such as fees for ‘priesterraden’ (priest councils) and for litigants were also discussed in colonial journals. This energetic flow of knowledge on Islam pulsed through Dutch colonial bureaucracy.

Dutch scholars eagerly engaged in intellectual conversations with each other which were not always cordial especially in book reviews. Written in a detached scholarly style, these book reviews, or rather, ‘besprekingen’ (literally: discussions) of books on Islam in the Netherlands Indies published in nearly every issue of Dutch colonial journals tended to be highly erudite, critical and impassioned.\(^\text{129}\) Particularly bitter debates occurred between Snouck Hurgronje and his peers, especially L.W.C. van

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\(^{129}\) The best example of this is Snouck’s critical review of Van den Berg’s *De Beginselen Van Het Mohammediaansche Recht* (1878) Snouck accused Van den Berg of being lacking in legal expertise (‘gebrek aan rechtskunde’) and being a quasi-practitioner (‘quasi-beoefenaar’) for making fundamental mistakes despite having specialized in Islamic law for more than a decade by then. Van den Berg (and earlier, D. Louter) had called him out on account of his youth. See C. Snouck Hurgronje, in *Verspreide Geschriften Van C. Snouck Hurgronje*, ed. A.J. Wensinck (Leipzig: K. Schroeder, 1923), 59-221.
den Berg, who was actually senior to him within the ranks of colonial bureaucracy. A scathing review of Van den Berg’s translation by Snouck Hurgronje was published in the journal *De Indische Gids* in April 1883.\(^{130}\) Snouck pointed out numerous errors in Van den Berg’s translation in his disparaging reviews of his publications on the whole.\(^{131}\) Nonetheless, the usefulness of Van den Berg’s work did not seem to suffer from Snouck’s harsh criticism. A question addressed to Snouck after the publication of his book *De Atjehers* was publicly described as unthinking (‘onbezonnen’) in the title of a one-page response to said question.\(^{132}\) Snouck responded to the question in articles full of invectives in the journal *Javabode* in 1899, and even went to the extent of calling one of his challengers an incompetent lawyer.

The prodigious amount of review-discussions on Islam published in colonial journals suggested that these scholar-bureaucrats were invested in debates on Islam in the region beyond practical administrative purposes. Indeed, many of them were members of academic associations such as the *Indisch Genootschap* (founded by P.J. Veth) and *Leidsche Maatschappij van Letterkunde*.\(^{133}\) By contrast to the vibrant world of Dutch

\(^{130}\) Snouck wrote the review in February 1883. C. Snouck Hurgronje, “Minhādj at-tālibin, Le guide des zéles croyants,” *IG* 5 (April 1883), 1-14.


\(^{133}\) “Een Antwoord van Dr. Snouck Hurgronje op een onbezonnen (?) Vraag,” *IG* 22, 2 (July-December 1900): 1534.
intellectual discussions, one would be hard-pressed to find a critical review of a legal digest, or code of Islamic law by a fellow British official or scholar. This was partly because in contrast to their more scholarly Dutch counterparts, British authorities tended to steer clear of debating the myriad understandings of Islamic law, by sticking instead to well-worn codes and manuals of Islamic law supplemented by formidable collection of legal precedents. Hence, English manuals and codes were judged solely on the basis of practical significance. The substance of laws that had been codified was rarely examined in detail, much less debated upon. On the whole, reviews tended to be extremely positive, complimentary and encouraging of scholarly ventures that could potentially ameliorate colonial administration of religious laws.\footnote{An exception to this rule was a review of Roland Knyvet Wilson’s \textit{A Digest of Anglo-Muhammadan Law} (1895) which was heavily criticized for producing an extremely cumbersome volume with a long addendum (8 pages long) at the beginning that corrected many errors in Islamic law found in the book, and for neglecting to mention recent works on Islamic law. According to the reviewer, R. K. Wilson failed to mention \textit{Rumsey’s Moomummudan Law of Inheritance} and the \textit{Al-Sirajiyyah} as well as L.W.C. van den Berg’s \textit{Fath Al-Qarib}. In a later edition released 8 years after the first in 1903, Wilson cited Van den Berg’s translation throughout his volume. \textit{“Review of A Digest of Anglo-Muhammadan Law,”} No. 3634, \textit{The AthenÆeum Journal}, (January – June 1897): 807.}

Thus, Howard’s venture in translating a dense volume of Islamic law was rare for a British judge, though no less necessary from a colonial perspective, judging from the warm reception his volume received. His translation received a resounding endorsement in \textit{The Straits Times} which was “exceedingly well-done” with “clearness of diction” that was “more helpful than the Koran,” “a complete code of rules of living for all classes and conditions of men and women who are followers of the Prophet.”\footnote{Interestingly, the rest of the review dealt with war conditions in Europe, and the issue of slavery in Muslim societies, rather than addressing the translation’s usefulness in administration of Islamic law in the British colonies. \textit{“Minhaj et Talibin,”} \textit{ST}, January 18\textsuperscript{th} 1915, 6.}
was considered particularly valuable because “there are few Englishmen who can read a law book in French with as much confidence and ease as when it is in their own language.”

Unlike Howard who later had the easier task of translating Van den Berg’s French rendition into English, Van den Berg, had to enlist help from Arab captain, Moḥamad ibn Ḥasan Bābahīr in translating Nawawi’s original Arabic text. As we will see in the next chapter, Snouck Hurgronje, profited from his own collaborative relationship with Sayyid ‘Uthmān bin Yahyā who in turn, had the opportunity to directly influence the colonial administration of Islamic law. The latter’s writings, which tended to bifurcate Islamic orthodoxy and adat, were reviewed and discussed extensively by Snouck in colonial journals granting them a wider audience amongst colonial administrators. Sayyid ‘Uthmān bin Yahyā’s writings subsequently had a direct bearing not only on the marriage practices of the Arab community in the Netherlands Indies but also in Singapore, where, according to Sumit Mandal, the “Sayyid colony” resided.136 In 1881, Sayyid ‘Uthmān bin Yahyā wrote a widely-read handbook on main points of Islamic law in the Indies, *Kitab al-Qawanin al-Shariyya* (Book of Administration of Islamic Law) that was reprinted as revised and expanded edition in 1894.137 Written in Jawi (Malay in Arabic script) for officials of the ‘priesterraden,’ the book translated into the Dutch under the title *De Gids voor Priesterraden* in 1895. In the book, Sayyid ‘Uthmān stressed the importance of marriage of equality between daughters of Sayyids

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137 Ibid., 161.
who were descendants of Prophet Muhammad and other Sayyids.\textsuperscript{138} This issue will be explored in greater detail in Chapter Three.

\textbf{Conclusion}

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

Undoubtedly, despite explicit claims of non-intervention in religious practices, Dutch and British colonial administrative policies led to a drastic reorientation of Islamic legal practice. Kugle refers to this process as a shift from Islamic law’s ‘substantial rationality’ to a more ‘formal rationality’ implemented by colonial authorities.\textsuperscript{139} Indeed, colonial regimes enforced a single interpretation in legal rulings as opposed to the potential multiple outcomes derived from a range of legal authorities that were consulted and relied upon within the Islamic legal tradition. An unnamed British reviewer of a digest of Anglo-Muhammadan Law noted that there were

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\textsuperscript{138} Ibid., 158.
\textsuperscript{139} Kugle, “Framed, Blamed and Renamed,” 270.
\end{flushright}
'discrepancies’ between the two works on Shāfi‘ī law translated by L.W.C. van den Berg, clearly indicating an implicit expectation that even colonial translations of original Arabic works should refine and streamline the practice of Islamic law.\textsuperscript{140}

Although colonial legal structures in the British Straits Settlements and the Netherlands Indies were different, in many cases, the practice of law in both territories were similar in that law seemed to emerge spontaneously on the spot. Indeed, legal practice in the region was on the whole, highly unpredictable, and thus should be examined more closely, case by case, in order to elucidate legal trends in colonial court judgments. Although colonial experience in administration of Islamic law in India provided British bureaucrats with a certain level of confidence that obviated the need for local intermediaries, legal codes and translations produced in India were mostly unhelpful because they pertained to Hanafi law. As a result, Shāfi‘ī legal doctrine was usually discovered on a case-by-case basis by colonial legal practitioners, as cases were brought before them in courts. In a way, this was not out of the ordinary since English Common Law operated on a case-law system of legally binding judicial precedents anyway.

Within Dutch territory, although theoretical postulates were intensely discussed in colonial journals, legal practice on the ground remained largely unknown to colonial bureaucrats in charge of a vast and unwieldy highly decentralized colonial state. The multiple roles of the village leaders (penghulu) in the Netherlands Indies were examined by Snouck in great detail and his successors, G.A.J. Hazeu and R. Kern, but often, they were too specific geographically to present a general picture of religious

\textsuperscript{140} ‘Review of A Digest of Anglo-Muhammadan Law,’ 807-808.
administration throughout the Netherlands Indies.\textsuperscript{141} Often, policy changes were enacted without specific reference to the priesterraden’s actual rulings. Specific examples of penghulus’ rulings were rarely alluded to. Even research findings focused on the Netherlands Indies published in several volumes of Adatrechtbundels did not offer any conclusion beyond detailed descriptions of empirical observations.

Well into the early twentieth century, colonial administration of Islamic law was unremittingly in constant flux. Very little was actually fixed in colonial legal administrative policies. In the Netherlands Indies, Dutch scholar-bureaucrats continually wavered between the two separate legal strands of ‘adat’ and religion. Although religious authority was formally delegated to the government-appointed priesterraden, Dutch authorities intervened at times to implement corrective measures that undoubtedly interfered with the administration of religious laws. In the Straits Settlements, British legal practitioners were forced to devise legal rulings as cases were brought before them in court since manuals and codes based on Hanafi law did not provide much aid. The reliable Shafi’i legal manual, Minhaj al-Ṭalibin was only translated into English in 1914, and even so, it was hardly comprehensive. Moreover, the different status of the Straits Settlements, being supposedly originally uninhabited without legally constituted courts,\textsuperscript{142} compared to British India which was previously

\textsuperscript{141} The penghulu or village chief simultaneously functioned as the qāḍī, the muftī, the marriage official, zakat official, mosque administrator and director, Snouck, “Serie IJ: Godsdienstig Recht en Godsdienstige Rechtspraak,” 206-208. Snouck’s last successor, G.F. Pijper sought to find out more about legal administration on the ground from the 1920s till 1951 but it was published late in 1977. G. F. Pijper, Studiën over De Geschiedenis Van De Islam in Indonesië, 1900-1950 (Leiden: E. J. Brill, 1977), 47.

\textsuperscript{142} Fatimah & Ors. v. D. Logan & Ors. [1871] 1 Ky 255.
ruled by Mughal emperors with a recognized developed legal system, necessitated a different kind of legal administration than in the latter.143

Language difficulties tended to restrict most colonial legal practitioners to Islamic legal texts that had been translated into European languages. This phenomenon propelled L.W.C van den Berg’s and E.C. Howard’s translations of the Minhāj to even greater prominence at the expense of the other members of the family of mukhtaṣars that were linked to it. However, from the colonial perspective, this was not necessarily considered a loss since colonial projects were undertaken precisely to clarify ambiguities in the texts and to choose the ‘correct’ opinion among contradictory ones.144

A few Arab residents in the Netherlands Indies aided colonial officials in producing key texts that formed the basis of colonial knowledge on Islam in the region due to their linguistic capabilities and deep knowledge of Islam. Nonetheless, with the exception of the prolific Sayyid ‘Uthmān and to a lesser extent, Moḥammad ibn Ḥasan Bābahīr, their specific contributions to the creation of legal textbooks were not cited by later scholars, such that their intellectual importance in the region receded into the background. In the Straits Settlements, the wealthy Arab elite successfully persuaded British authorities to bureaucratize qadīs and record marital unions. However, colonial sources reveal that Arabs’ contribution to colonial administration of Islamic law in both the Straits Settlements and the Netherlands Indies mainly came in the form of

143 British authorities stressed that the Straits Settlements was not connected to any territorial or State power unlike the neighbouring Federated Malay States and Unfederated Malay States. Hooker, Islamic Law in South-East Asia, 85.
extensive litigation in colonial courts. In the Straits Settlements particularly, Arab litigants themselves directed change in law over a period of time buoyed by the importance of legal precedent in the English Common Law tradition.145 The following chapters will focus on these cases.

Arab Petition

Arabs in the Netherlands Indies shared a similar anxiety for matrimonial matters as their counterparts in the British Straits Settlements. Just as the Arabs in the British colony requested British authorities to take a firmer hand in the administration of Muslim marriages and divorces in 1875, Arabs based in the neighbouring Dutch territory too first requested colonial intervention primarily in marital cases. In August 1890, sixty Arabs led by Said Abdullah bin Abu Bakar Alatas wrote a letter to the Governor-General of Netherlands Indies, Cornelis Hordijk, requesting that the colonial government authorize the establishment of an Arab court ('Arab raad') in each city within the Netherlands Indies with substantial Arab populations.¹ These Arab courts would settle family disputes involving Arabs. Their request was made after the priesterraden made several rulings that the petitioners believed had wrongfully

¹ Snouck to Governor-General, 8 September 1890, Ambtelijke Adviezen, Tweede Deel, 910-914.
separated Arab husbands from their wives due to the incorrect application of Islamic law.

Certainly, the Arab petitioners believed that their desire for a more stringent adherence to Islamic law in the Netherlands Indies necessitated a separate court. Much to their dissatisfaction in 1890, the existing priesterraden imposed a mixture of local customary laws and Islamic law in various configurations where the former often triumphed over the latter. The petitioners pointed out that Islamic law was implemented more extensively in their land of origin, Haḍramaut. L.W.C. van den Berg observed that Arabs who originated from Haḍramaut were indeed more mindful of Islamic religious precepts than local Muslims throughout the Netherlands Indies. Why should they then be subjected to courts which administered a version of Islamic law modified by adat in the Malay world that had never been a part of their culture?

Indeed, from 1890, Arab residents had been complaining to Dutch official Christiaan Snouck Hurgronje who later became the Advisor for Native and Arab Affairs, armed with copies of unjust rulings by the priesterraden. Through direct observation and complaints from local Muslims, Snouck himself began to share the Arabs’ concerns. For example in 1901, he sided with an Arab complainant when he vehemently concurred that the entire priesterraden in Surabaya be discharged. Snouck later wrote in 1904 to the Governor-General of the Netherlands Indies that “the Arab

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3 For example, see letters from Snouck to Resident of the Southern and Eastern division of Borneo, 13 December 1902 and from Snouck to Resident van Palembang, 20 November 1905, Ambtelijke Adviezen, Tweede Deel, 987-988.
4 In this case, the priesterraden had wrongfully dissolved a marriage by neglecting, deliberately or not, to investigate whether a husband had truly abandoned his wife. Snouck only wanted the Surabaya priesterraden was to be dissolved. Snouck to General Secretariat 30 June 1901, Ambtelijke Adviezen, Tweede Deel, 977.
has his own set of rules, although he has assimilated in local societies away from his native environment, his ancestry remains distinct and guarantees a certain priority." But to the Arabs’ disappointment, the priesterraden not only remained till the end of the colonial period despite its many imperfections but also continued to administer the lives of Arabs whose grievances persisted.

This chapter attempts to locate Arabs within the legal milieu in the Netherlands Indies which was conspicuously marked by legal pluralism, as J.S. Furnivall effectively demonstrated in his classic study on Indonesia. As we have seen in Chapter One, Arabs were mostly classified as Vreemde Oosterlingen or Foreign Orientals along with the Chinese and Japanese. Legally, the position of Foreign Orientals in colonial courts was not thoroughly clarified, unlike the two population categories known as ‘natives’ and ‘Europeans’ which were defined in greater detail. Within the already imprecise category of Foreign Orientals, the status of the Arabs remained the haziest. Time and time again, Dutch legal practitioners would return to the root of their ambiguity - the dual identity of Arabs that straddled both local and foreign worlds in the Netherlands Indies.

Although their status in the colonies were not clearly ascertained, by petitioning the Dutch government, the sixty Arab petitioners of 1890 demonstrated

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5 Snouck to Governor-General, Batavia, 19 April 1904, Ambtelijke Adviezen, Eerste Deel, 687.
7 Supomo and Djokosutono, Sedjarah Politik Hukum Adat, 22-23.
8 Both Arab and Native Muslims shared an advisor from 1879 till the end of the colonial period. Frances Gouda, “Mimicry and Projection in the Colonial Encounter: The Dutch East Indies/Indonesia as Experimental Laboratory, 1900-1942,” Journal of Colonialism and Colonial History 1,2 (2000), 18 June 2012 <http://muse.jhu.edu/journals/journal_of_colonialism_and_colonial_history/v001/1.2/gouda.html>
that they already recognized Dutch colonial authority as a binding force on legal judgments in the colony which made Dutch approval for any kind of legal forum essential. Outnumbered by native Muslims, perhaps the Arabs could not count on affecting change within the local *priesterraden* themselves, such that Dutch colonial channels would be a more effective avenue to enact any sort of transformation in the legal arena. This also implied that these Arabs did not possess much clout within the *priesterraden*, despite believing themselves to be more knowledgeable about Islamic law than the local Muslim judges who administered their lives.

The term ‘priesters en hoofden’ in Article 78 (2) of the *Regeeringsreglement* (Government Act) passed in 1882 had only referred to ‘priests and leaders’ of native communities. The *Regeeringsreglement* was introduced precisely to streamline judgments by reducing the possibility of arbitrary rulings in the hope of staving off corruption in the process. As a result of the new government regulations, Arabs came to be grouped together with other native Muslims in matters of personal law that involved family law. While the *Regeeringsreglement* of 1882 stated that Muslims were to be judged according to their religious laws they were also subjected to laws of ‘ancient origins’ which usually referred to ancient customs of the land, ie., the laws of native Muslims according to their geographical location in the culturally diverse Archipelago. This meant that highly mobile diasporic Muslim populations who did not subscribe to highly localized customary laws were likely to be at a disadvantage since they risked being subjected to laws which were not their own. To counter this limited reading of the *Regeeringsreglement*, Snouck later argued that these ‘ancient’ laws could include the

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laws that had been applied to Arab residents who had maintained their independence in matters of family law in varying degrees throughout the Archipelago for several centuries prior to 1882. Indeed, despite the Arabs’ complaints that their societies had been unfairly enmeshed with local populations, there were signs that Arab societies continued to lead somewhat separate lives from local Muslims under colonial rule. For one, Arab communities had their own separate marriage officers known as the huwelijksbeambten, separate from the local marriage officers (districtshuwelijksbeambten) appointed by the Dutch colonial government in cities with significant Arab populations such as Surabaya, Semarang and Cirebon.¹⁰

However, a completely separate jurisdiction for Arab residents in cases that involved family law was ultimately deemed too great a concession for the Dutch government. This was because their lives were intertwined with that of other communities. While ultraorthodox Jews later managed to convince British authorities in Mandate Palestine in the 1930s that they deserved the right to establish their own independent courts since they led separate lives from other communities, Arabs in the Netherlands Indies did not possess an identity distinct from other Muslim residents in the colony.¹¹ The problem with the sixty petitioners’ request for separate jurisdictions was that not all litigants in cases involving Arabs’ marriages were Arabs. As Chapter Three will also demonstrate, Arab men in the Malay world frequently married local women more often than Arab women. In fact, Snouck observed that right up till 1890 75% of cases brought to priesterraden pertained to marriages between Arab men and

¹⁰ Snouck to Resident of Surabaya, 24 December 1900, Snouck to Governor-General, 23 November 1905, Ambtelijke Adviezen, Tweede Deel, 908-909, 914-915.
their local wives.\textsuperscript{12} Entering into marriages with local women was one way for Foreign Orientals to obtain land since they were not allowed to own land.\textsuperscript{13}

These inter-racial marital unions led Snouck to question whether it would be fair to subject local women to Islamic law unmodified by local adat? Why should the law only benefit Arab men? Marital cases, he constantly emphasized from 1890 to 1905, should continue to be decided according to a mixture of adat and Islamic law by local judges in the priesteraden. In order to be fair to local women, he stipulated that only when all litigants involved were Arabs, should courts consider implementing a separate set of laws. Although the petition did not lead to Arab legal autonomy at all, it drove Snouck to seek clarification of legal jurisdiction concerning Arabs.\textsuperscript{14} Above all, Snouck wanted to ensure that the priesteraden could not be declared incompetent in marital disputes involving mixed marriages between Arab men and local women. Snouck was less concerned about his Arab friends’ distress due to what they perceived to be improper or incomplete application of Islamic law than by the position of non-Arab women in marital unions with Arab men. In 1905, Snouck informed the Governor-General that Arab men in fact notoriously entered into temporary unions with local women that lasted only several weeks or months. These impermanent marriages meant that these women already occupied legally precarious positions. Yet, there was no legal provision to prevent the looseness of mixed marriages in the Regeeringsreglement. The

\textsuperscript{12}Snouck to Governor-General, Weltevreden, 8 September 1890. Amtelijke Adviezen, Tweede Deel, 910-914.
\textsuperscript{13}KITLV Inventaris-27 H 797 no. 486, Rudolf Aernoud Kern to Resident of Bantam, May 2 1934.
\textsuperscript{14}Although the priesteraden was not declared incompetent yet in cases involving vreemde oosterlingen, Snouck was worried they might be declared ineligible in future.
local wives of Arab men would be in a riskier position should the gap in legislation be allowed to remain.

Because the Arabs’ lives were intertwined with that of local Muslims, separate jurisdictional courts and mediation sites for Arabs could result in unequal rulings for local women. For the same reason, in response to another petition by eleven Arabs based in Batavia in 1905, Snouck stressed that it was unnecessary to appoint separate marriage officers (huwelijksbeamten) for Arab marriages when the local districtshuwelijksbeamte could very well ratify and register marriages for all Muslims, locals and Arabs alike. He also considered it unnecessary for a council of three to be established in order to mediate marital disputes between Arab spouses, since this was already part of the priesteraden’s duties anyway.

It is clear that Snouck was not keen on granting Arabs more autonomy by granting them any freedom outside of Dutch official legal structures, despite recognizing the inadequacies of the priesteraden in administering Islamic law. The matter of separate courts for Arabs remained unresolved and in 1925, a commission based in Batavia revisited the issue by specifically investigating whether Muslim Foreign Orientals should have their own court, but in the end, the Dutch government decided not to establish separate jurisdictions for non-native Muslims. The question of jurisdiction over Arab subjects in the realm of personal law was an acute one, partly because it was only in 1882 that their jurisdiction was ascertained.

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15 Snouck to Governor-General, 23 November 1905, Ambtelijke Adviezen, Tweede Deel, 914-915.
16 Snouck confirmed that thus far, by counseling troubled spouses, the priesteraden had not caused many problems for Arabs.
17 Velde, De Godsdienstige Rechtspraak, 13.
Regeeringsreglement of 1882

Prior to this, Dutch colonial administration had not ascertained their jurisdiction over Arabs. From the early seventeenth century, the Dutch East India Company (VOC) allowed local populations to abide by their own laws with minimal interference although they did appoint heads of various communities in the Netherlands Indies.\textsuperscript{18}

Even by 1760, civil law in VOC courts was extended only to both natives and Foreign Orientals in areas of commercial interest, namely port cities and coastal areas where the VOC was based.\textsuperscript{19} In 1848, half a century after the Dutch government officially took over from the VOC as political rulers of the Netherlands Indies, colonial authorities began to take a firmer hand in the legal lives of subjects. A range of new codes were introduced including a civil code, a code of commerce and a code of criminal procedure.\textsuperscript{20}

Prior to 1882, cases involving Arabs often ended up the highest court in the colony, the Supreme Court, much to the irritation of Dutch judges who were understandably reluctant to administer Islamic family law since they were not well-versed in it at all. For example, in May 1850, a case involving an Arab was brought to the Supreme Court in Batavia after it was discovered that priesterraden had no


\textsuperscript{19} Cees Fasseur argues that even though Dutch authorities were a distant and somewhat careless architect of the colonial legal system in the early nineteenth century, there was a vague sense of legal unification in the Netherlands Indies. Fasseur, “Cornerstone and Stumbling Block,” 32.

\textsuperscript{20} In 1838, the Dutch civil code, heavily influenced by French codes, was introduced in the Netherlands, which were revised again in 1886 with strong German inflections. Following changes made in 1838, laws in the Netherlands Indies were revamped in 1848 by Dutch colonial authorities. Ibid., 35; Supomo and Djokosutono, \textit{Sedjarah Politik Hukum Adat}, 1-2.
jurisdiction over Arabs at the time, much to the judges’ dismay.\textsuperscript{21} Even though the aforementioned Article 109 of the \textit{Regeeringsreglement} had been promulgated in 1854, it was not implemented. It did however subsequently lead to a differentiation of laws in 1855 for Foreign Orientals with respect to civil and commercial laws. The \textit{regeeringsreglement} of 1882, which stated that the \textit{priesterraden} would hear cases involving the personal law of all Muslim subjects (including natives and Foreign Orientals), was supposed to define court jurisdictions once and for all.

As we have seen, personal law for Muslim subjects consisted of a mixture of customary law known as \textit{adat} and Islamic law. Yet personal law, loosely labeled as ‘\textit{adatrecht}’ (\textit{adat} law), remained a relative blind spot for the Dutch legal administration and laws for natives were codified in a fragmented manner in the late nineteenth century and early twentieth century. Codification of laws was a challenging undertaking for government officials because the colony was extremely diverse. Professor of \textit{adat} law, Cornelis van Vollenhoven, later identified no less than nineteen \textit{adat} law circles throughout the colony in his lifetime without ever implying that his research had been exhaustive.

Despite incomplete collation of \textit{adat} law, the Dutch legal system mainly rested on a system of \textit{adat} laws from 1910 onwards due to the relentless efforts of Cornelis van Vollenhoven and his disciples. Dutch legal structures determined that the Arab minority had to yield to the perceived demands of the majority native Muslim populations whose lives were governed by \textit{adat} at the expense of Islamic law. Ironically, Van Vollenhoven himself recognized that Islamic law, played a key role in these Arabs’

\textsuperscript{21} "De wees- en boedelkamer te Semarang, eerst gedaagde, later appellant tegen den Arabier Sech Achmat Ben Mohamad Ben Hamid," \textit{HRNI} 5 (1851): 131-140.
lives.\textsuperscript{22} Dutch attempts to impose native adat laws on Arabs could suggest that they perceived these Arabs to be culturally similar to the bulk of Muslim natives. Because Arabs were a highly mobile diasporic community with different levels of assimilation into local societies in the Archipelago, the question remained as to what their adat laws actually were. Rather surprisingly, Arabs, like other non-indigenous ethnic groups in the Netherlands Indies, were considered less diverse than local communities within the legal classification system. Were the adat laws governing the highly mobile Arab based on his location at the time the case was brought to court? Due to this legal uncertainty, an Arab could potentially shop from among the “labyrinth of unwritten adat laws” to the dismay of the then Advisor for Native Affairs, G.A.J. Hazeu.\textsuperscript{23} A judge could be easily hoodwinked into applying adat laws for which there was no written basis anyway since adat laws had only been codified in a fragmentary manner by the early twentieth century. In order to prove his point, Hazeu cited a case in 1910 between a hoofdpanghoeloë in Bandung and an Arab man named Seche Abdul Rahman, a money-lender.\textsuperscript{24} Hazeu was concerned that native ordinances pertaining to local Muslims did not apply to Arabs. He was alarmed by the crucial lack of consistency between government policy that underscored Arabs’ ‘foreign-ness’ and court decisions that showed remarkable variation. Already we have seen how some Arabs requested to be excused from the jurisdiction of the priesterraden by claiming that they did not share local customary law or adat in the Netherlands Indies since they were a migrant diasporic race. While Dutch colonial administrators generally agreed with Hazeu’s view

\textsuperscript{22} Cornelis van Vollenhoven, \textit{Adatrecht} (Leiden: Brill, 1925), 123.
\textsuperscript{23} KITLV, H 1083, No. 8, Statement No. 30 Appendices, Collectie Hazeu, G.A.J. Hazeu to Governor-General of Dutch East Indies, Weltevreden, February 13, 1910.
\textsuperscript{24} A full law report does not seem to be available in legal digests.
that it was essential to ascertain the legal status of Arabs to prevent legal chaos, they left the door open for Arab contestations of jurisdiction by not consistently enforcing legal classifications throughout the colony in a consistent manner.

**Law and Identity**

Dutch legal wavering shaped Arab identity to a significant degree. Historian Sumit Mandal has convincingly demonstrated how Arab identity in Southeast Asia was forged in two ways. Firstly, Arabic-language education led to marked ‘Arabization’ of the younger generation in the early twentieth century. Secondly, strong Arab leadership over native Muslims pioneered education efforts among Muslims with Arabs at the helm of Indies Muslim societies. This chapter adds yet another dimension to Arab identity during the same period. Arab identity was also forged in the legal arena which could not always accommodate their complicated multi-ethnic diasporic existence thus forcing them to commit to one ethnic identity or another at any one point resulting in a frenzied existence.

Mandal demonstrates how the Dutch Ethical Policy (1901-1942) witnessed an intensification of ethnic differentiation that ironically also saw greater cooperation and contact between Arabs and native Muslim businessmen in Java.\(^{25}\) Dutch colonial legal officials found it difficult to strive for legal clarity concerning Arabs, probably because in reality, such ethnic differentiation was not so apparent from the perspective of

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kinship relations that developed out of such long-term intense interactions.\textsuperscript{26} Within the intimate space of the family, natives and Arabs certainly did not lead separate lives since intermarriage was so common.

In fact, the close relationship between Arabs and locals led at least two Dutch advisors, Douwe Adolf Rinkes and G.A. J. Hazeu, to question whether Arab residents of the Netherlands Indies should be subjected to civil or Islamic law in courts.\textsuperscript{27} After all, most Arabs were classified accordingly in the Netherlands Indies by Dutch colonial officials solely based on paternal descent.\textsuperscript{28} Not surprisingly, their Arab identities were continually cast in doubt by colonial observers.\textsuperscript{29} For his own part, Hazeu argued that “gelijkgestelde Arabieren” or “assimilated Arabs” should always be subjected to Islamic law, just like local Muslims, and never be subjected to civil law, like other Foreign Orientals (Chinese and Japanese).\textsuperscript{30} Hazeu seemed confident that after several generations these Arabs would be more ‘native’ than ‘foreign.’ Contrary to Hazeu’s assessment however, Arabs remained a diasporic race to an extent since they frequently moved in and out of the colony. As late as 1938, a case involving the Belfas

\textsuperscript{26} During this period, the Dutch government attempted to downplay the mission of profit extraction in the colony while emphasizing the welfare of colonial subjects.
\textsuperscript{27} KITLV H 1083, No. 10, Mohammedansch Onderwijs, Collectie Hazeu, D.A. Rinkes to Directeur van Justitie te Weltevreden, July 12\textsuperscript{th} 1912.
\textsuperscript{28} The Arabs of Palembang were classified as such even after seven generations during the early twentieth century. Snouck to Governor-General, 19 April 1904, Ambtelijke Adviezen, Eerste Deel, 686-687.
\textsuperscript{30} He argued, like his predecessor, Douwe Adolf Rinkes, that Catholics were, after all, not subjected to ecclesiastical law in the Netherlands Indies. Hazeu considered it equally absurd that a ‘pure’ Arab (‘onvervalschten Arabier’ - literally, ‘unadulterated Arab’) could be regarded as European by the Supreme Court in a case in 1908. The Chinese population too were classified under two categories - ‘pure’ Chinese (Zuiver-Chineesch) and Indo-Chinese (Indo-Chineesch). KITLV H 1083, No. 8, Statement No. 30 Appendices, Collectie Hazeu, G.A.J. Hazeu to Governor-General of Dutch East Indies, Weltevreden, February 13, 1910.
family forced the landraad of Batavia to specifically consider Haḍrami laws (not Islamic law) concerning marriages and guardianship.31

Rather incongruously, the Dutch government ensured that natives and Arabs led separate lives in significant ways within the pluralistic political administrative structure. Foreign Orientals were governed by separate laws and rules with respect to government, jurisdiction, taxes, education, landed property militia units, dress as well as freedom of movement and residence.32 Laws for Foreign Orientals consisted of two parts. The first part consisted of codified law that pertained to dress, designated living areas and travel regulations.33 According to legal codes, each ethnic group was headed by separate captains assisted by their own quarter-masters, clerks and messengers.34 The second part was adat or customary law for Foreign Orientals that consisted of family law which was never codified for Muslim Foreign Orientals. In other words, although strict dress codes compelled Arabs to appear outwardly different from the native Muslim majority and designated quarters physically separated them from the natives, the Dutch government recognized that their lives had already been intimately linked with native Muslims. Colonial officials could not agree upon the level of assimilation of Arabs into local societies, which led to the highly uneven and rather haphazard application of law to Arab residents.

There were mainly two opposing groups within Dutch colonial circles. On one hand, adat law proponents situated Arabs within the complicated system of adat law circles. On the other hand, colonial officials better acquainined with Muslim affairs and Arab communities, such as L.W.C. van den Berg, Christiaan Snouck Hurgronje and G.F. Pijper, situated them within the universal Muslim community and perceived them to be more inclined towards Islamic law untainted by local adat which was not always compatible with Islamic law anyway. For some Dutch officials, the possibility of a competing universal appeal could potentially lead to anti-colonial, pan-Islamic uprisings. This did not necessarily mean however, that Van den Berg and Snouck were more secure and assured of Dutch colonial hold over local Muslim populations. Rather, their colonial policies and attitudes followed logically from their observations that Islam as a spiritual faith undoubtedly influenced the lives of Indies Muslims, especially the Arabs, in a practical manner especially in personal law. Snouck himself continued to espouse a policy of tolerance and vigilance concerning Arab communities.

It was not just the Arabs who were singled out as a problematic community from the Dutch colonial perspective. Historian Eric Tagliacozzo has demonstrated how all Foreign Orientals were conceptually grouped and dealt with as a common problem which necessitated strict laws governing dress and mobility towards the end of the

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35 Snouck was convinced that the vast majority of Muslims throughout the Archipelago adhered to Islamic law which has been influenced by local adat which remained resilient. Snouck to Directeur of Education, 26 February 1900, Snouck to Government Secretary, 26 November 1891, Snouck “Het Atjeh Verslag,” Ambtelijke Adviezen, Eerste Deel, 20, 21, 55.
37 Ibid., 24.
nineteenth century.\textsuperscript{38} Suspected of promoting anti-colonial sentiments in the region and criminal activities such as smuggling, their movements within the Netherlands Indies had to be monitored and kept in check by Dutch authorities. Blatant discriminatory measures against Foreign Orientals were implemented in the last few decades of the nineteenth century. After 1866, Chinese and Arabs were forced to live in designated quarters reserved for their own communities and were not allowed to travel outside these quarters. Naturally, this led to much inconvenience.\textsuperscript{39} In order to travel over land and sea, Foreign Orientals had to obtain passes from the government.\textsuperscript{40} The policy was finally abolished in 1915,\textsuperscript{41} but the Foreign Orientals’ commercial profits had already suffered by then. Ironically, even as they experienced decades of economic and political repression, Foreign Orientals continued to be perceived by the Dutch government as successful and exploitative merchants in the Netherlands Indies from whom natives should be protected.\textsuperscript{42} To make matters worse, the Agrarian Law of 1870 prohibited the sale or permanent transfer of land from 'natives' to Europeans or other 'foreigners' like the Chinese. Furthermore, ordinance no. 179 in the \textit{Staatsblad} 1875 expressly prohibited the alienation of land held by non-native population groups.

\textsuperscript{38} Tagliacozzo, \textit{Secret Trades, Porous Borders}, 129-130.  
\textsuperscript{39} For more on the quarter system, see de Jonge, “Dutch Colonial Policy & Hadhrami Immigrants,” 104-106.  
\textsuperscript{40} From 1819 till 1863, both natives and Foreign Orientals had to obtain passes to travel over land and sea. After 1863, Natives no longer had to do so, but Foreign Orientals still had to. Bit by bit, the system was dismantled during the 1910s. Passes were so hard to obtain during this period that a black market emerged in Singapore. Mandal, “Finding their Place: A History of Arabs in Java under Dutch Rule, 1800-1924,” 54-70.  
Hence, Foreign Orientals and Europeans were restricted from owning real estate altogether in several areas throughout the colony.43

Arabs were considered a particular problem since they were associated with the global specter of pan-Islamism.44 Certain Dutch officials believed that since a substantial number of Arabs were religious leaders throughout the Netherlands Indies, they were potentially able to stir native Muslims to fanatical acts against Dutch colonial rule.45 In parts of Sumatra and Borneo, they were members of the Muslim political ruling class as well. Hence, they had the political capacity to urge their subjects to rise up in anti-colonial revolt. Keeping them separate from native populations wherever possible was therefore seen as a logical policy. By classifying them as Foreign Orientals regardless of their personal affinities, lineages and kinship relations, the Dutch colonial classification system, haphazard as it might have been, tended to generally situate them as foreign to the Netherlands Indies. Because his identities was not fixed, when an Arab appeared in a Dutch colonial court, he was unlikely to know whether Native law, Foreign Oriental law or European law would be applied to him. This uncertainty that arose from the ongoing tension between local and foreign identities meant that Arabs could potentially manipulate their complicated multi-faceted identities to suit their

43 In some places such as Tjimanoek in West Java, Foreign Orientals had to prove that they have been there for more than three generations. J. Sibenius Trip, “Het efpachtregt op de particuliere landerijen bewesten de Tjimanoek,” HRNI 30 (1878), 99.
44 Nico Kaptein argues that there was only one thing that the Dutch feared more than the Arabs – the Sufi tariqahs. Nico J. G. Kaptein, “Arabophobia and Tarekat: How Sayyid Uthmān became Advisor to the Netherlands Colonial Administration,” in The Hadhrami Diaspora in Southeast Asia: Identity Maintenance or Assimilation, eds. Ahmed Ibrahim Abushouk and Hassan Ahmed Ibrahim (Brill: Leiden, 2009), 44.
45 An early yet surprisingly extensive assessment of pan-Islamism throughout the Netherlands Indies was provided by Snouck in 1883. Snouck, “Prof. De Louter, "Godsdienstige wetten," 98-108.
circumstances in legal arenas. How far were these Arabs able to exercise their influence over the Dutch legal system?

**Arab influence in Islamic Law**

Although Arabs’ desire for legal autonomy was curtailed in the colony, Arab affairs, and, one might even argue, Muslim affairs in general, remarkably remained in Arab hands to a certain extent in the Netherlands Indies through the special friendship between Snouck Hurgonje and Sayyid ‘Uthmān bin Yaḥyā. Born in the town of Pekodjan in Batavia in 1822, Sayyid ‘Uthmān was raised by his maternal grandfather Shaykh ‘Abd Al-Raḥmān bin Ṭāhir al-Miṣrī, an Egyptian. Upon his grandfather’s death in 1847, he travelled to Arabia to perform his pilgrimage. He later studied in Mecca with Sayyid Ṭāhir Dahlān, a Ṣāḥīfī mufti. After seven years in Mecca, he went to Haḍramaut to study with several prominent teachers, before returning to Mecca. Before returning to Batavia, he continued his studies in Morocco, Tunisia, Algeria, Egypt, Syria, Palestine and Istanbul. Sayyid ‘Uthmān returned to Batavia in 1882 and became well-acquainted with Dutch residents there. Moreover, his lithographed atlas of Haḍramaut, which could be taken as a nostalgic sense of belonging to the region of his ancestors, won him considerable attention from Dutch officials. By July 1888,

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46 Snouck stated that he was born in 1830 instead. Snouck to Director of Education, April 5 1891, Ambtelijke Adviezen, Tweede Deel, 1513.
Sayyid ‘Uthmān had already formed a friendship with his most formidable ally in colonial bureaucracy, Snouck Hurgronje.\textsuperscript{50}

Like his predecessor Van den Berg, Snouck regarded Sayyid ‘Uthmān as an ‘Ally of the Government of the Netherlands-Indies’ whom he called ‘a sound scholar.’ Snouck believed that Sayyid ‘Uthmān was a celebrated leader whose knowledge of Islamic theology and jurisprudence, Javanese customs and the Malay language made him extremely valuable to the colonial elite.\textsuperscript{51} Consequently, Snouck played a huge role in appointing Sayyid ‘Uthmān the Honorary Advisor for Arabian Affairs.\textsuperscript{52} Although Sayyid ‘Uthmān was not on the official government payroll, he was paid at least 100 guilders a month by Snouck to provide information on Islamic affairs.\textsuperscript{53} Snouck claimed that Sayyid ‘Uthmān was worth much more than the ‘liberal’ wine-drinking Javanese regents to the Dutch colonial elite who already faced the challenging task of governing millions of Muslims with great sensitivity and tact so as not to cause unnecessary discontentment.\textsuperscript{54} So close was their friendship that Snouck would not easily trust a Muslim religious authority who was unknown to Sayyid ‘Uthmān.\textsuperscript{55} Snouck’s subsequent denigration of adat may speak to Sayyid ‘Uthmān’s strong views on the

\textsuperscript{50} Ibid., 42.
\textsuperscript{52} Azra, “A Hadhrami Religious Scholar in Indonesia,” 253.
\textsuperscript{53} Snouck to Governor-General, 23 February 1906, Ambtelijke Adviezen Eerste Deel, 45; Snouck to Director of Education, 20 June 1889, Ambtelijke Adviezen tweede Deel, 1510-1511.
\textsuperscript{54} Snouck, “Een Arabische Bondgenoot," 85.
\textsuperscript{55} Snouck to Resident of Palembang, 23 October 1904, Ambtelijke Adviezen, Tweede Deel, 1178.
issue. Like Sayyid 'Uthmān, Snouck consistently cast local subject populations as Muslims whose lives were primarily governed by Islamic principles instead of adat which could sometimes be un-Islamic.\textsuperscript{56} Being an orthodox Muslim, Sayyid 'Uthmān was said to tolerate non-Muslim rule more than adat.\textsuperscript{57} In 1898, Sayyid 'Uthmān even wrote a prayer for the Dutch Queen Wilhelmina on the occasion of her ascent to the throne, a sign of loyalty to the Dutch colonial power, thus sealing his role as a steadfast colonial ally.\textsuperscript{58}

While based in Batavia, he wrote mostly in Malay and sometimes in Arabic. His influence over other Muslims in the Netherlands Indies was probably limited, although Van den Berg’s volume suggested that he was a respected authority on Islam and theology in general.\textsuperscript{59} Sayyid 'Uthmān was praised extensively by Van den Berg.\textsuperscript{60} It must be noted that Sayyid Uthmān hardly represented Arab opinions, and constantly faced opposition from fellow Arabs and other Muslims.\textsuperscript{61} His severe criticism of Sufi orders did not endear him to many Muslims in the Netherlands Indies.\textsuperscript{62} On the contrary, his close relationship with the Dutch might have contributed to local Muslims’ antipathy towards Arabs during the early twentieth century.\textsuperscript{63}

\textsuperscript{56} Lev, Islamic Courts in Indonesia, 17.
\textsuperscript{57} Snouck to Governor-General, 7 October 1900, Ambtelijke Tweede Deel, 1518.
\textsuperscript{58} The prayer was read in mosques in Java during the sermon before Friday prayers. Nico Kaptein, “The Sayyid and the Queen: Sayyid ‘Uthmān on Queen Wilhelmina’s Inauguration on the Throne of the Netherlands in 1898,” Journal of Islamic Studies 9, 2 (1998), 158-177.
\textsuperscript{60} Van den Berg, Le Hadhramout et les Colonies Arabes, 231.
\textsuperscript{61} Hamid Algadri, Dutch Policy against Islam and Indonesians of Arab Descent in Indonesia (Jakarta: Pustaka LP3ES, 1994), 82.
\textsuperscript{62} Snouck to Governor of Sumatra, March 10 1904, Ambtelijke Adviezen, Tweede Deel, 1520.
\textsuperscript{63} For example, Sheikh Omar Manggoesh (Manqush) criticized him in his own publications. Azra, “A Hadhrami Religious Scholar in Indonesia,” 252. Snouck to
As we have seen in Chapter One, Snouck had discredited L.W.C. van den Berg’s knowledge of Arabic and Islam in a series of scathing book reviews. In order to prop up Sayyid ‘Uthmān’s importance in the eyes of the Dutch colonial elite, Snouck proceeded to prove the incompetence of existing Arab advisors such as the existing Arab member of the Orphan Chamber (weeskamer), Muḥammad ibn Ḥasan Bābahīr, whom Van den Berg had specially thanked for helping him in the translation of the Minhāj al-Ṭalībīn. In April 1893, Sayyid ‘Uthmān was called to the Supreme Court of the Netherlands Indies in Batavia to advise on an unusual case on guardianship.64 Upon the recent death of his father, Sayyid Abdullah bin Muḥammad bin Shihab was appointed guardian of his minor brothers and sisters although their mother was still alive.65 Snouck cited Sayyid ‘Uthmān’s argument that normally, according to Shāfī’ī law in both the Netherlands Indies and Arabia, the mother would be the guardian of the children upon her husband’s death. The fact that law in Arabia was cited suggests that these Arabs straddled two worlds that had to be considered although they were based in the Netherlands Indies. Yet, in an earlier case heard in the Orphan Chamber in 1891, an Arab man named Sayyid Ali bin Ahmad bin Shahab had been declared the guardian of his own minor brothers and sisters upon the death of their father. The case was decided upon the advice of the leader (kapitein) of the Arab community, Muḥammad ibn Ḥasan

Resident of Batavia, March 30 1900, Snouck to Governor-General, October 7 1900, Ambtelijke Adviezen, Tweede Deel, 1516, 1517.

64 Snouck to Governor-General, 12 July 1893, Ambtelijke Adviezen, Tweede Deel, 1522-1526.
65 The mother of his minor brothers and sisters in question was most probably not his own mother.
Bābahīr. In his report in 1891, Bābahīr drew from supposedly Quranic principles which he claimed, stated that the eldest son should be the guardian of his siblings after they had passed away. However, as Sayyid 'Uthmān and Snouck well knew, the Qur’an did not touch upon the subject at hand at all, such that even European authorities in the Orphan Chamber expressed their surprise at this ruling, although they accepted his advice anyway. This legal ruling thus pitted Bābahīr directly against Sayyid ‘Uthmān and, of course, Snouck did not hesitate to dismiss Bābahīr as either ignorant or worse, unjust, especially if the latter had in fact judged out of malice. Snouck admitted that he was more inclined to believe that the Ḥasan Bābahīr had in fact been bribed to provide false rulings counter to Islamic law, though he was quick to add that these were simply rumours.

Nonetheless, this episode provided more fodder for Snouck’s argument in 1893 that members of the priesterraden, as well as government-appointed captains of Arab communities, were often corrupt because they were not paid sufficiently by the Dutch colonial government. Through hints and insinuations, Snouck attempted to destroy Ḥasan Bābahīr’s reputation as a reliable advisor to the Dutch colonial government. Always thorough in his judgment, Snouck held the European members of the Orphan Chamber responsible as well – in a way sealing his own authority on the subject of appointment of a suitable Arab advisor to the Orphan Chamber on religious affairs. Five months later, in December 1893, Snouck again wrote a letter to the Governor-General urging the government to investigate Bābahīr’s rulings and his suitability as a member

66 Van den Berg referred extensively to Sayyid ‘Uthmān in his rebuttal to Snouck’s harsh review, a strategic move since he must have been aware that Sayyid ‘Uthmān was Snouck’s main resource. Van den Berg, “Mohamedaansch Recht en Adat,” 150-155.
67 Snouck to Governor-General, December 4 1893, Ambtelijke Adviezen, Tweede Deel, 1527.
of the Orphan Chamber which would hopefully lead to his dismissal from the Orphan Chamber altogether.\(^{68}\)

Although the Arabs’ requests for a separate jurisdiction or mediation sites were repeatedly rejected by the Dutch colonial government as we have seen in Chapter One, this did not mean that distinctly Arab sites of legal recourse did not exist beyond colonial scrutiny. Snouck reported that various fatwas were frequently sought from Mecca, Cairo and Haḍramaut by the Arab communities. Authorities such as Sayyid Uthmān transmitted these fatwas to Muslim populations in the Netherlands Indies.\(^{69}\) Hence, it is very likely that that other leaders transmitted fatwas from the Middle East and South Asia to the Muslim community in the colony, outside of Dutch colonial surveillance.\(^{70}\) In writing to his Dutch superiors, Snouck, on the other hand, was understandably prudent enough to downplay Sayyid ‘Uthmān’s ‘orthodox’ beliefs, emphasizing the latter’s dislike of fanaticism.\(^{71}\)

Snouck, as Harry Benda has described in great detail, did not manage to convince his colleagues of the centrality of Islamic law in the lives of Native Muslim subjects in the Netherlands Indies.\(^{72}\) This did not mean that Snouck and his Arab ally Sayyid Uthmān were unable to influence the administration of religious family law in the colony. In 1881, Sayyid Uthmān had already published an important guidebook for

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\(^{68}\) Ibid.
\(^{69}\) Snouck Hugronje, “Islam Und Phonograph,” \textit{TVIT} 42 (1900): 399-400.
\(^{70}\) Van den Berg noted that the members of the same Sufi orders in Hadhramaut practiced their devotion differently from members of Sufi order in the Netherlands Indies. L.W.C. van den Berg, “Over de devotie Der Naqsjibendijah in den Indien Archipel,” \textit{TVIT} 28 (1883): 161.
\(^{71}\) Snouck Hugronje to Director of Education, 20 June 1889; Snouck Hugronje to Director of Education, April 5 1891, \textit{Ambtelijke Adviezen, Tweede Deel}, 1510-1511.
\(^{72}\) Benda, \textit{The Crescent and the Rising Sun}. 

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the *priesterraden* entitled *Kitab al-Qawanin al-Shar'iyya* usually rendered as ‘Book of Administration of Islamic Law.’ The book became an important reference for not just Muslim judges in the *priesterraden* but for the Dutch colonial legal administrators as well, especially after it was revised and expanded upon in 1894 and translated into Dutch the following year under the title *De Gids voor de Priesterraden*. Although it cannot be confirmed how closely other Dutch colonial legal administrators besides Snouck had followed Sayyid ‘Uthmān’s advice, it appears that Sayyid ‘Uthmān’s advice significantly shaped the administration of Islamic law. For one, Islamic law in the Netherlands Indies, unlike in the British Straits, was not codified by the Dutch colonial elite, something which Sayyid ‘Uthmān himself repeatedly stressed to Snouck.73

While it is difficult to measure how influential Sayyid ‘Uthmān was outside of Dutch colonial bureaucracy, his writings indicated that he was very keen on policing his own community, in particular, the Sayyids, not only in the Netherlands Indies but also in Malaya and Singapore.74 Sayyid ‘Uthmān’s *Gids voor de Priesterraden* moreover revealed deep anxieties about the uncertain role of the *priesterraden* in the solemnization of marriages. In particular, Sayyid ‘Uthmān maintained that the *qāḍī* could act as a woman’s *wali*, instead of a male relative. In line with the standard Islamic view, he qualified this statement by stating that a *qāḍī* was only allowed to stand in for

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73 While Sayyid ‘Uthmān was averse to codification because it was suited to classical Islamic tradition, Snouck was more concerned that since Islamic law was mixed with adat and that the combination was constantly changing, codification was highly unsuitable. Snouck, *Politique Musulmane de la Hollande*, 70, 86. Snouck Hurgronje, "Advies over Codificatie van Adatrecht," *Verspreide Geschriften Deel IV, Eerste Reeks* (Bonn Und Leipzig: Kurt Schroeder, 1924), 259-276.

74 Sayyid Uthmān used to spread his teachings orally primarily. For a list of his writings, see *Ini daftar nama kitab-kitab dan djawal jang dikarang dan ditjetak oleh Said ‘Otman bin Abdullah bin Aqil bin Yahyā di negeri Betawi* (Batavia: Sayyid Uthmān bin Aqil, s.n.)
an actual male blood relative in the case of the latter’s absence or death. However, Dutch colonial authorities actually recognized that the ‘Muslim priest,’ whether it be the qāḍī or penghulu (village head), could act as a wali for a woman in any circumstance. The role of the penghulu and priesterraden as qādis was never precisely defined by Sayyid ‘Uthmān, not even in his extensive handbook, as noted by Snouck. Perhaps Sayyid ‘Uthmān was not willing to contradict his Dutch superiors outright, despite his reluctance to cede patriarchal authority within the family to non-family members who were nothing but government functionaries.

In any case, within his own social political and economic milieu, Sayyid ‘Uthmān was able to use his own proximity and special relationship with Snouck Hurgronje to influence the social and legal mores of Muslims in the Netherlands Indies, and more specifically, that of the social norms of Arabs living in the Malay world. To some extent, Sayyid ‘Uthmān worked outside of the colonial framework in order to police Arab communities not only within the Netherlands Indies, but also in the British Straits Settlements, offering us a vivid glimpse of Arabs that breaks outside of strictly colonial legal structures. Yet, it would be hard to deny that it was the collaborative underpinning of his relationship with Dutch colonial authorities that propelled Sayyid ‘Uthmān to the position of authority. Indeed, Sayyid ‘Uthmān definitely drew upon colonial legitimacy in exerting his influence over Muslim societies. He actively requested Snouck to appoint him as an advisor and mufti by explaining that he was the only expert consulted about fiqh matters in family law and inheritance law by Javanese

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75 Snouck saw this as a huge contradiction on Sayyid ‘Uthmān’s part. Snouck, Sayyid Oethman’s Gids Voor De Priesterraden, 14-15.
and Malay judges and by European officials interested in Sufi tariqas. The fact that Sayyid 'Uthmān used his education to promote his unique capability in his letter to Snouck indicated that the vast majority of the members of the priesterraden were not educated in fiqh at all, although some prominent religious teachers were trained in Arabia.78

Local or foreign?

Sayyid 'Uthmān’s views were not uniformly accepted by Muslims, most probably due to his Arab identity which was considered out of touch with local realities according to proponents of adat law. His closest ally, Snouck, believed that the distinction between Arabs and natives in the colony was not manifest enough since both societies had been mixing long before the Dutch arrived in the region during the early seventeenth century.79 By no means advocating closer relations between natives and Arabs in the colony, Snouck was simply being realistic in his assessment of local conceptions of ethnicity and descent in the Netherlands Indies. However, extant social realities were doomed to be replaced by the rational authority of the colonial legal system. Most Dutch government officials held fast to the legal classification that distinctly separated Indies society into three population groups, namely Foreign Orientals, Natives and Europeans.80 In fact, Snouck’s successor as Advisor for Native Affairs, Bertram Schrieke

77 Kaptein, “Arabophobia and Tarekat,” 43.
78 A member of the priesterraad in Bandung, Raden Hadji Mohamed Rosdi, received an excellent education in Arabia which made him qualified to be a judge in Snouck’s own estimation. Snouck to Civil and Military Governor of Aceh and dependencies to Kotaraja, 23 November 1895, Ambtelijke Adviezen, Eerste Deel, 135-136.
79 Snouck to Governor-General, 19 April 1904, Ambtelijke Adviezen, Eerste Deel, 687.
maintained that the notion of ‘a native Sayyid’ was a contradiction in 1920.\textsuperscript{81} Yet Schrieke had to ultimately bow to the judgment of provincial court and government officials who attempted to accommodate myriad Arab identities from the 1910s onwards. Indeed, the lack of a centralized legal structure in the Archipelago meant that no one notion of Arab identity or legal status could be successfully imposed on the entire Netherlands Indies at any one time. Neither did colonial officials arrive at a common understanding of the diversity of Arab identities. It is important to note that legal integration was not even a goal in the Netherlands Indies; legal uniformity was hardly an objective in a colony where local customary law formed the primary core sets of laws in each location.

For mobile diasporic communities such as the Arabs who might have been accustomed to the universality of Islamic law, Dutch colonial legal configurations was understandably confusing. In 1938, an exasperated judge wondered out loud as to what sort of ‘international private law’ diasporic Arabs expected in the colonial courts of Batavia in cases involving family law. Did they assume that the landraad would apply Islamic law to all Muslims no matter their nationality?\textsuperscript{82} Perhaps. As we will see in subsequent chapters, British colonial administrators implemented Islamic laws in the realm of personal law over the lives of Muslim subjects with as little variation as possible across Empire. In contrast to Arabs in the British Straits Settlements who could count on British commitment to administer Islamic law, however imperfect and incomplete, Dutch legal structures were not predictable at all. This was unfortunate for

\textsuperscript{81} KITLV Inventaris-27, H 797, Collectie Kern, No. 210, Bertram Johannes Otto to Director of Justice to Governor-General of Netherlands Indies and Director of Civil Service, November 17 1920.
\textsuperscript{82} “Landraad te Batavia, Voorz. Mr. J. Roorda,” \textit{ITVHR} (1939) 153, 299-306.
Arabs who might have, rather ingenuously, hoped for legal commensurability in every location in Southeast Asia. Although Dutch officials such as Snouck generally recognized the centrality of Islamic law in their lives with little, if any, regional particularities or variations, Dutch legal structures did not accommodate this view and not only imposed local *adats* which were not part of the Arabs’ repertoire of customary laws in the first place, but also elements of Dutch civil law at times as in the outright ban of family waqfs.\(^{83}\)

Up until now, scholars have not fully explored the legal status of Arabs beyond legislation pertaining to dress codes, allocated living areas and travel restrictions.\(^{84}\) The study of the complicated legal status of Chinese inhabitants of the Netherlands Indies have gained significant headway in scholarship thanks to the work of Patricia Tjoek-Liem.\(^{85}\) The legal lives of Muslim subjects have not been examined however. The absence of centralized legal bureaucratic structures meant that court records were, unfortunately for historians, not kept diligently. Out of all the cases heard in the *priesterraden*, only a handful of cases involving Arabs were brought to the *landraad*. Yet, fewer reports of these cases were subsequently published in legal compendiums and legal journals which tended to focus on Java. Other islands, with the exception of Sumatra, were rarely mentioned. Nonetheless, the number of published cases involving Foreign Orientals were still disproportionate to their actual numbers in the Netherlands Indies. Hence, one suspects that their cases were often discussed because

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\(^{83}\) Van Vollenhoven, *Adatrecht*, 123.


\(^{85}\) Patricia Tjoek-Lim, *De Rechtspositie Der Chinezen in Nederlands-Indie 1848-1942: Wetgevingsbeleid Tussen Beginsel En Belang* (Amsterdam: Leiden University Press, 2009).
their status were never truly ascertained compared to status of natives which was clearer. Most of these cases involved commercial dealings. Law reports of cases of family law were considerably fewer since unfortunately, the priesterraden recorded very few cases. Nonetheless, scholars can still glimpse Arabs’ legal strategies from these richly-detailed reports.

Unlike legal policies in the neighbouring British Straits Settlements that were organized according to religious faiths, Dutch colonial legal policy was theoretically based on ethnicity. The effectiveness of this policy faltered when it came to Foreign Orientals with fluid identities along a spectrum ranging from ‘native’ to ‘European’. Arabs within one location were more assimilated into local communities than others. Members of the political ruling class who were of Arab descent tended to be regarded as of local origin, and classified accordingly as “native.” For example, Arab rulers of particular states within the Netherlands Indies and their descendants, like the Sultan of Pontianak on the west coast of Borneo and the ruling family of Siak in Riau, were classified as natives.86 Evidently, special circumstances such as the rank of nobility within local political structures allowed them to pass under the category of ‘natives.’

At times, the reverse happened and natives came under the category of “Arabs” in legal courts, usually through marriage to an Arab. A law report indicated that in 1889, a woman named Katidjah binti Abdulla identified as Javanese, yet she was subjected to laws of Foreign Orientals simply because her husband was an Arab.87

87 “De te batavia, Soerabaia, Semarang, Cheribon en Tjilatjap, gevestigde en kantereende Handelsvenootschap, onder de firma Geo Wehry & Co, appellante,
1934, another Javanese woman, keen on avoiding being judged according to civil law, directly pleaded with G.F. Pijper, the then advisor for native and Arab affairs, not to be considered an Arab simply because she was married to one.88

In 1920, local Arabs in Riau meanwhile had been allowed to become ‘natives’ simply after giving up their titles of Sayyid or Sharīfa that indicated their descent from the Prophet Muhammad. Much to the confusion and frustration of several Dutch provincial administrators, including members of the Justice Department based in Batavia, this cosmetic measure was deemed sufficient for the Arabs to change their legal status. The provenance of the decision to drop the titles remain a mystery. Dutch colonial laws did not mention titles as a marker of Arab identities at all. Why did the Arabs choose to drop their titles in order to prove that they were indigenous? If the title of ‘Sayyid’ was the only marker for their identity as ‘Arab’, what about the non-Sayyids Arabs who were also classified as ‘Foreign Orientals’ throughout the colony?

Marriage to a native woman was definitely an attractive prospect for all Foreign Orientals due to restrictions on land-ownership based on ordinance no. 179 in the Staatsblad 1875 which banned non-natives from owning land.89 In fact, it was common knowledge that the desire to own land was the main reason for Arabs’ wish to be legally

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88 KITLV Inventaris 27 H 797 Collectie Kern no. 486, Nji Ali to Advisor for Native and Arab Affairs, May 26 1934.
classified as natives by marrying to a native woman. Marriages could easily be arranged since there was no cultural distinction between an Arab and an indigenous inhabitant in Riau, at least, in terms of habits and customs.

Even after dropping their titles, these Arabs retained their higher rank within local societies. Such Arabs, just like the Sultan of Riau, though undoubtedly of highest social rank at the apex of society, were certainly not foreign. After all, they had lived in the Riau Archipelago for several generations and had grown deep roots in the islands by intermarrying with local indigenous societies while preserving their Arab identities based on patrilineal descent. Hence, their high rank in Riau society was, understandably, not just predicated on the title of Sayyid or Sharīfa. In the eyes of local inhabitants of Riau, Arabs remained Arabs even after they opted to drop their titles primarily because Arab women still garnered a higher 'mahr', the compulsory payment which the bridegroom had to give the bride when the contract of marriage was made and which then became the property of the wife.

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90 As emphasized in the previous chapter, Muslim women need not turn over or share their property with their husbands. KITLV Inventaris-27, H 797, Collectie Kern, No. 210, Sjarif Al Wahidin to Controleur of Poelau Toedjoeh te Terempa, August 18 1920.
91 KITLV Inventaris-27, H 797, Collectie Kern, No. 210, Mas Soeparto to Postholder in Sedanau, September 4 1920.
92 The controller claimed that political rulers of indigenous and Arab descent, took turns to rule the Riau islands. KITLV Inventaris-27, H 797, Collectie Kern, No. 210, Controller of Pulau Tujuh to Resident of Riau and Dependencies, September 20 1929.
93 They were still referred to as such by inhabitants of Riau.
The mahr for an Arab bride was 400 rial, equivalent to the mahr of a member of royalty and eight times more than the mahr for a local inhabitant. The price of mahr was taken to be an indication of social rank and not foreign status. Arab women in Riau were banned from marrying local men, even when they shared the same legal category of ‘natives’, unless they were part of the royal family. Similarly, female members of the royal family could not wed native commoners but were allowed to marry male Arabs who held the title of Sayyid (even after they had dropped their titles officially). In other words, a higher mahr and marriage restrictions did not point towards foreign status because local members of Riau Sultanate practiced similar traditions.

A person’s position depended not on what he was himself but on the population group to which he belonged according to Dutch definitions of ethnicity, as historian W.F. Wertheim pointed out. As we have seen however, ethnic classifications of Foreign Orientals were constantly shifting with no discernible trend across historical time. This was because, as Patricia Tjiook-Liem explains, it was not actually ethnicity which determined the status of the Foreign Oriental at all, despite the official word, but Dutch economic pragmatism and colonial political interests which were constantly

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95 KITLV Inventaris-27, H 797, Collectie Kern, No. 210, Controller of Pulau Tujuh to Resident of Riau and Dependencies, September 20 1929.
96 Snouck to Governor-General, 19 April 1904, Ambtelijke Adviezen, Eerste Deel, 687.
97 In addition, Sjarif Al Wahidin warned Dutch colonial officials that forcing Arabs to drop their titles as a prerequisite for legal classification as ‘natives’ might be an indication of Dutch hatred of Islam. However, this remark was not addressed by higher Dutch officials who were more interested in the legal aspects of the question. Sjarif Al Wahidin’s caution was a strong sign of Arabs’ sensitivity towards Dutch colonial suspicions of their community, it was only in the late 1920s that Dutch and British suspicions of Arabs as proponents of seditious pan-Islamist sentiments begin to wane.
fluctuating. Indeed, this was exactly why the ethnicity-based legal system in the Netherlands Indies created so much confusion. The legal identities had to be decided on a case-by-case basis right up to the end of the colonial period, resulting in severe discrepancies in the way Arabs were treated throughout the Netherlands Indies. On the other hand, this uncertainty opened up opportunities for legal discretion for both Dutch and Foreign Orientals in the Netherlands Indies in specific instances. While the personal laws of other Foreign Orientals, such as Chinese and Japanese residents, were elaborated upon in detail in legislation, discussed extensively in colonial journals, even codified and grounded in statute to some extent, there was no attempt to even elaborate upon laws pertaining to Arabs beyond rules concerning travel restrictions and dress codes. Perhaps, from the Dutch perspective, there was no urgent need to, since they were presumed to share laws with the native Muslims after living amongst them for several generations.

Although all Japanese residents, some Chinese Residents and a few natives were at times classified as Europeans. Arabs and Indians (listed as ‘mooren’ or ‘klingaleezen’) were only ever categorized in these censuses as Foreign Orientals and not

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99 Tjiook-Liem, *De Rechtspositie Der Chinezen*.  
102 On the whole, compared to British colonies, legislation was scarce and mostly focused on jurisdiction anyway. Hooker, *Islamic Law in South-East Asia*, 255.  
103 For example the age of majority for Muslim natives was the same for Orientals which precluded the need for an extra set of laws. In Riau, Arabs shared same adat as local inhabitants. KITLV Inventaris 27 H 797 Collectie Kern, No. 258 Rudolf Aernoud Kern to Governor-General, Stukken over kinderhuwelijken op Java en Sumatra, 1921-1923 August 9 1921; KITLV Inventaris-27, H 797, Collectie Kern, No. 210, Sjarif Al Wahidin to Controleur of Poelau Toedjoehe te Terempa, August 18 1920.
“Europeanen.” This did not stop several Arabs in Batavia from claiming European status after pledging their allegiance to the Ottoman Sultan. In the 1880s, these Arabs even produced certificates declaring European origin despite having never lived in Haḍramaut, which was itself not strictly a part of the Ottoman Empire, although in 1872, the Ottoman Sultan had installed a governor for the Haḍrami coast. Although links with Ottoman Empire were tenuous, Ottoman authority was strangely vested with a legal hold over Arabs of Haḍrami descent based in the Netherlands Indies, since Dutch authorities determined that legal documents produced by qadis in Hadhramaut should be subjected to ratification by the Ottoman consul in Batavia, Ghalib Bey, from the 1880s. The Dutch colonial government specifically tasked the Ottoman consul with verifying the authenticity of seals and signatures on these documents. This requirement met with several complaints from members of the Arab community with landholdings in Haḍramaut. They argued that it was ridiculous to expect the Ottoman consul to have knowledge of Haḍramaut and the Netherlands Indies because Ottoman officials were nowhere to be found in Haḍramaut since neither Haḍramaut or the Netherlands Indies was Ottoman territory. This episode clearly revealed how Arabs

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104 Historian Justus van der Kroef claims that that some Arabs were at times classified as Europeans by virtue of marriage, legal recognition or naturalization. Justus M. Van der Kroef, “The Indonesian Arabs,” Civilisations 5 (1955): 15.
105 Snouck to Governor-General, 19 April 1904, Ambtelijke Adviezen, Eerste Deel, 673-677.
107 Snouck to Governor-General, 12 July 1893, Ambtelijke Adviezen, Tweede Deel, 1525.
108 Naturally, the Ottoman consul often had to consult the Arabs themselves who could easily manipulate facts that challenge documents. Worse, the process demanded a hefty fee for the Ottoman Consul’s legal services, between 40 and 50 guilders, even when the real estate property in question was not worth that much. Yet, even more absurdly, documents deemed valid in the Orphan Chamber in Batavia was not
could simultaneously be Ottoman subjects which made them equal to Europeans, and Foreign Oriental subjects within the Dutch legal system, creating further confusion.

**Jurisdiction over Arabs**

Cases involving Arabs were often brought to higher civil courts that focused on circumscribing jurisdiction for all litigants involved. Civil courts had mostly European judges, since local judges (mostly high-born Javanese) were not appointed to European jurisdictions.\(^{109}\) Despite an aversion to administering religious and customary laws, legal authorities could not afford to be completely indifferent to these laws since cases involving inheritance, brought to these civil courts, involved landed property that was subjected to Dutch civil law which prohibited the perpetual alienation of land for private family purposes.\(^{110}\)

In 1882, the Appellate Judicial Council (*Raad van Justitie*), which heard cases from litigants of all ethnic backgrounds, declared itself incompetent to hear the case brought by an Arab man named Said Mohamad bin Hoesin Alhabshi against the Dutch colonial government.\(^{111}\) Hence, the case was brought to the Supreme Court (*Hooggerichtshof*) in automatically regarded as valid elsewhere in the colony such as in the Orphan Chamber of Surabaya.

\(^{109}\) Only one or two were given posts at higher courts. According to Daniel Lev, only two or three dozen local advocates established themselves as lawyers in colonial courts during the late colonial period throughout the Netherlands Indies. This is not surprising since the first law school for Indonesians was only opened in 1909. A full course law faculty was established in Batavia in 1924. Lev, "Judicial Institutions and Legal Culture in Indonesia," 256, 262; Fasseur, "Cornerstone and Stumbling Block," 34.


\(^{111}\) The *Raad van Justitie* was found only in Batavia, Semarang and Surabaya in Java. "Burgerlijk Zaken: Hooggerichtshof van Nederlandsch-Indie (Eerste Kamer) 20 Maart 1884, Said Mohamad bin Hoesin Alhabshi, zoo in privé als qq. appellant, comp- bij den adv. en proc. Mr. F.H. Gerritzen, contra Regeering van N.I. geintimeerde, comp. bij den landsadvocaat Mr. C.A. Hennij," *ITVHR* 79 (1884): 26.
March 1884. The case revolved around a piece of land in Central Java, the revenue of which was to go to the heirs of the deceased Said Aloei bin Sjech Aldjuffrie, who most probably died in 1815. The matter was difficult to resolve, not least because the Supreme Court had prematurely alienated the piece of land from the testator Said Aloei bin Sjech Aldjuffrie, although the case was brought to court to precisely ascertain its status with relation to his family. As a result, the land seemed to have had no legal owner between 1815, when Java was under British colonial rule, and 1884, when the case was brought to the Supreme Court. As we will see in Chapter Four, while British authorities definitely considered alienation of land (‘waqf’) to be legitimate to a certain degree, Dutch colonial authorities considered it illegal since all uncultivated land was automatically granted to the Dutch government. Rather curiously, the matter was classified under ‘civil affairs, not Islamic,’ although the description fits that of a family waqf, an undoubtedly religious institution, held by the family of Said Aloei bin Sjech Aljuffrie. The report thereafter focused on the technicalities of sovereign law in the Netherlands Indies. Were laws applied in 1815 still relevant? The law report vehemently indicated that Roman law, or Old Dutch law, would not have allowed Said Aloei’s heirs to benefit from the land in perpetuity. The problem was thus historicized. “When the assignment was made, the land was by no means considered alienated as a fixed property to the Said, but expressly assigned for the permanent and honorable

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112 The law report did not indicate the exact date of his death but it was definitely during British occupation of Java from 1811 to 1815 under Lieutenant-Governor, Thomas Stamford Raffles.
113 The piece of land was never even referred to as ‘property’ (or ‘eigendom’ in Dutch) in the law report.
114 For more on legal administration of Java under British rule from 1811 to 1815, see Supomo and Djokosutono, Sedjarah Politik Hukum Adat, Djilid 1, 67-88.
support, or such regulations and restrictions adopted by the government that he and his family were under.” Since the government was, at the time of the lawsuit, none other than the Dutch colonial government, the piece of property should be governed by Dutch colonial law. This was a typical approach by a higher civil court towards religious laws. The 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 law and Dutch law in Java.

Despite the lack of direct engagement with Islamic law in courts, Dutch scholars eagerly grappled with issues of Islamic theology and jurisprudence in journal articles, books and colonial correspondence, as we have seen in Chapter One. From time to time, Dutch colonial officials (not only Snouck Hurgronje, although he was, by far, the most prolific and knowledgeable) enthusiastically delved into the veracity of priesterraden rulings and offered their own view on specific issues such as the status of minors and inheritance. The topic of marriages amongst Muslim subjects seemed to have garnered the most attention. How did the proficient Dutch intellectual grasp of Islamic law manifest itself in legal rulings? Legal structures in the colony ensured that Dutch colonial bureaucrats rarely had the chance to show off their knowledge. Since Islamic law was strictly relegated to the local priesterraden staffed with Muslim judges,

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116 This is a literal translation of the Dutch ruling.
higher Dutch courts with non-Muslim legal authorities were prevented from administering Islamic law.

This did not mean that Dutch legal policies did not affect Islamic legal practices in significant ways. After all, earlier priesterraden decisions could potentially be overturned by either the landraad or the Supreme Court. Cases that seemed to involve religious laws on the outset were sometimes brought to civil courts usually to determine legal jurisdiction over persons, or more often, physical property. Landed property, except land owned by royal families, strictly fell under the purview of European civil law. At times however, family law cases touched upon commercial law as well. Secular civil Dutch courts such as the landraad and the Supreme Court had also interfered in the management of sacred family tombs. For example, in one case in 1918, a priesterraad ruling that non-Muslims could not inherit from a Muslim Arab was thrown out by the Supreme Court in Batavia.\footnote{\textit{Over Priesterrechtspraak in verband met Mr. B. Ter Haar’s Verhandeling}, ITVHR 113 (1918): 377-386.} In October 1918, a case that appeared in landraad of Batavia revolved around the guardianship of a small four-year-old girl.\footnote{The law report was unusual in that it actually printed a letter by Sayyid Moehamad Ashmoeni in Malay. \textit{Sayyid Moehamad Ashmoeni, wonende te Batavia eischer, contra Moehsina binti Hadji Abdoel Moerni, wonende te Batavia gedaagde,} ITVHR 113 (1918): 3.} The Arab plaintiff, Sayyid Moehamad Ashmoeni, requested for his daughter to be under his care, but his former wife, the girl’s mother, refused. He asked that the landraad order his former wife (identified as a native) to hand over his daughter to him. The court reasoned that guardianship (defined in the report as ‘wilayah’) was different from nursing (defined as ‘hadhanah’).\footnote{The Dutch terms were ‘voogdij’ and ‘verpleging.’} If the child was still being nursed, she would be under

\begin{footnotesize}
\begin{enumerate}
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\end{enumerate}
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the care of her mother, but since she was no longer being nursed, the court ordered
that she be returned to her father. The Supreme Court was careful to only speak on
matters of jurisdiction and not on the finer details of religious laws which they did not
dispute at all.

One of the most problematic cases concerning the matter of legal jurisdiction
involved members of royalty. In 1919, the *landraad* had to decide whether an Arab
defendant was to be subjected to either Native laws and European laws because the
plaintiff was a member of Javanese royalty. A 1925 case heard in the Supreme Court
captured the jurisdictional complications in such a diverse colony. A piece of land
had been given to the Arab plaintiffs by the Javanese Regent in Surakarta, already
subjecting the property to indigenous legal concepts defined by Javanese rulers.
Hence, the piece of property not only fell outside of European colonial jurisdiction but
was also exempted from the laws of Foreign Orientals, despite being owned by Arabs.
These examples indicated that Arab lives, intimately bound with those of locals',
became highly unpredictable in the ostensibly compartmentalized legal sphere.

**Commercial Cases**

Attempts to reduce the high unpredictability of the Dutch colonial legal administration
in commercial lawsuits were more successful. Since many Foreign Orientals were
merchants, European merchant houses specifically requested the Dutch government to

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123 "Sech Oemar bin Salim bin Soengkar van beroep koopman wonende te Solo, eischer,
namen der procurueurs niet opgegeven. Contra Sech Badar bin Talib Alkateri, wonende
 te Solo, gedaagde," *ITVHR* 120 (1925): 566.
124 To complicate matters further, the Javanese Regents of Surakarta and Jogjakarta
were classified as “Europeans.”
125 The land was therefore declared “Soenansgrond.”
apply Dutch civil and commercial law for all their trading partners in the 1830s.\textsuperscript{126} Legal scholar Daniel Lev demonstrates how economic position was the primary determinant in legal parity in colonial courts in the Netherlands Indies which Jacques van Doorn labeled an “exploitation colony.”\textsuperscript{127} While native Indonesians were primary producers in the colony, Arabs, Chinese and Indians were firmly identified as economic middlemen.\textsuperscript{128} Commercial efficiency demanded that commercial transactions be subjected to common norms.\textsuperscript{129} Lev stated that all colonial subjects who engaged in urban business transactions were conveniently presumed by a useful fiction to have acquiesced in the relevant rules of Dutch commercial law. Hence, Dutch colonial officials tried harder to arrive at a set of standard laws in commercial matters than in all other areas of laws.\textsuperscript{130} Fortunately for Dutch courts, while verbal agreements usually sufficed between villagers, a material binder was necessary in order to enforce obligations with Indonesian ‘strangers’ – Chinese, Arabs and Europeans.\textsuperscript{131} By 1850, an overwhelming number of legal cases involving Arabs and European litigants tended to

\textsuperscript{126} Several notices in government gazettes in the 1840s and 1850s clearly stating that Foreign Orientals should be subjected to European Law in commercial affairs Fasseur, “Cornerstone and Stumbling Block,” 37; Also, see R. A. Eckhout, “Het Erfregt van Chineezien in Nederlandsch-Indie,” HRNI 19 (1962): 133-154.

\textsuperscript{127} Jacques van Doorn, A Divided Society – Segmentation and Mediation in Late-Colonial Indonesia (Rotterdam: CASP, 1983), 1.

\textsuperscript{128} Lev, Legal Evolution and Political Authority In Indonesia, 249.

\textsuperscript{129} Lev, ”Judicial Institutions and Legal Culture in Indonesia,” 252-253.

\textsuperscript{130} The idea of standardizing bookkeeping practices was floated in 1876 especially after an Arab merchant’s books were brought to civil court as evidence. "Hadjie Moharie requirant van cassatie tegen den Arabier Sjech Salim bin Awab Landjar, gerequieerde,“ HRNI 27 (1876): 99-100.

\textsuperscript{131} Agreements with these so-called foreigners tended to be more detailed covering more eventualities Vollenhoven, Van Vollenhoven on Indonesian Adat Law, 205, 244.
revolve around settlement of debts. Dutch commercial laws were subsequently printed and widely distributed to Foreign Oriental communities. Europeans could not be tried in local courts which often meant that Foreign Orientals had to be subjected to laws reserved for Europeans in the Netherlands Indies. These Foreign Orientals were eventually subjected to European civil and commercial law even in commercial cases that did not involve Europeans. This was because sub-section 78(2) of the Regeeringsreglement in 1882 required both parties to be either Natives or Foreign Orientals for cases to be tried in the landraden.

Yet, contrary to Lev’s assessment, legal disputes in civil courts proved that there was still uncertainty regarding what laws governed cases involving Foreign Orientals and European litigants. Legal parity remained, for the most part, only theoretical. Within the realm of legal practice, there was reluctance in reconciling the status of Foreign Orientals and Europeans which continued to be disputed in law reports and journal articles. This was partly due to the different legal procedures followed by different ethnic groups. One reservation that emerged was the differences in oath-taking in matters of commercial transaction. Dutch legal authorities expressed their

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132 Indo-Europeans of mixed native and Dutch descent who possessed European legal status often borrowed heavily from Chinese and Arab moneylenders to maintain their prestige. Wertheim, *Indonesian Society in Transition*, 175.
133 Supomo and Djokosutono, *Sedjarah Politik Hukum Aだat, Djilid 2*, 36.
134 This was not always the case. Before 1848 when the *nieuwe wetgeving* (new laws) were introduced, Europeans were subjected to adat laws when litigants were natives. “Over priesterrechtspraak in verband met mr. B. Ter Haar’s verhandeling,” *ITVHR* 113 (1918): 386. Supomo and Djokosutono, *Sedjarah Politik Hukum Aだat, Djilid 1*, 88; Supomo and Djokosutono, *Sedjarah Politik Hukum Aだat, Djilid 2*, 23.
fear that the oath taken by Natives and Foreign Orientals was not as significant as that of the Christian oath. In light of these complications, it was not surprising that the question of jurisdiction over Arab litigants remained unresolved till end of the colonial period.

Conclusion

As we have seen, Arab residents in the Netherlands Indies frequently moved across jurisdictions in the highly stratified Netherlands Indies sometimes by choice, but more often by compulsion brought about by inconsistent legal classification. The Dutch government identified Arabs residents as members of a discrete middle class sandwiched between the European Dutch colonial elite and natives, a narrow image culled from observations in commercial port-cities in the colony. The classification of Arabs as ‘Foreign Orientals’ arose from a misperception that Arabs were culturally and ethnically distinct in the Malay Archipelago. As a result, Arabs were artificially separated from the natives within the legal system despite centuries of intermarriage. Needless to say, the Dutch legal system simplified a terribly complex situation.

Ultimately, no consistent legal policy on Arab colonial subjects emerged. Mainly, this was because the criteria of Dutch colonial legal system was continually shifting over time and space within the Netherlands Indies with no central authority to

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139 De Angelino, Eene Gehouden Enquete naar de Arbeidtoestanden in Batikkerijen, 96.
dictate legal policies. Situated between relatively well-defined legal classes – natives and Europeans – these Arabs constantly moved across a wide undefined spectrum until the end of the colonial period. Hence, Arabs were able to adopt a variety of legal strategies according to the circumstances. Their unstable identity in the Netherlands Indies allowed them to manipulate legal classifications at times. In order to travel more freely abroad during the late nineteenth and early twentieth centuries, some Arabs attempted to be categorized as Europeans by pledging allegiance to Ottoman rule via a protracted sense of loyalty towards their land of origin, Haḍramaut. After 1920, it became possible for them to be classified as natives by invoking previous judicial decisions to escape severe restrictions on land ownership. In 1920, Arabs in Riau successfully became natives by dropping their titles although they were still perceived to be Arabs within local societies to the confusion and frustration of Dutch colonial observers.

Although requests for separate religious courts were continually turned down, Arabs’ complicated mobile lives sometimes created jurisdictional complications for Dutch courts. The fact that Arabs appealed to Dutch authorities to establish a separate court for Arabs demonstrated how in a legal world where Islamic law was framed by Dutch colonial conceptions, colonial subjects attempted to manufacture a legal space within colonial structures. They chose to carve out of a space within the existing colonial legal system instead of departing from it altogether. When the Arab petitioners wanted to create separate jurisdictions for themselves, they did so in dialogue with colonial authorities, forging tighter bonds with colonial administrators in the process. This implied that their conception of legal administration of religious laws in the
Netherlands Indies rested on Dutch colonial authority. Then again, being a minority comprising an average of only 5% to 7% of the entire population of the Netherlands Indies, perhaps they had little choice but to appeal to the Dutch in order to counter legal rulings meted out by native Muslims who dominated the priesterraden.

Alliances with the Dutch were sometimes forged more obviously. Muḥammad ibn Ḥasan Bābahīr aided L.W.C. van den Berg to produce a book on Ḥaḍramis in the Archipelago in 1886. He continued to play a key role in helping Van den Berg translate the Minhāj al-Ṭalibīn, in 1882. In response, Snouck Hurgronje viciously attacked both Van den Berg and Bābahīr’s authority on Islamic matters and actively propped up his friend Sayyid ‘Uthmān bin Yaḥyā. For his own part, Sayyid ‘Uthmān shrewdly allied with Snouck in order to gain influence, not just over Arab communities, but over the entire Muslim community in the Netherlands Indies and beyond. Snouck’s support certainly propelled him to greater authority. As a recognized expert in Islamic theology and jurisprudence, he granted Snouck credibility in the eyes of both the Dutch colonial elite as well as Muslim subjects. This symbiotic relationship thrived on the uncertainty of colonial legal structures and classifications in the Netherlands Indies which were highly tentative and seemingly subject to negotiation, especially during the period of Ethical Policy (1901-1942) when the Dutch government asserted their commitment to experimentation. By contrast, in the British Straits Settlements, we shall see how legal configurations were far more fixed since British legal authorities were already empowered by their experience in implementing Islamic law in British India, making formal alliances with local religious experts unnecessary.
Surely a Mohamedan woman has her property separate from her husband. Mohamed decreed that a thousand years before the Married Women’s Property Act.

- Acting Chief Justice of the Supreme Court of the Straits Settlements, P.J. Sproule (1926)\(^1\)

Marriage was a source of particular anxiety for Arab communities in both the Straits Settlements and the Netherlands Indies. In fact, as we have seen in Chapter One, the impetus for colonial involvement in Islamic law in the Straits Settlements was mainly motivated by Arab efforts to guarantee that their marriage contracts were ratified by centralized colonial bureaucracy in 1875. What led to this acute concern over marital unions in the first place? Being a small minority within the Muslim population in Southeast Asia, marriages with members of other ethnic groups became very common. Moreover, only men migrated from Hadhramaut which made endogamy difficult, especially prior to the late nineteenth century.\(^2\) If their marriages were not deliberately recorded by any state agency, these highly mobile mercantile Arabs ran the risk of returning to Southeast Asia only to find that their wives remarried and their children taken away from their custody. Even if their marriages had been noted by a local qaḍī,

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2 This was the case in various places such as East Africa and Hyderabad as well. Peter G. Riddell, “Religious Links between Hadhramaut and the Malay-Indonesian World, c. 1850 to c. 1950,” in *Hadhrami Traders, Scholars and Statesmen in the Indian Ocean, 1750s-1850s*, eds. Ulrike Freitag and William G. Clarence-Smith (Leiden: Brill, 1997), 221.
their frequent long travels made it easier for their wives to claim divorce by alleging abandonment. In order to reduce the erratic nature of such unions, both the British and Dutch colonial governments wanted to verify, date and sanction all marriage contracts. Colonial state intervention was essential to bind far-flung families together.

In the Straits Settlements, the much-coveted Mohamedan Marriage Ordinance finally came into operation on December 1st 1882, two years after its promulgation. Even so, the Legislative Council stated that the British colonial government was more intent on making the registration of Muslim marriages “permissive” rather than compulsory because they did not want to interfere in the smallest degree with the religion of its subjects, especially since religion was so mixed with the legal question of property in Muslim marriages, in particular with regards to women’s property. In courts, judges still did not require strict proof of marriage if there had been extended cohabitation and a general recognition of marriage.

Indeed, separate qāḍīs were appointed for each community by the British Registrar. Within the settlement of Singapore, the qāḍī for the Arab community was appointed first, a full three months before the Malay qāḍī was picked, and despite their small numbers. Meanwhile, in Malacca, an Arab qāḍī was picked for the entire Muslim

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4 “A Marriage Question,” ST, December 10 1889, 3.
5 Syed Abdulrahman Sagaff bin Ahmad Aljunied was appointed the qāḍī and the Mahomedan Marriage Registrar for the Arab community, while two Malay qāḍīs, one Javanese qāḍī and one Indian Muslim qāḍī were appointed for Malay community residing in different districts throughout Singapore. More Malay qāḍīs were appointed after that. “Government Gazette, 12th January,” ST Weekly Issue, January 15 1883, 1; “Government Gazette, 6th April,” ST Weekly Issue, April 8th 1883, 1; “Government Gazette,
population. The Registrar did not merely record the names of qādis, brides and grooms, but also marriage settlements consisting of promises in consideration of marriages. The Ordinance stipulated that the Registrar provided an important repository of marriages that could be retrieved as evidence in colonial courts.

**Policy of Colonial Non-Intervention**

Why did British authorities wait until December 1882 before directly administering Muslim marriages? As mentioned before, British authorities throughout Empire pursued a general policy of non-interference in religious affairs. Colonial reluctance also arose from a specific legal conundrum in the Straits Settlements. Unlike in British India which had been under Mughal rule before British occupation, Islamic law was regarded as foreign law in the courts of the Straits Settlements. English Common Law, in force in the Straits Settlements from the outset, strictly defined ‘marriage’ according to established Christian notions. Even as late as 1876, a law report stated that “English law, based entirely upon the Christian marriage, is wholly inapplicable to the relationship existing between the sexes by virtue of a Mahomedan marriage.”

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6 Syed Muhammad bin Hussein Al Habshi was appointed the Mahomedan Marriage Registrar in Malacca. Three qādis were appointed in Penang and one in Dindings. “Government Gazette, 9th February,” ST, February 9th 1883, 2; “Government Gazette 21st Dec,” ST Weekly Issue, December 22 1883, 1; “Government Gazette, 14th March,” ST Weekly Issue, March 15 1884, 1; “Government Gazette Notifications,” Eastern Daily Mail and Straits Morning Advertiser, March 23 1907, 5.

7 For example, see Ahamed Meah & Anor. v. Nacobah Merican, [1893] 4 Ky 583.


10 “Judicial,” ST, July 15 1876, 1.
order to reconcile Muslim marriages with European marriages, British judges had to surmount a huge semantic challenge.

Prior to Arab requests for direct administration of Muslim marriages, the Muslim family and Chinese family were legitimized in stages vis-à-vis an ‘English household’, defined more specifically as a ‘Christian household.’ This was successfully done on a case-by-case basis. However, the difficulty lay in defining, and in the process, reconciling these marriages to make them legally acceptable to English Common Law once and for all. This strongly implied that although Indian legal codes and statutes had been informally transported to the Straits Settlements, the default law, at this time, was still English law as derived from England and not any of the other British colonies, including British India.11

In the case of Hawah v. Daud (1865) in the Court of Judicature in Penang, the Recorder of the Straits Settlements, Benson Maxwell stated that:

“To call such precarious unions by the same name as our own marriages, was, perhaps to give one name to two very different things... But still, that the Mahometan marriage was a good marriage in the eye of our law seemed incontestable.”12

Rather than suggesting that the application of English Common Law in the British colony was inflexible, Maxwell pointed towards an inadequacy of language. He admitted that the term ‘marriage’ in legislation specifically referred to a Christian marriage in the Straits Settlements. He argued that “the poverty of our language caused this complication, for one could not apply the same name to two things totally

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11 It was only in 1870 that laws promulgated in British India, the Indian Penal Code, was officially introduced in the Straits Settlements.
distinct.” Maxwell recognized from the outset that a valid Muslim marriage was essentially a contract that required an offer of marriage, followed by an acceptance in the presence of two male witnesses. However, he pointed out that the nature of the Muslim marriage contract was essentially a different form that was entered into by Christians in three significant ways. Firstly, a Muslim marriage could be polygamous. Secondly, unlike in a Christian marriage, a husband takes no interest in his wife’s estate. Thirdly, a Muslim marriage could be more easily dissolved. Despite these key differences, he maintained that the courts recognized that the children of a Muslim union and a Chinese union were legitimate.

Indeed, a peculiar aspect that prevented a Muslim marriage being recognized as a legitimate marital union in British colonial courts was the question of married women’s property. According to English law, upon marriage, the husband could partake of his wife’s real estate during the marriage or for his own life if a child was born alive as a result of the union. Upon marriage, the husband became thus entitled to all his wife’s personal effects, and to all the debts owing to her, and other rights, which were reducible, and which he reduced into possession during the marriage. In other words, English law clearly vests in the husband various rights in the property of his wife. By contrast, these rights were not applicable to a Muslim marriage. The Muslim

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13 It was unclear whether he meant ‘English language’ or ‘legal language.’ “The Council Meeting of 1st June,” ST, June 19 1880, 1; “The Legislative Council, 6th July,” ST Overland Journal, July 12th 1880, 3.
16 He became bound, on the other hand, to support her during the marriage, that is during his or her life. Not only that, he is also bound for her debts contracted before the marriage, for as long as the marriage lasts.
wife’s right of property and her powers of contract are unaffected by her marriage.\(^\text{17}\) In other words, marriage did not create community property.\(^\text{18}\) As noted by Benson Maxwell, Islamic law threw its protection over the wife, leaving her in full possession of all her property, rights and ability to contract. Ironically, this was exactly why Maxwell referred to Muslim marriages as “precarious.” Furthermore, he noted that the Muslim marriage was a contract dissoluble at the will and pleasure of the husband.\(^\text{19}\) Maxwell therefore found it crucial to ascertain:

> whether the Muslim marriage was good marriage with regards to its essential character, sanctioning and legalizing the union of man and woman, and legitimizing their offspring and yet not be that species of marriage to which the legal incidents as to property, rights and disability attached.\(^\text{20}\)

Maxwell determined in *Hawah v. Daud* (1865) that a Muslim husband has no interest in his wife’s property. However, as Hooker correctly points out, Benson Maxwell based his judgment in equity, not in reference to Islamic law at all.\(^\text{21}\) In most matters relating to real property, British authorities tended not to cite religious authority. As with cases involving *waqfs* analyzed in Chapter Four, English legal statutes and precedents formed the bases of argument. Precedents established in particular territories contributed to

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\(^{18}\) The wife should receive maintenance including good, shelter, clothing and sometimes cash, which must be equal to which she had been accustomed, or of a standard at least befitting a woman of her status before marriage. Wael B. Hallaq, *Shari’a – Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 279.

\(^{19}\) *Hawah v. Daud* (1865) Wood 26.

\(^{20}\) Ibid.

\(^{21}\) Hooker, *Islamic Law in Southeast Asia*, 90.
authoritative corpus of legal rulings. In fact, in March 1867 in Malacca, in a case involving the property of an Indian Muslim woman, Maxwell cited his own judgement in *Hawai v. Daud* (1865) as an authoritative ruling.\(^2^2\) He appealed to Common Law’s notion of “‘feme sole,’ a woman who contracts business in London, England”, instead of the notion of separate property in marriage according to Islamic law.\(^2^3\) His ruling upheld English Law and not Islamic law. The fact that Islamic law was not contravened was presented as being merely incidental. The basis of legal rulings remained particularly English.

Five years after Arabs petitioned the British government to record and bureaucratize Muslim marriages, Maxwell revisited the topic of marriage again at a legislative council meeting. In 1880 however, he changed tact by directly referring to Islamic law focusing mostly on the special status of Muslim married women’s property.\(^2^4\) He stressed that according to Islamic law, the Muslim husband could dissolve the marriage at any time, and her right to maintenance would end with the divorce.\(^2^5\) Considering these stark differences, he now concluded that it was unjust for English law to be applied to Muslims. In his view, it would be especially unfair for the Muslim woman in the Straits, who would not only be susceptible to sudden divorce by her husband, something which English law could not remedy, but also potentially deprive her of her property, which her husband would have had a stake in according to

\(^{22}\) The Muslim woman was bound to a bond and she was required to pay for the bond since her property was deemed separate from her husband. This case, in contrast to *Hawai v. Daud*, was not decided based upon equity. *Chulas and Kachee v. Kolson binte Seydoo Malim* (1867) Wood 30.

\(^{23}\) Hooker, *Islamic Law in Southeast Asia*, 91.

\(^{24}\) “The Council Meeting of 1\textsuperscript{st} June,” *ST*, June 19 1880, 1.

English law. Now Maxwell argued that Islamic law, with its own in-built system of preventive measures was best applied to Muslim marriages, rather than an incomplete application of English law, which could be potentially harmful to Muslim women who ran the risk of being doubly oppressed by both laws. Thus, he thought it more prudent for Muslims to be wholly subjected to Islamic law rather than a modified version of English Common Law.

**Equality in marriage (kafā’a)**

Arab marriages presented particular complications for British colonial courts. The marriage of equality (kafā’a) that was based entirely on race and descent, has certainly been portrayed as a particularly Arab preoccupation in the Straits Settlements and Netherlands Indies.²⁶ Even legal scholar Farhat J. Ziadeh admitted that although kafā’a was a common preoccupation amongst Muslims (especially those belonging to the Hanafi school), the ‘Alawis of Hadhramaut residing in Singapore took an “extreme view” of the matter when they regarded the marriage of the ‘Alawi woman to a non-Arab man, in this case an Indian man, as invalid.²⁷ By contrast, unequal marriages in other Muslim communities were based not on descent or ethnicity, but on material wealth. For example, in 1924, there was a Supreme Court case revolved around the

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merits of a union between a wealthy Bugis heiress and her considerably less rich prospective Bugis potential husband, whose union was in doubt.  

The notion of kafāʿa could be explored through the lens of a marriage in 1878 of an Arab woman named Fatimah (who was the daughter of an Arab man (deceased) and a Malay mother) to her husband, Ismail, a non-Arab man of Tamil descent. In April 1878, Shaik Omar bin Salaf, Fatimah’s uncle, and also her ‘wali’ or guardian, challenged the validity of the marriage for two reasons. First of all, he did not consent to the marriage such approval being incumbent in instances where the bride had never previously been married, according to Shāfi’ī law. Secondly, he argued that the marriage was unequal. The only equal marriage for Fatimah would be to another Arab. He stressed that this prerequisite was especially important since she was a descendant of the Prophet. Ignoring the second provision, however, Chief Justice Sidgreaves argued that since she did not obtain her rightful guardian’s approval in her marriage, the marriage was nullified.

The same case appeared again before Chief Justice Sidgreaves in August of the same year with new affidavits which stated that Fatimah had changed sects from the Shāfi’ī to the Hanafī madhhabs. Another affidavit by the Principal Civil Medical Officer, Dr. Thomas Rowell proved that Fatimah, aged 17, had attained puberty. The judge

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28 The approval of the Court was requested by her guardians. One of the lawyers argued that because of her large fortune, it was extremely rare to find a groom who could be her equal in this way. The judge cited this reason when he ruled that the marriage was therefore good. “Wealthy Malay heiress – Judicial Approval of Proposed Marriage,” ST May 1924, 9; “Infant Heiress’s Marriage,” ST May 13 1924, 7.
29 The groom was identified as a “Mahomedan Kling” – A Muslim of Tamil descent.
31 Hooker, Islamic Law in Southeast Asia, 87-88.
accordingly ruled that she was therefore “quite marriageable.”\(^{32}\) During the second hearing, Fatimah’s mother, Soolong, complained that Shaik Omar had never done anything other than giving each of her two daughters a sarong and twenty five cents each. When she remarried, her second husband provided for her daughters despite being poor himself. He then died and now she could not support her daughters. Lastly, she emphasized to the court that Shaik Omar was not “a pure Arab” as he was “born in Singapore and his mother was a native of Kotah in Sumatra.”

In so doing, Soolong, directly attacked the character of Shaik Omar. She implied that he had so far failed in his duties by not providing enough. She suggested Fatimah wanted to marry in order to alleviate her mother’s burden. Shaik Omar, who had apparently been of little help to his nieces was now trying to prevent this union, was exposed as hypocritical. He had been largely absent and merely entered their lives only to object to Fatimah’s marriage and stake a claim to Arab patrimony.\(^{33}\) Even so, the law report did not reflect upon the failures of Shaik Omar bin Salaf as a guardian or yet, the duties of a guardian, according to Islamic law, preferring now to refer to Fatimah’s majority.

In order to ascertain that Fatimah was indeed able to shake off her guardian’s authority in April 1878, the Supreme Court of Singapore consulted the Mufti of Johore, an Arab man named Syed Mohamed bin Shaik bin Sahil, for his opinions on the grave matters of kafā’a, change of madhhab and guardianship.\(^{34}\) This was regardless of the

\(^{32}\) “Heads of Medical Department,” Walter Makepeace et al, eds. One Hundred Years of Singapore, Volume 1 (London: John Murray), 518.

\(^{33}\) Such asymmetrical marriages were typical in Southeast Asia.

\(^{34}\) He admitted that he was thoroughly conversant with the Mohamedan Law of Marriage, having been educated in the “Mohamedan Law of Hydermaut” in Arabia.
fact that there was already a Shāfi‘i mufti in Singapore, named Alawi bin Ahmad al-Saqqaf, who had been asked about the validity of ‘insurance’ in Islam by some Adeni merchants in 1877. In any event the mufti of Johore stated in an affidavit that Fatimah required her uncle’s consent for her marriage to be valid. If her guardian was away, resident in another country ‘twenty-four hours journey’ by foot or forty five miles by sea, a qāḍī “appointed as such by the Government of the country” could stand in as a woman’s wali or guardian. Ignoring the existence of Alawi bin Ahmad al-Saqqaf, Syed Mohamed bin Shaik bin Sahil also pointed out that there was no qāḍī in the Straits Settlements. This was rather curious since British authorities often met with many complaints about several qāḍīs’ conduct in the Straits Settlements. Since the mufti was not likely to be ignorant of religious affairs in the Straits Settlements, he might have merely been implying that there were no qāḍīs in the Straits Settlements appointed by the British colonial government.

In his second affidavit, after Fatimah’s conversion, the Mufti clarified that a Shāfi‘ī woman could indeed switch to another sect after attaining puberty, but she still had to ensure that the marriage was “koofoo” or sufficient with a partner who was her equal. He emphasized that according to both the laws of Hanafi and Shāfi‘ī madhhabs, the Indians (‘Klings”) and Malays were not equal to the Arabs, and therefore Fatimah’s marriage to Ismail was null and void. He ended by saying:

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36 The petition by the 143 Muslim memorialists mentioned that there were too many Qadis on the island outside the control of the colonial government.
I cite as my authority for the statements of Mahomedan Law above given, the "Aldorul-Muktar," of Imam Hanifa, the great authority of the Hanifa sect, at the chapter in "Wali" pp. 458-9 and 498, which I now produce for the information of this Honorable Court.  

Chief Justice Sidgreaves was not unmoved by the Mufti’s emphasis on the notion of sufficiency or equality in marriage in Islamic law. Contrary to M.B. Hooker’s assessment that the judge simply dismissed the notion of equality in marriage, Sidgreaves actually dealt with the notion thoroughly. He carefully cited several authoritative works on the issue. Ultimately, he disagreed with the Mufti’s notion of marriage of equality between Arabs, and he dismissed the notion of equality of marriage by citing The Muhammadan Law by Shama Circun Sircar (who in turn had cited Macnaughten) who stated - "Except Islam and freedom, "equality in any other respect is not invariably observed in Ajam (sic) or in a country other than Arabia."  

Having dealt with the question of kafāʿa, Judge Sidgreaves then focused solely on the question of guardianship. Again, he cited no less than three legal manuals on this issue specifically, namely Macnaghten’s Principles of Mohamedan Law, Baillie’s Digest and Shama Churun Sircar’s The Muhammadan Law. In addition, he referred to a case in Bombay High Court Reports, Muhammad Ibraḥim bin Muhammad Parka’r v. Gula’m Ahmed bin Muhammad Sayad Roghe, and Muhammad Sayad bin Muhammad Ibra’him Roghe in 1864.

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37 The book he referred to was Al-Dūr al-mukhtar written by al-Ḥāṣkafī (d. 1088/1677).
38 ‘Ajam’ refers to non-Arab Muslim lands.
39 Circar’s volume referred mainly to the Hedaya and the Fatawa-i-Alamgiri. For the relevant sections on the subject of guardianship cited by Sidgreaves, see Shama Churun Sircar, The Muhammadan Law (Calcutta: Thacker, Spink and Co., 1873), 334;
40 Muhammad Ibra’him bin Muhammad Sayad Parka’r v. Gula’m Ahmed bin Muhammad Sayad Roghe and Muhammad Sayad bin Muhammad Ibra’him Roghe. Bom. H.C. Reports Suit no. 49 of 1863, Bombay High Court Reports Volume 1, 223. The headnote of the case clearly that: “After attaining puberty a Muhammadan female of any one of the four sects can
Unlike other Indian cases which were usually merely cited by judges or law reporters but not addressed, this case had a powerful bearing on Sidgreaves' ruling.

The Hanifites hold that a girl who arrives at puberty, without having been married by her father or guardian, is then legally emancipated from all guardianship, and can select a husband without reference to his wishes. The Shafites, on the other hand, hold that a virgin, whether before or after puberty, cannot give herself in marriage without the consent of her father. The effect of a lawful change from the sect of Shafi to that of Hanifa, would be to emancipate the girl, who had arrived at puberty, from the control of her father, and to enable her to marry without consulting his wishes or obtaining his consent.\(^{41}\)

He ended the report by stating that:

Now the words used here legally emancipated from all guardianship and can select a husband without reference to his wishes are very strong, and, it appears to me, that I should be acting in direct contravention of this decision, if I held that, on the ground of inequality, this girl Fatimah was still subject to her guardian, and that she could not select a husband without reference to his wishes.\(^{42}\)

The law report indicated that Fatimah had gone through all the necessary rites for a Muslim marriage to be valid. In her uncle's absence, she must have called upon a qāḍī for the marriage to be properly solemnized. This qāḍī was not only responsible for allowing a marriage between an Arab woman and a non-Arab man to proceed, but also elect to belong to whichever of the other three sects she pleases, and the legality of her subsequent acts will be governed by the tenets of the Imam whose follower she may have become. A girl whose parents and family are followers of the school of Shafii, and who has arrived at puberty and has not been married or betrothed by her father or guardian, can change her sect from that of Shafii to that of Hanifa, so as to render valid a marriage subsequently entered into by her without the consent of her father.”

\(^{41}\) *Salma And Fatimah, Infants, By Their Next Friend Shaik Omar V. Soolong* [1878] 1 KY 421. The entire law report is reproduced in *The Straits Times*. See *Untitled, ST*, September 14 1878, 2.

\(^{42}\) Ibid.
responsible for validating it again in future, if need be.\textsuperscript{43} The Supreme Court did not doubt that a marriage had indeed taken place. Perhaps a qāḍī-certified contract had either been produced in court, or the qāḍī himself had testified that he bore witness to the marriage between Fatimah and Ismail.\textsuperscript{44} However this was not alluded to in the newspaper reports and the law report.\textsuperscript{45}

The judge seemed intent on upholding the right of the young woman who had attained puberty to contract marriage for herself.\textsuperscript{46} Her conversion to Hanafī law was legally recognized in colonial courts, which meant that her marriage, contracted without the approval of her wali or guardian was also legitimate.\textsuperscript{47} In contrast, the mufti seemed to have either doubted the woman’s conversion or still tried to impose Shāfi’ī laws on her, despite her assertion that she had indeed converted to another madhhab.\textsuperscript{48} His main point, as we have seen, was that Fatimah’s marriage was void.

\begin{itemize}
\item \textsuperscript{43} The qāḍī was strangely absent during the proceedings, but this could simply be because this had been settled earlier in a first trial.
\item \textsuperscript{44} In a case involving guardianship of a minor, a Qāḍī had to was required to ensure the validity of the marriage. \textit{Ghouse bin Haji Kader Mustan v. Rex} [1941] SSLR 260.
\item \textsuperscript{45} The only time when a qadi was actually interrogated in court was when an English girl married a Muslim man according to Islamic rites after converting to Islam in 1892. See “The Assizes,” \textit{The Singapore Free Press and Mercantile Advertiser}, May 27 1892, 3.
\item \textsuperscript{46} This case pits Hanafi law against Shafi’ī law directly. In a separate case in 1928 in Madras, a law report stated that “The Hanafis allege that the Shafiis’ refusal to acknowledge the right of a maiden of full age to contract marriage of her own will amounts to a breach of a cardinal principle of Muhammadan Law, namely, that the legal status of grown up female is as complete as that of a male.” \textit{Hassan Kutti Beary vs Jainabha} on 5 September, 1928, 113 Ind Cas 306, (1928) 55 MLJ 828. For an example of case involving Shafi’ī law alone where the Shafi’ī ruling was upheld in India, see \textit{Sayad Mohiuddin Sayad Nasiruddin vs Khatijabi} (1939) 41 BOMLR 1020.
\item \textsuperscript{47} The ruling in this particular case as upheld in a later case, \textit{Ghouse bin Haji Kader Mustan v. Rex}, in 1941. The law report stated that a Mohamedan may be a minor for one purpose, such as for the purpose of contracting or suing, but not for others, such as marriage and guardianship. See \textit{Ghouse bin Haji Kader Mustan v. Rex} [1941] SSLR 260.
\item \textsuperscript{48} For more on Hanafi family law in postcolonial India and Pakistan, see David Pearl, \textit{Islamic Law and Jurisprudence} (Seattle: University Of Washington Press, 1990), 199-220.
\end{itemize}
because she did not ensure kafā’ā was fulfilled. The judge, on the other hand, emphasized that the woman had full rights over her own decision. He confidently made this ruling precisely because there had been at least one precedent of a marriage contracted by a Hanafi woman who had reached puberty without the approval of her wali who happened to be her father in this case. Since the Bombay High Court had already ruled in the young woman’s favour in 1864, Judge Sidgreaves needed only to cite the case in addition to the numerous books on Hanafi law.

The judge was blessed with a plethora of material on Hanafi law, unlike the sparse material available to him on Shāfi‘ī law. Legal historian M.B. Hooker stated that in the judgment of this particular case, the court gave a strong impression that it refused to interfere with the marriage on the ground of inequality. However, this was clearly not the case given Judge Sidgreaves cited Macnaghten’s legal manual that actually upheld the Mufti’s opinion. As Macnaghten had explained:

The marriage of a free adult and discrete damsel with a man equal in condition of life, is good and valid, without the permission of her guardian, but the guardian may object if there be not equality between the parties.

Later during the trial proceedings, he cited Macnaghten again -

[a] The marriage of a free and adult woman [contracted] without [the interference of] a guardian is valid even though the match be unequal, and though the guardian may make an objection with respect to the latter. By the mention of a free and adult woman, it is intended that marriages of minors, and slaves are not valid; for it is agreed by all, that guardians are necessary for the validity of their marriages.

Not surpisingly, the motion to dissolve the unconsummated marriage was rejected by Chief Justice Sidgreaves. This particular case strongly implied that the
colonial courts strove to empower women according to Islamic law. This case was certainly an important precedent to a later case in 1907 when an Indian Hanafi woman was allowed to marry without the consent of her guardian in Penang. The law report in question further ascertained that the age of majority for both members of the Hanafi and Shafi’i madhhabs was 15 years, as opposed to the age of majority in Common Law which was 21.

The issue of kafa’a remained an enduring concern of Arab communities. The famous case of the Arab woman of Singapore in 1905, which has been examined in detail elsewhere, strictly revolved around descent and ethnicity. The brother of the Arab woman and a large proportion of the Arab community questioned the validity of the marital union between a female descendant of the Prophet and a non-Sayyid. A fatwa by Sayyid ‘Uthman in the Netherlands Indies was secured, declaring the marriage void although the marriage had been approved by the bride’s wali (guardian). A Sayyid from the Al-Aṭṭas clan in Surabaya likewise declared the marriage haram, or unlawful. Various legal opinions, including a fatwa by Rashid Rida was secured and

50 There were two ages of majority – one concerning puberty and the other concerning discretion, which was a governed by English law entirely. In a case involving a property transaction in 1904, a woman’s age of majority was determined by English law (21 years) regardless of the fact that she might have attained puberty. Safeah v. K.Y. Adaykalavan Chitty [1904] 8 SSLR 102. Similarly, a man must be 21 years of age before taking out administration of his mother’s estate. Both cases involving the age of majority above influenced another the outcome of a case in Ghouse bin Haji Kader Mustan in 1941. See Ghouse bin Haji Kader Mustan SSLR [1941] 260.
51 Ho, Graves of Tarim, 173-181.
printed in issues of Cairo’s Al-Manār, a reformist publication. In 1913, Ahmad Surkatti issued a fatwa that declared the marriage lawful, sparking a rift between the Alawi Sayyids and non-Sayyids within the Arab community. These fatwas were legal opinions that could not be enforced by law but had to achieve social consensus for it to be accepted, something the colonial government was never able to enforce.

Polygamy

While British judges had willingly delved into the notion of kafā‘a in the nineteenth century, they found it much more difficult to reconcile English Law with polygamy since it was regarded as an unnatural graft on English Law. Arabs were involved in both landmark cases involving polygamous testators in 1924 and 1949. At the time, the practice of polygamy was thought to have been responsible for all kinds of social ills, ranging from the dwindling population in the state of Perak on the Malay peninsula during the mid-nineteenth century to the famines in China in 1920. Polygamy was frequently viewed negatively, even with revulsion, especially when it was linked with marriages to girls under the age of 16, an act that seemed to have been regarded as more deplorable than polygamy itself.

56 Rather, oppression, debt-slavery and polygamy were the causes of the decline in the population in Perak. Untitled, ST, December 4th 1875, 2; J.O.P. Bland, “Cause of Chinese Famines – Starving Europe and Starving Asia,” ST, December 10th 1920, 12.
58 J.T. Thomson, Sequel to Some Glimpses into Life in the Far East (London: Richardson and Company, 1865), 65-68; Untitled, ST, June 22 1852, 4. In Hongkong, polygamous unions were not officially recognized mainly to prevent child marriages from occurring, which implied that British authorities had either observed or simply assumed that the first
For example, the very first law report stemming from the Straits in 1858 indicated that:

unquestionably it is not easy to extend to Mahometan marriages that principle of Comity which the law of England has applied to Jewish marriages, without involving it in a recognition of polygamy, which has always been put by jurists beyond the pale of the Comity of Christian Nations.  

Nonetheless, it was decided that:

In this place, where the law of England has been for the first time brought to bear upon races among whom polygamy has been established from the remotest antiquity, the Court has had to consider the question, and has always held polygamous marriages valid...it is not because our Charter demands an exceptionally indulgent treatment of the question, but simply because the principle which makes the validity of a marriage to depend upon the religions of the parties, extends to polygamous marriages.

Hence, polygamous marriages were recognized because English law, the binding principle in the Straits, generously provided for Islamic law in matters of personal law including marriage and divorce. The law report stressed that:

If a Mahometan divorce be valid here—and its validity has never been disputed, I believe—it must be, not because there is anything in the Charter to make it valid, but because the law of England recognises the right of a Mahometan husband to dissolve the marriage contracted by him according to the Mahometan law with a Mahometan wife.

**Re Shaik Abubakar bin Mohamed Lajam (1924)**

Even when they were tolerated, polygamous marriages could lead to serious practical problems in the colony, since they could potentially complicate the application of the marriage was usually to a woman above the age of 16. See “The Protection of Women and Girls- The Proposed Hongkong Ordinance and Chinamen’s Marriages.” *ST Weekly Issue*, July 9 1890, 3.

English law of wills. This is due to a peculiar provision in English Common law embodied in the Indian Wills Act No 25 of 1838, taken from section 18 of the English Wills Act, 1837. The Act provided that every will made by a man or woman could be revoked by his or her marriage. Indeed, we see this in the will of an Arab man named Shaik Abubakar bin Mohamed Lajam which was revoked by his subsequent marriage in Singapore. He was a “domiciled Arabian” at the time of his death, which meant that the will should be governed by the law of the matrimonial domicile. However, Chief Justice Walter Shaw swiftly rejected this argument by pointing out that the precedent only referred to moveable property. The will was therefore revoked. Despite this judgement, Chief Justice Shaw admitted that he was indeed reluctant to revoke the will on this account, as he found it “somewhat unsuitable in the case of foreigners domiciled abroad, especially to such as practice polygamy and who are probably ignorant of the peculiar provision of our law.” The judge questioned as to whether it was a suitable provision to apply this particular law to “people whose polygamous marriages were recognized by law.”

In 1949, however, this decision was reversed in a separate case involving another wealthy Arab’s will. It was held that the will of a testator, were he involved in a polygamous marriage, and not domiciled in the colony, was not revoked on a

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60 The law report implied that the Straits Settlements this Indian Act. However, there is no equivalent of the Act in Arabia.
61 The provision was peculiar to English law and is taken from section 18 of the English Wills Act, 1837. The origin of this law predates the Wills Act.
62 Singapore Originating Motion No. 8 of 1924, Re Shaik Lajam bin Mohamed Lajam, Deceased, [1924] MLJ 4 138.
63 Ibid.
64 The judge emphasized that it was merely a coincidence that both cases involving wills of polygamous testators involved Arabs. Re Syed Hassan bin Abdullah Aljofri Deceased; The Estate & Trust Agencies (1927) Ltd. V. syed Hamid bin Hasan Aljofri & 2 Ors. (1949) 15 MLJ.
subsequent marriage and might even operate with regards to his landed property in the colony. The Arab testator was domiciled in the neighbouring Malay state of Johore in this case.\textsuperscript{65} He was first married in 1900, and made his will in Johore in 1935 in the English language which complied with the Wills Ordinance in the Straits Settlements. He married another woman in 1941. He then made another will which was proved in Johore in 1944, a year before his death.\textsuperscript{66} Unlike the 1924 case, the earlier will was still kept in force.

Polygamous marriages definitely broadened the English notion of ‘family’ to include a much larger group of people than English courts were familiar with.\textsuperscript{67} A law report in 1953 noted that in Islam, the term ‘family’ refers to “the members of a man’s family in the sense of stock from a common ancestry.”\textsuperscript{68} British judges generally agreed that the word ‘children’ had “a much broader sense than it would have in a will drawn up by an Englishman in England or in any country where neither polygamy nor adoption were recognized or practiced in the way that they were in the Straits Settlements.”\textsuperscript{69}

Yet, at the same time the definition of ‘legitimate children’ could be restricted in Islamic law. In 1922, the illegitimate children of the Arab merchant, Syed Mohamed

\textsuperscript{65} However he has a waqf that is still in operation in Singapore currently. “List of Last 35 Properties”

\textsuperscript{66} This occurred during the Japanese Occupation of Malaya and Singapore. After the war ended in 1945, a fresh grant of probate was made in substitution for the Japanese grant.

\textsuperscript{67} Re Shaikh Salman Bin Abdul Shaikh Bin Mohamed Shamee, Deceased; Syed Mohamed Alkaff & Anor v Syed Abubakar Alkaff & Anor [1953] MLJ 200.

\textsuperscript{68} Ibid.

Alsagoff and his widow, Asiah binte Haji Arshad, had attempted to insert themselves into the class of beneficiaries for two family endowments established by their father and their paternal grandfather. The case was decided purely upon British conceptions of Islamic law although it forced colonial legal practitioners to explore questions of descent, heir legitimacy and the various facets of an Islamic divorce which were hitherto relatively unknown.

The Alsagoff case (1922)

On October 16 1895, Syed Mohamed Alsagoff married Asiah binte Haji Arshad, who gave birth to a “legitimate child” named Syed Ahmad on July 1896. However, the legitimacy of Asiah’s subsequent children, Syed Yassin Alsagoff, born on August 12th 1899, and Sharifah Rugayah Alsagoff, born on September 1902, was cast in doubt. Both Syed Yassin and Sharifah Rugayah formed the first and second plaintiffs in the prominent 1922 lawsuit in the Straits Settlements Court of Appeal. There, it was alleged that the marriage between Syed Mohamed Alsagoff and Asiah had been dissolved according to Islamic law in December 1895, only two months into the marriage, rendering Yasin and Rugayah illegitimate and therefore not entitled to a share in the father’s estate, and in the estate of his father, the late Syed Ahmad Alsagoff.

Syed Mohamed Alsagoff’s widow Asiah binte Haji Arshad did not touch upon the divorce that occurred in December 1895. Instead, she claimed that she had merely quarreled with her husband after the birth of the second plaintiff in September 1902

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70 Syed Mohamed Yassin And Sheriffa Rogayah V. Syed Abdulrahman And Others [1922] SSLR 4.
71 For a more in-depth discussion of ṭalāq in colonial courts in British India, see Furzund Hossein vs. Janu Bibee and Ors (1879) ILR 4 Cal 588.
72 The first child, Syed Ahmad, whose legitimacy is not doubted was a beneficiary of the two estates.
and did not see her husband after the quarrel. Her father, Haji Arshad, had informed her she had been divorced by her husband. Given that a husband was indeed allowed to repudiate his wife by proxy,\(^73\) she remarried a man named Tungku Mohamed Ali on May 22\(^{nd}\) 1904. The Marriage Register recorded the bride as being a “divorced woman, husband alive, one Talak.” The defence argued that contrary to Asiah’s claim that she was divorced only after September 1902, she had actually been divorced with one \(\text{\text{tal\text{=}aq}}\) in December 1895 just before he left on a pilgrimage to Mecca on December 31\(^{st}\) December 1895.\(^74\)

Although complicated legal concepts like ‘\(\text{\text{tal\text{=}aq}}\),’ khul’” and “idda’ confounded more than one judge, no Muslim expert was consulted during court hearings. The term \(\text{\text{tal\text{=}aq}}\) was not defined in court, although the word was used 73 times throughout the entire law report. As a form of repudiation which was the husband’s exclusive right, \(\text{\text{tal\text{=}aq}}\) referred to a form of dissolution emanating entirely from his will and action. A man may repudiate his wife uttering \(\text{\text{tal\text{=}aq}}\) either once, twice or thrice in succession. The word does not have an exact equivalent in the English language but was often translated as ‘divorce,’ in court,\(^75\) even though the English translation of the *Minhaj et Talibin* translated it as ‘repudiation.’\(^76\) Strictly speaking, if \(\text{\text{tal\text{=}aq}}\) is pronounced less than three times, the repudiation is revocable and husband and wife may reconcile without legal action. However the pronouncement of three \(\text{\text{tal\text{=}aq}}\)s meant that resumption of marital relationship required the woman to first remarry another man, consummate

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\(^{74}\) He returned to Singapore in September 1896.

\(^{75}\) Hallaq, *Shari’a – Theory, Practice, Transformations*, 280.

the marriage and then have it dissolved. This was meant to act as a deterrent to the husband from pronouncing three ṭalāqs, a reprehensible act in Islamic law. None of this was mentioned in the law report.

Just like in cases involving waqfs to be examined in Chapter Four, evidence was mainly produced in documentary format. They included a seven-page letter written and signed by Syed Mohamed in Arabic. The judge complained that it was difficult to obtain reliable, or even any, translations from the Arabic. He understood however that the letters provided Syed Mohamed’s instructions for carrying on the business of Alsagoff and Co. in his absence. One of the instructions pertained to his wife, and was translated as follows in the law report:

After my departure from Singapore my wife, named Inche Asiah binte Haji Arshad, I have given her one talak, she must be paid $30 a month up to the time of her iddat, and must also be paid $100 for her mas kawin (dowry).

A corresponding diary entry on 31st December 1895 succinctly noted “talak Asiah binte Haji Arshad.” In addition, there was a letter signed by Abdul Kader of the firm Alsagoff and Co. on January 9th 1896 given to Haji Arshad, Asiah’s father, giving him $100 for Asiah with a statement that Asiah had been divorced by Syed Mohamed. That said, no evidence was ever produced showing that these letters ever reached Asiah or even her father, Haji Arshad. In fact these documents were found among the

77 Books kept were allowed to be entered as evidence, as long as the facts recorded in such books were regularly kept in the course of business, even if the recorded did not remember what transactions were entered. “Evidence. Ordinance no. 53, Section 160” Laws of the Straits Settlements (London: Waterlow & Sons Limited, 1926), 713.
78 There was also an entry in the day book of Alsagoff & Co. dated January 10th 1896 stating: “Cheque No. 14 name Haji Arshad to account in Syed Mohamed Alsagoff on account of his divorced wife, daughter of Haji Arshad... $100.”
papers of another widow of Syed Mohamed, Sharifah Alweah. Other entries in Syed Mohamed’s account were referred to purporting to show monthly payments of $30 to Haji Arshad, and for Asiah, up to the 6th of July, 1896 (the day after the birth of her eldest child, Syed Ahmad) on which date there is an entry of $50 paid to him on account of Inche Asiah Janda (widow) of Syed Mohamed.\(^79\)

Little doubt was cast on the veracity of Syed Mohammed’s books. Ironically, the other major piece of evidence, the register of the Mohamedan Registrar, was viewed with suspicion, mainly because it was soon discovered that the original register had been lost.\(^80\) A copy indicated that the date of the divorce was January 1\(^{st}\) 1896, although Syed Mohammad reportedly sailed for Jeddah on December 31\(^{st}\) 1895. The judge noted that the entry read “one talak” and the manner in which it was effected was “khula.”\(^81\)

Khula, or rather, khul’ is an offer made by the wife to the husband in respect of marital dissolution accompanied by some material consideration.\(^82\) A wife could be granted khul’ if the husband is unable to fulfil his marital duties such as being unable to provide marital alimony.

Judge L. Woodward pointed out that in the absence of an expert on ‘Mohamedan Law,’ he was unable to understand the insertion of the word ‘khula’ in the

\(^79\) The ledger of 1899 showed entries of payment of $20 for the expenses of his son Syed Ahmad.

\(^80\) “Mohammedan Marriages – Interesting Rulings in Supreme Court,” \textit{ST} February 1 1922, 9.

<http://www.brillonline.nl/subscriber/entry?entry=islam_COM-1159>

\(^82\) If the husband accepts the offer, he will then repudiate his wife once., considered to be an irrevocable utterance. The finality of the single utterance stems from the fact that payment renders the repudiation contractual, unlike the non-contractual, unilateral ṭalāq. Hallaq, \textit{Sharī‘a – Theory, Practice, Transformations}, 284.
Register. Thus, he referred to English textbooks on Islamic law produced in India, such as Syed Ameer Ali’s work which succinctly defined ‘khula’ as the form of divorce which occurred at the instance of the woman, as opposed to ‘talak’ which occur at the man’s initiative. At this point the counsel for the defendant clarified that the term ‘khula’ simply meant that the woman consented to the divorce, which was an equally accurate definition, as the term did refer to an amicable separation between the two parties, but the definition was clearly incomplete. Whatever the case, the judge noted that:

whether it was khula or talak, the requirements of Section 20 of Ordinance V of 1880 as to the signing of the register were not complied with... In the case of a khula divorce, the parties to the khula must sign, and a witness identifying the man, another identifying the woman, and two witnesses to the divorce being effected.

In this regard, only the names of two witnesses were mentioned, there were no signatures. The judge thus pronounced that the divorce has been informally entered in the Register, but added that this entry as it stood was indeed a statement, signed by Syed Mohamed to the effect that he had divorced Asiah by one talak. This appeared to be a departure from the usual Islamic requirement, but the judge explained his decision. While he certainly acknowledged that all parties involved in the lawsuit were members of the Shāfi’I madhhab, he only referred to Hanafi law which required no witnesses for a divorce to be legitimate. In the second half of the law report, probably in order to get around the problem of the lack of Shāfi’I legal sources, the judge referred to the laws he cited from Hanafi legal manuals and textbooks simply as Sunni

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83 The meaning of an informal document was recognized, although it could not be registered or entered as a binding document in colonial courts. For example, see In the goods of Hajee Mohamed Thaib 4 Ky 178.
law and claimed that the wife must be made aware of the divorce, of which there was no evidence, which led him to say:

I find it impossible to believe that a man of business, such as I take him to have been, the head of a large mercantile firm, could give elaborate written instructions for the management of his business during his absence, including payments to his wife, inform his head clerk of the divorce and go to the trouble of having it entered in the Kathi’s register on the eve of his departure to Europe, and yet not inform his wife of what he had done.

Yet, Judge Woodward immediately stated in the next line that “In spite of what she says, I must infer that either he made the pronouncement in her presence, or told her of it before he sailed away, or that it somehow came to her knowledge about that time, for the law does not require that the pronouncement should be made.” The divorce was therefore deemed valid. The Court of Appeals effectively overturned the decision of the district judge who had ruled that words that were addressed to the wife’s father, rather than the wife, did not lead to a legal pronouncement of divorce.

Despite pronouncing the divorce as valid, the judge did not doubt that Syed Mohamed was the father of Syed Yassin and Sharifah Rogayah since, upon his return to Singapore, he lived with Asiah. Cohabitation was easily proved by the presence of several witnesses that included local servants and a British doctor who attend the birth of Asiah’s children by Syed Mohammed. Moreover the Register of Births stated that the father of Syed Yassin and Sharifah Rogayah was in fact, Syed Mohamed. Despite acknowledging communication problems between Asiah and Syed Mohammed, the judge held the opinion that the divorce stood because several textbooks underscored the importance of a formal remarriage after divorce has been pronounced even when sexual intercourse had been resumed. Because she was pregnant at the time of divorce,
the period of *iddah*, the period until delivery, or the mandatory waiting period of three menstrual periods during which a divorced woman or a widow is forbidden by Islamic law to marry, in case she was pregnant by her husband, prevented the divorce pronounced on January 1 1896 from going through at the time.\(^8^4\) After she gave birth to Syed Ahmed in July 1896, the period of *iddah* ended and the divorce came into effect, because Asiah did not ask for a reconciliation during the period of *iddah*. Thus her two children born after December 1895 were not legitimate, which meant they could not partake in the family endowments established by Syed Mohamed Alsagoff and his father.

The two siblings appealed Judge Woodward’s ruling, only to see their cases dismissed in the Court of Appeals.\(^8^5\) Chief Justice Walter Shaw stated that there was no verbal evidence before them with regards to the formalities required by Islamic law in effecting a divorce. All they could do was to refer to textbooks, including Baillie’s *Digest of Moohummudan Law*, Wilson’s *Digest of Anglo-Mohummedan Law*, Ameer Ali’s *Mahommedan Law* and Charles Hamilton’s *Hedaya* and a few Indian cases. In sum, Shaw simply reiterated Judge Woodward’s rulings before finally affirming his colleague’s decision.

Chief Justice Walter Shaw shifted the focus from documentary evidence and references to Indian precedents and law textbooks to the figure of the widow Asiah binte Haji Arshad herself. By doing so, Chief Justice Walter Shaw portrayed Asiah more

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\(^8^4\) Hallaq, *Shari’a – Theory, Practice, Transformations*, 283.

\(^8^5\) The question that was raised in the appeal was whether it had been sufficiently established that the marriage between Syed Mohamed Alsagoff and Asiah Haji Arshad was validly dissolved. Two judges dismissed it while one allowed it. The case was therefore dismissed. “Mohamedan Marriages – Interesting Rulings in Supreme Court,” *ST*, February 1 1922, 9.
as an active actor. He pointed to the fact that she continued to reside in her father’s house after Syed Mohamed returned from his voyage. They sometimes visited each other. He then placed her in another house along with his two children, the present plaintiffs. Chief Justice Walter Shaw stated that “Had Asiah believed that she was still the legal wife of a very wealthy man like Syed Mohammed it appears to me to be very unlikely that she would have submitted to such conditions.” Furthermore, she described herself as a divorced woman when she remarried, although there was no satisfactory evidence on any divorce in 1902. In this way, he discredited her account in order to lend more credence to her actions rather than her words. In addition, between the date of Syed Mohammed’s death in 1906 and 1921, she had made no effort to enforce the rights of her children to an interest in the estate of their deceased father. The judge was therefore was convinced that she knew that they were in fact, illegitimate.

Perhaps because they were seldom seen in the public sphere, judges paid more attention to women’s intentions in court. In December 1924, the press in Singapore was seized by a sensational case of a young female Arab heiress named Fatimah binte Shaikh Obudh bin Saleh bin Abdad, who brought a total of four legal actions against her father, Shaikh Obudh bin Saleh bin Abdad in the Supreme Court of the Straits Settlements in Singapore which will concern us in the following section.86

86 These cases could not be found amongst the Straits Settlements Law Reports or Malayan Law Journal. They were probably not seen as a potential case for setting key precedent for future cases at the time.
The case of Fatimah bin Obudh bin Salleh bin Abdad (1924-1926)

Fatimah was the widow of the wealthy Shaikh Abdullah bin Sayeed bin Marie, who had died intestate in Batavia, just short of seventy years old, on March 10th 1920. In December 1924, Fatimah sued her father, Shaikh Obudh bin Salleh bin Abdad, for inducing her to sign a document purporting to be a contract of sale to him for 30,000 guilders of her interest in the estate of her wealthy late husband. A separate lawsuit was pending to set aside her late husband’s will under which Fatimah received little or nothing. She took legal action to upset the will because it had been made prior to her marriage with the deceased. Counsel stated that Shaikh Obud bin Salleh bin Abdad had effectively bought this lawsuit from her, not knowing its exact value, although it was indeed estimated to be about 30,000 guilders. He then took a considerable share in the property and settled in on the trustees in trust for 21 years for the plaintiff and her brothers, without taking a cent for this own benefit. Intent on projecting an image of a dutiful father, Shaikh Obudh vehemently stated in court that his daughter was the one who had offered to sell her share of the estate to him.

After hearing of her husband’s death, Fatimah’s cousin, Shaik Esah bin Omar bin Abdad arrived from Arabia with the intention of marrying her in Batavia. Fatimah consented to this union and stated in court that she intended to go to Arabia with him.

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89 He gave her as purchase price 15,000 guilders which she valued at 10,000 in cash and a half share in a date garden in Arabia which was worth $17,000. Ibid.
after selling her estates in Singapore and Batavia. Selling the estate could be in her favour since did not know exactly how much the estate was worth. However, moments before her marriage, a member of the Arab community pointed out that her prospective husband was the foster-child of her deceased husband. As a result, the marriage could not occur, since the groom was within the prohibited degrees of consanguinity or affinity with the bride. Consequently, Fatimah decided neither to marry Shaik Esah, nor to sell her estates in Singapore and Batavia. Instead, Fatimah married another man, a sayyid, at the end of 1923.

Her marriage to the sayyid had caused “very considerable offence” to her family. Shaik Obudh certainly did not approve of his daughter’s marriage to the latter, and admitted that if the marriage had been proposed through him, he “could have seen the man and satisfied himself.” This suggested that Fatimah or someone else had made the match herself without his approval. It was telling that the sayyid’s full identity was not explicitly revealed in most of the press reports. Instead, he was repeatedly identified during court hearings by his rank.

The facts were these. On March 16th 1922, letters of administration of Shaikh Abdullah’s estate and effects situated within the jurisdiction of the Supreme Court of the Straits Settlements were granted to Fatimah and his second widow, Shaika binte Jaafar bin Omar bin Abdul Aziz, by the Supreme Court of the Straits Settlements of

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90 Ibid.
91 It was apparently considered that there was such consanguinity that the marriage could not occur.
Singapore. Shortly afterwards, Fatimah followed her father, who had become her guardian following her husband’s death, to Cheribon in Java. There, she granted her father the Power of Attorney, along with another person who subsequently died. Consequently, her father managed all her affairs with regards to her deceased husband’s estate. Sometime in 1922 or 1923, Fatimah returned to Singapore with the intention of remarrying. From 1922 to 1923, her father brought her various documents to sign. In 1923, she found a deed in the Registry of Deeds purporting to be a gift from her to her father of her share in the property of her deceased husband. A contract of sale was also produced in court that supposedly proved that she had transferred her share of the estate of her deceased husband to her father. As noted above, the estate was believed to be worth 30,000 guilders. Fatimah claimed that she did not understand the contents of the contract of sale when it was shown to her, although she did sign it. She denied she had received the amount of money from her father, an amount that was “grossly inadequate anyway.” Her father, the defendant, however claimed that she was in fact fully cognizant of the contents of the document when she signed it. He also claimed that the 30,000 guilders had been paid to her in the form of jewelry and property in Arabia which included a date farm.

93 “Notice in the Estate of Shaik Abdullah bin Sayeed bin Marie, Deceased,” ST July 13 1922, 16.
94 “Daughter Sues Father – Arab Litigants in Supreme Court,” ST, December 17 1924, 9.
96 She revealed to the court that she had been twice married and divorced before she married Shaik Abdullah. Newspaper articles often foregrounded this information although it had no actual bearing on the case.
97 “Arab Lady Sues Father,” Singapore Free Press and Mercantile Advertiser, October 29 1925, 9.
99 “Daughter Sues Father – Arab Litigants in Supreme Court,” ST, December 17 1924, 9.
Throughout the trial, the judge presiding over the case, Chief Justice Walter Shaw displayed a strong protective impulse towards the plaintiff, Fatimah. He repeatedly implied that Fatimah’s cousin, the prospective groom, had come all the way from Arabia in order to marry her because he heard that she was a wealthy widow, especially since he had been eager to marry her even without seeing her. Nonetheless, the former prospective husband, Shaik Esah, and the defendant, Shaikh Obudh, claimed that this was not so. Both parties claimed that Shaik Esah wanted to marry her because she was a member of the family who had recently lost her husband. Chief Justice Shaw then moved on to cast doubt on the documentary evidence presented to him. He stated that it was obvious that the document, the contract of sale, could not be allowed to stand, as it was executed by Fatimah without her having independent advice at all, causing her to assign all her rights in a very valuable estate to her father in consideration of the payment of the sum of 30,000 guilders. Enquires showed that no such sum had ever been paid to Fatimah. In fact the plaintiff stated that he had only given her 25 cents a day for expenses. In addition, Chief Justice Walter Shaw believed that Shaikh Obudh had only a vague and doubtful right in the date plantation in Arabia since he had not possessed it for the last 30 years. Indeed, the plaintiff had never seen the date plantation. The Chief Justice’s suspicions of the defendant was exacerbated by the fact he had mortgaged Fatimah’s estate for a sum of $10,000, which had been lent to him. In other words, Fatimah’s credit was pledged for the return of this money. Being far from convinced by the defendant’s argument that he wished to protect his

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daughter, and harbouring deep sympathy for the plight of Fatimah, Chief Justice Walter Shaw predictably ruled in her favour.101

Although the case against her father was won by Fatimah, the outcome was actually decided upon by the very little she could provide. Despite being the one who initiated legal action against her father, in court, Fatimah frequently responded “I do not know” or “I don’t remember” to several of counsel’s questions. As a result, even Chief Justice Walter Shaw agreed that what she remembered was worth very little.102 Counsel for the defendant also faulted her for being very inconsistent in her testimonies.103

Not surprisingly, press reports placed little emphasis on what she said. Rather, they chose to describe her appearance and mannerisms in court in unusual vivid dramatic detail.104 One report stated that she was dressed in “picturesque native costume” and kept her face closely veiled. Another described her as “a striking figure” who had exchanged her brilliant red tudung kepala (head scarf) for one of “an equally striking Tartan creation which would have turned many a Scot green with envy.” In a third trial in September 1926, she entered the court of the Second Police Magistrate, “veiled from the top of her head to her slippered feet.” Her father demanded that she should uncover so that he could be sure that she was her daughter, and not some other

103 Counsel for the defendant argued that she had based her case on contradictory grounds as she stated the she did not sign the document, although she did. She claimed she signed it without understanding it but later rescinded this statement and confesses she was forced to sign it by her husband. “Daughter Sues Father – Arab Litigants in Supreme Court,” ST, December 17 1924, 9.
104 “Daughter Sues Father – Arab Litigants in Supreme Court,” ST, December 17 1924, 9.
woman. After much persuasion from Counsel for the prosecution and from the bench, she “peeped out shyly from under her silken cover.”

In October 1925, Fatimah appeared in court again as a plaintiff, against her father. In contrast to Chief justice Walter Shaw, Acting Chief Justice P. J. Sproule was less convinced about the amount of protection Fatimah needed from her father, her current husband and possibly, future husbands. In arguing his case, Mr. Page, the defendant’s lawyer, highlighted Shaik Obudh’s obligation as a father to a Muslim woman who had been twice divorced and once widowed. Page painted an extremely bleak portrait of a helpless woman when he said – “She might pass through the hands of a dozen husbands in a dozen years, and it might be that there was an intention here to protect this lady’s property from a future husband.” Sproule remained skeptical, especially since Page asserted the plaintiff’s independence almost immediately. Mr. Stevens, Fatimah’s lawyer, had argued that the onus was upon the defendant to establish that there was not undue influence exercised in causing the plaintiff to make the deed of a gift to her father. It was for a parent to prove that parental influence did not taint the gift, to quote the *Halsbury Encyclopaedia of Law*. Mr. Page however argued that the presumption of undue influence was an English rule applicable only to English people. “These people were not English, nor was a daughter who had already been three times married in a position to require protection.” So, was Fatimah a helpless

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107 *The Halsbury Encyclopedia of Law* was an authoritative compendium of laws first produced in 1907.
woman in need of protection, or an independent worldly woman who could manage her own affairs and transfer authority on her own wisdom? Mr. Page clarified:

She was capable of knowing her own mind, at any rate, but under Mohamedan Law the property of a wife passes to her husband, although it passes back on divorce. She is in an entirely different position to the ordinary married English girl.

Sproule was unconvinced and rebutted:

Surely a Mohamedan woman has her property separate from her husband. Mohamed decreed that a thousand years before the Married Women’s Property Act.

Mr. Page remained undaunted:

In the case of an English girl it would be an unnatural and unexpected thing for her to hand over her property to anybody. In the case of a Mohamedan woman, unaccustomed to collecting rents in a different country (she was resident in Java) it was perfectly natural for her to hand over her property to male relatives to be administered. Counsel submitted that the onus was upon the lady to set up the charges of fraud and dishonesty she had made.

Shaikh Obudh maintained that he acted solely to protect his daughter’s interests. In a separate trial in September 1926, clad in the “conventional garb of a respectable Arab, but displaying signs which bespoke of financial hardship, and with his bearded face wreathed in misery,” he told the court a heart-wrenching tale that did not, unfortunately, move his audience, who refused to sympathize with his plight. In a rambling story, Shaikh Obudh transferred the blame to her daughter and his new son-in-law named Shaik Mohamed, now identified as the complainant in this particular case.¹⁰⁸ He claimed that his son-in-law was trying to rob his daughter of her property.

¹⁰⁸ He did not seem to be formally involved in the three other legal actions.
inherited from her late husband. He was convinced that he would leave his daughter once he had achieved his “wicked ends.” Next, he stressed how he had raised his daughter and successfully given her in marriage to two (or possibly three) former husbands. Finally, he told the court, through sobs, that he was prepared to face death rather than the same misery that had been brought upon him. He then changed tack completely and confronted his daughter directly by accusing her of not telling the truth because she knew that her husband would beat her if she did. Fatimah indignantly responded to her father’s outburst by declaring – “My husband dare not beat me, but I dare to beat him.” She vehemently denied her father’s allegations that her marriage was not legal because she had supposedly been kidnapped by her husband, or that her husband would cast her off eventually after obtaining her money. She reiterated her wish to have nothing to do with her father. The Second Police Magistrate forced Shaik Obudh to sign a bond of good behaviour for a year on account of the “bitter fate” that he had endured. He also urged Shaik Obudh to leave his daughter alone since she appeared to be quite capable of looking after herself. The trial ended and we hear no more of Fatimah’s adventures in court, until May 1939 when she sued another Arab man named Syed Mohamed bin Aidross Albahar.

Conclusion

Arabs’ foreign identities were often emphasized in law reports and press articles.

Fatimah’s and Shaikh Obudh’s Arab identities were constantly highlighted for example,

110 Ibid.
111 The article did not provide all the details of this bitter fate.
112 A law report of this particular case cannot be found. “Law Notice for the Day,” The Singapore Free Press and Mercantile Advertiser, May 23 1939, 3.
and Fatimah’s exotic appearance was described with great relish by the press. The specific notion of rank within Arab societies was hinted at in the above case, pointing towards a Sayyid-Shaikh rivalry that emerged during the early twentieth century. By repeatedly emphasizing Fatimah’s current husband’s rank of Sayyid, Shaikh Obudh implied that he was less than happy about his daughter’s marriage to a sayyid, being a non-Sayyid himself. Lastly, extensive property holdings tended to be a feature of marital disputes involving Arabs, just like in the example above. Property costs, quoted in Dutch guilders, and the gift of a date-farm located in Arabia suggested a highly mobile existence. Likewise, spouses who hailed from Hadhramaut though they were willing to settle in the Malay world pointed towards a diasporic milieu which was far from fixed.

This chapter demonstrates how British legal authorities reluctantly committed to administering Islamic law in the realm of family law, specifically marriage and divorce cases, after responding to requests by members of the Arab community in 1880. Yet, Islamic law was constantly couched in English legal terms. As legal anthropologist Sally Merry emphasizes in her seminal article, when ordinary people’s problems are handled in colonial courts, which embodied laws or procedures of the metropolitan country, their problems were reinterpreted in the language of these new institutions and judgments were rendered in these terms.\textsuperscript{113} Prior to the promulgation of the Mohamedan Marriage Ordinance 1880, court judges had displayed extreme caution in calling a marriage between Muslims, a ‘marriage’ for several reasons. Firstly, Muslim wives were allowed to keep their property separately from their husbands, unlike in

English Christian marriages, where husbands have an interest in their wives’ property. Secondly, polygamy was considered repugnant to English law. By the early twentieth century however the period of uncertainty had passed. The validity of Muslim marriages was no longer questioned in colonial courts. In general however, Islamic legal precepts were upheld, even if reluctantly, by colonial judges.

Nonetheless, polygamy, relatively common amongst wealthy Arabs, remained a problematic issue. British judges furthermore had to deal with the notion of kafā’a. Although there was a tendency for female descendants of the Prophet to marry fellow Sayyids, they sometimes married non-Arab men. Social stratification that might have existed in Hadhramaut did not necessarily carry over to Southeast Asia, where British judges were reluctant to uphold kafā’a. Farhat J. Ziadeh had already shown that the doctrine of kafā’a was frowned upon in British territories such as Uganda, Somaliland and Zanzibar.114 Social stratification of Hadhrami communities was not made into law in the British colony.115 In other words, social distinction was prevented from being transformed into legal distinction in a state where only colonial officials possessed the power to mete out legally-binding rulings. Unlike cases involving other non-Arab Muslim spouses, law reports involving Arabs often ran several pages. Divorce cases were fraught with complications due to the huge amounts of wealth that were usually

115 Sayyids occupied the top strata of society in Hadhramaut. However, at least one observer had noted that this was no longer the case by 1886. In Southeast Asia however, social stratification seemed to have remained for some time, manifested through marriages. For more on this issue, see Sylvaine Camelin, “Reflections on the System of Social Stratification in Hadhramaut,” in Hadhrami Traders, Scholars and Statesmen in the Indian Ocean, 1750s-1850s, eds. Ulrike Freitag and William G. Clarence-Smith (Leiden: Brill, 1997), 147-156; Van den Berg, Le Hadramout et les Colonies Arabes dans l’Archipel Indien, 189.
at stake. Judges tended to spend much more time on rulings in cases that involved larger sums of money.  

Women approached courts with prior knowledge of their rights, and expected courts to likewise be fair and enforce their rights. Courts remained largely sympathetic to their causes. Judges were in fact highly protective of women, and tended to portray fathers and husbands as exploitative and controlling. One element that was striking was that both legal courts and the press spoke for female litigants and witnesses when they were reticent or not forthcoming with evidence. Chief Justice Walter Shaw actually spoke for Asiah binte Haji Arshad in the Court of Appeals in 1922. When Fatimah binte Shaikh Obudh bin Abdad appeared before him four years later, he ruled in her favour despite the fact that she did not reveal much. The press did their part in amplifying her voice while muffling that of her father’s. While Shaikh Obudh was portrayed as an ill-tempered rambling old man, Fatimah was more positively presented as a well-dressed, feminine yet feisty young lady who declared her strength during the few times she spoke. Her remarks were cited verbatim in press reports and presented as exclamations rather than statements. Reticence was not criticized when it came to female litigants. In fact it seemed to have worked in their favour, as in the case of Fatimah bin Abdad. Law reports demonstrated that these Muslim women chose to adhere to Islamic law which led to them to exhort colonial courts to implement these laws as promised. These women actively sought favourable outcomes in colonial courts within the confines of Islamic law. The extensive family laws of the Qur’an emphasized the preservation of family order, not the promulgation of male or female individual

Colonial courts conformed to their expectations since judges consistently strove to abide by Islamic legal rulings while expressing sympathy towards the plight of Muslim women in general.

It is curious that despite being a litigious society, Arabs based in the Straits Settlements did not feel the need to have their own lawyers within their own community, unlike the Parsi community in India, who avidly pursued law as a vocation, such that during the later colonial period, Parsi cases in colonial courts in India were arbitrated by Parsi judges. Arab litigants were only represented by British lawyers in courts. Why did the Arab community not consider it crucial to have Arab legal practitioners? A clue lies in the case of Salmah And Fatimah, Infants, By Their Next Friend Shaik Omar V. Soolong where the Arab Mufti of Johore was consulted by the colonial court in 1878. In his lengthy commentary, the Mufti addressed specifically Arab concerns indicating a vast intimate knowledge of the community. Indeed, the Mufti of the neighbouring state of Johore was traditionally Arab, and he was consulted on various cases involving Islamic law. Engseng Ho argues that while the British built an administration for direct supervision of religious practice, the Haḍramis were well-
positioned to man these stations.\textsuperscript{121} Even in the Straits Settlements, where Muslim judges were non-existent, the Hadhramis somehow managed to assert some influence over their own communities through British channels, as compared with the Arabs who navigated the more complicated Dutch colonial legal administration in the Netherlands Indies.

\textsuperscript{121} Ho, \textit{Graves of Tarim}, 182.
CHAPTER FOUR: ADJUDICATING ARAB FAMILY WAQFS IN THE STRAITS SETTLEMENTS

Introduction

In November 2009, members of the Arab Alsagoff family in Singapore challenged the decision of the Islamic Religious Council of Singapore to appoint one of their family members who would identify the beneficiaries of a religious family trust known as a waqf.¹ In order to ascertain the testator’s original wishes in establishing the trust, the court pored over the text of the will of Raja Siti binte Kraying Chanda Pulih, dated November 29, 1883.² In December 2009, Judge Andrew Ang ruled that the Islamic Religious Council of Singapore would retain management of the religious endowment which allowed the Council to appoint any member of the Alsagoff family as the person to identify the trust beneficiaries.³

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² It was common for waqf disputes to drag on for decades or even centuries. Kozlowski, “A Modern Indian Mufti,” 246.

This case is the latest link in a chain of lawsuits that have been filed periodically by Arab clans in Singapore since the late nineteenth century.\textsuperscript{4} It is highly likely that colonial legal authorities were well aware of the huge significance of the institution in the lives of Muslims across the British Empire by the late nineteenth century since Lord Stanley of Alderley had pointed out to the House of Lords in 1895 that the \textit{waqf} was “one of their most cherished institutions, upon which depends the prosperity of their individual families which have rendered important services to the State in times of danger.”\textsuperscript{5} Legal cases adjudicated by colonial courts set binding precedents for future cases involving religious trusts and Arab \textit{waqfs} were disproportionately represented in colonial courts. The reason for this lay in the fact that Arab residents owned much larger amounts of immoveable property which they were able to convert into \textit{waqf} property. By 1936, they were the richest group in terms of ownership of assets per head in Singapore.\textsuperscript{6} Despite constituting only 0.34 percent of the population in Singapore by 1930 at their peak, at least 40 cases involving \textit{waqfs} owned by Arab families were brought to courts from 1868 to 1963.\textsuperscript{7} The number of cases involving Indian Muslim

\textsuperscript{4} There were at least four lawsuits involving the Alsagoff family \textit{waqf} from 1918 till 2009. They were filed in 1918, 1956, 1958 and 2009. In 1997, the value of one of the largest Arab family \textit{waqfs} was only 300 million Singapore dollars. The decline of the Arab landowning families continued during the urban renewal and public housing construction of the 1970s and 1980s. Edwin Lee, \textit{Singapore: The Unexpected Nation} (Singapore: Institute of Southeast Asian Studies Press, 2008), 327. For more on the decline of \textit{waqfs} in Singapore, see Ameen A. Talib, “Hadhramis in Singapore.” \textit{Journal of Muslim Minority Affairs} 17, 1 (April 1997): 91-93.

\textsuperscript{5} IOR/L/PJ/6/400, File 1104, 5\textsuperscript{th} July 1895. House of Lords question on Muslim law relating to endowments.


\textsuperscript{7} 40 law reports were published, but there might have been more cases.
wāqfs by comparison trailed a distant second with less than 10 disputes in colonial courts during the same period.

As I will argue, not only were Arabs over-represented, Arab litigation exerted a transformative effect on colonial administration of Islamic law. Due to the peculiarities of the Common Law tradition which privileges earlier legal rulings, Arabs affected the administration of Islamic law in the colony to a significant degree.

By contrast to the law report of the case in 2009, colonial reports on cases involving wāqfs were often rife with uncertainty, and reflected a wide spectrum of legal opinions regarding the compatibility of Islamic law with English law. This chapter demonstrates how colonial legal practitioners faced a daunting task in administering family wāqfs from 1860 till 1942 as they were forced to debate the meanings of family, descent and charity, while grappling with documents written in three languages – English, Malay and Arabic.

**Trusts and Waqfs**

F.W. Maitland famously referred to the trust as the “quintessential English institution.”⁸ Within the British Empire, several entities which shared sufficient similar traits with the English trust came to be referred to as such.⁹ These included Chinese trusts, Hindu trusts and Muslim trusts known as wāqfs. The wāqf was a device utilized by

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Muslims to organize and maintain wealth.\textsuperscript{10} Although historians such as Gregory Kozlowski imply that English Law distinguished between public and private endowments and thus affected Muslim subjects minimally in India, this chapter will demonstrate that English Law directly impinged upon private family endowments by blurring the line between private and public arenas.\textsuperscript{11}

Scholars have attempted to show how Chinese and Hindu trusts were not commensurable with the English definition of ‘trust.’ In her study of Chinese ‘tong’ (trust), Stephanie Po-Yin Chung’s recent article contrasts Chinese business conduct that values joint ownership based on kinship and communal bonds with Western conceptions of business based on individual ownership.\textsuperscript{12} Ritu Birla’s book, \textit{Stages of Capital: Law, Culture, and Market Governance in Late Colonial India}, on the other hand, traces the unfair colonial impositions of a standardized rational market through the formulation and implementation of law on the Hindu trust. She demonstrates how British legal authorities changed the notion of charitable giving within Hindu communities, despite British official policy of non-intervention in the cultural conventions and practices of Indian subjects. She maintains that in British India, the English legal distinction between public charitable trusts and private trusts (which includes family trusts) actively mistranslated customary social welfare practices that were traditionally directed at families. Hindu, Muslim and Muslim family endowments

\textsuperscript{11} Kozlowski, \textit{Muslim Endowments and Society in British India}, 194.
were considered problematic as they clearly defied the public/private distinction.\textsuperscript{13}
Because of this quality, the Muslim waqf, the Chinese tong and the Hindu trust were incompatible with English trusts, no matter how much British administrators tried to equate them by introducing artificial definitions based on existing English law.

However, the waqf was, in effect, a species of trust in the British Empire, more so than the Chinese ‘tong’ and Hindu trust, since it was, practically speaking, a dedication or consecration of property either in express terms, or by implication for any charitable or religious object or to secure any benefit to human beings. In order to establish a waqf, the Muslim settlor would sequester the property such that it became perpetually inalienable, and appoint a trustee to manage it. According to shari‘a, the act was deemed legally irrevocable as it entailed the complete transfer of the right to ownership from the hands of the founder (also known as ‘wāqif’) to those of God.\textsuperscript{14} In this way, the waqf was a thoroughly religious concept and a charitable act of the first order.\textsuperscript{15} Henceforth, the property sequestered could not be sold, inherited or given away as a gift.\textsuperscript{16} The property would also potentially be free from the claims of other family members and other heirs. This ensured the physical and economic integrity of the estate across multiple generations who were appointed beneficiaries of the waqf.\textsuperscript{17}

\textsuperscript{14} The purpose was after all to do good for the sake of God. Hallaq, \textit{Shari‘a – Theory, Practice, Transformations}, 143.
\textsuperscript{15} Tyabji, \textit{Muhammadan Law}, 541.
\textsuperscript{17} Several waqfs established in 19th century are still in existence today.
Theoretically, upon extinction of the family line, entitlement to the usufruct would then pass to a religious or charitable institution.

Nonetheless, since the religious peculiarities of the *waqf* were not considered relevant in the Straits Settlements, judges had little problem using the more generic term of ‘trust’ despite actual key differences between the two institutions. In fact, any mention of testators’ religious intentions were notably absent in the majority of cases that revolved around *waqfs*, as if Straits judges were deliberately distancing themselves from the litigants’ religious intentions in administering such trusts. One particular law report referred to the “‘wakaf” only when citing an Arabic will. However, as mentioned before, equating a *waqf* with the English legal definition of a ‘trust’ actually obscured key differences between the English common-law trust and the Islamic *waqf*.

The Muslim trustee of a *waqf*, specifically known as the *mutawalli*, was in fact not a ‘trustee’ in the English legal sense of the word, but a ‘manager’ of the property that had been alienated to form a *waqf*. No property was ever ‘conveyed’ to a *mutawalli* in the

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19 For example subsequent law reports on lawsuits involving the Alsagoff *waqf* did not mention the testator’s faith and religious intentions in establishing the *waqf*. *Re Syed Ahmed Alsagoff Decd* [1960] MLJ 147; *Re Syed Ahmed Alsagoff, Deceased* [1962] MLJ 361; *Re Syed Ahmed Alsagoff, Deceased* [1963] MLJ 39.


case of a dedicated unlike in an English trust, precisely because all rights of property for the waqf managed by the mutawalli was vested in divine authority. Yet, the word ‘trustee’ constantly appeared in law reports involving the waqfs, instead of mutawalli. In this way, the English institution of the ‘trust’ imposes its own limitations and expectations on the waqf.

Waqfs in the Straits Settlements, though defined imperfectly in courts, were at least, allowed to exist in some form. By contrast, within the Netherlands Indies, the Agrarian Law of 1870 known as the vervreemdingsverbod or ‘disposal ban’, forbade the alienation of indigenous-held land by all persons who were considered non-indigenous. In his collection of advice to Dutch colonial administrators, Snouck Hurgronje only referred to public waqfs, usually consisting of mosques. In fact, he implied that waqfs which were meant for family waqfs were not even truly religious endowments. Nonetheless, in one of his letters to the Governor-General in 1892, he alluded to a case in Surabaya where the Captain of the Arab community channeled the estate of several public waqfs to the inheritance of some private individuals. His observation implies that family waqfs still existed somewhat covertly in the Netherlands Indies.


23 Fyzee, Cases in the Muhammadan Law of India and Pakistan, 386.


25 Snouck, Ambtelijke Adviezen, deel tweede, 847.

26 Ibid., 848.
Waqfs flourished in the Straits Settlements, albeit in limited forms. In order to administer local endowments in the colonies, British colonial authorities actively gathered knowledge about this vital institution in its various forms. By the first half of the twentieth century, they had amassed information on a wide range of waqfs, such as family endowments, mosques, schools, burial grounds, shrines and tombs located within various British spheres of influence including India, Palestine, Iraq, Egypt, Mecca, Madina and Syria. Correspondence on waqfs was widely circulated between the Colonial Office, the India Office and the various offices in particular colonies.  

By the first half of the twentieth century, two trends that would drastically transform the waqf began to emerge. First, the relatively limited English legal concept of charity deeply impinged upon Islamic concept of charity. Second, the English Rule Against Perpetuities which stated that “no interest is good unless it must vest, if at all, no later than twenty-one years after some life in being at the creation of the trust” led to the abolition of the waqf as a perpetual trust in favour of a more limited temporal trust. Law reports strongly that the ostensible purpose of litigation was financial. There were two main classes of litigants. They were either members of the testator’s descent group included in the class of beneficiaries, or members of the same clan.

27 These included the colonial governments of Palestine, Iraq, Malay states, Kenya, Zanzibar, Somaliland, Nigeria, Cyprus, Gold Coast and Ceylon. CO 732/26/2, Draft 49052/27 Arabic, March 1927.

28 The historical background of the Rule Against Perpetuities is highly complex. It could be traced back to the medieval period, when feudal lords became suspicious of state property held by the dead hand (‘mort main’). In order to avoid such alienation of property, which would lean to a valuable loss of tenure for an indefinite period of time, the Rule Against Perpetuities gradually developed in Western Europe. In England specifically, the statutes of mortmain was enacted in 1279 and 1290 to circumscribe the Church’s property holdings. The modern version of the Rule Against Perpetuities was contained in the Mortmain and Charitable Uses Acts of 1888 and 1891 that effectively repealed the Mortmain Act of 1736. An exception to this Rule was the charitable trust.
outside the lineal descent group excluded from the class of beneficiaries. In court, both groups of litigants pressed for a re-examination of the testator’s will and trust deed. Non-beneficiaries of a particular waqf, who would have otherwise inherited according to the formula prescribed in the Quran (as if there had been no waqf) tended to focus on the wording of the waqf deed in their efforts to include themselves within the class of beneficiaries. The number of cases involving waqfs in the Straits Settlements suggested that they were highly contentious institutions, not just according to English law but under Islamic law as well. Although the waqf was legal according to Islamic law, by alienating part of his property (a maximum of a third, according to Islamic law), a founder could, after all, prevent the otherwise rightful inheritors and their descendants from partaking in the alienated property forever.

On the other hand, beneficiaries could profit either from questioning trustees’ competence and good faith or disputing their fellow beneficiaries’ shares in the settlement. In the event that a waqf was declared a failure, the money earned from the sale of the endowment would go to beneficiaries named in the founding waqf testament. In this way, these beneficiaries stood to gain a lump sum of money derived from the entire waqf instead of relatively small occasional installments from the estate. Moreover, waqf failure was an attractive outcome as it would effectively end all other external claims to the waqf such as those made by the testators’ other descendants not named as beneficiaries by the testator. Since legal costs of a waqf dispute were borne out of the waqf estate, dissolution could prevent its worth from being whittled away over time by several expensive lawsuits.

29 In the Straits Settlements, waqfs were established upon death, and rarely during the lifetime of the settlor.
By disputing *waqfs* in colonial courts, Arab litigants were in fact challenging the key anchor of family property holdings. In fact, alterations to an existing *waqf* could lead to significant repercussions on kinship relations, since the *waqf* often not only bound members of a particular clan in the Straits Settlements, but also members of the same clan residing further afield elsewhere, whether on the Malay Peninsula, in Burma, the Netherlands Indies, India or yet, Arabia. Often, the family *waqf* functioned as the resilient linchpin of a clan with far-flung members scattered across the Indian Ocean. Hence, within the context of precarious diasporic family relations, challenging the status of an existing *waqf* that had been purposefully established by a deceased patriarch was a rather bold act.

**Colonial Policy of Non-Intervention**

Why did testators continue to establish *waqfs* in the Straits Settlements despite so many challenges? For one, the default application of English law in the colony had advantages for Muslim testators as it granted more testamentary freedom that a strict application of Islamic law would allow.²⁰ For example, testators could, if they wished, pass the whole of their property in the form of a *waqf*, and not just a third of it as prescribed by Islamic law.²¹ It was not until January 1 1924 when property was devolved according to Islamic law by default should a Muslim die intestate.²² Even after 1924, if a testator so

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²¹ *In the Goods of Abdullah, deceased*, WOC, 1.
²² After 1³ January 1924, Ordinance 1923 came into force when the estate and effects were administered according to Islamic law by default, as long as it did not run counter to English law. Ahmad, *The Legal Status of the Muslims in Singapore*, 27. In 1940, a judge actually upheld Islamic law which only bequeathed a maximum of a third of the total value of a testator’s estate to strangers (non-heirs) *In re M. Mohd Haniffa Deceased. Abdul Jabbar v. M. Mohd. Abubacker* [1940] SSLR 251.
wished, he or she could still devolve his property contrary to Islamic law, and in accordance with English law.\textsuperscript{33} In other words, the default administration of Islamic law allowed Muslim testators more liberty in disposing their property than Islamic law would allow.

Colonial courts might have been severe on \textit{waqfs}, but they were not particularly attentive to the various endowments being established. In fact, colonial courts rarely challenged the status of a \textit{waqf} on their own, although from 1886 onwards, land granted or leased by on or behalf of the Crown free of rent or of nominal value for religious purposes required the Governor’s written consent.\textsuperscript{34} Even so, most of the time, family \textit{waqfs} were usually brought to the court’s attention by Arab litigants interested in the \textit{waqf} in the first place.\textsuperscript{35} Up until the point of litigation, the management of family \textit{waqfs} remained firmly in the hands of private trustees appointed by testators without any interference from the state.\textsuperscript{36} If private trustees were incompetent or untrustworthy, the onus was upon beneficiaries to inform the court by enacting some form of legal action. Most \textit{waqfs} were only critically examined by colonial courts only after they were challenged and disputed in colonial courts usually by the testators’ descendants and relatives. A valuable \textit{waqf} established by Syed Ahmed Alsagoff existed for 43 years prior to being disputed in colonial courts in 1918,\textsuperscript{37} while the \textit{waqf} of Syed Shaik Alkaff was in

\textsuperscript{33}“English law” refers to the English law in force in the Colony for the time being.
\textsuperscript{34}Ordinance II of 1886, Section 9, \textit{The Acts and Ordinances of the Legislative Council of the Straits Settlements from the April 1867 to the 7th March 1898}, Vol. II (London: Eyre and Spottiswoode, 1898), 876.
\textsuperscript{35}Re Syed Shaik Alkaff, Decd.; Alkaff & Anor V. Attorney-General [1923] MC 1.
\textsuperscript{36}Trustees could be members of the family, usually the brother of the deceased. At times, it could be someone in the testator’s employ prior to his death.
\textsuperscript{37}Syed Ali Bin Mohamed Alsagoff And Others V. Syed Omar Bin Mohamed Alsagoff And Others [1918] SSLR 2.
existence for a full 13 years before its terms were challenged in court by some of his descendants in 1923. 38 Hence, waqfs would have been allowed to exist as they were in the Straits Settlements if they had not been brought to the attention of the colonial courts in the form of various lawsuits by Arab litigants.

Indeed, colonial subjects were free to dispose of their landed property as they wished in the Straits Settlements. After all, Judge Benjamin Malkin had stressed in 1835 that although English law was the default law in the Straits Settlements, law, as established in the colony, gave the most unlimited freedom of disposal of property by will to "any man who wishes his property to devolve according to the Mahomedan, Chinese, or other law has only to make his Will to that effect, and the Court will be bound to ascertain that law and apply it for him."39

Nonetheless, the family waqf occupied an ambivalent status in the Straits Settlements, for although the institution was situated within the realm of personal law, the waqf consisted of tangible, immovable property that could be potentially inalienable in the British colony. 40 Moreover, the transmission of immovable property

39 Fatimah & Ors. v. D. Logan & Ors. [1871] 1 KY 255.
40 Although the Straits Settlements was not regarded as one unit, Malacca actually differed by having its own customary land laws first formalized in 1886. This was because the Portuguese and Dutch colonial powers retained Malay laws (customary adat and Islamic) in Malacca prior to British occupation. Malacca customary land automatically descended on the death of the holder to the holder's heirs according to Islamic law, regardless of stipulations in the holder's will. For a discussion on Malacca's special status vis-à-vis the Straits Settlements, see Benson Maxwell, “Land Tenure in Malacca under European Rule,” JSBRAS 13 (June 1884): 75-220. For a list of laws, “Malacca Lands Customary Rights Ordinance no. 39,” Laws of the Straits Settlements, Volume 1 (London: Waterlow & Sons Limited, 1926), 456-472 and “Mutations in Titles to Land,” Laws of the Straits Settlements, Volume 1 (London: Waterlow & Sons Limited, 1926), 18-21. For a case involving this law, see Abdul Wahab bin Abdul Rauf and Another v. Haji Wahab bin Haji Mohamed and Another SSLR [1940] 199.
in the Straits Settlements was taken to be that of nature of chattels real and not of freehold, according to Indian Act XX of 1837. Clearly, this Act could potentially limit the testator’s power of devolution of property severely, for chattels real automatically possessed a time limit, unlike freehold property which could potentially be held perpetually. British colonial conception of landed property in the Straits Settlements effectively placed a time limit on all property.

This view obviously ran counter to the establishment of waqf that was, by definition, permanent. In general, English judges (in England and abroad) were reluctant to allow property, especially immoveable property held under private trusts, to become subject to restrictions that would unduly prevent its free marketability. Since trustees were required to keep the capital of the fund intact and use only the income of the stated purposes, the trust could conceivably last forever. These trusts

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41 Indian Act 20 of 1837 stated that “That from the 1st day of October 1837, all immovable property within the jurisdiction of the Court of Judicature of Prince of Wales’ Island, Singapore and Malacca, shall, as regards the transmission of such property on the death and intestacy of any person having a beneficial interest in the same, or by the last Will of any such person, be taken to be, and to have been of the nature of chattels real and not of freehold.” This act was cited in the following cases. Wanchee Incheh Thyboo & Anor. v. Golam Kader (1883) 1 Ky 611; Attorney-General v. Hajee Abdul Cader (1883), 1 Ky 616; Fatimah & Anor v. Armoottah Pullay 4 KY 225; Mahomed Meera Nachiar & Anor. v. Inche Khatijah, WOC (1890) 608; Ismail bin Savoosah v. Madinasah Merican & Anor. (1887) 4 KY 311; Syed Ali Bin Mohamed Alsagoff And Others V. Syed Omar Bin Mohamed Alsagoff And Others. [1918] SSLR 2; Chulas and Kachee v. Kolson binte Seydoo Malim (1867) Wood 30.


could potentially be exempted from taxation.\textsuperscript{44} Consequently, colonial courts divorced the \textit{waqf} from the domestic sphere of the family by only discussing the \textit{waqf} from the perspective of state land, without referring to the family at all.\textsuperscript{45} Active litigation on the part of Arab communities allowed the colonial court to directly regulate familial and kinship relations for the benefit of the colonial state. Not surprisingly, litigation strategies involved a fundamentally different power dynamic outside the family. Arguments in law reports tended to focus on semantics in legal terms and clauses, while neglecting the role of kinship relations, most probably because they were aware that such familial bonds had no place in colonial courts which had already placed the family \textit{waqf} in the realm of the public.

\textbf{Textual memory}

But colonial courts had advantages as well for Arab mercantile families whose lives traversed huge geographical expanses not just within the Malay archipelago but also across the Indian Ocean. Just as ecclesiastical courts in England were courts of verification and record,\textsuperscript{46} colonial courts functioned as a crucial repository of important documents. Insistence on documentary evidence was a marked feature of common law courts, as opposed to Islamic courts which placed much more importance on oral testimony.\textsuperscript{47} Straits judges referred almost exclusively to textual evidence which consisted mainly of wills, but also occasionally included codicils and \textit{waqf} deeds, all of

\textsuperscript{44} The Indian Income Tax Act stated that charitable trusts could be exempted from taxation. However, confusion ensued revolving around the distinction between public charity, religious purposes and private charity. Birla, \textit{Stages of Capital}, 79, 95.
\textsuperscript{45} Kozlowski, \textit{Muslim Endowments and Society in British India}, 150.
\textsuperscript{47} Anderson, “Islamic Law and the Colonial Encounter in British India,” 178-179.
which had to be notarized. The wills under consideration had often been accepted into probate several years prior to the suit. Every instrument purporting to be testamentary and executed in accordance with the formal statutory requirements was entitled to probate if it purported to dispose of property or contained the appointment of an executor. However, the document still had to fulfill certain conditions. According to Ordinance no. 26 of 1921 and Ordinance no. 3 of 1926 of the Laws of the Straits Settlements, a will included “a testament and an appointment by will or by writing in the nature of a will in exercise of a power and also a disposition by will and testament or devise of the custody and tuition of any child.” For a will made by a Muslim to be accepted on probate, it therefore had to comply with the provisions with regards to execution and attestation contained in the Wills Ordinance. Section 101 of the Evidence Ordinance provided that “wills should be construed according to the rules of construction which would be applicable thereto if they were being construed in a court of justice in England.” According to principles in English law operating in the Straits Settlements, the will had to be in written form. In addition, even though it was never

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48 Existing waqfs that were established orally by a testator risked being declared null without exception. See CO 167/919/14, C. A. Hooper, Procureur and Advocate General, Explanatory Report on Ordinance no. 9 of 1941, May 9th 1941.
49 The will could also include a codicil. Ordinance no. 3, Section 2, Laws of the Straits Settlements, Volume 1 (London: Waterlow, 1926), 11; Chapter 121, Section 2, Laws of the Straits Settlements, Volume 3 (London: Waterlow, 1926), 329.
50 Every will should be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator as the signature to his will or codicil in the presence of two or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary. Ordinance 3, Section 6, Laws of the Straits Settlements, Volume 1 (London: Waterlow, 1926), 14.
51 Ahmad, The Legal Status of the Muslims in Singapore, 32.
52 Ahmad, Islamic Law in Malaya, 300.
mentioned in government gazettes and *Laws of the Straits Settlements*, law reports indicated that legal documents including wills and codicils had to be in English since there was a chance they might not be fully accepted by all government offices if it was written in another language.\(^5^3\) However in a case involving an Arabic will in 1941, the court maintained that although it has discretion, it would not revoke the appointment without sufficient cause.\(^5^4\) Once a will was ‘proved,’ authenticated and subsequently accepted into probate, it was not taken lightly by the court. The will then became a binding document.

The amount of documentary evidence produced in *waqf* disputes highlighted the official textual memory of the colonial legal system. Written records played a particularly critical role in the resolution of disputes over family endowments since they usually arose one or more generations after the death of the founder.\(^5^5\) Trust that had been vested in the courts by Arab communities who purposefully created wills which conformed to rules ultimately paid off in these legal disputes. In this way, the textual memory possessed by the courts usefully spanned several generations, both familial and legal. Since these documents made dispositions that did not follow a

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\(^5^3\) For example, one law report revealed that an informal document could not be registered in the Land Office precisely because it was in Malay. *In the Goods of Hajee Mahomed Thaib 4 Ky* [1886] 178. In Mauritius, a French document was recognized in British colonial courts, although accounts still had to be produced in the English language. CO 167/919/14, C. A. Hooper, Procureur and Advocate General, Explanatory Report on Ordinance no. 9 of 1941, May 9\(^{th}\) 1941.

\(^5^4\) In the case, the eldest living son of the testator wished the court to revoke the appointment of the testator’s brother as executor. *In re Shaik Abdullah bin Ahmad bin Ali Al Tway Basalamah Decd* [1941] MLJ 6.

\(^5^5\) In contrast, Muslim jurists tended to view written documents with a generous measure of suspicion as the written word can be manipulated in a manner that the oral testimony of trustworthy persons cannot. Powers, “Islamic Family Endowment (*Waqf*),” 1182-1183.
specific prescribed formula and produced highly particular configurations of
devolution of property which frequently departed from Qur’anic regulations, it was all
the more crucial that written documents exist to prove testators’ precise intentions in
establishing waqfs.56

Influence of Litigation

As I shall argue below, by initiating numerous lawsuits in colonial courts, members of
Arab clans inadvertently helped to define the colonial court as a highly influential
institution that significantly encroached upon the praxis of Islamic law in the Straits
Settlements. After all, it was precisely in response to Arab litigants’ requests for legal
intervention that colonial courts devised schemes to take over the administration of
the waqf, or to interfere with existing management, often contrary to testators’
intentions, and sometimes in blatant contravention of Islamic legal precepts. In other
words, legal disputation over the family waqf allowed the colonial state to meddle
extensively into private family affairs and Islamic legal practices. As Nicholas Dirks
warns, by losing some measure of control over the management of estates, the British
gained all the more control over the old elites,57 manifested, in this case, in a string of
partially disabled trusts. Indeed, in utilizing legal channels, Arab litigants did not
deliberately intend to transform legal administration in any significant way. Neither
did the litigants attempt to exert an actual transformative effect on legislation,
according to official law reports.

56 A common tactic was the addition of several witnesses to attest to each document
signed by the testator. In the Matter of the Estate of Kulsoome Bee, Deceased. Che Puteh and
Rahimah Fatimah Bee v. Syed Omar Alsagoff and Others [1930] SSLR 64.
57 Nicholas Dirks refers to zamindars specifically in his seminal article. Dirks, “From
Little King to Landlord,” 332-333.
Arab litigants were able to exploit opportunities granted by the rigorous demands of the colonial legal system. Courts required that instructions in wills and codicils be unambiguous. Instructions that were found to be too vague or unclear as in the case of Alsagoff (1918) and Alkaff (1923) opened the door for challenges to be put forward in courts. For example, testators’ descendants who were not included in the list of beneficiaries could attempt to insert themselves into the class of beneficiaries named by the testator in his will.

The ambiguity of the status of the family *waqf* in the Straits Settlements was reflected in the lengthy and intricate discussions in colonial law reports that arose in no small part, from general uncertainty in legal administration of the Islamic endowment, both public and private, in British colonies. Because of jurisdictional differences between the formerly uninhabited Straits Settlements, which was no longer ruled by British Indian Government after 1867, legal rulings were passed by British judges independent of Indian precedents even when court decisions ultimately aligned with Indian court decisions. The most glaring omission in law reports during the early twentieth century was the famous case of *Abul Fata Mahomed Ishak v. Russamoy Dhur Chowdry* in 1894, in which the Privy Council affirmed a High Court ruling that the *waqf* in question was not a valid charitable endowment, but only a ruse to aggrandize the family holdings. The case quickly acquired political valence as several Muslim subjects

58 The object of this suit was to establish whether a settlement of property effected by deed dated the 21st December 1868 was a valid *waqf*. House of Lords question; on Muslim law relating to endowments. In July 1895, the House of Lords ruled that the poor had been added as beneficiaries to the settlement merely to give it “a colour of piety.” Parliament believed that the only real beneficiaries of the *waqf* were members of the family which meant the trust was invalid. IOR/L/PJ/6/400, File 1104, House of Lords Question on Muslim law relating to endowments, 5th July 1895.
rightfully saw it as symptomatic of a broader colonial attack on *waqf* as an economic hindrance for growth in a market economy. Used as a rallying point by discontented Muslims, the case led to the Wakf Validating Act of 1913 which dramatically overturned the Privy Council decision. While both Ali Jinnah, then a barrister in Bombay who was an unofficial member of the Governor-General’s Council, and later lawyers like Asaf Fyzee, claimed that the Act triumphantly restored Islamic law, it was actually more akin to a political act, according to Michael R. Anderson.\(^5^9\)

Questioning *waqf*s consisting of mosques, schools, or burial grounds was clearly a sensitive topic amongst Muslims who gave these endowments particular attention.\(^6^0\)

In the Straits Settlements, charitable endowments given in land or money to support a mosque or Hindu temple, shrine or school fell under the “Mahomedan and Hindu Endowments Ordinance no. 92, (formerly Ordinance XVII of 1905) that was made operational in January 1\(^{st}\) 1906.\(^6^1\) Subsequently, the Mohamedan Advisory Boards in each settlement supervised the management of public *waqf*s. Municipal Commissioners ensured that public *waqf*s, especially burial grounds, were properly run.\(^6^2\) Concern was


expressed by local Muslims in numerous published letters and articles in the press, calling for the government’s attention to these public waqfs.\(^6^3\) Although private, family waqfs were not discussed in the media as much, they were clearly not exempted from governmental control.

**Rule Against Perpetuities**

Despite testators’ attempts to abide by English Law, their waqfs suffered from the same limitations as the English trust, namely the restrictions denoted by the English concept of charitability, and the Rule Against Perpetuities which provided that no contingent or executory interest in property can be validly created, unless it must necessarily vest within the maximum period of one or more lives in being, and twenty one years afterwards.\(^6^4\) Although the Rule Against Perpetuities eventually influenced judges’ decisions to a great extent, it did not automatically prevent the perpetual establishment of waqfs in courts, as evident in judges’ lengthy, contrapuntal ruminations and discussions with their predecessors and contemporaries on the waqf. This is because the wording of terms in Arab wills incorporated elements from Islamic law which called for more attention from the English judge who was understandably less familiar with the highly specific terminology. In fact, judges rarely set out to sidestep testators’ wishes on their way to implementing the Rule Against Perpetuities. For example, judges often took a considerable amount of time to determine who should be included in the class of beneficiaries termed “heirs as then ascertained according to

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\(^6^3\) ‘Letter from ‘A Mohamedan’ to the Editor,’ *ST*, December 2\(^{nd}\) 1911, 10; ‘Letter from S to the Editor,’ *The Singapore Free Press and Mercantile Advertiser*, October 28\(^{th}\) 1926, 16.

\(^6^4\) The relevant period is the same as that which obtains against remoteness of vesting, which governs trusts for persons (as opposed to trusts for purposes). Ahmad, *The Legal Status of the Muslims in Singapore*, 25.
Mohammedan Law” in several cases (Alsagoff, 1918; Altway, 1933; Bin Shahab, 1939; Harharah, 1959; Bin Abdat, 1954). Lawyer Ahmad Ibrahim erroneously implied that judges routinely assumed that this phrase referred to the testator’s heirs according to Islamic law if the testator had died at the expiration of twenty-one years from the actual date of death. In actual fact, court judges often took their time to carefully determine what was meant by the testators in each case, even to the point of challenging their predecessors rulings on the same waqf. In other words, colonial courts did not merely dismiss the testators’ intentions straightaway by imposing their own English legal definitions. Each case involving a waqf or any other form of perpetual trust in the Straits Settlements reopened the debate on the applicability of the Rule in the Straits Settlements in the first place.

Nonetheless, the English Rule Against Perpetuities influenced the establishment of the waqf to a great extent by eradicating the perpetual aspect of these waqfs. Advised by English lawyers who familiarized their clients with the pitfalls of English law, Arab testators ultimately became more mindful of significant potential legal limitations posed by English law. Consequently, they took great measures to institute the waqf in a manner that was acceptable to that law. This precaution was necessary in order to ensure that the waqf was not declared void from the outset. One of these wealthy patriarchs who took measures to ensure the posthumous establishment of his waqf was Syed Ahmed bin Abdul Rahman Alsagoff. In 1868, he attempted to establish a waqf by specifically directed that his freehold and leasehold property should not be sold or mortgaged or in any way encumbered, but should be held in perpetuity by his trustee

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65 Ibid.
upon trust, to let the same from year to year or for any term not exceeding five years at the best rent, to manage and receive the rents and profits and after payment of the incidental outgoings and expenses.\textsuperscript{66} However, being mindful of the limitations of English law, he astutely added the crucial provision if the English Law Against Perpetuities is enforced, then the same rights be accorded to his trustees and heirs “for and during the further term or period of twenty years to commence and be computed from the time of the decease of the survivor of the said children.”

The alternative trusts above in accordance with English law were consequently established upon his death in 1875, but later contested in 1918 by the founder’s descendants who argued that trusts of the will, both as to corpus and income, were void for remoteness.\textsuperscript{67} By 1917, there were two grandchildren (who were income beneficiaries) who were born after Syed Alsagoff’s death, and they had died leaving children. If these great-grandchildren succeeded to their parents’ shares, there would be two successive unborn generations taking life interests in the income.\textsuperscript{68}

The case did not revolve around the applicability of Islamic law. Rather it turned upon the question of old and new versions of the Rule Against Perpetuities. The rule of \textit{Whitby v. Mitchell} (1889), sometimes called the Old Rule Against Perpetuities, prevented

\textsuperscript{66} According to the law report, the expenses included repairs of the houses and buildings and the construction of new buildings when judged beneficial to the interests of the estate and including the rebuilding of any houses or buildings which had become decayed or had been destroyed or injured by fire or tempest, to distribute $1,000 annually at the discretion of the trustee for charitable purposes (sedikah) according to ‘Mohammedan customs and uses,’ and to divide the clear residue of such rents and profits annually amongst the Testator’s wife and children above-named and their descendants according to the shares prescribed by the ‘Mohammedan law.’

\textsuperscript{67} The other plaintiffs were the executors of the trust and the Attorney-General who represented the charitable objects of the trusts.

\textsuperscript{68} The deceased testator had, at the time of the suit, eighteen great-great-grandchildren and one great-great-great-grandchild.
the creation of a settlement by giving a series of life estates from father to son for
generations was often invoked.\textsuperscript{69} Eventually, the Chief Justice Bucknill held in the
Alsaogff case in the Court of Appeal in 1918 that \textit{Whitby v Mitchell} had no application on
the ground that the legal conditions applicable to the transmission and devolution of
real property in Singapore were different from those applicable in England.

Legal uncertainty of the \textit{waqfs} stemmed from the absence of formal legal codes
on the \textit{waqfs}. From the outset, it seemed that the general lack of formal codification of
laws concerning the \textit{waqf} gave the judges much potential leeway in their legal
decisions. In other words, the absence of specific legal codes, and case law concerning
legal administration of the trusts and \textit{waqfs} in the Straits Settlements presented judges,
at least theoretically, with the opportunity to perform a new set of legal gestures in
colonial courts. Unfettered by established legal codes in the Straits Settlements, judges
potentially possessed much flexibility, and were in fact, compelled to act upon their
own initiatives in the absence of specific legislation on the \textit{waqf} in the Straits
Settlements. The judicial interpretation of concepts and applications of charity law was
a particularly subjective approach with no clear definitions in English and Irish court
decisions that formed the main body of precedents alongside a handful of Indian cases
in \textit{waqf} cases in the Straits Settlements.\textsuperscript{70}

\textsuperscript{69} The rule had in fact been accepted and practiced by conveyancers for two centuries
prior to 1889 when it became the subject of judicial decision. For a discussion of the
discussed extensively in the following case. \textit{Syed Ali Bin Mohamed Alsagoff And Others V.
Syed Omar Bin Mohamed Alsagoff And Others} [1918] SSLR 2.

\textsuperscript{70} Irish and English courts actually disagreed on key issues involving charity such as the
question of whether gifts to a closed order of nuns were legitimate. While courts in
However, it seems that judges in the courts of the Straits Settlements preferred not to exploit this judicial freedom. Instead, judges in the Straits Settlements actively opted to align themselves with decisions in British India. No matter how keen the judges might have been in wishing to chart their own legal course in the Straits Settlements, the parochial nature of the legal system is such that a legal decision which was consistent with previous rulings elsewhere in the Empire was preferred to an inconsistent one. In this manner, previous legal rulings provided a basis of authority for later ones in the Straits Settlements. Judges’ judicial discretion was consistently tempered by previous colonial rulings as well as English statutes that had been enforced in the United Kingdom and/or elsewhere in the Empire.

**Legal Definition of Charity**

Despite the emphasis on the English Law of Perpetuities, the perpetual nature of trusts did not automatically render it void, for the establishment of public trusts clearly meant for charity was actually permitted in the Straits Settlements. The English Law of Perpetuities did not apply to charitable trusts. Due to the fact that charitable *waqfs* could run perpetually, English courts paid extra attention to *waqfs* that were labelled ‘charitable’ since they might just be a shrewd tactic to circumvent limitations on perpetuity that were imposed on family *waqfs*. Wills and *waqf* deeds produced by Arab testators however did not differentiate between public and private, thus forcing judges to pore over individual terms dictated by testators in order to parse the terms.

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71 Judge-made law was frowned upon being subject to the temper of the individual judge. Thomas Macaulay, India’s first Law Member referred to it disparagingly. Elizabeth Kolsky, “Codification and the rule of Colonial Difference: Criminal Procedure in British India,” *Law and History Review*, 23,3 (Fall 2005): 634-640.
according to English legal conceptions of charity in order to determine whether the trust was viable or not. This led to a seemingly subjective system of determining what was ‘charitable’ in colonial courts. Subsequently, certain terms in wills and deeds were consistently deemed uncharitable by court judges. They included ‘kandoories,’ postmortem feasts which were given to relatives, friends and the poor in the name of the deceased testator. Judges reasoned that these ceremonies were intended to be held in honour of an individual, and did not lead to any public advantage or utility. In addition, pilgrimages to Mecca done in the testator’s name was also considered uncharitable since they were conducted for the sole benefit of the testator.

Waqfs often ran aground, partially or completely, on the English Common Law definition of charity in the colonies. In contrast, the Islamic definition of charity is

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72 A law report in 1887 of a case in Penang involving Indian Muslims indicated that a kenduri for a dead person was “supposed by Malays to confer some benefit on the soul of such person and is generally observed first on stated dates after his death and on the anniversary of his decease in such succeeding year. Ashabee & Ors. V. Mahomed Hashim & Anor. 4 Ky 212. Often at these feasts, alms were given to the poor and prayers were recited. Mustan Bee & Ors. v. Shina Tamby & Anor. 1 Ky 580. A ‘kandoorie’ or ‘kenduri’ is a feast that symbolizes and celebrates the major events in the human life cycle from birth to death. These events include birth, circumcisions, marriages and death anniversaries. They were also given to repay social obligations, and to catch up with friends. They also provide individuals with an opportunity to indicate the growing closeness of a relationship, its weakening or its demise. David J. Banks, Malay Kinship (Philadelphia: Institute for the Study of Human Issues, 1983), 158-165.


74 The preamble to the Statute of Charities in 1601, also known as the Charitable Uses Act of 1601 or Elizabeth Statute (Statute 43 Eliz. C. 4), limited the classes of legal charities. However, the preamble was meant to be hortatory than definitive. The list included 1) The relief of aged, impotent and poor people, 2) the maintenance of sick and maimed soldiers and mariners, 3) the maintenance of schools of learning, free schools and scholars in universities, 4) the repair of bridges, ports, havens, causeways, churches, sea-banks and highways, 5) the education and preferment of orphans, 6) the relief, stock, or maintenance of houses of correction, 7) marriages of poor maids, 8) the
extremely broad and wide-ranging including all actions which were benevolent and “doing good for humanity in general.”

‘Charity’ was indeed a malleable concept, which colonial courts continually tried to fix from the perspective of colonial benefits at the time – social, economic and political. However, according to Jeffrey Schmidt, in modern society, charitable giving is above all the heroic act of an individual, perhaps spurred on by religion, conscience, or social concern, but only contingently related to either the reproduction or imagination of social order; its meanings as a social act are diluted, secondary, and obscure. Charity is, in other words, context-dependent, rooted in practices of sociability, irreducible to a core principle of application.

However, charity could be regulated by courts, certain charitable characteristics of the *waqf* were firmly banned from taking root in the Straits Settlements despite being well-established in the Islamic legal tradition.

Within the colony, the meaning of charity in English courts was influenced by two related factors, namely the role of judiciary, and second, the interpretation of the

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supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed, 9) the relief or redemption of prisoners or captives 10) the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes. The statute remained unrepealed till Mortmain and Charitable Uses Acts of 1888. For a full text of the preamble in old English, see Lian, “Meaning of Charity in Malaya, 220-222.


76 Schmidt specifically traces the concept of charity in the public statements made about charity in the context of the early eighteenth-century charity schools linked to the discourse on social and moral discipline of the poor. In light of Schmidt’s study of English openness towards several conceptions of ‘charity in England, it is rather jarring that the Muslim concept of ‘charity’ was not recognized in British colonies. Jeremy Schmidt, “Charity and the Government of the Poor in the English Charity-School movement, circa 1700-1730,” *Journal of British Studies* 49, 4 (October 2010): 774-775.
concepts of charity law. Although both forms of trusts were equally valid according to Islamic law, family waqfs were regarded as markedly different from public waqfs according to English law. Unlike family waqfs, public waqfs (waqf khayri), where the founder dedicates property to a religious or charitable institution, were deemed charitable according to English law, and therefore faced fewer legal impediments in the Straits Settlements. This was because according to the principles of the English law of charities, a purpose is not charitable unless it was for public benefit, although British authorities recognized that the Muslim definition was different. By the late 1880s, the legal definition of charity in England referred specifically to the act of giving with

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77 Although deemed problematic, this legal framework carried over to postcolonial Malaysia. Lian, “Meaning of Charity in Malaya,” 221-222.

78 In fact, colonial courts administered family waqfs more extensively than public waqfs. This was because public waqfs could be administered, at least partly, by Mohamedan Advisory Boards established by the government in each Straits Settlement, Each Advisory Board was headed by a British colonial official with several local Muslims under his charge. Unlike family waqfs, public waqfs could be administered, at least partly, by Mohamedan Advisory Boards established by the government headed by a British colonial official with several local Muslims under his charge. Indeed, endowments in land or money given or to be given for the support of any mosque or other pious, religious, charitable or beneficial purpose were to be managed by the Mohamedan and Hindu Endowments Board from January 1st 1906 onwards. Ordinance no. 92, Section 2, Laws of the Straits Settlements, Volume 1 (London: Waterlow, 1926), 92. This did not mean that public waqfs escaped the courts’ attention altogether during the colonial period. For more details on the administration of public waqfs, see Haji Salleh Bin Haji Ismail And Another V. Abdullah Bin Haji Mohamed Salleh And Others. [1934] SSLR 7; Re Shrine Of Habib Noh [1957] MLJ 139.

79 As part of the wealthy Muslim elite in the traits Settlements, rich Arabs frequently established public trusts which consisted mostly of mosques and schools. Public waqfs have various uses. They have been used to supply weapons to warriors fighting in God’s service, provide funds for the establishment of mosques, schools and hospitals and pay the salaries of scholars, religious functionaries and students. Powers, “Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India,” 536.

80 Ahmad, The Legal Status of the Muslims in Singapore, 34.

clear intention of public benefit. In contrast, family endowments benefited only a relatively small, select group of people, i.e. members of a particular family of clan, instead of the general, more abstract public. An exception would be gifts meant for the testators’ poor relatives which were regarded as charitable in courts. Although the concept of charity was never properly defined, judges cited four specific divisions of charitable trusts, namely trusts for the relief of poverty, for the advancement of education, religion and trusts for other purposes beneficial to the community not falling under any of the preceding categories. Although Arab testators paid much attention to the English Rule Against Perpetuities by significantly modifying their waqfs in this respect, they opted not to alter charitable clauses in their wills to suit English legal definitions of charity. Rather, they stuck to a list of clauses deemed charitable according to Islamic law. It was for this reason that Arab waqfs partially or completely failed.

**Diasporic Complications and Multiple Translations**

A diasporic family structure that spanned huge geographical expanses guaranteed that a complex trans-legal existence Arab clans maintained. Hence, British judges frequently wavered between *lex situs* (law of the place in which property is situated) and *lex domicilli* (law of domicile) and had to address this dilemma at the beginning of

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82 Birla, *Stages of Capital*, 70.

83 Interestingly, Wael Hallaq points out that the understanding of many Muslim jurists is that the charitable nature of the *waqf* dictated that the rich could not benefit from charitable endowments. However a minority of later Shāfi’ites, came to approve of establishing endowments for the benefit of the well-to-do. Wael Hallaq, *Sharīʿa – Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 145.
law reports.\textsuperscript{84} \textit{Lex situ}s ultimately triumphed.\textsuperscript{85} Eventually, judges consistently concluded that since the immoveable property that constituted the \textit{waqf} was situated in the Straits Settlements, they should be subjected to English Law. With regards to a ruling in 1923 over the Alkaff family \textit{waqf} in Singapore, an English judge emphatically stated that

\begin{quote}
The trustees, having chosen Singapore as the site of the trust estate, we have only to consider the law administered by these Courts. That law is municipal in the strictest sense. The domicile of a testator, or the religious sect to which he belonged, is never allowed to interfere with the destination of his immovables... it is so firmly embedded in our law that no Court can venture to break in upon it.\textsuperscript{86}
\end{quote}

Diasporic complications led to translation difficulties and Arab \textit{waqfs}, not surprisingly, ran aground of language complications. Often, Arab testators produced multiple wills- either simultaneous versions of the same will in different languages, or completely different wills produced at separate times which supplemented or cancelled earlier versions. Sometimes, a testator’s final will would emerge to challenge another version of his will that had already been accepted by legal authorities in the Straits Settlements, although this was surprisingly rare in cases involving Hadhramis.\textsuperscript{87} To

\begin{flushleft}
\begin{itemize}
\item \textsuperscript{85} At least one scholar has pointed out that it is commonly known that wills involving immoveable property was clearly subject to lex situs in Britain. If so, it is curious that judges grappled with this question well into the twentieth century. This pointed towards the wide judicial discretion that judges in the Straits Settlements seemed to possess. E.J. Cohn, “The Form of Wills by Immoveables,” \textit{International Journal of Comparative Law Quarterly}, 5 (1956): 395-404.
\item \textsuperscript{86} Re Syed Shaik Alkaff, Decd.; Alkaff & Anor V. Attorney-General [1923] MC 1.
\item \textsuperscript{87} A will by an Indian Muslim who died in Singapore was challenged by a later version in India. \textit{In the Estate of Vavena Katha Pillay Marican, deceased}, SSLR [1934] 281.
\end{itemize}
\end{flushleft}
complicate matters further, translations were often made by several translators, often due to the testators’ highly mobile lifestyle which made them subject to multiple jurisdictions that possessed their own respective official languages – both local and colonial. Sometimes, testators died in one place having established trusts in another. Even when the testator had settled in the Straits Settlements for a considerable amount of time, he tended to bear in mind his far-flung relatives connected with his trust or will and produce multiple, though not necessarily identical, versions of the same will. Complications also arose due to the lack of capable translators in one location who could translate directly, or locations of documents and originals.

In the Straits Settlements, the problem of interpretation of wills in Arabic arose due to the multiple layers of translation that the will underwent before finally being accepted in probate.\(^{88}\) Wills written in Arabic were often translated into Malay by one translator, then from Malay into English by another translator in the Supreme Court.\(^{89}\) Not surprisingly, such translations were seldom identical.

No case reflected the complexity of multiple wills in different languages more than the case revolving around the multiple wills of an Arab merchant who made his fortune in Singapore named Syed Ahmed bin Abdul Rahman Alsagoff who died in Singapore on March 27 1875.\(^ {90}\) 7 years before, on December 21 1868, he made a will in Arabic which was annexed to his English will dated nine days later, 30\(^{th}\) December 1868 which was subsequently proved by his son who was also his executor, Syed Mohamed

\(^{88}\) Re Syed Shaik Alkaff, Decd.; Alkaff & Anor V. Attorney-General, [1923] MC 1.
\(^{89}\) In general, legal practitioners often complain about the difficult of getting proper translations of documents written in Arabic.
\(^{90}\) Syed Ali Bin Mohamed Alsagoff And Others V. Syed Omar Bin Mohamed Alsagoff And Others. [1918] SSLR 2.
Alsagoff. Both documents were admitted to probate. Rather interestingly, in the law report, the judge implied that he regarded the main will to be the one in English, with the Arabic as addendum, despite being aware that the English document was created several days after the Arabic one. It was even suggested in court that the Arabic will formed “part of the English will” as if it was not sufficient to stand on its own. The original Arabic will, despite having been produced earlier, was thus relegated to a secondary status, and the English will became the sole document referred to during more than half the trial. However, the Arabic will subsequently acquired a more important status as the Alsagoff waqf continued to be challenged in court through the rest of the twentieth century. During court proceedings, the judge appreciated the fact that the Arabic will contained much more precise detail that clarified certain vague but key terms in the English will. For example, it was determined that the term "descendants" could only ascertained by reading both the English and the Arabic together.  

Needless to say, erroneous probate copy of wills could have widespread repercussions through time. In the case of Syed Sheik Alkaff’s will of 1910, the Malay rendering was deemed inaccurate and “too free” by one of the judges in 1923. As a result, one of the plaintiffs’ lawyers was forced to tender a revised translation of the trust deed. However, even this revised translation failed to satisfy Judge Sproule, who

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91 Re S A A Alsagoff, Deceased; Syed Zakaria Alsagoff & Ors v R D Stewart & Ors [1958] MLJ 264.  
92 The judge held that the testator had intended to use that expression to include the remotest generation coming into being during the prescribed period, and that on the death of the parent each succeeding generation should take, per stirpes, a life interest in the income till the time of distribution (subject only to the share of every male being twice that of every female, as directed by the Arabic will).  
was unimpressed by the oral evidence of the Malay translator, Haji Wan Abdullah, who had been called to correct the earlier translation. Sproule lamented that the man was more disposed to give opinions on Islamic law than Arabic grammar which was his recognized area of expertise. On the other hand, he praised another Arabic translator named J.N. Mobaied, a commission agent in Singapore most probably from the Levant, who apparently knew Arabic and French very well, and whose evidence he found to be very reliable. However, while they might be experts in Arabic grammar and etymology, translators were certainly not experts in Islamic law. In fact, translators sometimes inaccurately framed understandings of certain highly specialized legal terms with their own prejudice or ignorance. Even the supposedly reliable Mobaied was not exempted from making literal translations that were oddly removed from context of the trust deed that was heavily imbued with highly specialized Islamic legal terms. For example, in the Alkaff case in 1923, Mobaied emphasized to the court that the term “amur-al-khaira”, (umūr al-khayra) which he literally translated as “bonnes oeuvres,” meant “nothing religious”, and simply denoted “giving something without return” or “generosity.” By contrast, all the court judges recognized the religious intentions of establishing waqf and the concomitant ‘amur-al-khaira’ specified in the deeds. Judges in the Court of Appeals sought to further refine juridical exactitude in their legal definition of the concept of waqf by referring to legal textbooks instead of merely relying on translators. Consequently, all three judges in the Court of Appeals consistently defined the phrase more comprehensively as “being good works in the eyes of God as perceived by a devout Muslim.”

94 It was likely that this was due to his lack of familiarity with the highly specific legal institution of the waqf.
The case turned upon yet another crucial translation error. Mobaied translated the Arabic word *awlad* as ‘children,’ and *ibna* as ‘sons,’ but Judge Sproule crucially pointed out that both words were translated simply as “anak-anak” in Malay, which in fact only meant ‘children’ without taking gender into consideration. Gender distinction was crucial due to the different inheritance shares for male and female progeny under Islamic law. Syed Shaik Alkaff himself took pains to list the names of his sons under “Ibna” (*abnā’*) and all this names of his children, male and female under “awlad” (*awlād*) in his will.95

**Female testators and heirs**

The term *abnā’* excluded female descendants entirely. Because of this exclusion, the class of descendants that was often the subject of debate in court was female descendants, and by extension, the issue of female descendants. Indeed, several Arab family *waqf*'s tended to exclude daughters from the settlement, or deliberately limit the amounts they could reap from the trust.96 However, as long as they lived on the family estate, they could gain from the *waqf*.97 In general, lineal descendants formed the main...

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95 One of the terms of the verdict in fact turned upon this very point. The original will stated the condition for a granddaughter of Syed Shaik to partake from the corpus, was that Syed Shaik’s son had to die before him or prior to the date of the agreement. Thus although one of the testator’s daughters had died, the judge ruled that her share should not go to the daughter of the deceased who was one of the defendants in this case.

96 Rather ironically, within the Ottoman Empire, since women’s right to own property was guaranteed by Islamic law, the alienation of property in *waqf* gave additional legal sanction and protection to women’s property ownership and control, because the *waqf* is regulated by Islamic law and came under the authority of the Islamic court. these women often alienate their property during their lifetimes. Mary Ann Fay, “Women and Waqf: Toward a Reconsideration of Women’s Place in the Mamluk Household,” *IJMES*, 29,1 (February 1997): 36.

97 Upon marriage, women tended to leave the estate and therefore lost their right to benefit from the *waqf*.
class of beneficiaries of *waqfs* established by Arab families.\(^{98}\) The exclusion of living daughter and granddaughters was due so the expectation that women would marry and leave the family home.\(^{99}\)

Law reports indicated that women tended to reserve for themselves to the right to be the first administrators of their own property, including endowments. They used this right to establish *waqfs*, and sue against infringements to their property. However, the number of cases involving female settlors in the Straits Settlements was certainly few compared to that of male settlors, although women were deemed as qualified as men in their capacity as managers of endowments.

There were certainly key differences between trusts established by female testators and male testators in law reports. Firstly, cases centered around female settlors tended to stand alone with little, if any, follow-up in court. In contrast, most of the other cases referred to in this dissertation tended to be revisited often, as heirs periodically renewed their claims to dissolve a *waqf*, either to take advantage of changing legal administrations, or to argue against existing trustees’ ineptitude or untrustworthiness in managing the trust. For example, the legal dispute involving the Alkaff family settlement was renewed about every ten years up till 2001.

Secondly, law reports indicated that a large number of widows preferred to act through proxies. These women rarely acted on their own in any capacity apart from the original act of conferring authority, either partial or complete, to their chosen

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\(^{98}\) Nonetheless, on the whole Tyabji’s *Principles of Mohammedan Law* emphasized that a *waqf* often benefitted two classes of descendants namely women and orphan who were often excluded from inheritance. While women may have benefitted more from *waqfs* established by Hadhramis in the Straits Settlements, this was not obvious from the *waqfs* disputed in Straits Settlements courts. Tyabji, *Muhammadan Law*, 539.

\(^{99}\) Kozlowski, *Muslim Endowments and Society in British India*, 56.
representative. Often, their brothers, brothers in-law, sons, and other more distant relatives acted on their behalf in a legal capacity as powers of Attorney. Hence, although law reports purported to represent the woman’s voice in court, it was more likely that they were recording her representatives’ claims instead. Women’s independence was somewhat curtailed by the fact that male witnesses were required to be present at the preparation of official documents. The 1883 will of Raja Siti binte Kraying Chanda Pulih, the rich widow of the Arab merchant, Syed Ahmad bin Abdulrahman Alsagoff, listed the names of three of her male relatives as witnesses, although it seemed that she had full control over her property. Access to and control of wealth need not translate into greater autonomy or authority for women.

Thirdly, law reports of cases involving female settlors’ wills and deeds were more detailed than other law reports. Such attention to detail could be because female settlors were less common than male settlors. Thus their intentions might understandably need further explication. In addition, a wife had more leeway in dispersing her income as she was not bound like her husband to provide for her family. In fact, she could keep her income to herself if she so desired. Truly, it seemed that women tended to continue to disperse their income differently male settlors when establishing a waqf. As a result of this freedom, a female settlor’s instructions were likely to be less formulaic, and open to several permutations that had to be elucidated more explicitly.

100 Syed Abbas bin Mohamed Alsagoff and Another v Islamic Religious Council of Singapore (Majlis Ugama Islam Singapura) [2009] SGHC 281.
Raja Siti’s will, for example, differed from male testators’ wills. Her will stated that she created a *waqf* from her houses and her mother’s estate. In establishing *waqfs*, testators usually exploit the opportunity to specifically name the beneficiaries that often consisted of patrilineal descendants. In addition, women founded trusts that tended to benefit other women to a significant degree proportional to their entire estate. Raja Siti bequeathed a significant portion of her estate to female descendants of the Prophet in Mecca, Madina and Taif. Likewise, in November 1911, another wealthy woman named Sharifah Shaikah bt. Syed Omar bin Ali Aljunied bequeathed a third of her estate be applied to purchase a house or shop and apply the income of the property to commemorate the memory of herself, her, her parents and her daughter. This could be construed as an attempt to create a sort of matrilineal system of property devolution on the part of female settlers.

**Conclusion**

The legal status of the *waqf* long remained a contentious issue in the Straits Settlements. On December 12 1955, lawyer J.C. Cobbett beseeched local courts to clarify

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102 It was unclear what portion this estate occupied relative to her entire property not mentioned in this particular document. Since she only delegated half of her property to her kin in her will, it was possible that she had made a separate settlement which was not addressed in the law report. Ibid.
104 In addition she directed that free supply of ten vessels of zamzam water be provided to the holy mosque of Mecca, furnishing a mat for Quran reciters every night for the period between the third and the fourth prayers and engaging annually somebody to perform the pilgrimage on her behalf. *LS Investment Pte Ltd v Majlis Ugama Islam Singapura* [1998] SGHC 51.
105 Unfortunately, there are insufficient law reports to corroborate this in the case of the Straits Settlements. Hallaq, *Shari`a*, 195.
laws regarding Muslim subjects in the local newspaper.\textsuperscript{106} One of the questions he asked was – “Can a Mohammedan create a trust?” He answered his own question by responding – “I rather doubt it unless by wakf.” This led to another related question – “Is a wakf to be regarded as a testamentary instrument?” Cobbett again responded to his own query, this time in the affirmative, since he believed “there is some case authority for it.” Although the word waqf had often been equated with ‘trust’ in numerous trials, Cobbett clearly deemed the two entities to be distinct. Cobbett’s second response implied that case law was responsible for reinforcing the status of a wakf as a testamentary instrument. This implied that the legal status of a waqf within the Straits Settlements was mainly, and perhaps only, reinforced by the several waqf disputes in colonial courts.

Despite their high mobility across the Indian Ocean and within the Malay Archipelago that granted them a wide array of legal avenues and jurisdictions, wealthy Arab patriarchs usually chose to link their families to a British colony by rooting a significant source of family wealth in the Straits Settlements. By entering their wills into probate at English courts in the Straits Settlements, and by alienating their immoveable property to form their family waqfs, Arab migrants constantly subjected themselves to English law which in turn significantly shaped the establishment and administration of these religious institutions. Although family waqfs were private religious establishments, they were not automatically relegated to the realm of personal law as they consisted of immoveable property, i.e. precious land resources in the colony. Ultimately, laws concerning the waqf were developed within the context of

\textsuperscript{106} J.C. Cobbett was offering a few comments on the new Marriage Bill relating to Muslims. “The Muslim Marriage Bill,” \textit{ST}, December 12\textsuperscript{th} 1955, 6.
the common law trust without taking into account Islamic law at all. This was evident from the legal restrictions imposed on family waqfs that were derived from the common legal tradition. Firstly, unlike Hindu religious endowments, waqfs were restricted from the outset by the English Rule Against Perpetuities. Secondly, clauses in a family waqf that were deemed unambiguously charitable according to Islamic legal precepts were instead denounced as being uncharitable in English courts. The bases of these rulings were clearly not Islamic law but English Common Law. Influential precedents cited in these cases often involved English, Irish and Indian trusts which were already limited by English law. Not surprisingly, it was rare for waqfs in the Straits Settlements to be approved of entirely in accordance with the wishes of the testator in colonial courts.

By repeatedly denying posterity to family waqfs which could potentially alienate property perpetually, the courts functioned as state agents intent on generating as much revenue as possible for the colonial power.\(^ {107} \) Taxes bore directly on the development of property rights institutions which had to be defined and redefined.

\(^ {107} \) After all, even when privately-owned freehold and leasehold property by individual residents, it was usually held under either 99 years or 999 years lease from the government. In his seminal book on waqfs in British India, Gregory Kozlowski touches upon the debate on trusts in England which had two opposing poles represented by John Stuart Mill who supported trusts, and Lord Hobhouse on the other end. Adam Smith’s influential idea that interest of the state requires that lands should be as much in commerce as any other goods for when land is in commerce and frequently changes hands it is most likely to be well managed. Needless to say, this belief is the antithesis of the waqf. However wealthy landowners in England were able to circumvent this restriction by agreeing to accept a specific income from an estate while renouncing the right to sell or alienate the property that formed the basis of the family’s wealth. This was renewed every third generation and limited in force to thirty years after the death of the most junior participant in the entail. Technically this did not therefore violate the rule forbidding perpetuities. However, in the colonies, legal authorities were more mindful of such wily tactics. Kozlowski, *Muslim Endowments and Society in British India*, 148-149.
throughout history.\textsuperscript{108} This outright ban on perpetual trusts noticeably represented direct state intervention into the family and religious domain.\textsuperscript{109} Here we see a tension between the political goal of placating religious communities, and the practical desire to conserve modes of production in which the structures of family and community organized labour, investment and exchange.\textsuperscript{110} As a compromise, \textit{waqfs} that started out as perpetual family trusts were mostly allowed to continue to exist, but in a limited fashion, in order to abide by English law.

The legal structure in the Straits Settlements which had allowed the testator to establish the \textit{waqf} simultaneously paved the way towards its dissolution by the 1950s. As a result of the peculiar status of the \textit{waqf} that mainly consisted of immoveable property in the Straits Settlements, litigants who wished to challenge the status of an existing \textit{waqf} were guaranteed a legal forum that could potentially be hostile to \textit{waqfs} in the form of colonial courts. Nonetheless, it could not be said that litigants wholeheartedly embraced the colonial court’s power to adjudicate in \textit{waqf} matters. After all, the colonial court was the only formal legal recourse sanctioned by the ruling government in the Straits Settlements for any kind of legal dispute, a colonial reality that Muslim subjects were aware of. English law was appealed to in other issues as well outside the scope of this chapter.\textsuperscript{111} Only rulings meted out by colonial courts were

\begin{footnotesize}
\begin{enumerate}
\item Ewout Frankema, “Raising revenue in the British Empire, 1870-1940: how extractive were colonial taxes?” \textit{Journal of Global History} 5, 3 (November 2010): 447-448.
\item Nicholas Dirks debunked the colonial myth that law was autonomous in practice by arguing that law was a powerful arm of the state because it appeared to be autonomous, seemingly separate from the government arm of the colonial state. Dirks, “From Little King to Landlord,” 322-323.
\item In one particular case involving an absent trustee of an Islamic religious \textit{waqf} (a mosque), a Muslim letter-writer cited an English law that stated that a trustee must be
\end{enumerate}
\end{footnotesize}
legally binding in the Straits Settlements. In light of colonial legal realities, Arab litigants perhaps had no choice but to subject the waqf consisting of immoveable property to a colonial legal system devoid of religious considerations. In any case, there were no clear winners or losers in each legal dispute since English law would have benefitted some, where Islamic law would have allowed others to gain.

consecutively absent for more than 12 months before he lost his position. ‘Letter from A Mohamedan to the Editor,’ ST, December 2nd 1911, 10.
British authorities’ universal conception and negotiation of Islamic law stood in stark
distinction to explicit Dutch commitment to legal diversity in Southeast Asia. In British
India, legal codification had already undermined the Islamic classical tradition.
Codification of the shari‘a had enabled authorities to neatly sidestep the plurality of
legal opinions held by Muslim scholars and, eventually, ignore the spectrum of legal
interpretations on a single issue. British confidence, derived from their experience in
administering Islamic law in India, created a global view of Islam. But, to the dismay of
British judges in the Straits Settlements, the hybrid Anglo-Mohamedan Law that
emerged in British India at the end of the eighteenth century proved to be an
inadequate export, given that local Muslims generally belonged to a different school of
law, that of Imām Shāfi‘ī. Hence, despite an awareness of key differences between the
two schools of law, especially with regards to family law, British legal authorities did
not create a separate legal code anywhere else in the Empire. Perhaps their universal
view of Islam rendered such an effort unnecessary. Instead, local variations were
simply tacked on to existing legal codes based on Hanafi law.

But even then, Islamic law was not consistently applied in the realm of family
law. In fact, English Common Law deeply impinged upon Islamic law, even as British
administrators claimed to administer codified versions of Islamic law for their Muslim subjects. While a plural legal system was preserved in matters of personal law, Islamic law was still subordinate to English Common Law and Muslim marriages in particular were incongruously subjected to English legal definitions which were based on Christian religious terminology until the end of the nineteenth century, as Chapter Three has shown. Law reports of cases involving waqfs in the Straits Settlements cited English and Irish cases almost exclusively, rather than other cases involving religious family endowments elsewhere in Empire. While the notion of marriages were ultimately resolved by 1880 with the promulgation of the Mohamedan Marriage Ordinance, the term waqf was unwaveringly equated with the English trust, along with its many accompanying legal restrictions. Since a waqf could potentially lead to the perpetual alienation of property which would mean to a great loss of revenue for the colonial state, the government could not afford to grant Muslim subjects the full ability to abide by Islamic legal precepts with regards to this particular institution. At least, as Chapter Four has shown, each family waqf was allowed to partially exist, unlike in the Netherlands Indies where each institution was banned completely.

As a migrant diasporic community across the Indian Ocean, Arabs theoretically had recourse to a variety of legal forums. Rather than avoid colonial courts though, we have seen how Arab communities tended to seek justice and accountability in separate colonial legal arenas for various reasons. This was because the Arab elite had opportunities to influence colonial administration of their respective communities through political and social means. Indeed, they had control over administration of family law in these colonies that was entirely disproportionate to their numbers given
that they were a tiny minority within the Muslim society of Southeast Asia. Colonial channels were therefore the most effective way to gain control over their communities.

Even so, it seems that Arab subjects did not consistently desire for Islamic law to be applied in the colonies where they resided. Indeed, colonial law presented opportunities to gain other more earthly immediate material benefits besides God’s approval. As the last chapter argued, Arabs were actually pragmatic in their approach towards Islamic law. In trying to dissolve waqfs, trust beneficiaries, rather than adhering to the wishes of their dead ancestor who established a religious institution, repeatedly challenged the validity of these endowments in British colonial courts, knowing full well that English Common Law banned perpetual trusts and non-charitable trusts.

Indeed, British colonial courts in the Straits presented opportunities to Arab colonial subjects. As Chapters Two and Three demonstrate, Arabs tried to enforce their own notions of Islamic law on Arab women through both Dutch and British colonial courts without success. Efforts to guarantee that female descendants of the Prophet marry men of equal status were derailed in colonial courts. In the Straits Settlements, British judges’ were eager to protect Muslim women from patriarchal figures that drove them to be skeptical of these claims of kafā’a. At the same time, the pressure to keep their promises to respect religious laws in the realm of personal law compelled individual judges and magistrates to delve deeper into legal codes and religious textbooks only to discover that such notions of marriage were not universal at all, and were in fact peculiar to the Arab Sayyids. Hence, these so-called laws were eventually
not applied to Arab women who wished to marry non-Sayyids. In this way, British
colonial courts inadvertently empowered these Arab women.

With hindsight, while the administration of Islamic family law resulted in a
mixed bag for various Arabs in the Malay world, commercial law was a more
predictable arena. In the 1880s, Dutch colonial official L.W.C. van den Berg noted that
Singapore possessed the most flourishing, though not the largest, Arab colony in all the
Indian Archipelago.¹ This phenomenon, which lasted till the outbreak of the Second
World War, proves historian Janet Abu-Lughod’s argument that what mobile merchants
value above all else is freedom from oppressive restrictions and taxes, the ability to
store their wealth safely and to switch their capital at will from one trading circuit to
another.² In this way, their primary roles as agents of trade in societies were politically
contingent and economically unstable. Their loyalties were determined primarily by
the level of freedom granted to conduct trade. Since property was entwined with
family law, Arab property-holdings was intrinsically linked to political power.
Ultimately, the Straits Settlements, especially Singapore, seemed to be a more
attractive locale for Arabs in the region.

Furthermore, the indeterminacy of ethnic classification of Arab subjects led to
instability of jurisdictions. As shown in Chapter Two, legal classifications artificially
separated Arab residents from native Muslims in the Netherlands Indies unlike in the
Straits Settlements where they were grouped with their Muslim co-religionists. While
the personal laws of all Muslim subjects came under British colonial purview,

¹ L.W.C. van den Berg cited in W.H. Ingrams, A Report on the Social, Economic and Political
Condition of the Hadhramaut, (London: His Majesty’s Stationery Office, 1936),149.
² Abu-Lughod, Before European Hegemony, 311.
The main source of grievance for Arabs based in the Netherlands Indies was that Islamic law was not fully implemented throughout the Dutch colony since Dutch authorities prioritized local adat laws instead. Despite inconsistencies in the application of Islamic law, the British imperial framework based upon English Common Law was generally appreciated by diasporic Arabs who valued predictability and commensurability of laws in different locales.

Indeed, rational efficiency associated with Weberian bureaucracies was realized to a greater extent in the more centralized British Straits Settlements, a colony within an agglomeration of territories within the British Empire, loosely centered on the metropole where the Privy Council was the highest court within the legal hierarchy. By contrast, the Dutch government’s reluctance to centralize administrative and legal bureaucracies meant that legal policies and classifications were never determined and hardly standardized in the colony.

In present-day Singapore, Malaysia and Indonesia, Arabs are subjected to Islamic law along with their co-religionists in the realm of family, although in all three countries, colonial fragmentation of society brought about by institutional politics
 persists. While Singapore retains the racial classification of Arabs, Malaysia subsumes
Muslim Arabs and Indian Muslims under the category of ‘Malays’ to a higher degree.
Postcolonial taxonomies devised by governments of Malaysia, Singapore and Indonesia,
whether deliberately or not, reflect social realities more accurately than colonial
classifications, at least with regards to the Arab communities. Have the Arabs thus
stopped being less foreign in Indonesia today? While the Chinese communities
acculturated into the nation-state of Indonesia, they recently experienced an ethnic
resurgence. Did the Arab communities ever experience a similar phenomenon? A
systematic study of Arab identities during the postcolonial period awaits.

How do we explain the popularity of colonial legal codes and rulings in
Singapore, Malaysia and Indonesia today? In Malaysia and Singapore, the pressures of
common law dictates that legal precedents were binding and therefore could not be
cast aside easily. Colonial translators deliberately preserved certain particular terms
such as *waqf*, *iddah*, *talaq* and *baligh*. The preservation of specialization of technical
terms could also be part of the British and Dutch colonial attempts to monopolize the
discourse, which included impressing the lay public with their specialized skills and

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3 For more on racialization in Southeast Asia, especially Malaysia, see Sumit K.
Mandal, “Transethnic Solidarities: Racialization and Social Equality” in *The State of
49-78.

4 Leo Suryadinata, “Resurgence of Ethnic Chinese Identity in Post-Suharto’s Indonesia:
Some Reflections,” *Asian Culture* 31 (June 2007): 11-17.

5 Legal scholar Ahmad Ibrahim writes that the postcolonial governments of Malaysia
(federal) and Singapore inherited the British mantle by administering Islamic law
without dealing with substantive Islamic law in any significant way. Ahmad Ibrahim,
“The Administration of Muslim Law in South-East Asia,” *Malaya Law Review*, 13 (July
1971), 128-129. For more on the development of Islamic family law in Malaysia, see
Raihana Abdullah, “A Study of Islamic Family Law in Malaysia: A Select Bibliography,”
command of technical language and literature, as suggested by Sally Humphries.⁶ But it also suggests a thread of continuity from the pre-colonial through the colonial period and up until today.

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