State legal pluralism: the intersection of adat, jinayah, and national penal law in Gayo, Indonesia

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Chapter VI
Conclusion

This book has discussed how the introduction of state-designed legal pluralism in penal law in Aceh started as a response to local protests against the central government. This state legal pluralism was established through the official recognition of adat law and the enactment of state Shari'a law in the province of Aceh in 2002, while national penal law remained in place.

The existence of state legal pluralism in Aceh would not have been possible if the authoritarian New Order government had not been replaced by a democratic system from 1998 onwards. Democratization shifted the Indonesian national government's approach from centralism to promoting regional autonomy, not only in Aceh, but also in other regions. The final step in this process was the Village Law (6/2014) which has enabled villages to adopt forms beyond the administrative village of the New Order regime and to revive and re-practice their culture, including adat law. However, Aceh province is the only region where a formal legal boundary between different legal systems was established.

This situation is not new. During colonial times the Dutch maintained a plural legal system based on race and social class (Hadikusuma, 1989, pp. 22–32; Haveman, 2002), yet there are clear differences. F. and K. von Benda-Beckmann call this transformation process the re-actualization or reinvention of older legal forms to match and legitimize the current and future administration of justice agenda (F. and K. von Benda-Beckmann, 2006, p. 8). An important consequence of the current practice of legal pluralism is the opportunity it offers legal actors not only to choose between existing legal systems in a way that suits their own interests (forum shopping) but also to choose a rule from a different legal system to achieve another legal outcome in cases concerning seemingly identical offenses as a strategy to deliver fairness to the plaintiff, defendant and or the community (legal differentiation).

By looking at the Mahkamah Syar'iyah, the secular court, and the adat tribunal, this research has studied how in Central Aceh (Gayo), the intersection of the three penal legal systems operates in practice in dealing with public morality and sexual offenses. I have also considered the roles of public prosecutors, police officers, officials of the district Shari'a agency, adat officials at the village level and WH Kampong. Legally speaking, all of them are state officials, and adat officials are therefore backed up by the government. Although they are elected by their village members, their power in solving communal issues and authority to force adat law derives in large part from this support. They are paid, trained and given particular

facilities by the provincial and district government. The same applies to WH Kampong, who are trained, given work incentives and the power to raid and detain offenders by the government.

Three major findings

This book presents three major findings. The first one deals with the relation between the village and higher levels of government. It is well-known that state policies often fail to change social arrangements because they are new and strange to the community who prefer their own (Moore, 1973, p. 723). This was the situation found in Gayo during the New Order. However, by recognizing customary rules and involving the village elites in the government developmental project, the new democratic regime has been much more successful in changing the Gayonese socio-politics and culture.

The second major finding relates to the development of adat concerning family and penal law. This research has found that these two fields develop in different ways. Adat family law has developed mainly as a result of changes in local communities' ideas about Islam, the influence of the Islamic court and the policy of land ownership introduced by the government. Under these external influences, Gayonese have reformulated their own adat legal rules concerning the family in ways that suit their sense of justice. The results are in accordance with the basic tenets of Islam but differ from the standard Islamic legal interpretations.

By contrast, the transformation of adat penal law happened only more recently and involved many actors from different political layers; local, national, and international organizations and activists. Initially, they aimed at maintaining the just achieved peace at the grassroots level in Aceh by using adat law and institutions. Later, some institutions and activists reconstructed the adat and promoted the codification of adat penal law. The arrangement and the outcome of the "adatized" mixture of norms differ from one village to another. Some villages have developed adat progressively. Instead of re-introducing the old norms, lawmakers, activists and local leaders in some places have developed new sets of norms influenced by local, regional, national and international practices and campaigns. These include religious, secular and liberal ideas such as human rights, gender equality and child protection. In other places in Gayo and Aceh in general, local elites have reintroduced old norms and traditions which give greater opportunity to elderly men to monopolize the adat. Both developments have been legitimated by the government.

Which of these two opposing legal developments has become prevalent depended on the presence and the creativity of state and non-state legal actors,

such as *reje*, activists and paralegals. It should also be noted that the continuous campaign on human rights in Aceh province has imposed limitations on village elites to enforce adat law based on old norms and traditions violating individual rights. On the other hand, it has also led village elites to codify adat law in order to force non-native village members, who adhere to different cultural system, to become subject to adat law, including the exile punishment that contradicts an individual's right to stay anywhere within the jurisdiction of the Indonesia.

The third finding concerns the state legal pluralism of penal law. This research has found that as a result of institutional recognition, adat has become more important than both Aceh Shari'a and national penal law for dealing with common criminal offenses in everyday life. This applies in particular to minor offenses, and, more specifically, to sexual offenses. The different objectives of adat and the other two legal systems provide room for forum shopping and legal differentiation, not only for community members but also for the police and the public prosecutor. The limits of Aceh Shari'a and national law, the injustice they may cause to the victim (in the case of Aceh Shari'a), and the negative effect they may have on a juvenile offender (in case of national penal law) reinforce the importance of adat for the community and state legal agencies.

On the other hand, activists and paralegals have challenged the undifferentiated adat approach of sexual offenses – adat simply categorizes any sexual offense as premarital or extramarital sex (which reflects the community's understanding about sexuality) – and the lack of legal knowledge of village/adat officials. This situation makes the interaction of the three penal systems highly dynamic and always open to new (re)interpretations, (re)organization, (re)positioning and interventions. Their legal boundaries have become flexible and negotiable despite the set of formal boundaries designed by the government to manage overlapping jurisdiction between them.

In fact, state legal agencies benefit from the support of adat to the enforcement of the state Shari'a project on morality and sexuality. On the other hand, adat has gained autonomy and is hard to control for the government. The rise of vigilante action against sexual offenders is an example of such uncontrollable outcomes from using adat for the state legal project.

The rise of vigilantism on behalf of the state can also be seen in the coastal part of Aceh province. As David Kloos has observed, vigilantism is conducted in the name of the enforcement of *shari'a* at the village level (Kloos, 2014). In Central Aceh, as I have found, it is conducted in the name of adat. For the police, on the one hand, adat contributes to decreasing their workload, but on the other it makes it harder for them to protect individuals citizens, particularly (suspected)

offenders. For the Shari'a agencies it matters that the adat institutions are helping them in achieving their mission, i.e. controlling and suppressing immoral acts in the community.

This book discussed the utilization of adat for the state Shari'a project in the creation of the WH Kampong and based on this case presented two more general conclusions. First, the presence of more than one penal system produces interlegality, in which the provision of one legal system is adopted by the other. This phenomenon takes many forms and is observable in countries where the demand to recognize indigenous law is high (Collier, 1998; Hoekema, 2005; Proulx, 2005; Simon Thomas, 2009). An example of such interlegality in Central Aceh is the report of WH Kampong to the district Shari'a agency, which mixed the provisions of Aceh Shari'a about *khalwat* and *zina* with the adat norms about *sumang* (shame). Secondly, the creation of WH Kampong suggests that two legal systems can be reconciled if both recognize a similar source of authority and aim at a similar objective, even if they are distinct as regards concepts and formulas. In this case, the commonality shared by state Shari'a and adat is their source of law and objective: the Divine Shari'a and controlling immorality.

This book argues that the pluralism of penal law in this case does not lead to contestation, as the pluralism of family law does (Salim, 2015), but instead that its nature is one of complementarity. An important cause of this difference is the legal procedure involved. In family law, as shown by many scholars (Irianto, 2004; Salim, 2010; Shahar, 2015), plaintiffs can directly file their case – with or without a lawyer. A judge's verdict or a communal consensus in the family can be contested in other judicial systems at the same level or before other authorities such as adat officials. In the penal law system, the contestation among legal systems exists only in how the laws formulate an offense and its punishability, not in how institutions contest each others' rulings.

Moreover, the interests of those reporting the crime or the interests of the victims are represented by state legal actors. Reporters and victims have no freedom to choose a legal system which best serves their wishes, but instead have to follow the hierarchical order of state legal pluralism. By contrast, state legal actors have the opportunity in case of certain offenses to choose among the three legal systems to apply legal differentiation in such a way: they select a particular legal system to obtain the legal consequences they desire. They observe the limits of each operating legal system and choose among laws to meet their own, the victims' or someone else's interest. For example, they can return a premarital sex case to the adat institution instead of pursuing it under State Shari'a or national penal law. The application of legal differentiation enables the police to satisfy the

sense of justice of those involved in the case, particularly when it concerns minors as offenders. At the same time the legal agency's own institutional interest may also be involved, such as realizing a reduction in workload and reinforcing the civil image of the police after they split away from the military in 2000.

Sometimes, the plural legal situation leads to problems. There are cases concerning extramarital sex offenses where two legal systems have been applied to the same offense at the same time. In the case of premarital sex offenses involving offenders from the same village, adat law has been applied where officially it is not applicable as the case concerned is within the legal competence of Mahkamah Syar'iyah. In these cases, the importance of social arrangements and support for the offenders prevents those involved from reporting such transgressions to the other legal systems. Such practical conjectures and the discretion of legal agencies blur and sometimes even undo the official design of the system. This shows how hard it is for the state to control adat. Adat has so far always managed to adapt to external forces and to produce new arrangements, which have kept it in place as the most important normative system for the community. Moreover, while state actors try to utilize adat for their political and legal interests, adat actors use the state to reinforce their power.

I will discuss these three findings in more detail in the following sections in an attempt to provide a comprehensive conclusion about the current development of state legal pluralism of penal law in Aceh province.

Gayo Villages in Post-New Order Regime

Unlike Minangkabau of West Sumatra and Rejang Lebong of South Sumatra, Gayo managed to maintain its village structure during the New Order. While the socio-political structure of society changed, traditions were less directly affected. The reason for this is that the Nagari of the Minangkabau and Marga of Rejang-Lebong were larger than the village structure of Gayo. During the New Order, they were broken up into many independent villages. This process disoriented the notions of social belonging and relationship, the cultural moorings and leaders' authority over law and politics. However, in Minangkabau adat retained its importance (Galizia, 1996; F. and K. von Benda-Beckmann, 2013, pp. 48, 149-152).

In Gayo, the territorial divisions consisted of *belah*, which were much smaller in size than the Nagari and Marga. In pre-colonial times Gayo knew kings, but these did not have authority over the entire *belah.* They could only rule in the *belah* where they resided, as their main royal duties were related to external affairs. Later the *belah* came under the less powerful *reje*. Although the traditional political structure changed during the New Order, the authority and the responsibility of

the *reje* and *imem* were maintained. Other traditional political posts, *petue* (*reje* assistant for adat) and *sudere* or *rayat* (the representative of the people), were still recognized but merged into the Village Community Body (LMD, *Lembaga Masyarakat Desa*).

Serious changes in village organization started after 1999, when the central government shifted from authoritarianism to democracy. The government gradually reorganized villages and granted them more autonomy in managing their affairs. This paved the way for reinstalling traditional socio-political structures and for the enforcement of adat law. Village autonomy became even more significant after the introduction of the Village Law in 2014. While the central government has managed to maintain some control over the implementation of developmental and political projects, this control does not extend to legal matters. Villages have become more autonomous in reinforcing adat law, as the central government promoted adat law to legitimize its position.

Another key development is that to boost village development, district governments have promoted the creation of new villages. This has led to a shift from the traditional *belah* village communities, where people from other ethnicities live next to the local *belah* members. It has also shifted the authority of *reje* and the jurisdiction of adat law from both personal and territorial to only territorial. These changes have forced all internal immigrants, both from other *belah*s and from outside Gayo, to follow the law of the local *belah*. Internal immigrants have become subject to *farak* punishment (temporal banishment from the village) for breaking the prohibition of endogamous marriage, just like local *belah* members. Since social security networks are highly important in Gayo, immigrants have no other option than accepting these changes. Reporting by immigrants to the police about the application of adat law makes no sense, as the later will ignore such complaints. Mostly of local origin, police officers adhere to adat norms as well. In new village territories, which do not belong to any *belah*, we also see that 'new' adat law has been constructed, following general principles of Gayo adat.

The promotion of new villages and the shift of jurisdiction have been followed by the introduction of democratic elections for *reje* and imam. This has reinforced their political and legal authority. They also receive a regular salary, training, extra income from specific activities, and other facilities. Such developments have made the village dependent on the government politically and financially. Consequently, the loyalty of the members has shifted from the *reje* of the *belah* to the *reje* and other officials of the village. Communal obedience and loyalty to village officials are based on the services the latter provide.

For the community, this development has an interesting consequence. Each adult member presently has the same political opportunity to elect and be elected. However, most do not consider this as the best way to select a village leader. In the old election system of *musyawarah* (communal deliberation), the community directly chose or 'forced' the most suitable candidate to become *reje* or imam. A simple democratic election served as a mean to respect the weakest candidate when there were two or more of them. The intimate knowledge attendees had of the personal and leadership qualities of each candidate usually resulted in the best qualified candidate taking office, even if reluctantly. This possibility has been ruled out by the current democratic system.

The old system also promoted the community's involvement in public services, since the *reje* and *imem* received no salary or other payments. As volunteers, they enjoyed much authority. This has changed by the shift from personal to territorial jurisdiction, the introduction of democratic elections and – most of all – the financial benefits connected to the office. The communal relationship has thus changed from reciprocal to nonreciprocal.

In all of Indonesia the government control over villages has also become stronger and deeper by assigning community policing officers of the Bhabinkabtimas to almost every village. The Bhabinkabtimas officer is the ultimate outpost of the state legal organization to deal with social order. They are involved in communal meetings and in ending communal disputes. In Gayo, or Aceh province in general, they are allowed to do so only after they take over a case for further investigation at the recommendation of *reje*. The Bhabinkamtibmas officers, who are mostly of local origin, are tied to adat and village consensus. Nonetheless, the presence of Bhabinkamtibmas officers in the village reflects the increasing government control over the village; these officers may be locally embedded, but first and foremost they are under the command of their superiors at the police station.

The outcomes of the policies conducted under the New Order and those developed since 1998 demonstrate that the government has been unable to penetrate the villages and transform their social arrangements (cf. Moore 1973, p. 723). Such penetration, in the end, succeeded by promoting mutual obligations between the state and adat institutions, by means of official recognition and involvement of the whole body of adat into the state project, providing financial support (salary, extra incomes and developmental funds to the village), and by introducing other political reform and developmental projects. These approaches, as shown in Gayo, have made the village politically and financially dependent on

the government. But unexpectedly, they have also made the village more independent of the state in legal matters.

Some scholars have discussed how the legal recognition of adat enables the adat elite or chiefs to oppress less privileged groups and to promote their political interests at the village level (Oomen, 2005; Bouchier, 2007; Ubink, 2008, 2009). In Gayo, as explained earlier, I have observed a different outcome, although we see that the government has lost some of its capacity to promote individual protection and rights. The question is whether the central government is very concerned about this, in particular in the case of sexual offenses.

The Contemporary Transformation and the Use of Adat

An essential development in the mutual obligations between the government and the village has been the state recognition of adat institutions, which allows the village elites to enforce adat law. This recognition was part of the special autonomy granted to Aceh, together with the recognition of Aceh Shari'a. This has made Aceh the only region in Indonesia with three penal legal systems: the State Shari'a, adat, and national penal law. While the development of Aceh Shari'a was initially challenged by the central government, the development of adat law went smoothly.

After the 2005 peace agreement, as an alternative dispute mechanism outside of the court system, adat became an important instrument to maintain peace and deliver justice at the grassroots level. National and international organizations, which were in Aceh for humanitarian assistance projects, engaged directly in the adat projects. Their main objectives were maintaining and developing peace in Aceh while the regional police department was involved in designing the legal boundary between adat, Aceh Shari'a and national penal law. The engagement of multi-layered political organizations resulted in formalizing adat as the first legal system to proceed complaints and tackle 18 minor offenses.

This new power distribution strengthened the position of village elites in the community, even though adat penal law is limited to 18 offenses. However, this limitation in practice is ineffective. Qanun 10/2008 allows the village elites to use adat to address any case offending local norms, except for crimes leading to loss of life. As shown earlier, adat has been used to prosecute premarital and extramarital sex offenses, which are not originally included in the adat jurisdiction.

As also indicated above, this development has limited the choice of those who want to report a crime because they have to follow the designated legal mechanism, whereas it opened up opportunities for official legal actors to engage in forum shopping. On the positive side, this development allows legal actors to apply legal differentiation, as they can submit cases to two or more legal systems

which attach different consequences to similar constellations of facts. In this manner legal actors have more opportunities to take into account the context of a case.

Aside from being important now for the police to control minor offenses, adat has become an equally important instrument for the government in order to support the enforcement of Aceh Shari'a at the villages. The local officials share the common notion with the public that adat is one of many forms of the Divine Shari'a. Moreover, some parts of adat have gradually transformed since the colonial period to become more Islamic, in particular, family law (Bowen, 1988, pp. 281–182, 2000, pp. 107–112). The provincial and the village government have different objectives in using adat. For the provincial government, the utilization of adat aims at promoting Aceh Shari'a. For the village government, supporting the state's legal projects reinforces their authority in the villages and enables them to directly intervene in and examine cases dealing with public morality and sexuality. This helps them to maintain social stability, and to give social protection to the women who have become pregnant as a result of unlawful sexual intercourse.

The abovementioned developments suggest that adat changes according to developments in the community and under the influence of external forces affecting community life. Indeed, this study shows that the transformed adat law both in its codified and in its uncodified form is a mixture of various norms from religious, secular, national and international projects and that it is an important instrument for those who wish to engage in 'social engineering'.

My thesis thus supports F. and K. von Benda-Beckmann's observation in the Minangkabau that adat law is a hybrid law, in which many norms are hybridized and "adatized" (F. and K. von Benda-Beckmann, 2013, pp. 421–22). One of the hybridized or "adatized" norms is the Divine Shari'a, which is developed in the continuous religious campaigns to create an Islamic community. This continuous interpretation of Divine Sharia for practical life in certain localities has promoted the understanding of adat as a form of contextualized Divine Shari'a. As a result of adapting the state's developmental projects, the function and the jurisdiction of adat also transform. Adat is practiced at and centered on the village. It operates and functions to maintain internal stability, as intended by the state. In family issues, adat is no longer associated with maintaining the link with the ancestors, as Bowen suggests. Instead, it operates now in the extended family and functions to maintain stability and harmony of its members. These changes took place since the transformation of the village by the state.

The instrumentality and pragmatism of the government in strengthening adat law are particularly visible in the use of adat to support Aceh Shari'a. This can be clarified from the use of the adat norm of *sumang* (shame), whose transgression can be punished by *farak* or *jeret naru*.

In Gayo, like in other parts of Indonesia, *sumang* or shame is the foundational norm of many social arrangements (Koesnoe, 1971, p. A.8; Hazairin, 1974, p. 85). Shame is constructed differently from one community to another but always functions to arrange internal stability, reproduction and continuity of a communal group (Mead, 1961, pp. 493–496). It is supported by different levels of punishment or sanction and it is closely connected with morality and sexual behavior. Changing the concept of shame and its authority changes the social structure and the way the community see themselves and others. For the Gayonese, this social control mechanism is considered as the actualization of the Divine Shari'a that – among others – forbids *zina*.

Zina, i.e., premarital and extramarital sex, is the worst violation of the *sumang* norm. Gayo adat gives different punishments to these two kinds of offenses. Premarital sex offenders will be ostracized temporarily and be re-admitted once the offenders fulfill the conditions imposed by adat (*farak*). Those involved in extramarital affairs are ostracized permanently and all their ties with the village are cut off (*jeret naru*).

In fact, the *farak* is not applied to all kinds of cases involving premarital sex, but only to those concerning an endogamous relation. The prohibition from practicing endogamy serves to maintain the internal stability of *belah* whose members in the past were few. What usually happens in the case of premarital sex in an endogamous relation is that one of the persons involved, mostly the girl who fears she is pregnant, makes a confession to one of her family members. The family then brings the situation to the *reje* or imam in order to force the other party to an endogamous marriage if the man is from the same *belah* or village. Both are then sent off from the community.

Exile is a process of reinstruction of morality and the re-acceptance through particular ritual means to communicate the evil of the offenders to the community and to remind the society about the danger of the offense. Braithwaite calls processes such as these "reintegrative shaming", as the shaming serves to pave the way for reintegrating the offender into a legal community through particular rituals (Braithwaite, 1989, pp. 100–101). However, in the case of endogamous marriage, the reintegration is only partial. Many offenders undergo the penalty only to restore their ancestral identity that ties them to their *belah*, social status,

and the honor of each core family. The completion of the ritual then releases them from other consequences of the offense such as being prohibited from visiting their parents.

Marrying offenders to one another is considered a religious punishment. In local Islamic understanding, this form of marriage is suggested by the classical Islamic legal text of the Shafi'e and Hanafi law schools. It has to do with a particular theological conception that, according to the local belief, Islam promises a virgin male to marry a virgin woman. By marrying offenders to each other, God cancels his promise for offenders to marry a virgin. Virginity in this context is a symbol of purity, virtue and morality, of both the male and the female. Offenders are considered not to have such qualifications, which makes them socially and culturally punishable.

The most essential part of local belief is that such a marriage does not release the offenders from the sin they have committed. Freeing oneself from the sin is a personal endeavor and commitment to God. However, the punishment, including the forced marriage, serves as a cultural mechanism to provide security for the woman and to guarantee the lineage for her child, which is a necessity in patriarchal society and Islam. Without a patriarchal lineage, a baby has no position in the social structure.

Sumang, farak and *jeret naru* rely on cultural understandings of Islamic sexuality but they are in most respects in line with broadly shared interpretations of Islamic law. The basic prescription of *jinayah* (Islamic penal law) on *zina* also suggests exile, in addition to flogging (Cook, 2003, pp. 451). All fiqh schools, except the Hanafite, agree that offenders should be banished in addition to 100 lashes (Peters, 2005, p. 60). Perhaps, when Islam arrived in Gayo, this punishment was embedded into the cultural system and the flogging was dropped. In the same way as *farak*, *jeret naru* might be a cultural interpretation of the Islamic penal law on extramarital sex. According to standard Islamic legal texts, those engaged in extramarital sex should be punished by stoning. *Jeret naru*, or permanent exile, in which offenders are considered dead (literarily *jeret naru* means long grave), is an interpretation of the death penalty, as the offenders' affiliation to their *belah* or village is ended. It is apparently the outcome from the assimilation of Islamic teachings in the very early time of arrival of Islam to the area.

These Islamic legal teachings have been "adatized" and are essential features of local social arrangements. In the old practice, *farak* could be applied to all *belah* members, as they were considered from "one mother" or "one origin". This rule was personal and applied beyond the *belah* territory. Presently, the practice has

become territorialized as *farak* is now only applied within the jurisdiction of the village.

Still, there are differences. In Bener Meriah, the old idea of *belah* has survived. The local *adat* still prohibits the scattered *belah* members from marrying each other, even if they live in a different village. In the villages of Lot Kala and Jongok Meluem, the *farak* is applied to village members whose *belah* or even ethnic background is diverse. This application is common in the Uken community living around the Lake of Lot Tawar and in the highlands. It is remarkable that the practice has persisted, as the members of the original *belah* are a minority. However, this minority elite finds legal support from the state law, which makes it difficult for the immigrants to challenge the norm. Moreover, police officers, to whom a complaint might be filed are not only under a legal obligation to respect the local practice, but also subscribe to the common norms themselves.

These different practices of *farak* demonstrate that adat law is different from one village to the other and that it is adapted under the influence of internal and external forces. The source is a more or less general, common idea of Gayo or Acehnese adat, but it allows for new local adat constructions or at least modifications.

An important feature of the current practice of *sumang* and *farak* is that the district government supports their application. State authorities consider them as instrumental for the enforcement of the state Shari'a's project on public morality and *zina*. They have distributed power to the village and thus reinforced the adat institutions' authority to address *zina* and other immoral acts. In some cases, the legal boundaries have been transgressed as a result of this situation. A good example is the creation of the Village Sharia Unit (*Wilayatul Hisbah Kampong* or WH Kampong) in 2011. This unit is staffed by local youths who have been authorized to take action against offenders of adat. State officials even allocate regular income for them and they are backed up by higher officials, particularly from the military and the police department. Ironically, it does not seem that those making up the WH Kampong are motivated by religious ideas, but rather by a romantic image of adat in the past when *sumang* commanded great authority.

The use of adat to support the State Shari'a and the creation of the WH Kampong suggest that, first, the presence of more than one penal legal system produces interlegality in which a legal provision of one system is adopted by the other. Interlegality seems to be a common phenomenon in Aceh. A good example

is the report submitted by WH Kampong to the district Shari'a agency in which they blend the norms of *sumang* and Aceh Shari'a.[36]

Second, the creation of WH Kampong shows how two or more legal systems which share similar sources of law and similar objectives in governing society can be reconciled. The interest of the state Shari'a agency is to govern public morality and to promote the enforcement of Aceh Shari'a, while the adat elites' interest is to reinforce adat norms to control social behavior. The incapability of the government in Aceh to enforce the state Shari'a combined with the wish on the part of adat institutions to reinforce public morality, which they consider to be threatened by global culture, has led to the creation of the WH Kampong, which straddles the systems and accommodates both interests.

Importantly, the district government lost its control over adat tribunals and the WH Kampong when the government shifted their funding from the district budget to the national budget for village development. As a result of this shift, adat institutions and WH Kampong are no longer supervised by the district government. Furthermore, adat tribunals and the WH Kampong no longer have to submit their reports to the district agency for Shari'a, but only report to the Agency for Village Empowerment at the district level on the use of the village fund for their activities. The Agency of Village Empowerment, the representative of the central government for village development, takes no interest in supervising the activities of the adat tribunal and WH Kampong nor in evaluating both institutions, since law and morality are not the main concern of the agency. This has allowed the WH Kampong to continue their surveillance and leaves the district government severely handicapped in following the progress of the enforcement of Aceh Shari'a and adat law at the village level.

The government has a decisive role in calibrating the composite system because its power validates the adat institutions' authority over the individual. Such reconciliation between national and adat law might also happen in other places in Indonesia, for instance, in Kalimantan. My assumption here is based on news media reporting that many major offenses are reconciled through the adat mechanism with a state official acting as a witness. A mixture between adat and state penal law indeed takes place in these regions and other peripheral regions where the penetration of the government is limited compared to urbanized areas such as in Java. It seems that in these peripheral regions, adat penal law is sometimes more powerful than the state law even in dealing with major offenses (Media, 2009, 2016a; JawaPos.com, 2017).

[36] See Chapter IV.

The legitimization of adat for social control has its consequences. In Gayo, the *reje* and parents of offenders of adat are bound by a social code in which shame is central and this sometimes leads them to force the offenders to marry. This has led to a sharp increase in the number of underage marriages in Central Aceh. Judges, who grant marriage compensation for a minor couple, share the common understanding about the necessity to marry those who are involved in premarital sex even if pregnancy has not been proven. Marriage, according to the judges, is an 'act to be recommended'. They follow the religiously inspired reasoning that this forced underage marriage serves to avoid further unlawful sexual intercourse. Marriage is considered as the safeguard of the Shari'a that legalizes (sexual) relationships and protects a couple from the sin of *zina*. In other words, marriage will keep them from further damaging interactions (*pergaulan yang merusak*) and allay their concern about sexual intercourse (cf. Fauzi, 2021, pp. 168, 179–180).

In recent years, the reemergence of adat law in Gayo has led the trend of a decreasing number of underage marriages to reverse. The same has happened in other parts of Indonesia where adat is dominant over state law (Grijns and Horii, 2018b; Bemmelen and Grijns, 2019). It indicates the inability of the government to change the marriage practice in the face of religious and adat convictions even if state policies do have an influence. For instance, as shown in this book, the prohibition of endogamous marriage and the forced marriage of minors lead those involved to 'strategize' their marriage arrangement. Minors who are forced to marry by adat penal law because of their involvement in premarital sex have to propose for marriage dispensation to judges or delay registering their marriage to the government until they reach the legal age for marriage (cf. van Bemmelen and Grijns, 2019).

While the enforcement of *farak* and forced marriage are affected by village institutions with the backing from the state, Gayonese have Aceh Shari'a as additional punishment of *jeret naru* for extramarital sex offenders. Before the introduction of Aceh Shari'a, *jeret naru* was not followed by any other punishment and its application was difficult because of the degree of shame it also brought on the community in the eyes of others. But now, extramarital sex offenders can be subjected to additional punishment under Aceh Sharia after having been sentenced to *jeret naru* in the village. Almost all sexual offenses punished under Aceh Shari'a indeed deal with extramarital sex – none of them concern other sexual offenses such as premarital sex, rape, or pedophilia, although such offenses are officially within the jurisdiction of Aceh Shari'a. The exposure of offenders in the courtroom and public punishment seems to have made it easier to follow the practice of *jeret naru* in the villages.

The preference of the communities concerned for Aceh Shari'a as an additional mechanism in these cases has put pressure on state legal agencies (police and public prosecutors) to prosecute offenders under Aceh Shari'a rather than national penal law. Public shaming by flogging in front of the public, which is the characteristic punishment under the *jinayah* law, is the only motive that drives a community to hand over offenders to the state. For the official agencies, flogging renders visible the legal enforcement by the state. However, by applying the *jinayah* law after *jeret naru*, an offender gets double punishment, which goes against a fundamental principle of national penal law.

We have seen from premarital and extramarital sex cases, that adat and Aceh Shari'a can supplement each other as long as they share common objectives and interests. Both are local interpretations and contextualizations of the Divine Shari'a. Adat (Shari'a) is a cultural interpretation of Divine Shari'a which is unwritten and developed on the basis of group and individual cases. By contrast, the Aceh version of Shari'a is a government interpretation of the Divine Shari'a constructed as a western legal framework. The source they share makes both of them the actualization of the Divine Will; however, they have been developed with different purposes, approaches, histories, and legal constructions. Yet, the commonality has made them instrumental for each other.

Thus, this book shares a common argument with other legal anthropologists that whatever form of Shari'a is practiced and observed, it does not represent a Divine Shari'a that is broad, unchallenged and timeless. The "earthly observable Shari'a" takes many different forms and is articulated in many cultural expressions as it is a product of various interpretations made in order to extract the actual meaning of the Divine Shari'a. It may be associated with the state, in which case it is referred to by different terms such as formal Shari'a, normative Islam, the State Islamic law (Berger, 1999; Bälz, 1999; F. and K. von Benda-Beckmann, 2013; Kloos, 2018) or Aceh Shari'a as used in this book. The local interpretations of the Divine Shari'a are adapted and embedded in many different cultural contexts and also referred to by different terms, such as informal Shari'a, folk Islamic law or, in this book, adat Shari'a.

This book has demonstrated that the state Shari'a of Aceh Province cannot replace the adat (Shari'a), which remains a considerable force in the community. Although the state Shari'a of Aceh derives from the interpretation of the Divine Shari'a, it cannot undo the Gayonese's bond to their local norms nor can it shift their legal orientation from adat to Aceh Shari'a. Aceh Shari'a is less effective, not only because it is a new legal system but also because it is limited in many aspects. As part of a secular positive law, produced through the secular reading of the

Divine Shari'a and legalized following the Western legal framework, Aceh Shari'a is limited in its institutions, budget, authority and legal formulation. Its "open texture of law" also leads to legal uncertainty. These limits make the state Shari'a in Aceh province less effective than the other two legal systems, adat and Indonesian penal law, in dealing with sexual offenses.

In general, the legal conception of the state Shari'a in Aceh focuses on moralizing the offenders by shaming them through public caning. It does not have any concern for the victims, usually women and children, who suffer a 'cultural punishment' on top of the harm already inflicted upon them by the perpetrator. These limits of Aceh Shari'a have become a concern for legal agencies (the police and public prosecutors) and for rights activists.

The Limits of the Law and the Creativity of Legal Institutions

All three penal law systems operating in Gayo – adat, Aceh Shari'a, and national penal law – have limitations in dealing with sexual offenses. As a legacy of the past, adat law and its institutions have a narrow conception of sexuality. Adat's categorization of sexuality is limited to premarital and extramarital sex. All sexual offenses not involving a married offender are treated as premarital sex. This includes pedophilia and other forms of sexual harassment. According to the standard adat law, premarital sex offenders must be married to each other as soon as possible. Rape has now become known to the Gayonese as a new category of sexual offenses, but it is not regulated in adat law. The Gayonese, furthermore, do not include domestic rape as a sexual offense, but consider it as a response to the failure of the wife to fulfill her sexual obligations to the husband.

Homosexuality is not specified as an offense, even if the Gayonese have long been familiar with this category since they have learned about it through the story of Sodom and Gomorrah, in their studies about Islam. However, the Gayonese have not found or received any religious instruction on how to deal with homosexuality, nor does adat law say anything about the punishment of such an offense. As a result, Gayonese tend to treat those engaged in homosexual acts less harshly than those in premarital or extramarital sex. However, this may well change following the intensity of the current anti-homosexuality campaign in Indonesia at the national level and after Aceh Sharia has criminalized homosexuality explicitly since October 2015.

Next to the limits discussed in the previous section, Aceh Shari'a is also limited in its legal enforcement. This is both because of a lack of institutional capacity and because of the legal definition of *zina.* Although Aceh has a special institution to monitor the enforcement of the law (Sharia Police of Wilayatul

Hisbah attached to the provincial police), it has a lack of staff, budget, and authority. The enforcement of Aceh Shari'a relies on national legal institutions, the police and the public prosecutors. They decide whether an offense should be brought either to the Mahkamah Syar'iyah or the secular district court.

The dependence of the Aceh government on national legal institutions indicates how much control the central government has over the enforcement of the state Shari'a in Aceh. Police and public prosecutors in Aceh are never censored by the central government for ignoring Aceh Shari'a and the regional government cannot prevent this. As a result, the central government has almost complete control over the enforcement of state Shari'a in Aceh Province.

Up like adat, Aceh Shari'a treats premarital sex and extramarital sex equally as zina. Aceh Shari'a punishes both with 100 lashes. Rape also partly falls into this category. The perpetrator is lashed 100 times for genital insertion, which is considered as an act of *zina*. In addition, the offender can be imprisoned for the absence of consent from the victim and the use of force, but this is based on national penal law. Aceh Shari'a does not consider the negative effects of the offense on the victims. In general, in cases of sexual offenses and rape in particular, the victims are blamed by the community for having seduced the offender. Consequently, victims are often discriminated against and isolated by the community, to the extent that some of them have to move their residency from the village.

Another issue is that judges of the Mahkamah Syar'iyah Court of Central Aceh and Bener Meriah district have not been trained to try juvenile cases as required by the Supreme Court. Judges define the age of minority based on various sources: Islamic legal texts and national penal law. For these reasons, public prosecutors prefer to bring cases involving juveniles to the district court where certified judges for juvenile case are available.

State and non-state legal agencies differ in the degree to which they take into account the negative implication of the Shari'a punishment to the victims' psychology and social life. Because usually they are the first to deal with such offenses, non-state agencies play an important role here by extending and adapting the adat perspective on sexuality and legal choice. In so doing, they often exceed the limits of the adat and deploy other legal systems to intervene in a case. Sometimes, they suggest the victim's family to escape the adat institution and Aceh Shari'a and to opt for national penal law instead. The presence of such actors in a community has a major influence on the development of adat and its interaction with other legal systems.

Sometimes, those involved themselves refuse the application of adat and directly file a report to the police station. A good example is the case I discussed in Chapter V where an underage couple from two different villages was involved in premarital sex. In this case, the parents of the girl involved were reluctant to marry their daughter because she would have to halt her school education.

Sometimes, although the police take over and start an investigation with the assistance from the *reje*, those involved still arrange an adat tribunal to achieve agreement between the boy's and the girl's families. The police will accept the resulting peace agreement and cancel or return the case to the village. The police have this option once a copy of the agreement is presented to them. This is one of the outcomes from the recognition of adat law as state penal law. Canceling the investigation is an expression of the police's sympathy to the juvenile offenders who would otherwise have to spend their lives with adult criminals in jail, at least during the months of investigation and all the dangers this entails. The offenders would also find it difficult to return to the community as they will be stigmatized as ex-criminals. However, canceling the investigation is also said to be a sign of respect for the adat law.

Just as to the community, adat also responds to the sense of justice of police officers by restoring the harmony of the community rather than involving the state legal systems, which leads to conflict. They also perceive that the sexual offense involving juveniles occurs due to a curiosity of both a boy and girl about sexuality during their puberty. These views allow adat to go beyond the formal legal boundary, in which it is not recognized to tackle sexual offenses.

As a result of such considerations, police and public prosecutors in Central Aceh only prosecute extramarital sex offenses using the *jinayah* law when they are under public pressure to inflict shame on the offender in front of the public. The police and public prosecutor prosecute other sexual offenses under national penal law instead, even though, formally, these offenses must be tried under Aceh Shari'a. This concerns rape, pedophilia, sexual abuse and sodomy. The reason is that under *jinayah*, rape and pedophilia are partly *hudud* (with a fixed penalty in which flogging is the only option) and partly *ta'zir* (penalties at the discretion of judge). This forces judges to convict the offender to a fixed number of lashes (*hudud*) while as an additional punishment they can only impose a short term in jail (*ta'zir*), usually three months which are already spent during the investigation and trial. This means that immediately after the trial and the imposition of the corporal punishment the offender returns to his community, where the victim also resides. This increases the trauma of the victim, in particular because in many cases the community accepts the returning offender but stigmatizes the victim.

Aware of such practices, the state legal agencies opt for prosecuting under the national penal law to keep the perpetrator away from the victim(s) and family as long as possible. Although neither does national penal have much concern for the victims' needs, at least it provides more opportunity for victims to heal from trauma. It also helps to save the victims from cultural stigma and to frame the offender as a criminal.

For victimless offenses, such as gambling and drinking, the state legal agencies will use Aceh Shari'a. For such offenses, the *jinayah* punishment is lighter than the punishment given by the national penal law. Under *jinayah* law, offenders can only be detained for up to three months for investigation and trial and they will normally be released immediately after having been flogged in front of the public. National penal law allows for imprisoning gambling offenders up to ten years or fine them up to IDR, 25 million. The illegal distribution of liquor carries a sentence of up to 20 years in prison. Even if in practice much lighter sentences are imposed, offenders will serve a three months prison sentence in addition to detention during investigation and trial. The different consequences for the identical offenses have become a reason for non-Muslim offenders to subject themselves voluntarily to the *jinayah* law of Aceh Shari'a, a right non-Muslims have. Moreover, there is less cultural stigma for such offenses than the sexual offenses, which are culturally and religiously considered much worse. In Gayo, this difference can also be seen through the size of the crowd attending the execution of the flogging sentence.

In short, in the case of Gayo state legal pluralism provides considerable freedom for legal agencies in constituting and choosing a legal system that suits not only their interests but also the victim's and the offender's. The interests of these actors are driving the dynamic of three legal systems enforced in one political community. They creatively observe, negotiate and arrange the normatively contesting legal systems in such a way that it provides a sense of justice to all those involved. Consequently, the legal boundaries become highly flexible and empirically negotiable.

To recall the concept of Triangle of Law (Buskens, 2000), the legal agencies are at the center of the triangle. Their creativity in applying legal differentiation to suit their own interest, the interest of the victim or the interest of the offender, creates the intersection between the three penal systems. Sometimes, they choose a legal system that is not supposed to be applied and ignore the one that formally speaking should be used. The application of legal differentiation depends on the capacity, awareness, and the interest of the legal agencies, both official and informal (Bedner, 2017). The creativity of legal agencies suggests that the formal

jurisdiction and the development of these legal systems not only depend on the formal legal jurisdiction that influences and limits other legal systems, but also on the ability of legal agencies to manipulate their limits.

Note for Further Investigation, Discussion and Lesson for Indonesia's Legal Project.

The state Shari'a in Aceh is still immature compared to national penal law. Although Aceh enforced *jinayah* during the time of the Sultanate, this stopped when the region became part of the Indonesian state. Attempts to reintroduce the *jinayah* failed until Aceh emerged from violent conflict and natural disaster. Therefore the state Shari'a has been codified and enforced very recently, unlike the national penal law which has been refined and adapted over decades. Evidently, Aceh Shari'a still shows limits in its legal conceptions, institutions, resources, the capacity of actors that influence its operation, and the role of law in the social field.

Still, some important 'progressive' developments have taken place. Local activists and state legal agencies have been critical towards the Shari'a and adat. This has continued beyond my formal fieldwork period for this book where local activist have attempted to eliminate articles discriminating women and children from Jinayah by influencing the government. The local debate about proper application of Aceh Shari'a is tense and embedded in national and global politics, legal debates and practices. Since the independence of Indonesia, in Aceh, Islam or its Shari'a plays an important role in the debates between progressives, who promote human rights, education, and economic and regional development, and conservative Muslims who dominate religious public spaces such as mosques, Islamic study circles, and Islamic boarding schools. The presence of the central government in all debates related to the Shari'a indicates that it also follows closely what happens in the enforcement of Aceh Shari'a. Although local officials and scholars as well as a large number of ordinary Acehnese claim that Aceh has been given freedom in their special autonomy to develop distinct legal and political features, the central government has always had the final word in their development and enforcement. In the end the Aceh government relies for enforcement on national legal agencies: police, public prosecutors and judges.

In 2015, activists affiliated with the Civil Society Network Caring About Shari'a (JMSPS, *Jaringan Masyarakat Sipil Peduli Syariat*) persuaded the provincial agency for Aceh Shari'a to integrate adat law into state Shari'a. This was part of a large project scheme called "the grand design" of the state Shari'a. This suggested that the purpose of the local Shari'a is not only legal, but rather to promote a better life in all of its aspects. This idea is also known as "Islamic governance", ironically

composed of aspects that are believed to be practiced mainly in Western countries, such as transparency, accountability, justice, and equality. One important way to achieve this would be to integrate adat law into the state Shari'a legal system (Serambi, 2017a).

Such integration may lead to new outcomes, such as a mixture of Aceh Shari'a and adat but alternatively also to a new situation of legal pluralism in which the interplay between adat and Aceh Shari'a leads to more conflict. This is likely to happen if adat will be repressed like it was during the New Order regime. However, it is very hard to make any predictions now because the "grand design" has not yet been officially published.

While some creative minds and actors have made efforts to improve law and promote development at the provincial level, unfortunately, discourses based on adat have been marginalized through the discursive dominance of the Aceh Shari'a. The development of adat has received far less attention from the media than the Shari'a, whose public floggings have more media appeal than the punishments based on adat. Given the relative importance of the two in practice, with adat punishments far more frequently imposed than Aceh Shari's ones, this is quite remarkable – as we have seen the communities in Gayo try to maintain their adat by any means and use it for addressing the feeling of 'moral panic'.

One thing I would like to highlight from all these developments is how the young and immature legal systems of Shari'a and Adat continue growing in different ways. Both legal systems are dynamic and continue evolving under the pressure of internal and external forces. There is much to be learned from Aceh for the study of Islam, law and development. Here, I offer some suggestions for further inquiries and contemplation.

The first is the application of state Shari'a in Aceh, which has been controversial and led many to assume that Indonesia was allowing the creation of an Islamic state within its borders, is nuanced and ambiguous. It includes surprising facts such as that non-Muslims violating drinking and gambling rules prefer flogging under Jinayah to serving time in prison under national penal law, despite the common opinion that flogging is in violation of human rights. The *Jinayah* allows the offenders to immediately return to their family and provide for them, unlike the secular penal law of Indonesia which will keep them in jail for months. Here the legal pluralism in Aceh has thus provided individuals a space that allows them to navigate between Aceh Shari'a and national secular penal law.[37]

[37] See chapter V for the caseload comparison between the Mahkamah Syar'iyah and District court.

The second concerns the legal pluralism of penal law. The relation of Aceh Shari'a with adat and national penal law is influenced by politics, economic development, culture and religion. With the three legal systems in place, legal certainty has been at risk because individual legal actors have much leeway to pursue their own interests and because law enforcement is hard to predict given the discretion police and prosecutors have.

However, the three legal systems, if they are carefully and attentively operated, can actually promote individual rights and respond to the sense of justice of those involved. The space of choice embedded in the legal pluralism allows individual state legal agents to freely navigate between legal systems to pursue their own interests or those of victims or offenders. The police officers and public prosecutors in Gayo have done this quite effectively in their attempts to diminish the harsh effects of the application of one of these three legal systems and to respond to the local sense of justice.

Interestingly, attempts to introduce legal pluralism of penal law have nuanced the debate at the national level as to how the government ought to respond to the diversity and multiculturality of the country, even if its position towards adat law remains ambiguous. This can be seen for instance in the 2015 draft for a new Indonesian Criminal Code (RUU KUHP). Article 2 of the proposed draft states that (1) It is not prejudiced to the validity of the living law in a society which determines that a person can be criminally convicted even though the action is not regulated by the law. (2) The living law as mentioned in clause (1) is valid since it is in accordance with Pancasila, human rights, and general legal principles acknowledged by the community. Although all agree with the proposal, how exactly adat law should be integrated into the state legal system has triggered vigorous debates among scholars, activists, and legal enforcers. Their main concern is how to allow legal pluralism to exist in Indonesia. How should it be arranged to avoid overlap and contestation?

Another issue concerning the RUU KUHP is the state's attempt to control *zina* and cohabitation (articles 417 and 419). Although they are crimes by complaint, many worry that this may allow everyone in the village on behalf of village, the parents or neighbor to file a report to the police to complain about the feelings of discomfort caused by the acts of those reported. This idea has been protested by many, as this would mean that the government would deeply intervene into the individual life of its citizens (Liputan6.com, 2013; Tempo.Co, 2013, 2015; Media, 2016c, 2018; Savitri, 2019). This could also promote moral policing in villages in which adat and religious teachings may become instrumental in controlling morality.

Despite some advantages of adat penal law for victims and offenders and some advantages of Aceh Shari'a for those prosecuted for gambling and drinking alcohol, the current practice of legal pluralism of penal law in Gayo also has some drawbacks. I particularly underline the danger that the more adat is recognized and supported by law and regulation the more autonomous it becomes from the state and the more harm it can inflict on the civil rights of individuals (cf. Bedner 2017). Or, as Bowen suggests, it can even lead to unguided chaos (Bowen, 2003, pp. 4). As shown particularly in chapter IV, all legal attempts by the government to use adat for its purposes are conversely utilized by the adat institutions to strengthen their own authority in the villages (cf. Wolf, 1990). This legal and political development is not limited to Gayo only. Scholars have pointed at relatively similar developments in other developing countries such as South Africa, Ghana, Ecuador and some American countries (Oomen, 2005; Ubink, 2008, 2009; Simon Thomas, 2009; Gabbert, 2011). In these countries, customary (adat) institutions have gained remarkable legal authority as an outcome of the state's legal and even constitutional recognitions of customary institution. The recognition results in a thick line demarcating the government from the community. Legal development in Gayo and Aceh has not gone that far, but it may well develop that way if the government keeps producing law for supporting and utilizing adat without considering the effect of law on individuals and on the national legal project of the state. In short, legal pluralism may promote justice and differentiation, but the state should always handle it with caution.